

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,  
and Ontario Regulation 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MARKEL INSURANCE COMPANY

Applicant

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY  
and LOMBARD CANADA LTD.

Respondents

## **AWARD**

### **Counsel Appearing**

George Wray for the Applicant, Markel Insurance Company

Mark Donaldson for the Respondent, Co-operators General Insurance Company

Leilah Edroos for the Respondent, Lombard Canada Ltd.

### **Introduction**

This matter comes before me as a result of a dispute between insurers with respect to the obligation to make payment for statutory accident benefits. The parties are automobile insurers carrying on business in Ontario.

As a result of an accident that occurred at January 19, 2006, Ronald B.<sup>1</sup> sustained an impairment giving rise to claims for statutory accident benefits.

Markel has responded to those claims and has initiated these proceedings against Co-operators and Lombard in accordance with the *Insurance Act* and O. Reg. 283/95.

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<sup>1</sup> In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

The substantial issue to be resolved is a procedural question, whether or not the proceedings initiated are precluded as a result of not being commenced in a timely fashion. The question may be framed as raising the question of whether the time limits imposed by O. Reg. 283/95 govern the issue, or whether the *Limitations Act* 2002 provisions apply, superseding the O. Reg. 283/95 provisions.

There is a substantial practical difference between the rules imposed by the two laws. Essentially, O. Reg. 283/95 requires commencement of proceedings within 12 months of a Notice of Dispute, whereas the *Limitations Act* creates a presumptive limitation of 2 years, but triggered by discoverability criteria.

### **The Nature of the Underlying Dispute**

This ultimate issue in this matter is to resolve a priority dispute between automobile insurers. Each of the parties is an automobile insurer carrying on business in the Province of Ontario. Each of them has a connection to an automobile accident which occurred on January 19, 2006, in which the claimant, Ronald B., was injured. The circumstances are such that there is now a priority dispute between Markel, Lombard and Co-operators as to which of the insurers is obliged to pay the statutory accident benefits payable as a result of this accident. This dispute may turn on questions of occupancy, regular use of a business vehicle or other issues of a factual and legal nature that have yet to be determined in this proceeding.

As a preliminary matter, there is a procedural issue which has arisen and which the parties have asked me to rule upon at this stage.

Section 268 of the *Insurance Act* sets out a scheme of priority of benefits in order to differentiate between various insurers that might be called upon to respond and pay statutory accident benefits in a claim situation. Under that section of the *Insurance Act* a priority ranking is set out. This is necessary because under the Ontario automobile insurance scheme, a number of definitions of insured person apply to statutory accident benefits, with the effect that a person injured in an automobile accident is likely to have more than one insurance policy where they would be regarded as an "insured person". The legislation attempts to set out which of the insurers is obliged to respond when there are multiple insurers that might be claimed against.

There are a variety of issues that arise in these priority disputes that are factually and legally controversial. The legislators have prescribed O. Reg. 283/95 to create a process for determination of these issues.

### **The Regulation Governing Disputes between Insurers**

O. Reg. 283/95 is a brief document that provides a mandatory, comprehensive, dispute resolution framework. There is no leeway in section 1 of the regulation:

- 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.**

The regulation provides a three stage process for insurers to follow. Firstly, the claimant's interests are addressed by requiring the first insurer that receives an application to deal with the claim. Clearly this provision is aimed at keeping the inter insurer dispute in the background as far as the accident victim is concerned.

**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.**

Secondly, the regulation requires the insurer to give a timely notice of a dispute about the obligation to pay benefits. Such a provision has the effect of alerting the targeted insurer of a priority dispute that might be coming their way.

**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.**

**(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 insurers is liable under section 268 of the Act; and**

**(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.**

**(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.**

Finally the regulation directs the insurers to turn to private arbitration per the *Arbitration Act* if they cannot resolve the dispute. That step must be initiated within one year of the initial notice.

**7. (1) If the insurers cannot agree as to who is required to pay benefits or if the insured person 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*.**

**(2) The insurer paying benefits under section 2, any other insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.**

Importantly, the regulation has a paramountcy clause that proclaims the regulation provisions to override provisions of the *Arbitration Act*.

