IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, s. 268, and Regulation 283/95 thereunder;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17;

AND IN THE MATTER of an Arbitration

B E T W E E N :

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

-and-

LOMBARD INSURANCE COMPANY

Respondent

AWARD

Introduction

The parties have brought this arbitration before me pursuant to the provisions of the *Arbitration Act, 1991*, and the provisions of the *Insurance Act.*

Both the Applicant and the Respondent are insurance companies carrying on business in the province of Ontario. In respect to the dispute between the parties, it is relevant that these insurers carry on the business of automobile insurance. There is a dispute between the insurers as to which insurer is obliged to pay statutory accident benefits in relation to an injured claimant, Patrice B. There is an issue as to whether or not Patrice B. is a dependant of his parents, Marcel and Chantal R. Marcel and Chantal R. are named insureds of Dominion. There is also an issue as to whether or not a vehicle insured by Lombard was made available for the regular use of Patrice B. by an entity such as to deem Patrice B. to be a named insured under the Lombard policy.

There is a preliminary issue of importance, which is the subject of this decision. The question arises as to whether or not the Applicant gave written notice to the Respondent within 90 days of receipt of a completed Application for Accident Benefits.

The parties submitted various documents to me for the purpose of resolving this dispute, and we heard testimony from several witnesses *viva voce* and in affidavit form.

Legal Framework

The dispute between the insurers in this case arises because of their respective potential obligations to pay accident benefits with respect to the injuries sustained by Patrice B. Those statutory accident benefits are part of an extensive scheme of no-fault, first party, benefits that are available to persons who are injured in motor vehicle accidents that occur in Ontario. The *Insurance Act* provisions deem all automobile insurance policies in the province of Ontario to

include elaborate statutory accident benefits. Ontario Regulation 403/96 under the *Insurance Act* describes the particulars of those benefits.

For the purpose of making the no-fault accident benefits widely available to people who are injured in car accidents, the regulations broadly define the individuals who may be entitled to benefits from any one insurer. An insurer has obligations with respect to accident benefits to its named insured, a spouse of a named insured, a dependant of a named insured, or to an occupant of a vehicle that is insured, or a person involved in an accident with a vehicle that is insured by the insurer. This very broad approach to making available benefits necessarily means that any individual injured in a car accident might have the status of being an insured person under more than one contract of insurance if the accident happens in Ontario.

Under section 268 of the *Insurance Act*, the statute sets out a priority of the obligations of the involved insurers. The priority scheme is intended to sort out the various obligations so that insurers can have some certainty about their responsibilities and injured accident victims can be clear about which insurer should be approached for the necessary benefits.

The Legislature is mindful of the fact that insurers can have disputes as to which insurer has highest ranking priority for the payment of benefits. Accordingly, the Legislature has promulgated a regulation that governs how these disputes should be resolved. Ontario Regulation 283/95, entitled "Disputes Between Insurers", sets out the procedure to be followed. Included in that Regulation is the obligation to resolve such disputes through an arbitration under the *Arbitration Act, 1991*. That is the course that the parties have taken.

The preliminary issue arises as a result of section 3 of the Regulation which provides as follows:

> **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).
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> (2) An insurer may give notice after the 90-day period if,
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> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
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> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).
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> (3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

Lombard raises the preliminary objection that Dominion has not given notice and compliance with section 3 of Ontario Regulation 283/95 and, therefore, Dominion is not entitled to dispute its obligation to pay benefits under section 268 of the *Act*. Hence, if Dominion has not provided the notice as required, the other issues about dependency or about the vehicle being available for regular use to Patrice R., do not arise for resolution.

The Issue

Pursuant to the Arbitration Agreement, I am asked to answer the following question: did the Applicant (Dominion) give written notice to the Respondent (Lombard) within 90 days of receipt of a completed Application for Accident Benefits?

The Record

1. The record in this matter consists of an Arbitration Agreement dated July 27, 2007, which was marked as Exhibit 1 to the proceedings;
2. an Applicant's Document Brief, which was marked as Exhibit 2;
3. an Affidavit of Jackie Lyons, which was marked as Exhibit 3 to the proceedings;
4. an Application for Accident Benefits apparently dated May 22, 2005, which was marked as Exhibit 4 to the proceedings;
5. an Application for Accident Benefits dated July 5, 2005, which was marked as Exhibit 5 to the proceedings;
6. an Affidavit of Anita Heer, which was marked as Exhibit 6 to the proceedings;
7. an Application for Expenses dated June 6, 2005, which was marked as Exhibit 7 to the proceedings;
8. an Explanation of Benefits Payable by Insurance Company dated July 6, 2005, which was marked as Exhibit 8 to the proceedings;
9. an original signed Statement marked as Exhibit 10;
10. an OCF-2 claim form dated May 31, 2005, marked as Exhibit 11;
11. an OCF-5 dated May 24, 2005, marked as Exhibit 12;
12. an OCF-23 dated July 8, 2005, marked as Exhibit 13;
13. an OCF-18 Treatment Plan with a date of June 20, 2005, which was marked as Exhibit 14;
14. an OCF-18 with a date of June 21, 2005, which was marked as Exhibit 15.

