Appeal P06-00037

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALEXANDER NTEREKAS

Appellant

and

RUGANRAJ SEBAMALAI and
ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondents

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Andrew Suboch for Mr. Nterekas Ms. Kadey B.J. Schultz for Royal No one attended on behalf of Mr. Sebamalai
HEARING DATE:	March 14, 2008 Additional written submissions were received by May 6, 2008

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Appeal is dismissed and the Orders of Arbitrator Alves dated October 31, 2005 and November 1, 2006 are confirmed.

2. If the parties are unable to agree on the legal expenses of this appeal proceeding, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*

June 2, 2008

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL AND BACKGROUND

This matter arises out of a February 5, 2002 motor vehicle accident.

I base the history of this matter largely on the exhibits contained in the Affidavit of Mr. Alexander Nterekas (the "Appellant") sworn November 20, 2006. I am allowing this material into evidence, for reasons which are set out later in this decision.

Mr. Sebamalai applied for mediation at the Financial Services Commission of Ontario (the "Commission"), represented by Appellant. The Appellant is noted in the October 15, 2003 Report of Mediator as a consultant with Laraia/Nterekas. Mr. Sebamalai sought payment of statutory accident benefits payable pursuant to the *Schedule*[1] from Royal & SunAlliance Insurance Company of Canada ("Royal") as a result of injuries sustained in the said accident. Mediation failed to resolve all of the issues in dispute, but did result in Royal paying $1,498 directly to a Dr. Kachooie on July 22, 2003 for his account rendered pursuant to section 24 of the *Schedule*, Royal further agreeing to pay interest on this resolved issue.

The Appellant sent an initial Application for Arbitration to the Commission by letter dated November 25, 2003. It is unclear what happened to this Application. The Appellant's Affidavit does not include a copy of this Application, but includes an Application for Arbitration dated January 20, 2004. The Appellant is noted therein as the representative. A signature, purported to be that of Mr. Sebamalai, is written twice on page two of the Application.

The first signature, certifying that all information in the Application is true, is noted as being signed on January 20, 2004. The second signature, confirming that the representative has been provided with full authorization to discuss, negotiate and enter into an agreement or settlement of all issues in dispute, is noted as being signed on the same date.

[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended.

The Appellant includes in his Affidavit, at Tab "A," an authorization for someone from Laraia/ Nterekas "to act as my representative and to make binding decisions on my behalf in all matters connected with this arbitration." The "Re" line in the form is left blank, as is a description of the Claim, the date of loss, the file number, the specific person authorized to act, the date and the signature line. The only addition to this otherwise blank form is a signature above the witness line. It is not apparent that this signature and the signatures purported to be those of Mr. Sebamalai in the January 20, 2004 Application for Arbitration are necessarily the same.

A July 14, 2004 pre-hearing discussion was held before Arbitrator Alves (the "Arbitrator"). The Arbitrator noted that Mr. Sebamalai did not attend the pre-hearing. She confirmed that:

> [The Appellant] also undertook to advise [counsel for Royal] and the Commission in writing in **30 days** whether he had been able to reach his client and whether he had the necessary authorizations signed by his client so that he could obtain the requested productions. [emphasis in the original]

The Arbitrator set hearing dates for March 8, 9 and 10, 2005.

Royal wrote to the Appellant on August 17, 2004, copied to the Commission, confirming the Appellant's August 5, 2004 letter which indicated that he had not been successful in contacting Mr. Sebamalai.

On January 19, 2005, the Appellant wrote the Commission confirming he had been unsuccessful in his efforts to contact Mr. Sebamalai. The Appellant enclosed correspondence (which is omitted from the affidavit) which he states shows that Mr. Sebamalai had either abandoned his claim or had moved. The Appellant requested that he be "struck from the Record, as Agent for the plaintiff as I am unable to go forward without a client and/or his instructions." The letter is not noted as being copied to Mr. Sebamalai.

In his February 9, 2005 response to the Arbitrator's January 24th request, the Appellant stated that he had "made inquiries with Bell Canada, [Mr. Sebamalai's] Family Physician and other treating practitioners on file, but [had] been unable to determine if this gentleman is still in Toronto, let alone obtain a new contact number for him." The Appellant again requested that he

be removed from the record. By letter dated February 15, 2005, the Arbitrator removed the Appellant as Mr. Sebamalai's representative "due to his inability to contact him or receive instructions."

Royal wrote the Commission on February 23, 2005 advising that it had located Mr. Sebamalai and had spoken to him directly. An address and telephone number for Mr. Sebamalai were provided. Mr. Sebamalai was said to be very confused, and was of the view that he had no arbitration proceeding ongoing. Mr. Sebamalai was also said to have advised that he did "not know of the firm Laraia Nterekas, and does not recall having ever retained same to represent him with respect to an Arbitration proceeding."

