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

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17, as amended

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

CERTAS DIRECT INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Chris Schnarr and D'arcy McGoey for the Applicant

Sean A. Brown for the Respondent

ISSUES:

1. Is Dominion of Canada General Insurance Company ("Dominion") barred from disputing its obligation to pay accident benefits for failure to give written notice of its intention to dispute priority within 90 days of receipt of the completed application for accident benefits?

DECISION:

1. Dominion is barred from disputing its obligation to pay accident benefits for its failure to comply with regulation 283/95.

HEARING:

This hearing in this matter was held in the city of Toronto on July 17, 2007 and February 12, 2008. It proceeded by way of viva voce evidence and documentary evidence filed.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident that occurred on November 9, 2001. At that time, Ms. Julia Gordyukova was a passenger in a motor vehicle insured by Dominion. Due to injuries suffered in that accident Ms. Gordyukova applied to and received accident benefits from Dominion. The completed application for accident benefits was received on or about December 10, 2001. The 90 day time limit for putting other insurers on notice of their intention to dispute priority would have expired on or about March 10, 2002. It was not, however, until April 28, 2004 that Dominion put Certas Direct Insurance Company ("Certas") on notice that it was disputing priority. Dominion took the position that at the time of the accident Ms. Gordyukova was married to Mr. John Nanos, who held a policy of motor vehicle liability insurance with Certas. As such, Certas would be in priority.

There is now no dispute that Ms. Gordyukova was married to Mr. Nanos at the time of the accident and that he was insured by Certas. The issue to be determined at this time is whether the saving provisions of section 3 (2) of regulation 283/95 should be invoked, and even if there were good reasons for not complying with the 90 day provisions, did Dominion delay too long after obtaining the relevant information so as to be precluded from proceeding with the arbitration.

Dominion concedes that it did not serve the notice within the 90 days of receiving the completed application for accident benefits. It therefore submits that the savings provisions of section 3 (2) of regulation 283/95 should be invoked. That section is composed of a two part test. It requires (a) that 90 days was not a sufficient time to make a determination that another insurer was liable; and (b) it made reasonable investigations within the 90 day period to determine if another insurer was liable.

In the original application for accident benefits, Ms. Gordyukova checked off the box for "single" despite the fact it was subsequently learned that she was in fact separated but still married.

Prior to receiving the formal application Dominion had been aware of the accident and Ms. Gordyukova's injuries. The adjuster assigned to the file, Ms. Lilya Kogut, on November 29, 2001, assigned a field adjuster Ms. Angie Giuntoli to meet with Ms. Gordyukova and her solicitor to sign a statement that would deal with her injuries, entitlement to various benefits and status regarding possible priority issues, including her marital status.

Ms. Giuntoli met with Ms. Gordyukova along her with her legal representative and her friend, Joseph Rockman. Over the course of approximately one and a half to two hours, Ms. Giuntoli took a very detailed eight page hand written statement which covered the details of the accident, her injuries, the care she was receiving, her employment situation and certain questions designed to determine possible priority issues. Ms. Giuntoli testified in a very forthright and open manner. She testified that she would ask Ms. Gordyukova questions and receive answers that she would eventually put into the eight page statement. On page one of the statement is the following:

> "I am not married and I do not have any children. I do not live common law with anyone. I live reside alone 393 King Street West, Unit 303-401 in Toronto."

The statement was signed by Ms. Gordyukova, as well as Mr. Rockman and Ms. Giuntoli.

Counsel for Certas suggested at the hearing that Ms. Gordyukova was tired at the meeting, had been on medication, and was simply unclear in giving her answers. Ms. Giuntoli indicated that Ms. Gordyukova did in fact indicate near the end of the interview that she was tired, but that it appeared that she fully understood what she was being asked and gave appropriate answers. Because she was tired, Mr. Rockman read the complete statement back to her. Upon reviewing the actual statement one notes that changes were made to the statement and the changes were initialled by Ms. Gordyukova. I am satisfied, on the evidence before me, that Ms. Gordyukova was capable of, and in fact did give a very detailed statement which Ms. Giuntoli took down accurately.

Counsel for Certas submitted that Ms. Giuntoli should have gone further in questioning Ms. Gordyukova's marital status and asked her if she was separated. While, with the benefit of hindsight, this might have been desirable, one must look at what is reasonable in each particular case. I accept Ms. Giuntoli's evidence that Ms. Gordyukova seemed quite capable of understanding and answering the questions. Ms. Giuntoli covered off the various ways that Ms. Gordyukova could have been considered married, for the purposes of the statutory accident benefits schedule in that she asked if she was living common law, or had children. Ms. Gordyukova clearly said that she was not married. In the particular circumstances of this case I am satisfied that what Ms. Giuntoli did was reasonable.

Ms. Giuntoli then submitted the signed statement along with a memo summarizing the meeting to the adjuster, Ms. Kogut. Ms. Kogut testified at the hearing. She indicated that based on the "marital status" section of the application for accident benefits which indicted that she was single, and under the "marital status" for tax purposes she indicated that she was single along with the signed statement of Ms. Giuntoli stating she was not married, Ms. Kogut decided that Ms. Gordyukova was in fact single and therefore Dominion was in priority.

