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

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Helmut R. Brodmann for the Applicant

Rohit Sethi for the Respondent

ISSUES:

1. Does the notice provided by the Fund to Intact constitute proper notice of commencement of the arbitration, or is the Fund precluded from pursuing Intact for priority in accordance with section 7(2) of *Regulation 283/95*?

2. If the notice provided is sufficient, do the "Other Automobile" provisions in section 2.2.3 of Ontario Auto Policy 1 extend accident benefits coverage through a 'listed driver' on the Intact policy to Ms. Mohd-Amin?

RESULTS:

1. The notice provided by the Fund is sufficient to commence the arbitration.

2. Section 2.2.3 of the OAP 1 does not operate to extend accident benefits coverage to the Claimant in the circumstances.

BACKGROUND:

Latifa Mohd-Amin was walking across an intersection in Ottawa on December 17, 2009 when she was struck by an uninsured vehicle. She suffered a brain injury and has been determined to be catastrophically impaired pursuant to the *Statutory Accident Benefits Schedule.* Ms. Mohd-Amin is not a named insured under any auto policy, nor a spouse or dependent of a named insured.

The Claimant applied for payment of accident benefits to the Motor Vehicle Accident Claims Fund ("the Fund"). The Fund conducted an investigation and determined that the driver of the uninsured vehicle, Munir Saraj, was a listed driver on a policy issued by Intact Insurance Company ("Intact") to his mother, Lula Salah Yusuf. The policy covered Ms. Yusuf's Toyota Corolla. The parties agree that this was not the vehicle involved in the accident.

The Fund accepted the application and has been paying benefits to Ms. Mohd-Amin. It retained Claimspro to investigate and adjust the claim. Claimspro provided written notice to Intact that it was disputing its obligation to pay benefits to the Claimant, in accordance with section 3 of *Regulation 283/95.* The Fund contends that notwithstanding the fact that the vehicle involved in the accident was uninsured, the "Other Automobile" provisions in section 2.2.3 of the OAP 1 extend coverage under the Intact policy, through Mr. Saraj, to the Claimant, and that Intact is consequently in higher priority to pay the claim pursuant to section 268(2) of the *Insurance Act*.

Intact takes the position that the "Other Automobile" provisions do not extend coverage for accident benefits provided under its policy through a listed driver in these circumstances, and that the Claimant is therefore not eligible to claim benefits from them.

Further, Intact contends that the communication it received from Claimspro and/or the Fund within the one-year period following the notice provided under section 3 of the regulation was not sufficiently clear to indicate that it was initiating arbitration, and that it does not fulfil the required criteria to constitute a proper commencement of arbitration.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of the ***first issue*** –

Regulation 283/95:

> **2.** (1) 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.** (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.

Arbitration Act:

> **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.

These provisions are relevant to my determination of the ***second issue*** –

Insurance Act:

> **224.** (1) "… "insured" means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person;
>
> **244.** Any person insured by but not named in a contract to which section 239 or 241 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefore.

> **268. (2)** The following rules apply for determining who is liable to pay statutory accident benefits…
>
> 2. In respect of non-occupants,
>
> > i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
> >
> > ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
> >
> > iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
> >
> > iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Ontario Automobile Policy (OAP 1):

2.2.3 Other Automobiles

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- Liability,
- Accident Benefits,
- Uninsured Automobile, and
- Direct Compensation - Property Damage.

Special Conditions: For other automobiles to be covered, the following conditions apply:

1. Both the other automobile and a described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

2. The named insured is an individual, or if the described automobile is owned by two people, the named insureds are spouses of each other.

3. Neither you nor your spouse is driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.

4. The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.

5. **For all coverages, except Accident Benefits,** the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses. (For the purposes of this paragraph, we don't consider use of an automobile rented for 30 or fewer days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile, this policy will provide **Liability** and **Uninsured Automobile Coverages** while you drive that automobile.

1.3 Definitions

We and You
Throughout this policy the words **you** and **your** refer to the person or organization shown on the Certificate of Automobile Insurance as the named insured.

