IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

TD GENERAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

The Dominion of Canada General Insurance Company (Applicant): Daniel Strigberger

TD General Insurance Company (Respondent): Matthew Dugas

Introduction:

This matter came before me pursuant to the *Arbitrations Act,* 1991 to arbitrate an issue between the above-noted insurers with respect to a priority dispute pursuant to the *Insurance Act* and Regulation 283/95. Specifically, this claim arises out of a motor vehicle accident that occurred on August 29, 2013 and a claim for statutory accident benefits that has been advanced by Tony Rizzo.

The parties selected me as their Arbitrator on consent and this matter proceeded to a hearing with documentary evidence only for one day in Toronto on December 3, 2015.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated December 3, 2015;

Exhibit 2: Agreed Statement of Facts with attachments at tabs A through to L;

Exhibit 3: Letter December 1, 2015 Travellers (Dominion of Canada General Insurance Company) to Tony Rizzo enclosing a Notice to Applicant of Dispute Between Insurer dated December 1, 2015

The Issue In Dispute

The Dominion of Canada General Insurance Company (hereinafter called "Dominion") commenced this arbitration by way of a Notice to Participate and Demand dated November 26, 2014. Dominion claimed that TD General Insurance Company (hereinafter called "TD") was the priority payor of accident benefits paid to or on behalf of Mr. Rizzo as a result of the accident of August 29, 2013 as TD insured one Maryann Rizzo under policy 73116838. It is alleged by Dominion that Maryann Rizzo was Tony Rizzo's spouse at the time of the accident.

However, this arbitration was a preliminary issue hearing to determine whether Dominion had the right to proceed to arbitration in light of an argument raised by TD with respect to the limitation period found in Ontario Regulation 283/95 as amended by Ontario Regulation 16/13: Section 7(3).

Dominion received the initial Application for Accident Benefits from Mr. Rizzo by letter dated March 18, 2014. Dominion had already investigated priority and determined that Mr. Rizzo was still married to his estranged wife, Maryann Rizzo. Dominion insured a 2002 Chevy Malibu at the time of the accident. Mr. Rizzo was a passenger in that vehicle while it was being driven by Tammy Smith, who is Dominion's named insured.

While the Arbitration Agreement sets out a very broad issue with respect to priority and quantum, the issue for determination in the preliminary issue hearing ultimately boiled down to the following two questions:

1. Is Dominion prohibited from proceeding with its priority arbitration as it did not initiate the arbitration in this matter no later than one year after the day the insurer paying benefits first gave notice under Section 3 of Regulation 283/95;

2. If the result with respect to question 1 is yes, then the second issue is whether Dominion is prohibited to proceeding to arbitrate the priority dispute as the Notice of Dispute of March 25, 2014 does not meet the requirements of Section 4(1) of Regulation 283/95 as amended.

Facts

There were no facts in dispute. The arbitration proceeded by way of an Agreed Statement of Facts together with the filing of various documents.

As noted above, this priority dispute arises out of the accident of August 29, 2013.

According to the Agreed Statement of Facts, Dominion insured Tammy Smith who was the driver of the vehicle in which Mr. Rizzo was a passenger on the date of the accident. The accident involved a head-on collision.

Dominion learned about the accident through its insured, as her vehicle was involved in the accident.

Presumably, this conversation was sufficient to provide Dominion with enough information to know that Mr. Rizzo was involved in the accident and to provide his name and address.

On October 2, 2013, Dominion sent a letter to Tony Rizzo at 502-801 Concession Street, Hamilton, Ontario L8V 1C5 enclosing an Application for Accident Benefits and providing him with information explaining Ontario accident benefit laws.

Mr. Rizzo was asked to submit his Application for Accident Benefits within 30 days and that if he was unable to submit his Application by November 4, 2013 he should contact the adjuster immediately.

According to the Agreed Statement of Facts Dominion investigated priority immediately and determined that Mr. Rizzo was still married to his estranged wife, Maryann Rizzo and that she was insured under the TD policy.

Therefore, Dominion, although they had not yet received an Application for Accident Benefits (OCF-1) from Mr. Rizzo, on October 25, 2013 wrote to TD Meloche Monnex and provided them with a Notice to Applicant of Dispute Between Insurer.

