IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 s. 268 and Ontario Regulation 283/95 thereunder
AND IN THE MATTER of the *Arbitration Act*, 1991, S.O. 1991 c.17
AND IN THE MATTER of an Arbitration

BETWEEN

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

And

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondent

AWARD WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL APPEARING

Daniel Strigberger, counsel for the Applicant, The Dominion of Canada General Insurance Company (hereinafter called Dominion).

Mark A. MacNeil, counsel for the Respondent, the Motor Vehicle Accident Claims Fund (hereinafter called MVACF).

BACKGROUND

This matter comes before me by way of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990 c. I.8 as amended and Ontario Regulation 283/95. While the broader issue is one of priority, a preliminary issue arose which the parties agree should be heard before any determination of the actual priority dispute under s. 268 of the *Insurance Act*.

This case arises out of an accident that occurred on July 9, 2017. The claimant was racing a motocross bike in a competition when he was involved in an accident. He sustained significant injuries. He applied to Dominion for statutory accident benefits. Dominion denied the claim on the grounds that the incident did not involve an accident as defined under the Statutory Accident Benefits Schedule and also on the grounds that the claimant's policy with Dominion was comprehensive only and did not provide coverage for statutory accident benefits.

Litigation ensued between the claimant and Dominion proceeding through the Licence Appeal Tribunal and ultimately up for leave to appeal to the Supreme Court of Canada. The net result was that the incident was found to be an accident in accordance with the Statutory Accident Benefits Schedule and Dominion was obliged to pay accident benefits to the claimant. The AB claim has subsequently settled.

Dominion now claims that their policy did not provide coverage to the claimant as he had previously reduced the coverages under the Dominion policy to comprehensive coverage only. Therefore, Dominion takes the position, there being no other available insurance to the claimant, that MVACF is the priority insurer and responsible for paying the accident benefits to the claimant.

While MVACF disputes the position of Dominion, it raises a question here as to whether or not Dominion can dispute its obligation to pay benefits against MVACF on the basis that it did not provide notice of the priority dispute within 90 days after Dominion received the claimant's OCF-1 contrary to s. 3 of Ontario Regulation 283/95.

It is this notice question that forms the preliminary issue before me.

PROCEEDINGS

This matter proceeded by way of a written hearing including written submissions, case law and various documents including the decisions of the Licence Appeal Tribunal and various courts on the issue of "the accident", the Dominion certificate of automobile insurance issued to the claimant, a copy of the OCF-1 dated August 16, 2017, the denial letter sent by Dominion to the claimant on August 31, 2017 and finally the notice letter sent by counsel for Dominion to MVACF on March 18, 2021. Counsel also provided oral submissions.

FACTS

On July 9, 2017 the claimant was injured while racing a dirt bike at the Rockstar Energy Motocross Nationals at Gopher Dunes in Courtland, Ontario.

The claimant was injured when he lost control of his dirt bike during the race. The claimant completed an OCF-1 dated August 16, 2017 which he submitted to Dominion. Part 4 of the OCF-1 indicates he was claiming under his own policy number APP 1816848.

A certificate of automobile insurance indicates that policy number had an effective date of March 1, 2017 and insured a 2001 Ford F150 SuperCrew.

According to Dominion there is no evidence that the claimant was insured under any other policy, he was not a listed driver under any policy, was not a dependant of anyone with an automobile policy nor a spouse. Nor is there any evidence he had regular use of any other vehicle.

By letter dated August 31, 2017 Dominion wrote to the claimant and advised that his accident benefit claim had been denied for the following reasons:

> "1. At the time of the accident, your automobile coverage with Dominion was reduced to comprehensive coverage only, as per your request of September 12, 2016. Accordingly, there was no coverage for accident

> benefits available under your policy."

The second reason given was:

> "Further, at the time of the accident you were riding an uninsured dirt bike owned by you and competing in a closed course dirt bike competition organized and hosted by the Canadian Motorsport Racing Corp. … The dirt bike you were riding in the competition does not satisfy the definition of 'automobile'."

