

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTIONS 268 and 275, *REGULATION 283/95* and
REGULATION 664, as amended**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

PRELIMINARY DECISION

COUNSEL:

Eric Grossman for the Applicant

Sandi J. Smith for the Respondent

BACKGROUND:

Gary Kregar and Bonnie Begin were injured when the truck they were driving was involved in a single-vehicle accident near Sudbury, Ontario on August 25, 2005. Mr. Kregar and Ms. Begin were spouses, and regularly drove large tractor-trailers between Toronto and Vancouver to deliver goods. Ms. Begin was driving at the time of the accident. Mr. Kregar sustained serious injuries in the accident, and ultimately passed away in 2008.

Both Mr. Kregar and Ms. Begin applied to Nordique/ ING Insurance (“ING”), the insurer of their personal vehicle, for accident benefits. The truck they were driving at the time of the accident was registered in British Columbia and insured by the Insurance Corporation of British Columbia (“ICBC”). ING paid benefits to Mr. Kregar until his death, and has paid benefits to Ms. Begin. It takes the position that ICBC is in higher priority to pay both claims pursuant to section 268(2) of the *Insurance Act*, and that it is entitled to indemnification from ICBC pursuant to the Loss Transfer provisions in section 275 of the *Act*.

An initial pre-hearing call was convened on January 4, 2007 to discuss the issues in the arbitration. A second call was held in March, and on July 4, 2007, during the third pre-hearing call in this matter, the question of whether the arbitration proceeding encompassed Ms. Begin’s claim or only that of Mr. Kregar emerged as an issue. Counsel for ICBC advised that her client had only received a Notice of Commencement of Arbitration relating to Mr. Kregar’s claim, and was not aware that the arbitration that had been convened included Ms. Begin’s claim.

Counsel for ING subsequently produced a copy of a notice regarding the Begin claim that she alleged had been forwarded to ICBC on May 12, 2006. ICBC maintained that it had never received this notice, and did not accept my jurisdiction to arbitrate the matter. ING then brought a court application to determine the issue. After affidavits were filed and cross-examinations held, the matter was heard in September 2008 by Justice Trotter, who

determined that I had the jurisdiction to consider whether ING had complied with section 7(2) of the Regulation with respect to Ms. Begin's claim.

PRELIMINARY ISSUE HEARING:

A hearing was held in Toronto on December 11 and 15, 2009, pursuant to the provisions of the *Arbitration Act, 1991*. The following issue was addressed:

1. Does section 7(2) of *Regulation 283/95* to the *Insurance Act* preclude ING from pursuing its claim for reimbursement from ICBC for the accident benefits it has paid out to Bonnie Begin ?

RESULT:

1. No, ING is not precluded from pursuing its claim for reimbursement from ICBC for accident benefits it has paid out to Ms. Begin.

RELEVANT PROVISIONS:

The following provisions are relevant to the issue:

Arbitration Act, 1991

23. (1) An arbitration may be commenced in any way recognized by law, including the following:

1. *A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.*
2. *If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.*

3. *A party serves on the other parties a notice demanding arbitration under the agreement.*

24. *A notice that commences an arbitration without identifying the dispute shall be deemed to refer to arbitration all disputes that the arbitration agreement entitles the party giving the notice to refer.*

Regulation 283/95

7. (1) *If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991*

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.*

THE EVIDENCE:

Two witnesses testified at the hearing – Jennifer Griffiths, a partner at Zarek Taylor Grossman Hanrahan (“ZTGH”), the law firm retained by ING to advise on the claims and conduct the arbitration, and David Webster, a Bodily Injury Unit Manager at the ICBC who was a claims examiner at head office at the relevant time. Ms. Griffiths and Mr. Webster were also examined under oath earlier in the proceeding, as was Louise James (a lawyer at ZTGH at the relevant time) and Michelle Hiscox (Ms. James’ administrative assistant). Counsel referred to the transcripts of these examinations in their arguments. Christine McKenna, another lawyer at ZTGH, swore an affidavit in support of the court application brought by ING. She was cross-examined on the affidavit, and a transcript of that evidence was also referred to.

