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

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 :

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Robert W. Kerkmann – Loudon & Sterling LLP
Counsel for the Applicant, Motor Vehicle Accident Claims Fund
(hereinafter referred to as the "Fund")

Mark K. Donaldson – Dutton, Brock LLP
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company
(hereinafter referred to as "State Farm")

ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c.I.8, did the Motor Vehicle Accident Claims Fund ("the Fund") initiate arbitration within one year of having provided notice to State Farm of its intention to dispute its obligation to pay benefits, as required by subsection 7(2) of Ontario Regulation 283/95?

On October 16, 2009, a priority dispute notice was sent on behalf of the Fund to State Farm with respect to its insured De Young. On October 29, 2009, a priority dispute notice was sent on behalf of the Fund to State Farm with respect to its insured Barton. The issue before me is whether correspondence from counsel for the Fund to State Farm dated October 14, 2010 constituted "initiation of the arbitration" no later than one year after serving notice to dispute priority as required by subsection 7(2) of Ontario Regulation 283/95.

PROCEEDINGS

The arbitration of the preliminary issue herein was completed on the basis of an Agreed Statement of Facts, Joint Document Brief, Factums and oral argument heard on August 26, 2015.

AGREED STATEMENT OF FACTS AND JOINT DOCUMENT BRIEF REFERENCES

1. Mr. Stephen Young, at age 23, was injured in an accident on May 16, 2009. He was a passenger on an ATV operated by Joshua Barton.

2. Mr. Young did not have his own policy of insurance at the time of the accident.

3. Mr. Young submitted an application for accident benefits to the Motor Vehicle Accident Claims Fund (the "Fund") on August 27, 2009, through his lawyers Bergeron Clifford **(TAB 1)**.

4. At the time of the accident, Mr. Barton had a standard auto insurance policy with State Farm, policy 601125238. The ATV was not a described vehicle under the policy. However the ATV qualified as an 'other automobile' under the other automobile provisions of the policy, and therefore accident benefits coverage applied to the ATV.

5. The Fund, through its adjusting firm Claimspro, sent a priority dispute notice to State Farm on October 16, 2009 in respect of a State Farm policy issued to Jason DeYoung, who was thought at the time to be the owner of the ATV **(TAB 2)**.

6. On October 29, 2009, Claimspro sent a further priority dispute notice to State Farm, this time in respect of State Farm policy 601125238 issued to Mr. Barton **(TAB 3)**.

7. In the period of October 16, 2009 to April 13, 2009, Claimspro also sent notices to Dominion of Canada General Insurance ("Dominion") and Lombard General Insurance Co. of Canada ("Lombard"), and it sent follow up letters to State Farm, Dominion and Lombard. This correspondence is collected and arranged in chronological order at **TAB 4**. However, Lombard and Dominion are not involved in this arbitration hearing since neither State Farm nor the Fund take the position that Lombard and Dominion are priority insurers.

8. On October 14, 2010, the Fund's lawyer at the time, Ms. Sylvia Corthorn, sent a letter to Dominion and State Farm, and to the lawyer for Lombard **(TAB 5)**. This is a key document in the arbitration. The Fund submits that the letter initiated arbitration in accordance with the Regulation. State Farm submits that the letter did not initiate arbitration.

9. Correspondence was exchanged between representatives of the Fund, State Farm, Dominion and Lombard in the period of October 18, 2010 to February 26, 2015, prior to the appointment of Ken Bialkowski as arbitrator. A list of the correspondence is as follows:

The relevant contents of the aforesaid correspondence will be dealt with in the Analysis section of this Decision.

LAW

This dispute arises out of an accident that occurred prior to September 1, 2010. Regulation 283/95, prior to the September 2010 amendments, stated that an arbitration may not be initiated after one year from the time the first insurer gives a dispute notice under s.3:

> 7.(2) The insurer paying benefits under section 2, any other insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.

ANALYSIS AND FINDINGS

The Fund takes the position that the letter from their counsel dated October 14, 2010 to State Farm initiated the arbitration herein and was sent less than a year after its Notices of Dispute to State Farm dated October 16 and October 29, 2009.