The claimant retained counsel and a LAT application was commenced. Adjudicator Karina Kowal in a decision dated October 17, 2018 concluded that the incident was not an accident as defined under the Statutory Accident Benefits Schedule.

The claimant filed for a reconsideration. Associate Chair Jonathan Batty allowed the reconsideration in a decision dated September 17, 2019.

Dominion appealed to the Divisional Court. Pursuant to s. 25 of the *Statutory Powers Procedure Act*, once Dominion appealed the reconsideration, the decision was stayed.

The Divisional Court appeal was heard on October 20, 2020 and the decision was rendered on February 26, 2021. The Divisional Court held that the dirt bike was "an automobile" during the race. This dispute ultimately seemed to revolve around whether or not the race was "sponsored by a motorcycle association".

Once the Divisional Court's decision was released then the stay was lifted and on March 18, 2021 Dominion's lawyers sent MVACF a letter setting out the history of the litigation and taking the position that with the release of the Divisional Court's decision that Dominion was now responsible for paying statutory accident benefits under s. 268 of the *Insurance Act*.

The letter confirms to MVACF that:

1. The claimant was not a named insured under any other policy other than Dominion;
2. Was not the spouse of a named insured;
3. Was not the dependant of a named insured or spouse;
4. Was not a listed driver;
5. Was not a regular user of any company vehicle; and
6. The dirt bike he was driving was not insured under an auto policy.

The letter further advised with respect to the coverage being reduced to comprehensive and that therefore Dominion did not provide coverage for statutory accident benefits leaving MVACF as the priority insurer.

The final paragraph of the letter was:

> "Please consider this letter as notice that Travelers intends on disputing priority against the Fund. We will be sending a priority dispute notice separately."

On March 22, 2021 counsel for Dominion sent a further letter to MVACF taking the position that the letter was written notice under Regulation 283/95 that the Fund is required to pay the claimant's benefits under s. 268 of the *Insurance Act*.

Dominion was still pursuing the issue of whether or not the incident constituted an accident under the Statutory Accident Benefits Schedule.

Dominion was granted leave to appeal to the Court of Appeal. The matter was heard in the Court of Appeal and they rendered a decision on December 21, 2022 upholding the Divisional Court decision.

Dominion then sought leave to appeal to the Supreme Court of Canada and that was denied on June 15, 2023.

In the meantime this priority dispute had been commenced.

SUBMISSIONS OF THE PARTIES

Dominion

Dominion takes the position that it was under no obligation to provide notice to any other insurer and/or MVACF with respect to this potential priority dispute until the Divisional Court ruled that the claimant was involved in an accident thus lifting the stay on the LAT reconsideration decision.

Dominion submits that their notice letter of March 18 and March 22, 2021 is within 90 days of the Divisional Court's decision released on February 26, 2021 and therefore the requirements of s. 3 (1) of Regulation 283/95 have been met.

Dominion submits that the priority regime set out under s. 268 of the *Insurance Act* is not accessible or activated unless there is accident benefits coverage under more than one policy and unless the insurer pursuing priority is paying accident benefits.

Dominion submits that prior to the Divisional Court decision it was doing neither. Dominion was actively taking the position that there was no coverage for accident benefits under their policy and further were paying no accident benefits so s. 268 was not applicable and accordingly Regulation 283/95 was not activated. The notice requirement was only triggered once Dominion was obliged to start paying benefits when the Divisional Court decision was rendered.

Dominion submits that its denial of benefits to the claimant was not policy-specific in that it was not a denial based on policy coverage but was rather SABS-specific in that it was a denial that the claimant did not pass the coverage threshold under the SABS as he had not been involved in an

accident. Therefore, there was no dispute initially as to which insurer was obliged to pay any benefits as there was no determination that the claimant was entitled to any benefits based on the definition of accident.

Dominion relies on the decision of *Economical v. Intact*, 2021 ONSC 3249, a decision of Justice Chalmers. Dominion points to Justice Chalmers's comments that it is a threshold requirement for an insurer to commence a priority dispute that they must first be paying benefits.

