IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8,
AND REGULATION 283/95 AS AMENDED BY REGULATION 38/10

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

UNIFUND ASSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Sharla Bandoquillo – Zarek, Taylor, Grossman, Hanrahan LLP
Counsel for the Applicant, Unifund Assurance Company
(hereinafter referred to as "Unifund")

Katherine Kolnhofer and Antonietta Alfano – Bell Temple LLP
Counsel for the Respondent, Wawanesa Mutual Insurance Company
(hereinafter referred to as "Wawanesa")

ISSUE

In the context of a priority dispute pursuant to s. 268 of the Insurance Act, R.S.O. 1990, c.I.8, is an insurer precluded from proceeding to arbitration upon a breach of s. 8(2)(2) of Ontario Regulation 283/95 in failing to schedule and have a pre-arbitration hearing take place no later than 120 days after the appointment of the arbitrator?

PROCEEDINGS

This preliminary issue in the priority dispute proceeded by way of Document Brief, Written Submissions and Books of Authority.

FACTS

On December 7, 2010, Shirley Macho was involved in a motor vehicle accident when she witnessed a vehicle insured by Unifund strike her house in Hamilton. She alleges to have sustained psychological injuries.

At the time of the accident, Ms. Macho was 79 years old (born March 30, 1931) and lived with her daughter, Heidi Macho, who was insured by Wawanesa.

On March 5, 2013, over two years post-accident, an Application for Accident Benefits dated March 4, 2013 was received by Unifund from Shirley Macho.

A Notice of Dispute was issued by Unifund to Wawanesa on or about May 30, 2013.

On June 3, 2013, an Examination Under Oath of Shirley Macho and Heidi Macho took place on behalf of Unifund.

On January 13, 2014, a Notice of Commencement of Arbitration was served on Wawanesa proposing Kenneth J. Bialkowski as arbitrator.

It is alleged by Wawanesa that a letter dated January 27, 2014 was sent to counsel for Unifund agreeing to the choice of arbitrator and requesting all investigations and a complete copy of the accident benefits file. It is alleged that this letter was not received by Unifund. A copy was requested and was only provided by Wawanesa on February 11, 2015.

The appointment of the arbitrator was effective either on January 27, 2014 if the alleged letter above is proven to have been sent or on February 12, 2014 which was the 30th day after the Notice of Commencement of Arbitration was served.

The 120th day from the date of appointment of the arbitrator was either on May 27, 2014 or on June 12, 2014 pursuant to the dates above.

By May 2014, having heard nothing from Unifund's counsel and in an effort to move the arbitration forward (despite Wawanesa being the Respondent in the arbitration), Wawanesa's counsel's office called Arbitrator Bialkowski's assistant, Shelley Delorme, to schedule an initial pre-arbitration hearing.

Wawanesa was advised by Ms. Delorme to complete an initial intake form. This was submitted by Ms. Green.

On May 26, 2014, Ms. Delorme sent a list of available pre-arbitration dates to Wawanesa's counsel. In Ms. Delorme's correspondence, she made it clear that the parties had 120 days to schedule the pre-arbitration hearing from the date the arbitrator was appointed. The list included dates in June earlier than the potential June 12, 2014 deadline.

On May 27, 2014, the office of Wawanesa's counsel emailed the office of Unifund's counsel advising of arbitrator Kenneth Bialkowski's available dates and times for a pre-arbitration hearing.

On May 30, 2014, the office of Unifund's counsel advised that a new lawyer was assuming carriage of the file and that the list of available dates was being forwarded to his assistant to co-ordinate the initial pre-arbitration hearing.

On June 10, 2014, Unifund's present counsel wrote to Wawanesa's counsel advising that she had taken over carriage of the file. At this time, there was still no response to Wawanesa's May 27, 2014 communication requesting available dates for the pre-hearing.

It was only in October 2014 when Unifund's present counsel contacted Wawanesa's counsel to arrange a date for the initial pre-hearing.

On November 3, 2014, counsel for Wawanesa wrote to Unifund's counsel advising that Unifund had missed the 120-day deadline to schedule a pre-arbitration hearing after the appointment of arbitrator pursuant to s.8 of Ontario Reg. 283/95, and therefore was out of time to pursue the claim.

On November 4, 2014 counsel for Unifund requested that the issue be decided for the arbitrator. Accordingly, a pre-arbitration hearing was scheduled for December 19, 2014.

On the same date, Wawanesa advised that it could still not agree to book a Pre-Hearing date.

On November 10, 2014, Unifund again followed up with Wawanesa with respect to scheduling the Pre-Hearing.

On November 11, 2014, Wawanesa agreed to a Pre-Hearing date.

A Pre-Hearing took place on December 19, 2014 which was the earliest available mutual date among the parties and the Arbitrator.