This letter has some significant wording in my view. The letter states:

> *"Please find enclosed the Notice to Applicant of Dispute Between Insurer. Please note, we are within our 90 days to provide this notice, which is clear from the date of this loss. Mr. Tony Rizzo is claiming accident benefits as a passenger of our insured's vehicle. He indicates he resides alone, does not own an insured automobile, and is not listed as a driver under an automobile policy. He is however, still the spouse of your named insured. As per priority rules, he would come to your policy for accident benefits, as Securite Nationale is the payor in this case."*

The letter also encloses a motor vehicle accident report and notes in conclusion

> *"Please advise if you would be taking over the handling of this claim, as well as acceptance of this claim as the payor."*

The Notice to Applicant of Dispute Between Insurers is in the required form. It is relevant to note that the name of the applicant is completed as Tony Rizzo.

Under "details", the Dominion adjuster noted the following:

> *"The claimant, Tony Rizzo, was a passenger in our insured's vehicle. Tony Rizzo, does not own an automobile, nor does he drive. He is still married (separated to Maryann Rizzo), policy number 73116836, policy valid November 19, 2010 to November 19, 2014. Maryann Rizzo is insured with Securite Nationale. As the date of loss is August 29, 2013, we are well within our time limits".*

The document is dated October, 25, 2013.

The Notice to Applicant of Dispute Between Insurers was also sent to Tony Rizzo. Even though no OCF-1 had yet been submitted by Mr. Rizzo to Dominion, it is relevant to note that the prescribed form: (Notice to Applicant of Dispute Between Insurers) states the following on the first page:

> *"This notice is to inform you that the insurer to whom you have applied for accident benefit claims that another insurer is responsible for paying these benefits...*
>
> *You will continue to receive accident benefits that you are entitled to from the insurer that you applied to while the insurers attempt to resolve their dispute."*

As of the end of October, Dominion had still not received an OCF-1 and the following follow up letters were sent out to Mr. Rizzo:

1. November 11, 2013. This letter asks Mr. Rizzo to complete his OCF-1 and submit it within 30 days. It also asked him whether he had submitted his Application for Accident Benefits to another insurer or to the insurer that had been listed on the priority notice that he had been provided.

2. December 27, 2013. This letter was in the same format as the earlier letter, again asking him to submit the OCF-1 and/or to advise whether he had submitted it to another insurer.

3. January 15, 2014. It was noted that it had been over 30 days since the last letter and as no Application for Accident Benefits had been received, Dominion would be closing their file.

In the meantime, Dominion also kept TD up to date with respect to what was going on with Mr. Rizzo's file and TD did provide a response to the Notice of Dispute that had been served upon them in October.

By letter dated November 14, 2013, TD wrote to Dominion acknowledging receipt of the Notice of Dispute. The letter indicated that before they could determine whether Securite Nationale was in priority, some further information was required including:

a) Property damage documents including photos;

b) Any other information with respect to any other insurer that may have priority and who had also been put on notice;

c) Information from the AB file;

d) Quantum of benefits paid to date

The letter did not request a copy of the OCF-1.

The letter also indicated that TD was expecting to complete their investigation within the next 60 days, at which time they would advise of their decision as to whether they accepted or denied priority. There is no dispute that TD did not advise Dominion within the next 60 days as to their position.

Dominion followed up with TD on November 27, 2013, providing them with the property damage documentation and as well a copy of the police report. They confirmed they had not yet received an Application for Accident Benefits. They asked for TD's position.

By letter dated March 18, 2014 from Ross & McBride, Dominion was provided with the OCF-1 for Mr. Rizzo. Ross & McBride confirmed they had been retained by the Office of the Public Guardian and Trustee, who were acting on behalf of Tony Rizzo.

A Certificate of the Public Guardian and Trustee was attached to that letter, confirming that they were the statutory guardian of Samuel Anthony Rizzo pursuant to the *Substitute Decisions Act*. The Certificate was dated December 23, 2013.

The OCF-1 indicated that Mr. Rizzo was separated but that he was not covered under his spouse's policy. There is no reference to the TD policy in that document.

Part 5 (Applicant's Status), Part 6 (Student Attending School) and Part 7 (Caregiver) of this document was not completed. However, Part 8 was completed indicating that Mr. Rizzo was employed at the time of the accident with Dofasco.

