

IN THE MATTER OF THE *INSURANCE ACT*,  
R.S.O. 1990, c. I. 8, as amended

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY

Respondent

**DECISION WITH RESPECT TO PRELIMINARY ISSUE**

**COUNSEL**

Julianne Brimfield – Samis & Company  
Counsel for the Applicant, Economical Mutual Insurance Company  
(hereinafter referred to as "Economical")

Derek Greenside – Kostyniuk & Greenside  
Counsel for the Respondent, Unifund Assurance Company  
(hereinafter referred to as "Unifund")

**ISSUE - REQUEST TO EXTEND TIME TO COMPLETE HEARING**

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant Liam Donnelly with respect to personal injuries sustained in a motor vehicle accident which occurred on October 15, 2014.

The preliminary issue to be dealt with is the Applicant Economical's request for an extension of the requirement to complete the arbitration within two years of the commencement of the arbitration as set out in s.8(2)5 of O. Reg 283/95. The determination is complicated by the fact that the priority dispute involves two issues, dependency and an excluded driver issue,

with the latter issue awaiting the release of an Ontario Court of Appeal decision that was heard on June 22, 2017, that will likely be determinative of the excluded driver issue in this proceeding.

## **PROCEEDINGS**

The motion to extend the time was completed on the basis of Document briefs, Books of Authority and written submissions.

## **FACTS**

The subject accident occurred on October 15, 2014. The claimant, Liam Donnelly, was struck by an Economical-insured vehicle while crossing the road as a pedestrian.

After performing its priority investigations, Economical determined that the claimant may have coverage under his mother's policy with Unifund. As such, Economical put Unifund on notice on January 13, 2015.

The Arbitration in this matter was commenced on December 15, 2015, when Unifund was served with Economical's Notice to Participate and Demand for Arbitration.

By e-mail dated July 4, 2016, counsel for Economical advised Arbitrator Bialkowski that the main priority issues in dispute included (1) whether the claimant was an excluded driver/listed driver on the Unifund policy and; (2) whether the claimant was dependent on Unifund's named insured (the claimant's mother). Counsel for Economical also advised that the potential benefit of performing Examinations Under Oath (hereinafter referred to as "EUOs") was unknown, given the fact that the claimant sustained a brain injury and was catastrophically impaired as a result of the accident.

The first pre-hearing was scheduled to take place on July 18, 2016. This pre-hearing proceeded as scheduled. The second pre-hearing was scheduled to take place on October 17, 2016. This pre-hearing also proceeded as scheduled. The third pre-hearing was scheduled to take place on March 7, 2017. This pre-hearing did not proceed. By letter dated January 17, 2017, counsel for Economical advised counsel for Unifund that the Court of Appeal was scheduled to hear submissions on the excluded driver/listed driver issue in March 2017. As such, an adjournment of the upcoming pre-hearing was proposed. Counsel for Unifund agreed to the proposed adjournment and the pre-hearing was rescheduled to proceed on May 18, 2017.

By letter dated April 17, 2017, counsel for Economical advised counsel for Unifund that the Court of Appeal hearing on the excluded driver issue had been further delayed until June 2017. As such, an adjournment of the May 2017 pre-hearing was proposed. Counsel for

Unifund agreed to the proposed adjournment and the pre-hearing was rescheduled to proceed on August 28, 2017. Counsel for Unifund also requested any documentation received from the Canada Revenue Agency with respect to the claimant's 2014 income.

Counsel for Economical had previously provided counsel for Unifund all of the financial documents in Economical's possession under cover of letter, dated September 8, 2016.

On April 25, 2017, counsel for Economical wrote to counsel for the claimant requesting additional financial documents to confirm his pre-accident income, as the Economical adjuster handling the claimant's file had experienced no success obtaining these documents. Counsel for Economical followed up on these requests by letters dated May 4, June 15 and August 22, 2017.

Counsel for Economical also obtained an Order from Arbitrator Bialkowski for the production of various financial records, which was served on counsel for the claimant on September 1, 2017.

On August 28, 2017, counsel for Economical also spoke to a clerk at the office of counsel for the claimant, who advised that the claimant was paid in cash, had no records to prove his income and had misplaced his Notice of Reassessment following the submission of his revised T1. However, the clerk advised that she would request the Notice of Reassessment directly from the CRA.

The last pre-hearing proceeded on August 28, 2017. Prior to this pre-hearing, counsel for Unifund had suggested postponing the pre-hearing given the pending Court of Appeal decision. Counsel for Economical agreed with the proposed adjournment, but also requested that counsel for Unifund confirm he would consent to an extension of time for completing the arbitration. It was only at that time that counsel for Unifund advised that he would not consent to an extension of time for completion of the arbitration with respect to the dependency issue. The two year deadline would expire on December 14, 2017.

On September 7, 2017, counsel for Economical requested dates to complete EUOs.

### **ANALYSIS AND FINDINGS**

The "Priority Rules", contained in s.268(2) of the *Insurance Act*, set out the rules that determine which insurer is liable to pay accident benefits with respect to non-occupants.

**(2) The following rules apply for determining who is liable to pay statutory accident benefits:**

**2. In respect of non-occupants,**

- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
- ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
- iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
- iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

*Insurance Act*, R.S.O. 1990, c. I.8, s. 268(2), Book of Authorities (BOA), Tab A.

As the insurer of the striking vehicle, Economical is only the priority insurer if the claimant is not an "insured" under another policy.

As outlined above, two issues have been identified and need to be addressed in this arbitration. One of these issues is whether the claimant is an "insured" by virtue of being an excluded driver/listed driver upon the Unifund policy. The other issue is whether the claimant is an "insured" by virtue of being a dependant of his mother.

Section 8(2) of Ontario Regulation 283/95 ("the Regulation") outlines various timelines to be followed during an arbitration, including holding a pre-hearing within 120 days of appointing the arbitrator and completing the arbitration within two years of commencement of the arbitration, unless an extension of time is consented to by all parties.

Section 8(2)5 of Ontario Regulation 283/95 states:

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

Unifund has partially consented to an extension of time to allow for the Court of Appeal to render a decision on the excluded driver/listed driver issue in dispute. However, Unifund has not consented to an extension of time on the dependency issue.

Economical has submitted that Unifund should not be permitted to consent to an extension of the arbitration on one issue but not another, thus effectively bifurcating the arbitration hearing, as there is no provision in the Regulation that allows for a bifurcation of the arbitration. Economical also submits that it is unreasonable for Unifund to demand a bifurcation of the arbitration at this stage. Economical relies on Section 31 of the *Arbitration*

*Act* allows an arbitral tribunal to invoke equitable remedies when necessary, if it is in the interest of justice.

The decisions of *The Co-operators v. Perth Insurance, Aviva Canada, Intact Insurance Company and TD Insurance Company* (Arbitrator Bialkowski – February 3, 2015) and *Pafco Insurance Company v. Wawanesa Mutual Insurance Company* (Arbitrator Novick – November 22, 2016) have established that section 31 of the *Arbitration Act* can be relied upon by arbitrators in priority disputes in order to extend the time for arbitration when the parties do not consent. Furthermore, the timelines outlined in section 8(2) of O. Reg. 283/95 have been found to be directory and permissive, rather than mandatory.

The decisions in *Her Majesty The Queen v. Jevco Insurance Company* (Arbitrator Bialkowski – June 16, 2017) and *Allstate Insurance Co. of Canada v. Gore Mutual Insurance Company and The Motor Vehicle Accident Claims Fund* (Arbitrator Bialkowski – June 24, 2017) identify a list of factors which can be considered in situations where an extension of time is requested. These include:

1. Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?
2. Was it practical to complete all necessary steps (production exchange, completion of Examinations Under Oath, obtain satisfaction of undertakings provided, obtain co-operation and production of documents from non-parties, etc.) to be in a position to complete the hearing within two years of the commencement of the arbitration?
3. Did the complexity of the dispute (number of issues, number of parties, involvement of 3rd tier insurers, etc.) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?
4. Has the Respondent been prejudiced by the delay?
5. Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?
6. Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?
7. Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?

**Was it practical to complete all necessary steps to be in a position to complete the hearing within two years of the commencement of the arbitration?**

One of the issues in dispute, being the excluded driver/listed driver issue, is the subject of two conflicting Superior Court decisions, citations as set out below, that were both released after the commencement of this arbitration. These conflicting decisions need to be resolved by the Court of Appeal and that hearing proceeded on June 22, 2017. The Court of Appeal has not yet released its decision.

*Dominion of Canada General Insurance Company v. State Farm Mutual Automobile Insurance Company (Dominion v. State Farm)*, Unreported, dated October 26, 2015, released in March 2016

*Belairdirect Insurance v. Dominion of Canada General Insurance Company*, 2017 ONSC 367 (CanLII)

Both parties in this dispute appear to be in agreement that it makes no practical sense to proceed with an arbitration on the excluded driver/listed driver issue before the Court of Appeal releases its decision.

Economical has submitted that it also makes no practical sense to proceed with an arbitration hearing solely on the dependency issue, as the outcome of that hearing may not finalize this dispute.

Economical also maintains that the dependency issue is also complicated by the fact that the claimant is catastrophically impaired and resides in Ottawa. They claim that the dependency issue cannot be resolved without production of financial documents from the claimant. As outlined above, counsel for Economical has made a number of requests for this documentation and a production Order has been issued as recently as August 28, 2017, leaving 3½ months to the hearing date deadline. As far as I know, no EUO of the claimant has been conducted, nor attempts made to force production with use of s. 33 of the Statutory Accident Benefits Schedule.

Counsel for Economical has also attempted to avoid the expense of conducting an EUO of both the claimant and his mother on the dependency issue by requesting the financial documentation to support the claimant's alleged pre-accident income. Given the lack of forthcoming documentation, Economical now states that an EUO will be necessary in all the circumstances. However, practically speaking, the pending Court of Appeal decision on the excluded driver/listed driver issue could resolve this entire arbitration. If the Court of Appeal decides that an excluded driver can also be a listed driver, then the claimant is an "insured" under the Unifund policy and the dependency issue is entirely moot. As such, Economical submitted that it was practical in the circumstances to await this decision before pursuing other avenues of the dispute. Economical also submitted that it was under the impression that Unifund agreed with this practical approach.

Section 8(2)5 of the *Regulation* may be permissive and not mandatory but it is directory. It shows that the Legislature wishes these priority disputes be completed in a timely fashion and wherever possible, within two years of the commencement of the arbitration. I find that steps could have been taken by the Applicant Economical to obtain the financial records much earlier than the present time, particularly when one considers that it is always possible that an accountant may be required to provide an opinion on dependency which may then give rise to the need of the Respondent to obtain a responding accounting report, causing further delay. Given the perceived acquiescence of the Respondent, the cost involved in completing an EUO in Ottawa and the complicating factor of the companion "listed driver" issue, this delay in taking aggressive steps to obtain the financial documentation will only be a factor in the ultimate decision with respect to granting an extension.

**Did the complexity of the dispute make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?**

Economical has taken the position that this is a complex dispute. Not only are there two distinct priority issues in dispute, this is also a catastrophic impairment case with a claimant who suffered a brain injury as a result of the accident.

This is also an unusual situation in that the parties have been awaiting the decision of the Court of Appeal on the excluded driver/listed driver issue for some time, due to the above-noted conflicting Superior Court cases having been released after the arbitration was commenced. Ultimately, the decision of the Court of Appeal could resolve this entire arbitration, thus rendering a hearing on the dependency issue, EUOs and these submissions, unnecessary.

I do not find that the issues presented are overly complex. Both counsel have agreed to stay the "listed driver" issue pending release of the Court of Appeal decision on the matter which makes perfect sense. This leaves only the "dependency" issue which is most common in these priority disputes and subject to well established jurisprudence. It is very common in dependency cases to proceed with less than perfect evidence such as where there has been a lack of co-operation or the documents are simply not available.

I am not satisfied that complexity is an factor in my determination.

**Has the Respondent been prejudiced by the delay?**

Economical has submitted that Unifund is not handling the accident benefits file and this dispute has largely been dormant due to the parties' agreement to await the Court of Appeal decision. As such, Economical submitted that Unifund has not been prejudiced by the delay.

Furthermore, given that a fulsome hearing on the excluded driver/listed driver issue cannot proceed at this time in light of the conflicting case law, the arbitration cannot actually be completed within two years of its commencement. As such, a delay with respect to the hearing of the dependency issue does not prejudice Unifund.

Conversely, Economical claims that it will be prejudiced if the time to complete the arbitration is not extended, as it should be entitled to satisfy itself as to whether or not the claimant is a dependent on Unifund's insured.

I find that there would be no prejudice to Unifund if the dependency hearing took place with some brief extension, if necessary.

**Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?**

Economical has submitted that counsel for the Respondent was seemingly unaware of the approaching two year deadline for completion of the arbitration, as he suggested that the August 2017 pre-hearing be adjourned to continue to await the Court of Appeal's decision.

Additionally, they have indicated that at no time prior to August 2017 did counsel for Unifund demand that the arbitration be completed within two years. Rather, Economical claims that Unifund's behaviour suggested that it acquiesced to the pace of the proceeding.

I find that waiting until August 28, 2017 for Unifund to state that it wished the dependency hearing completed within two years, thereby leaving only 3½ months to complete EUOs and retain accountants, is somewhat unreasonable. I am of the view that if any party is demanding that the hearing be completed within two years, then such demand ought be made at the earliest possible date so that any steps such as EUOs, motions to satisfy undertakings and the retaining of experts can be completed before a hearing date within two years. Here, clear indication of a demand for a hearing within two years was only given with 3½ months remaining for the hearing with EUOs not having completed. I view this as acquiescence to that date and a consideration in my determination.

**CONCLUSIONS AND ORDER**

I am satisfied that the principles of practicality and fairness must be considered by an arbitrator when making a determination as to whether to grant an extension of the time to complete arbitration.

I am also of the view though that meaning must be given to the legislative intent of s. 8(2)5 of O. Reg. 283/95, namely that priority hearings be completed within two years of the



commencement of the arbitration wherever possible. There is no indication as to when the Ontario Court of Appeal is to release its decision with respect to the "listed driver" issue. Conceivably, it could be months away. To wait would simply delay the hearing far beyond the two years set out in the *Regulation*, provided the Ontario Court of Appeal decision is not determinative of the dispute before me. As a result, I am prepared to bifurcate the two issues before me so as to avoid such possible delay particularly when one party is demanding the hearing be completed within two years. I order that immediate steps be taken to do what is necessary to ready the dependency issue for a hearing. It may be necessary to grant a short extension for the actual hearing beyond two years given any scheduling difficulties that may be encountered by counsel. Consideration may also be given to a "dummy hearing" where only the evidence of the claimant and a Revenue Canada representative would be completed in Ottawa. The oral evidence of accountants and submissions would take place at a later time in Toronto. I would ask that counsel advise me immediately as to the date selected for EUOs and their suggestions as to a month for the hearing of the dependency issue. I would then advise as to my availability. It remains possible to have the hearing completed before year end or at the very least a short time thereafter.

I reserve any decision with respect to costs of this preliminary issue until such time as the dispute has been resolved.

DATED at TORONTO this 26<sup>th</sup> )  
day of September, 2017. )

  
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KENNETH J. BIALKOWSKI  
Arbitrator