The Appellant includes in his affidavit at Exhibit "S" a letter from himself to Mr. Sebamalai with the typed dated of July 5, 2005 crossed out by hand and replaced with the printed words "sent March 3, 2005." The letter encloses an account of $3,563.10 for services at mediation and arbitration, including Dr. Kachooie's invoice of $1,498. The account notes a meeting with Mr. Sebamalai "at this office and obtaining details of motor vehicle accident." The account does not note any further meeting with Mr. Sebamalai nor, specifically, does it refer to any meeting, discussion or correspondence regarding instructions to commence an arbitration proceeding.

By letter dated March 8, 2005, the Arbitrator confirmed a telephone pre-hearing resumption held March 3, 2005. The Arbitrator states that she revoked her order removing the Appellant from the record as there now appeared to be an address at which Mr. Sebamalai could be reached. The Arbitrator notes that Mr. Sebamalai participated in the discussion, but early on his cell phone disconnected while the legal representatives were trying to determine whether the Mr. Sebamalai who contacted the Commission was the same person who had spoken to Royal. The Arbitrator stated that it "may be that there are two persons with the name of Mr. Ruganraj Sebamalai who live at the same address whose circumstances with respect to this accident are quite different."

In her further letter of April 13, 2005, the Arbitrator acknowledged receipt of the Appellant's April 12, 2005 letter which advised that Mr. Sebamalai had terminated his retainer and wished to withdraw his arbitration application. The Arbitrator also acknowledged that Royal was seeking

terms for this withdrawal, specifically its legal expenses. The Arbitrator provided time lines for written submissions should the parties be unable to reach a resolution.

By letter dated April 19, 2005 the Arbitrator again removed the Appellant as Mr. Sebamalai's representative, on the basis his retainer had been terminated. The Arbitrator asked Royal and Mr. Sebamalai to confirm whether terms or conditions were being sought for this withdrawal of services. The Arbitrator indicated that she remained seized regarding this question.

In written submissions dated April 28, 2005, copied to Mr. Sebamalai, Royal submitted that any withdrawal of this arbitration application be on terms that Mr. Sebamalai be barred from initiating a further arbitration with respect to the same issues and that he pay Royal its legal expenses incurred in this proceeding. Royal submitted that Mr. Sebamalai "whether personally or through his legal representative, has used the dispute resolution process of arbitration with wanton disregard for whether he had a *bona fide* claim, or a *bona fide* intention of prosecuting his claim." Royal noted its legal expenses as $5,802.28, in addition to its $3,000 filing fee.

Royal also noted that the Appellant wrote to the Commission on January 19, 2005 advising he had not heard from Mr. Sebamalai since November 25, 2003. Royal queried as to how, then, did Mr. Sebamalai sign the Application for Arbitration on January 20, 2004.

By letter dated May 16, 2005 to Royal's counsel, evidently copied to the Commission and the Appellant, Mr. Ruganaj Sebamalai wrote that he would not be paying the money requested until "the arbitration pays me back the money that rightfully belongs to me. Otherwise, if you are not able do so, just close this case and stop disturbing me." The letter is silent regarding legal representation.

The Arbitrator wrote to the Appellant on August 29, 2005, copied to Royal and Mr. Sebamalai, stating that "[a]s you will note, Royal is seeking an order that you or Mr. Sebamalai pay its expenses." Citing the requirements of the *Insurance Act*, R.S.O. 1990, c. I.8, the Arbitrator provided the Appellant with an opportunity to respond, stating that:

> Your representations may be in the form of written submissions, a request for a hearing at which evidence would be heard to decide if Mr. Sebamalai authorized the commencement of the arbitration, or other reasonable way of communicating any position you may wish to take.

By letter dated September 29, 2005, the Appellant submitted that his response was neither anticipated nor requested by Royal. He enumerated his efforts to contact Mr. Sebamalai (and his ongoing communication with Royal), stating he had been writing to Mr. Sebamalai repeatedly since November 25, 2003 and leaving messages for him since December 2, 2003. The Appellant stated that:

> While I appreciate the insurer's dilemma with this particular file, namely that the Applicant frustrated all attempts to proceed on this matter, unfortunately I experienced the same difficulties.

In her decision dated October 31, 2005, the Arbitrator stated that an unsigned Application for Arbitration was submitted to the Commission in the name of Mr. Sebamalai in January 2004 by Laraia/Nterekas, including the certification that the representative had full authority. The case administrator, observing this omission, returned the incomplete application. The application form, dated January 20, 2004, "with two signatures in the appropriate spaces was resubmitted by Laraia/Nterekas and registered by the Commission on January 23, 2004."