This critical letter states:

> "This letter is to inform you that I am retained on behalf of the Motor Vehicle Accident Claims Fund to represent them with respect to the Dispute Between Insurers.
>
> …
>
> My instructions are to :
>
> 1) Finalize the arrangements for arbitration;
>
> 2) Complete production of relevant documents in a timely manner, and;
>
> 3) If possible narrow the issues and, if appropriate, the number of insurers involved.
>
> I would appreciate hearing from each of Mr. Brown and Ms. Munoz and representatives of Dominion of Canada and State Farm (the latter with respect to the policies issued to Eric Barton), at your earliest convenience. I would like to arrange a conference call to address the selection of arbitrator, the time for the arbitration, and other matters as my be required.
>
> If there is anything arising from this letter that you wish to discuss, please let me know. Otherwise, I look forward to hearing from each of you at your earliest opportunity and to the teleconference to discuss further this dispute between insurers."

In response to Ms. Corthorn's letter, Dominion sent a letter on October 18, 2010, confirming their position denying priority, and they advised of the appointment of Pat Peloso as their lawyer. Solicitor Harry Brown, on behalf of Lombard, sent a letter on October 20, 2010, suggesting that Brian Parnega be considered as arbitrator, and he looked forward to approval by all other representatives/counsel. Ms. Corthorn, by letter of October 25, 2010, advised that the Fund was in agreement to appoint Mr. Parnega and she would appreciate hearing from the other parties. State Farm, by letter of November 2, 2010, advised that they assigned the file to Mark Donaldson. Mr. Donaldson, by letter of January 4, 2011, advised that he would seek instructions regarding arbitral candidates. Mr. Donaldson did not express any suggestion at that time that the letter of October 14, 2010 did not initiate arbitration.

In 2011, Ms. Corthorn was involved in an accident and carriage of the file was transferred to a different lawyer at her firm, Allison Klymyshyn. Ms. Klymyshyn advised in a letter of September 16, 2011, that Mr. Parnega had been proposed and she looked forward to hearing from all counsel as to whether he is acceptable as a choice. Harry Brown responded in a letter of September 23, 2011 that Lombard accepted Mr. Parnega as arbitrator, and he would appreciate if the Fund's counsel would set up the initial pre-hearing.

By e-mail of November 12, 2012, Dominion's lawyer Katie Gauthier advised that she was assisting Pat Peloso (the lawyer for Dominion) "with respect to this priority dispute/arbitration commenced by your client the Motor Vehicle Accident Claims Fund."

By February 2013, carriage of the file had returned to Ms. Corthorn. By letter of Feb.21, 2013, Ms. Corthorn explained the reason for the slow rate at which the file had progressed, which in large part related to her personal injury.

By letter of March 25, 2013, Ms. Corthorn advised Pat Peloso and Mark Donaldson that she had not heard from either of them in response to the proposal that Brian Parnega be appointed as arbitrator. The letter requested a response no later than end of April.

No response was received by the end of April, and Ms. Corthorn sent a follow-up letter on May 15, 2013.

By letter of June 10, 2013, Mr. Donaldson responded for the first time since his previous letter of January 4, 2011. He advised of State Farm's position that the Fund had not met the limitation imposed by s.7(2) of Ontario Regulation 283/95. He further advised that he did not have instructions to appoint Mr. Parnega and he proposed three other alternatives, including Mr. Bialkowski.

By letter of August 27, 2013, Katie Gauthier advised that Lombard was agreeable to appointing Brian Parnega as arbitrator. However, this letter ignored Mr. Donaldson's previous advice that State Farm would not agree to Mr. Parnega and the letter did not state whether Lombard would agree to any of the three arbitrators proposed by Mr. Donaldson.

By letter of September 10, 2014, Ms. Corthorn advised that carriage of the file was being transferred to new counsel, Rob Kerkmann.

By letter of February 26, 2015, Mr. Kerkmann advised Mr. Donaldson that he would recommend the appointment of Mr. Bialkowski as arbitrator and he would arrange for a pre-hearing. Mr. Kerkmann further advised that the Fund was not proceeding against Lombard or Dominion.