Factual Background

The underlying claims in this matter arise out of a motor vehicle accident which occurred on May 7, 2005. Evidently, Patrice R. was injured in that motor vehicle accident. Ultimately, he came to make an Application for Accident Benefits to the Applicant, Dominion. Dominion, purported to give notice to Lombard of a dispute pursuant to section 3 of Ontario Regulation 283/95. Lombard denies receipt of any such notice within the time limits prescribed by the Regulation.

The question which is submitted to me at this point in the proceedings is to determine whether or not the notice provisions of the Regulation have been met by Dominion.

There are two aspects to this, when did Dominion receive a completed application, and what notice was provided to Lombard by Dominion?

The Evidence

I was provided with a variety of documents to form part of the record in this matter. Included in the documentation are the printouts of the Dominion file notes with respect to this claim. I was also provided with affidavit material which has been marked as an exhibit. Witnesses were called to give *viva voce* testimony with respect to the transactions involved in this case.

A key witness in this matter was Nancy Bryan. She is a former adjuster from Dominion of Canada General Insurance Company. She had worked at that company for a number of years and had previous experience at another company. She ceased working for Dominion of Canada in October of 2006.

She gave her testimony by referring to various notes which can be found at Tab 2 of Exhibit 2 of the record. These represent the electronic notes from the Dominion file. In my view, this witness had no independent recollection of the transactions involved in this case. Her testimony was simply to recite and interpret her own notes, and to speak hypothetically about what her practice would have been in various circumstances.

The key transaction involved in this case is to identify whether or not a Notice of Dispute was given to Lombard Insurance Company at any time prior to December 19, 2005, when counsel for Dominion wrote to Lombard. It appears that a Notice to Applicant of Dispute Between Insurers was found in the file materials at some point. It was provided to Dominion's legal counsel. Dominion's legal counsel provided it to Lombard. No one admits to having the original document. The document is dated September 19, 2005, and is signed by Nancy Bryan.

Importantly, this is a form prescribed by the Regulation for the purpose of giving notice to the claimant, Patrice B., with respect to his possible participation in a dispute between insurers.

The form is not expressly designed for the purpose of giving notice to other insurers but is adequate for that purpose.

Under cross-examination Ms. Bryan admitted that she had no recollection of specifically sending out this notice. She did not create any covering letter to enclose this notice in order to send it to Lombard or anyone else.

It is perhaps telling that in her testimony Ms. Bryan was clearly of the view that the 90-day time limit for giving notification to Lombard would commence running once she had knowledge of Lombard. In her view, she put Lombard on notice as soon as she found out about them, "so it wasn't an issue".

But, in fact, that is not correct. The documentation on the file shows that Ms. Bryan was advised of Lombard's role in the matter in a telephone call of June 30, 2005. No notice was created or sent at that point.

With respect to the September 19 form, the file notes made by Ms. Bryan do not show any record of her sending a notice to Lombard on September 16, 2005, or September 19, 2005, or September 20, 2005. On each of these three dates, Ms. Bryan has made a note with respect to collecting insurance information with respect to Lombard.

There is a note dated November 7 in which Ms. Bryan has called Lombard and spoken to someone there who indicates that there is no report of a claim. Ms. Bryan's note in the file indicates that she explained to the person on the phone that she had sent a Notice of Dispute on September 19, 2005. The Lombard representative indicated that there was nothing in Lombard's system.

The sequence of events here may be significant. Although the file notes indicate that Ms. Bryan obtained a policy number for Lombard's policy on September 20, 2005, there is no policy number referenced in the notice document. In my view, this gives credence to the suggestion that the Notice of Dispute was, in fact, created on its stated date, September 19, 2005.

