

IN THE MATTER OF THE *MOTOR VEHICLE ACCIDENT CLAIMS ACT*, R.S.O. 1990 c. M.41  
AND IN THE MATTER OF THE ARBITRATION UNDER THE *ARBITRATION ACT* 1991, S.O. 1991, c.17  
AND IN THE MATTER OF A DISPUTE BETWEEN INSURERS UNDER O. Reg 283/95, AS AMENDED  
MADE UNDER THE *INSURANCE ACT*, R.S.O. 1990, c.I.8

BETWEEN

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Applicant

And

THE PERSONAL INSURANCE COMPANY and PRIMMIUM INSURANCE COMPANY

Respondents

### **AWARD**

#### **APPEARING**

Nathan Tischler, counsel for Primmum Insurance Company: hereinafter called "Primmum".

Stephanie Charikar, counsel for The Personal Insurance Company: hereinafter called "The Personal".

#### **BACKGROUND**

This matter comes before me pursuant to the provisions of the *Insurance Act*, R.S.O 1990, s. 268 and Ontario Regulation 283/95. This is a dispute between two insurance companies as to which is the priority payer for statutory accident benefits to a claimant who was involved in an accident on June 27, 2020. The parties agreed on consent to appoint me as arbitrator pursuant to the *Arbitration Act* and Regulation 283/95.

By way of background, the claimant was involved in an accident on June 27, 2020. He sustained various injuries. The accident occurred when he was driving an uninsured motorcycle and was struck by another vehicle.

The claimant, through his counsel, applied to the Motor Vehicle Accident Claims Fund (hereinafter

referred to as "the Fund") for statutory accident benefits. While the Fund has played a role in the arbitration process, for the purposes of the issue before me, all parties agreed that the Fund did not need to participate in this hearing.

The Personal insures the Dodge Caravan that struck the claimant. Primmum insures the spouse of the claimant. On the date of loss, while he was separated, he remained legally married. Both policies were in full force and effect on the date of loss.

This dispute is not at this time about which of the insurers stand in priority under Section 268 of the *Insurance Act*, but rather involves a procedural argument between the two insurers arising from the interpretation and application of Regulation 283/95.

## **ISSUES**

An Arbitration Agreement dated September 28, 2023 was submitted as part of this hearing. That agreement sets out three issues for me to determine:

1. Was MVACF or The Personal the first insurer to receive a completed Application for Accident Benefits?
2. Was The Personal subject to the 90-day deadline to dispute priority, as required by Ontario Regulation 283/95?
3. Which insurer, as between Primmum and The Personal, should be responsible for:
  - a. Paying MVACF's adjusting fees;
  - b. Paying the arbitration costs;
  - c. Indemnifying MVACF for payment of the claimant's benefits to date; or
  - d. Ongoing handling of the claim?

## **THE PROCEEDINGS**

This matter proceeded in writing. The parties submitted a Joint Agreed Statement of Facts as well as the Arbitration Agreement previously referred to. There was a Joint Document Brief submitted which included a copy of the accident benefit file from the Fund, log notes from the Fund and The Personal, an MVA report, copies of various OCF-1s submitted by the claimant, and various emails and correspondence between the relevant parties.

Primmum and The Personal each submitted a Factum and a Book of Authorities. As agreed upon in advance of this hearing, the Fund made no submissions and played no role.

## **RELEVANT FACTS**

There is really no significant issue in terms of the facts in this case, but rather what conclusion

one draws from the facts. I set out below the relevant facts as I find them, based on the materials submitted.

1. On June 27, 2020 the claimant was injured in a motor vehicle accident. He did not have his own policy of insurance at that time.
2. The claimant was legally married to the named insured under a Primum policy which was in full force and effect on the date of loss.
3. When the accident of June 27, 2020 occurred, the claimant was driving an uninsured motorcycle which was struck by an automobile insured by The Personal whose policy was valid on the date of loss.
4. On October 27, 2020 the claimant, through his counsel, submitted a letter to the Fund which included the following:
  - a. An OCF-1;
  - b. An Authorization and Direction;
  - c. An OCF-10 electing income replacement benefits;
  - d. Identification; and
  - e. Vehicle permit.

