**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, Section 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 CO-OPERATORS

Applicant

- and -

PERTH INSURANCE, AVIVA CANADA, INTACT INSURANCE COMPANY
and TD INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO PRELIMINARY ISSUES

COUNSEL

Marni E. Miller – Zarek, Taylor, Grossman, Hanrahan LLP
Lawyer for the Applicant, The Co-operators
(hereinafter referred to as "Co-operators")

Laura Emmett – Lerners LLP (London)
Lawyer for the Respondent, Perth Insurance
(hereinafter referred to as "Perth")

Charlia von Buchwald – Aviva Canada
Lawyer for the Respondent, Aviva Canada
(hereinafter referred to as "Aviva")

Jennifer Imrie – Sigurdson, Courtlander, Burns and Silverstone
Lawyer for TD Home and Auto Insurance Company
(hereinafter referred to as "TD")

ISSUES

The preliminary issues herein involve s. 7(3) of Ontario Regulation 283/95 which deals with the 1 year time limitation with respect to initiating a priority dispute arbitration after serving Notice of Dispute and secondly, the requirement as set out in s. 8(2)(5) of Ontario Regulation 283/95 of completing such arbitration within 2 years of its commencement.

Specifically, the Applicant Co-operators seeks the following Orders with respect to the preliminary issues:

1. The Applicant seeks an Order that the correspondence sent by The Co-operators to Perth Insurance on June 1, 2012 was sufficient to initiate arbitration, and that Co-operators therefore complied with the one year requirement to initiate arbitration as set out in Regulation 283/95, section 7(3).

2. The Applicant further seeks an Order that the failure to complete an arbitration in this matter within two years of the date of the commencement of the arbitration should not preclude the arbitration hearing from proceeding.

PROCEEDINGS

This matter proceeded before me on the basis of Written Submissions, Document Briefs and Books of Authority.

Intact Insurance Company has been let out of this proceeding on consent of all parties.

FACTS

Mr. Cory McDonnell was a passenger in a motor vehicle operated by Mr. Ivan Reeb, and insured by Co-operators, on March 29, 2012, the date of loss.

Mr. McDonnell did not have his own policy of insurance at the time of the March 29, 2012 accident.

Co-operators received notice of the loss and information with respect to possible injuries sustained by Mr. McDonnell soon after the accident. An adjuster at Co-operators contacted Mr. McDonnell on April 5, 2012. A letter, with a blank Accident Benefit package, was also sent to Mr. McDonnell on that date, along with a request for information with which to determine priority of payment of accident benefits.

Mr. McDonnell completed an Application for Accident Benefits on May 9, 2012. The Application was received by Co-operators on May 30, 2012.

After receipt of the Application and upon review of same, Co-operators sent a Notice of Dispute to Perth Insurance, dated June 1, 2012, advising that priority rested with Perth alleging that Mr. McDonnell was a listed driver on his parent's policy of insurance, #3048113. The Notice of Dispute was on the usual Ontario Insurance Commission form.

Together with the Notice of Dispute aforesaid, Co-operators, by way of simple correspondence also dated June 1, 2012, sends what it purports to be the initiation of the arbitration indicating the following:

> *"It is our understanding that Mr. Cory McDonnell is a listed operator and dependent of your insured under policy #3048113 insuring a 2002 Ford.*
>
> *At this time, please accept this letter as our formal demand for arbitration. We hope that it will not be necessary to pursue the arbitration route, however, to preserve our rights to pursue this matter, we are now issuing our formal demand for arbitration in respect of this Priority Dispute. I would appreciate if someone could contact me within 30 days to discuss your company's position on Priority, as well as the selection of an arbitrator.*
>
> I would appreciate if someone could contact me within 30 days to discuss your company's position on Priority, as well as the selection of an arbitrator.
>
> *If we cannot agree on who is responsible for paying benefits or do not receive a response from you, we will propose an arbitrator and proceed with the arbitration."*

Perth did not initially respond to the demand for arbitration. The Co-operators continued to adjust Mr. McDonnell's claim in the interim.

On November 19, 2013, Perth sent a letter to Co-operators advising that Co-operators should continue handling the claim, that Perth did not believe that it was in priority and that Co-operators had missed the one year limitation to pursue Arbitration.

On November 20, 2013, Co-operators sent a letter to Perth stating that their correspondence of June 1, 2012, as set out above, was sufficient pursuant to Regulation 283/95 section 7(3) to satisfy the requirement of the initiation of arbitration.

On December 20, 2013, Perth issued a Notice of Dispute Between Insurers as against Intact Insurance, Aviva Insurance, and TD Insurance, whom Perth argued were at higher priority than Perth with regards to Mr. McDonnell's claim. In the world of priority disputes this was a 2nd tier insurer putting three 3rd tier insurers on notice that priority was being disputed. All of the three insurers had allegedly previously issued policies of insurance to Mr. McDonnell's mother, Cheryl Tower, although it was not clear at the time if any of the policies were in effect at the time of the motor vehicle accident. Perth was of the view that the claimant was principally financially dependent on his mother and would therefore be considered the equivalent of a named insured as far as the priority scheme was concerned.

On March 6, 2014 (approximately 15 months after Co-operators had served its Notice of Dispute and its Demand for Arbitration) Ms. Miller, solicitor on behalf of Co-operators, wrote to all four parties (2nd and 3rd tier insurers) and advised:

> *"I have been retained by the Co-Operators in order to commence arbitration proceedings with respect to a priority dispute arising out of the above noted motor vehicle accident, involving Mr. Cory McDonnell.*

The Co-Operators had previously put Perth on notice with respect to this dispute. I have received a copy of correspondence as between, Perth, and Aviva, TD and Intact, indicating that Perth believes one of those aforementioned policies is at higher priority that it's own.

My client wishes to retain Mr. Ken Bialkowski as arbitrator in this matter. Kindly also provide me at your earliest convenience with all of the following:

1. *Any underwriting, agent or broker information or documentation, including internal logs, with respect to Mr. Cory McDonnell or his mother, Ms. Cheryl Tower, including all policies of insurance held by your respective companies, as well as dates of force of all policies;*

2. *Any and all investigation you have conducted with regards to this priority dispute, involving all records, documents, statements;*

Should I not hear from you within 30 days, I will assume you have accepted the choice of arbitrator and will schedule a prehearing with Arbitrator Bialkowski."

No explanation has been provided as to the delay between Co-operator's Demand for Arbitration on June 1, 2012 and their counsel's letter of March 6, 2014, some 15 months later.

Following the letter of March 6, 2014 aforesaid, efforts were made to schedule an Examination Under Oath of Mr. McDonnell with respect to the priority dispute.

On March 21, 2014, counsel for Perth confirmed their agreement with respect to the retainer of Arbitrator Bialkowski.

On April 2, 2014, a formal request to retain the services of Arbitrator Bialkowski was made. Copies of the request were forwarded to the 2nd and 3rd tier insurers or their solicitors.

On April 4, 2014, counsel for Aviva is retained and confirms their agreement with respect to the retainer of Arbitrator Bialkowski as arbitrator.

On April 24, 2014, correspondence was sent to Arbitrator Bialkowski's office from the solicitor for Co-operators advising that scheduling the initial prehearing had been hampered by the lack of response by TD Insurance (they had yet to appoint counsel) and requesting that a prehearing be scheduled in the absence of TD such that the matter could proceed. A copy of this letter went to all insurers involved or their solicitors. In the letter, Ms. Miller, on behalf of Co-operators, raises the issue of the requirement to complete the hearing within two years of the Demand for Arbitration sent to Perth on June 1, 2012. There is no documentation before me from of any of the parties that they required a hearing being completed by June 1, 2014 despite that fact that the issue was raised by counsel for the Applicant. Examinations Under Oath had yet to be arranged and only one of the 3rd tier insurers had appointed counsel.

On May 24, 2014 counsel for Perth wrote to TD confirming that an arbitration had been commenced by Co-operators and urging them to appoint counsel.

Perth was advised by counsel for Co-operators of attempts to schedule an Examination Under Oath of Mr. McDonnell and agreed to same, asking that all the insurers involved in the dispute be advised.

After numerous attempts at scheduling an Examination Under Oath of Mr. McDonnell due to the involvement of multiple parties, an agreed upon date of July 25, 2014 was arranged in Windsor, Ontario. Confirmation of the date for the EUO was sent to everyone by the solicitor for Co-operators on May 27, 2014. For some reason counsel for Aviva had not been consulted with respect to her availability on that date.

If Co-operators letter to Perth dated June 1, 2012 is found to have initiated the arbitration, then the application of s.8(2)(5) would have required a completed hearing by early June of 2014 barring any legal exceptions that may be applicable.

On July 18, 2014, counsel for Aviva advised that the EUO had been scheduled without their knowledge and they were not available to proceed with the EUO on that date. No explanation has been given as to why it took Aviva more than six weeks to discover this conflict. Further, as the matter in dispute dealt with the issue of dependency, counsel for Aviva then sought to have the EUOs adjourned until such time as an initial prehearing before Arbitrator Bialkowski could be heard, so that Orders could be obtained for Examinations for both the mother and father of Mr. McDonnell, as well as the claimant, so that the dependency claim could be thoroughly canvassed.

On July 21, 2014, Co-operators advised that Co-operators was agreeable to adjourn the EUO for Mr. McDonnell until such time as all counsel could participate and that all necessary parties could be examined, on the agreement that no party asserted at a later date that this delay prejudiced Co-operators position with respect to the dispute.

On July 21, 2014, Counsel for Aviva confirmed that Aviva was content to defer the EUOs and "Aviva will not raise an issue about the delay in rescheduling the EUOs".

On July 22, 2014, counsel for Perth also agreed to the adjournment of the Examinations Under Oath. TD had yet still to appoint counsel.

On December 18, 2014 Perth (2nd tier insurer) served Notice to Submit to Arbitration on the 3rd tier insurers Aviva and TD. The Notice indicated that Perth was claiming that the claimant was dependent on his mother who had policies of insurance issued to her by both Aviva and TD. TD did not appoint counsel until December 2014. Aviva had already appointed counsel after earlier having been served with Perth's Notice of Dispute.

All now represented, the parties have decided to proceed with the preliminary limitation issues herein before dealing with substantive issues of coverage under the Perth policy and dependency.

APPLICABLE LEGISLATION

The priority dispute resolution process was enacted after consultation with the insurance industry by way of Regulation, specifically "Ontario Regulation 283/95 - Disputes Between Insurers". It was developed as a simple, expeditious and relatively inexpensive way of determining who the appropriate insurer was for the purposes of paying accident benefits. Simply stated, it was a scheme to determine which insurer stood in priority to all others with regard to paying statutory accident benefits to an injured claimant.

The Regulation sets out in precise and specific terms the scheme for resolving disputes between insurers.

The Regulation provides a three stage process for insurers to follow. First, the Claimant's needs are addressed by requiring the first insurer that receives an Application to deal with the claim. This provision is aimed at keeping the priority dispute between insurers in the background as far as the accident victim is concerned. The injured claimant continues to recover benefits from the first insurer to have received a completed application while the priority dispute is ongoing. Section 2 states:

> *"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."*

Second, the Regulation requires the insurer to give a timely notice of a priority dispute. Such a provision has the effect of alerting the targeted insurer of a priority dispute that might be coming their way and enabling them to conduct whatever investigation is necessary to deal with the priority issue at an early stage. Specifically, section 3 states:

> *"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."*

Finally, the Regulation directs the insurers to turn to private arbitration, per the *Arbitration Act 1991*, if they cannot resolve the dispute. That step must be initiated within one year of the initial notice. Section 7 states:

> *(1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed.*
>
> *(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and 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 initiated by the insured person.*
>
> *(3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3.*

Amendments to Ontario Regulation 283/95 were made effective September 1, 2010 and applicable to motor vehicle accidents occurring on or after that date. The amendments included an obligation to complete the hearing of the arbitration, barring consent of all parties, within two years of the commencement of the arbitration. S.8(2)(5) states:

> *"Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration."*

In the present arbitration we are dealing with the issues of whether there has been compliance with s.7(3) with respect to initiation of the arbitration within 1 year of serving its Notice of Dispute and s.8(2)(5) with respect to the completion of the arbitration within 2 years of commencement of the arbitration.

ANALYSIS AND FINDINGS

1. S. 7(3) - INITIATION OF CLAIM WITHIN 1 YEAR ISSUE

I will first deal with the issue of whether the arbitration herein was initiated no later than one year after the day the insurer paying benefits first gave notice of the priority dispute as required by s. 7(3) of the Ontario Regulation 283/95.

The Applicant Co-operators maintains that the arbitration herein was initiated on the same day it put the Respondent Perth on notice of the priority dispute, namely June 1, 2012. Two documents were forwarded to Perth that day. The first was a Notice of Dispute on the standard Ontario Insurance Commission form and the second being a Demand for Arbitration in the form of a letter. The wording of Co-operators Demand for Arbitration is as follows:

> *"It is our understanding that Mr. Cory McDonnell is a listed operator and dependent of your insured under policy #3048113 insuring a 2002 Ford.*
>
> *At this time, please accept this letter as our formal demand for arbitration. We hope that it will not be necessary to pursue the arbitration route, however, to preserve our rights to pursue this matter, we are now issuing our formal demand for arbitration in respect of this Priority Dispute. I would appreciate if someone could contact me within 30 days to discuss your company's position on Priority, as well as the selection of an arbitrator.*
>
> *I would appreciate if someone could contact me within 30 days to discuss your company's position on Priority, as well as the selection of an arbitrator.*
>
> *If we cannot agree on who is responsible for paying benefits or do not receive a response from you, we will propose an arbitrator and proceed with the arbitration."*

The Respondents take the position that the letter aforesaid is insufficient to constitute the initiation of an arbitration.

Section 23(1) of the *Arbitrations Act* 1991, provides:

> *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.*

The Applicant Co-operators contends that their Demand for Arbitration dated June 1, 2012 satisfies s.23(1)(3) above and effectively initiated the arbitration well within one year of serving the Notice of Dispute. Here, the two documents were served on the same day.

The parties have referred me to several cases dealing with the issue as to what type of document would constitute the initiation of an arbitration and which document would not.

In *State Farm Mutual Insurance Company v. Echelon General Insurance Company* (December 2008) Arbitrator Novick considered whether the Applicant was barred from pursuing its priority dispute because it failed to initiate arbitration within one year. The purported initiation of the arbitration consisted of three letters sent to the Respondent. Arbitrator Novick held that the first two letters sent by the Applicant were requests for a response on the priority question which ended with the caution that if no response was received, "we will proceed to arbitration." Arbitrator Novick opined that while the third letter stated "we are now proceeding to file for Arbitration on this issue" evidenced an intention to commence an Arbitration proceeding, it does not itself constitute a notice demanding Arbitration (emphasis mine) as required by section 23 of the Arbitrations Act. Furthermore, correspondence from counsel for State Farm just before expiry of the limitation, although asking for them to appoint counsel and even proposing an arbitrator, included the words "if I do not hear from you within a reasonable period of time, I will initiate an arbitration proceeding." The Applicant was found by Arbitrator Novick to be barred from proceeding with its priority dispute on the basis that the letters were found to evidence an intention to commence arbitration and not a notice demanding arbitration. In the case before me Co-operators letter of June 1, 2012 included the words "please accept this letter as our formal demand for arbitration" (emphasis mine). These are the very words contained in s. 23(1)(3) of the *Arbitration Act* which essentially says that "arbitration may be commenced by serving a notice demanding arbitration".

Arbitrator Samis, in *Markel Insurance Company v. Co-Operators General Insurance Company and Lombard Canada Ltd.* (March 31, 2011) indicated that to initiate an Arbitration, there must be "some overt step" taken towards an Arbitration process that will lead to an award resolving the dispute. There must be action taken which signals a clear intention to start a process that will end with a determination of rights by an Arbitrator. 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.

The Respondents take the position that Co-operators letter of June 1, 2012 and its subsequent conduct did create uncertainty in the minds of the recipients. The letter did not propose a specific arbitrator. It essentially said "if we do not receive a response from you we will propose an arbitrator and proceed with the arbitration" which is they argue is essentially the facts in *State Farm v. Echelon* (supra) which arbitrator Novick found to be insufficient to be construed as the initiation of an arbitration. Furthermore, Co-operators conduct after the purported Demand for

Arbitration would create uncertainty as to whether an arbitration was proceeding or not. No further steps were taken by Co-operators from the June 1, 2012 letter until November 2013, almost 1 ½ years later when Co-operators, responding to a letter from Perth indicating they had missed limitation, responded by suggesting that their June 1, 2012 had initiated the arbitration process. In addition, once counsel was appointed their initial letter of March 6, 2014 included the words "I have been retained by Co-operators in order to commence arbitration proceeding". Arguably this would suggest that Co-operators did not believe the arbitration had been commenced prior to March 6, 2014. The Respondents take the position that the conditional wording of Co-operators initial letter and its subsequent conduct ought be deemed insufficient to meet the requirements of s. 7(3).

In response, Co-operators submitted that nothing be clearer to constitute the initiation of an arbitration than a letter including the words "please accept this letter as our formal demand for arbitration" and seeking input as the selection of the appropriate arbitrator.

In *MVACF v. Intact Insurance Company* (November 2011) arbitrator Novick found a letter from the Fund's adjuster to Intact's adjuster sufficient to constitute the initiation of the arbitration. The letter was entitled "notice of Commencement of Arbitration" and included the words "the Fund hereby commences an arbitration ... to dispute priority". The letter goes on to indicate that counsel will be appointed. Arbitrator found that the wording used in the letter was definite and not conditional. In the case before me Co-operators letter of June 1, 2012 there existed some conditional wording. The last paragraph of the letter indicates:

> *"If we cannot agree on who is responsible for paying benefits or do not receive a response from you, we will propose an arbitrator and proceed with the arbitration."*

It is noted though that words like "if we do not hear from you we will initiate an arbitration" were not used leaving it open to interpret the words used in the Co-operators letter to say "if we do not hear from you, we will propose an arbitrator and proceed with the arbitration *that we have commenced with this Demand for Arbitration*".(emphasis mine)

In *Lloyd's of London Insurance Company v. Wawanesa Mutual Insurance Company* (March 2004) arbitrator Jones found that two letters from counsel sufficient to constitute the initiation of the arbitration. The first letter indicated the solicitor had been retained to proceed to an arbitration of the priority dispute and requested input as to who they wished to use as an arbitrator. There was no response. The second letter a month later proposed specific mediators. Arbitrator Jones found these two letters constituted commencement of the arbitration. I take notice of the fact that Co-operators letter of June 1, 2012 did not propose specific arbitrators.

In *Gore Mutual Insurance Co. v. Markel Insurance Co.* (1999) O.J. No. 2688, Justice Archibald found two letters from counsel for Gore to Markel constituted initiation of an arbitration. The first letter merely referred to the Notice of Dispute and asked them to appoint counsel to proceed with a private arbitration. The second letter outlined the basis as to why Gore felt Markel stood in priority. Justice Archibald stated at p.5 :

> *"Clearly, those two letters constitute clear notice of the Applicant's determination that arbitration should be held. They also constitute clear notice that the arbitration is to beheld pursuant to Ontario Regulation 283/95. In this Court's determination, the notice is clear and full."*

In the case before me, we essentially have a letter making a "formal demand for arbitration" (separate and apart from the Notice of Dispute) and seeking input as to the selection of an arbitrator. In my view, the fact that specific arbitrators were not proposed is not fatal to the letter not being construed as the initiation of the arbitration. I do not believe the conditional wording contained in the last paragraph of the letter is of the type of wording that leads one to conclude that it only expressed an "intention to commence arbitration" as opposed to a notice "demanding arbitration" which was the distinction in *State Farm v. Echelon* (supra). Because the letter from Co-operators made a "formal demand for arbitration" the purported conditional wording should be interpreted as saying "if we do not receive a response from you we will proceed with the arbitration that we have commenced with this formal demand for arbitration". This is quite different that the conditional words used in *State Farm v. Echelon* (supra) which were "if no response is received, I will initiate an arbitration proceeding."

What could be clearer than "a formal demand for arbitration"? These are the very words used in the *Arbitration Act* as an example as to how an arbitration can be commenced. A party receiving the June 1, 2012 letter from Co-operators should have reasonably come to the conclusion that Co-operators was proceeding to arbitration and ought to have either accepted priority or provided names of arbitrators that they were content on using to resolve the priority dispute. The delay by Co-operators after making the formal demand for arbitration is concerning, however it would have been avoided if Perth would have responded in a timely fashion to Co-operators Demand for Arbitration of June 1, 2012 by either an acceptance of priority or putting forward the names of arbitrators that they would consider. In addition, delay, like that which occurred here, places the first tier insurer in peril of missing the two year limitation in completing the hearing after the arbitration was commenced. Given this peril, such delay is unusual. Although the delay is concerning, it does not take away from the fact that Co-operators letter of June 1, 2012 ought be considered a "formal demand for arbitration" and commencement of the arbitration proceeding itself.

2. - S. 8(2)(5) - 2 YEARS TO COMPLETE ARBITRATION ISSUE

I will now deal with the second issue before me, namely whether Co-operators application herein ought be dismissed on the basis that the arbitration hearing was not completed within 2 years of the arbitration process having been commenced as required by s. 8(2)(5) of Ontario Regulation 283/95.

Of significance is the fact that the 2nd tier insurer Perth made no submissions with respect to this issue. It is the Respondents Aviva and TD that submit that Co-operators is precluded from proceeding since that arbitration hearing was not completed within two years of the arbitration having been commenced. In my view, the fact that this arbitration involves 3rd tier insurers (Aviva and TD) must be considered. The 3rd tier insurers Aviva and TD did not become involved until December 20, 2013 when the 2nd tier insurer Perth served them with a Notice of Dispute. Aviva appointed counsel on April 4/14.By letter dated December 18, 2014 Perth served a Notice to Submit to Arbitration. TD did not appoint counsel until December 2014.

Counsel for Co-operators, by letter sent to all parties dated April 24, 2014 raised the issue of completing the hearing within two years of the commencement of arbitration. The letter specifically indicated that the demand for arbitration was issued on June 1, 2012. In my view, it ought to have been clear to all parties that the deadline for completion of the arbitration was only some 5 weeks away if the any of the parties was insisting that the arbitration be completed in that short time frame. At this point in time Aviva had appointed counsel but TD had not. No

party demanded an immediate hearing given the potential limitation expiring in early June 2014 some five weeks later. In my view, it is clear from the conduct of Perth that they preferred hearing all issues at the same time which meant EUOs had to be conducted to deal with the dependency issue as between the 2nd and 3rd tier insurers. I am satisfied that Perth's failure to demand a hearing within the two year limitation, having been made aware of the issue, and its conduct in moving toward EUOs with respect to the substantive issue of dependency amounted to implied consent in waiving the requirement to have the hearing conducted within two years of the arbitration having been commenced against Perth. Perhaps this is the very reason why Perth has chosen not to make submissions with respect to this issue.

In many situations the two year period requires the co-operation of multiple parties, including the co-ordination of schedules of multiple counsel as well as the arbitrator, in order to conduct possibly numerous prehearings, examinations under oath, preliminary issue hearings, and hearings. It is not feasible that all arbitrations can be completed within a two year time frame, depending on the nature of the issues to be determined. This is particularly true in a situation where 3rd tier insurers are involved and it is in the interests of all parties to have a single arbitration hearing and avoid any duplication of costs.

The 3rd tier insurers, Aviva and TD, take the position that they did not, impliedly or directly, consent to an extension of the hearing date. They submit that the requisite components of the legal doctrine of waiver were not met. They state that although s. 31 of the Arbitration Act grants arbitrators authority to invoke equitable remedies, the elements of the test for relief from forfeiture are not met in the case herein.

In the case here I have found that Co-operators initiated the arbitration against Perth in a timely fashion. A 1st tier insurer has no control over how long it will take for a 2nd tier insurer to put the 3rd tier insurers on notice. Jurisprudence (*Certas Direct v. Security National Insurance Company* – Arbitrator Kenneth J. Bialkowski - February 2, 2012 and *Wawanesa Mutual Insurance Company v. Peel Mutual Insurance Company* - Arbitrator Samis – January 28, 2011) supports the proposition that the 2nd tier insurer is not bound by the 90 day requirement as contained in s.3 of the Regulation with regard to putting another insurer on notice. In the case here, notice by 2nd tier insurer occurred at a late stage in the process, some 18 months after the arbitration was initiated. A demand for arbitration by the 2nd tier insurer Perth against the 3rd tier insurers was not made until December 18, 2014 long after the completion of the arbitration between Co-operators and Perth was to have taken place according to s. 8(2)(5) of the Regulation and in the absence of consent, waiver or equitable remedy. However, as I have found here, there was implied consent or waiver of the 2 year requirement by reason of the conduct of Perth. Perth was made aware of the limitation issue, did not demand a hearing within the 2 years and was complicit in making arrangements to complete EUOs so all issues could be dealt with at the same time. It makes no sense that the 3rd tier insurers can now say that the arbitration cannot proceed. It would be inequitable to do so and I would be inclined to extend the time by reason of the authority provided to me in s.31 of the Arbitration Act to award equitable relief if it were necessary. However, I simply find that when the 3rd tier insurer TD was served in December 2014 with a Demand for Arbitration, they were simply being added to an arbitration where the 2 year requirement to complete the arbitration had been waived or an extension impliedly consented to by conduct of the 2nd tier insurer Perth. At that point in time, the time required to complete the arbitration was in the discretion of the arbitrator.

The situation is different when it comes to the 3rd tier insurer Aviva. They were served with Perth's Demand to Arbitrate in December 2014. They appointed counsel on April 4, 2014 more than 3 months later. By appointing counsel Aviva then joined the arbitration that had been initiated by Co-operators. The letter from counsel for Co-operators dated April 24, 2014 that was

sent to counsel for Aviva specifically raised the 2 year limitation to complete the arbitration and specifically indicated that the demand for arbitration was issued June 1, 2012. There is no evidence before me indicating that Aviva required a hearing by early June 2014. Thereafter Aviva continued its pursuit of productions and demanded, quite appropriately, that EUOs be conducted on dates convenient to Aviva's counsel. In these circumstances, I find that the conduct of Aviva ought be construed as a waiver of the requirement of completing the hearing by early June 2014. At that point in time Aviva did not have full production of relevant documentation and EUOs on the dependency issue were not completed and only being arranged. It stands to reason that an early hearing date was not being demanded.

As I have indicated earlier, if I am wrong with respect to my findings on the issue of waiver, I am satisfied that the facts here require me, in the interest of justice, to grant an extension of the timeline set out in s.8(2)(5) of the Regulation pursuant to the authority to invoke equitable remedies as set out in s. 31 of the Arbitration Act 1991, S.O. 1991, c. 17 which reads:

> *Application of law and equity*
>
> 31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

If Perth had responded in a timely fashion to Co-operators Demand for Arbitration of June 1, 2012 and in a timely fashion served its Notice of Dispute on the 3rd tier insurers there would have been plenty of time to exchange productions, complete EUOs and complete the arbitration within 2 years and there would have been no need for me to deal with the limitation issues herein. Perth as 2nd tier insurer sent its Notice of Dispute to both 3rd tier insurers, Aviva and TD, on December 20, 2013. If Aviva and TD responded in a timely fashion there may well have been time to complete production exchange and EUOs so that a hearing could have been completed within 2 years of the commencement of the arbitration and there would have been no need for me to deal with the limitation issues herein. With this background, it in the best interests of justice to have the priority dispute decided on the merits.

ORDER

I hereby order that the arbitration was commenced in compliance of s.7(3) of Ontario Regulation 283/95 and that failure to complete the arbitration within two years of the commencement of the arbitration, in the present circumstances, does not preclude the arbitration from proceeding.

I order that Perth, Aviva and TD equally pay the costs of Co-operators with respect to these preliminary issues on a partial indemnity basis and the costs of the arbitrator.

I will remain involved with respect to the substantive issues.

DATED at TORONTO this 3rd)

day of February, 2015.)

KENNETH J. BIALKOWSKI
Arbitrator