**8. (1) Except as provided in this Regulation, the *Arbitration Act, 1991* applies to an arbitration under this Regulation.**

**(2) The decisions of an arbitrator made under this Regulation shall be public**

## **The Issue**

The Respondent argues that the Applicant is precluded from this arbitration proceeding as a result of tardiness in commencement of the arbitration. The Applicant's position is that the time limit for commencement of this proceeding is governed not by the *Insurance Act* regulations, but instead is governed by the *Limitations Act 2002*.

This appears to be the first occasion for this issue to be raised in the context of a priority dispute arbitration.

If the *Insurance Act* provisions apply, then I must determine whether Markel has commenced this proceeding within the time limited.

### **The Application of the *Limitations Act* 2002**

The *Limitations Act* is comprehensive legislation that applies to a wide variety of disputes and governs the limitation period for initiation of proceedings. Essentially the legislation imposes a 2 year default limitation, adopts discoverability as the trigger of the time period and applies an overarching 15 year ultimate limitation. The legislation has a broad paramountcy clause that negates other limitations, except for those enumerated in a schedule to the Act.

The paramountcy clause in the *Limitations Act* provides:

**19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,**

- (a) the provision establishing it is listed in the Schedule to this Act; or**
- (b) the provision establishing it,**
  - (i) is in existence on January 1, 2004, and**
  - (ii) incorporates by reference a provision listed in the Schedule to this Act.**

**(2) Subsection (1) applies despite any other Act.**

**(3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act.**

**(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.**

**(5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).**

The limitation found in O. Reg. 283/95 under the *Insurance Act* is not mentioned in the schedule to the *Limitations Act*. Accordingly that *Insurance Act* based limitation provision is of no effect if this priority dispute is "a claim to which this act [*Limitations Act*] applies".

Section 2 of the *Limitations Act* sets out the scope of that legislation as follows:

#### **Application**

**2. (1) This Act applies to claims pursued in court proceedings other than,**

- (a) proceedings to which the *Real Property Limitations Act* applies;**
- (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;**
- (c) proceedings under the *Judicial Review Procedure Act*;**
- (d) proceedings to which the *Provincial Offences Act* applies;**
- (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and**

- (f) proceedings based on equitable claims by aboriginal peoples against the Crown.

In my view, this provision directs us to examine two questions in order to ascertain whether the *Limitations Act* applies: (1) Is this proceeding a "claim", and (2) is this "in court proceedings"?

### What is a Claim?

The *Limitations Act* only applies to "claims". Narrowly construed this might be argued to exclude this dispute. The concept of "claim" is not restricted. Having regard to the scope of the *Limitations Act*, as evidenced by its omnibus application, its legislated paramountcy over almost all other legislation, and the specific matters addressed within the act (e.g. demand obligations) it is appropriate to give "claims" its ordinary, unrestricted meaning. I regard "claims" as the assertion of a set of circumstances that gives rise to a legal right.

By virtue of the definition provision in the *Limitations Act*, that statute limits its attention to a subset of "claims". Section 1 provides:

**1. In this Act,**

...

**"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;**

Accordingly, for the purposes of the *Limitations Act*, it is not all "claims" that come within its purview. It is only those claims that are to "remedy an injury, loss or damage", and only if that injury loss or damage occurred as a result of "an act or omission".

Further, having regard to section 5 of the *Limitations Act*, it appears that it is acts or omissions of the person claimed against that are germane, not other acts or omissions. Addressing when the tolling of the limitation commences s. 5 (1) of the *Limitations Act* provides:

**5. (1) A claim is discovered on the earlier of,**

**(a) the day on which the person with the claim first knew,**

- (i) that the injury, loss or damage had occurred,**
- (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,**
- (iii) that the act or omission was that of the person against whom the claim is made, and**
- (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and**

**(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).**

As defined, a "claim" must be for injury loss or damage that occurs as a result of someone's (anyone's) act or omission. But there is no discoverability unless the act or omission was that of the person against whom the claim is made. If a "claim" is made in court proceedings against a person whose "act or omission" caused the injury, loss or damage, then the *Limitations Act*

applies, overruling any other limitation in other legislation (except for the itemized legislation in Schedule B to the Act).

But if the person against whom the claim is made is not the source of the act or omission that caused the injury, loss or damage, the claim can never be "discovered" and the limitation provision never begins to run. This seems completely at odds with the general purpose of limitation laws and the *Limitations Act* 2002 in particular.