Other people may also be covered under certain conditions. We call both them and you **insured persons**.

We, **our** and **us** mean the company providing the insurance.

4.1 Who is Covered

For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse, same-sex partner or dependant of a named insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them.

THE ISSUES:

None of the relevant facts are in dispute, and no *viva voce* evidence was called at the hearing. Counsel relied on and referred to various letters that were exchanged between the parties that are set out below. I will address each issue in turn:

(i) Did the Fund initiate arbitration within the allowable one-year time frame?

The Fund received the Claimant's application on January 21, 2010, and retained Claimspro to investigate and adjust the claim. On April 12, 2010 Tammy Stathopolous, the Claimspro adjuster assigned to the matter, sent a letter to Intact with the heading "Priority Dispute Notice – New Claim". This was not the commonly used Notice to Applicant of Dispute Between Insurers form, but referenced the date of loss and identified Intact's named insured and policy number. The letter advised that the Fund had been presented with Ms. Mohd-Amin's claim, but that its investigation revealed that "the

Claimant has access to claim accident benefits through your company". The letter also states – "Please consider this our formal Notice of Dispute".

It appears that voice mail messages were exchanged between the parties a few weeks later. On February 9, 2011, Ms. Stathopoulos wrote a letter titled "Priority Dispute – 2nd Notice" to Kim Bellemare at Intact. This letter requests that Intact advise of its position on the priority issue in writing, and that if it chose to deny coverage, reasons for the denial and the relevant underwriting material should be provided. The last line of the letter states –

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

A response to the above was sent by Ms. Bellemare from Intact on March 7, 2011. She acknowledged the request, and asked that a Notice to Applicant of Dispute Between Insurers form ("DBI") be forwarded so that the required information could be provided and the claim considered.

The Fund subsequently retained counsel to deal with the matter. On March 9, 2011 Mr. Brodmann wrote to Ms. Bellemare advising that he had been retained by the Fund, and outlined the background details to the priority dispute. The last two paragraphs of the letter read as follows –

> Notice of the Fund's intentions to dispute the priority of payment was delivered to Intact under a letter dated February 9th, 2010. *Notice of the Fund's intention to commence arbitration was delivered to Intact Insurance on February 9th, 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.*

The parties agree that the reference to the February 9, 2010 letter was incorrect, and that the actual date of the initial letter sent by Claimspro was April 12, 2010.

On March 13, 2011, Lorie Bortolon, an Intact adjuster at the Thunder Bay office, wrote to Mr. Brodmann and advised that the matter had been transferred to her. She advised that upon receipt of a DBI notice form, she would advise of Intact's position.

On March 30, 2011 Mr. Brodmann wrote to Ms. Bortolon and confirmed a telephone discussion they had had. He also enclosed an arbitration decision that addressed the 2.2.3 "Other Automobiles" issue, and set out his view that Intact was in priority to pay the claim. He concluded the letter as follows:

> *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 that we proceed to arbitration and would suggest retaining Brian Parnega to hear the matter.*
>
> *I look forward to hearing from you.*

On June 21, 2011, Intact advised that it was "not in a position to accept priority" of Ms. Mohd-Amin's claim.

Arguments & Analysis: (First Issue)

The parties agree that the combined effect of section 23 of the *Arbitration Act* and *Regulation 283/95* constitute an agreement to arbitrate priority disputes between insurers in Ontario, in accordance with the decision in *Gore Mutual Insurance v. Markel Insurance* [1999] 12 C.C.L.I (3d) 313. Counsel also agree that there is no legislative or regulatory requirement mandating that an arbitration of this type be initiated in any particular way or by any specific format.

The question then becomes whether the Fund has satisfied the requirement in section 23(1)3 of the *Arbitration Act* to serve a "notice demanding arbitration" to Intact, within the prescribed one-year period.