While counsel raised several legal arguments in their submissions, the factual question before me boils down to whether or not counsel for ING sent a Notice of Commencement of Arbitration referencing Ms. Begin's claim to ICBC, within the time permitted by section 7(2) of the Regulation. There was no dispute that the notice referencing Mr. Kregar's claim was sent on May 12, 2006 and received by ICBC no later than May 19, 2006. The dispute between the parties centers around whether or not the notice relating to Ms. Begin's claim was sent along with it.

The relevant facts can be summarized as follows:

ING received Mr. Kregar's Application for Accident Benefits on September 21, 2005. Ms. Begin's application was received on October 16, 2005. In late October 2005, the ING adjuster advised the independent adjuster who had been retained to manage the claims that she would be sending out a Dispute Between Insurers notice, and inquired about the identity of the person handling the physical damage portion of the file at ICBC, so that the notice could be directed to them. It is unclear why the adjuster wanted to forward the notice to the adjuster handling the physical damage claim, but in any event, the name Rick Kulcheski was provided, along with an ICBC office address in Surrey, British Columbia.

ING contends that two Notice of Dispute Between Insurers forms were then sent to ICBC on November 17, 2005 - one relating to Mr. Kregar's claim, and a second with respect to Ms. Begin's claim. ICBC denies having received either of these notices, despite the fact that they were sent by registered mail. The copies of the notices produced at the hearing are addressed to Rick Kulcheski at ICBC, at a North Vancouver address. Subsequent answers to undertakings provided by Ms. McKenna at her cross-examination indicate that a Canada Post representative advised that these documents were delivered to ICBC on November 21, 2005.

ICBC retained Tom Wright of the law firm Gilbert Wright Kirby ("GWK") in September 2005, to defend the tort claim issued on behalf of Gary Kregar. Bonnie Begin, the driver of the truck, was also named as a defendant. GWK was also retained to advise ICBC and

participate on its behalf in the arbitration proceeding before me. Ms. Griffiths testified that a discussion between counsel took place in March 2006. She recalled participating in the call, along with Eric Grossman from her office. She recalled Mr. Grossman asking Mr. Wright to clarify who he was acting for, and suggesting that he may be in a conflict of interest position by representing Ms. Begin as a defendant in the tort claim and by also acting for ICBC in the accident benefits claim and priority dispute with ING. She recalled that Mr. Wright stated that “if there was a conflict, it was his to sort out”. Ms. Griffiths explained that if the arbitration had only been convened to address Mr. Kregar’s claim, there would have been no need to have had that discussion, as Mr. Wright would not be in a position of potential conflict with respect to Mr. Kregar.

Ms. Griffiths testified that she delegated the preparation of the Notices of Arbitration for each of the Kregar and Begin claims to Louise James, a junior associate at the firm. An email message dated April 6, 2006 outlining these instructions was filed at the hearing. It instructs Ms. James to “confirm with the client whether we are commencing ...in respect of both Mr. Kregar and his c/l wife”. It also recommends that separate notices be drafted for each claimant. Ms. James attested in her affidavit that after consulting with the client and confirming that ING intended to commence an arbitration with respect to both claims, she prepared two separate arbitration notices on May 1, 2006. She also reviewed the firm’s directory of documents after this issue was raised, and determined that it contains two separate notices – one referencing the Kregar claim and one referencing Ms. Begin’s claim. It also indicates that the Begin notice was last altered on May 12, 2006. Copies of these “screens” were filed into evidence at the hearing.

Ms. James then sent an email to her assistant, Michelle Hiscox, advising that the two notices had been prepared, and instructing her to prepare a cover letter and arrange for the notices to be sent out by ICS or regular mail to the attention of “Brian Kulcheski”. The letter prepared by Ms. Hiscox is dated May 12, 2006, and is addressed to Mr. Brian Kulcheski at Insurance Bureau of British Columbia, 151 West Esplanade, North Vancouver, BC, V7M 3H9. It states:

Dear Mr. Kulcheski:

*Re: ING ats Kregar
 Your Claim No. 112
 Date of Loss: August 25, 2005*

Enclosed please find our client's Notice of Commencement of Arbitration on behalf of ING Insurance Company of Canada, which is served upon you pursuant to the Dispute Resolution Practice Code.