At the time the Pre-Hearing took place, there were approximately 13 months left before the two year mark for when the arbitration is to be completed if competed in accordance with s.8 of Ontario Regulation 293/95 as amended.

LAW

Disputes Between Insurers O.Reg. 283/95 sets out the process and procedure by which two or more insurers determine disputes with regards to priority of payment of accident benefits.

Section 8(1) and (2) of Disputes Between Insurers O.Reg. 283/95 set out the relevant rules for when a pre-hearing and arbitration are to be completed:

> **8.** (1) Except as provided in this Regulation, the *Arbitration Act, 1991* applies to an arbitration under this Regulation. O. Reg. 283/95, s. 8 (1).
>
> (2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:

> 1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.
>
> 2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator. (emphasis mine)
>
> 3. Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.
>
> 4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.
>
> 5. Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration. O. Reg. 38/10, s. 9.

PARTY POSITIONS

At risk of oversimplification, I will attempt in the following paragraphs to highlight the positions taken by the parties.

Wawanesa takes the position that Section 8(2)(2) of O. Reg. 283/95 indicates that:

> A pre-arbitration hearing **must** be scheduled and take place no later than 120 days after the appointment of the arbitrator.

Wawanesa takes the position that the section mandates a clear limitation period for the scheduling and completing of the initial pre-arbitration hearing. The word “must” indicates a mandatory requirement. If the regulation merely intended to encourage parties to schedule and participate in pre-arbitration hearings, it would have used “should,” “may,” and “are encouraged to.” There is no competing plausible construction to the phrase “must”. If Unifund’s interpretation were to be accepted, the word “must” in section 8(2)(2) would be rendered meaningless.

According to Wawanesa, Unifund had up to May 27, 2014 to schedule and participate in a pre-arbitration hearing. A pre-arbitration hearing did not take place until December 19, 2014. Therefore, the limitation set out in section 8(2)(2) was not complied with and the arbitration is barred.

Section 8(2) of Ontario Regulation 283/95 as amended by Ontario Regulation 38/10 only came into effect on September 1, 2010. To my knowledge and that of counsel no case has yet been released dealing with the interpretation of the section or penalty for non-compliance.

Unifund has asserted that the purpose of Section 8 is to facilitate a timely resolution of any dispute between insurers once a priority arbitration has been commenced. Unlike the 90 day requirement to put another insurer on notice of a priority dispute following receipt of a

completed application as set out in s.3(1) or the 1 year limitation on commencing an arbitration after serving Notice of Dispute as set out in s.7(3), which are substantive, the requirements of s.8 are procedural. The legislation provides no specific guidance as to the penalty to be imposed if a pre-arbitration conference does not take place within 120 days of initiating the arbitration. Unifund stated that the penalty ought reflect fairness and proportionality and be similar to the consequences in failing to schedule a pre-arbitration hearing at FSCO pursuant to the Dispute Resolution Practice Code or arranging a pre-trial conference pursuant to Rule 50.02 of the Rules of Civil Procedure. In both situations the consequence is the unilateral setting of a date for the pre-arbitration conference or pre-trial. Unifund submitted that requiring a dismissal of the arbitration for a procedural breach would be an unfair and a disproportionate consequence on the facts herein.

In response, Wawanesa points out that when assessing fairness and proportionality, the courts have held that there is no unfairness visited upon parties who are insurance companies by insisting on strict compliance with notice requirements. Insurance companies are sophisticated and experienced participants in the insurance industry and have advisors of the "highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime." They refer to the decision in *State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance),* 53 O.R. (3d) 436, [2001] O.J. No. 1115, at para 22.

Furthermore, Wawanesa submitted that Arbitrators have found that breaching section 7(3) of the regulation, which sets a limitation on initiating arbitration no later than one year after giving notice of the dispute, completely precludes an insurer from proceeding with the dispute. They refer to *State Farm Automobile Insurance Company v Co-operators General Insurance Company of Canada, (Arbitrator Bialkowski, dated March 26, 2013).*

In the alternative, Unifund submits that an arbitrator has jurisdiction to grant an extension of the timeline set out in section 8(2)(2) by way of section 31 of the *Arbitration Act* which grants authority to an arbitrator to invoke equitable remedies:

> Application of law and equity
>
> **31.** An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies. 1991, c. 17, s. 31.

Unifund also submitted that relief against forfeiture is available to it as the elements of the test are met in the circumstances of this case. Relief from forfeiture is available as set out in *Saskatchewan River Bungalows v. Maritime Life Assurance Company (1994) 2 S.C.R. 490* where the following elements are established:

a) the reasonableness of the conduct of the party requesting the relief;
b) the gravity of the breach; and
c) the disparity between the value of the property forfeited and the damage caused by the breach.