Counsel for Intact contends that the Fund failed to do so by April 12, 2011, the one year anniversary of the date that the Fund provided notice to Intact of its intention to dispute its obligation to pay benefits to Ms. Mohd-Amin. He cited my decision in *State Farm Mutual Insurance vs. Echelon General Insurance (*unreported decision, dated December 3, 2008) in which I stated that a party intending to commence arbitration must show a clarity of intention to proceed in that fashion, and argued that the communications from the Fund in this case did not meet this test.

Mr. Sethi submitted that the mere mention of the term "arbitration" and the provision of the name of an arbitrator is not enough to express the required clarity of intention to initiate arbitration. He argued that Mr. Brodmann's reference in his March 9, 2011 letter to the earlier notice provided by the Claimspro adjuster of the Fund's intention to commence arbitration cannot retroactively cloak that letter with sufficient clarity to meet the required threshold. He noted that the adjuster's letter ends with the declaration that the notice should be considered to be the Fund's "notice of commencement of Arbitration *should we not receive a response",* and contended that I had determined that the same "if/when" expression in the *State Farm v. Echelon*, *supra*, case was not sufficiently clear to initiate arbitration.

Mr. Sethi also noted that the two letters forwarded by Mr. Brodmann to the Intact representatives contain conditional statements such as "in the absence of a satisfactory explanation for Intact's refusal to assume priority…I would propose proceeding to arbitration", or "if we are not able to come to an agreement …I suggest that we proceed to arbitration" and contended that those statements are more suggestive of avoiding arbitration than initiating it. He argued that conditional statements are insufficient to commence arbitration, and that these letters are different in substance and tone than the correspondence found to be sufficient to commence arbitration in either the *Gore Mutual v. Markel*, *supra*, or *Lloyd's of London v. Wawanesa Mutual Insurance* (unreported decision of Arbitrator Jones, March 2004) decisions.

Counsel for the Fund took a different view. He cited Arbitrator Samis' comments in *Markel Insurance v. Co-operators' General Insurance and Lombard Canada* (unreported decision, March 31, 2011) referring to the requirement that "some overt step" must be taken towards an arbitration process, and that there should be no uncertainty in the mind of the recipient about whether or not the arbitration process is being invoked. Mr. Brodmann noted that Arbitrator Samis compared the communication between the parties in his case to the letters exchanged in the *Gore v. Markel* case, *supra*, and in *State Farm Mutual Insurance v. Dominion of Canada* (Arbitrator Jones, unreported decision, March 2, 2004, upheld on appeal by Backhouse, J. December 7, 2004, reversed by Court of Appeal on other grounds, December 22, 2005) and found that the statements made by the Applicant insurer regarding arbitration were always "conditional, dependent upon the responsiveness of the targeted insurer", such that it would likely have been unclear to recipients of the letters sent of Markel's resolve to proceed to arbitration.

Mr. Brodmann argued that in contrast, the letters exchanged in the instant case between the Claimspro adjuster (as well as counsel) and Intact set out the Fund's position, ask that counsel be appointed and demand to proceed to arbitration. He contended that they would leave no doubt in the mind of the recipient that an arbitration process had been invoked.

He also likened the letters sent by Claimspro and/or the Fund to those relied on by the applicant insurer in the *Lloyd's of London v. Wawanesa, supra,* case. Counsel for Lloyd's sent one letter asking whether the Wawanesa adjuster had a preference as to who should arbitrate the matter, and advised that if no response were to be received within two weeks, "we will make some proposals to you as to the selection of an arbitrator". The second letter, sent approximately one month later, proposes three names of potential arbitrators and advises that if no response is received, a court application will be brought seeking the appointment of an arbitrator. Arbitrator Jones determined that those letters constituted clear notice that an arbitration was to be held. Counsel for the Fund argued that there was no real difference between those letters and the communication between the parties in this case. He noted the reference in his first letter that the Fund had

delivered a Notice of Arbitration to Intact, and contended that the letters in the instant case are clearer.