The Arbitrator further noted that that the Appellant indicated in his documentation that he had not heard from Mr. Sebamalai since on or before November 25, 2003. The Arbitrator stated that:

> This was approximately two months before Mr. Nterekas resubmitted the arbitration application to the Commission which purported to have been signed and certified by Mr. Sebamalai.

The Arbitrator found that:

> Unfortunately, Mr. Nterekas did not address the key concerns - whether Mr. Sebamalai authorized the commencement of the arbitration, and whether either Mr. Nterekas or Mr. Sebamalai should be required to pay Royal's expenses.
>
> In the absence of a response on the question of whether Mr. Sebamalai authorized the commencement of the arbitration, I am left with an arbitration application submitted by Mr. Nterekas which purports to have been signed and certified two months after Mr. Nterekas admits he last had contact with Mr. Sebamalai. I am

> persuaded by the documentation, and by Royal's submission that Mr. Sebamalai could not have signed or certified the application for arbitration. I therefore find the proceedings were commenced without Mr. Sebamalai's authority, and for that reason, they should be withdrawn.

The Arbitrator concluded that the application for arbitration should be withdrawn without terms, conditions or expenses against Mr. Sebamalai. She found that this proceeding should not have been commenced and, hence, the entire proceeding was improper and an abuse of process. The Appellant was "a paralegal registered as a statutory accident benefits representative" who, in the finding of the Arbitrator, had commenced the proceeding without Mr. Sebamalai's authority and caused expense to be incurred by Royal without reasonable cause. Accordingly, the Arbitrator found that the Appellant should bear Royal's reasonable legal expenses, as agreed or assessed.

By letter dated November 30, 2005, Royal submitted two Bills of Costs. One was noted as the actual fees and disbursements, and totaled $7,618.96. The second, using the *Legal Aid Services Act* rate under the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "*Code*"), was in the amount of $2,910.41.

In her decision dated November 1, 2006, the Arbitrator assessed Royal's expenses at $2,910.41. She stated that the Appellant submitted that $1,500 was a reasonable amount to allow for Royal's expenses, "but took no issue with any of the amounts detailed in the Bill." The Arbitrator held that the *Code* "expressly limits costs or expense awards to Legal Aid rates and these rates are not at a substantial indemnity level." In her decision, the Arbitrator also stated that:

> At the expenses assessment hearing, counsel for Mr. Nterekas submitted that while Mr. Sebamalai did not authorize or sign the Application for Arbitration this case was not one which involved lying or the manufacture of evidence. He submitted that from a practical point of view, Mr. Nterekas commenced the arbitration because of an approaching limitation period. This was the first occasion on which this argument was advanced.

Royal submitted that there was no limitation issue as Mr. Sebamalai's claim had been denied in October 2002 and the Application for Arbitration was filed in January 2004, some nine months before the two-year limitation period would have expired. The Arbitrator found that the Report

of Mediator supported Royal's submission, and found "no merit in the submissions that [the Appellant] commenced the arbitration because of an approaching limitation period."

The Appellant filed his Notice of Appeal with the Commission November 30, 2006, seeking as relief that the cost order be varied such that the Appellant was not personally liable for any legal expenses. In his appeal, the Appellant sought to introduce into evidence his affidavit sworn November 20, 2006.

By letter dated December 7, 2006, Delegate Makepeace made Mr. Sebamalai a respondent in the Appeal. By letter dated December 19, 2006, the Appellant confirmed that the orders of October 31, 2005 and November 1, 2006 were both being appealed. The Appeal was acknowledged by Delegate Makepeace by letter dated December 29, 2006.

The Commission received Royal's Response to Appeal on February 12, 2007. Royal submitted that the further evidence proffered should not be accepted.

Upon receipt of written submissions from the Appellant and Royal (there being no participation by Mr. Sebamalai in the appeal, although served with notice by the Commission), a hearing date was set. By letter dated October 4, 2007, Delegate Makepeace indicated that the preliminary issues raised by Royal, including whether to consider fresh evidence, would be addressed at the hearing.

II. SUBMISSIONS

The Appellant has not appealed the quantum of legal expenses payable set at $2,910.41. Rather, the Appellant provides the following submissions:

(a) The Appellant initially requested that the Arbitrator's orders be varied in accordance with Rule 61 of the *Code*, which pertains to the variation or revocation of an order pursuant to section 284 of the *Insurance Act*. In his oral submissions, the Appellant clarified that he was advancing both an appeal and a variation proceeding. Although the Respondents had not been so informed, there was no prejudice to them. Further, although the Appellant's

reliance on the Arbitrator's lack of jurisdiction may not have been formally set out, it was implicit in his written submissions. The Appellant thus requested that the Arbitrator's orders be revoked or varied, and that he be awarded the legal expenses of his counsel's attendance both in arbitration and on appeal.