The letter requested that all communications be with the claimant's counsel.

5. Neither the OCF-1 nor the letter of October 27, 2020 attached a copy of a Police Report, a Notice of Collection of Personal Information form or a Form 3, all of which were required when submitting an OCF-1 to the Fund.
6. By letter dated November 2, 2020 a claims administrator from the Fund wrote to the claimant's counsel, acknowledging receipt of what she described as an **incomplete Application** for accident benefits. The letter indicated that in order for the Application to be complete, the Fund required a copy of the Police Report, the Notice of Collection of Personal Information form, and the Form 3. The letter also advised that the claim was going to be assigned to an outside adjuster.
7. On receipt of the OCF-1, the Fund retained ClaimsPro, an independent adjusting firm, to handle the claimant's Application. All further communications and handling of the claimant's file were conducted by ClaimsPro on behalf of the Fund.
8. By letter dated November 5, 2020 directed to the claimant and copied to his counsel, ClaimsPro advised that they were conducting a priority investigation and required a series of questions/information to be provided to them. These were set out in the letter of November 5, 2020 and were by and large designed to determine whether another insurance company would stand in priority to the Fund. The questions included

information about leased vehicles, whether the claimant was married, whether he was living common law, and whether there were any dependants.

9. A second letter was sent to the claimant and his counsel on November 5, 2020 repeating the information from the Fund's initial letter that the Application was considered incomplete as the three items were missing. In addition, it was noted that part 10 of the OCF-1 required completion. The letter advised the claimant that there was not enough information in the OCF-1 to determine whether the loss was covered under the Fund's guidelines. The Fund was going to investigate the loss on a without prejudice basis.
10. The OCF-1 submitted by the claimant indicated under marital status that he was "single".
11. On November 12, 2020 ClaimsPro sent out a Standard Benefit Statement indicating a start date of June 27, 2020 and an end date of November 11, 2020. It indicated the claimant had been placed in the Minor Injury Guideline with maximum benefits available of \$3,500 and that no payments had been made to date.
12. On November 18, 2020 3:45: pm counsel for the claimant sent an email to ClaimsPro. The email advised that the redacted Motor Vehicle Accident Report had been received. It suggested that there was a policy no. K8050643 with The Personal. The email indicated that claimant's counsel at 3:41 pm had sent an email to ab.claimssupport@dgig (The Personal's email) enclosing an OCF-1. The subsequent email to ClaimsPro indicated "If The Personal accepts priority then there is no exposure on the MVACF. Kindly contact The Personal to help them get them to accept priority."
13. The email sent to The Personal advised that "**a claim was made to the motor vehicle accident claim fund.**" While the email indicated that an OCF-1 and other documents were being enclosed, what was in fact enclosed was a copy of the original letter to the Motor Vehicle Accident Claims Fund of October 27 and the enclosures that had accompanied that letter. The email however added in a copy of the Police Report. The email went on to ask that The Personal immediately contact counsel to advise whether they are accepting the claim.
14. Neither ClaimsPro nor claimant's counsel advised The Personal that the Fund had taken the position that the OCF-1 they had received on October 27, 2020 was incomplete.
15. By letter dated November 19, 2020 ClaimsPro wrote to The Personal providing them with "MVAC Fund Priority Notice". The letter indicated that the Fund had been presented with a claim for accident benefits by the claimant. Their investigation into priority had determined that he may have access to coverage under The Personal policy. The letter sought confirmation from The Personal that they would "assume carriage of the claim or provide with a written explanation for the refusal." The letter also noted that under Regulation 283/95 The Fund is exempt from using the Notice to Applicant form prescribed for insurance companies and this was to be considered formal notice under Regulation

283/95.