Counsel for Certas pointed out that in the materials accompanying the completed application for accident benefits was an income tax return for the year 2000 and on that form it indicates that Ms. Gordyukova was "separated" for the 2000 tax year. Counsel for Certas suggests that this should have put Dominion on notice that there was an issue regarding marital status at the time of the accident. In this particular circumstance, I do not agree with counsel's position. The accident was in 2001 and the tax form was for the year prior to the accident and so it is not inconsistent with what Ms. Gordyukova indicted in her application for accident benefits and her signed statements.

One must be very careful when reviewing, in hindsight, the actions of an extremely busy accident benefits adjuster. While there was, of course, no inconsistency with the 2000 income tax return, there were other documents that came in subsequently, which supported the theory that she was not married. For example, an "in home assessment" report dated December 24, 2001, indicated that Ms. Gordyukova was a "single female" and a "Home Functional Assessment" indicated that the claimant " lives alone".

Just as counsel for Dominion is able to point to various subsequent documents to reinforce the idea that the adjuster could reasonably assume that Ms. Gordyukova was single at the time of the accident, counsel for Certas can point to various documents received, outside the 90 day period, which he submits, Dominion should have realised indicated that Ms. Gordyukova may have in fact been married but separated at the time of the accident. These include such things as receipt by Dominion, in May 2002 of a "Behavioural Assessment of Pain Clinical Profile" that described Ms. Gordyukova as "divorced/separated female who is living alone", receipt in August 2002 of a copy of the 2001 income tax return that indicated that she was "separated", bank statements referring to Ms. Gordyukova as Julia Nanos, an " in home occupational therapy functional assessment" dated February 11, 2003, which indicated that Ms. Gordyukova was separated from her second husband.

These and other documents were received outside of the 90 days notice period and therefore ought not to be considered in the 90 day test, however, I believe that one should be very cautious in relying, in hindsight, on such documents to determine whether an adjuster should have reasonably noticed what is often a passing remark in an often voluminous report that is not prepared for the purpose of determining priority. Accident benefit adjusters deal with far more than priority issues in their jobs and once the priority issue has been decided one must be very cautious in using other documents not prepared priority purposes to suggest that the adjuster should have automatically picked up on the priority issue.

With regard to the 90 day issue I am satisfied that Dominion has satisfied both parts of the test. It conducted what was in the circumstances of this particular case, a reasonable investigation. It was mislead by the incorrect application for accident benefits form. This is a factor to be considered but not in and of itself necessarily sufficient reason to extend the 90 day notice period. An insurer can not simply sit back and basically do no investigation (see: Primmum Insurance Company of Canada vs. Aviva Insurance Company of Canada, decision of Justice Ducharme released April 7, 2005, court file 04-CV-275318 (M2)). However, in our particular case Dominion did more than simply rely on the truthfulness of the application. It obtained a signed statement wherein the applicant said she was not married, not living common law and had

no children. Counsel for Certas suggested that the adjuster taking the signed statement should have explained the importance of the question as they related to priority, and also listed the various categories of married status, such as "separated" etc. One must remember that the test is one of reasonable and is not perfection, and in this case, I find that the adjuster acted reasonably in what was already a one and half to two hour meeting.

I am also satisfied in the circumstances, 90 days was not sufficient time to determine that another insurer might have been in priority. Certainly, more inquiries could have been made, but at some point a decision has to be made that sufficient information has been obtained and the adjuster moves on to providing the benefits and otherwise adjusting the file. Insurance companies do not have unlimited resources to investigate every potential lead. Here Dominion had no real reason to conduct any further investigation when it made the decision that it did.

THE POST 90 DAY PERIOD:

Counsel for Dominion submits that having decided Dominion had satisfied the 90 day test, that is the end of the inquiry and they must be allowed to pursue the their claim by way of this arbitration. Counsel cites section 3 (2) of regulation 283/95 which states "an insurer may give notice after the 90 day period if" and then goes on to state the two part test. This does not, in my view, exclude the arbitrator from examining what transpired after the 90 days in order to determine if the arbitration should be allowed to proceed. If the insurer acts with reasonable diligence after discovering the new information, outside the 90 days, then the arbitrator should grant the extension. If, however, the insurer comes across new information outside the 90 day period, but then still delays for an unreasonable period of time, the arbitrator has the discretion not to extend the time frame. As arbitrators and judges have commented upon on numerous occasions, there is a need for certainty and closure in these matters.

Having decided that I have the authority to consider a delay outside the 90 days, it now remains to examine what transpired between March 10, 2002 and April 24, 2004, when notice was finally given by Dominion to Certas. I will attempt to summarize this briefly.