Dominion responded to the Application by letter dated March 25, 2014. Dominion did not take any issue with the fact that Parts 5, 6 and 7 of the Application for Accident Benefits had not been completed. The letter did deal with weekly benefits and requested a disability certificate if the benefit was being applied for, as well as an election of benefits form.

Also on March 25, 2014, Dominion wrote TD. They confirmed that the Application for Accident Benefits had been received on March 18, 2014. They repeated the information with respect to the spousal status and their position that TD was in priority. The last sentence of the letter noted:

> *"We are also resending the Notice of Priority which is enclosed."*

The Notice of Priority which was enclosed was the same document that had been served by letter October 25, 2013. It was agreed at the arbitration hearing that that document was not resent at the same time to Tony Rizzo or his counsel or to the Public Guardian and Trustee.

The Notice to Participate and Demand for Arbitration, served and filed by Miller Thomson, counsel to Dominion, is dated November 26, 2014.

The final relevant document is Exhibit 3. This is a letter dated December 1, 2015 directed to Tony Rizzo, care of The Ministry of Attorney General and copied to his counsel in which a Notice of Dispute Between Insurers is served on Mr. Rizzo through the Public Guardian. The document attached is a new Notice to Applicant of Dispute between insurer dated December 1, 2015. There is a faxed confirmation attached also dated December 1, 2015 at 3:58 p.m.

The final relevant date is the arbitration date itself, which was December 3. Two days after Exhibit 3 was sent to the insured.

Position Of The Parties

TD takes the position that Dominion cannot proceed with its arbitration as it has failed in two respects to meet the requirements of Regulation 283/95.

TD's first argument is that the letter of October 25, 2013 which included the Notice to Applicant of Dispute Between Insurers form is the document that sets the limitation period under Section 7 of Regulation 283/95 running. TD takes the position that it is irrelevant that Dominion did not have an OCF-1 at the time this document was served. If TD is right then the 1 year limitation period under Section 7(3) requires that the arbitration be initiated by Dominion no later than 1 year after the day the insurer paying benefits first gave notice under Section 3. TD says notice under Section 3 was given on October 25, 2013. Therefore arbitration would have had to have

been commenced by October 25, 2014. The arbitration as evidenced by the Notice to Participate and Demand for Arbitration was not commenced until November 26, 2014, nearly a month too late.

In the alternative, if I find that the October 25, 2013 letter and enclosures did not constitute notice under Section 3 as no OCF-1 had been received and therefore there was "no insurer paying benefits" as yet, that the second notice sent by Dominion also does not meet the requirements of regulation 283/95. While TD accepts that the arbitration was commenced within 1 year of the second Notice to Dispute (letter of March 25, 2014) TD takes the position that the notice was not sufficient as it did not comply with Section 4(1) in that the notice was not also given to the insured person at the time it was given to the insurer TD. TD takes the position that the effort of Dominion to serve that document one day before the arbitration either does not comply with 4(1) or is so late as not to comply with 4(1). TD also raises the question as to whether there was a completed Application for Accident Benefit that could be relied upon. I do not find that argument to be at all compelling. I find that the Application for Accident Benefits, even though Section 5, 6 or 7 was not completed, was in fact a completed application under Regulation 283/95.

Dominion on the other hand, takes the position that its letter of October 25, 2013 and the Notice to Applicant of Dispute Between Insurer was no more than a "heads up" to TD that if Dominion received an Application for Accident Benefits they would be pursuing a priority dispute against them. Dominion alleges that it is good practice for an insurer to give early notices such as this. It allows time for investigations to take place by the potential priority insurer. However, the time does not begin to run under Section 7(3) of Regulation 283/95 as there has been no OCF-1 submitted as yet and therefore Dominion was not (as set out under Section 7(3): "the insurer paying benefits first". TD argues that until an OCF-1 is submitted that no cause of action arises and no limitation period can run.

With respect to the second issue, Dominion takes the position that it's letter of March 25, 2014 together with its letter of December 1, 2015, the former to TD and the latter to Mr. Rizzo, together with the two notices of dispute to applicant that were enclosed is sufficient to meet the requirements of Section 4(1) and therefore they meet the requirements of Regulation 283/95 and are not prohibited from proceeding to arbitration on those grounds.

