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 -

PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Janis P. Criger for the Applicant

D'Arcy McGoey for the Respondent

ISSUES:

1. Did the Fund provide written notice to Portage Mutual of its intention to dispute its obligation to pay accident benefits to the Claimant within the time required by section 3(1) of *Regulation 283/95*?

2. If not, is the Fund's late notice excused by the 'savings provisions' contained in section 3(2) of the regulation ?

RESULT:

1. No, the Fund's notice was not provided within ninety days of having received a completed application for benefits.

2. No, the Fund has not satisfied the requirements for the application of section 3(2) of the regulation**.**

BACKGROUND:

David Sweeney was struck by a car as he crossed the street in Hamilton, Ontario on May 4, 2010. Both the identity of the driver of the vehicle and the insurance particulars of the vehicle are unknown. Mr. Sweeney applied to the Motor Vehicle Accident Claims Fund ("the Fund") for payment of benefits under the *Statutory Accident Benefits Schedule*, and the Fund has paid benefits to him and on his behalf.

Mr. Sweeney was 43 years old at the time of the accident. He had been incarcerated for approximately three months, and was released from jail on the day prior to the accident. He moved into his parents' home upon his release. His mother, Dorothy Lewis, was a named insured on an auto policy issued by Portage La Prairie Mutual Insurance Company ("Portage") at the relevant time. The Fund takes the position that the Claimant was principally dependent for financial support on his mother, and that Portage is therefore in higher priority to pay his claim under section 268(2) of the *Insurance Act*.

The Fund provided notice of its intention to dispute its obligation to pay benefits to Mr. Sweeney to Portage on March 8, 2011. Portage contends that this notice was provided outside of the ninety days permitted by section 3(1) of *Regulation 283/95,* and that the Fund should therefore be prevented from pursuing this priority dispute. Portage also asserts that the Fund did not comply with the requirements outlined in the savings provisions in subsection 3(2), and that they would accordingly not apply.

The Fund contends that given the late receipt of the police MVA report, and the lack of co-operation on the part of the Claimant, its notice to Portage complied with the time limits in the regulation.

Counsel agreed to have the 'ninety-day issue' decided by way of a preliminary issue hearing, and restricted their submissions to this question.

THE EVIDENCE:

The key facts relevant to the determination of this matter are not in dispute. No witnesses were called to testify, and all relevant documentation, including the electronic log notes generated by the Claimspro adjusters who worked on Mr. Sweeney's claim, were filed prior to the hearing.

As mentioned above, Mr. Sweeney was struck by an unidentified vehicle on May 4, 2010. The documentation establishes the following relevant facts:

Mr. Sweeney's Application for Accident Benefits (OCF 1 form) was received by the Fund on July 18, 2010. It did not contain his address, and indicated in Part 4 of the form that he was not covered by any policy of insurance. An OCF 3 form was received on July 19, 2010, which did indicate the address of his parents' home, at which he was living at the time. Despite the reference in Part 10 of the OCF 1 that a Motor Vehicle Accident (Police) Report must be attached whenever an application is sent to the Fund, no police report was submitted with the application.

The Fund appointed an adjuster at Claimspro to adjust Mr. Sweeney's claim. She wrote to the Claimant on various occasions and requested a copy of the police report, advising that his application was incomplete without it. Claimspro finally received a copy of the police report on November 4, 2010. The fax copy of the report indicates that it was actually transmitted by fax on November 2, 2010, but the parties agree that nothing turns on whether it was received by Claimspro on November 2nd or 4th.

After receiving the police report, the Claimspro adjuster approved payment of various benefits to Mr. Sweeney and on his behalf. She also made a few attempts to obtain a signed statement from him. Some of her phone messages were not returned. It appears that a letter was also sent out, requesting that the Claimant provide a sworn statement. The log notes indicate that phone calls were exchanged between the parties in early January, and an appointment was made for Mr. Sweeney to attend the Claimspro office in order to provide a statement on January 13, 2011. Mr. Sweeney did not attend the scheduled meeting.