Dominion relies on Justice Chalmers where he states (see paragraph 41):

> "The rationale behind the 'pay first and dispute priority later' policy is to promote the timely delivery of accident benefits: see Chubb paragraph 40. To permit Economical to pursue a priority dispute without making any payment is inconsistent with this policy. Also, if no payment is made by Economical, there is nothing for Intact to reimburse on a priority dispute."

Dominion submits that therefore for the priority dispute scheme under s. 268(2) to (5.2) to be activated there must be two policies providing statutory accident benefits otherwise the priority scheme is not accessible.

MVACF

MVACF's position is that Dominion has failed to provide notices required under s. 3 of Regulation 283/95. MVACF submits that it does not matter on what basis the first insurer that receives the OCF-1 denies entitlement to the benefits but that once it receives the OCF-1 it is obligated within the next 90 days (subject to any saving provisions) to put any other insurer on notice that they believe may rank in priority to the first insurer. In other words, MVACF's position is that Dominion had 90 days from its receipt of the OCF-1 on August 16, 2017 to put MVACF on notice. Therefore, the letter of March 18, 2021 is well beyond the 90 days required under s. 3.(1).

MVACF also submits that it has a special position in terms of the priority rules. While MVACF acknowledges it is an insurer it points out that it is "the funder of last resort". MVACF makes reference to the case of *Ontario (Finance) v. Echelon General Insurance Company*, 2019 ONCA 629. Justice Lauwers of the Court of Appeal commented on MVACF's role in the overall priority dispute scheme. He noted:

> "Another purpose of the scheme is to ensure that the Fund is the funder of last resort, liable to pay statutory accident benefits with public money only if there is no private insurance available for that purpose. The expenditure of public funds should be guarded carefully and entitlement clearly established."

MVACF also points to the following comments by Justice Lauwers:

> "Therefore, much care and vigilance is required before the court can be satisfied

> that the conditions of the statute have been fulfilled, or before dispensing with the necessity for complying with any of the statutory requirements in a particular case. Every provision of the Act designed for protection of the Fund should be given full consideration and effect."

MVACF points to the wording of s. 3(1) of Regulation 283/95. The Regulation provides that no insurer can dispute its obligation to pay benefits under s. 268 of the Act unless it gives written notice within 90 days of the receipt of a completed application for benefits. MVACF submits that this section does not suggest that the 90 days only runs when that insurer has been found to be required to pay statutory accident benefits. Rather, it is triggered simply by the receipt of the OCF-1.

In keeping with the comments of Justice Lauwers, the Fund also relies on s. 3.1(2). That section provides that an insurer, before giving notice to the Fund must:

> "(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and
>
> (b) provide particulars to the Fund of the investigation and the results of the investigation."

MVACF describes this as placing an additional burden on other insurers before putting the Fund on notice. In the context of this arbitration, MVACF's position is not only did Dominion not comply with their obligations with respect to the 90-day issue, but as well they did not comply with their obligations under s. 3.1 (2) and complete a reasonable investigation to determine what other policies may be available and to provide particulars of that investigation.

MVACF points to the communications from Dominion's counsel and the letter of March 22, 2021 which provides no details as to what efforts Dominion made to investigate the circumstances of the incident and to confirm that there were no other insurers who may respond. Specifically, MVACF suggests that there is no evidence that Dominion asked for any video footage of the race, took steps to identify other participants in the race, interview any witnesses and determine whether they were any other involved vehicles.

With respect to Dominion's argument that the denial of the claim for accident benefits on the receipt of the initial OCF-1 was SABS-based as opposed to policy-based, MVACF has two positions. The first position is that that does not matter. Once the OCF-1 is received it triggers the obligation to put any other insurer on notice irrespective of the basis for the denial.

The second position of MVACF is that Dominion not only denied the claim on the basis of the SABS defence (whether it was an accident as defined under the Statutory Accident Benefits Schedule) but in addition and in fact the first reason given in the denial letter of August 31, 2017 was a denial based on that the automobile coverage with Dominion had been reduced to comprehensive coverage prior to the accident specifically on September 12, 2016. Therefore,

Dominion cannot now be arguing that just because they chose to pursue the accident issue that they did not also deny it on a policy basis which based on their own argument would therefore have triggered the requirement to provide notice.