Dominion submits that Section 4(1) does not require that the Notice to Applicant of Dispute Between Insurers be served contemporaneously with notice to the insured person and the insurer. They submit that as long as the notice is served on the insured person, irrespective of the timing that that is sufficient. If the legislature had intended that those notices be served contemporaneously then the regulation would have said so.

The Law

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

Ontario Regulation 283/95: as amended by Ontario Regulation 16/13

1: All disputes as to which insurer is required to pay benefits under Section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

2(1): The first insurer that receives the completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is require to pay benefits under Section 268 of the Act. O. Reg. 283/95, s. 2.

2.1(1): This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.

2.1(2): The insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.

2.1(3): The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.

2.1(4): The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.

2.1(6): The first insurer that received a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefit. O. Reg. 38/10, s.

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. O. Reg. 283/95, s. 3 (1).

3(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 insurer is liable under section 268 of the Act; and

(b) The insurer made the reasonable investigation necessary to determine if another insurer was liable within the 90 days period. O. Reg. 283/95, s. 3 (2).

4(1): An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent. O. Reg. 283/95, s. 4; O. Reg. 305/98 s. 1.

5(1): An insured person who received a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (1)
5(2): If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (2)

5(3): Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between the insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the *Arbitration Act, 1991* O. Reg. 283/95, s. 5 (3); O. Reg. 38/10, s. 7.

7(1): If the insurer cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insurer paying benefits under Section 2 or 2.1. or any other insurer against whom the obligation to pay benefits is claimed. O. Reg. 38/10, s. 8.

7(2): If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insured person. O. Reg. 38/10, s. 8.

7(3): The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3. O. Reg. 38/10, s. 8.

Counsel also submitted in evidence and referred to parts of the Notice of Applicant to Dispute Between Insurers form. I attach the relevant portions of the form below:

Notice of Applicant of Dispute Between Insurers

This notice is to inform you that the insurer to whom you have applied for accident benefits claims that another insurer is responsible for paying these benefits. You may be required to assist the insurers in resolving their dispute by providing them with any

information that may be needed to determine which insurer should be paying your accident benefits claim.

You will continue to receive accident benefits that you are entitled to from the insurer that you applied to while the insurers attempt to resolve their dispute.

You also have the right to object to your claim being transferred to another insurer. If you wish to object please complete Part 5 of this form and send it within 14 days to the insurer that is currently paying you the accident benefits. If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you.

If you do not object, you will not be permitted to dispute the transfer of you claim to another insurer. If you have any questions about this notice, or about the process that insurers use to determine who is responsible for paying your claim, please contact the representative of the insurance company that is paying your accident benefits claim. The name and telephone number of the representative is listed in Part 1.

Part 5:

You can object to your claim being transferred to the insurer(s) referred to in Part 2 by completing this section and returning the form to the insurer that you applied to in Part 1 within 14 days.

If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you. If you do not object, you will not be permitted to dispute the transfer of your claim to another insurer.

Please check the box below and return this form to the insurer listed in Part 1 within 14 days only if you wish to object to your claim being transferred to another insurance company.

Analysis and Findings and applicability of Section 7(3) limitation period

Not surprisingly, there was no case law that dealt with the first issue (the limitation period under section 7(3)) head on. However, there are a number of cases which are helpful in informing an arbitrator with respect to the purpose of Regulation 283/195.

The regulation itself has been found to have been intended as a simple expeditious and relatively inexpensive way for insurers to resolve priority disputes as between them *(State Farm Automobile Insurance Company v. Co-operators General Insurance Company of Canada 2013 Carswell Ontario, 7710, 21C.C. LI 5th (161).*

I also take notice of the Decision of the Court of Appeal in State Farm Mutual Automobile Insurance Company versus Ontario (Minister of Finance) 2002, 58 O.R. (3D) 251. In that Decision the Court set out the importance of ensuring that Regulation 283/95 was interpreted so that it preserved certainty and clarity in its application. The Court of Appeal stated at paragraph 10:

> *"The regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subjects to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to be that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting,* ***there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases.*** *(emphasis added)."*

In rendering my decision in this case, I am very much guided by the words of the Court of Appeal in reaching my decision.