It appears that nothing further was attempted on the file until a call was received on March 7, 2011, some seven weeks later, from Howard Katz. Mr. Katz advised that he was representing the Claimant, and that he did not object to having his client provide a statement. An appointment was made, and Mr. Sweeney attended at the Claimspro office, and provided a detailed statement on March 7th. The statement indicates that Mr. Sweeny was living with his parents at the time of the accident, and that he was financially dependent upon them.

An Autoplus search was conducted on Dorothy Lewis, the Claimant's mother's, later that day. It revealed that Ms. Lewis was a named insured under a policy issued by Portage at the relevant time. The Fund forwarded its "DBI Notice" to Portage on March 8, 2011, the day after obtaining the statement from Mr. Sweeney.

RELEVANT PROVISIONS:

Ontario Regulation 283/95

> **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.

(2) An insurer may give notice after the 90-day period if,

(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

6. The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act.

Insurance Act - Section 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.

PARTIES' ARGUMENTS:

Counsel agreed that the Court of Appeal's decision in *Ontario (Minister of Finance) v. Pilot Insurance Co.*, [2012] 109 O.R. 3d 168, is central to the analysis of this issue. Justice LaForme reversed the lower court's decision and restored the arbitrator's award in

that case, finding that the Fund's delay in pursuing information from a 911 call made by a driver who had struck a cyclist brought it outside of the ninety-day requirement for providing notice under section 3 of the regulation. He adopted the view expressed by Justice Perell in *Ontario (Minister of Finance) v. Lombard*, (2010) ONSC 1770, 100 O.R. (3d) 51, that in determining when the 'ninety-day clock' starts to run for the purposes of section 3, one must consider whether the application received by the first insurer is "genuinely complete", functionally adequate" or treated as being complete based on that insurer's conduct.

Applicant's argument

Counsel for the Fund contended that Mr. Sweeney's application in this case was not genuinely complete when it was filed, as it did not contain a copy of the police report. She then contended that the application was actually not functionally adequate until March 7, 2011, when the Claimant finally provided a statement to Claimspro, and it was revealed for the first time that he had been living with his parents prior to the accident. She submitted that this was the first hint that another insurer could be in priority, and that the ninety-day clock should not start to run until this date.

Counsel stated that given the Claimant's age, there would have been no reason to suspect that he might be financially dependent upon someone else, and that the facts of this case are distinguishable from those in the *Lombard, supra,* case in which the Fund was found not to have been diligent in pursuing an obvious "lead".

Alternatively, counsel for the Fund submitted that if Mr. Sweeney's application was deemed to be complete once the police report was obtained by Claimspro on November 4, 2010, and the 'ninety-day clock' begins to run on that date, its late notice to Portage should be excused by the 'savings provisions' in section 3(2) of the regulation. She emphasized the various attempts that the adjuster made to contact the Claimant in order to schedule an appointment to obtain a signed statement, and noted that when she was finally able to speak with him and schedule a meeting for January 13, 2011, he did not attend. Had he turned up that day and provided the information that he subsequently did

in early March, counsel submitted that the adjuster would have acted in the same manner and with the same haste that she subsequently did, and that notice would have been provided to Portage well within the allowable ninety-day period.

Finally, Ms. Criger noted that section 6 of the regulation requires claimants to provide insurers with all information that is required "in order to determine who is required to pay benefits", and that Mr. Sweeney clearly breached this provision. She contended that his failure to comply with the regulation should result in a finding that ninety days was insufficient within which to make a priority determination, and that the Claimspro adjuster had conducted reasonable investigations within the period.

Respondent's argument

Counsel for Portage noted the Court of Appeal's statement in the *Pilot, supra,* case that the 'ninety-day clock' will start to run when an insurer fails to fulfill its obligation to take steps to ascertain missing information. He contended that applying that view to the facts in this case, the time should run from July 2010, at which point the adjuster had received an OCF 3 form from the Claimant indicating that he was living at his parents' home address. Counsel submitted that given the documentation filed and the information obtained during a telephone conversation that the adjuster had had with Mr. Sweeney in July, further investigations should have been conducted to determine whether any insurers would be in priority to pay the claim. He argued that her failure to do so, and her blind pursuit of a signed statement from the Claimant as her only investigative tool, constitutes a failure of her duty to obtain "missing information" and starts the time running.