However, it is less clear why Ms. Bryan was following up with telephone calls to Lombard on September 20 if she had already sent out the notice on September 19. Logic suggests that the follow-up call made by Ms. Bryan on September 20 was to obtain a policy number in order to add that into the notice, or to put it on a covering letter, or to somehow use that information to enhance the effectiveness of the notice which she was intending to give to Lombard. There really does not seem to have been any point to the phone call made September 20, 2005, to Lombard if the notice to Lombard had already been dispatched.

The evidence of the phone call to Lombard on September 20, 2005, inquiring about a policy number, does tend to indicate that Ms. Bryan's inquiries in support of giving those to Lombard were not yet complete as of September 19.

However, I note that Ms. Bryan had called Lombard on September 19 and had left a voicemail message asking if they have a commercial auto policy applicable to this loss. Therefore, it is theoretically possible that the call that Nancy Bryan made to Lombard on the next day, September 20, 2005, was in response to a voicemail message from Lombard responding to her earlier message. However, I note that elsewhere in the record Ms. Bryan has made a note when she was returning calls from other people or when the other people were calling her. That kind of note is not applicable to this September 20, 2005, communication with Lombard. In my view, this evidence is strongly suggestive of the fact that the Notice of Dispute Between Insurers was not dispatched on September 19, 2005.

Ms. Bryan also testified with respect to the issue of when a completed application was received by Dominion. It is clear that there were a number of transactions back and forth between Dominion and the claimant in the late spring of 2005. Indeed, Dominion did return various documents to the claimant asking for more substantial completion. Based on the file notes of Vivian Legge dated July 26, 2005, a completed application was received by Dominion by at least that date. In my review of the exhibits, it seems clear that a completed application was probably received by Dominion on July 8, 2005.

The evidence indicates that there were various other claims documents submitted prior to July of 2005, including an invoice from a physician which was paid by Dominion.

There was much discussion at the arbitration hearing about what constitutes a completed application. There is case law on this issue suggesting that a completed application is received

when adequate information is received by the insurer for the purpose of processing the claim. That case law emanates from various rules determining when an insurer must respond to a claimant who has submitted a claim. I have doubt whether the same analysis logically applies when one is trying to determine the commencement of the 90-day notice period with respect to other insurers. In my view, different policy goals are being served when considering the issue of "completed application" for the purpose of commencement of the 90-day notice period. While an insurer may receive adequate information to allow response to a claimant's claim, that same information may not be sufficiently complete as to impose upon the insurer the commencement of the notice period for involving another insurer in a priority dispute. In my view, completely different policy considerations apply.

Of course, if the insurer has, in fact, received an Application for Benefits which is complete in all material respects, the inquiry is over. It is only in that subset of cases where the insurer receives partial information that we have to consider whether or not that partial information constitutes a "complete application" for any particular purpose under the SABS or under the other regulations. In my view, when we are examining the "completed application" issue based on partial information, for the purpose of the notice under Ontario Regulation 283/95, it is appropriate to give wide latitude to the insurer receiving the application materials. Information which might be sufficient to cause the insurer to give a response to the claimant is not the same information that would be sufficient to cause an insurer to instigate dispute proceedings against another insurance company.

Evidence of Jackie Lyons

Jackie Lyons offered testimony by way of an affidavit and was cross-examined briefly at the hearing. Her affidavit was marked as Exhibit 3 to these proceedings. She briefly has described the process in Dominion with respect to mailroom operations. She deposed that claims examiners could go to two mail bins in the mailroom to deposit outgoing mail in one of the two bins. One bin was for regular Canada Post mail, and the second bin was for insurance courier services mail. The insurance courier service mail is a reciprocal courier service utilized by major insurers in South Central Ontario. In either bin material received prior to 3:00 p.m. any day would be expected to be dispatched from the premises on that day.

Under cross-examination Ms. Lyons admitted that she had no way of knowing what Bryan might have sent out on this claim on any day. For whatever it is worth, Ms. Lyons offered the view that she personally would have sent a covering letter with a notice such as the Notice of Dispute in this matter to make sure that nothing goes astray. Ms. Bryan did not send any such covering letter.

Evidence of Anita Heer

Anita Heer testified by way of affidavit which was marked as Exhibit 6 in this matter and was cross-examined at the hearing. She gave evidence with respect to Lombard's process and procedures with respect to receipt of mail.

She testified that Lombard would have been easily able to match the incoming Notice of Dispute with a policy based on the name of the insured, which was in the notice. They did not need the policy number in order to establish a file. Accordingly, one would conclude that if the Notice of Dispute had been received by Lombard, it would have resulted in a file being opened, and no file was in fact opened until December of 2005.