I find that the correspondence forwarded by the Claimspro adjuster and Mr. Brodmann, on behalf of the Fund, meets the required criteria for commencing an arbitration. As noted above, despite the lack of a regulatory directive about the required steps to be followed, the case law provides that a party initiating arbitration must clearly communicate a clarity of intention to proceed to arbitration to the other party, and must also take concrete steps evidencing that intention. In view of the clear language in section 7(2) of the regulation and the Court of Appeal's comments in *Kingsway v. West Wawanosh* [2002] 58 O.R. (3d) 251 that emphasize the importance of clarity and certainty of application, any statements that leave it unclear in the mind of a recipient that an arbitration process has been initiated would fall short of the mark.

When the series of letters sent in this case are analysed, I find that the requisite clarity of intention has been expressed. The February 9, 2011 letter sent by Tammy Stathopoulos at Claimspro to Kim Bellemare at Intact ends with the statement "This is the Fund's notice of commencement of Arbitration should we not receive a response". This plain statement should have sent a clear message to Intact that the Fund intended to proceed to arbitration, if the matter could not be resolved.

Mr. Brodmann's March 9, 2011 letter then reinforces the fact that notice of the Fund's intention to commence arbitration was delivered earlier. He proposes that the parties proceed to arbitration with Brian Parnega if no satisfactory explanation is received for Intact's refusal to assume priority of the matter. While that statement is phrased in conditional language, it takes things further down the path leading to arbitration. Mr. Brodmann's subsequent letter of March 30, 2011 should have cleared up any doubt that may have lingered in the mind of the Intact adjuster regarding the Fund's intention. After citing various cases and summarising the case law on the "Other Auto" issue, Mr. Brodmann concludes his letter with the statement – "If we are not able to come to any

agreement in the matter, I suggest that we proceed to arbitration and would suggest Brian Parnega to hear the matter".

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 or preclude the other.

For the reasons expressed above, I would accordingly dismiss Intact's preliminary objection that the arbitration was not commenced by the Fund within the required one-year timeframe.

ii) Does section 2.2.3 of OAP 1 apply in these circumstances?

As set out above, Mr. Saraj, the driver of the uninsured vehicle that struck Ms. Mohd-Amin, was a listed driver under a policy issued by Intact to his mother, covering a 2001 Toyota. The Fund contends that the "Other Automobiles" coverage in the OAP 1 extends accident benefits coverage under the Intact policy to the Claimant through Mr. Saraj, despite the fact that he was not driving the Toyota at the time of the accident.

Arguments & Analysis:

Counsel for the Fund contends that the court's decision in *Co-operators v. Pilot Insurance* (1998) Carswell Ont 5158, upheld by Court of Appeal (1999) 133 O.A.C. 119, as well as other, more recent arbitration awards make it clear that if the Claimant had been struck by either a named insured, or the spouse of a named insured driving an

uninsured vehicle, she would be extended accident benefits coverage under the Intact policy. He submitted that the fact that Mr. Saraj was a "listed driver" as opposed to a named insured is a distinction without a difference when section 2.2.3 is considered.

Mr. Brodmann referred to the definition section (1.3) of the OAP 1 and noted that while the word "you" is defined as describing the named insured on a policy, it also states that "other people may also be covered under certain conditions". He contended that that phrase extends the meaning of "you" to other people named in the policy, which in this case would include Mr. Saraj, and submitted that this provision opens the door to include drivers listed on the policy. Mr. Brodmann also cited the broad definitions found in sections 224(1) and section 244 of the *Insurance Act* and contended that they provide that someone can be insured under a contract of insurance even if they are not specified as a named insured under the policy.

He also noted the broad wording in section 4.1 of the OAP 1, setting out who is covered for accident benefits, and contended that the Claimant would fall within this definition even though Mr. Saraj was not a named insured under the Intact policy.

Counsel for Intact argued that Intact was not the priority insurer in this case, as it did not insure the vehicle involved in the accident, and that the "Other Automobile" provisions contained in section 2.2.3 of OAP 1 would extend coverage under the policy only to named insureds driving other vehicles, as opposed to "listed drivers". He took exception to Mr. Brodmann's statement that those roles are a 'distinction without a difference', and noted that the term "named insured" is a very specific term in the insurance industry, providing very clear rights and responsibilities.