Unifund maintained that despite the delay in scheduling the Pre-Hearing, Unifund was able to mitigate whatever consequence there may be by ensuring that the Pre-Hearing took place

and leaving the parties with ample time for compliance with the limitation in section 8(2)(5) for the completion of the arbitration.

Unifund submitted that the nature of the timeline in section 8(2)(2) is procedural so as to facilitate the completion of the arbitration ultimately. Despite the delay in completing the Pre-Hearing, the parties are still left with 13 months before the date to have the arbitration completed. The Regulation's objective of quick uncomplicated and efficient process for resolving disputes between insurers without delaying the payment of accident benefits is still intact. Accordingly, the breach of the timeline in section 8(2)(2) was not fundamental in the case at hand.

Unifund submitted that there is no discernible consequence to the breach of the section 8(2)(2) timeline in this case. The fact is that when the Pre-Hearing was finally completed, the parties still had 13 months thereafter to complete the arbitration. There is no evidence of prejudice caused to the accident benefits claimant nor to Wawanesa. In contrast, if the consequence of the breach were a dismissal of the priority claim the prejudice would be significant if Wawanesa would have been held to stand in priority on the merits.

Alternatively, Unifund has submitted that Wawanesa's actions in not taking steps to arrange for the pre-arbitration conference constitute a waiver with there being an implicit consent to proceed with the Pre-hearing outside the timeline set out in s.8(2)(2). *The case of Saskatchewan River Bungalows v. Maritime Life Assurance Company (1994) 2 S.C.R. 490* deals with the issue of "waiver". Waiver will be found "where the evidence demonstrates that the waiving party had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them".

In response, Wawanesa claims there was no unequivocal and conscious intention to abandon their rights when they were making efforts in arranging the initial pre-arbitration hearing within the 120 day timeline in s.8(2)(2).

ANALYSIS AND FINDINGS

What we have in the case before me is a situation where counsel for Unifund served a Notice of Commencement of Arbitration. Counsel for Wawanesa claims to have responded by letter within a couple of weeks. The law firm representing Unifund denies having received the letter. Regardless, since there is a deemed appointment of arbitrator 30 days following the service of the Notice of Commencement of Arbitration, a pre-hearing was to have been arranged by June 12, 2014 at the latest. Prior to June 12, 2014 counsel for the Respondent Wawanesa was pro-active and provided possible dates for the initial pre-hearing. It was not until October 2014, some 4 months later, that attempts were made by Unifund's counsel to arrange for a pre-hearing. This was long after the 120 day requirement set out is s. 8(2)(2). No explanation has been given by counsel for Unifund for the delay in finally getting around in October 2014 to co-ordinate the initial pre-arbitration conference. As a result, there is less time to complete the arbitration within 2 years of commencing the arbitration as required by s. 8(2)(5) of the Regulation.

I find that there has been a clear breach of s.8(2)(2) by Unifund. No reasonable explanation has been provided for the delay. I cannot be critical in any way of the conduct of Wawanesa. With the approach of the 120 day deadline for arranging the initial pre-arbitration hearing they were pro-active in trying to co-ordinate a mutually agreeable date but their efforts seem to have fallen on deaf ears.

Ontario Regulation 283/95 - Disputes Between Insurers - has existed since 1995 setting out a procedure for insurers to resolve disputes as to which insurer stands in priority while protecting the rights of accident benefit claimants. It was only on September 1, 2010 that the Regulation was amended to add s.8(2) setting out timelines for the dispute process once commenced pursuant to s.7(3) of the Regulation. In my view the purpose of s.8(2) is to insure that the dispute resolution process once initiated is completed in a timely fashion. Section 8(2) compels the parties to appoint an arbitrator and complete the initial pre-arbitration hearing in a timely fashion. It compels the parties to complete the arbitration within 2 years of commencing the arbitration.

On careful analysis of the jurisprudence provided to me, I am of the view that the requirements of s.8(2) of the Regulation are procedural rather than substantive. I find that the timelines set out in s.8(2) were intended to be directory and permissive rather than mandatory.

The decision of *Rahman v. Alberta College of Respiratory Therapy, 2001 A.B.Q.B. 222* provides an excellent overview as to the factors to be considered in determining if timelines within a statute are directory and permissive rather than mandatory. It contains a review of several texts on Administrative Law as well as an historical analysis of the jurisprudence out of which these factors evolved. In that case, Mr. Rahman was a respiratory therapist against whom a complaint had been registered. Section 15.1(2) of Alberta's Health Discipline Act stated:

> "A hearing under subsection (1) shall be commenced not more than 90 days after the date on which the matter is referred to the committee or the determination that a hearing should be held is made."