16. By letter dated November 21, 2020 The Personal wrote to ClaimsPro advising that the claimant had a spouse whose policy would be in priority to The Personal's and in addition he may have a common law partner whose policy would be in priority to The Personal's, and accordingly The Personal would not be accepting priority.
17. According to the log notes of The Personal, on November 19, after having received the email from claimant's counsel, they initiated a call to the claimant and left a message with his brother and also initiated a call to the claimant's law firm and left a message.
18. On December 10, 2020 ClaimsPro received an OCF-3 Disability Certificate dated November 20, 2020 on behalf of the claimant.
19. On December 18, 2020 ClaimsPro wrote the claimant and his counsel advising they could not respond to the OCF-3 as the Application remained incomplete. The notice of Collection of Personal Information, Form 1 and completion of part 10 are still required.
20. On December 8, 2020 ClaimsPro contacted The Personal with respect to the issue of priority. ClaimsPro noted that The Personal would be considered in higher priority than MVACF and therefore they could accept the claim and continue to investigate accordingly. The adjuster for The Personal advised that she could look into that with management, however "**MVACF received the Application first**". Also, there were higher priority insurers including the spouse and common law wife whom she believed had a policy with RSA.
21. On December 8, 2020 and January 8, 2021 The Personal responded to further enquiries from the Fund with respect to priority advising that The Personal would not accept priority due to the presence of a higher priority insurer.
22. On January 4, 2021 ClaimsPro wrote the claimant and his counsel advising that it had come to their attention that the claimant had been married as well as in a common law relationship at the time of the accident. ClaimsPro requested a copy of the Marriage Certificate.
23. On January 21, 2021 ClaimsPro received the Questionnaire that had been sent to the claimant and his counsel by letter dated November 5, 2020. This had been completed and the claimant advised that he was married on the date of loss, but had been separated for five years. He says he was not in a common law relationship.
24. By letter dated March 16, 2021 ClaimsPro advised the claimant and his counsel that they had received three OCF-18s dated October 7, 2020 but received on March 4, 2021. ClaimsPro advised they were unable to respond to the Treatment Plans as the OCF-1 Application still remained incomplete.

25. On February 10, 2021 ClaimsPro returned a phone call from The Personal. The Personal adjuster advised that they had obtained the common law spouse's information and she provided an RSA policy number. The Personal adjuster also provided the separated spouse's name, although they did not have her insurance information.
26. By letter dated March 16, 2021 ClaimsPro wrote to The Personal noting that the Fund has been unable to verify coverage under policies for either a common law spouse or a legal spouse. ClaimsPro takes the position as The Personal was the striking vehicle, that it was clearly in priority to the Fund and requested again that The Personal "assumes carriage of this claim".
27. On April 6, 2021 ClaimsPro received the OCF-1 with part 10 completed as well as a copy of the Form 3 and the Notice of Collection and Personal Information.
28. By letter dated April 9, 2021 ClaimsPro wrote the claimant and his counsel confirming that the required documents had been received on April 6 and "as such, your Application to Motor Vehicle Accident Claims Fund is now deemed complete." A Summary of Available Benefits under the SABS was set out.
29. By letter dated April 13, 2021 ClaimsPro wrote the claimant and his counsel still requesting a copy of the Marriage Certificate.
30. By letter dated August 5, 2021 counsel for the claimant provided to ClaimsPro a copy of the Marriage Certificate and Licence.
31. On December 6, 2022 through counsel the Fund served a Notice of Commencement of Arbitration on The Personal Insurance Company and Primmum Insurance.
32. On March 2, 2023 ClaimsPro wrote to Primmum putting them on notice of a priority dispute given the legal marriage between the claimant and Primmum's named insured.

## **POSITION OF THE PARTIES**

### **Primmum**

It is Primmum's position that The Personal received the first completed OCF-1 and as such was the first tier insurer under Regulation 283/95. As the first tier insurer/the insurer to receive the first OCF-1, this then obliged The Personal to put Primmum on notice within 90 days of the priority dispute in accordance with Regulation 3(1) of Ontario Regulation 283/95.