(b) Citing *Bershteyn and Spiegel and Allstate Insurance Company of Canada*, (FSCO P04-00020, November 4, 2004) and *McCormack and Aviva Canada Inc. and Isabella & Associates Inc.*, (FSCO P06-00024, March 3, 2008), the Appellant submitted that it is the Commission's practice to hear appeals from legal representatives who have been ordered to pay legal expenses, and no such appeals have been refused. Director Sachs's letter decision in *Elkaim and State Farm Mutual Insurance Company* (FSCO P98-00006, November 5, 1998) was distinguishable, as it pertained to a witness' ability to appeal an arbitrator's decision, as opposed to a legal representative appealing a subsection 282(11.2) award of expenses. Sections 283 (applying to appeals) and 284 (applying to variations) of the *Insurance Act* should, on the basis of fairness, be read broadly. The Appellant did not dispute that as a party to this appeal he is potentially liable for legal expenses.

(c) The Appellant's November 20, 2006 affidavit should be received into evidence as it provided a contextual background and a complete record. The documentation was relevant not only to whether the Appellant was authorized to commence an arbitration but whether he reasonably believed he was so authorized. Tab "A," a Direction, was really the only new document, and showed that the Appellant was at most negligent, if that, and there was no attempt to mislead the Commission, unlike the situation in *Royal & SunAlliance Insurance Company of Canada and Volfson*, [2005] O.J. No. 4523 (leave to the Court of Appeal denied April 18, 2006). Further, Royal had conceded that there was no prejudice to it in allowing this affidavit into evidence.

(d) The Appellant denies he conceded at arbitration that the Application for Arbitration filed on January 23, 2004 was not authorized by Mr. Sebamalai. Rather, he admitted only that the first time the Application for Arbitration was filed with the Commission it was not signed. Further, it was merely a submission that the Appellant had commenced the

Application because a limitation period was approaching. In the alternative, if there was any such admission, it was an error made by counsel.

(e) An arbitrator has no inherent or implicit jurisdiction to control the process. The Arbitrator lost jurisdiction over the Appellant once she removed him as Mr. Sebamalai's representative. The Arbitrator thus exceeded her jurisdiction at the March 3, 2005 resumption when, on her own initiative, in the absence of any such request by Mr. Sebamalai and over the Appellant's forceful objections, she unilaterally revoked her prior order removing the Appellant as the representative of record. The Appellant indicated in his oral submissions that he was now appealing the reinstatement order.

(f) An arbitrator can impose a cost award against a representative only while the latter is formally on the record. This is made clear by the use of the present tense in subsection 282(11.2) of the *Insurance Act* that an arbitrator may "make an order requiring a person representing an insured person or an insurer for compensation" personally pay all or part of any expenses awarded against a party. These words are unambiguous and should be given their ordinary meaning. Once a representative is removed from the record, an arbitrator's authority over that person and the ability to order personally the payment of legal costs is "completely and forever eliminated." An arbitrator can penalize a legal representative for past acts, but only if the representative is still on the record.

Subsection 282(11.2) of the *Insurance Act* also sets as a pre-requisite that an arbitrator must first assess legal costs against a party (which the Appellant was not) and only then order the legal representative to pay all or part of same. In this case, the Arbitrator specifically declined to make an expense award against Mr. Sebamalai.

(g) The Arbitrator misapplied the law with respect to awarding legal expenses, taking a very unusual and "rather unprecedented step" in ordering a legal representative to personally pay costs as opposed to the unsuccessful applicant. This order was "unusual, unjustified and draconian," as well as "manifestly incorrect and improper," the Arbitrator failing to not consider or properly balance the facts.

The Commission is "a provincial inferior court. It is required to apply and consider relevant caselaw from a superior court pursuant to the concept of *stare decisis*." Legal representatives must guard confidential instructions and courageously advance cases. Therefore, as stated by the Supreme Court of Canada in *Young v. Young et al*, [1993] 4 S.C.R. 3:

> … The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister … Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

This decision is binding on this Commission. Accordingly, it is only in the rarest of cases that a legal representative should be required to personally pay legal costs. For legal expenses to be awarded against a legal representative, there must be, as in *Volfson*, a repetitive attempt to defraud and an intent to frustrate.

(h) The Arbitrator erred in not finding that the Appellant had commenced the arbitration with Mr. Sebamalai's authority. The standard of review is correctness. An arbitration order can be varied if an arbitrator ignores relevant evidence. If the signature on the Application for Arbitration was that of Mr. Sebamalai, then he authorized the Application. If that is so, there was no basis for an expense order against the Appellant. The authenticity of the signature should have been the inquiry of the Arbitrator and she erred in not making a finding in this regard.