I have carefully examined Regulation 283/95 and with reference to Dominion's argument that the Regulation read as a whole suggests that until an insurer receives an Application for Accident Benefits that no cause of action arises. While that may be the case as between the insured and the insurer, I do not see that as applying to the question of a cause of action as between two insurers arising from a priority dispute. As with the loss transfer provisions, I see the dispute arising when one insurer recognizes that it may be receiving a claim for statutory accident benefits as a result of an accident and that they put another insurer on notice, taking the position that the other insurer takes priority. Once the first insurer recognizes the priority dispute and puts the other insurer on notice of that dispute, surely a cause of action has now arisen, irrespective of whether an OCF-1 has been received the day before, the day after or six months after.

While generally it is certainly the case that insurers normally do not send out the Notice to Applicant of Dispute form until an OCF-1 is received, that does not mean that such a notice sent out prior to the receipt of the OCF-1 is invalid. To find that would, in my view, be completely contrary to the comments of the Court of Appeal outlined above. It would be a creative interpretation and would be carving out a judicial exception to deal with the equities of this particular case. It would not lend itself to certainty and clarity in the application of the regulation.

At the time that Dominion served its Notice to Applicant of Dispute Between Insurers on October 25, 2013, Dominion had accepted, in my view, that it was the "insurer paying benefits first". It had received a notice of the accident. It had sent out the Application for Accident Benefits as required under Regulation 283/95 to the insured. In accordance with Section 2.1(4) Dominion could anticipate that Mr. Rizzo was going to use the application provided to it and would send in the completed application form to it. Section 2.1(4) of Regulation 283/95 makes it mandatory upon the applicant to send a completed application to only one insurer. I therefore do not accept Dominion's arguments that the limitation period in Section 7(3) can only begin to run and/or crystalize when an OCF-1 has been received and therefore there is an "insurer paying benefits".

Even if Dominion had received an OCF-1 prior to sending the letter out on October 25, 2013, they may not have been a "insurer paying benefits" if, for example, benefits have been denied as a result of some exclusion. Once again I stress that this Regulation is designed to provide certainty and clarity. In my view the limitation period under Section 7(3) must begin to run when an insurer gives notice under Section 3, irrespective of when the OCF-1 is received. This will encourage both insurers to conduct early investigations and determine where proper priority lies.

I am comforted in my conclusion by the decision of Arbitrator Bialkowski in the case of *State Farm Automobile Insurance Company v. Co-operators General Insurance Company of Canada 2013 Carswell Ontario, 7710, 21C.C. LI 5th (161).* In that particular case, Co-operators had received the Notice to Applicant of Dispute Between Insurers on November 30, 2001. State Farm, the initiating insurer, had until November 30, 2002 to commence its arbitration against Co-operators but it did not commence its arbitration until April 12, 2011. State Farm argued that the limitation period did not run as the 90 day period had not been a sufficient period to make a determination that another insurer had priority. As State Farm had made reasonable investigations within the 90 days, they argued that the limitation period under Section 7 should be expanded.

In my view, Arbitrator Bialkowski correctly found that one must distinguish between the notice required to be given under Section 3 of Regulation 283/95 and the limitation period set out under Section 7. They are two completely different issues. Arbitrator Bialkowski found that Section 7 of the Regulation creates an absolute limitation period once notice has been served. I agree with him. He further noted that the language of Section 7 is plain on its face. He noted that unlike Section 3 of the Regulation, there are no "saving provisions" under Section 7 of the Regulation. Arbitrator Bialkowski found in that case that when a company misses the one year period it cannot proceed to an arbitration at a later date, even though there may be some equitable circumstances that arguably might warrant an extension. I agree with Arbitrator Bialkowski and apply the same analysis to this case. I also point out that I do not believe my finding in this case will discourage insurers from giving early notice of priority disputes before an OCF-1 is received if warranted, although I recognize that is relatively unusual. What this decision should do is to encourage insurers to give that early notice but to recognize that the one year limitation period under Section 7 will immediately begin to run.

In my view, in its letter of October 25, 2013, Dominion accepted that it was the "insurer that would be paying benefits first" and wisely gave early notice to TD based on the information it had unearthed with respect to Mr. Rizzo's spousal status. What Dominion failed to do was initiate arbitration within one year of the notice having been given.

