IN THE MATTER OF THE ***Insurance Act***, R.S.O. 1990, c.I.8 s. 268,

AND IN THE MATTER of O.Reg 283/95- Disputes Between Insurers, as amended

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

B E T W E E N:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

-and-

GORE MUTUAL INSURANCE COMPANY and THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Daniel Strigberger – Samis & Company
Counsel for the Applicant, Allstate Insurance Company of Canada
(hereinafter referred to as “Allstate”)

Arthur Camporese – Camporese, Sullivan, Di Gregorio
Counsel for the Respondent, Gore Mutual Insurance Company
(hereinafter referred to as “Gore”)

John Friendly – Ministry of the Attorney General
Counsel for the Respondent, The Motor Vehicle Accident Claims Fund
(hereinafter referred to as “MVACF” or the “Fund”)

ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8, the preliminary issue before me is whether Gore has the right to arbitrate the issue of "involved vehicle" when allegedly raised at a late stage in the arbitration process, so as to require a hearing beyond the two year limitation prescribed by s.8(2)(5) of Ontario Regulation 283/95 - Disputes Between Insurers hereinafter referred to as "the Regulation".

PROCEEDINGS

The matter proceeded on the basis of Factums, Document Briefs and oral submissions on July 17, 2017.

FACTS

This priority dispute arises out of an incident which occurred on December 26, 2013, when apparently and subject to the evidence to be heard at the arbitration hearing of the remaining issues if allowed to proceed, two snowmobiles hit a tree on the path and went out of control causing injury or death to those involved. At the moment, there is no evidence either way as to whether there was contact between the vehicles before or after impact with the tree limb lying across the path or any other information as to how this accident occurred. Of the three individuals involved, two sustained fatal injuries and the third has no memory of the accident. At the moment, the only source of liability information is the police report. The full police investigation file resulting from this double fatality has yet to be produced.

The snowmobile operated by Casey Uglini was insured by Gore. The other snowmobile operated by Chris Uglini was uninsured. Both operators sustained fatal injuries. Lindsay Lance was a passenger on the uninsured snowmobile. She sustained personal injury.

Allstate insured the parents of Casey and Chris Uglini.

Claims with respect to the Casey Uglini fatality claim were presented to Gore and paid by them.

Claims with respect to the Chris Uglini fatality claim and the Lindsay Lance personal injury claim were presented to Allstate and paid by them as the first insurer to have received completed applications. Allstate immediately took the position that the claimants were not principally financially dependent upon their insured and therefore another insurer would stand in priority. Allstate placed Gore and the Fund on Notice of a Dispute on May 2, 2014 with respect to the claims of Chris Uglini and Lindsay Lance. It is the claims of these two claimants that are the subject matter of this dispute.

The priority claim against Gore was in respect of policy #1279617 which the police report indicated insured both snowmobiles owned by the Ugulini brothers, but as it turns out only covered one of the snowmobiles.

Allstate served a Notice to Participate and Demand for Arbitration dated November 18, 2014. This act commenced the arbitration process and set into motion the timelines set out in s. 8(2) of the Regulation.

Eventually, Kenneth J. Bialkowski was selected as Arbitrator in January 2015 and an Arbitration Agreement was drafted by counsel for the Applicant Allstate, but for some reason not signed by the parties outlining the following issues:

a. Which insurer is liable to pay Christopher Ugulini (deceased) & Lindsay Lance statutory accident benefits under section 268 of the *Insurance Act*?

b If it is determined that the Respondent is liable to pay the claimant accident benefits under section 268 of the *Insurance Act*, what is the amount that is due form the Respondent to the Applicant as reimbursement for benefits and expenses the Applicant has paid?

b. If there is an amount due from the Respondent to the Applicant, is there interest due to the Applicant, and if so, what is the quantum of that interest?

In the pre-amble of the draft Arbitration Agreement was contained the following clause:

> "AND WHEREAS the two snowmobiles were involved in a motor vehicle accident on December 26, 2013;"

In a pre-arbitration telephone conference on July 30, 2015, the issue of "dependency" was specifically identified. No other priority issue was specifically identified. It was determined that Examinations Under Oath with respect to the dependency issue would be required.

Examinations Under Oath took place October 22, 2015 and a hearing on what was thought to be the issue of "dependency" was scheduled for May 1, 2017. It was acknowledged this was beyond the two year limitation outlined in s. 8(2)(5) of the Regulation which would have called for a hearing no later than November 18, 2016, but the 5½ month extension was consented to by the parties.