The Arbitrator "failed to consider available, applicable and relevant evidence." It was undisputed that the Application for Arbitration submitted to the Commission was signed by Ruganraj Sebamalai. The signatures for Mr. Sebamalai on the Application for Arbitration and his letter of May 16, 2005 were "essentially identical. Therefore, it must be concluded that they are from the same person." Royal had conceded the signatures were the same. This reliable evidence should have been preferred over Mr. Sebamalai's oral representations given when he was facing possible cost sanctions if it was found that he had authorized the Appellant to commence this arbitration.

The Appellant had sworn in his affidavit that the signature on the Application for Arbitration was that of Mr. Sebamalai. The Appellant was not cross-examined on his affidavit, nor was that evidence challenged. In his May 16, 2005 letter, Mr. Sebamalai did not "deny, expressly or implicitly, that the application for arbitration was commenced without his authority or signature." It was obvious from this letter that Mr. Sebamalai knew about the Application for Arbitration and hoped that it would be decided in his favour. Mr. Sebamalai did not deny at the March 3, 2005 pre-hearing discussion that he had authorized this proceeding, nor did anyone ask him this question.

The Appellant cannot explain the discrepancy in dates other than it was in "the heat of litigation" and perhaps there was negligence. What is fundamental is that Mr. Sebamalai gave the Appellant instructions to represent him. Mr Sebamalai had every opportunity to say that the Appellant did not represent him, and he did not. A finding of fact, on the civil standard of a balance of probabilities, should now be made that the signature on the Application for Arbitration is that of Mr. Sebamalai and he thus authorized this proceeding.

The Arbitrator failed to reasonably consider the Appellant's valiant, ongoing, exhaustive and, ultimately, unsuccessful efforts to contact Mr. Sebamalai, as shown by the Appellant's letter of August 5, 2004. Mr. Sebamalai's failure to make any effort to participate in these proceedings, although given ample opportunity to do so, and his failure to respond to Royal's letters was "new evidence that [he] never intended to follow the process even when duly served." He considered "himself to be in a world not bound by the norms of practice." It ought to have been unequivocally clear to the Arbitrator that Mr. Sebamalai "chose to commence this arbitration knowing full well that he had begun the process but when 'the tide turned against him' he decided to 'cut bait and run.'" When "it was made crystal clear to [Mr. Sebamalai] that he was unlikely to gain a significant recovery from the arbitration process, he decided to blame his legal representative for his inability to mount a decent claim."

(i) The Arbitrator has a bias against paralegals, shown by her reliance on the triple hearsay in Royal's letter of February 23, 2005. Neither Royal nor Mr. Sebamalai requested that

the Appellant pay Royal's legal costs and the Arbitrator made a clear error of fact in saying that Royal had requested such relief. The Arbitrator's unilateral action in seeking such a term broke a convention that a court does not usually initiate such a request. It was also an error for the Arbitrator to request submissions from the opposing party when a representative wishes to be removed from the record.

Royal responds that:

(a) While the Appellant seeks to vary the Arbitrator's orders pursuant to Part 5 of the *Code* and section 284 of the *Insurance Act*, he has not filed an Application for Variation but, rather, a Notice of Appeal pursuant to Part 4 of the *Code* and section 283 of the *Insurance Act*.

(b) Subsection 283(1) of the *Insurance Act* limits appeals from the order of an arbitrator to "[a] party to an arbitration." The Appellant is not a party to the arbitration. Subsection 284(1) of the *Insurance Act* only allows the insured person or the insurer to apply to the Director to vary or revoke an order made by an arbitrator. The Appellant is not an insured person or an insurer. Director Sachs' letter decision in *Elkaim* provides that "the dispute resolution process, when viewed as a coherent whole, contemplates only two parties to both the mediation and adjudication functions." There is no gap in the legislation in not allowing a legal representative to appeal a cost order made personally against him or her, as such orders pertain to findings of fact, and findings of fact are not appealable.

(c) The Arbitrator allowed the Appellant an opportunity to provide submissions. The Appellant failed to file submissions within the deadline provided and was given an extension, notwithstanding which, he failed to file any submissions, evidence or authorities. The Appellant's affidavit should not now be allowed into evidence as it does not meet the criteria in *Non-Marine Underwriters, Mbrs. Of Lloyd's and Dhir*, (FSCO P98-00024, October 25, 2000) and *Tesfai and Allstate Insurance Company of Canada*, (FSCO P00-00048, December 21, 2001), namely:

- all of the evidence could have been obtained prior to the arbitration motion with the exercise of due diligence by the Appellant;
- the evidence does not bear on the decisive issue as it fails to address whether Mr. Sebamalai signed and dated the Application at the same time; and,
- it cannot, when considered with the rest of the evidence, reasonably be expected to affect the result.

