IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 and REGULATION 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE (MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Applicant

\- and -

INTACT INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Janis P. Criger for the Applicant

Joseph Lin and Rohit Sethi for the Respondent

BACKGROUND:

Ravindra Singh was struck by a van owned by Discount Car and Truck Rental and insured by Intact Insurance on December 13, 2008. He submitted an application for payment of accident benefits to the Motor Vehicle Accident Claims Fund ("the Fund") in March 2009. The Fund retained Claimspro to adjust Mr. Singh's claim. Claimspro sent written notice of the Fund's intention to dispute its obligation to pay benefits to Intact (then ING Canada) on April 24, 2009. Intact subsequently retained Crawford & Company ("Crawford") to handle the matter.

Claimspro sent correspondence to Crawford entitled Notice of Commencement of Arbitration on April 13, 2010. Intact alleges that this document does not fulfil the criteria required to properly initiate an arbitration, and that the Fund has accordingly not complied with the requirement in *Regulation 283/95* that an arbitration be commenced within one year of the date that notice was provided to Intact under section 3.

HEARING:

Counsel agreed to have this issue determined by way of a preliminary hearing. A hearing was convened on June 9, 2011 in Toronto, Ontario, pursuant to the *Arbitration Act, 1991* and *Ontario Regulation 283/95* of the *Insurance Act*.

ISSUE IN DISPUTE:

1. Does the April 13, 2010 document sent by Claimspro to Crawford & Company constitute valid notice of the initiation of an arbitration ?

RESULT:

1. Yes, the notice sent by Claimspro is sufficient to initiate arbitration, and the Fund has therefore complied with the one-year requirement in the regulation.

RELEVANT PROVISIONS:

At the time of this accident, the following provisions were in force:

Regulation 283/95:

> ***2.*** *The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.*
>
> ***3. (1)*** *No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.*
>
> ***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 benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991.*
>
> ***7. (2)*** *The insurer paying benefits under section 2, any 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.*

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.*

FACTS :

The relevant facts are not in dispute, and no *viva voce* evidence was called.

The discrete issue before me is whether or not the document sent by Claimspro to Crawford on April 13, 2010 is sufficient to commence an arbitration under the regulation. As the wording of the document is central to the parties' arguments, I will set it out in full below.

> *Attn: Mike Dickson*
> *Crawford & Company*
> *300 - 123 Front St. West*
> *Toronto, ON MSJ 2M2*
>
> *Via Facsimile: 416-867-1925 & ICS Courier*
>
> *RE: Your lnsured: 2319-7292 Quebec lnc. (Discount Car & Truck Rental)*
> *Your Policy: 691-9454*
> *Type of Loss: Accident Benefits*
> *Date of Loss: December 13, 2008*
> *Claimant: RAVINDRA SINGH*
>
> ***Notice of Commencement of Arbitration***
>
> *Dear Mr. Dickson:*
>
> *The Minister of Finance administers the Motor Vehicle Accident Claims Fund.*
>
> *As you know, the Fund is the payor of last resort of Statutory Accident Benefits where there is no recourse to insurance.*
>
> *Take Notice that ClaimsPro lnc. on behalf of the Minister of Finance, who administers the Motor Vehicle Accident Claims Fund, hereby commences an arbitration under the Arbitrations Act,1991 to dispute priority of payment under s.268 of the Insurance Act and O. Reg 283/95 respecting the accident benefits claim of Ravindra Singh arising out of a motor vehicle accident which occurred on December 13, 2008.*
>
> *The Minister seeks an award reimbursing all benefits paid to the claimant, all legal, investigative and administrative fees and expenses to adjust the claim, together with interest and legal costs on a full indemnity basis.*

And, take Notice the Minister reserves its right to pursue its remedies in court in a proper case.

The Minister of Finance will now assign counsel, who will contact you or your counsel in the near future to arrange for production and disclosure of documentary evidence.

Should there be questions or concerns, please do not hesitate to contact the undersigned.