At the pre-hearing on September 13, 2016, counsel for Gore first raised the issue of "involved vehicle" and the possibility that the snowmobile insured by Gore was not "involved in the incident" with the uninsured snowmobile and therefore not in priority by reason of s.268(2)(iii) of the *Insurance Act*. It was mentioned that it may have been simply two snowmobiles merely striking the same tree lying across the roadway with the two snowmobiles not having been "involved" with one another so as to bring into play s.268(2)(iii) and leaving priority resting with the Fund. Mr. Camporese, on behalf of Gore, agreed to seek instructions with respect to the "involved vehicle" issue. Up until this point in time the only legal issue discussed in the pre-arbitration telephone conferences was whether the claimants were dependent on Allstate's insured even though the draft, but not executed, Arbitration Agreement identified the issues in a much broader sense. The documents provided to me confirm that counsel for Gore, having raised the "involved vehicle" issue, wrote to counsel for the claimant in the companion tort action on numerous occasions between October 13, 2016 and January 19, 2017 requesting a copy of the complete police file. I am advised that such file was not released, making it necessary for Gore to make an application to the court for a Wagg Order. This has yet to be done pending the outcome of this preliminary issue determination before me as to whether Gore is barred from proceeding with the "involved vehicle" issue at this stage of the proceeding, which would result in a hearing for that issue far beyond the two year limitation set out in s. 8(2)(5) of the Regulation.

On February 7, 2017, Mr. Camporese provided his client's firm position for the first time, namely, that the Gore insured vehicle was <u>not</u> involved and therefore not responsible for the claims arising from the two individuals who were on the uninsured snowmobile.

The May 1, 2017 arbitration hearing which was scheduled to deal with what was thought to be the dependency issue only did not take place as Gore and the Fund conceded in advance on the Examination Under Oath transcript evidence that Chris Ugilini and Lindsay Lance were not "dependent" on Allstate's insured.

The preliminary issue to be dealt with here is whether Gore is entitled to arbitrate the "involved vehicle" issue, which the Fund claims was raised at a late stage in the proceeding and which would now require a hearing beyond the two year requirement that a hearing be completed as set out in s. 8(2)(5) of O. Reg. 283/95.

ANALYSIS AND FINDINGS

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accidents benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits in a situation like this where the claimant was an occupant of a motor vehicle. Since the claimants were occupants of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(i)* *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
>
> *(ii)* *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii)* *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
>
> (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund* [emphasis mine]

On the basis of this priority hierarchy Gore and the Fund, having conceded that the individuals on the uninsured snowmobile were not dependent on Allstate's insured, leaves a situation whereby Gore would stand in priority by reason of s. 268(2)(iii) if it were demonstrated the snowmobile insured by Gore was "involved in the incident" with the uninsured snowmobile and the Fund would stand in priority if the vehicle insured by Gore

was found not to be "involved in the incident" involving the uninsured vehicle. There exists a body of jurisprudence to determine if a vehicle is "involved in the incident" but that will only be considered if this dispute is allowed to proceed.

Also coming into play in the priority analysis are the time requirements outlined in the Disputes Between Insurers O.Reg. 283/95 which 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.
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> 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.
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> 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.[emphasis mine]

The issue to be dealt with is whether Gore is entitled to arbitrate the "involved vehicle" issue raised at a late stage in the proceeding and which would now require a hearing beyond the two year requirement that a hearing be completed as set out in s. 8(2)(5) of O. Reg. 283/95 highlighted above.

The Fund has submitted that the Notice of Dispute clearly articulated Allstate's priority claims and the basis for them and the draft Arbitration Agreement was also fairly precise in framing

the understanding common to the parties of what issues were in dispute. At no time did Allstate raise the issue of “involved vehicle”. The Fund states that at no time was the arbitration extended past the two year mark to deal with issues not raised by Allstate. By formally adding the issue of “involved vehicle” on February 7, 2017, the time had already expired to complete a hearing within two years other than with respect to the dependency issue which issue was agreed by the parties to be heard May 1, 2017 and never proceeded as Gore conceded that the claimants were not “dependent” on Allstate’s insured.

In response, Gore took the position the involved vehicle issue was raised within two years of the commencement of the arbitration on November 18. 2014 and that the requirement of completing the hearing within two years of commencement had already been extended on consent of all parties by 5½ months to May 1, 2017 in any event. The Respondent Gore also submitted that the Fund was aware that the only means by which Gore Mutual would be found to have priority over the Fund would be with respect to the “involved vehicle” subparagraph under Section 268 of the *Insurance Act,* which was outlined in the Notice to Participate and Demand for Arbitration of November 18th, 2014. Furthermore, even the draft Arbitration Agreement did not restrict the issue to dependency only.

Section 8(2) of Ont. Reg. 283/95 is relatively new only coming into effect in September 2010. There are only a few cases dealing with the time requirements set out in the section and the consequences of a breach of the provisions.