Primmum submits that the Fund did not receive a completed Application until it received the Police Report on November 18, 2020 at 3:45 pm. By that time, the OCF-1 had been submitted to The Personal some five minutes earlier.

Primmum correctly identifies a difference between a completed Application for the purposes of a priority dispute versus a completed Application for the purposes of determining entitlement to accident benefits. The Fund continued to take the position it had not received a completed Application vis-à-vis the claimant until it had also received the Notice of Personal Information form, the Form 1 and part 10 of the OCF-1 was completed

Primmum submits that for an Application to be complete for the purposes priority of Regulation 283/95, the OCF-1 must be functionally adequate in that it must contain sufficient particulars to allow the first insurer to give a notice of dispute to another insurer. As the Police Report was not included in the letter of October 18, 2020 with the OCF-1 the Fund did not have a functionally adequate Application for benefits for the purposes of priority as they did not have sufficient information to determine at that time whether there was another insurer who would stand in priority.

Primmum further submits that the Fund did not engage in any conduct which would serve as a waiver or estoppel of its right to assert that it had not received a completed Application for benefits under s. 3 until after it received a copy of the Police Report. It was only after it received a copy of the Police Report that the Fund put The Personal on notice, specifically on November 19, 2020.

Primmum submits that as the insurer that received the first completed Application, The Personal became the first tier insurer under Regulation 283/95 and in order to dispute priority, it had to put another insurer under notice within 90 days of the receipt of the completed OCF-1. Primmum submits that The Personal has never put another insurer on notice. Specifically The Personal never put Primmum on notice. It was the Fund that served the Notice of Priority Dispute.

Primmum also submits The Personal's conduct in its response to the receipt of the OCF-1 must be looked at. Primmum submits that having received the first OCF-1, The Personal should have accepted the claim from the insured and commenced paying statutory accident benefits. Rather, The Personal refused to accept the completed Application, which resulted in the claimant being unable to access any statutory accident benefits until the Fund accepted the claimant's Application as complete on April 7, 2021. This, Primmum submits, results in a deflection of the claim and that the conduct is sufficiently serious that The Personal should be sanctioned by requiring it to pay the Fund's adjusting fees, arbitration costs and indemnification costs on a full indemnity basis as well as being obliged to accept priority and handle the claim despite it not being the highest priority insurer pursuant to the *Insurance Act*.

Primmum also submits that the fact that The Personal was not aware initially that MVACF had not accepted the Applicant's OCF-1 as complete is irrelevant. Primmum submits that Ontario Regulation 283/95 is to be interpreted strictly. Extraneous considerations are irrelevant. The sole factor to determine is which insurer received the first completed Application for benefits and it is that insurer who becomes the first tier insurer and must institute an appropriate priority dispute.

## **The Personal**

The Personal takes the position that the Fund received a completed Application on October 27, 2020 and accordingly they are the first tier insurer. This therefore makes The Personal the second tier insurer and not subject to the 90 day deadline as set out under s. 3 of Ontario Regulation 283/95.

The Personal submits that the Fund received a functionally adequate Application for the purposes of a priority dispute on October 27 on the basis that the OCF-1 had enough relevant documentation for the Fund to conduct diligent investigations and determine that Primmum would be the priority insurer due to the claimant's marriage. In addition, The Personal submits the Fund had sufficient information to independently obtain a Motor Vehicle Accident Report and they did not have to wait to receive one.

Primmum submits that the OCF-1 contained the claimant's contact information as well as the name of the claimant's legal rep and a call or discussion about the claimant's marital status would have been sufficient for the Fund to determine that Primmum was the priority insurer. The Personal points out that that is exactly what they did within less than 24 hours of receiving a copy of the OCF-1 submitted initially to the Fund.