There were a number of documents received by Dominion, outside the 90 day period that perhaps might have "twigged" Dominion to the fact that Ms. Gordyukova was separated but still married at the time of the accident. I have already mentioned a few of these documents and have cautioned that they be given limited weight in the circumstances.

The next major occurrence in the matter took place on April 30, 2003 when Ms. Gordyukova submitted to an examination for discovery which included not only counsel for Dominion on an accident benefit action, but also to counsel for the tort action. At that time one the defence counsel in the tort action asked the following:

> Q. And you were married on point to John Nanos. Is that right?
> A. Yes, I am married.
>
> Q. I am sorry?
> A. I am married.
>
> Q. Are you still married?
> A. Yes.
>
> Q. Have there been any divorce proceeding initiated at all?
> A. This year, I missed that. Of this year?
>
> Q. This year, there were?
> A. No.
>
> Q. Well, I am asking you if any divorce proceedings have been initiated.
> A. Yes.
>
> Q. And when did these divorce proceedings get initiated?
> A. In Canada
>
> Q. Alright. Well, you didn't know Mr. Nanos in Russia, did you?
> A. No.
>
> Q. Alright. When did the divorce proceedings get initiated?
> A. In Canada.
>
> Q. Alright. I am asking when?
> A. When? A few years back. I can't remember. I would have to look up my papers.

Q. So they began a few years back and you are still not divorced,
A. Yes, I am not divorced Nanos.

Q. Is there a dispute?
A. No.

Q. Was it your petition for divorce or was it Mr. Nanos' petition for divorce?
A. What is petition?

Q. It is the commencement of the divorce proceedings. Who started them?
A. It was, I guess, mutual.

Q. Somebody had to initiate or start the court proceeding. Was it you or was it Mr. Nanos.
A. Court, it didn't go to court.

Q. Was there any court documents issued at all with respect to your divorce?
A. No.

Q. No?
A. Not with Nanos, no.

Q. I thought you just said that divorce had started, a few years back?
A. Well, I am divorced. I was married, divorced. Now I am married.

Q. Who are you married to now?
A. John Nanos.

Q. So you were married before Mr. Nanos as well?
A. Yes.

Q. Alright. So tell me when you were married to Mr. Nanos.
A. I don't remember, a few years.

Q. When did you last live with Mr. Nanos?
A. Maybe six years ago.

Q. Have you had contact with Mr. Nanos in the last few years.
A. He is my friend.

Counsel for Certas suggested this was clear evidence that Ms. Gordyukova was married at the time of the accident and that Dominion should have pursued the matter expeditiously thereafter.

I would not characterize Ms. Gordyukova's answers at the April 30, 2003 examination for discovery as straight forward, but rather confusing, at best.

I note that counsel for Dominion, who had not yet had the opportunity to question Ms. Gordyukova at the examinations for discovery, wrote to Ms. Gordyukova's solicitor two days later requesting particulars of any possible spouse and possible motor vehicle liability policy particulars.

Counsel for Dominion on May 5, 2003 or five days after the examination for discovery reported to Dominion and recommended that an investigator be retained immediately to locate Ms. Gordyukova's husband, John Nanos and determine if he had a motor vehicle liability insurance policy at the time of the accident. It would appear that on June 10, 2003 the adjuster agreed to hire an investigator for this purpose. What then transpired were a number of delays, however, it would appear that it was not until November 7, 2003 that Dominion retained a Mr. William Horvath of Channis Corporate Services to run an investigation to "run down a spouse's insurance information". On December 9, 2003, Horvath was provided with a business address for John Nanos which proved to be outdated. Two possible residential addresses were listed but no further inquiries were made.

It was not until March 30, 2004, that Dominion retained G. Davis and Associates to attempt to identify and locate John Nanos. On that same day a further examination for discovery of Ms. Gordyukova took place at which time her lawyer agreed to make his best efforts to obtain insurance particulars of Mr. Nanos.

On April 28, 2004, Dominion's solicitor received a letter from Ms. Gordyukova's solicitor advising that Mr. Nanos was insured by Certas at the time of the accident. On that same day, Dominion's put Certas on notice.

On May 14, 2004 Mr. Davis submitted his report wherein he provided Mr. Nanos' address, drivers license number, date of birth and Certas policy number. Mr. Davis indicated that he did this by on March 31 submitting an Address/Restricted Record Search Application to the Ministry

of Transportation requesting an insurance history for John Nanos and received the relevant information back on May 11, 2004.

While I am prepared to allow some latitude for delays in conducting investigations, and taking into account busy schedules and lack of co-operation in the part of non-parties, I am troubled by the length of delay from April 2003, when the presence of John Nanos first became known, until April 2004 when notice was finally given. There was, in my view, an unreasonable delay in retaining investigators to locate Mr. Nanos and determine his insurance particulars.

In light of the above, I am not prepared to extend the time for proceeding with the arbitration and accordingly Dominion may not continue with the arbitration against Certas.

In the event that the parties cannot agree with regard to the issue of cost I may be spoken to.

Dated at Toronto, this _____ day May 2008.

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M. Guy Jones

Arbitrator