Finally, reference should be made to the Decision of Justice Belobaba in *Pilot Insurance Company v. Royal and Sun Alliance Insurance Company of Canada 2006 CarswellOnt 1048, [2006] I.L.R. I-4501.* This case was an appeal from a decision of a private arbitrator with respect to the limitation period under Section 7, in circumstances where there were, in essence, two different insurers who were giving notice under Section 3 and disputing priority.
The insured in that case applied for accident benefits to Zurich in April of 2001. Zurich served a Notice of Dispute on Pilot on June 25, 2001. After several months of investigation, Pilot discovered that there may be coverage under a policy with RSA. Pilot advised Zurich of the possible coverage with RSA and agreed that Zurich's policy was not priority. Pilot then took over the claim from Zurich and began to pay accident benefits. As the dispute with Pilot was resolved Zurich did not pursue arbitration.

Pilot then served its Notice of Dispute on RSA on November 6, 2001 and commenced arbitration proceedings against RSA on October 24, 2002.

The issue for the arbitrator was whether the limitation period ran from the date that Zurich, as the first insurer had served its notice on Pilot which would mean the arbitration should have been commenced by June 27, 2002. If the limitation period ran from the date that Pilot served its notice on RSA then the arbitration was not time barred. The arbitrator interpreted Section 7 and 10 of Regulation 283/95 as providing each successive insurer who receives a Notice of Dispute with its own one year limitation period within which to commence an arbitration. That decision was overturned by Justice Belobaba.

Justice Belobaba noted that the issue that was argued before him really involved whether an arbitrator could "adapt" and "modify" the limitation period in Section 7 by deleting and adding some additional words. Justice Belobaba felt that one could not. He noted the following:

> *"In my view the meaning of Section 7(2) is plain on its face. The one year limitation period begins to run from the date that the insurer paying benefits under Section 2 first gives notice under Section 3. There is no reason to adapt or modify this provision to accommodate the requirements of Section 10...*
>
> *The one year limitation period set out in 7(2) is an umbrella limitation period that begins to run from the date the insurer paying benefits under Section 2 first serves the notice under Section 3. There is nothing in the regulation that requires or suggests that each successive insurer served with a Notice of Dispute is to be provided with its own one year limitation period in which to commence an arbitration."*

Justice Belobaba also makes reference to the core decision of the Court of Appeal with respect to the issue of certainty, clarity and a concern that creative interpretations not be used in interpretive analysis.

Having reviewed the relevant case law and following the admonition of the Court of Appeal as noted above, I feel I can reach no other conclusion other than that the notice of October 25, 2013 and the enclosed Notice to Applicant of Dispute Between Insurers was intended to be and was indeed notice under Section 3 and therefore irrespective of whether an OCF-1 was received, this was the notice to commence the running of the limitation period under Section 7(3) of Regulation 283/95. Therefore with respect to this issue, I find that Dominion is barred from proceeding to arbitration.

Is Dominion's second notice of March 25, 2014 valid?

While technically having determined that Dominion does not have the right to proceed because they missed the limitation period given in the first Notice, I feel that based on the arguments put before me I need to address the second issue as well. If I am wrong that the limitation period did not begin to run with the first notice because there was no OCF-1 then I still conclude that Dominion is barred from proceeding to arbitration as their second notice of March 25, 2014 did not meet the requirements of Section 4.

The letter of March 25, 2014 Dominion simply resends the previous Notice of Dispute. While the letter is dated March 25, 2014, the Notice of Dispute is still dated October of 2013. Clearly, the letter and the document itself meet the requirements of Section 3 and are appropriate notice. However, the document is not served on Mr. Rizzo. If counsel for Dominion is correct and their notice of October 25, 2013 is deemed to be invalid as there is no OCF-1 then it is invalid for all purposes. It would not only be considered ineffective notice to the insurer, TD but it would also have to be considered as ineffective notice to the Applicant. Therefore, Dominion would have to have re-served the Notice of Dispute on Mr. Rizzo in order to comply with Section 4. They did not do so until December 1, 2015, a day before the arbitration was due to proceed.

