



Q.: WHEN IS A TERMINATION VALID?

The starting point in any discussion regarding termination is the 2003 Supreme Court of Canada decision in *Smith v. Co-operators General Insurance Co.* (“*Smith*”) in which was discussed the issue of termination of benefits in the context of the limitation period set out in s.285(1) of the *Insurance Act*. The Court determined that for a refusal to pay (or termination of) benefits under Bill 164 to be valid it must comply with section 71 (now section 49) of the *Schedule*, as follows:

1. The insurer must inform the claimant in writing of the dispute resolution process contained in sections 279 to 283 of the *Insurance Act*; and
2. This information must be provided in a **straightforward and clear language directed towards an unsophisticated person.**

The Court specified the requirements necessary to comply with s.71 (now section 49) of the *Schedule* as including:

at a minimum...a description of the most important points of the process, such as the right to seek mediation, the right to arbitrate or litigate if mediation fails, that mediation must be attempted before resorting to arbitration or litigation and the relevant time limits that govern the entire process. Without this basic information, it cannot be said that a valid refusal has been given.

Emphasis added.

The Court confirmed one of the main objectives of insurance law as consumer protection and thus held that it was not sufficient for an insurer to inform the insured only of the right to refer the dispute to mediation, since that is merely the first step in the dispute resolution process. Rather, section 71 (now section 49) places upon the insurer the obligation to inform the claimant of the most important points of the dispute resolution process. Only once an insurer has complied with section 71 (now section 49) does the two year limitation period in which the insured is required to commence an action begin. The Court further held that “the insurer’s obligation extends beyond mere communication of the limitation period” to the insured.

FSCO arbitrators have consistently followed the Court’s lead and adopted its reasoning in a number of Bill 59 decisions. The appeal in *Nahsari v. Belair* (FSCO P02-00002) follows the *Smith* decision and confirms that “the case law is clear that a refusal must be in writing, must be clear and unequivocal and must contain reasons for the refusal”. In *Finlayson v. Allstate* (FSCO A04-002133), the arbitrator stated that although *Smith* was decided under Bill 164, the wording of the relevant sections in the current regime (section 49 in Bill 59) is almost identical and the underlying principles

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of consumer protection remain the same. The Arbitrator stated that an insurer's refusal is not only required to be clear and unequivocal, but is also required to contain all of the essential elements of the dispute resolution process in order to trigger the start of the limitation period. No weight was given to the fact that a Disability DAC was offered and attended, since "nothing in the *Schedule* indicates that referring an insured to a DAC relieves an insurer from the obligations imposed by section 49 (as interpreted by the Supreme Court of Canada)." The fact that insured's counsel had informed the insurer that it would be proceeding to mediation does not amount to the insurer having met its obligation under section 49 of the *Schedule*. Furthermore, the applicant's understanding of the dispute resolution process is irrelevant, as it would lead to the conclusion that an insurer's obligation to provide information would vary depending on the level of knowledge and understanding of the applicant.

Finally, in *Narain v. ING* (FSCO A05-002327), the arbitrator states that an insurer is not entitled to terminate the payment of Income Replacement Benefits to the applicant at the 104 week mark without issuing a notice of stoppage or offering a DAC assessment in accordance with section 37 of the *Schedule*.

As you can see, improper termination of benefits is a potential minefield for insurers, and indeed we are seeing cases being re-opened on the grounds that termination was not in keeping with the *Smith* decision.

To discuss your case, please contact information@ztgh.com.