MVACF also relies on the decision of Justice Chalmers in *Economical v. Intact* (*supra*). MVACF submits that this is not a case that would support an argument that if you are denying the claim on the basis of it not being an accident, that you have not triggered the obligation to give notice under s. 3 (1). MVACF points to Justice Chalmers's comments where he says (see paragraph 40):

> "Economical argues section 3(1) of that Regulation imposes strict time limits on an insurer to put another insurer on notice of a priority dispute, and it may be necessary for an insurer to provide notice of a priority dispute before it makes a payment to the claimant. Economical argues that paying a claim is not a prerequisite to providing notice pursuant to section 2.1(6) of disputes between insurers. I acknowledge that there may be circumstances in which notice must be provided before the insurer makes a payment. Although a payment may not be a prerequisite to providing notice, it is my view that the insurer cannot proceed to an arbitration hearing to dispute priority unless it first makes a payment to the claimant."

MVACF argues that Justice Chalmers distinguished between the notice provisions and commencing an arbitration in terms of having the right to proceed to dispute priority in accordance with s. 268 of the *Insurance Act*. MVACF suggests that the fact that Dominion chose not to pay a benefit to its insured does not absolve them of the mandatory 90-day notice requirements of Regulation 283/95.

MVACF seeks an order dismissing the arbitration on the grounds that Dominion failed to give the required notice and therefore they remain obliged to pay the statutory accident benefits to the claimant.

ANALYSIS AND DECISION

For reasons that will be outlined below, I agree with MVACF's position in this matter.

The applicable legislation in this case is s. 3 of Ontario Regulation 283/95. It sets out the notice obligations on an insurer who wishes to dispute priority in accordance with s. 268 of the *Insurance Act*. Section 3(1) is reproduced below:

> "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."

In this case Dominion insured the claimant's 2001 Ford F150 SuperCrew. There was no dispute that the policy was in full force and effect although there is a dispute as to whether it offered

accident benefits and whether the policy had been effectively reduced to comprehensive coverage only prior to the date of loss on July 9, 2017.

Dominion received the OCF-1 from the claimant identifying its policy and claiming statutory accident benefits on August 31, 2017.

Dominion chose to deny the claim on two grounds. Firstly that the incident did not involve an accident as defined under the Statutory Accident Benefits Schedule due to the nature of the incident involving a dirt bike incident during a race. Secondly it chose to deny the claim on the grounds that it was comprehensive coverage only.

Dominion chose not to put MVACF on notice until March 18, 2021 when it had lost the argument at the Divisional Court with respect to whether or not the incident was an accident under the SABS. Dominion argues that its obligation to put MVACF on notice was only triggered at that time. At that point Dominion submits due to there being no stay of the original reconsideration order from the LAT, Dominion became obligated to commence adjusting and paying the claimant statutory accident benefits irrespective of their argument with respect to whether or not there was accident benefit coverage on the policy at all.

Dominion argues that only once it commenced actually paying accident benefits to the claimant did its right to dispute priority under s. 268 crystallize and this advocate its obligations under section 3 (1) of the regulation. I disagree with Dominion's position.

I do not agree with the interpretation that Dominion offers of the reasons of Justice Chalmers in *Economical v. Intact*. I find that there is a difference between the notice provisions under Regulation 283/95 and the right to proceed to a priority dispute arbitration under that Regulation. Indeed, Justice Chalmers identifies that difference where he notes that there may be circumstances in which notice may be provided before the first insurer may make payment. He goes on to say that though a payment may not be a prerequisite to providing notice, a payment is a prerequisite to proceeding to an actual arbitration hearing. Justice Chalmers clearly distinguishes between proceeding to a hearing where no benefits are being paid as opposed to the notice requirements under section 3 (1).