Yours very truly,

Louise A. James

Ms. James advised that she did not seek Ms. Griffiths' approval of the notices, or that of any other lawyer at the firm before sending them out. The notices are issued in Mr. Grossman's name, but are unsigned. Ms. James stated that she had found the ICBC address somewhere in the file, but had not called anyone to confirm that address was correct. She acknowledged that after reviewing the matter, it was clear that she should have addressed the letter to Rick Kulcheski. She could not explain how she came up with the name Brian Kulcheski, other than to speculate that she may have confused that name with a name from another file that she had been working on.

Ms. Hiscox advised at her examination that she had typed up the cover letter, and would have ensured that the attachments would have been printed out for Ms. James' review before she would have brought the letter for her to sign. When Ms. Hiscox was asked why the letter referred to "notice" in the singular if two notices were actually attached, she stated that it must have been a typographical error.

Ms. Griffiths testified that the firm's practice was to generate three copies of a document such as this, with one being sent to the recipient, one maintained in the file and one "blind copied" to the client. A copy of the Begin notice was in fact located on the correspondence brad in the ZTGH file, stapled to the Kregar notice and the cover letter signed by Ms. James. I note that despite Ms. Griffiths' instructions that separate notices

be prepared for each claimant, the two-page Begin notice is identical in every respect to the Kregar notice, except for the name inserted in the middle of paragraph 1 at the top of the first page. The claim is framed as a dispute brought under the loss transfer provisions in section 275 of the *Insurance Act*. Paragraph 3 on the second page of the notice contains the alternative argument that ICBC is “at priority to respond to the Application for Accident Benefits of Mr. Gary Kregar arising out of a motor vehicle accident which occurred on August 25, 2005”.

Ms. Hiscox explained that she often uses the ICS courier to send correspondence to insurance companies. She stated that the firm’s reception desk maintains designated folders for correspondence addressed to specific insurers, but that as these documents were addressed to ICBC in Vancouver they would likely have been placed in the “miscellaneous” folder. She stated that she would not have placed the documents in an envelope, but would have given them to the receptionist who would have then prepared one general courier envelope for ICS containing all of the documents received that day.

David Webster at ICBC testified that he received the Notice of Commencement of Arbitration relating to Mr. Kregar’s accident benefits claim on May 19, 2006, as an attachment to an interoffice memorandum. The memo was sent by Diane Finnerty, who was then the Regional Manager of the ADR Department. Mr. Webster was asked at his initial examination to ask Ms. Finnerty about her recollection regarding her receipt of the notice. She advised that she received the one notice relating to Mr. Kregar’s claim on May 19th. She could not recall how the notice came to her attention, but stated that she reviewed it, and searched the ICBC system for Mr. Kregar’s name. She was able to determine that Mr. Webster was the adjuster handling the Kregar claim, and forwarded the notice on to him. Ms. Finnerty advised that she did not receive a second notice, and that if she had, even if it had been virtually identical to the first one, she would have also passed it on to Mr. Webster.

Mr. Webster noted that no one by the name of Brian Kulcheski works at ICBC, and that the claim number referenced on the cover letter is not a valid ICBC claim number. He

testified that when the letter was received at head office the mailroom staff would likely not have known what it related to, but as the document referred to an arbitration, they would have likely assumed that Ms. Finnerty would be familiar with it. He stated that he was neither aware of nor had seen the Notice of Dispute Between Insurers form for either Mr. Kregar or Ms. Begin prior to this issue being raised at the hearing, and insisted that he had been unaware of ING's intention to pursue arbitration with regard to Ms. Begin's claim up to that point.

In the course of his examination, Mr. Webster undertook to contact Rick Kulcheski and ask him whether he had seen any of the documents referred to. He later reported that Mr. Kulcheski advised him that he had not received either of the DBI Notices, but that he may have been off work on a medical leave in November 2005. Mr. Kulcheski also reported that he did not recall having ever seen the Kregar or Begin arbitration notices.

