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

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

DECISION ON PRELIMINARY ISSUES

COUNSEL:

Lorraine E. Takacs for the Applicant

D'Arcy McGoey for the Respondent

ISSUES:

1. Was the Dominion policy issued to the driver of the vehicle in which the Claimant was a passenger at the time of the accident, validly cancelled prior to that date?

2. Is the Motor Vehicle Accident Claims Fund ("the Fund") barred from proceeding with this arbitration because it did not initiate the arbitration within one year of having provided notice to Dominion of its intention to dispute its obligation to pay benefits to the Claimant, as required by subsection 7(2) of the regulation ?

RESULT:

1. The Dominion policy was not validly cancelled, as the notice sent out was directed to the insured's old address, despite the fact that a new address had been provided to the broker.

2. The Fund initiated the arbitration in a timely manner and is not barred from proceeding with the arbitration.

BACKGROUND:

1. Yaroslav Ocheretnyiy was a passenger in a vehicle operated by Zardasht Abdul Khalejh on July 10, 2010, when that vehicle was involved in a single-car collision. Mr. Ocheretnyiy was not a named insured on an auto policy, and was not a spouse or dependent of anyone covered by a policy at the time. The police MVA Report does not contain any insurance particulars, and the driver was charged with operating a vehicle without proper insurance under the *Compulsory Automobile Insurance Act.*

2. Mr. Ocheretnyiy submitted an Application for payment of accident benefits under the *SABS* to the Motor Vehicle Accident Claims Fund ("the Fund"). The Fund accepted his application and has paid benefits to him and on his behalf.

3. The Fund provided written notice of its intention to dispute its obligation to pay benefits to the Claimant to Dominion on September 1, 2010. It alleged that the vehicle involved in the accident was insured under a Dominion policy at the time of the accident, and that Dominion would therefore be in higher priority to pay benefits to the Claimant in accordance with section 268(2)1(ii) of the *Insurance Act*. Dominion concedes that it issued a policy insuring Mr. Khalejh's vehicle in January 2009, but claims that this policy was either validly cancelled or had lapsed prior to the accident in July 2010.

4. Dominion contends that the Fund should be precluded from proceeding with this arbitration, as it did not initiate the arbitration within one year of having provided notice under section 3, as required by section 7(2) of *Regulation 283/95*. The Fund claims that a letter sent by its independent adjusters to the Dominion adjuster on August 4, 2011

constitutes notice of its intention to initiate arbitration. Dominion disputes that this letter satisfies the criteria for initiating an arbitration under the regulation.

5. An issue arose between the parties after counsel exchanged factums setting out their positions on these issues. A teleconference was convened the day before the hearing, at the request of counsel for the Fund, who advised that she had only became aware for the first time after reviewing the Respondent's factum that Dominion was asserting that its policy had lapsed prior to the accident. She advised that she had previously understood that the only issue surrounding the validity of the policy was whether it had been cancelled in accordance with the statutory requirements and conditions. She requested that the hearing date be adjourned so that she could resume the Examination Under Oath of the Dominion representatives in order to ask further questions.

6. Counsel for Dominion objected to the request for an adjournment, claiming that the question of whether the policy had lapsed or expired prior to the date of the accident had been raised earlier in the proceeding. Mr. McGoey forwarded a letter he had sent to Ms. Takacs on October 21, 2011, prior to my becoming involved in the matter, explicitly referring to the expiration of the policy on January 31, 2010. However, my initial pre-hearing letter sent to counsel confirming our discussions at the first teleconference cites the issue of whether Dominion had validly cancelled the policy, but does not include any reference to the policy having expired or lapsed.

7. After hearing counsels' submissions on whether the arbitration should proceed as scheduled, I ruled that the hearing would proceed on the issues of the validity of the cancellation of the Dominion policy and the "section 7 issue". We agreed that if the Fund was successful on both counts, the hearing would reconvene so that the final issue of whether the Dominion policy lapsed or expired prior to the date of loss could be determined.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act -

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

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.*

Regulation 283/95 – Insurance Act

> ***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.*

Ontario Regulation 777/93 Statutory Conditions – Automobile Insurance)

> ***12.*** *Any written notice to the insurer may be delivered at, or sent by registered mail to, the chief agency or head office of the insurer in the Province. Written notice may be given to the insured named in this contract by letter personally delivered to the insured or by registered mail addressed to the insured at the insured's latest post office address as notified to the insurer.*

EVIDENCE & ANALYSIS:

8. No witnesses were called at the hearing. Various documents were filed and relied on by counsel, including transcripts from Examinations Under Oath conducted prior to the hearing of Rocco Fragomeno, a claims adjuster at Dominion, and Eric Voogjarv, a

Dominion underwriter. I will outline the relevant evidence relating to each of the two issues raised separately.