The purpose of the 90-day notice requirement after the receipt of the OCF-1 is to give other insurers an early opportunity to make a decision about coverage, an early opportunity to investigate the claim, speak to their insured and determine whether this is a case where they wish to take over priority or dispute priority. If they choose to take over priority, this section speaks to being given an opportunity to do so at an early stage so that they can adjust and handle the claim in accordance with their practices and protocols as opposed to another insurer's. If an insurer is not paying benefits, they will still be adjusting the file and possibly arranging surveillance, insurer's exams and again this early notice is designed to allow an insurer who chooses to accept priority to take over the file quickly and handle these adjusting issues in accordance with their procedures.

There is nothing in s. 3 (1) of the Regulation that suggests the 90-day notice is not triggered by the mere receipt of the OCF-1 and that it is in essence put on hold while an insurer makes decisions vis-à-vis paying accident benefits to a claimant.

I completely agree with Justice Chalmers that the interpretation of Regulation 283/95 in conjunction with 268 of the *Insurance Act* requires that one insurer be paying statutory accident benefits in order for there to be a priority dispute that can proceed to a hearing.

As I found in the case of *TD General Insurance Company v. Wawanesa Insurance Company et al.* (decision Philippa Samworth arbitrator, September 29, 2021) there are ways of dealing with circumstances where an insurer wishes to preserve their right to dispute priority but does not have a right to proceed to arbitration as there have been no payments made to the insured. In that case, while it was primarily about whether the saving provisions set out in s. 3(2) would apply to permit TD to pursue the claim for priority, it was complicated by the fact that TD was now taking an off-coverage position with the two claimants alleging they had been grossly dishonest to the point that their claims were fraudulent and thus they were not receiving nor had they been paid any statutory accident benefits.

I concluded in that case that while the arbitration had to be dismissed as there was no dispute under s. 268 of the *Insurance Act* as no payments had been made (and no claim made by the two claimants at the Licence Appeal Tribunal) that it was without prejudice to the right of TD to reinitiate the priority dispute before me in the event that a claim was initiated by either of the claimants and there was a conclusion that they did have a right to pursue their claims on the basis that there had been an accident and that it was not a fraudulent claim. The concern of course was that if I dismissed the arbitration outright they would have to reinitiate the arbitration process and it might be argued that they were out of time in terms of the limitation. Arbitrators are provided with significant tools to handle the disputes before them under the *Arbitrations Act*, the *Statutory Powers Procedure Act* and Regulation 283/95.

I also find that it would not have made any difference to my conclusion had Dominion only denied the claimant's application on the grounds that the incident did not involve an accident under the Statutory Accident Benefits Schedule. I find that a denial in both circumstances still triggers the notice requirements under s. 3(1) that any other insurer should be put on notice within 90 days of the receipt of the OCF-1.

There is some considerable time period before an insurer is required to commence an arbitration under the Regulation and the notice. The flexibility of the arbitration process itself would allow sufficient time for the insurer that receives the first OCF-1 to pursue whatever arguments it may have against the insured and determine if any accident benefits are payable. An arbitrator is given some considerable leeway to adjourn arbitrations and extend the two-year time period to complete the arbitration where there are compelling reasons to do so. In a case such as this, there would have been compelling reasons.

With respect to the second issue raised by MVACf and whether Dominion complied with its

obligations under s. 3.1, I conclude that Dominion did make a reasonable investigation to determine if other insurers were liable to pay in priority and that they provided sufficient particulars of that to the Fund when they gave notice in the letter dated March 18, 2021. Considering the nature of the accident, I conclude that the final paragraph of counsel's letter to MVACF of March 18, 2021 provided specific particulars in those areas to satisfy s. 3.1 of the Regulation.

ORDER

I therefore order that this arbitration be dismissed on the grounds that Dominion did not provide the required notice to MVACF within 90 days of the receipt of the Application for Accident Benefits and accordingly Dominion has no right to pursue this priority dispute under s. 268 of the *Insurance Act* and remains the insurer obligated to pay statutory accident benefits to the claimant.

COSTS

As MVACF has been completely successful in this matter, Dominion is responsible for paying the costs and any expenses relating to the arbitration. Dominion will also pay reasonable costs of MVACF including legal fees and disbursements. If the parties cannot agree on that, they may contact me and we will schedule a costs pre-hearing

DATED THIS 23rd day of May, 2025 at Toronto.

_____

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