

**IN THE MATTER** of the *Insurance Act*, R.S.O. 1990, c.1.8, and Regulation 664

**AND IN THE MATTER** of the *Arbitration Act, 1991*, S.O. 1991, c. 17

Canada Life Insurance Company

Applicant

- and -

Progressive Casualty Insurance  
Company

Respondent

## **AWARD**

### **Introduction**

The parties come before me as an arbitrator pursuant to the *Arbitration Act, 1991* for resolution of a dispute between two insurance companies. Each of the insurance companies carries on business as a property and casualty insurance company in the Province of Ontario and is an insurer that issues policies of automobile insurance in accordance with Ontario's *Insurance Act*.

The parties have an issue to be resolved as a result of the provisions in Part VI of the Insurance Act which set out a scheme for payment of Statutory Accident Benefits, and also set out a scheme for re-imbursement pursuant to Section 275 of the Insurance Act and the Ontario Regulation 664, which is issued under the Insurance Act.

The parties entered into an Arbitration Agreement dated April 5, 2004. Additionally, the parties put before me an Agreed Statement of Facts which recites many of the relevant background circumstances.

With respect to the arbitration agreement, the agreement contains provisions with respect to confidentiality and the parties agreed that it is in order for the reasons for this award to be distributed or made public.

### **Factual Background**

This dispute arises out of a motor vehicle accident which occurred October 8, 1994. Stephen Legge was injured in a motor vehicle accident which occurred in Toronto on that day. At the time of the accident he was operating a motorcycle. The information before me suggests that Legge may have sustained injuries as a result of the improper actions

of another motorist, Wodkowski, who was operating a private passenger vehicle which collided with Legge's motorcycle.

Legge suffered injuries in this incident and as a result became entitled to certain benefits from his insurer, Canada Life, the applicant in this proceeding. The Wodkowski vehicle was insured by the respondent, Progressive Casualty Insurance Company.

### **The Benefit Scheme**

Since June 22, 1990, automobile insurance in Ontario has featured extensive benefits payable on a "no fault" basis for those who are injured in motor vehicle accidents. There are provisions of the Insurance Act and regulations under the Insurance Act that require these benefits to be incorporated into every policy of insurance. The specifics of the benefits are set out in a regulation under the Insurance Act.

Section 268 of the Act provides that every motor vehicle liability policy is deemed to include these "Statutory Accident Benefits" as set out in the schedule. In certain limited circumstances an insurer that has become obliged to pay its policyholder statutory accident benefits may be entitled to reimbursement from another insurer. One of these circumstances is described in Section 275 of the Insurance Act which provides for indemnification in accordance with regulations. Section 275 provides as follows:

#### **Indemnification in certain cases**

**275.(1)** The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1.

#### **Idem**

**(2)** Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules. R.S.O. 1990, c. I.8, s. 275 (2).

#### **Deductible**

**(3)** No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (3); 1993, c. 10, s. 1.

#### **Arbitration**

**(4)** If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*. R.S.O. 1990, c. I.8, s. 275 (4).

## Stay of arbitration

**(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits. 1993, c. 10, s. 31.**

As can be seen, the indemnification contemplated by Section 275 contemplates payment by one insurer, to another insurer. This is not traditional subrogation. This is not a right exercised by an insurer, standing in the shoes of its policyholder. Indeed, it is a right exercised by the insurer which could not be exercised by the policyholder. This right to indemnity is solely a creation of the statute and the regulations thereunder.

Section 9 of Ontario Regulation 664 addresses the indemnity contemplated by Section 275 of the Act and provides as follows:

### INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

“first party insurer” means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

“heavy commercial vehicle” means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

“motorcycle” means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the Highway Traffic Act;

“motorized snow vehicle” means a motorized snow vehicle as defined in the Motorized Snow Vehicles Act;

“off-road vehicle” means an off-road vehicle as defined in the Off-Road Vehicles Act;

“second party insurer” means an insurer required under section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s. 9 (3); O. Reg. 780/93, s. 1.

Furthermore, Regulation 668 under the Insurance Act prescribes "Fault Determination Rules" which are applied to determine the responsibility of an insurer based on the degree of fault of its insured, in accordance with the Fault Determination Rules.

As can be seen, the statute and the regulations do not set out detailed procedures for dealing with these indemnity matters. Subsection 275(4) of the Act merely indicates that a dispute shall be resolved through arbitration under the Arbitrations Act.

### **The Issue Between the Parties**

The parties have prudently refined the larger issue of indemnification to be dealt with in two stages. The first stage raises the following question:

**"Is there a limitation period for bringing a claim for indemnification against the second party insurer under the loss transfer provisions of the Insurance Act, RSO 1990, and if there is, when does the limitation period begin to run and is the first party thus barred from proceeding with this arbitration?"**

In this stage of the arbitration I am challenged to determine whether or not a limitation period precludes this proceeding. For the reasons which follow, I conclude that the first party insurer is barred from proceeding with this arbitration.