As an alternative, if the mailroom could not identify the incoming correspondence as relating to some policyholder of Lombard, it would have been returned to the sender with a covering letter. No such return letter has been found in Dominion's file with respect to this matter.

Evidence of Joey Chacko

Mr. Chacko is a supervisor at Lombard responsible for the mail operations and courier and storage operations. He testified with respect to the handling of mail that comes in to Lombard. He gave evidence that he had considerable experience personally in dealing with these matters and that the staff employed by Lombard for this purpose had considerable experience as well.

He explained the procedure followed by Lombard with respect to incoming mail and indicates that mail addressed to a designated person would go to that person. Otherwise, documents which were identified for a particular department would go to that department. In this instance, he readily acknowledged that the Notice of Dispute Between Insurers was a claims document that would have been forwarded to the claims department.

Evidence of Tina DaSilva

Tina DaSilva is a clerical supervisor in the Lombard claims department. She has 26 years of experience with Lombard and three years in that current position.

Her function was a clerical function in the claims department. She described for us the mail desk operations in the claims department.

She explained the process that would be involved to relate an incoming piece of mail to an existing policyholder and the ability to search out a policyholder by name.

Analysis and Findings

This is clearly a case where a Notice to Dispute document exists, but there is no conclusive evidence about how that document was handled, dispatched, received, etc. At its highest, the evidence of Nancy Bryan would suggest that the document would have been put in the mail by her on September 19, 2005. This is a transaction which is not supported by a contemporaneous note in the file materials. There is no covering letter to document transmittal of this document on September 19, 2005. The telephone call made by Nancy Bryan on September 20, 2005, to Lombard would suggest that she did not have, on September 19, the information which she wanted to have in order to send some kind of a communication to Lombard.

The evidence from Nancy Bryan suggested that she thought she had 90 days from the time at which she became aware of Lombard's involvement in order to give that notice. It is unclear what she may have thought was the pending time period. She indicated that she thought she was sending the notice as soon as she knew about Lombard so that it would not be an issue. File notes would tend to indicate that she actually had some knowledge of Lombard well before that and did not give a notice at that earlier time, contrary to her assertion of what her practice would have been.

Of course, Dominion is unable to offer any evidence of the document actually being received by Lombard at any time prior to December of 2005.

The evidence offered by Lombard's employees with respect to Lombard's procedures in handling the incoming mail was impressive. I thought that these employees described a well-organized mailroom operation with clearly defined processes, and the people involved appeared to me to be knowledgeable and conscientious. While I would not presume that any mailroom operation in a busy organization runs without ever making a mistake, I am prepared to accept that on the balance of probabilities, an incoming Notice of Dispute received by Lombard would either generate the creation of a file or a return letter to the sender. Neither of these events took place, and I am unable to conclude that Lombard actually received the Notice of Dispute prior to December of 2005. Indeed, I conclude that they did not receive the Notice of Dispute prior to December of 2005.

As I have found that the completed application was received by Dominion no later than July 27, 2005, and probably somewhat earlier, I conclude that Dominion has not given written notice to Lombard within 90 days of receipt of a completed Application for Accident Benefits in this case. Accordingly, pursuant to subsection 3(1) of Ontario Regulation 283/95, Dominion is not entitled to dispute its obligation to pay benefits under section 268 of the *Insurance Act*.

A saving provision operates in subsection 2 of section 3. Counsel candidly acknowledged that this saving provision is inapplicable in this case, and I wholeheartedly agree. Indeed, the record indicates that Dominion had the same information on June 30, 2005, as they had on September 19, 2005. They had the name of the insured, the identity of the insurer and the particulars of the accident. These are the same particulars which are found in the Notice of Dispute Between Insurers.

Conclusion

The question posed was:

> Question: did the Applicant give written notice to the Respondent within 90 days of receipt of a completed Application for Accident Benefits?
>
> Answer: no.

Accordingly, the parties have agreed that the arbitration proceeding will be dismissed with costs and that the Applicant will maintain carriage of the claimant's accident benefits file. In accordance with paragraph 7 of the Arbitration Agreement, Dominion will be responsible to pay to Lombard, Lombard's costs of this arbitration as agreed upon or as assessed by me. If counsel cannot agree on this and wish to have the costs assessed by me, I would ask that you notify me within the next 15 days.

In accordance with paragraph 6 of the Arbitration Agreement, I will submit my account with respect to the arbitration proceedings to the Applicant via their counsel. If the parties require anything further or wish to bring anything to my attention, I will be pleased to hear from them.

Dated at Toronto this 13 day of November.

LEE SAMIS
Arbitrator