Correspondence filed at the hearing indicates that counsel had discussions regarding the selection of an arbitrator in May and June of 2006. It appears that ICBC's belief at that time was that only the Kregar claim was the subject of the loss transfer and priority dispute, whereas ING was operating under the assumption that the arbitration that had been commenced encompassed both the Kregar and Begin claims.

My office was initially contacted in late October 2006, and a pre-hearing teleconference was scheduled for January 4, 2007. Ms. Griffiths participated on ING's behalf, and Ms. Smith represented ICBC. I subsequently sent out a letter confirming our discussions. The letter does not contain any reference to Ms. Begin, other than the fact that she was the driver of the truck at the time of the accident. The issues identified in the letter as being in dispute are – whether the loss transfer provisions in section 275 of the Act apply to single vehicle accidents, and whether Mr. Kregar should be deemed to be a “named insured” under the ICBC policy pursuant to section 66 of the *Statutory Accident Benefits Schedule*.

Ms. Griffiths testified that she did not read my pre-hearing letter until July 2007, at which point the question of whether the arbitration encompassed Ms. Begin's claim had already been raised. She explained that she went off on maternity leave in February 2007, and had transferred the file to Christine McKenna to oversee in her absence. Shortly after the initial pre-hearing call on January 4, Ms. Griffiths wrote both a memo to the file and a reporting letter to her client. The memo refers to ING's position that ICBC is primary in respect of the claims of Ms. Begin and Mr. Kregar pursuant to section 66 of the *SABS*. The letter to the client refers to counsel for ICBC "expressing surprise that this proceeding was being advanced in respect of the claims of both Mr. Kregar and Ms. Begin". She also requests her client to confirm the amounts paid out by ING in accident benefits to Ms. Begin.

Ms. Griffiths also stated that she recalled having had a discussion with Ms. Smith either at or prior to the initial pre-hearing call, at which Ms. Smith expressed surprise that ING would be pursuing an arbitration with respect to Ms. Begin's claim, explaining that she had met her and was under the impression that she was not suffering from any injuries.

A further pre-hearing call was held with me on March 2, 2007, with Ms. James participating on ING's behalf. That discussion focused on obtaining production of documents from Mr. Kregar's counsel. Our third call took place on July 4, 2007, with Ms. McKenna participating on ING's behalf. As stated above, it was during this call that the question of whether the arbitration encompassed Ms. Begin's claim was first raised as an issue.

ING also alleges that it sent Notices of Loss Transfer to ICBC with respect to both the Begin and Kregar claims, on March 9, 2007. Again, despite these having been sent by registered mail, ICBC has no record of ever having received them. Ms. McKenna's inquiries of Canada Post further to her examination under oath revealed that the Kregar notice was mailed on March 9th, and was signed for by someone at ICBC on March 12, 2007. Similarly, the loss transfer notice with respect to Ms. Begin's claim was mailed on March 12th and delivered to ICBC on March 14, 2007.

ING raised a new argument on the first day of hearing, contending that ICBC had ‘deflected’ Ms. Begin’s claim and should therefore not be entitled to rely on the limitation period set out in section 7 of the regulation. The reason for raising the issue at that late stage was that the file from the independent adjusting firm hired by ICBC had only been produced to counsel the day prior to the hearing. The main bases for the “deflection” argument are that Travis Alcock, the adjuster handling the matter for ICBC, had met with Ms. Begin on September 21, 2005, and that Mr. Webster had inquired in a letter to Mr. Alcock, on October 24, 2005, whether Ms. Begin had presented her accident benefits claim to ING, the WSIB or to ICBC, and advised him to contact Ms. Begin and direct her to make a claim to the WSIB. On November 9, 2005 Mr. Alcock wrote to Ms. Begin and set out ICBC’s position that she should be proceeding with a claim to the Workers’ Compensation Board of British Columbia, and if that is refused, to ING as the “secondary payee”.