### **The Chronology of Proceedings to this Point**

<b>Date</b>	<b>Description</b>
October 8, 1994	Date of Motor Vehicle Accident, benefits are commenced immediately by Canada Life
January 23, 1997	Mr. Legge and Canada Life negotiate a lump sum settlement of the remainder of accident benefits potentially payable to him
October 22, 2002	Canada Life sends a letter to Progressive Casualty. The letter invites Progressive Casualty to contact Canada Life's representative to "arrange an indemnification plan".
October 24, 2002	Progressive writes to Canada Life's representative requesting additional information.
January 14, 2003	Canada Life's representative submits additional information to Progressive Casualty.
February 17, 2003	Canada Life's representative sends Progressive a "loss transfer request for indemnification form".

April 4, 2003	Canada Life's representative followed up with Progressive.
May 16, 2003	Canada Life's representative followed up with Progressive.
July 21, 2003	Progressive formally denied the indemnification request to Canada Life on the basis that their insured was not responsible for the motor vehicle accident and asserting that the limitation period for commencing arbitration proceedings had expired.
September 30, 2003	Progressive's representative reiterated its previous position.

It is relevant that the parties have agreed that accident benefits payments were made by Canada Life to Mr. Legge from the date of the accident and onward until a lump sum settlement was negotiated in January of 1997.

The evidence of notice to Progressive is somewhat vague. The letter of October 22, 2002, at tab of 5 of the Agreed Statement of Facts, from Canada Life's representative, recites that Canada Life had put Progressive Casualty on notice with respect to loss transfer in November of 1994. Progressive Casualty denies any knowledge about this earlier notice. Canada Life has no evidence of this earlier notice except that an adjuster's report referred to it, and the adjuster billed for this, but Canada Life is unable to produce the actual communication. However, mere notice to Progressive is not helpful in determining the issue before me. The ultimate question is whether Canada Life commenced an arbitration proceeding, and there is no evidence to suggest that the November 1994 communication could be construed as such.

The parties agreed that the foregoing information forms part of the record of this proceeding.

### **The Law With Respect to Limitations Applicable to Arbitration Proceedings**

This proceeding is entirely a creation of statute, enacted by Section 275 of the Insurance Act. The statute contains no limitation provision applicable to the process. The regulations under the statute contain no limitation period. The statute does require that the proceedings arising from any disagreement between the parties shall be conducted in accordance with the Arbitrations Act. Section 52 of the Arbitrations Act, 1991, provides as follows:

- (1) "The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action".

Section 23 of the same statute also sets out the procedure by which an arbitration may be commenced. If a limitation period applies, a person must take one of the steps enumerated in Section 23 of the Arbitrations Act, or some other act of commencement recognized by law, within the period set out by the limitation provision.

The applicant's position is that there is no limitation that applies to this type of proceeding. The respondent takes the position that there is a six-year limitation which arises from Section 45 of the Limitations Act. Section 45 of the Limitations Act provides as follows:

**"(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,**

...

**(g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,**

**within six years after the cause of action arose,"**

During the course of the hearing I questioned whether or not clause 45(1)(h) of the Limitation Act might be relevant to these proceedings. In their submissions, both counsel submit that this provision has no application to these proceedings.

There is case law that the parties put before me which is highly relevant to this issue. In particular, there is a decision of Mr. Justice Somers in *York Fire v. Co-operators*, delivered November 4, 1999.<sup>1</sup> Essentially Justice Somers held that loss transfer proceedings such as this must be commenced within the limitation set out in clause 45 (1)(g) of the Limitations Act and Justice Somers concluded that the date for commencement of the running of the Limitation is the payment by the insurer to its insured.

### **The Submissions of Canada Life**

The applicant submits that there is no limitation that applies to this kind of loss. Alternatively, the applicant takes the position that any limitation period does not commence until there is a disagreement between the first and second party insurers contemplated by Section 275 of the Insurance Act where it refers to the parties being "unable to agree".