How can the Respondent in this case be said to have committed an act or omission that caused the injury, loss or damage sustained by the Applicant? This is troubling. Clearly there was an incident allegedly involving the use or operation of an automobile that was the immediate cause of the injuries sustained by Ronald B. Likely those injuries may have been caused by the act or omissions of some motorist or other condition. But none of these are the acts or omissions of the Respondent. In my view this is not the correct analysis to apply. We must look at the injury, loss or damage sustained by the Applicant, not by the injured person who has subsequently received benefits from the Applicant.

In this context the assertion is that the Applicant has paid benefits that ought to have been paid by the Respondent. For the Applicant this is "injury, loss or damage". If the Respondent knowingly had the obligation to pay these benefits and did not do so, then that is an act or omission that has caused the Applicant's losses.

It is unnecessary for there to be any wrongful attribute to the Respondent's "act or omission". The mere fact that there was a subsisting obligation unsatisfied is sufficient. There is some analogy between the obligations that flow in priority disputes, and the obligations that flow in some commercial financing transactions. Ontario courts have discussed the *Limitations Act* in the context of a claim based on a demand obligation. The "act or omission" might be the mere existence of the note, but an unfulfilled demand might be needed to cause an "act or omission" in respect of claims against a third party obligee.

In the context of a priority dispute, the Applicant's claim follows a Notice to Dispute and an unresolved indemnification dispute.

Accordingly, I conclude that this matter, if it were an action, would be a claim within the ambit of the *Limitations Act*.

### **Are These Court Proceedings?**

Immediately one recognizes that this dispute is not in "court proceedings". As mandated by O. Reg. 283/95 under the *Insurance Act*, this claim is conducted as an arbitration under the *Arbitration Act*, 1991.

Hence this proceeding, not being a court proceeding, is not within the scope of the *Limitations Act* 2002.

But that is not the end of the inquiry. The *Arbitration Act*, 1991, governs this proceeding and that act speaks to the question of limitation provisions. Section 52 provides:

**52. (1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action.**

Therefore I am required by the *Arbitration Act* to consider what limitation provision would apply to this matter if it were conducted as an "action". The term "action" is not defined in the *Arbitration Act*, but it is defined in the *Rules of Civil Procedure* as follows:

**1.03 (1) In these rules, unless the context requires otherwise,**

**"action" means a proceeding that is not an application and includes a proceeding commenced by,**

- (a) statement of claim,**
- (b) notice of action,**
- (c) counterclaim,**
- (d) crossclaim, or**
- (e) third or subsequent party claim; ("action")**

The definition found in the Rules is not determinative of this issue. It essentially mirrors the definition found in the *Courts of Justice Act*. But neither of these provisions explicitly equates "action" with "court proceeding". But both definitions enumerate methods of commencement of proceedings and all of those mechanisms are steps in court proceedings.

As employed in s. 52 of the *Arbitration Act* the concept of "action" is, in my view, equivalent to "court proceeding". The context of this provision clearly excludes arbitration as a type of "action". It is clear that the legislators were mindful of possible disparity between court proceedings and arbitration proceedings at many different points in the *Arbitration Act*. The *Arbitration Act* repeatedly references court proceedings for comparative purposes. My interpretation of the *Arbitration Act* is that an arbitrator is required to apply the limitation that would apply if the dispute were an action conducted as a court proceeding. Hence section 52 of the *Arbitration Act* would require me to apply the *Limitations Act* provisions, notwithstanding that this proceeding is not an action. If it were an action conducted as a court proceeding, then the *Limitations Act* would apply, if the matter is a "claim".

The result then would be the application of *Limitations Act* constraints to this process, notwithstanding the restrictive language of section 2 of that statute.

### **Effect of Section 8 of O. Reg. 283/95**

This analysis leads us back to the enabling regulation for this proceeding, O. Reg. 283/95. As noted above, this is the legislator's mandate for this proceeding. It is mandatory in tone. Insurers have no option but to conduct themselves in accordance with the regulation.