(i) Was the Dominion policy validly cancelled prior to the date of the accident ?

9. Most of the facts surrounding this issue are not in dispute. Zardasht Abdul-Khalejh was a named insured under a Dominion policy with a term of January 31, 2009 to January 31, 2010. The policy was arranged through a broker. Dominion sent correspondence titled "Notification of Cancellation" to Mr. Khalejh on December 23, 2009, advising that its attempt to withdraw the monthly premium due under the policy on December 1st was refused by the bank, due to insufficient funds in his account. The letter advised that a certified cheque or credit card authorisation in the amount of $145 was required before January 24, 2010 in order to keep the policy in force, and that if payment was not received, the policy would be cancelled on that date.

10. The above notice appears to have been sent by registered mail to Mr. Khalejh at 29 Frost King Lane in Etobicoke. It was not claimed, and was returned to Dominion by Canada Post. The Dominion underwriter testified at his Examination that Mr. Khalejh had provided notice of a change of address to the broker from whom he had arranged the policy in late November 2009, but that for reasons he was unable to explain, the notice sent by Dominion was directed to his former address.

11. It appears from entries in the log notes filed that Dominion was aware in November 2010, after receiving notice of the priority dispute from the Fund, that "the initial cancellation was not done properly because the letter was sent to the incorrect address".

12. Counsel for Dominion contended that it was open to me to find that the policy was validly cancelled, despite Mr. Khalejh having provided notice to the broker that his address had changed, as the cancellation letter was sent to the address provided by its insured on the Application for Insurance. This point was not vigorously pursued by counsel.

13. Counsel for the Fund asserted that Dominion had not complied with the statutory conditions regarding policy cancellations contained in the OAP 1, and that its attempt to cancel the policy was therefore invalid. She noted that the law is clear, and provides that once an insurer is provided with notice by an insured of an address change, either directly or through its agent, it cannot continue to correspond with an insured at an old address.

14. Ms. Takacs also noted that the letter that Dominion had attempted to send to Mr. Khalejh at the 29 Frost King Lane address did not include a refund of premium, and that no notice of the cancellation had been sent to the Superintendent of Insurance. She contended that the statutory conditions require that these steps be taken, and that in accordance with recent case law (*Gore Mutual v. Lombard and MVACF (Bialkowski), June 21, 2010, Economical v. Wawanesa, Unifund and MVACF (Bialkowski), February 8, 2011*), strict compliance with the conditions is required.

Findings:

15. It is clear that the onus is on an insurer who wishes to terminate a policy to show that it has complied with the Statutory Conditions regarding termination in the Ontario Automobile Policy Form 1 (OAP 1). I agree with counsel for the Fund that Dominion did not comply with all of the requirements when it attempted to cancel Mr. Khalejh's policy, most notably, the requirement outlined in section 12 that written notice of termination must be provided to an insured at the insured's latest post office address "as notified to the insurer".

16. Dominion did not deny that Mr. Khalejh had provided a new address to the broker in November 2009, a few months before the cancellation notice was sent out by Dominion to his previous address on Frost King Lane. Regardless of whether Dominion's actions fell short of the requirements imposed by the Statutory Conditions as alleged by the Fund, this is sufficient to justify a finding that the policy that was issued to Mr. Khalejh was not validly cancelled in January 2010.

17. As mentioned above, the argument that Dominion's policy either lapsed or expired prior to the date of loss remains open and will be determined at a later point.

(ii) Did the Fund provide notice to Dominion that it was initiating arbitration in accordance with section 7(2) of the Regulation*?*

18. The parties agree that Claimspro, on behalf of the Fund, sent written notice of its intention to dispute its obligation to pay benefits to Mr. Ocheretnyiy to Dominion on September 1, 2010. They also agree that the deadline for the Fund to initiate an arbitration pursuant to section 7 of the regulation would therefore be September 1, 2011.