With respect to the decision in the *York Fire v. Co-operators* case, Canada Life says that there have been developments in the jurisprudence that undermines the rationale of the *York Fire* case. Canada Life refers to the decision of the Supreme Court of Canada in *M (K) vs. M (H)*<sup>2</sup>. That case dealt with a claim for sexual abuse in a family setting. The Supreme Court of Canada dealt with the Ontario Limitations Act and made a number of important comments. At paragraph 85 of the Decision the court held as follows:

#### **"Limitations Legislation**

**Ontario's Limitations Act is one of the few remaining limitations statutes in Canada that is not made applicable to civil actions in general. Such provisions capture any**

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<sup>1</sup> [1999] O.J. No. 4172

<sup>2</sup> [1992] 3 S.C.R. 6

common law or equitable claim, and reference can be made to six provincial statutes in this regard: Limitation Act, R.S.B.C. 1979, c. 236, s.3(4); Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4(1)(g); The Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(1)(j); Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(g); The Limitation of Actions Act, R.S.M. 1987, c. L150, s. 2(1)(n); Limitation of Actions Act, R.S.N.B. 1973, c. L-8, s. 6. In Ontario, by contrast, the Act applies only to a closed list of enumerated causes of action. Counsel for both parties have apparently conceded that this list does not include fiduciary obligations, and it is therefore unnecessary to consider this question in great depth. However, [page 70] some comment on the issue may be helpful in understanding the next defence under consideration, namely, limitation by analogy to the statute".

The court clearly concluded that the Ontario Limitations Act has selective application to the circumstances enumerated within that act and does not create a general limitation applicable to actions in general.

Counsel for Canada Life further argues the application of a case *Perry, Farley, and Onyschuk vs. Outerbridge Management*<sup>3</sup>, a decision of the Ontario Court of Appeal. This was a case based on an action brought by a creditor pursuant to the Fraudulent Conveyances Act. The Ontario Court of Appeal affirmed that the Ontario Limitations Act does not provide a residual limitation period that applies to all actions that are not specifically enumerated. The court found that there was no limitation period applicable to the claim under the Fraudulent Conveyances Act.

Accordingly it is submitted by Canada Life that there is no limitation that applies to this proceeding, because it is not an action enumerated within the Limitations Act, and no residual clause exists that could apply to bar this proceeding.

**An argument was also made by the applicant that the relationship between first and second party insurers under the Insurance Act ought to be treated as a "fiduciary" relationship and that therefore no limitation provision applies between the parties.**

Additionally, the applicant submits that the time for running of a limitation period does not begin until there is a disagreement between the two insurers. Counsel refers to Section 275 of the Insurance Act and the reference that the parties may have recourse to the Arbitrations Act if they are "unable to agree" about indemnification. On this analysis, the applicant submits that these proceedings were commenced within six years of the date upon which the disagreement arose, which applicant says is July 21, 2003.

### **Position of the Respondent, Progressive Casualty**

The position of Progressive Casualty is that there is a six-year limitation applicable as a result of the Limitations Act and that Canada Life did not commence proceedings within six years of the commencement of the limitation period. It is the position of the respondent that the cause of action arose with the first payment by the applicant and expired six years thereafter.

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<sup>3</sup> (2001) 54 O.R. (3d) 131

The respondent submits that I am bound by the decision of Justice Somers in the York Fire vs. Co-operators decision.

## **Analysis**

The record in this matter does not clearly indicate when this arbitration was begun, other than it was sometime prior to the end of 2003. I find no evidence to suggest that the November 1994 communication, if any, was sufficient to constitute a commencement of an Arbitration within the meaning of section 23 of the Arbitrations Act. I infer from the record that the commencement of the arbitration must necessarily have taken place sometime after September 30, 2003. If a six-year limitation period commenced to run on the date of the accident, October 8, 1994, then the time of commencement for an arbitration had long since expired. Hence, the application of any limitation period, and the commencement of its running, is material to whether or not the applicant has any right to indemnification that can be enforced by these proceedings.

As can be seen from the above set out provisions, neither the Insurance Act nor the Regulations thereunder specifically prescribe any procedural rules associated with these loss transfer disputes. The briefest of reference is made to the application of the Arbitrations Act. That statute has all of the necessary provisions in it to allow resolution of these types of disputes. However, that statute does not set out a limitation. Therefore, if any limitation is to be found to apply by the operation by any statute, it must be found in the Limitations Act.

According to the parties, the only place that it can be found in the Limitations Act is in clause 45(1)(g). It seems clear that that clause of the Limitations Act can only apply if this proceeding is considered to be "an action... upon the case".

The Court of Appeal in the Perry, Farley, and Onyschuk vs. Outerbridge Management case, suggests that the characteristics of an action upon the case include damages, and a breach of legal duty. It is not clear to me that an indemnity under Section 275 requires any breach of duty.

On the other hand, I note that Justice Somers in the York Fire vs. Co-operators case, refers to the decision of Superior Propane vs. Tebby Energy Systems.<sup>4</sup> Justice Somers' characterization of the decision in Superior Propane was that Justice Austin "came to the conclusion that since those claims were not included in the forms of writs known in 1258 they must be by definition be form part of an action on the case". Justice Somers followed the reasoning of Justice Austin. Justice Somers concluded that the six-year limitation applies to a loss transfer proceeding.