Royal concedes that the Affidavit is not prejudicial to it. Royal agrees that there is no agreement as to what is contained in the record.

(d) The Arbitrator stated in her November 1, 2006 decision, that the Appellant, represented by counsel at the July 21, 2006 expense assessment hearing, submitted that Mr. Sebamalai did not authorize or sign the Application for Arbitration.

The Appellant's statement was an admission, in the words of Master MacLeod in *Hughes v. Toronto-Dominion Bank*, [2002] O.J. No. 2145 (S.C.J.) "an unambiguous deliberate concession to the opposing party." As stated by the Ontario Court of Appeal in *Marchand et al. and The Public General Hospital Society of Chatham et al.*, [2000] O.J. No. 4428, "a formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made."

(e) The Appellant did not object to being reinstated as representative of record. Rather, as set out in the Arbitrator's March 8, 2005 letter, he agreed to get in touch with Mr. Sebamalai to obtain authorizations regarding outstanding productions. The time for the Appellant to object to this order was on March 8, 2005 or immediately thereafter, not during oral submissions on March 14, 2008.

In any event, the Arbitrator had jurisdiction under section 25 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*") to reinstate a representative, and it was just and equitable to do so. Further, pursuant to section 23 of the *SPPA*, a tribunal may make such orders in proceedings before it as it considers proper to prevent abuse of its process.

(f) The Appellant was representing Mr. Sebamalai "at the time of filing the unauthorized Application for Arbitration which commenced the abuse" of the tribunal's process. It is necessary to look at the entire statute, consider its objectives and the surrounding provisions as well as the provisions under discussion. As stated by the Divisional Court in *Volfson*, "[i]t must surely be part of a tribunal's power to prevent abuse to ensure that those who perpetuate such abuse not be permitted to do so with impunity." To restrict an arbitrator's jurisdiction to representatives still on the record would allow potential abuse. In any event, the two provisions under which the Arbitrator found the Appellant liable, being clauses (a) and (b) of subsection 282(11.2), both use the past tense in describing actions covered by the provision.

(g) Appeals are limited to questions of law. The standard of review is correctness. In accordance with Delegate Naylor's decision in *Caruso and General Accident Assurance Co. of Canada*, (FSCO P97-00020, July 17, 1998), an award of expenses should not be disturbed unless a serious error has been made by the arbitrator in the exercise of his or her discretion. The decision in *Young* is not relevant as it does not address the relevant legislative wording, the Commission's jurisdiction or a claim under the *Schedule*.

Arbitrator Wilson's decision in *Shaikh and Allstate Insurance Company of Canada*, (FSCO A06-001502, April 4, 2008), provides that the exercise of discretion must be just and equitable, its application principled and dependent upon the circumstances of each case. The exercise of discretion must, amongst other things, discourage abuses, but not discourage access to the system by persons having valid claims.

Subsection 282(11.2) of the *Insurance Act* does not require that the question of a legal representative's responsibility for costs be raised by a party. Similar to the question of a special award, this question can be raised by an arbitrator. In any event, if Royal had not wanted its legal expenses paid by the Appellant, it would have said so.

(h) When Royal contacted Mr. Sebamalai, the latter advised that he had not consented to the commencement of the arbitration proceeding. The Arbitrator gave the Appellant an opportunity to make representations as to whether Mr. Sebamalai had authorized the

arbitration and who should pay Royal's legal expenses. The Appellant failed to address whether Mr. Sebamalai authorized the arbitration and whether Mr. Sebamalai should pay Royal's expenses.

In the absence of a response from the Appellant, the Arbitrator was persuaded that the Application for Arbitration was signed two months after the Appellant admits he last had contact with Mr. Sebamalai, the arbitration proceeding was thus commenced without Mr. Sebamalai's authority, and was entirely improper and an abuse of process and hence, the Appellant was responsible for Royal's legal expenses of the proceeding.

These findings of fact were based on a thorough consideration of all of the evidence and submissions. The Divisional Court in *Volfson* held that a party who commences a proceeding before a tribunal without proper authority is acting in a manner which is unreasonable and vexatious. A tribunal has jurisdiction to prevent an abuse of its process, including ordering the abuser to pay the expenses of the innocent parties. The Appellant does not contest the Arbitrator's finding of fact that he had not contacted or received instructions from Mr. Sebamalai for at least two months before the date certified on the Application for Arbitration, nor does he assert that the Application for Arbitration was signed and dated on the same date.

III. ANALYSIS

Subsection 282(11) of the *Insurance Act* provides that:

> **Expenses**
>
> (11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations. 1996, c. 21, s. 38 (4).