There is no question that the above approach is contrary to the *SABS*. However, after reviewing the relevant documentation, it is clear that ICBC could not have deflected Ms. Begin’s claim. The Application for Accident Benefits submitted on her behalf is dated September 13, 2005, and was sent to ING on September 30, 2005 by Mr. Kregar’s case manager. It is date-stamped as having been received by the ING adjuster on October 6, 2005. Other documentation indicates that ICBC only retained its independent adjuster on September 16, 2005, which was three days after the application was signed by Ms. Begin. While counsel referred to other details relating to this issue, I am satisfied that the evidence does not support a finding that ICBC deflected Ms. Begin’s claim, and I will not address this argument further in the section below.

ARGUMENTS & ANALYSIS:

Aside from submitting that the arbitration notice was sent as alleged, counsel for ING raised three further points in support of his contention that ING had commenced the arbitration with respect to Ms. Begin's claim within the time required by section 7 of the Regulation.

He submitted that it is open to me to find that the arbitration with respect to her claim was commenced by the delivery of the Kregar notice in March 2006, by the conversation he and Ms. Griffiths had with Mr. Wright in which they discussed the appointment of an arbitrator around that same time, and/or by the discussions held between the parties and my office before the initial pre-hearing call took place in January 2007, when dates for the call were being discussed.

Mr. Grossman contended that a formal notice is not required to commence an arbitration, as long as there is a 'meeting of the minds' and an intention by the parties to commence the arbitration. He submitted that it was also open to me to accept Ms. Griffiths' evidence that Ms. Begin's claim was discussed either at or prior to the initial pre-hearing, and that that is sufficient to support a finding that the arbitration encompassed her claim.

I do not accept these contentions. Section 23 of the *Arbitration Act* requires that two basic steps be followed in order to commence an arbitration – there must be an agreement to arbitrate, and pursuant to that agreement, a notice demanding arbitration must have been served. Justice Archibald's finding in *Gore Mutual Insurance Co. v. Markel Insurance Co.* 12 C.C. L. I (3d) 313 (Ont. Sup. Ct.) that the provisions of the *Insurance Act* and of *Regulation 283/95* constitute an agreement to arbitrate in this context are now well accepted. The question then becomes whether a "notice demanding arbitration" has been "served". I find that this language clearly contemplates a written notice of some form, and anything short of that, such as a discussion about scheduling dates for a pre-hearing call or exchanging views about which arbitrator to choose, is simply not sufficient.

It is undisputed that ING served a notice on ICBC advising that it was commencing an arbitration proceeding with respect to Mr. Kregar's claim. Can this notice be said to encompass Ms. Begin's claim, given that the two claims arise out of the same accident, and involve the same parties? In my view, it cannot. The focus of the relevant sections of *Regulation 283/95* is on which insurer is required to pay benefits to "the insured person". Both subsections 7(1) and 7(2) of the regulation also contain reference to "the insured person". I conclude from the repeated use of this term that the provisions in the regulation that direct that the dispute be resolved through arbitration refers to the individual claims for benefits, as opposed to all claims that may arise out of the same accident involving the same insurers.

Counsel for ING also made reference to section 24 of the *Arbitration Act*, which provides that a notice commencing arbitration is deemed to refer to the arbitration of all disputes, and refers to a "party" as opposed to an individual. This section does not apply to the instant case, however, as it specifically refers to a notice commencing an arbitration "without identifying the dispute". The Kregar notice sent by ICBC very clearly identifies the dispute and therefore I find that, its impact cannot be expanded upon in the manner suggested by counsel for ING.

Having addressed these legal arguments, I turn now to the factual question that is at the center of the parties' dispute. Was the Begin notice forwarded to ICBC along with the Kregar notice in May of 2006, as ING alleges? Counsel for ING contended that the Begin notice was sent by their office, received by ICBC, and was somehow discarded, destroyed or lost once it was in ICBC's possession. Counsel for ICBC argued that the Begin notice was either never sent, or was sent out but never made it to ICBC. She acknowledged that it is difficult to prove a "negative", but contended that when the surrounding circumstances are considered it is clear that normal business practices were not followed in this instance, and that I should conclude that the Begin notice was not sent to ICBC along with the Kregar notice