The Fund maintains that the letter of October 14, 2009 initiated the arbitration herein. The letter was addressed to State Farm and others, and it specifically refers to State Farm's policy 601125238 issued to Joshua Barton. In the letter Ms. Corthorn advised that she had been instructed to finalize arrangements for arbitration. The Fund has submitted that there was no uncertainty conveyed in that wording. An arbitration necessarily starts with the selection of an arbitrator, and Ms. Corthorn expressly stated that she wished to arrange a conference call to address the selection of an arbitrator. According to the Fund, this was an overt step taken toward proceeding with the Arbitration process. The letter expressed a clear intention to start the arbitration process. Ms. Corthorn did not state that she might wish to arrange a conference call. The letter did not suggest that pursuance of an arbitration is conditional on some act or thing occurring. For example, the letter did not threaten to initiate or commence an arbitration if there was a lack of response to her letter. Instead, the Fund takes the position that Ms. Corthorn was initiating the process of arbitration by proposing a conference call to select an arbitrator and outlining an agenda to deal with production issues and the narrowing of any issues within the priority dispute itself.

Ms. Corthorn's letter was followed closely by Harry Brown's letter of October 20, 2009 in which he proposes Mr. Parnega to act as arbitrator. Clearly Mr. Brown accepted that an arbitration had been initiated. Ms. Corthorn then sent a letter on October 25, 2010 advising that the Fund agrees to Mr. Parnega, and asking the other parties to agree. The letter is still within one year of the priority dispute notice, and therefore the Fund claims it can be said that a specific arbitrator was proposed by the Fund within the one year limitation period.

Although it certainly took a long time to agree on an arbitrator, the Fund maintains that this does not change the effect of the October 14, 2010 correspondence which initiated arbitration. Some of the delay in selecting an arbitrator may have been caused by State Farm's delayed responses to Ms. Corthorn's correspondence. Ms. Corthorn asked State Farm by letter of October 25, 2010 if it would agree to Mr. Parnega as arbitrator. State Farm's response did not come until June 10, 2013, when Mr. Donaldson advised that State Farm would not agree to Mr. Parnega. Some of the delay appears to have resulted from Ms. Corthorn's personal injury.

At risk of oversimplification, State Farm takes the position that the letter of October 14, 2010 lacks the clarity and certainty to constitute the initiation of an arbitration as required by s.7(2) of Ontario Regulation 283/95. Furthermore, as a sophisticate and experienced litigant in priority disputes, the Fund must be held at law to strict compliance with the Regulation.

Numerous cases have dealt with the issue now before me. The first two cases deal with general interpretation of the Regulations dealing with inter-company priority disputes.

The decision of *State Farm Mutual Automobile Insurance Company* v. *Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance* (2001) 53 O.R. (3d) 436, stands for the proposition that in an inter-company priority dispute strict compliance with any requirements is required given the sophistication of the parties. Although within the context of addressing the timeliness of the notice letter under s.3(1) of Ontario Regulation 283/95, Justice Nordheimer notes at pages 6 and 7 that he failed to :

> "see any reason why the parties here should not be held to strict compliance with the requirements of the Regulation. In both of these appeals, we are dealing with three large insurance companies and a branch of the Provincial Government. It goes without saying that these parties are sophisticated and experienced participants in the insurance industry. They have available to them all of the advisors of the highest

> quality that they could need in order to determine their rights and obligations under the prevailing statutory regime. There is, therefore, no unfairness visited upon them by insisting on strict compliance with the notice requirements".

In a similar vein, and also dealing with the 90 day notice requirements under s.3 of Ontario Regulation 283/95, *Kingsway General Insurance Co.* v. *West Wawanosh Insurance Co. (2001)* 58 O.R.(3d) 251, stands for the proposition that in interpreting the Regulations pertaining to inter-company priority disputes, that there is little room for creative interpretations or for carving out of judicial exceptions designed to deal with the equities of particular cases given the sophistication of the litigants. The Ontario Court of Appeal observed at paragraph 10 that Regulation 283/95:

> "The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases".