There are three decisions that deal with breaches of the timelines set out in s.8(2) of the Regulation and the consequences thereof. The first is the decision in *Unifund Assurance Company and Wawanesa Insurance* (Arbitrator Bialkowski - April 8, 2015). The second is the decision of *Pafco Insurance Company v. Wawanesa Mutual Insurance Company* (Arbitrator Novick - November 22, 2016). The third is the decision of *The Motor Vehicle Accident Claims Fund v. Jevco Insurance Company* (Arbitrator Bialkowski - June 16, 2017). Emerging from these decisions are several general principles. They conclude that the purpose of Regulation is to ensure that the priority dispute process, once initiated, is completed in a timely fashion. They conclude that s.8(2) is procedural rather than substantive. They find that the timelines set out in s.8(2) are directory and permissive rather than mandatory. They confirm that the s.8(2) timelines apply to both parties. They conclude that any penalty for breach of the timelines rests in the discretion of the arbitrator based on the specific facts in the case before

the arbitrator. The decisions confirm that if a penalty is found, there must be proportionality between the breach and the consequences imposed on the breaching party. These general principles are best described by the arbitrator in *MVACF v. Jevco* (supra) at p.13:

> "On the basis of the jurisprudence outlined above, I am satisfied that the time requirements set out in s. 8(2)(5) are permissive and not mandatory, thereby providing the arbitrator with discretion to be exercised where circumstances permit. I am also of the view that the obligation to complete the arbitration hearing applies to both parties and their conduct must be viewed against the very reason why s. 8(2)(5) was included in the Regulation, namely to "ensure that the priority dispute resolution process once initiated is completed in a timely fashion". Whether discretion is exercised to extend the two year requirement depends on the facts of each particular case."

In that same case, some of the factors to be considered in a determination of a party's right to proceed in the face of a breach of s. 8(2)(5) of the Regulation are outlined:

> "I am of the view there are several factors to consider in the determination of whether the Applicant's right to proceed with the arbitration is precluded for not having the hearing completed within two years of the commencement of the arbitration, or the determination of the appropriate penalty, if any, if dismissal is inappropriate. Some of these factors are:
>
> 1. Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?
> 2. Was it practical to complete all necessary steps (production exchange, completion of Examinations Under Oath, obtain satisfaction of undertakings provided, obtain co-operation and production of documents from non-parties, etc.) to be in a position to complete the hearing within two years of the commencement of the arbitration?
> 3. Did the complexity of the dispute (number of issues, number of parties, involvement of 3rd tier insurers, etc.) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?
> 4. Has the Respondent been prejudiced by the delay?
> 5. Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?
> 6. Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?
> 7. Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?"

It is clear on the facts before me that during the initial stages of the arbitration proceeding, the issue of "involved vehicle" was not considered by the parties. The issue was not discussed in any of the initial pre-arbitration telephone conferences which dealt with productions and Examinations Under Oath. The Examinations Under Oath proceeded but

dealt with the “dependency” issue only. It was only on September 13, 2016 that the issue was ever raised by counsel for Gore as a potential issue in the dispute. This was approximately two months before expiry of the two year limitation as set out in s. 8(2)(5) of the Regulation, but eight months before the date agreed upon by the parties on the same pre-arbitration telephone conference for the hearing on the dependency issue. At this point in time the only liability document in the possession of the parties appears to be the police report which essentially states:

> “vehicles travelling southbound collide with a tree that was covering the pathway.”

On this limited information, it would at least be arguable that the two snowmobiles were not involved with one another but only involved with the fallen tree. More information was obviously needed such as the police investigation file which might assist as to whether the two snowmobiles came into contact with one another before or after colliding with the tree, for example. The documents provided to me indicate that counsel for Gore took steps in October 2016, having identified the potential “involved vehicle” issue, to obtain the police file from the claimants’ counsel in the companion tort action. Despite several letters, eight in fact, the file was not produced, leaving counsel for Gore in a position wherein he would have to obtain a Wagg Order by way of an application to the court to obtain the police file and presumably the full forensic investigation normally done in a double fatality. By this time, counsel for the Fund had taken the position that Gore was time barred from arbitrating the “involved vehicle” issue. This was February 2017, some three months following the two year expiry in November 2016, yet three months from the agreed upon extension of the arbitration hearing on the “dependency” issue on May 1, 2017. Initiation of a Wagg Order application has been put on hold pending the determination of the preliminary issue herein as to whether Gore should be allowed in the circumstances to proceed to an arbitration of the “involved vehicle” issue beyond the two years prescribed by s. 8(2)(5) of the Regulation.