Counsel for Portage submitted that at the latest, the ninety-day clock would have started to run on November 2, 2010, the date that the police report was transmitted by fax to Claimspro.

Mr. McGoey submitted that in either of the above scenarios, the notice provided by the Fund to Portage was well beyond the ninety days permitted by the regulations. He noted

that in order to rely on the 'savings provisions' contained in section 3(2) of the regulation, an insurer must prove both that ninety days was insufficient within which to determine that another insurer is liable, and that the Fund conducted reasonable investigations within the ninety day period. He contended that the evidence filed clearly indicates that neither of these requirements were met, and that the arbitration should therefore be dismissed.

ANALYSIS & FINDINGS:

I find that the notice provided by the Fund to Portage on March 8, 2011 was provided beyond the ninety days permitted by section 3(1) of the regulation. I do not accept the Fund's argument that the Court of Appeal's statement in the *Pilot* case that an application must contain sufficient information to allow the first insurer to provide notice of dispute to another insurer in order to be deemed to be "functionally adequate" for the purpose of section 3 means that Mr. Sweeney's application was incomplete until March 7th, when the fact that he was living with his parents before the accident was revealed in his statement. It is important to consider the court's comments in their proper context, so that they are not misunderstood or misapplied.

In the *Pilot, supra,* case, Justice LaForme referred to the comments made by Justice Perell in *Lombard, supra,* in determining when an insurer has received a "completed application" for the purposes of section 3. The Lombard case addressed an unusual situation – one in which an accident had taken place but no police report existed. The parties in that case agreed that when an application is submitted to the Fund, it is entitled to consider the application incomplete until it receives a copy of the police report. But what happens if no such report exists? When does the 'ninety-day clock' start to run?

Various arguments were made on that point, and as the arbitrator in that matter, I determined that the ninety-day period would begin to run once the Fund was advised that there was no police report. Justice Perell disagreed, and found that while the application could be deemed to be complete for the purpose of section 2 at that point (triggering the Fund's obligation to pay benefits to the Claimant), it should not be considered to be a

"completed application" in reference to the Fund's rights to pursue a priority claim against another insurer under section 3 of the regulation. He found that the 'ninety-day clock' should only start at the point that the Fund was provided with the licence number of the vehicle that had collided with the Claimant a few months later. Importantly, Justice Perell qualified his finding that the time not start on the earlier date by saying "provided that the insurer continues to take steps to ascertain the missing information".

The issue of when the ninety-day period starts to run when there is no police report arose again in the *Pilot* case. The Claimant in that case had submitted an application for benefits to the Fund, and provided a statement indicating that the driver of the vehicle that struck him (as a cyclist) had made a 911 call. The Fund's investigator made two unsuccessful attempts to obtain these records through Freedom of Information requests. Six months later, the Fund turned the matter over to its legal counsel, who filed a motion and received an unopposed court order requiring the police to provide the particulars of the 911 call, including the driver's identity. This led quickly to the identity of another insurer, who was promptly put on notice of the claim. The arbitrator found that the Fund should have moved for the court order far earlier than it did, and that it could not claim that it had not received a completed application for the purpose of section 3 until the 911 call records were received.

The Fund appealed the arbitrator's finding. The appeal judge disagreed with the arbitrator, finding that the Fund did not have a "functionally adequate" application until September 2008 when the call records were received. On further appeal by Pilot to the Court of Appeal, the arbitrator's decision was restored. Justice LaForme stated –

> I agree with the decision of the arbitrator…[his] evidentiary findings support the conclusion that the Fund had a functionally adequate application and therefore a completed application, in September 2008 (once 911 records were received). *However, because the Fund was not diligent in investigating the missing information, it cannot claim that it did not receive a completed application until September 2008. Rather, the Fund ought to have pursued the information by at least February 2008 and was required to put Pilot on notice under section 3 by May 2008.*
>
> *(emphasis added)*

Justice LaForme goes on to state that "an application must contain sufficient information to allow the first insurer to give notice of dispute to another insurer" in order to be considered functionally adequate for purposes of s 3. However, he then states that that is not the end of the analysis, and makes the point that the ninety-day clock "will start to run when an insurer fails to fulfil its obligation to take steps to ascertain the missing information" (at para. 59). With this statement, he echoes Justice Perell's comments, excerpted earlier, in the *Lombard, supra,* case.