19. The documents filed by the parties indicate that several letters were exchanged between various adjusters at Claimspro and Susan Bocl-Camara, a claims adjuster at Dominion, between September 2010 and August 2011. All of the Claimspro letters are titled "Priority Dispute Notice". The letters exchanged were primarily requests for information (by Claimspro) and responses (by Dominion) regarding when and how Dominion notified Mr. Khalejh that his policy was being cancelled or not renewed. It appears that the Dominion adjuster enclosed a copy of the "cancellation notice" with one of her letters.

20. The Fund retained counsel in early October, after the one-year deadline for commencing arbitration had passed. Ms. Takacs wrote to the Dominion adjuster on October 6, 2011 advising that she had been retained by the Fund and that "you have left us no choice but to proceed to initiate an arbitration". She provided the name of an arbitrator, and asked for a response within 30 days. Mr. McGoey was retained by Dominion two weeks after that, and suggested a different arbitrator. My office was retained a few months after that.

21. The parties agree that Ms. Takacs' October 6th letter would satisfy the criteria for initiating an arbitration, but that it was sent beyond the one-year deadline permitted for providing such notice.

22. The Fund claims that the Claimspro correspondence to the Dominion adjuster dated August 4, 2011, prior to the expiry of the one-year deadline, is valid notice of its intention to initiate an arbitration. Dominion contends that that letter falls short of doing so. As the language of this letter is central to the parties' arguments, I will set out the text of it below:

Susan Bocl-Camara
The Dominion of Canada Insurance Company
8133 Warden Avenue
Unit 500
Markham ON L6G 1B3

By fax 905 825 5929

Dear Susan Bocl Camara:

RE: Date of Loss: July 10, 2010
Our Claimant: Yaroslav Ocheretnyiy
Your Insured: Abdul-Kha;ejh, Zardasht
Your Policy #: APP1140700

PRIORITY DISPUTE NOTICE – 6th REQUEST

Thank you for speaking with me on the phone on the above date regarding your above mentioned insured.

As we discussed, the Fund requires a proper copy of your ***cancellation letter*** *accompanied with the note sent to your policy holder on January 26, 2010 confirming that the cancellation note/letter was sent via registered mail and that you allowed two weeks from the date of sending your letter*

Please provide us with a copy of your ***actual terminations letter in accordance with Section 11 (1.2) sent to the claimant advising him that his policy was cancelled.*** *Please also confirm whether the letter was sent by* ***registered mail*** *and or regular delivery. Please be advised that the Motor Vehicle Accident Fund is now proceeding to arbitration regarding this matter.*

We thank you once again for your prompt attentions to this matter. Please contact the undersigned if you have any questions on this matter

Regards,

Nora Bedrossian, Adjuster
nora.berossian@scm.ca
Claimspro Inc.

(emphasis in the original)

23. On June 10, 2011, almost two months prior to sending the above letter, Ms. Bedrossian had sent a letter to Ms. Bocl-Camara entitled "Priority Dispute Notice – 5th Request", in which she made similar requests for information. I note that in the second to last paragraph of that letter, she states –

> *If we did (sic) not receive a copy of the proper termination documents in a timely fashion, the Fund will be assigning counsel and will proceed to arbitration.*

24. Ms. Bedrossian's claims notes were also filed at the hearing. The note dated August 4, 2011 outlines a telephone conversation with Ms. Bocl-Camara and contains details of their discussion regarding the sufficiency of the cancellation notice sent out by Dominion. The note also includes these references to arbitration – "I explained that the Fund is proceeding to arbitration" and "I advised her that I was faxing my note to them re: arbitration as per the Fund's instruction".

25. For the sake of completeness, I will set out the text of Ms. Takacs' subsequent letter of October 6, 2011:

Ms. Susan Bock-Camara
Dominion of Canada General Insurance Company
1275 North Service Road West
Oakville, ON
L6M 3M3

Dear Ms. Bock-Camara:

RE: HMQ re Dominion (Yaroslav)
Claimant: Yaroslav Ocheretnyiy
Your Insured: Zardasht Abdul-Khalejh
Your Policy: APP 1140700
Date of Loss: July 10, 2010
Our File No. 411315

I have been retained to represent Her Majesty in the Right of Ontario with respect to a priority dispute involving your insured, Zardasht Abdul-Khalejh. We appreciate your most recent correspondence in May 2011 advising you are relying on the cancellation notice. However, you have yet to provide confirmation that the cancellation in accord

with the requirements under the Insurance Act. Unfortunately, you have left us no chice but to proceed to initiate arbitration.