Mr. Sethi noted that the term "you" is defined in section 1.3 as the named insured that is designated on the Certificate of Automobile Insurance, and contended that the person enjoying the coverage afforded by section 2.2.3 of the Intact policy on the date of the accident was Mr. Saraj's mother, and not him. He contended that as Mr. Saraj is not a named insured on the policy or a spouse of the named insured, the condition precedent in

section 2.2.3 is not met, and coverage accordingly does not flow through a named insured on the policy to Ms. Mohd-Amin.

Counsel for Intact contended that section 224(1) of the *Insurance Act* is not germane to the analysis, as it refers to a person insured by a "contract" and Ms. Mohd-Amin is not. He submitted that the circumstances of this case fall within section 268(2)(2)(ii) of the *Ac*t, and that the question is whether Ms. Mohd-Amin can seek recourse against Intact as the "insurer of the automobile that struck the non-occupant".

He acknowledged that section 4.1 of the OAP 1 provides broad coverage for accident benefits, but noted that this provision specifically refers to "the automobile". He submitted that that refers to the described automobile under the policy, being Ms. Yusuf's Toyota Corolla, and would therefore not apply in these circumstances.

I agree with the position of counsel for Intact, and find that the "Other Automobile" provisions contained in section 2.2.3 of OAP 1 **do not** extend accident benefits coverage to the Claimant through Mr. Saraj, a listed driver on the policy.

Section 1.3 of the OAP 1 specifically defines the word "you" as "the person …shown on the Certificate of Automobile Insurance as the named insured." Section 2.2.3 then clearly states that automobiles other than the one covered by the policy are "also covered when driven by you, or driven by your spouse who lives with you". When the section 1.3 definition of "you" is plugged in to section 2.2.3, a plain reading of the provision restricts the extension of coverage for the operation of other vehicles to the named insured under the policy, or his or her spouse living in the same household. In this case, that would be Ms. Yusuf, or her spouse.

I have addressed the applicability of section 2.2.3 of the OAP 1 to situations in which pedestrians were injured when they were struck by drivers driving uninsured vehicles who were either named insureds or spouses of named insureds under policies issued by an insurer in two previous cases. (*Economical Insurance v. HMQ,* unreported decision

dated January 30, 2009, and *Perth Insurance Company v. State Farm Mutual Insurance & HMQ,* unreported decision dated May 29, 2009) In both cases, I found that section 2.2.3 applied, and extended coverage for accident benefits under the policies to an uninsured pedestrian, either through the named insured or his spouse. While I expressed concern that such a finding was contrary to the general rule (and legal requirement set out in the Comp*ulsory Automobile Insurance Act)* that drivers are expected to place insurance on each vehicle that they drive, I found that I was bound by the Court's finding in *Co-operators' General Insurance v. Pilot Insurance Co., supra,* on similar facts.

The circumstances in this case are clearly distinguishable from those in the *Co-operators'* case. As stated above, I find that on its face, section 2.2.3 does not extend coverage to listed drivers in the same way that it does to named insureds. I do not feel compelled to interpret it more broadly for either policy reasons or reasons of statutory interpretation.

In the result, Ms. Yusuf's policy with Intact does not extend coverage to the Claimant for accident benefits in the circumstances. I therefore find that it is not the "insurer of the automobile that struck the non-occupant" pursuant to section 268(2)(2)(ii) of the *Act,* and that the Fund is therefore responsible to pay accident benefits to Ms. Mohd-Amin.

The Fund's application for arbitration is hereby dismissed.

COSTS:

In accordance with the parties' Arbitration Agreement, the Fund is liable to pay Intact's costs of the arbitration. If counsel cannot agree on the quantum of costs payable, I am prepared to review brief submissions on the issue.

DATED at TORONTO, ONTARIO this _____ DAY OF JULY, 2012.

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Shari L. Novick, Arbitrator