Alternatively, The Personal submits that once the Fund received the redacted Motor Vehicle Accident Report on November 18, 2020, that that in essence crystallised the Fund as the first tier insurer. The Personal points out that when it received the Application on November 18, 2020, the letter from claimant's counsel indicated that "A claim was made to the Motor Vehicle Accident Claims Fund". The Personal submits that the status of the claim with the Fund was not communicated to The Personal on that date. No one advised The Personal that the Fund was taking the position that the Application for benefits they had received was not considered complete. This was substantiated and evidenced by the service of the Notice of Priority Dispute by the Fund on The Personal on November 19, 2020. The Personal submits that at that point clearly the Fund had established or crystallised itself as the first tier insurer. The Personal received the notice in the position of a second tier insurer.

The Personal submits that as a second tier insurer it was not subject to the 90 day notice requirements contained under s. 3 of Regulation 283/95. The parties agree that the Fund is never subject to the 90 day notice requirements pursuant to the Regulation (see s. 3(2.1) of Ontario Regulation 283/95 as amended January 2013).

The Personal submits having been put in the position of the second tier insurer by virtue of the position taken by MVACF that The Personal could not be said to have deflected the claim. The Personal submits all parties were aware that the Fund was handling the claim. It had served a Notice of Priority Dispute. It continued to contact The Personal to discuss "priority". It continued to adjust the claim with both the claimant and his counsel by continuing to seek further information to complete the Application from a benefits perspective.

The Personal therefore submits that the 90 day issue is not applicable, that The Personal did not receive the first Application and therefore Primum should be required to accept the accident benefit claim of the claimant, indemnify MVACF and pay any costs associated with the priority dispute.

## **ANALYSIS AND DECISION**

The facts of this case are quite unique and while both counsel submitted considerable case law, there was no one case with such similar facts that I found it helpful. It is relevant to set out the key portions of Regulation 283/95 that I reviewed in coming to my decision:

"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."

2.1(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer.

2.1(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer."

2.1(6) The first insurer that receives 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 benefits."

2.1(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance."

"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."

"10.(1). If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers."

This case is an example of what goes wrong when an insured fails to comply with s. 2.1(4) and sends an Application to more than one insurer. While it is complicated by the arguments that are put forward as to who received a "completed" Application, it is worth noting that this arbitration would not be proceeding if the Applicant only submitted a completed Application to only one insurer.

With respect to the issue of whether or not the Fund received a completed Application before The Personal the case law appears to be clear that, at least for the purposes of a priority dispute, the Fund requires a copy of a Police Report before it has a functionally adequate Application for accident benefits that allows it to determine whether there is another insurer that may be in priority. Arbitrator Novick in the decision *Her Majesty the Queen in right of Ontario as represented by the Minister of Finance v. Lombard Insurance Company of Canada* (October 2009) concluded that the requirements of the OCF-1 form are clear when a claimant submits an Application for Accident Benefits to the Fund. The claimant must provide the Police Report and if the Police Report is not submitted, then a completed Application had not been received. This part of Arbitrator Novick's decision was upheld by Justice Perell's decision dated March 25, 2010 (2010 ONSC 1770).

In my view I am therefore bound by Justice Perell in accepting that in order for there to be a completed Application to the Fund for the purposes of Regulation 283/95, that a Police Report, assuming it is available (as there is case law that deals with that situation) is mandatory.

However in the unusual circumstances of this case, The Personal submits we need to look at the conduct of the Fund and whether by its conduct it in fact accepted that it was the first tier insurer and therefore that it had accepted it had the first completed Application once it received the Police Report, at least for the purposes of priority.

In my view, the facts of this case support that The Personal was led to believe by the communications from the insured, the insured's counsel and the Fund that it was not the first insurer to receive the completed Application and that the Fund had accepted its position as first tier insurer. Therefore, The Personal would not have known, or been in a position to know, that it had in fact received the first completed Application approximately five minutes before the Fund, and that it was therefore obligated to accept the claim and send out a 90 day notice in accordance with the Regulation.