We would like to appoint Mr. Scott Densem to act as Arbitrator, pursuant to Regulation 283/95. May we please hear from you within the next thirty (30) days so that we can move this matter along.

Yours very truly,

HUGHES AMYS LLP

Loraine E. Takacs

26. Counsel for Dominion noted that the Claimspro adjuster's statement in the June 10 letter referencing arbitration is clearly conditional – "if we do not receive documents in a timely fashion, the Fund will be assigning counsel and will proceed to arbitration" – and that the case law on this issue makes clear that this does not constitute sufficient notice. He contended that the adjuster's August 4, 2011 letter is also insufficient to constitute proper notice, as it is entitled "Priority Dispute Notice" and continues in the same vein as the earlier requests by asking for a copy of the cancellation letter sent and the manner in which it was sent.

27. While Mr. McGoey acknowledges that Ms. Bedrossian states in the August 4th letter that the Fund is "now proceeding to arbitration regarding this matter", he contends that the fact that no arbitrators' names are provided and no suggestion is made that Dominion retain counsel makes that phrase ambiguous. He cited my decision in *State Farm Insurance v. Echelon General Insurance* (December 3, 2008) and noted my finding that the phrase "we are now proceeding to file for arbitration on this issue" evidences an intention to commence an arbitration, but does not in itself constitute a notice demanding arbitration as required by section 23 of the *Arbitration Act.*

28. Mr. McGoey submitted that Ms. Takacs' letter of October 6, 2011 to Ms. Bocl-Camara is further proof that the Fund had not yet initiated arbitration. He noted her phrase "you have left us no choice but to proceed to initiate an arbitration", along with

her suggestion of a particular arbitrator, and contended that there would have been no need to set this out if the earlier correspondence had initiated the arbitration.

29. Ms. Takacs countered that the phrase "Please be advised that the …Fund is now proceeding to arbitration regarding this matter" in the August 4 letter from the Claimspro adjuster is a clear instruction to Dominion that it is commencing an arbitration. She submitted that the claims note produced confirms that a discussion took place on that date between the principles involved on both sides, in which the Fund's intention to proceed to arbitration was clearly communicated. Counsel contended that when the letter is read along with the note providing the background to it having been sent, it satisfies the criteria set out in the case law for initiating an arbitration.

Findings :

30. It is now widely accepted that 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. (*Gore Mutual v.Markel Insurance [1999] O.J. No. 2688).* The question then becomes whether the party intending to initiate an arbitration has provided proper notice to the other party or parties involved in the dispute within the proper timeframe.

31. Section 7(2) of *Regulation 283/95* stipulates that an arbitration must be initiated within one year from the date that notice was provided by the first insurer to the "target insurer" of its intention to dispute its obligation to pay benefits to a claimant. The regulation, however, is silent with regard to the form or manner in which an arbitration must be initiated. Section 23(1) of the *Arbitration Act* states that "an arbitration may be commenced in any way recognized by law". Given that the only two statutory and regulatory pronouncements that guide the parties' behaviour in this regard are worded as broadly as can be imagined, arbitrators have found that a flexible standard is to be applied.

32. Communications between insurers addressing priority disputes are often varied and can take on different levels of formality. Counsel may or may not be involved at that stage of the process. In *Markel v. Co-operators and Lombard Canada* (March 31, 2011) Arbitrator Samis concluded 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 by an arbitrator that will resolve the dispute.

33. I have endorsed this view in two earlier decisions on this issue. In *HMQ v. Intact Insurance* (award on a preliminary issue, September 15, 2011) and a further decision involving the same parties but relating to a different claim (*HMQ v. Intact,* July 19, 2012), I found that in order to commence an arbitration, some action must be taken that signals a clear intention to start a process that will end with a determination by an arbitrator. Ideally, an insurer should refer to the priority regulation and indicate its readiness to proceed to arbitration by suggesting the name or names of arbitrator(s). While these references would make it clear that a party has decided to proceed in that fashion, those details are not required by the provisions.