The procedure to be followed is adopted from arbitration law by requiring the proceedings to be in accordance with the *Arbitration Act* 1991. But, importantly, O. Reg. 283/95 has its own version of a paramountcy clause, vis-a-vis the *Arbitration Act*. Subsection (1) of section 8 provides:

**Except as provided in this Regulation, the *Arbitration Act*, 1991 applies to an arbitration under this Regulation.**

The *Arbitration Act* 1991 does not apply to this proceeding to the extent that O. Reg. 283/95 addresses a matter. As noted, O. Reg. 283/95 does impose a limitation provision of sorts. The regulation requires a formal, time limited, initial notice and commencement of arbitration must take place within one year of that notice.

As a limitation is "provided" in O. Reg. 283/95, section 52 of the *Arbitration Act* does not apply to this arbitration. As section 52 of the *Arbitration Act* does not apply, the *Limitations Act* rules are not relevant to this proceeding.

### **The Confrontation of the Paramountcy Clauses**

One can argue this dispute is a conflict between two paramountcy clauses -- the *Limitations Act* clause of broad application vs. the O. Reg. 283/95 s. 8 claiming paramountcy for the provisions of that regulation. I do not see the issue in that light. In my view, an analysis of the legislation does not lead to the conclusion that the two paramountcy provisions conflict.

But given that possible perception of the issue, I refer to the passages from Sullivan on the *Construction of Statutes*, 5th ed.:

"On its face, the language is clear, but in practice it leads to uncertainty. First, given the doctrine of Parliamentary sovereignty, it is doubtful that a legislature can effectively provide for the subordination of future legislation. Second, even though legislatures are presumed to know their own statute book, it is easy to imagine a conflict arising between the statute with the paramountcy provision and an earlier provision overlooked by the drafter -- a conflict which the legislature might wish to resolve in favour of the earlier provision, given the chance to do so. It seems fair to conclude that in some circumstances at least it may be proper for a court to give priority to a provision that is inconsistent with the paramount statute, despite its all-encompassing provision."

### **Conclusion re Application of the *Limitations Act***

The only limitation provision applicable to this priority dispute is the provision found in O. Reg. 283/95.

I am mindful that the *Limitations Act* has not in fact negated the limitation found in O. Reg. 283/95. Without question the legal landscape on this issue is a Gordian knot of entanglements. Some housekeeping amendments to O. Reg. 283/95 might be helpful in avoiding confusion in future cases.

### **Was this Arbitration Commenced within the Time Limited by O. Reg. 283/95?**

Having determined that the *Limitations Act* has no application to the issue before me, I now turn my mind to the question of whether or not this arbitration proceeding was commenced in a timely manner as contemplated by the *Arbitration Act*.

Firstly, I observe that Ontario Regulation 283/95 does not make any provision for what constitutes the commencement of an arbitration. That regulation does provide for a form of notice of dispute, but that is clearly contemplated to be something antecedent to the commencement of an arbitration and is not designed to be the document initiating the arbitration process. Otherwise the regulation does not give any direction with respect to the form or content of communications that might constitute the commencement of arbitration. Therefore,

the legal requirement for commencement of the proceeding must be found elsewhere than in the Dispute Between Insurers Regulation. For that we turn to section 23 of the *Arbitration Act*.

Section 23 of the *Arbitration Act* addresses the methodology to be employed by a party seeking to initiate an arbitration proceeding. That section provides as follows:

**23. (1) An arbitration may be commenced in any way recognized by law, including the following:**

- 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.**
- 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.**
- 3. A party serves on the other parties a notice demanding arbitration under the agreement.**

Clearly the statute allows considerable flexibility about the precise steps that might be taken in order to commence arbitration.

In my view, section 23 requires some overt step towards an arbitration process that will potentially lead to an award resolving the controversy between the parties. Whether that overt step is described as a Notice to Participate, or as a Demand for Arbitration, the substance of the communication must set the wheels in motion for the arbitration process and there should be no uncertainty in the mind of the recipient about whether or not that process is being invoked.

I am mindful of the discussion in the case law about this topic and in particular in the case of *State Farm vs. Dominion* where Arbitrator Jones, upheld on appeal by Justice Backhouse, made a clear distinction between a communication advising a party that claim "will be made" and actual commencement of an arbitration process. In their communications, one of State Farm's letters expressly stated that the matter would be put into the hands of counsel if there was no affirmative response to a demand for reimbursement.