I will now deal with those cases dealing specifically with the type of document that constitutes the "initiation of an arbitration" pursuant to s.7(2) of Ontario Regulation 283/95.

In *Co-operators v. Perth Insurance* (Arbitrator Kenneth J. Bialkowski February 3, 2015), a letter that stated, "*please accept this letter as our formal demand for arbitration*" was found to have initiated arbitration. It was found to have initiated arbitration even though it went on to state, "*If we cannot agree on who is responsible for paying benefits or do not receive a response from you, we will propose an arbitrator and proceed with the arbitration*." In that decision I held that the letter did not merely express an intention to commence arbitration but was a demand for arbitration. I further held that it was not necessary for a specific arbitrator to be proposed.

In *Markel v. Co-operators and Lombard Canada Ltd*. (Arbitrator Samis March 31, 2011), Arbitrator Samis indicated that to initiate arbitration there must be some overt step taken towards an Arbitration process that will lead to an award resolving the dispute. There must be action taken which signals a clear intention to start a process that will end with a determination of rights by an Arbitrator. The substance of the communication must set the wheels in motion for the arbitration process and there should be no uncertainty in the mind of the recipient where or not the process is being invoked. Arbitrator Samis concluded that the communications between the parties did not constitute initiation of the arbitration and that Markel was precluded from pursuing the priority dispute. The first letter included the comment:

> "in the event that we do not hear from you within 30 days of this communication we will be seeking that an arbitrator be appointed"…..

A second letter indicated:

> "please re-evaluate your position and respond to this letter within 30 days to avoid Markel Insurance Company applying for private arbitration"

Arbitrator Samis writes at page 10 of his decision:

> "While the totality of the communications leave no doubt of Markel's persistence with respect to their recovery efforts, their assertions about moving forward into arbitration were always put as conditional, dependent upon the responsiveness of the targeted insurer. The recipients of that correspondence may or may not have been persuaded of Markel's resolve to proceed through arbitration. But having been presented with a communication which in effect said 'if you don't respond then we will arbitrate', this communication on its own cannot be equivalent to a Notice to Arbitrate."

In *HMQ v. Dominion of Canada* (Arbitrator Novick December 2014), the Fund's adjuster wrote a letter to Dominion requesting a copy of Dominion's policy termination letter, and the Fund's letter states:

> "*Please be advised that the Motor Vehicle Accident Claims Fund is now proceeding to arbitration regarding this matter*."

Arbitrator Novick cited Arbitrator Samis' decision in *Markel v. Co-operators* (supra) and endorsed the view that initiation of an arbitration "requires some overt step" to be taken towards an arbitration process. She noted there is no requirement to refer to the priority regulation or suggest the names of arbitrators in a letter. Also, the request for further information in a letter or the suggestion that an insurer would like to resolve the dispute short of arbitration, does not preclude a finding that the insurer has also decided to pursue the procedural steps required to pursue the matter toward arbitration. Arbitrator Novick notes there is a "*fairly low threshold*" required to initiate arbitration under section 7. She noted that sometimes it is necessary to consider the overall context of a letter.

In *HMQ v. Intact* (Arbitrator Novick July 2012), a series of letters were written by the Fund's adjuster and lawyer to Intact. The last line of a letter dated February 9, 2011 stated:

> "This is the Fund's notice of commencement of Arbitration should we not receive a response."

A subsequent letter dated March 9, 2011 included the following paragraphs:

> "Notice of the Fund's intentions to dispute the priority of payment was delivered to Intact under a letter dated February 9, 2010. Notice of the Fund's intention to commence arbitration was delivered to Intact Insurance on February 9, 2011.
>
> Would you please advise us of Intact's position with respect to this matter? In the absence of a satisfactory explanation for Intact's refusal to assume priority in this matter, I would propose proceeding to arbitration with Brian Parnega."

A further letter was sent by the Fund dated March 30, 2011 in which it was stated:

> I would appreciate having your thoughts on this once you have had a chance to consider the matter. If we are not able to come to any agreement in the matter, then I suggest we proceed to arbitration and would suggest retaining Brian Parnega to hear the matter."