34. It is also important to consider the overall context of the parties' communications when determining whether a particular letter is clear enough to constitute the initiation of an arbitration. I have also found that while the tone or content of a letter may suggest that an insurer would like to resolve the issue or obtain further information from the other party, that does not preclude a finding that it has also decided to pursue the procedural steps required to move the matter toward arbitration, if that is clearly expressed (*HMQ v. Intact #2, supra).*

35. I find that the Claimspro adjuster's correspondence of August 4, 2011 in this case passes the fairly low threshold required to initiate arbitration under section 7 of the regulation. When the overall context of the parties' communications is considered, the statement in it clearly indicates that the Fund will be moving beyond the discussion stage

to the arbitration stage. This is the "overt step" or expression of a clear intention alluded to in the earlier cases.

36. The parties were in frequent communication as of January 2011, a few months after the initial DBI notice was served. Various letters were exchanged, which also reference telephone conversations held between the parties. The Claimspro adjuster repeatedly requested documentation from Dominion to corroborate her statement that the policy was cancelled or lapsed. On June 10, 2011, in a letter entitled "Priority Dispute Notice – 5th Request", Ms. Bedrossian from Claimspro acknowledged receipt of a document sent by the Dominion adjuster purporting to confirm that the policy was no longer in force. Her letter clearly indicates that the documentation received does not allay her concerns about the validity of the cancellation, and advises that if proper termination documentation is not received in a timely fashion, the Fund will assign counsel and proceed to arbitration.

37. Two further letters were sent by the Dominion adjuster, which make clear that no further documents will be forthcoming. The claims notes confirm that a telephone discussion then took place between the parties on August 4, 2011. Ms. Bedrossian's note outlines some discussion regarding the sufficiency of the cancellation documents provided, and states that she "explained that the Fund is proceeding to arbitration." Ms. Bocl-Camara apparently agreed to forward a note indicating her view that the cancellation notice was all that was required by Dominion to cancel its policy and Ms. Bedrossian notes again – "I advised her that I was faxing my note to them re: arbitration as per the Fund's instruction. She was gracious and we concluded our conversation."

38. Ms. Bedrossian then forwards the August 4th letter that is the focus of this inquiry. It references their phone discussion and repeats the requests she had made in the earlier letters for a "proper copy of your cancellation letter" and further information regarding the timing and manner in which it was sent. She then ends the letter by stating "Please be advised that the Fund is now proceeding to arbitration regarding this matter".

39. When the background and overall context to this letter is considered, I find that this statement from the Claimspro adjuster clearly signals to the Dominion adjuster that while she may still be interested in reviewing further documentation, if it exists, she has decided to move to the next stage and proceed to arbitration. While changing the format and title of this letter in order to distinguish it from the others previously sent to clearly show that a new step was being taken would have been preferable, such details are not required by the regulation. The statement is clear, and is consistent with the telephone discussion they had had earlier that day. I accordingly find that it is sufficient notice of the Fund's intention to proceed to arbitration.

40. Mr. McGoey noted that I found that a similar statement made by a State Farm adjuster in the *State Farm v. Echelon, supra,* case was insufficient to constitute notice to commence an arbitration. A review of the surrounding circumstances and the context in which those comments were made in that case indicates some significant differences, however. Several letters had been previously sent in which the adjuster implied that arbitration would be commenced if no response was received to the priority issue, with no action having been taken in that direction. As well, the log notes produced for the months following the letter in issue referred repeatedly to steps to be considered in pursuing arbitration, but no further action was taken until almost one year later when the matter was referred to counsel.

41. Accordingly, for all of the above reasons, I dismiss Dominion's preliminary objection and find that the Fund is not barred from proceeding with the arbitration.

42. As stated above, the issue of whether Dominion's policy either lapsed or expired prior to the date of the accident remains a "live issue". I will ask my assistant to contact your offices in order to schedule a further pre-hearing or arbitration date to address that issue.

COSTS:

43. The parties' Arbitration Agreement provides that the successful party shall recover its legal costs from the unsuccessful party, or a percentage thereof, with the quantum to be fixed by me under the *Arbitration Act*. The Fund would accordingly be entitled to its costs relating to this hearing. However, the matter has not been finally concluded, and the agreement is silent on whether costs for a preliminary hearing are to be payable after that hearing is concluded, or at the end of the matter. I leave it to the parties to discuss this and invite them to contact me if they cannot agree with the approach to take in that regard.

I will send an interim account for my arbitration fees and disbursements out under separate cover.

DATED at TORONTO, ONTARIO this _____ DAY OF DECEMBER, 2014.

_____

Shari L. Novick
Arbitrator