Subsection 282(11.2) of the *Insurance Act* more specifically states that:

> **Liability of representative for costs**
>
> (11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to

> personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,
>
> (a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;
>
> (b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or
>
> (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default. 2002, c. 22, s. 127.

The Appellant may not proceed with a variation or revocation proceeding under Part 5 of the *Code*. Firstly, the Appellant never filed such an application. Secondly, an application for variation or revocation may be rejected, under subsection 61.4 of the *Code*, if it is in respect of an order that has been appealed and the appeal is pending, which is the case here. Thirdly, and most importantly, subsection 284(1) of the *Insurance Act* provides that either an insured person or an insurer may apply to vary or revoke an order. As the Appellant is neither an insured person nor an insurer, he has no standing to commence an application for variation or revocation.

The Appellant may proceed with his Notice of Appeal pursuant to subsection 283(1) of the *Insurance Act*. As I stated in *Luskin and Personal Insurance Company of Canada et al.*, (FSCO P07-00028, April 25, 2008):

> … when an expense order is made against a representative, their substantial, personal and direct interest in the outcome of the issue makes them a party to the proceeding pursuant to section 5 of the *SPPA*. As such, that person has the right to appeal the expense order of an arbitrator on a question of law, in accordance with subsection 283(1) of the *Insurance Act*. To decide otherwise would allow adjudicators (who are, in the vernacular, "creatures of statute") to potentially err in law by imposing an expense order against a representative for reasons not provided by statute, or in amounts not sanctioned by legislation, without any available remedy (in the absence of their clients, be it the insurer or the insured, agreeing to advance an appeal).

The Appellant's affidavit sworn November 20, 2006 is allowed into evidence. The affidavit is helpful as it includes 27 documents which set out the history of this matter, when the precise formal record is unclear. The parties were aware of almost all of these documents during the pre-hearing process leading to the Arbitrator's decisions. Royal concedes there is no prejudice to it in allowing the affidavit into evidence. Indeed, in my view, the documentation supports Royal's

position that there was no contact between the Appellant and Mr. Sebamalai between November 25, 2003 and the January 20, 2004 signature date of the Application for Arbitration.

I am not persuaded that the Appellant conceded that Mr. Sebamalai did not authorize or sign the Application for Arbitration. The Arbitrator, in her November 1, 2006 decision, states that this was a submission.

I am also not persuaded that if the Arbitrator had failed, or had no jurisdiction, to reinstate this Appellant as the representative of record, that would have been fatal to an expense order pursuant to subsection 282(11.2) of the *Insurance Act* or subsection 23(1) of the *SPPA*.

Subsection 23(1) of the *SPPA* provides that a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. The Divisional Court in *Volfson*, which addressed the statutory framework prior to the enactment of subsection 282(11.2) of the *Insurance Act*, held that it was a logical and necessary extension of a tribunal's powers under subsection 23(1) to prevent abuse to require someone who wrongly invoked the jurisdiction of the tribunal to pay the expenses of the innocent parties.

As also stated in *Volfson*, based on the principles of fairness and natural justice, and as codified by subsection 282(11.4) of the *Insurance Act*, it was necessary that a representative have a reasonable opportunity to make representations to the arbitrator. There is no question, nor is it disputed, that the Arbitrator afforded such an opportunity to the Appellant.

The powers of an arbitrator to control the process are further entrenched with the enactment of subsection 282(11.2) of the *Insurance Act*. Clause 282(11.2)(a) allows an arbitrator to make a cost award against a non-lawyer representative of an insured person if the proceeding is commenced without authority. In such a case, it is questionable whether the non-lawyer was ever truly a representative in the proceeding. In any event, to accept the Appellant's argument, for an expense award to be made against a representative the insured person (or where applicable, the insurer) must continue to retain the representative until an expense award is made under subsection 282(11.2), notwithstanding the possible harm of such continued representation or the desire of the insured or the insurer to immediately fire the representative.

To give reasonable effect to subsection 282(11.2) of the *Insurance Act*, I am persuaded that the words "a person representing an insured person or an insurer for compensation in an arbitration proceeding" mean a person who has represented, or has purported to represent an insured or insurer at some point in the arbitration proceeding, whether or not when the actual expense order is made that person is still on the record, or was perhaps ever truly or properly on the record, as long as the requirements of subsection 282(11.4) and the grounds of subsection 282(11.2) of the *Insurance Act* are met.

Likewise, to give effect to the purpose of subsection 282(11.2), the words "personally pay all or part of any expenses awarded against a party" must include expenses which could have been payable by an insured person or an insurer. If not, looking at a factual situation such as in *Volfson*, the arbitrator would be required to make an expense award against a totally innocent insured person, who perhaps must remain jointly and severally liable for legal expenses, as a pre-requisite to an award being made against the legal representative. To quote the Court in *Volfson*, "limiting tribunals in the face of abuse cannot have been the intention of the legislature."