Yours truly,

Margarita Vorobeva
Accident Benefit Adjuster
Claims Pro lnc
800 - 150 Commerce Valley Dr. West
Markham, ON L3T 723
T: 1-800-268-8080 Ext 5418
F:905-695-6492

cc. Intact Insurance, Sunil Manocha at Claims Pro Inc., MVAC Fund

It is undisputed that the above notice was received by Mr. Dickson. He responded by letter a few weeks later, and requested that certain documents be provided. The Claimspro adjuster responded on May 19, 2010, enclosing the documents requested. Subsequently, counsel for the Fund wrote to Mr. Dickson on November 23, 2010 to advise that she had been retained by the Fund to pursue the arbitration. She attached the above notice, and requested that the file be referred to counsel so that an arbitrator could be appointed.

PARTIES' ARGUMENTS:

Intact's position

Counsel for Intact reviewed the general principles that have emerged from the case law regarding the criteria required for initiating an arbitration under *Regulation 283/95.* He noted that it is generally accepted that both an agreement to arbitrate and a demand to submit to arbitration must be present, and that an agreement to arbitrate is created in this

context by the combined effect of section 23 of the *Arbitration Act* and *Regulation 283/95.* (*Gore Mutual Insurance Co. v. Markel Insurance Co.* [1999] O.J. No. 2688).

The question then becomes whether the April 13, 2010 letter from Claimspro constitutes a valid demand to submit to arbitration. Intact contends that it does not. Its primary argument is that the document is addressed to Mr. Dickson at Crawford & Company and does not specify in any way that the arbitration is being commenced against Intact. Mr. Lin submitted that Crawford likely handles claims on behalf of many insurers, and that while he accepts that Mr. Dickson was acting as an agent for Intact, it is not at all clear that Intact is the intended 'target'. He also noted that the letter neither mentions the appointment of an arbitrator, nor requests that the names of suitable arbitrators be provided.

Counsel noted that the case law requires that a notice show a "clarity of intention" to proceed to arbitration. Mr. Lin acknowledges that the document does state that arbitration is being commenced, but fails to advise against whom it is being commenced. He contends that a Statement of Claim intending to commence a court action that does not name a defendant would be invalid, and argued that in the same way, Claimspro's failure to clearly name the respondent in its notice is fatal to its claim that this document is sufficient to initiate arbitration.

Counsel also contends that the subsequent correspondence between the parties, in which documents are requested and provided, "muddies the waters" further. He submits that this exchange evidences an intention to avoid arbitration, and is inconsistent with the Fund's position that the notice is a clear indication of its desire to proceed to arbitration.

Fund's position

Counsel for the Fund submitted that there is no legislative requirement that an arbitration be initiated in a particular format. She noted that section 23 of the *Arbitration Act* provides that an arbitration may be commenced in "any way recognized by law", and

submitted that this language signals that a flexible approach be taken when considering whether an arbitration has been properly initiated.

Ms. Criger contended that the notice in question is sufficient to initiate the arbitration as it contains the phrase - “the Fund hereby commences an arbitration”. She notes that it references the statutory authority under which the arbitration is being commenced, sets out the issue to be arbitrated, and details the relief claimed. She argued that it is clear on an objective reading of the document that a process is being commenced, and the details relating to “what, when and how” are provided, and thus it cannot be said that a clarity of intention is lacking.

Ms. Criger acknowledged that the notice does not specifically name Intact as the respondent, but pointed out that the “Re line” refers to Intact’s insured and the policy number, as well as the Claimant’s name. She also noted that “Intact Insurance” is listed on the “c.c. line” at the bottom of the notice, and that they would have therefore received a copy.

Finally, counsel noted that unlike other cases referred to by counsel for Intact where conditional language is used in correspondence that the first insurer alleges constitutes valid notice of commencement of an arbitration, the words used in this notice (“hereby commences an arbitration”) are clear and definite.