I find that the following facts support the conclusion that the Fund not only led The Personal to believe that it had accepted the Application and was the first tier insurer, but it had in fact accepted the Application as complete for the purposes of priority and had indeed become the first tier insurer under Regulation 283/95. First, the email that The Personal received from counsel for the claimant enclosed the same letter and the same OCF-1 from October 27, 2020 that had been submitted to the Fund. There was no new OCF-1 or a request to The Personal to provide an Application form for him to complete in accordance with the Regulation.

Further, the email specifically noted that "A claim was made to the Motor Vehicle Accident Claims

Fund." While the email asked The Personal to advise whether they were accepting the claim, there was no indication in this communication or any subsequent communications on the evidence before me where the Fund, the claimant or his counsel advised The Personal that the OCF-1 submitted to the Fund had not been accepted as complete and that no benefits were being paid to the claimant. In fact, all the evidence suggested to the contrary. Less than 24 hours after receiving the email from claimant's counsel, The Personal received a letter dated November 19, 2020 from ClaimsPro providing The Personal with the Fund Priority Notice. There is no obligation under Regulation 283/95 for the Fund to provide the Notice of Dispute to Insurers. This document is what the Fund uses to put another insurer on notice that a priority dispute is in progress. This would have, in my view, further supported The Personal's understanding that the Fund had accepted the claim, and that there was no issue as to who had received the first completed Application.

Further communications by email and by phone between the representatives of The Personal and ClaimsPro would only have reinforced this. There were numerous exchanges, both verbally and in writing, by the Fund asking The Personal to accept priority and The Personal declining to do so on the basis that there was another insurer that ranked higher in priority than they did. The Personal's adjuster even contacted ClaimsPro to advise them that the claimant was married, was legally separated although married, and gave him the name of the spouse and advised that there may also be a common law spouse and provided information with respect to that. This is all consistent with an insurer who believes they are a second tier insurer defending a priority dispute, not an insurer who has received the first Application and who is deflecting a claim.

Justice Perell in *Her Majesty the Queen v. Lombard (supra)* noted at paragraph 48 that pursuant to the doctrines of waiver or estoppel, by its conduct an insurer may be treated as if it had received a completed Application. In this case, I find that the Fund accepted that it had received the first completed Application for the purposes of the priority dispute, accepted its position as first tier insurer under s. 2(1) and appropriately put The Personal on notice required under s. 3(1.1.) of the Regulation.

I therefore conclude that in the unusual circumstances of this case, the Fund accepted that it had received the first completed Application for accident benefits and accepted that it was the first tier priority insurer under Regulation 283/95. Having done that, it left The Personal with no choice other than to be the second tier insurer. The Personal, having received the Notice of Priority Dispute on November 19, would have had no opportunity nor any reason to assume that it had received the first completed Application and act as a first tier insurer, as the Fund had accepted that role.

Therefore, I find that the Fund through its conduct is the first tier insurer. I find that the Personal was not subject to the 90 day deadline to dispute priority.

Primum is therefore the priority insurer responsible for indemnifying the Fund for payment of the claimant's benefits to date, and continue with the ongoing handling of the claim.

I do not find that The Personal deflected the claim and accordingly make no ruling with respect to the Funds adjusting fees. With respect to the arbitration costs, as The Personal was entirely successful in this matter, I order that the costs of the arbitration and the legal costs be payable by Primmum. If a dispute arises with respect to the amount of the legal costs, counsel can contact me so we can schedule a further pre-hearing.

#### **AWARD**

1. The Fund by its conduct was first insurer to receive a completed Application for Accident Benefits.
2. The Personal is not subject to the 90 day deadline to dispute priority under Regulation 283/95.
3. Primmum is responsible for indemnifying the Fund for the payment of the claimant's benefits to date.
4. Primmum is responsible for the ongoing handling of the claimant's accident benefit file.
5. Primmum shall pay to The Personal its legal costs with respect to this arbitration, and Primmum will pay the arbitration costs.

DATED THIS 5 day of February, 2024 at Toronto.



---

Arbitrator Philippa G. Samworth  
**DUTTON BROCK LLP**  
Barristers and Solicitors  
1700 – 438 University Avenue  
TORONTO ON M5G 2L9