According to Arbitrator Novick, each letter conveyed a message that the Fund intended to proceed with arbitration if the Fund did not receive a response or the matter could not be resolved. Despite the statements being arguably 'conditional statements', Arbitrator Novick found that the letters were sufficient to initiate arbitration. She wrote at page 12 of her decision:

> "I find that these arguably 'conditional statements" are different than those in the Gore Mutual v. Markel, supra, case, decided by arbitrator Samis. The message ought to have been clear to the Intact representatives involved that the Fund was proceeding along an 'arbitration path', given the text of the letters, the fact that counsel had been retained by the Fund, and the repeated references to retaining a specific arbitrator. The fact that interest was expressed in discussing and resolving the dispute does not take away from this expressed intention. The practical reality surrounding priority disputes is that the parties will often proceed along both tracks – discussing the merits of a claim and attempting to negotiate a resolution, while at the same time pursuing the procedural steps required to move the matter along toward an arbitration hearing should the negotiations fail. One discussion does not negate the other."

In *Gore Mutual v. Markel* (1999) O.J. No. 2688 (S.C.J.), Justice Archibald found that two letters from Gore's lawyer to Markel constituted initiation of an arbitration. The first letter merely referred to the Notice of Dispute and asked Markel to appoint counsel to proceed with a private arbitration. The second letter outlined the basis as to why Gore felt Markel stood in priority. Justice Archibald stated at p.5:

> "Clearly, those two letters constitute clear notice of the Applicant's determination that arbitration should be held. They also constitute clear notice that the arbitration is to be held pursuant to Ontario Regulation 283/95. In this Court's determination, the notice is clear and full."

Justice Archibald was satisfied that the demand to appoint counsel so that they might proceed to an arbitration constituted notice demanding arbitration and "initiation of the arbitration".

In *Lloyds of London v. Wawanesa* (Arbitrator Jones March 2004), Arbitrator Jones found two letters from counsel sufficient to constitute the initiation of the arbitration. The first letter indicated that the lawyer had been retained to proceed to an arbitration of the priority dispute and requested input as to who they wished to use as an arbitrator. There was no response. The second letter a month later proposed specific mediators. Arbitrator Jones found these two letters constituted commencement of the arbitration.

With the background of the jurisprudence aforesaid, I am satisfied that the letter from the Applicant's counsel to State Farm date October 14, 2010 essentially initiated the arbitration process as required by s. 7(2) of Ontario Regulation 283/95. The letter confirmed that she was retained to finalize the arrangements for the arbitration and requested a conference call to address the selection of the arbitrator, production issues, the time for the arbitration and

other matters as may be required. In my view, any party receiving this communication would reasonably conclude that the Applicant was proceeding along the arbitration path. How much clearer could it be where the counsel says essentially "I have been retained to finalize arrangements for arbitration" and essentially "let's select an arbitrator"? In my view, this was an "overt step" to proceed to an arbitration and It "set the wheels in motion for the arbitration process." These were the very words used by Arbitrator Samis in *Markel* (supra) as to the substance of the communication required to be considered the initiation of the arbitration. I am satisfied that the letter of October 14, 2009 demonstrated a clear intention to start the arbitration process. Counsel for the Fund in her letter of October 14, 2010 did not state that she might wish to arrange a conference call, nor did she suggest that the selection of an arbitrator would be conditional on something else happening so as to come within the facts of Markel (supra). There was nothing in the letter that suggested that pursuance of the arbitration was conditional on some act or thing occurring. For example, the letter did not threaten to initiate or commence an arbitration if there was a lack of response to her letter. I find that the correspondence from counsel for the Fund to State Farm dated October 14, 2010 constituted initiation of the arbitration process.

ORDER

I hereby order that the Fund is not precluded from proceeding with this priority dispute by reason of a breach of s.7(2) of Ontario Regulation 283/95.

I order that State Farm pay to the Fund its costs of the arbitration of the preliminary issue on a partial indemnity basis and the costs of the Arbitrator with respect to the preliminary issue.

DATED at TORONTO this 31st)

day of August, 2015.)

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KENNETH J. BIALKOWSKI
Arbitrator