The jurisprudence makes it clear that the purpose of s. 8(2) of the Regulation is to ensure that the priority dispute process, once initiated, is completed in a timely fashion. The jurisprudence also makes it clear that the timelines set out in the Regulation are permissive and not mandatory, providing the arbitrator the authority to extend such timelines where the situation warrants and to impose a penalty upon the breaching party proportional to the breach and the consequences imposed on the breaching party.

I am advised that the priority dispute herein involves just under $100,000. This would represent a sizeable loss to Gore if the issue were not allowed to proceed on the merits. There is simply insufficient information at the present time to determine whether Gore would be successful or not on the “involved vehicle” issue.

I find that there was a breach of s. 8(2)(5) of the Regulation but the nature of the breach insufficient at this time and in the absence of actual prejudice to call for a bar to Gore proceeding with a determination on the merits of the “involved vehicle” issue. In my view, it was unreasonable for Gore to not have identified the “involved vehicle” issue at an earlier stage and raised it in the initial pre-arbitration telephone conferences. It is not clear when they obtained a copy of the police report which, when reviewed, would indicate that there was potential for the “involved vehicle” argument. However, and most importantly, the issue was raised by Gore within two years of the commencement of the arbitration process, namely September 13, 2016 and several months, 7½ to be exact, before the extended time for the arbitration of the dependency issue in May 2017. All that was available to the parties at that time was a copy of the police report. Technically, an arbitration date could have been set before expiry of the two year limitation of November 18, 2016, but the Fund may well have been prejudiced if forced to proceed without possession of the full police file and only the police report information which could be interpreted as being the two snowmobiles not having been involved with one another. Counsel for Gore indicated that he was prepared to proceed with the issue on the basis of the police report alone. There ought be some penalty for the breach but not a bar to proceeding. In my view, the penalty ought be payment by Gore of any interest beyond November 18, 2016 on any amounts the Fund may ultimately be required to pay to Allstate by way of indemnity and the breach considered in any ultimate award as to costs. I believe such penalty to be proportional to the nature of the breach and sufficient to encourage insurers to ensure that the priority dispute process is completed in a timely fashion and within two years where practical and subject to the factors outlined at p.8 aforesaid.

In reaching my decision, I am unable to place any weight to the submissions advanced by the Fund with respect to the wording of the draft Arbitration Agreement, as it was never executed by the parties. In any event, the issues were only identified in broad terms which would not exclude the “involved vehicle” issue and the preamble wording “two snowmobiles

involved in a motor vehicle accident" arguably different than an admission that the two snowmobiles were "involved in the incident" as required by s. 268 of the *Insurance Act*.

In considering prejudice to the Fund for any delay, I am not prepared to accept the submission that raising the issue at an earlier time would have allowed for an inspection of the scene and the involved vehicles. The accident occurred on December 26, 2013. The arbitration was commenced November 18, 2014, almost a year post accident. There is no evidence before me that there would be something to be gained by an inspection of the scene at that time or whether the snowmobiles were available for inspection in their damaged state at that time.

I have also considered that the jurisprudence would indicate that the timelines in s. 8(2) apply to both parties. The only way Gore would stand in priority to the Fund would be if it could be demonstrated that the Gore snowmobile was involved in the incident with the uninsured snowmobile. Knowing this, it was also open to the Fund to investigate the liability issue at an early stage and obtain a Wagg Order if necessary so as to allow a hearing within two years of the commencement of the arbitration. I have also considered that there was a certain amount of acquiescence on the part of the Fund in agreeing to an extension of the two year time line by 5½ months for determination of the dependency issue.

The Fund in this case seeks a bar of Gore being able to proceed for a breach of s. 8(2) where in *The Motor Vehicle Accident Claims Fund v. Jevco Insurance Company* (Arbitrator Bialkowski - June 16, 2017), the Fund was not precluded as Applicant from its priority dispute even though it had not even appointed counsel when the two year limitation had expired. The Fund in that case had argued that s. 8(2)(5) was not in the nature of a limitation period and a claim is not barred if the arbitration hearing is not completed within two years of the arbitration process having been initiated. A penalty was simply imposed in that case as a deterrent to other insurers allowing a delay in priority dispute proceedings. Similarly, the nature of the breach here in raising an issue in the late stages of the arbitration process, yet within two years of commencement, does not warrant a bar from proceeding but in my view a penalty to deter others from such conduct.

ORDER

I hereby order that:

1. The priority dispute be allowed to proceed with respect to the “involved vehicle” issue;

2. That Gore be responsible for any interest payable by the Fund beyond November 18, 2016 should the Fund ultimately be found to be the priority insurer;

3. That the breach herein be considered in any final costs disposition.

DATED at TORONTO this 24th)

day of July, 2017.)

KENNETH J. BIALKOWSKI
Arbitrator