After considering all of the evidence, I find that on a balance of probabilities, the Begin notice was sent, as alleged by ING. Ms. Griffiths testified that it had always been her intention to commence the arbitration with respect to both the Kregar and Begin claims, and several of the documents filed confirm that intention. The email she sent to Ms. James requesting that she prepare the notices instructs Ms. James to confirm with the client whether notices should be prepared for both the Kregar and Begin claims. Internal firm documents indicate that the client advised that arbitration should indeed be commenced with respect to both claims. The “Word” directory shows that a separate Begin notice was created, and was modified on May 12, 2006, the same day that the Kregar notice was sent out. A copy of the Begin notice was found in the ZTGH file, on the correspondence brad stapled to the Kregar notice and the cover letter.

Given all of the above, as well as the evidence of Ms. Griffiths, Ms. James and Ms. Hiscox, I am prepared to find that a notice of arbitration regarding the Begin claim was in fact sent to ICBC along with the Kregar notice.

Ms. Smith contended that given the various errors surrounding the creation of the notice and the accompanying letter, I should conclude that the Begin notice was not sent as alleged. I can certainly appreciate why she makes this argument, given that the notice is unsigned, is identical in every way to the Kregar notice except for the name in the first paragraph, and was sent to the wrong person, at the wrong address, citing an incorrect claim number. It was attached to a cover letter that is fraught with errors, not the least of which is a reference to the attached singular “notice”.

As tempting as it is to find that a Notice of Commencement of Arbitration that contains such errors and is addressed to a person who does not exist at a corporation that is misnamed does not constitute a valid notice, I am not in a position to make that determination. Arbitrators appointed pursuant to the *Arbitration Act* are creatures of statute, and are bound by the provisions of the *Act*. The *Act* does not require that a notice commencing arbitration be signed or that it be specifically sent to the adjuster responsible for managing the claim. While I am troubled by the fact that the Begin notice is identical

in every respect to the Kregar notice, save for the name inserted on the first page, and that the cover letter that accompanied the notices contains more incorrect information than accurate details, the “bar” for accuracy is not set particularly high. The statutory/regulatory framework simply requires that a written notice be sent to the insurer who has been provided with notice of the dispute, advising of the intent to commence an arbitration. The notice sent by counsel for ING satisfies this requirement.

Counsel for ICBC noted Ms. Hiscox’s evidence that despite the fact that the notices were being sent to Vancouver, they were simply brought to the firm’s reception desk, without being placed into a separate envelope, with instructions that they be sent by ICS courier. While this does not strike me as the most prudent way to ensure that important documents are received across the country, it is clear, as Mr. Grossman pointed out, that the cover letter and the Kregar notice did arrive at ICBC.

While it is possible that the Begin notice was “lost” along the way and did not make it to the ICBC office, I find it more likely that it arrived there with the other notice and was either misplaced or discarded after arriving at ICBC. While I cannot determine this with any certainty, the fact that *four* other notices related to this file – the two DBI Notices sent in November 2005 and the two Loss Transfer notices sent in March of 2007 – were not received by Mr. Webster (or Mr. Kulcheski), *despite having been sent by registered mail*, leads me to conclude that the mailroom practices at the ICBC office to which they were sent were far from infallible.

Accordingly, I find that the arbitration proceeding ongoing before me was commenced by ING with respect to both the Kregar and Begin claims, and that section 7(2) of *Regulation 283/95* does not preclude ING from proceeding against ICBC with respect to the benefits it has paid out to Ms. Begin.

Ms. Smith advised at the preliminary issue hearing that the Workplace Safety and Insurance Appeals Tribunal has now determined that Mr. Kregar and Ms. Begin were both “workers” in the course of their employment at the time of the accident, and that

their right to claim accident benefits under the *SABS* is taken away. I expect that counsel will need to discuss matters further, in light of this finding and my determination above.

I will have my assistant contact counsel to schedule a further pre-hearing teleconference, so that this matter can proceed ahead and other details relating to the conduct of the arbitration can be discussed.

DATED at TORONTO, ONTARIO this _____ DAY OF MAY, 2010.

Shari L. Novick
Arbitrator