There did not seem to be any significant disagreement by Dominion with respect to the position of TD that if the letter of December 1, 2015 had not been sent out that Dominion would not have complied with Section 4(1) and therefore notice would have been invalid and those documents could not have been relied upon. However, I did ask counsel to provide me with cases on that issue. Counsel provided me with two cases. The first *was Ontario Municipal Insurance Exchange and Liberty Mutual Insurance Company*, a decision of Arbitrator Guy Jones dated October of 2000. In that case notice of the dispute had been given to the insured but it was not notice in the prescribed form: the "Notice to Applicant of Dispute Between Insurers" was a letter notice given by the solicitors for the applicant, Omex. Liberty argued in that case that while notice had been given, as it was not in the prescribed form, it did not meet the

requirements of Regulation 283/95 and therefore could not be relied upon. Arbitrator Jones stated:

> *"In my view, failure to comply with Section 4 of the Regulation is not, by itself, fatal to Omex's claim for relief under Section 3(2). While the notices are to be given simultaneously, failure to comply with the notice to the insured, at least in these particular circumstances, does not mean that Section 3(2) was not complied with."*

Arbitrator Jones does not provide any authority for his comments that the "*notices are to be given simultaneously.*" I find that Section 4 does not set out any specific time for the notice to given to the insured. In fact, Section 4(1) simply states that the insurer that gives a notice under Section 3 **shall also give notice to the insured person..."** There is no provision as in Section 3(1) that that notice is to be given within 90 days of receiving the OCF-1. Section 4(1) seems to stand apart from Section 3 which clearly deals with the obligations as between the two insurers as opposed to the obligations between the insured and the insurer. I therefore find that Section 4(1) does contemplate the possibility that the notice to the insured person may be given at a different time then the notice to the insurer. While general practice is that the notice is given contemporaneously that does not mean that notice that is not given contemporaneously is not a valid notice under 4(1).

The question therefore arises whether notice given to the insured more than a year and 9 months after the notice given to the insurer and on the eve of arbitration meets the requirements of Section 4(1). I find that it does not.

The right of the insured to be involved in a priority dispute is a bit of an anomaly. There are rarely circumstances that I have come across in the years that I have been working as an arbitrator where a claimant has ever made an objection pursuant to Regulation 283/95 to his claim being transferred from one insurer to another.

However, the regulation was clearly set up to anticipate that there may be some circumstances when an insured person may object to the transfer of his claim from one insurer to another. It sets out a process whereby the insured has the right to get notice of the transfer so that he or she can object. It sets out a process whereby the insured has an obligation to provide information relating to priority. Lastly, the regulation even sets out a process for the insured who has objected to the transfer of this file, to initiate an arbitration on his own. Therefore, I must accept that there is some purpose in the insured being given the notice and one of those purposes is that the insured has the right to initiate his own arbitration or to participate in any priority dispute that may be commenced between the two insurers. The Notice to Applicant of Dispute Between Insurers itself indicates:

> *"If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you"*

This is what is set out in the prescribed form that the insurer disputing priority is required to serve on the insured person. I find that such a notice, served on the insured on the eve of arbitration cannot possibly meet the requirements of Section 4(1) as it would not give the insured sufficient time to notify the insurer of its intention to dispute the transfer and certainly in this case, would have not allowed Mr. Rizzo any opportunity, through the public guardian and trustee, to participate in the arbitration.

Counsel did provide me with one decision on this point. It was the decision of Arbitrator Novick in *The Dominion of Canada General Insurance Company and Unifund Insurance Company* released on October 20, 2015. This decision is under appeal.

In that case Mr. Fan had applied to Dominion for statutory accident benefits on January 4, 2012. Dominion took the position that Unifund was the priority insurer and forwarded a Notice of Applicant to Dispute Between Insurers to Unifund in January of 2012. It met the requirements of Section 3 of Regulation 283/95 and an arbitration was commenced within the required time. However, Dominion did not provide a copy of the Notice to Applicant of Dispute Between Insurers until after the priority arbitration had been commenced and after the first prehearing had taken place, during which Unifund raised the sufficiency of the notice under Section 4. Therefore, on June 23, 2014 Dominion sent out the Notice of Dispute to the insured. The question before Arbitrator Novick was whether that notice would be considered timely under Section 4 of Regulation 283/95. Arbitrator Novick accepted that it was. She noted that the notice was sent two years after the notice provided to Unifund and 6 months after the first arbitration prehearing teleconference. In the case before Arbitrator Novick, as indeed in the case before me, the accident benefit claim of the insured was still open.