ANALYSIS:

As stated by the court in *Gore Mutual v. Markel Insurance, supra*, the combined effect of section 23 of the *Arbitration Act* and the scheme set out in *Regulation 283/95* constitute an “agreement to arbitrate” priority disputes between insurers in Ontario. While *Regulation 283/95* has been described as a complete code that regulates priority disputes between insurers, it provides no guidance or detail regarding how an arbitration should be initiated or commenced. Section 7(1) of the regulation does provide that a dispute regarding which insurer is required to pay benefits “shall be resolved through an

arbitration under the *Arbitration Act, 1991*." Section 23 of that Act, excerpted above, provides that an arbitration may be commenced "in any way recognised by law" and provides three examples. None of the three examples provided fit the circumstances in this case.

The question then becomes – what is a first insurer who has provided notice under section 3 of the regulation required to do to initiate arbitration pursuant to section 7? The phrase "in any way recognised by law" is broad and wide-sweeping. While it is puzzling, and perhaps frustrating, that the statutory "bar" for the commencement of a process between sophisticated parties that will often involve large sums of money and require the resolution of complex issues is placed so low, it is clear from these words that a flexible standard is to be applied.

Arbitrator Samis concluded in the *Markel v. Co-operators and Lombard Canada* decision (unreported decision, dated March 31, 2011), that while the *Act* allows for considerable flexibility regarding the steps to be taken to commence an arbitration, section 23 "requires some overt step" to be taken towards an arbitration process that will lead to an award resolving the dispute. I agree with this statement. While clearly not exhaustive, the three examples provided in section 23 involve the service of a notice which either appoints an arbitrator or demands arbitration under an agreement. Without putting too much credence on examples which are not meant to be exhaustive, I take from this that in order to commence an arbitration, some definite action must be taken that signals a clear intention to start a process that will end with a determination of rights by an arbitrator (or arbitral tribunal).

In this case, the document sent by the Claimspro adjuster clearly states that Claimspro, on behalf of the Fund, is commencing an arbitration. Unlike many of the cases referred to by counsel, the language used here is definite and not conditional. While the other scenarios refer to arbitration as a potential future possibility if no response is received, the wording used here confirms it as a current reality. Reference is made to section 268 of the *Insurance Act* and *Regulation 283/95*, the key pillars of the priority scheme. The

Claimant's name and the date of the accident are referred to in the body of the letter, and notice is provided that counsel will be assigned to the matter. In my view, it constitutes clear notice that action is being taken to proceed to arbitration, so that the priority for Mr. Singh's claim can be determined.

I find that the fact that there is no reference to either appointing an arbitrator, or soliciting the names of acceptable arbitrators is not significant. While that practise has developed over the years and is certainly an efficient way for the process to move along, there is no statutory requirement for this to be included in a notice for it to be considered valid.

I am more concerned about the fact that the notice is neither addressed to, nor references Intact Insurance as the respondent. After much consideration, I find that while it is certainly preferable to clearly identify the respondent or 'target insurer' when commencing an arbitration, it is not fatal in this case for the Fund not to have done so. The document is addressed to Mr. Dickson at Crawford, Intact's agent, and Intact is copied on the notice. While Mr. Dickson may have had to match the name of the insured (Discount Car & Truck) with the policy number and Claimant to determine that Intact was the insurer involved, that would likely not have been very difficult to do.

In the end, I find that all the requisite elements are present in the notice sent by Claimspro to initiate an arbitration, and that Intact's preliminary objection must therefore fail.

I was advised by counsel that the above issue is the only issue in dispute between the parties, and accordingly, I find that Intact is responsible to repay the Fund for all reasonable payments made, and assume priority of Mr. Singh's accident benefits claim.

COSTS:

In light of my findings above, Intact is responsible to pay the costs of the preliminary issue hearing. Counsel agreed at the hearing that the unsuccessful party would bear the costs of the other party in the amount of $3,000 plus HST and reasonable disbursements.

Accordingly, I direct Intact to pay that amount to the Fund, and to bear the full costs of my fees and disbursements.

If any issues arise regarding the payment of costs, I invite counsel to contact me in writing setting out the nature of the issue, and arrangements will be made for a further teleconference with counsel.

DATED at TORONTO, ONTARIO this _________ DAY OF SEPTEMBER, 2011.

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Shari L. Novick

Arbitrator