

**IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.I.18, and Regulation 664 283/95 as amended;**

**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 :

AVIVA CANADA INC.

Applicant

- and -

YORK FIRE & CASUALTY INSURANCE COMPANY

Respondent

A W A R D

Counsel:

Charlia von Buchwald

Counsel for the Applicant, Aviva Canada Inc. ("Aviva")

Ruth Henneberry

Counsel for the Respondent, York Fire & Casualty Insurance Company ("York Fire")

Issue:

1. This Arbitration involves a priority dispute between insurers. A preliminary issue has been raised as to whether Aviva complied with the procedural requirements for notice and initiation of this priority dispute Arbitration proceeding as prescribed by Regulation 283/95. More specifically, the issue is whether Aviva gave written notice within 90 days of receipt of a completed application for benefits to York Fire (see Section 3(1) Ontario Regulation 283/95). An ancillary issue has been raised by York Fire as to

whether the alleged failure on the part of Aviva to give notice to the insured person using a form approved by the Superintendent impacts upon the adequacy or inadequacy of the notice alleged to have been given by Aviva to York Fire (see Section 4 of Ontario Regulation 283/95).

Facts:

2. Counsel for the parties elected to proceed with the Arbitration of the preliminary issue on written facta (together with oral submissions). As a result, I was provided with transcripts of the examinations under oath of Nancy Nurse (of Aviva) and Peggy Samaroo (of York Fire). Copies of all of the documents referred to, below, along with other documents such as log notes and the like were filed as part of the facta of the parties.

3. In general terms, most facts were either agreed upon between the parties or not in dispute. To the extent that there are facts in issue which impact materially on my Award, I will address them.

4. This proceeding arises as a result of a motor vehicle accident which occurred on September 8, 2008 where a vehicle insured by Aviva struck Ms. Carmen Jung ("the claimant").

5. By September 25, 2008, Aviva had assigned the claimant's accident benefits claim to Ms. Nancy Nurse, a claims representative/claims advisor employed by Aviva. Ms. Nurse appreciated that there was a potential priority issue and made diligent efforts to ascertain the existence of the other insurer.

6. It is agreed between the parties that on or about October 28, Aviva had received a completed application for accident benefits. This triggers the commencement of the running of the 90 days for giving written notice required in Section 3(1) of Ontario Regulation 283/95.

7. On December 2, 2008, Ms. Nurse was informed by a private investigator as to the believed identity of the other insurer (York Fire) and supplied with their policy number. On December 15, 2008, Ms. Nurse received a written report from the private investigator which set out the foregoing information in written form.

8. On or about December 15 – 16, 2008, Ms. Nurse apparently called York Fire to see if a claim had been reported and was advised that no such claim had been presented to York Fire. Ms. Nurse testified on her examination under oath that she made no written note about the telephone conversation but has a recollection she was provided with the mailing address, phone number and fax number for York Fire (such that she updated information which she had obtained from a 2004 General Insurance Register).

9. Ms. Nurse prepared a letter dated December 16, 2008 and a Notice to Applicant of Dispute Between Insurers similarly dated December 16, 2008.

10. Both documents were inaccurate in relation to the street name (Huron Ontario Street rather than Hurontario Street). The postal code was recorded as L4W 0B2 rather than L5W 0B2; the fax number recorded by and used by Ms. Nurse being 905-696-1007 which appears to bear no relationship to the fax number disclosed in correspondence from York Fire to Aviva of February 10, 2009, being 905-795-0887). It matters not, for purposes of my Award, whether information was accurately provided by York Fire and

mis-recorded by Ms. Nurse or inaccurately provided by York Fire and recorded, as supplied, by Ms. Nurse.

11. On December 16, 2008, Ms. Nurse attempted to fax the letter of December 16, 2008 and the Notice to Applicant of Dispute Between Insurers to York Fire. After five failed attempts (on each occasion, the fax number utilized was busy), Ms. Nurse testified at her examination under oath that she signed the original letter and original notice and enclosed such documents, together with the fax transmission verification report(s) (which demonstrated that the fax was not sent as the line was busy), in an envelope to York Fire.