Justice LaForme noted that the Fund's adjuster was one step away from turning an incomplete application into a functionally adequate application (by moving for a court order compelling production of the 911 records) , but that in waiting seven months to do so, it did not exercise reasonable diligence in pursuing the missing information. He concludes by stating that "given the short notice period established by section 3, it would be contrary to the legislative intent to allow the Fund to sit on the application without adequate investigation for months at a time."

In my view, the court in *Pilot, supra*, is essentially reinforcing the principles established in the earlier case law, rather than extending the time limit faced by a first insurer to the point at which sufficient information is obtained that could justify providing notice to another insurer, as contended by counsel for the Fund in this case. In stating that a decision to allow the Fund to "sit on the application" for several months would be contrary to the legislative intent behind the provision, the Court of Appeal is also confirming that adjusters must act quickly to pursue all potential avenues that may lead to information revealing that another insurer is in priority. When no police report exists, it now seems clear that the 'ninety-day clock' will begin to run when an insurer fails to take steps to ascertain potentially helpful information.

The facts in the instant case are different. Mr. Sweeney was able to produce a police report, albeit three months after submitting his application for benefits. I find that the ninety-day period would therefore have started on the date that it was transmitted by fax

to Claimspro, on November 2, 2010. The deadline for providing notice would therefore have been January 31, 2011. As agreed, the Fund's notice to Portage was not received by that date, but rather by March 8, 2011, some five weeks later.

The question then becomes whether the Fund has met the stringent test set out in subsection 3(2) of the regulation. I find that it has not. While I appreciate that the Claimant did not respond to a few messages left by the Claimspro adjuster advising that a sworn statement would be required, I find that there were other investigative steps that ought to have been taken to obtain the information sought. While an adjuster's actions are not to be held to a standard of perfection, it is simply not sufficient to continue to pursue one avenue or option in obtaining information, when it is clearly not yielding the desired result.

Ms. Criger contended that given the Claimant's age, there was no reason to believe that he would be financially dependent upon anyone else. On the evidence before me, I cannot accept that argument. Within two weeks of receiving the application, the Claimspro adjuster spoke to the Claimant on the phone, and was advised that he had been in jail for three months, and had been employed as a roofer. The log notes filed indicate that he has "no documented income", and is now "on welfare". There is reference to his having a daughter and a former spouse, and renting an apartment from his girlfriends' parent. Notes from a further call indicate that he lived with a brother, and that his brother "has an insurance policy". I find that these details should have raised various 'red flags' in the adjuster's mind with respect to financial dependency or spousal status, and that further investigations should have been conducted.

Most importantly, after Mr. Sweeney did not appear at the appointment that had been scheduled on January 13, 2011, no further steps were taken on the file (regarding priority issues or others) for over seven weeks. It was only once a call was received from his new counsel and an assurance given that the Claimant would provide a statement was another appointment scheduled. It is not clear when further attempts at obtaining relevant priority

information would have been made, if at all, if Mr. Katz had not initiated contact with the Claimspro adjuster.

Given the evidence cited above, I find that the Fund has failed to prove that ninety days was not a sufficient period of time in which to make a determination that another insurer was liable to pay benefits to Mr. Sweeney, or that it made the reasonable investigations necessary within ninety days to determine if another insurer was liable. It can therefore not avail itself of the 'savings provisions' contained in subsection 3(2) of the regulation.

ORDER & COSTS:

The application for arbitration is hereby dismissed.

In view of the result, I order the Fund to pay the legal costs incurred by Portage and my full account for fees and disbursements incurred in relation to the arbitration. I enclose a copy of my account with this decision, directed to counsel for the Fund.

If the parties cannot agree on the quantum of costs payable, I will entertain written submissions on the matter.

DATED at TORONTO, ONTARIO this ____ DAY OF MARCH, 2013.

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Shari L. Novick
Arbitrator