A hearing date was set within the timeline set out in s.15.1(2) but adjourned to a date outside of 90 days in order to accommodate counsel. Mr. Rahman's counsel then claimed the College no longer had jurisdiction because the hearing was not commenced within 90 days. The Court concluded that the timelines in s.15.1(2) were directory and permissive rather than mandatory, despite the use of the word "shall", and allowed the hearing to proceed on the merits. As I have indicated, the decision contains a careful analysis as to the factors involved in determining whether a provision is directory and permissive rather than mandatory. Coutu J. found that the Legislature did not intend that a hearing must proceed within 90 days at any cost, no matter what the circumstances. This would not be a reasonable interpretation. He considered the practical difficulties in arranging convenient dates for all parties involved. Coutu J. also indicated that the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory as opposed to being mandatory in terms of prejudice. Coutu J. also held that the fact that the statute did not contain a penalty for failure to observe the time limit tended to show that the provision was intended to be directory.

There are several factors in the case before me which lead me to the conclusion that the timelines set out in s.8(2) of the Regulation are directory and permissive rather than

mandatory. Unlike the time limitations set out in s.3 with respect to notice of dispute and s.7 with respect to commencement of the dispute, the time limitations set out in s.8 apply to both parties. The section does not say the Applicant must arrange the pre-arbitration hearing within 120 days or the Applicant must complete the arbitration within 2 years. There may be situations where failure to arrange the initial pre-arbitration conference within 120 days or failure to complete the arbitration within 2 years is the fault of one or more of the Respondents and not the Applicant. It would be absurd to have the Applicant's claim dismissed in those circumstances.

As in *Rahman* (supra), a comparison of the relative prejudice to the parties in determining whether permissive or mandatory clearly supports a finding as to the permissive nature of the imposed timeline. The prejudice to Unifund if the words are found to be mandatory and the arbitration is dismissed might well be financially significant. On the other hand, if the timeline is found to be permissive then the parties would simply have a shorter timeline to complete a hearing within 2 years. Keep in mind that it is Unifund that remains obligated to adjust and to pay the accident benefit claim of the claimant Macho pending resolution of the priority dispute so any delay would prejudice Unifund more significantly than Wawanesa.

Section 8(2) of the Regulation does not set out a penalty for breach of the timelines. In *Rahman* (supra) this was a factor considered to be suggestive of the requirement being directory and permissive. I am of the view that this is supportive of my finding that the timelines set out in s.8(2) are directory and permissive rather than mandatory.

On the basis of the aforesaid I therefore find that applying the criteria set out in *Rahman* (supra) leads to the inescapable conclusion that the timelines set out in s.8(2) of the Regulation are directory and permissive.

I am of the view that the imposition of some penalty or consequence for a breach of the timelines ought rest in the discretion of the arbitrator in a priority dispute based on the particular circumstances before the arbitrator and the arbitrator's finding as to which party or parties were responsible for the breach. Depending on the severity of the breach, consequences could involve costs, suspension of or denial of pre-judgment interest, imposing of strict timelines for the remainder of the dispute and possibly, in the most outrageous fact situation, dismissal of the priority claim. All would depend on the circumstances of the case.

I am of the view that there must be some proportionality between the breach and the consequences imposed upon the breaching party.

If I am wrong in finding that the timelines set out in s.8(2) of the Regulation are procedural and directory, then I would be inclined to grant relieve from forfeiture in the present circumstances by way of the authority provided to me by way of s.31 of the *Arbitration Act 1991, c.17* to grant equitable relief.

I do not believe that the legal doctrine of waiver would apply here as I am not satisfied that Wawanesa at any time displayed an unequivocal or conscious intention to abandon its rights.

As I have indicated, I find that the failure to arrange the pre-arbitration conference in a timely fashion in accordance with s.8(2)(2) was completely the fault of Unifund. In these circumstances, I am not prepared to allow Unifund their legal costs of the determination of this preliminary issue even though they have met with success on the issue. To my

knowledge there have been no cases interpreting s.8(2) of the Regulation. Wawanesa was entitled to have the preliminary issue determined. The preliminary issue determination would not have been necessary were it not for the breach of s. 8(2)(2). I further suspend any pre-judgment interest for the period June 12, 2014 to the date of this decision that may be payable if I were to ultimately find Wawanesa to stand in priority. I am prepared to impose strict timelines upon Unifund with respect to the balance of the arbitration proceeding so as to meet the legislative intent of completing the arbitration within 2 years of the commencement of the arbitration. I reserve my right to consider this breach of s.8(2)(2) in the award of costs in the ultimate arbitration decision herein. The arbitrator's costs of the preliminary issue will remain in the cause.

ORDER

In light of the findings aforesaid I hereby order that the arbitration between Unifund and Wawanesa proceed on the merits. I order a suspension of pre-judgment interest for the period June 12, 2014 to the date of this decision in the event Wawanesa is ultimately found to stand in priority.

DATED at TORONTO this 8th)

day of April , 2015.)

KENNETH J. BIALKOWSKI
Arbitrator