The applicant points out that the logic ascribed to the Superior Propane decision implied that the six year limitation under the Limitations Act is a residual limitation period that applies to an action that was not one of the "more appropriate" forms of action, or, not "included in the forms of writs known in 1258". Justice Somers may have regarded this as authority for the proposition that all actions are subject to a general limitation of six years unless some shorter period is specified.

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<sup>4</sup> (1992) 9 O.R. (3d) 769



In view of the subsequent jurisprudence in *M (K) vs. M (H)*, and in the *Perry, Farley, and Onyschuk vs. Outerbridge Management* cases, it may be that this reasoning is no longer applicable. If so, distinct consideration should be given to whether or not this proceeding under section 275 of the Insurance Act can be considered an "action on the case".

However, I am mindful of the fact that the decision of Justice Somers in the *York Fire vs. Co-operators* case is a decision on Appeal from a private arbitration exactly parallel to this proceeding. In the *York Fire vs. Co-operators* case the original arbitration award had been given by the Honourable Richard E. Holland Q.C. as the arbitrator of first instance. It was appealed to the Ontario Superior Court of Justice where Justice Somers gave his decisions on appeal. Having canvassed the case law at the time, and discussed the Superior Propane case, Justice Somers held as follows:

**"Following the reason of Austin J., I have concluded that there is a limitation period properly applicable to this arbitration and that this arbitration is an action upon the case with the meaning of Section 45(1)(g) of the Limitations Act. That being so, the proper limitation is six years".**

The applicant urges me to disregard the decision of Justice Somers and suggests that the subsequent case law of *M (K) vs. M (H)* and *Perry, Farley* undermines the rationale of the decision of Justice Somers. It is entirely possible that Justice Somers would give a different decision today than was given in November of 1999. However, I am not satisfied that Justice Somers necessarily would have come to an opposite conclusion and none of the cited cases directly disapproves of the decision of Justice Somers in *York Fire vs. Co-operators*.

A right to compensation created by a statute might well be an "action upon the case" which is enumerated as subject to the six year limitation. This is the conclusion of the Federal Court of Appeal in *A.M. Smith v. The Queen*<sup>5</sup>. If a loss transfer proceeding is "an action upon the case" then Section 45(1)(g) of the Limitations Act applies.

In the circumstances, I am not satisfied that I should disregard the decision of Justice Somers on this point. The applicant may be right that the analysis underlying Justice Somers' decision is in question as a result of subsequent case law. Indeed there is reason to believe that this is the case. However, the principle of *stare decisis* would not be well served if I were to fail to follow the precedent set by Justice Somers. In these circumstances I surmise that the subsequent decisions might have affected the decision of Justice Somers, but I cannot be so certain of that as to allow me to disregard the precedent. Reconsideration of this precedent would be most appropriately considered at the appellate level.

With respect to the argument that the alleged liability of Progressive arises from a fiduciary relationship, I do not agree. I am not at all convinced that the relationship between the first party and second party insurer is a "fiduciary" relationship. The statute does not create an obligation on the part of the second party insurer to act for the benefit of the first party insurer. An argument could be made that such an obligation exists in the other direction, but I think that this is doubtful. The first party insurer, in the administration of the accident benefits claim, may make certain decisions in the handling of a claim but it is not an unfettered discretionary power. Indeed the actions of the first

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<sup>5</sup> (1981) 120 D.L.R. (3d) 345

party insurer are closely defined by the regulations and other contractual provisions which govern the administration of accident benefits claims.

With respect to the second branch of the York Fire vs. Co-operators case, the issue of when the time commences to run, I see no reason for doubting the correctness of Justice Somers' decision in this respect.

Therefore, applying the law as set forth by Justice Somers in York Fire vs. Co-operators, I conclude that there is a six-year limitation that applies to this loss transfer proceeding. The time limit commences to run with the payment of benefits, which the parties have indicated occurred immediately after the accident.

Therefore these proceedings were not commenced within the limitation period set out in the Limitations Act as applied by Justice Somers in York Fire vs. Co-operators.

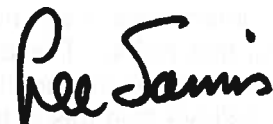
#### **Award**

The first party insurer is barred from proceeding with this arbitration.

#### **Costs**

In accordance with the arbitration agreement I order Canada Life to pay the cost of these proceedings and the party and party costs of Progressive Casualty. With respect to the costs of Progressive Casualty, the parties may make very brief submissions to me in writing. Progressive should make its submission by December 14, and Canada Life should make any response by December 1, 2004.

Dated at Toronto this 2nd day of December, 2004



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Lee Samis