This type of communication is very close to the communications evidenced in Exhibit 2 to this proceeding. Markel had sent a series of letters trying to recoup their payout with respect to the benefits. The initial Notice of Dispute was sent to Co-operators on March 14, 2006 and to Lombard on April 3, 2006. On April 18, 2006 further information was sent to Co-operators. On June 11, 2006, Co-operators was contacted again on behalf of Markel and their response was requested "at this time in order that we may proceed accordingly".

On July 13, 2006 Markel wrote to Lombard again. Their response was requested, seeking Lombard's decision. On the same date, July 13, 2006, Markel followed up again with Co-operators again. On August 14, 2006, Markel's representative wrote to Co-operators yet again asking for a position with respect to the priority issue. The following comment is made:

**"in the event we do not hear from you within 30 days of this correspondence we will be seeking that an arbitrator be appointed"**

On January 22, 2007, Markel's representative wrote to Lombard referring to some indication from Lombard dated January 10, 2007. Markel's representative responded to the correspondence and the issue raised there and said:

**"please reevaluate your position and respond to this letter within 30 days to avoid Markel Insurance Company of Canada applying for private arbitration"**

On February 22, 2007, Markel wrote again to both Lombard and the Cooperators. The merits of the case were discussed in that correspondence. Both letters clearly communicate Markel's intention to proceed to arbitration unless they receive a response from the insurers by March 23, 2007 (Lombard) and March 22, 2007 (Co-operators).

Evidently there was no response to the letters of February 22, 2007 and on April 13, 2007 counsel for Markel communicated with the representatives of the Respondents taking the position that the arbitration "has been initiated" per the February 22, 2007 correspondence.

This raises the difficult issue of whether or not these communications actually are sufficient to commence arbitration in accordance with section 23 of the *Arbitration Act*.

In this vein I have carefully examined the underlying facts of the *Gore Mutual vs. Markel* case, a decision of Justice Archibald on July 19, 1999. In that case the insurer had sent to Markel a letter with the following provision:

**"we would appreciate it if Markel would appoint counsel so that we might proceed with a private arbitration in this matter concerning which insurer should be responsible for payment of accident benefits."**

Justice Archibald held that this letter, together with another letter with the "same demand" clearly constituted notice of a determination that arbitration should be held.

In the *State Farm vs. Dominion* case, a decision of Arbitrator Jones upheld on appeal by Justice Backhouse, and further upheld on appeal by the Court of Appeal, the communications in question were held to be insufficient to commence the arbitration process, but were communications which were less direct than those in this case, or those in the *Gore vs. Markel* case. In the *State Farm* case the letters sought reimbursement for loss transfer, but the letters do not mention arbitration, although one of the letters did mention *State Farm's* intention to forward the file to counsel.

This case law reveals a range of communications that are argued to have been sufficient to commence arbitration for the purpose of the *Arbitrations Act*. In the *Gore* case a request to appoint counsel "so that we might proceed with a private arbitration" was found sufficient. In the *State Farm* case a conditional referral to counsel, conditioned on the non response of the targeted insurer, was held not to be sufficient to constitute commencement of an arbitration.

In my view, the communication by Markel on February 22, 2007, in this case is closer to being a commencement of an arbitration than the letters in the *State Farm* case, but is not as strong as the letters in the *Gore* case. While the totality of the communications leave no doubt of Markel's persistence with respect to their recovery efforts, their assertions about moving forward into arbitration were always put as conditional, dependent upon the responsiveness of the targeted insurer. The recipients of that correspondence may or may not have been persuaded of Markel's resolve to proceed through arbitration. But having been presented with a communication which in effect said "if you don't respond then we will arbitrate", this communication on its own cannot be equivalent to a Notice to Arbitrate.

The *Arbitration Act* contemplates a communication emanating from the applicant to the respondent demanding participation in arbitration. No such communication is found on this

record. Therefore I must conclude, not without considerable reluctance, that arbitration in this matter was not commenced by the correspondence of February 22, 2007 or earlier. Accordingly, based on the record before me, this arbitration proceeding has not been commenced in a timely way and the Applicant is precluded from proceeding with this matter.

Counsel should make any submissions which they wish to make on the question of cost within the next 30 days. If further time is required, please do not hesitate to contact me.

Dated at Toronto this 31<sup>st</sup> day of March, 2011.

A handwritten signature in black ink that reads "Lee Samis". The signature is written in a cursive, slightly slanted style.

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LEE SAMIS  
Arbitrator