DATE: 20080917

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **ING Insurance Company of Canada (Applicant) v. The Insurance Corporation of British Columbia (Respondent)**

BEFORE: **Trotter J.**

COUNSEL: **Eric K. Grossman for the Applicant**
Sandi Smith for the Respondent

HEARD: **September 16, 2008**

E N D O R S E M E N T

[1] This Application arises from a dispute between two insurance companies over who is liable to pay statutory accident benefits under the *Insurance Act* (R.S.O. 1990, c. I. 8). The principal issue is whether an arbitrator can decide if the one-year limitation period in s. 7(2) of Ontario Regulation 283/95 (Disputes Between Insurers) (hereafter "the Regulation") precludes resort to the arbitral process in this case. I have been referred to no direct authority on this issue of law. However, the related case law strongly suggests that an arbitrator may (and probably should) decide this issue at first instance.

[2] In *Primmum Insurance Co. v. ING Insurance Co. of Canada* (2007), 45 C.C.L.I. (4th) 284 (Ont. S.C.J.), D. Brown J. held that the mandate of an arbitrator acting under the Regulation is a very broad one. At para. 15 of his decision, Brown J. said:

> 15 First, Primmum confuses the jurisdiction of an arbitrator to consider a question of law with the correctness of the arbitrator's answer to the question posed. Given the breadth of the arbitrator's jurisdiction over SAB priority disputes, she can entertain an argument on any question of law related to the dispute. Her conclusion on a question of law is not final. If a party disagrees, it can appeal. When the appeal routes are exhausted, the parties will know the correct answer to the question of law.

[3] I can find nothing in the Regulation that suggests that the limitation period in s. 7(2) cannot be determined by an arbitrator, even without the consent of one of the parties: see s. 8(1) of the Regulation. In *Pilot Insurance Co. v. Royal & Sun Alliance Insurance Co. of Canada* (2006), 80 O.R. (3d) 308 (S.C.J.), Belobaba J. reviewed the correctness of an arbitrator's

decision concerning the applicability of s. 7(2) of the Regulation. Belobaba J. concluded that the arbitrator had erred in his interpretation of s. 7(2). In allowing the appeal, Belobaba J. made no suggestion that the arbitrator did not have the jurisdiction to deal with the issue in the first place.

[4] In *Unifund Insurance Co. v. Insurance Corp of British Columbia* (2001), 28 C.C.L.I. (3d) 38 (C.A.) (hereafter "*Unifund*"), in interpreting s. 10(1)(*b*) of the *Arbitration Act, 1991*, S.O. 1991, c.17, the Court said that, whether arbitration is triggered by agreement or by statute, all decisions are to be made by the arbitrator, including questions of law and jurisdiction. After setting out the scheme of the *Arbitration Act*, in a proceeding triggered by the *Insurance Act*, Feldman J.A. held at paragraph 15:

> It is clear from these sections that when a statute provides that a matter is to be decided by arbitration under the *Arbitration Act*, ***the arbitrator is to make the initial determination of any questions of jurisdiction***, subject to the right of appeal to the court. [emphasis added]

The decision of the Court of Appeal was reversed by the Supreme Court of Canada: [2003] 2 S.C.R. 63. The majority of the Court acknowledged that s.17 of the *Arbitration Act* provides that an arbitral tribunal may rule on its own jurisdiction. Moreover, the majority held (at para. 37) that an arbitrator may be vested with jurisdiction to determine questions of law, including questions of constitutional law going to its own jurisdiction. However, the majority stopped short of abandoning all restrictions on the issue of jurisdiction. As Binnie J. held (at para. 41):

> **41** There is nothing in the *Insurance Act* of Ontario…to suggest that the legislature intended an arbitrator appointed under that Act, ***usually an insurance specialist***, to have exclusive jurisdiction (even in the first instance) to determine the constitutional applicability of that Act under the division of legislative powers in the Canadian Constitution. [emphasis added]

In my view, the interpretation of the limitation period in s. 7(2) of the Regulation is far removed from the constitutional division of powers issue that concerned the courts in *Unifund*. While thorny issues of extra-territoriality may be better left to the courts, whether timely, appropriate notice was given under the Regulation is a decision that an arbitrator ("usually an insurance specialist:" *Unifund* (S.C.C.), per Binnie J.) is well-suited to make ("at least at first instance:" *Unifund*, per Feldman J.A. (Ont. C.A.), at para. 19). Moreover, there is guidance in the case law on this issue that may assist arbitrators in applying the provision: see *Pilot Insurance Co. v. Royal and Sun Alliance Insurance Co. of Canada*, *supra* and *Gore Mutual Insurance Company v. Markel Insurance Company* (1999), 12 C.C.L.I. (3d) 313 (Ont. S.C.J.).

[5] Relying on the wording of the Regulation and the applicable legislation, and having regard to the principles expressed in the decisions cited above, it is my view that an arbitrator

does have jurisdiction to determine whether, on the facts of this case, there has been compliance with s. 7(2) of the Regulation. Moreover, given the expertise of arbitrators practicing in this area, it is appropriate that this issue, along with all of the other issues that the two parties cannot agree upon, be decided by an arbitrator, as contemplated by the Regulation. Accordingly, I order that Ms. Shari Novick conduct the arbitration with respect to all outstanding issues between the parties, including the applicability of s. 7(2) of the Regulation. If either party is dissatisfied with her decision on this or any other legal issue, recourse may be made to the courts in accordance with the *Arbitration Act*.

[6] As counsel drew to my attention during the hearing, there is currently an outstanding proceeding before the Workplace Safety and Insurance Appeals Tribunal in relation to whether the insured, Ms. Begin, is entitled to benefits under the *Workplace Safety and Insurance Act* (S.O., 1997, c. 16). Counsel for the Respondent asked me to stay or adjourn proceedings until the tribunal empowered by that Act determines the issue before it. This submission makes a great deal of sense to me. Had I decided to determine the substantive issues between the parties (as opposed to ordering that the matter be referred to the arbitrator), I would have been very concerned about the prospect of wasting valuable court time while this important issue remains outstanding. However, I stop short of fettering the discretion of the arbitrator and leave it to her discretion.

[7] In light of my decision on the arbitration issue, it is not necessary for me to decide the issue of whether the Respondent be granted leave to deliver an affidavit on this Application, having already cross-examined on the Applicant's affidavits. However, as I expressed during the hearing, I would have been inclined to grant the relief sought on the facts of this case.

[8] On the issue of costs, substantial resources have already been expended by both parties on the central issue addressed on this application, as well as on collateral issues related to the Respondent's affidavit material. Counsel for the Respondent argues that the point argued before me was a novel one, not having been directly decided in any other case. Counsel for the Applicant contends that the answer was clearly dictated by the principles expressed in the cases cited above. Both counsel prepared themselves to argue the case on the merits before me (i.e., whether arbitration is time-barred by s. 7(2) of the Regulation). This will now be done by the arbitrator. It seems to me that the time spent preparing the factual foundation for this application, as well as the research that went into the legal submissions that were filed, may well be useful to the arbitrator when she confronts the issues referred to her. In all of the circumstances, and with particular emphasis on this last factor, it is my respectful view that the issue of the costs of these proceedings also be addressed by the arbitrator and at the conclusion of that process.

TROTTER J.

Released: **September 17, 2008**

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

ENDORSEMENT

TROTTER J.

Released: September 17, 2008