12. Ms. Nurse acknowledged that she did not make a photocopy of the documents which she signed but retained unsigned files copies.

13. Ms. Nurse further testified that she wrote on one of the transmission verification reports "mailed with confirmation sheet" (as a copy of this document was produced by Aviva in the course of the within proceeding). I received no evidence as to how Ms. Nurse came to make a photocopy of this document, with her handwritten notation, whereas she chose not to make copies of the documents as signed and sent.

14. I received no evidence as to how or when Ms. Nurse came to prepare the envelope within which the documentation was alleged to have been sent. It appears, from all the evidence, that Ms. Nurse's original intention was to fax the documentation (which, if successful, would have been sufficient written notice to comply with Section 3(1) of Ontario Regulation 283/95). I can infer that when Ms. Nurse encountered difficulties sending the documentation by fax, she must have prepared an envelope which would have contained the same address details (and the same deficiencies as I have noted in relation to the letter of December 16, 2008, above referred).

15. Counsel for York Fire points to the following deficiencies or peculiarities respecting the letter of December 16, 2008 and the Notice to Applicant of Dispute Between Insurers and Ms. Nurse's conduct in or around this time:

- (a) the street name is incorrect;
- (b) the postal code is incorrect;
- (c) the letter does not reference York Fire's insured or York Fire's policy number;
- (d) the letter does not indicate the manner in which it is being sent;
- (e) the letter does not reference in its body that the Notice to Applicant of Dispute Between Insurers is enclosed;
- (f) The letter does not reference, at its conclusion, that there were enclosures or attachments (or used the short forms "encl." or "att.").

16. Ms. Nurse's work sheet (log notes) for December 16, 2008 simply indicates "received report from King-Reed. Sent notice to York Fire". The notes do not expand upon the manner by which notice was sent.

17. York Fire acknowledges that the copy of the Notice to Applicant of Dispute Between Insurers retained by Ms. Nurse and produced in this proceeding does include, in Part 3, York Fire's insured and York Fire's policy number.

18. As Ms. Nurse heard nothing from York Fire in response to her activities on December 16, 2008, she called York Fire on January 22, 2009 to ask if a claim had been reported and if the Notice to Applicant of Dispute Between Insurers had been received.

She made a log note entry on January 22, 2009 to this effect and apparently left a message with "Serena" (according to York Fire, they employ an accident benefit claim supervisor by the name of Sarina Amatuzio).

19. Ms. Nurse did not receive a return call from York Fire.

20. Aviva takes the position that 90 days from its receipt of the completed Application for Accident Benefits concludes on Friday, January 30, 2009. York Fire takes the position that when one calculates the specific number of days, being 90, the time for giving notice expired on Wednesday, January 28, 2009. As it turns out, nothing turns on this arithmetical calculation.

21. On February 9, 2009, Ms. Nurse ascertained that no response had been provided by York Fire. She called York Fire and was advised, by persons unnamed, that York Fire had received neither a report of a claim by the claimant nor a Notice to Applicant of Dispute Between Insurers. She received a fax number (905-696-1777) and faxed her letter of December 16, 2008 and the Notice to Applicant of Dispute Between Insurers. This facsimile transmission was successful. Ms. Peggy Samaroo, a claims representative employed by York Fire, testified that she received the fax on or about February 9, 2009 and spoke with Ms. Nurse on or about February 10, 2009.

22. Ms. Samaroo testified that when she spoke with Ms. Nurse, Ms. Nurse advised Ms. Samaroo that the documents sent by fax on February 9, 2009 had been sent in December 2008. Ms. Nurse identified the fax number utilized as 905-696-0777 (the fax that was successfully sent to York Fire was sent to 905-696-1777) and, furthermore, that Ms. Nurse had sent the hard copies by ICS.

23. No evidence was tendered as to whether the envelope which I infer to have been prepared by Ms. Nurse was returned to her or to Aviva. Similarly, no evidence was tendered from ICS as to whether they have any records of making the delivery or could offer any evidence as to whether an envelope, if prepared in a manner in keeping with Ms. Nurse's letter of December 16, 2008, would likely have been delivered to York Fire at its correct address.

24. That said, Ms. Samaroo acknowledged that it was possible that a mistake was made at York Fire such that the documents sent by ICS which Ms. Nurse testified she sent by ICS were received by York Fire but were not properly processed.

Law:

25. A priority dispute arises when there are two or more motor vehicle liability policies which may be applicable to a claimant involved in an accident. Section 268 of the Insurance Act sets out the priority rules to be determined and applied as to which insurer is liable to pay statutory accident benefits.

26. Ontario Regulation 283/95 governs the initiation of the priority dispute. Section 3(1) provides as follows:

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). [emphasis added]

27. According to counsel, there is apparently no law which is directly on point which gives insight or meaning into the phrase "**gives written notice**".

28. While York Fire referred me to the decision of Nordheimer J., in *State Farm v. Her Majesty*¹ to suggest that, on the facts of the within matter, it would be necessary for me to find that York Fire “received” proper notice, I disagree. Nordheimer J.’s comments, at paragraph 23 of the decision, relate to the adequacy or propriety alleged to have been given from or on behalf of State Farm so as to initiate the priority dispute. Nordheimer J.’s decision in this regard is distinguishable from the facts of the within matter.

29. Both Aviva and York Fire acknowledge that Section 3 of Ontario Regulation 283/95 is to operate strictly.

30. Sharpe J.A., for the Court of Appeal for Ontario, in *Kingsway General Insurance Co. v West Wawanosh Insurance Co.*² stated the following:

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

31. It is agreed by the parties that the onus or burden of proof rests with Aviva to demonstrate that it **gave** written notice within 90 days of receipt of a completed Application for Benefits. The standard of proof is on the balance of probabilities.

¹ (2001) 53 O.R. 3(d) 436 at paragraph 23

² (2002), 58 O.R. (3d) 251 (at paragraph 10).

Analysis and Findings:

32. This is one of the rare cases where the onus or burden of proof is dispositive of the preliminary issue. I find that while it is entirely plausible that Ms. Nurse did exactly that which she testified, it is equally plausible that she did not successfully and effectively **give** written notice on behalf of Aviva to York Fire.

33. The latter proposition can be inferred from the deficiencies or peculiarities as noted by and submitted on behalf of York Fire. No evidence was offered by either of the parties from ICS. This is not a case where written notice was given by mail (where one party or the other could argue and rely upon the legislation respecting Canada Post or the law developed in that regard).

34. Logically, the act of “giving” written notice carries with it some requirement of proof that the actions of the insurer giving written notice to another insurer were sufficiently effective or likely to be effective such that the notice was likely to have been received by that other insurer.

35. I find that Aviva has failed to discharge its onus or burden of proof that Aviva gave written notice to York Fire within the 90 days required. By making this finding, I wish to make it clear that I do not intend to nor do I impugn the evidence given at examination under oath of Ms. Nurse given on behalf of Aviva (or the evidence given at examination under oath of Ms. Peggy Samaroo given on behalf of York Fire). I am simply unable to find that Aviva has “tipped the scale” in its favour in relation to this preliminary issue.

36. I hasten to add that I accept that it was, at all times, Ms. Nurse's intention, on behalf of Aviva, to investigate and pursue the priority dispute. That said, Aviva has failed to discharge its onus.

37. Given the findings I have made, I do not need to decide whether Aviva's failure to give notice to the claimant (see Section 4 of Ontario Regulation 283/95) would have impaired Aviva's ability to assert the priority dispute (had Aviva proven, on the balance of probabilities, that it gave written notice within 90 days to York Fire).

ORDER:

38. On the basis of the foregoing, I hereby Order that Aviva did not comply with the procedural requirements for notice and initiation of this priority dispute Arbitration as prescribed by Ontario Regulation 283/95.

39. If costs between the parties (including my account for services rendered as an Arbitrator) cannot be agreed upon, I would ask for written submissions to be made by York Fire (received in my office on or before Tuesday, June 8, 2010) with responding submissions to be made by Aviva (received in my office on or before Tuesday, June 22, 2010).

40. I am obliged to counsel for the care, effort and skill they have demonstrated in conducting this Arbitration.

Dated at Toronto this day of May, 2010.

Vance H. Cooper, Arbitrator