Arbitrator Novick commented:

> *"While insurers should ideally provide notice to claimants at the same time as they do to "target insurer(s)", the fact remains that Mr. Fan was provided with the opportunity to participate in the process. I find that the notice provided by Dominion, albeit very late, satisfies the requirements in Section 4 of the Regulation"*

While I do not disagree with Arbitrator Novick that Section 4 of the Regulation leaves it open to serve the Notice of Dispute on the insured at a later time than the insurer, I find that on the facts of this case that the notice is simply served too late. In the case before Arbitrator Novick, the notice was served in time for an insured to participate in the arbitration process should they choose to do so. In this case, with the notice having been served on December 1, 2015 and the arbitration taking place on December 3, 2015, it simply did not allow the insured time to respond and therefore could not meet the requirements of Section 4.

Having determined that the notice to the insured in December of 2015 did not meet the requirements of Section 4, I must then determine whether that would bar Dominion from

relying upon its March 25, 2014 notice for the purposes of having the right to proceed with this arbitration, the notice to participate and demand for arbitration having been served on November 26, 2014 less than a year after that notice was served. I find that the letter and re-sent notice of priority of March 25, 2014, having not met the requirements of Section 4, results in the notice of March 25, 2014 being invalid and cannot be relied upon to provide Dominion with the right to pursue arbitration. I find that Section 4(1) of Regulation 283/95 is mandatory in terms of its requirement that when an insurer gives notice under Section 3 it shall **also give notice to the insured person, using the approved form.** Failure to do so means that the insurer has not met the requirements of Regulation 283/95 and that is sufficient to preclude Dominion from proceeding with its priority dispute.

Counsel provided me with a decision of Arbitrator Shari Novick in *Belair Direct Insurance Company of Canada and Security National Insurance Company of Canada*, a decision of April 11, 2014. This decision has not been appealed. In very similar circumstances, Arbitrator Novick concluded that where Belair had failed to provide a copy of the Notice to Applicant of Dispute Between Insurers to the insured, that Belair was banned from proceeding with its priority arbitration. I agree with Arbitrator Novick.

Arbitrator Novick noted that the text in the form: Notice to Applicant of Dispute Between Insurers clearly shows that the drafters of the Regulation intended that the rights of an insured person be given special consideration in the priority process. She noted, as I do, that the regulation was clearly drafted with the potential participation of claimants in mind. She also took note of the general message from the Court of Appeal, noting:

"The general message from the Court of Appeal is clear- the rules are to be applied as stated in the regulation and exceptions should not be made to deal with the equities of a particular case. I take this to mean that while an arbitrator may consider an argument based on equitable principles, interpretations of the regulation that are either creative or based on purely equitable considerations must be avoided."

She also noted that the parties involved in priority disputes are presumed to be sophisticated litigants with access to expert advisors who are engaged in conducting business of this nature on a regular basis and the procedural requirements of regulation 283/95 should be applied strictly. I agree with Arbitrator Novick.

I therefore conclude that on both issues that Dominion has 1: missed the limitation period under Section 7(3) and is statute barred from pursuing TD for priority in this arbitration and 2: in the alternative, that Dominion's notice of March 25, 2014 is not a valid notice as it was not provided to the applicant as required under Section 4 and on that basis, Dominion is precluded from proceeding with this priority dispute.

Order

For the reasons expressed above, the arbitration is therefore dismissed. Dominion of Canada General Insurance Company remains the insurer responsible for paying statutory accident benefits to Tony Rizzo as a result of the accident of August 29, 2013.

Costs

The arbitration agreement provides that costs are to be apportioned as determined by the arbitrator, taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in litigation before the courts.

There were no offers to settle. As TD was successful in both branches of their argument, I find that the costs of TD General Insurance Company are to be payable by The Dominion of Canada General Insurance Company. The costs of the arbitration are also to be borne by The Dominion of Canada General Insurance Company.

If counsel cannot agree upon costs then a further prehearing can be scheduled to argue the issues of costs.

DATED THIS _____ day of December, 2015 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP