

Allstate Insurance Company of Canada v. Brown et al.**[Indexed as: Allstate Insurance Co. of Canada v. Brown]**40 O.R. (3d) 610
[1998] O.J. NO. 2318
Court File No. 487197**Ontario Court (General Division),
Divisional Court
O'Leary, Corbett and Swinton JJ.**

June 9, 1998

Insurance — Arbitration — Insurer denying claim for no-fault benefits on ground that policy had expired before accident and not therefore an "insurer" for purposes of claim — Claimant proceeding through mediation to arbitration — Arbitrator ordering insurer to pay interim benefits pending determination of arbitration without first determining that insurer was "insurer" — Arbitrator's decision not patently unreasonable — Insurer's application for judicial review of order for interim benefits premature — Insurer not exhausting remedies under Insurance Act as it did not ask director to allow appeal on preliminary order of arbitrator as provided in s. 46.2 of Ontario Insurance Commission's Dispute Resolution Practice Code and did not seek stay of decision.

The claimant was seriously injured in a motor vehicle accident. He applied unsuccessfully for statutory accident benefits from three insurers, including A Co., the insurer of the lessee of the vehicle in which he was a passenger at the time of the accident. A Co. declined to pay statutory accident benefits on the basis that there was no valid policy of insurance in existence at the time of the accident as the policy had expired several months earlier, and that A Co. was therefore not an insurer for the purposes of the application. The claimant filed four mediation forms with the Ontario Insurance Commission in respect of the four insurers. The Commission closed all but the first-served application to A Co. The claimant proceeded to mediation against A Co. but they were unable to resolve their dispute. The claimant then proceeded to arbitration before the Commission. He sought a preliminary determination that A Co. was an insurer and brought a motion for A Co. to pay interim benefits. The arbitrator held that the forum for determining whether a particular insurance company is liable to pay statutory accident benefits is through private arbitration under the Arbitration Act, 1991, S.O. 1991, c. 17 as provided in O. Reg. 283/95. She stated that A Co. had provided coverage on the vehicle up to four months before the accident and that prima facie the facts created enough of a connection between the parties to generate an obligation on the part of A Co. to respond to the application. She further held that she did not have to decide, as a preliminary matter, whether A Co. was an "insurer" for the purposes of the regulation since that was integral to the question which the arbitrator appointed under the Arbitration Act, 1991 had to determine. She found it appropriate to order the payment of interim benefits. A Co. applied for judicial review of that decision.

Held, the application should be dismissed.

Per Corbett J. (Swinton J. concurring): If the arbitrator's statement that she need not decide whether A Co. was an insurer for the purposes of the regulation was taken to mean that the arbitrator need not decide as a preliminary matter whether A Co. was an "insurer" for the purposes of the Insurance Act, R.S.O. 1990, c. I-8 then the arbitrator erred in law. This preliminary determination was within her

jurisdiction pursuant to s. 282 of the Act. However, the statement of the arbitrator could also be taken to mean that she need not determine the issue in the context of O. Reg. 283/95 as opposed to the Act. Earlier in her decision, she had in fact found a sufficient nexus to require A Co. to pay interim benefits. Sufficient evidence existed in the record before the arbitrator for a preliminary finding that A Co. was an "insurer" although A Co. might ultimately be found not to be an "insurer" under the Act. The arbitrator did not decline jurisdiction and the result she reached was correct. Even if the arbitrator erred in her view of her own jurisdiction on the preliminary issue, the standard of review was patent unreasonableness and the decision was not patently unreasonable.

It was not unreasonable to require A Co. to pay interim benefits. There was a sufficient nexus between the claimant and A Co. Not only does O. Reg. 283/95 provide for immediate payment of benefits where an insurer may not ultimately be liable, but the Act itself provides in s. 268(8) that where the Statutory Accident Benefits Schedule provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved. A Co. itself followed the procedure in O. Reg. 283/95 and advised the claimant that another insurer was responsible three days before the arbitration decision. The arbitrator was well aware of the policy of the Act and the change in forum for such disputes from the Commission to private arbitration and did not err in her view that the forum to determine whether there was a dispute between insurers was governed by O. Reg. 283/95. Although the arbitrator had jurisdiction to determine the preliminary issue of whether A Co. was an "insurer" under the Act, any such determination would be required to be on notice to the other three insurers. Any finding that A Co. was not an "insurer" would vitally affect one of the other insurers who would then become the first-served insurer and liable for payment of the interim benefits. The Commission ought not to have closed the other three files and ought to have considered combining the applications in accordance with s. 15 of the Commission's Dispute Resolution Practice Code.

The application for judicial review could not succeed for two additional reasons. A Co. had not exhausted its remedies under the Act as it did not ask the Director to allow an appeal on the preliminary order of the arbitrator as provided in s. 46.2 of the Practice Code and did not seek to stay the decision of the arbitrator. Moreover, the application for judicial review was premature. Fragmentation of issues should not be permitted except in the rarest of cases. It was inappropriate to entertain this application on the basis that the decision of the arbitrator was an interim decision on a preliminary issue which all parties agreed should be subject to a full hearing.

Per O'Leary J. (dissenting): Where an insurer disputes a person's claim to entitlement to statutory accident benefits on the grounds that it was not at the time of the accident giving rise to the claim an "insurer", then the arbitrator cannot order the insurer to make payments unless and until she has decided that it was in fact an "insurer".

Cases referred to

Federation Insurance Co. of Canada v. Vineski (1997), 31 M.V.R. (3d) 134, [1997] O.J. No. 4304 (Div. Ct.) [leave to appeal refused [1998] O.J. No. 339 (C.A.)]; Gouliaeff v. Commercial Union, [1997] O.J. No. 4218 (Div. Ct.); Jevco Insurance Co. v. Ontario Insurance Commission, [1996] O.J. No. 2216 (Div. Ct.); Ontario College of Art v. Ontario (Human Rights Commission) (1993), 11 O.R. (3d) 798, 99 D.L.R. (4th) 728 (Div. Ct.); Union des employés de service v. Bibeault, [1988] 2 S.C.R. 1048, 24 Q.A.C. 244, 95 N.R. 161, 35 Admin. L.R. 153, 89 C.L.L.C. 14,045

Statutes referred to

Arbitration Act, 1991, S.O. 1991, c. 17

Insurance Act, R.S.O. 1990, c. I-8 [as amended 1990, c. 2; 1993, c. 10; 1996, c. 21], ss. 1 "contract", "insurance", "insurer", 20(3), (4), 268, 270, 280(1)-(3), 281, 282(1), 283(1)

Rules and regulations referred to

Disputes Between Insurers, O. Reg. 283/95 (Insurance Act), ss. 1, 2, 3(1), 7(1), 10(1), (3)

APPLICATION for a judicial review of a decision of an arbitrator.

Samantha E. Simpson, for applicant.

John T. Petrosioniak, for respondent, Ontario Insurance Commission.

David A. Payne, for respondent, Mark Brown.

CORBETT J. (SWINTON J. concurring): — This is an application for judicial review of the interim decision on a preliminary issue of Senior Arbitrator, Frederika Rotter, of the Ontario Insurance Commission (Commission) made on May 29, 1997 in an arbitration between Mark Brown (claimant) and the applicant (Allstate). The arbitrator ordered Allstate to pay interim statutory accident benefits pursuant to the Insurance Act, R.S.O. 1990, c. I-8 (the Act) and regulations, to the claimant pending the resolution of any dispute about its liability to pay such benefits.

The claimant sustained severe injuries in a single-vehicle motor vehicle accident on September 2, 1996 in New York State. As a result of these injuries, the claimant was rendered a quadriplegic. The claimant was a passenger in a motor vehicle owned by Nissan Canada Finance Limited and leased to the driver, Yvonne Lai. The claimant applied unsuccessfully for statutory benefits from:

- Allstate as the insurer for the lessee of the vehicle, Leanora Brown;
- Yasuda Insurance Company as insurer for the lessor/owner of the vehicle, Nissan Canada Finance Limited;
- the Royal Insurance Company of Canada as the personal insurer of the driver, Yvonne Lai; and
- the Motor Vehicle Claims Act Fund (MVCAF).

The no-fault application forms were served in the following order during the month of February 1997: Allstate, Royal, Yasuda and MVCAF. Allstate declined to pay statutory accident benefits on the basis that there was no valid policy of insurance in existence at the time of the accident, the policy having expired on May 18, 1996, and therefore, Allstate was not an insurer for the purposes of the application.

By letter dated March 13, 1997, the claimant filed four mediation forms with the Commission in respect of the four insurers and requested the Commission to make immediate arrangements for no-fault benefits to be provided from one or the other of the insurers.

In its reply dated March 26, 1997, the Commission closed all but the first-served application to Allstate stating as follows:

You applied for mediation against the three insurers and MVCAF, noting that the first insurer to whom a completed application for benefits was sent was Allstate. The Dispute Resolution Group does not handle liability disputes between insurers which are covered by Regulation 283/95. We therefore closed each of the three other applications for mediation as being non-jurisdictional; and wrote to both you and Allstate to indicate, pursuant to 283/95, we would proceed on a mediation of entitlement with Allstate only.

The intent of regulation 283/95 is that claimants receive benefits promptly. The Commission has taken considerable steps to bring the requirements of this Regulation to the attention of all insurer's [sic]. If there is no question as to whom received the first application, and based upon the injuries sustained by Mr. Brown, no question as to entitlement, then there certainly appears to be a case of non-compliance with the intent of the regulation by one of the parties.

.....

It is unfortunate that we were unable to have the issue resolved in mediation. You may of course, also pursue the options available to all claimants after a mediation which was not able to resolve outstanding disputes; applying to court or arbitration.

As a result, the claimant proceeded to mediation against Allstate and they were unable to resolve their dispute. Mediation is a mandatory first step under the Act which provides in s. 281(2) as follows:

281(2) No person may bring a proceeding in any court or refer a matter to arbitration unless mediation has first been sought and has failed.

If mediation is unsuccessful, the insured person has a choice of proceeding to binding adjudication at the Commission, a court proceeding or private arbitration pursuant to the Arbitration Act, 1991, S.O. 1991, c. 17. This claimant proceeded to arbitration before the Commission and sought a preliminary determination that Allstate was an insurer and brought a motion for Allstate to pay interim benefits.

The arbitrator held that the forum for determining whether a particular insurance company is liable to pay statutory benefits under the Act is through private arbitration under the Arbitration Act as provided in O. Reg. 283/95. Section 268 of the Act establishes a priority for determining liability to pay no-fault benefits and provides:

268(1) Every contract evidenced by a motor vehicle liability policy, including . . . shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in the Schedule.

.....

(2) The following rules apply for determining who is liable to pay no-fault benefits:

1. In respect of an occupant of an automobile,
 - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has

- recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund.

.....

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or ii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) Despite subsection (4), if a person is a named insured under contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

Ontario Regulation 283/95 is entitled "Disputes Between Insurers" and provides:

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.

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.

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.

.....

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.

.....

10(1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers.

.....

(3) The dispute among the insurers shall be resolved in one arbitration.

The arbitrator stated as follows:

In the present case, Mr. Brown is asserting that a valid contract exists. Allstate concedes that it provided coverage on the vehicle up to four months before the accident in question. In my view, these facts, prima facie, create enough of a connection between the parties to

generate an obligation, on the part of Allstate, to respond to this application. Allstate should invoke the process set out in Ontario Regulation 283/95 -- Disputes Between Insurers, if it feels that it is not the insurer who is ultimately responsible for paying benefits in this case.

.....

I need not decide, as a preliminary matter, whether Allstate is an "insurer" for the purposes of the Regulation since that is integral to the question which the arbitrator appointed under the Arbitrations Act, 1991 must determine.

.....

In this case, Allstate is using a form of circular logic to support its position. If I accept that it is not an insurer, I must first make a finding on whether a valid policy of insurance, issued by Allstate, was in effect at the time of the accident. This is precisely the issue in dispute between the parties, and in my view, the means for resolving that dispute has been prescribed by Regulation 283/95.

Under the regulation, Mr. Brown has the opportunity to participate in the private arbitration. Whether or not he chooses to participate, it is my view that the decision rendered by the private arbitrator will be binding on Mr. Brown.

In the interim, and pending a finding on liability as among several insurers, the regulation provides, at section 2, that the first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person.

Until an arbitrator appointed under the Arbitrations Act 1991 determines that Allstate is not required to pay benefits under section 268 of the Insurance Act, I cannot find that Allstate is not an insurer. Accordingly, I conclude that pursuant to section 2 of the Regulation, Allstate is responsible for paying benefits to Mr. Brown, on an interim basis.

The arbitrator found it appropriate to make an interim order on the motion for the payment of interim benefits although such orders are made only in special or unusual circumstances. She stated:

The overriding principle in most cases is that an order will be made only after a hearing which fully canvasses the evidence and positions of both sides. Interim orders are generally granted where an applicant has (1) established, to a convincing degree, that he or she is entitled to the benefits claimed and (2) demonstrated a need, necessity or urgency for the interim order.

The arbitrator concluded that the applicant met these criteria and ordered interim benefits to be paid.

In its application for judicial review, Allstate seeks:

- an order setting aside the decision on a preliminary issue;
- a declaration that, if it is determined as fact that Allstate did not undertake or agree or offer to undertake a contract of insurance with Mark Brown at the date of the motor vehicle accident on September 2, 1996, that Allstate is not an "insurer" within the meaning of s. 268(8) of the Insurance Act and is therefore not subject to the provisions thereof;
- an order remitting the preliminary issue to an arbitrator of the Commission and

compelling him or her to make a finding of fact as to whether Allstate is an insurer within the meaning of s. 268(8) of the Insurance Act.

The applicant submitted that the arbitrator was required to make a determination of the preliminary issue of whether Allstate was an insurer within the meaning of the Act. The arbitrator stated that she need not decide whether Allstate was an insurer "for the purposes of the Regulation, since that is integral to the question which the arbitrator appointed under the Arbitration Act, 1991 must determine" (emphasis added). If this statement is taken to mean that the arbitrator need not decide as a preliminary matter whether Allstate is an "insurer" for the purposes of the Act, then the arbitrator erred in law. This preliminary determination was within her jurisdiction pursuant to the Act which provides in s. 282 as follows:

282(1) An insured person seeking arbitration under this section shall file an application for the appointment of an arbitrator with the Commission.

(2) The Director shall ensure that an arbitrator is appointed promptly.

(3) The arbitrator shall determine all issues in dispute and such other issues as the parties may agree.

My conclusion is supported by *Jevco Insurance Co. v. Ontario Insurance Commission*, [1996] O.J. No. 2216 (Div. Ct.), where the insurer commenced an application for judicial review and sought an order prohibiting the Director of Arbitrations from appointing an arbitrator in the dispute resolution proceeding. The insurer asserted there was no jurisdiction to permit arbitration as mediation had not failed or, alternatively, was still ongoing. Steele J. observed that in the mediator's opinion, arbitration was not ongoing, as he had already written his report. Steele J. held ". . . an arbitrator has the power under Section 282(3) to determine all issues in dispute. In my opinion this could also include its own jurisdiction."

The above-quoted statement of the arbitrator may also be taken to mean that she need not determine the issue in the context of O. Reg. 283/95 as opposed to the Act. Earlier in the decision, the arbitrator had in fact found a sufficient nexus to require Allstate to pay interim benefits. She stated that insurance coverage on the vehicle up to four months before the accident prima facie provided enough evidence to create a connection between the parties sufficient to generate an obligation by Allstate to respond to the application.

As well, sufficient evidence existed in the record before the arbitrator for a preliminary finding that Allstate was an insurer although Allstate might ultimately be found not to be an "insurer" under the Act. The arbitrator had before her six document books filed by the parties. These documents included:

- an Allstate motor vehicle liability insurance card naming "Nissan Canada Finance Inst., c/o and Leanora Brown, lessee" as the insured with an expiry date on the policy of May 18, 1996;
- an automobile insurance offer effective from May 18, 1996 to November 18, 1996;
- copy of a cheque dated January 7, 1997 from the claimant to Allstate which was cashed and returned by a cheque issued in the same day by Allstate to Nissan Finance; and
- records with respect to past defaults and reinstatements in respect of this policy.

Further, while "insurer" is defined under the Act as "the person who undertakes or agrees or offers to

undertake a contract", the Act provides for recourse against a variety of insurers whether or not the claimant is named in a contract. Section 270 provides:

270. Any person insured by but not named in a contract to which section 265 or 268 applies may recover under the contract in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

In my opinion, the arbitrator did not decline jurisdiction and the result reached by the arbitrator was correct. Even if the arbitrator is found to have erred in her view of her own jurisdiction on the preliminary issue, the standard of review is patent unreasonableness and her decision was not patently unreasonable.

With respect to "jurisdictional" issues, Beetz J. stated in *Union des employés de service v. Bibeault*, [1988] 2 S.C.R. 1048 at p. 1086, 95 N.R. 161:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

He continued at p. 1088:

However, by limiting the concept of the preliminary or collateral question and by introducing the doctrine of the patently unreasonable interpretation, this Court has signalled the development of a new approach to determining jurisdictional questions.

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.

The standard of review of decisions of the arbitrator and Director acting within their jurisdiction and in the area of their expertise under the Insurance Act has been held to be that of patent unreasonableness: *Federation Insurance Co. of Canada v. Vineski* (1997), 31 M.V.R. (3d) 134, [1997] O.J. No. 4304 (Div. Ct.), leave to appeal denied [1998] O.J. No. 339 (C.A.); *Gouliaeff v. Commercial Union*, [1997] O.J. No. 4218 (Div. Ct.). In *Vineski*, the court referred to three other Divisional Court cases in which the standard of review was held to be patent unreasonableness.

In the case at bar, the court is reviewing a decision of the arbitrator, as opposed to a decision of the arbitrator and the Director. Arbitrators' decisions are final and conclusive unless an appeal is provided for under the Act. Section 20(2) of the Act provides:

20(1) This section applies with respect to proceedings under this Act before the Tribunal, the Superintendent and the Director and before an arbitrator.

(2) A person referred to in subsection (1) has exclusive jurisdiction to exercise the powers conferred upon him or her under this Act and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes.

An appeal is provided under the Act and decisions of arbitrators may be appealed to the Director of Arbitrations on a question of law. Section 283(1) provides:

283(1) A party to an arbitration under section 282 may appeal the order of the arbitrator to the Director on a question of law.

With respect to preliminary orders, s. 46 of the Commission's Dispute Resolution Practice Code ("Practice Code") provides:

46.1 A party to an arbitration may appeal an order of an arbitrator to the Director only on a question of law.

46.2 A party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director orders otherwise.

46.3 An appeal does not stop an arbitration order from taking effect, unless the Director orders otherwise.

In my opinion s. 20 of the Act must be read in conjunction with s. 283. Together they have a privative effect making the standard of review of a decision of the arbitrator that of patent unreasonableness.

In my opinion, it is not at all unreasonable to require Allstate to pay interim benefits. First, there is, as I have reviewed, a sufficient nexus between the claimant and Allstate.

Second, not only does O. Reg. 283/95 provide for immediate payment of benefits where an insurer may not ultimately be liable but the Act itself provides in s. 268(8) as follows:

268(8) Where the Statutory Accident Benefits Schedule provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.

As the arbitrator observed (p. 5):

Insurers may dispute their liability on numerous grounds. A policy may be void or voidable, for various reasons. Whether or not a valid policy exists in a particular case is a question of fact and law, which can only be determined after a full hearing on the merits.

The practice note entitled "Process For Settling Disputes Between Auto Insurance Companies" in the Practice Code refers to s. 268 of the Act as follows:

The section is used to determine which insurer is liable to pay benefits when the claimant does not have an auto insurance policy of his or her own, or where coverage may be available under more than one policy.

.....

Disputes between insurers can arise various ways. For example, in cases where a passenger involved in a car accident has no auto insurance of his or her own, it may not be clear whether the passenger looks to the insurance policy of their spouse, parents, or another vehicle involved in the accident.

.....

This Regulation ensures that accident victims will not be denied statutory accident benefits simply because the first insurer applied to for [sic] benefits thinks another insurer should pay. Section 2 of the Regulation requires the first insurer that receives an application to adjust the claim and to pay benefits to which the insured person is entitled, pending resolution of any dispute as to which insurer is required to pay benefits.

.....

All such arbitrations must be commenced within a year from the date that the first insurance company gave notice that it believes another company is liable.

Third, Allstate itself followed the procedure in O. Reg. 283/ 95 and advised the claimant that another insurer was responsible by notice dated May 26, 1997, three days before the arbitration decision. This notice stated:

This notice is to inform you that the insurer to whom you have applied for accident benefits claims that another insurer is responsible for paying these benefits. You may be required to assist the insurers in resolving their dispute by providing them with any information that may be needed to determine which insurer should be paying your accident benefits claim.

You will continue to receive accident benefits that you are entitled to from the insurer that you applied to while the insurer's attempt to resolve their dispute. Part 1 shows Allstate as the insurer to whom the claimant applied for accident benefits and part 2 lists Yasuda Insurance Company as the insurer notified to pay benefits as well as Royal Insurance Company.

Fourth, the arbitrator was well aware of the policy of the Act and the change in forum for such disputes from the Commission to private arbitration. The arbitrator did not err in her view that the forum to determine whether there was a dispute between insurers was governed by O. Reg. 283/95.

Prior to this regulation coming into force on May 27, 1995, the forum for determining this issue was

the dispute resolution group of the Commission. A bulletin circulated to all automobile insurance companies described the new Regulation as providing protection to injured accident victims who may be entitled to benefits and are caught in the middle of disputes between automobile insurance companies when it is unclear which company is liable to pay for benefits. Insurers that first receive an application for accident benefits will now be required to pay benefits pending the resolution of the disputes. The bulletin described the background as follows:

Section 268 of the Insurance Act sets out a priority ranking for determining which insurer is liable to pay for accident benefits in situations where more than one insurer may be liable to pay for benefits. However difficulties have emerged in resolving these disputes between companies: some claimants who have been entitled to benefits have been subject to delays in payments.

Fifth, although the arbitrator had jurisdiction to determine the preliminary issue of whether Allstate was an "insurer" under the Act, any such determination would, in my view, be required to be on notice to the other three insurers. The notice of hearing of a preliminary issue was issued by the Commission to the claimant and to Allstate. This notice contained no description of the nature of the preliminary issue and the notice was not given to any other interested party. Any finding that Allstate was not an "insurer" would vitally affect one of the other insurers who would then become the first-served insurer and liable for payment of the interim benefits.

Further, in my view, the Commission ought not to have closed the other three files and ought to have considered combining the applications in accordance with s. 15 of the Practice Code as follows:

15. Combining Applications

15.1 Where two or more Applications for Mediation have been filed involving the same parties or the same accident, the Commission may:

- (a) combine the Applications;
- (b) schedule any mediation meetings to take place one immediately after the other; or
- (c) on the consent of all parties, conduct any mediation meeting with all parties present at the same time.

Section 30 of the Practice Code provides for combining applications:

30.1 Where two or more Applications for Arbitration have been filed and it appears that:

- (a) they have an issue or question of law, fact, or policy in common; or
- (b) the application of this Rule will result in the quickest, most just and least expensive means to deal with the Applications;

The Commission will notify the parties that an arbitrator may order that:

- (c) the proceedings be combined;
- (d) the proceedings be heard at the same time;
- (e) the proceedings be heard one immediately after the other;
- (f) the proceedings be stayed until the determination of any one of them;
- (g) evidence presented in one proceeding will be applied in another proceeding;
- or
- (h) an order or decision made with respect to one proceeding be applied to the

other proceeding.

It was not disputed by any party throughout that there would have to be a determination of the issue raised by Allstate on the merits in some fashion. As a practical matter, and given the lack of participation by the other insurers in the arbitration, and in keeping with the legislative scheme respecting disputes between insurers, the action taken by the arbitrator was entirely reasonable and correct.

This application for judicial review cannot succeed for two additional reasons. The applicant has not exhausted its remedies under the Act and the application is premature.

Allstate did not ask the Director to allow an appeal on the preliminary order of the arbitrator as provided in s. 46.2 of the Practice Code quoted earlier.

James Malcolm, Registrar and Executive Co-ordinator of the Dispute Resolution Branch, deposed as follows:

After an unsuccessful mediation, a hearing on a preliminary issue was held where Arbitrator Rotter determined that Allstate had to make certain interim payments to Mr. Brown. Neither Allstate, nor anyone on its behalf, has filed an appeal with the Director of Arbitrations with respect to this ruling. (par. 29)

The Director of Arbitrations has the authority to hear appeals on preliminary issues. Section 47.2 of the Practice Code provides that, as general rule, appeals from preliminary issues are normally not heard unless they finally decide the rights of the parties. A number of preliminary issues have been decided on appeal, however, where final decisions were made determining the rights of the parties. Also, pursuant to section 79 of the Practice Code, the Director may determine that a Rule does not apply in particular cases. (par. 30)

Ian Kirby, solicitor for the insurer, deposed in his affidavit sworn June 24, 1997 in support of the application for judicial review, as follows:

I have also reviewed section 46.2 of the Dispute Resolution Practice Code and verily believe that no appeal, with any practical effect, lies from the preliminary decision of the Senior Arbitrator, Frederika Rotter.

In cross-examination, Ian Kirby testified as follows on this issue.

176 Q. . . . 46.2 relates to you being barred from appealing a preliminary or interim order until all of the issues in dispute have been finally decided.

You'd agree with me now, sir, that effective as of September 18th your client can use section 47 for appeal purposes?

A. No.

177 Q. What is to prevent them from appealing an arbitration order right now, sir?

A. One, the application for judicial review has already been launched and, secondly . . .

181 A. . . . there is a perception of bias on the part of my client concerning the ability of the Director of Arbitrations to give an unbiased decision on appeal.

And thirdly, the practical difficulty in this case, which was brought home to --

.....

187 A. The third was that as a practical matter, which was brought home to me as recently as today, in my experience at the Commission when an application for appeal is heard, either by the Director of Arbitrations or one of her delegates, that there is a lengthy delay between the hearing and the written decision being released.

.....

197 Q. Okay. Let's ask you that then.

It is possible, isn't it -- you're giving me reasons why you haven't -- but as of September 18th, 1997 there is absolutely nothing in the world to prevent your client from appealing the decision pursuant to section 47; correct?

A. Well, there are and I've given you the three reasons.

198 Q. No, those are reasons why you may choose not to, but that's quite different from my question which said there's nothing preventing you because section 46 prevented you from appealing.

But now I'm suggesting to you that there's nothing to prevent you from appealing. You may choose not to, but there's nothing to prevent you from appealing . . . correct?

A. Well, it's a semantical discussion, Mr. Payne, because if I can do the physical exercise of filing the papers to appeal the Director of Arbitrations, the net result is that I will never get a hearing on the appeal --

199 Q. As you say, "the fix is in"?

A. No, for all practical purposes if I'm not going to get a hearing or a decision before the private arbitration, then for all practical purposes I can't do it.

200 Q. Yes. But just so we're clear on the record, you do agree with me that it's possible, you can do it now?

MS. SIMPSON: I believe that's calling for a legal opinion.

MR. PAYNE: Well, I want his client's position.

BY MR. PAYNE

201 Q. For example, and it's quite clear and it's very relevant, he states in his affidavit:

"I have also reviewed section 46.2 of the Dispute and Resolution Practice Code and verily believe that no appeal and any practical effect lies from the preliminary decision." That may very well be correct. I'm now asking him if there's anything to prevent him from appealing pursuant to section 47?

He's given me reasons why his client may choose not to avail himself of that remedy, but I'm just trying to get it confirmed that is an available avenue to them; correct?

A. I've answered the question as best I can, Mr. Payne.

202 Q. Okay. Just so we're clear because I'm quite confused on this and it seems like a clear point. Is it something your client can do if it chooses to?

A. For all practical purposes, no.

In this case, Allstate did not pursue the avenue of appeal under s. 46.2 and the opinion of Allstate's counsel that such recourse is of no practical effect is not determinative of the requirement to pursue all avenues of appeal.

Allstate may have sought a stay of the order of the arbitrator. Section 20(3) provides:

20(3) An application for judicial review and any appeal from an order of the court on the application does not stay the decision made under this Act.

As well, the court may grant a stay pursuant to s. 20(4) as follows:

20(4) Despite subsection (3), a judge of the court to which the application is made or a subsequent appeal is taken may grant a stay until the disposition of the judicial review or appeal.

Allstate did not seek to stay the decision of the senior arbitrator and in fact, is proceeding to arbitration which will commence presently.

This application for judicial review is premature. Fragmentation of issues should not be permitted except in the rarest cases. In *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798, 99 D.L.R. (4th) 728 (Div. Ct.), Callaghan C.J.O.C. stated at p. 800:

For some time now the Divisional Court has, as I have indicated, taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion. In particular, at that time these applicants will have a full right of appeal pursuant to s. 42 of the Human Rights Code, R.S.O. 1990, c. H.19.

In my opinion, it is inappropriate to entertain this application on the basis that the decision of the arbitrator is an interim decision on a preliminary issue which all parties agree must be subject to a full hearing.

For all of these reasons, the application is dismissed. Unless written submissions are received to the contrary, costs are fixed at \$3,000 payable by Allstate to the claimant.

O'LEARY J. (dissenting): — The issue raised on this application for judicial review is: Can an arbitrator of the Ontario Insurance Commission order an insurance company to pay interim statutory accident benefits pursuant to the Insurance Act, R.S.O. 1990, c. I.8 and regulations thereunder without first determining that the insurance company is an "insurer" within the meaning of that word in the Insurance Act?

For the reasons which follow I am of the view that where an insurance company disputes a person's claim to entitlement to statutory accident benefits on the grounds that it was not at the time of the

accident giving rise to the claim an "insurer" (say as in this case where it claims that the policy of insurance which would have made it an "insurer", lapsed for non-payment of premium some four months before the accident) then the arbitrator cannot order the company to make payments unless and until she has decided the company is in fact an "insurer".

Mr. Mark Brown was injured in a single motor vehicle accident outside of Ontario on September 2, 1996. He applied for statutory accident benefits from Allstate Insurance Company of Canada. Allstate declined to pay benefits on the basis that, while it had insured the lessee of the vehicle that he was in at the time of the accident, coverage was terminated on May 18, 1996 for non-payment of premium.

Mr. Brown alleges that four possible parties are responsible for payment of his no-fault benefits: Allstate, insurer of the lessee of the vehicle in which he was a passenger; the Yasuda Insurance Company, insurer of the lessor of the vehicle in which he was a passenger; the Royal Insurance Company of Canada, the personal insurer of the driver of the vehicle in which he was a passenger; the Motor Vehicle Claims Act Fund.

After the accident none of the parties just named were willing to pay him no-fault benefits, each alleging that for various reasons he was not covered by it. In February 1997 Brown served each of the named parties with an application form for no-fault statutory benefits, serving them in the following order -- Allstate, Royal, Yasuda, the Fund. On March 13, 1997 Brown served and filed with the Ontario Insurance Commission, in the same order as he had served his application for benefits, four separate applications for mediation, one for each of the named parties. The Ontario Insurance Commission refused to process all four application forms for mediation, stating that it would only accept the mediation application relating to Allstate, on the basis that it was the first insurer served with an application for benefits. The Commission said this method of handling the applications for mediation was dictated by O. Reg. 283/95.

Before us counsel for the Ontario Insurance Commission submitted that O. Reg. 283/95 does not prevent four applications for mediation being received by and dealt with by the Commission.

Ontario Regulation 283/95 (Disputes Between Insurers) provides in part:

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.
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.

Ontario Regulation 283/95 requires the first "insurer" that receives an application for statutory benefits to pay such benefits pending the resolution of any dispute between insurers as to which is ultimately responsible to pay benefits, but it does not prevent the Commission from receiving more than one application for mediation and conducting more than one mediation.

Indeed ss. 280 and 281 of the Insurance Act, provide in part:

- 280(1) Either the insured person or the insurer may refer to a mediator any matter in dispute in respect of the insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which the insured person is entitled.
- (2) The party seeking mediation shall file an application for the appointment of a mediator with the Commission.

(3) The Director shall ensure that a mediator is appointed promptly.

281(1) If mediation fails, the insured person may bring a proceeding in a court of competent jurisdiction or may refer the matter to an arbitrator.

(2) No person may bring a proceeding in any court or refer a matter to arbitration unless mediation has first been sought and has failed.

Since Mark Brown was entitled to commence proceedings in a court or refer the matter to an arbitrator only after failed mediation and since the Commission knew he was alleging four different parties were liable to pay his no-fault benefits, in order that he might take such court proceedings or arbitration proceedings against the four parties, the Commission ought to have accepted all four of his applications to it for mediation.

In this case where each of the four parties alleges it does not provide coverage it is essential that all four parties be included in the court or arbitration proceedings to determine whether any of them provided coverage -- i.e., is an "insurer". Economy of time and fairness to the parties in such a case dictate that all should participate in the one proceeding.

The mediation between Mark Brown and Allstate Insurance Company of Canada took place on March 25, 1997. The mediation failed. Allstate Insurance Company of Canada, not surprisingly since it said the policy of insurance had terminated, made no offer to pay any benefits to Mr. Brown.

On March 31, 1997, an application for arbitration was filed against Allstate Insurance Company of Canada and a request for an interim decision on a preliminary issue was filed by Mr. Brown requesting the arbitrator immediately declare the obligation of Allstate Insurance Company of Canada to pay Mr. Brown his no-fault benefits, pending any resolution of who the proper party was that should be paying him his no-fault benefits.

On May 29, 1997, the hearing of the aforesaid preliminary issue took place. At that time, Ms. Frederika Rotter, senior arbitrator, made a preliminary order that Allstate Insurance Company of Canada "must pay Statutory Accident Benefits to Mr. Brown pending the resolution of any dispute about its liability to pay such benefits". It is that order that is attacked on this application for judicial review.

Counsel for the Ontario Insurance Commission informed us he was unaware of any provision of the Insurance Act or regulations thereunder that empowers an arbitrator to make an order to pay against anyone not an insurer under the Act.

Section 1 of the Insurance Act provides in part:

"insurer" means the person who undertakes or agrees or offers to undertake a contract;
 "contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement;
 "insurance" means the undertaking by one person to indemnify another person against loss . . .

"Insured" is defined in s. 224(1) of the Insurance Act to mean "a person insured by a contract whether named or not and includes every person who is entitled to statutory benefits under the contract whether or not described therein as an insured person".

Since "insured" in the Act means a person insured by a contract that contract must be in force and

provide coverage to the "insured" at the time of the injury before anyone is an "insured".

Only an insured person can claim benefits. I refer to the following sections:

280(1) Either the insured person or the insurer may refer to a mediator any matter in dispute . . .

.

281(1) If mediation fails, the insured person may bring a proceeding . . .

.

282(2) An insured person seeking arbitration shall file an application for the appointment of an arbitrator . . .

If I am right that only an insured person is entitled to no-fault statutory benefits before a court or arbitrator orders an insurance company to make such payments, it must first be decided that the person claiming is in fact an insured person. Here Allstate says its contract of insurance expired for non-payment of premium approximately four months before the accident. It was incumbent then on the arbitrator to inquire into and determine on the evidence the parties might produce whether Mark Brown was covered by Allstate at the time of his injury, before making any order that Allstate pay benefits.

We are told by counsel for the applicant, and such is not denied by counsel for Mark Brown, that Allstate wanted to call witnesses before the arbitrator to establish that it did not cover Mark Brown because its policy had expired for non-payment of premium.

The arbitrator decided not to hear that evidence and to leave to an arbitrator under O. Reg. 283/95 the task of deciding whether Allstate insured Mark Brown at the time of the accident.

I point out that s. 282 provides:

282(1) an insured person seeking arbitration shall file an application for the appointment of an arbitrator with the Commission.

.

(3) The arbitrator shall determine all issues in dispute and such other issues as the parties may agree.

Ontario Regulation 283/95 reads as follows:

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.
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.

It would appear then that while disputes between insurers as to which is required to pay benefits under s. 268 of the Act are to be settled in accordance with O. Reg. 283/95 -- that is to say by an arbitrator under the Arbitration Act, 1991, S.O. 1991, c. 17 as provided for by O. Reg. 283/95 -- the arbitrator appointed by the Commission to hear Mark Brown's application had authority to and was bound to

determine whether Mark Brown was an "insured" and whether Allstate was an "insurer".

The arbitrator stated:

Mr. Brown brought a motion for interim benefits to be paid, pending the resolution of the question whether Allstate is ultimately liable to pay benefits. . . .

Result

1. Allstate must pay statutory accident benefits to Mr. Brown pending the resolution of any dispute about its liability to pay such benefits. . . .

This matter came before me as an issue for a preliminary determination and a motion for interim benefits. . . .

Allstate denies that it is responsible to pay benefits. Mr. Brown requests an interim order, requiring Allstate to pay benefits pending the resolution of the dispute about liability. . . .

Allstate denies that it is liable to pay benefits. It states that it had no policy of insurance on the Nissan vehicle in effect at the time of the accident. Allstate acknowledges that it did at one time insure the vehicle, but states that its policy expired on May 18, 1996. . . .

Allstate argues that in the present case there was no existing agreement, undertaking or offer to undertake a contract, and so it cannot be considered an insurer, within the meaning of the Insurance Act. . . .

Allstate claims that the applicant first has the onus of establishing that Allstate is an "insurer" within the meaning of the Act, before any statutory duty or obligation to respond to the application can be invoked. . . .

In the present case, Mr. Brown is asserting that a valid contract exists. Allstate concedes that it provided coverage on the vehicle up to four months before the accident in question. In my view, these facts, prima facie, create enough of a connection between the parties to generate an obligation, on the part of Allstate, to respond to this application. Allstate should invoke the process set out in Ontario Regulation 283/95 -- Disputes Between Insurers, if it feels that it is not the insurer who is ultimately responsible for paying benefits in this case. . . .

Whether or not a valid policy exists in a particular case is a question of fact and law, which can only be determined after a full hearing on the merits. . . .

I find that the question of whether Allstate had a valid policy in effect on the Nissan vehicle must be decided by a private arbitrator under the Arbitration Act 1991. I need not decide, as a preliminary matter, whether Allstate is an "insurer" for the purposes of the Regulation, since that is integral to the question which the arbitrator appointed under the Arbitrations Act, 1991 [sic] must determine. . . .

In the interim, and pending a finding on liability as among several insurers, the regulation provides, at section 2, that the first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person. . . .

It is apparent then that the arbitrator, Frederika Rotter, found that on a motion for interim benefits, it was not for her to decide whether Allstate is an insurer, that being a question to be decided by private arbitration under O. Reg. 283/95.

The arbitrator also found that because Mr. Brown asserted that a valid contract existed and Allstate conceded that it provided coverage up to four months before the accident, there was enough of a connection between the parties to generate an obligation on Allstate to respond to the application. While it is not clear what responding to the application has to do with an obligation to pay benefits, it does

appear that this alleged "connection" is the basis on which Allstate was ordered to make interim no-fault payments.

There is nothing in the words of the arbitrator to suggest that in concluding there was "enough of a connection between the parties to generate an obligation", the arbitrator relied on the many documents filed with her that related to the question of the existence of insurance coverage. Indeed, it is doubtful that she could rely on them in the absence of evidence or agreement as to their significance. We must accept the arbitrator's words to the effect that the finding of "enough of a connection" was based on the assertion by Mr. Brown that a valid contract exists and the concession by Allstate that it provided coverage up to four months before the accident.

While O. Reg. 283/95, s. 2 provides that "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", such does not require someone not an insurer to make payments to someone not an insured person. In short, before payments can be ordered it must first be established that the person claiming was insured.

I can find nothing and have been referred to nothing in the Act or regulations that permits an order for payment interim or permanent to be made against an insurance company before it has been found to be responsible as an insurer at the time of the accident. Certainly there is nothing to suggest an insurance company is liable for interim payments because there is a "connection" between it and the claimant.

Here Allstate was ordered to make interim payments that have already reached \$100,000 without its liability to make such payments being determined. There is no certainty it will some day be reimbursed for such payments. The other parties Brown claims against allege, for various reasons, that they are not liable to make no-fault payments.

It has been submitted that this application for judicial review should not be entertained because Allstate failed to make use of the appeal provision set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission which reads in part:

46. Appeal

46.1 A party to an arbitration may appeal an order of an arbitrator to the Director only on a question of law.

46.2 A party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director orders otherwise.

James Malcolm, Registrar and Executive Co-ordinator of the Dispute Resolution Branch of the Ontario Insurance Commission states, by way of affidavit that:

30. The Director of Arbitrations has the authority to hear appeals on preliminary issues. Section 47.2 of the Practice Code provides that, as general rule, appeals from preliminary issues are normally not heard unless they finally decide the rights of the parties. A number of preliminary issues have been decided on appeal, however, where final decisions were made determining the rights of the parties.

Thus the combined effect of the practice code and the policy of the Director is that the Director does not hear appeals on preliminary issues that do not finally decide the rights of the parties. There was then no effective appeal route available.

It was further submitted that it is the policy of this court not to hear applications for judicial review of preliminary or interlocutory decisions. Certainly that is the court's policy but it is not a policy that has been or should be applied where the decision, though interlocutory, nevertheless imposes a heavy and immediate obligation on someone, as in this case to pay large sums of money. There is no good reason for refusing to hear this application for judicial review.

As to the merits of this application, in my opinion, there is no jurisdiction in an arbitrator nor would there have been jurisdiction in the court if Mr. Brown had chosen to come to the court, to order an insurance company to pay no-fault statutory benefits until it has been determined that the claimant was insured at the time of the accident by the insurance company. The arbitrator, of course, had the jurisdiction to decide whether or not Allstate was an insurer and whether Mr. Brown was an insured, but she chose not to exercise that jurisdiction. Rather, she ordered Allstate to pay without first finding it was an insurer. She had no jurisdiction to do that. The arbitrator acted then without jurisdiction and her decision must be quashed and the matter remitted to another arbitrator to determine whether Allstate is an insurer of Mr. Brown.

Application dismissed.