Sullivan and Driedger on the Construction of Statutes, Fourth Edition (Ottawa: Butterworths, 2002), state at page 236 that encompassed in the "golden rule" is the presumption that "the legislature does not intend its legislation to have absurd consequences," which includes "violations of widely accepted standards of justice and reasonableness." Whenever possible, an interpretation that leads to absurd consequences should be rejected in favour of one that avoids absurdity, but no further. The more compelling the absurdity, the greater the departure from the ordinary meaning that is tolerated which, as set out on page 254, would include an expansive interpretation. I am persuaded that the interpretation of subsection 282(11.2) proffered by the Appellant would defeat its purpose, especially in the most egregious of cases such as *Volfson*.

If, however, I am incorrect in my interpretation of subsection 282(11.2), I find that the Arbitrator had residual powers under subsection 23(1) of the *SPPA* to make her orders. Further, Rule 9.8 of the *Code* allowed the Arbitrator, on terms she "considers just," to set terms to allowing the Appellant to withdraw as representative, as raised in her letter of April 13 2005.

One does hearken to the words of the Supreme Court of Canada in *Young* that counsel must

courageously advance even unpopular causes. One also takes to heart that adjudicators must equally courageously, with reason and propriety, control their proceedings.

This case is not about a representative guarding the confidentiality of instructions or courageously advancing a case where the above comments in *Young* would be pertinent. Rather, this case is about the authority of a representative to commence and conduct a proceeding. Indeed, the Appellant's opening words in oral submissions were "I don't care about Mr. Sebamalai and what treatment he gets."

Director Sachs stated in *Hunt and Royal Insurance Company of Canada* (OIC P-000370, October 28, 1996) that "[t]he Director's function is one of appeal, not of first instance … The Director should only interfere with the arbitrator's assessment, and substitute another finding, if it can be shown the findings are unsupportable, or clearly wrong." This is even more so now that appeals from the decision of an arbitrator are restricted to questions of law.

Further, as stated by Delegate Naylor in *Allison and Markel Insurance Company of Canada* (OIC P-001231, August 21, 1996):

> An award of expenses is a matter within the discretion of the arbitrator, although the discretion must be exercised reasonably. Because the discretion is given to the arbitrator, it should not be interfered with lightly on appeal. The arbitrator is able to consider the evidence in totality, including observing and hearing any witnesses, and usually is in the best position to assess the merits of the case and the way it was handled by the parties. Generally, his or her determination should not be disturbed unless the party appealing the order can point to a serious error in the exercise of the discretion: for example, the arbitrator adopted a wrong approach, based the decision on irrelevant considerations or inadequate evidence, or failed to look at the merits of the individual case by inappropriately fettering his or her discretion …While consistency of approach is important to the integrity and fairness of the dispute resolution system, there are bound to be shades of difference in individual arbitrators' perspectives of the cases before them. Provided that the arbitrator has approached the discretion on a proper basis, his or her judgement should not be second-guessed merely on the basis that another arbitrator might have reached a different conclusion.

I am not persuaded that the Arbitrator erred in finding as a fact that the Appellant did not have the requisite authority when he filed an Application for Arbitration noted to be signed by

Mr. Sebamalai on January 20, 2004, when the Appellant's own letter of August 5, 2004 to Mr. Sebamalai (confirmed by letter dated September 29, 2005 to the Commission) indicated that he had been trying to contact Mr. Sebamalai, without success, since November 25, 2003. Rather, the first documented contact the Appellant had with Mr. Sebamalai following the October 15, 2003 mediation (and it is not clear precisely what contact took place then) is the March 3, 2005 telephone pre-hearing resumption. In any event, subsection 283(1) of the *Insurance Act* restricts appeals to questions of law.

The Appellant was given an opportunity to address the question of authority, and failed to do so. The Appellant's affidavit sworn November 20, 2006 states that Mr. Sebamalai retained him "with respect to Arbitration matters," but refers solely to a Direction which is blank other than for a signature on the witness line. There are no further details as to when such instructions were given, under what circumstances and how Mr. Sebamalai's signature is found on a document dated January 20, 2004 when there had been no contact with him for some two months.

I am not persuaded it was a pre-requisite that there be a finding of fact that the signatures on the Application for Arbitration had been forged, as opposed, for example, to Mr. Sebamalai having signed a blank Application for Arbitration form at some earlier time, similar perhaps to the misplaced signature on the otherwise blank Direction included in the Appellant's affidavit.

The Application for Arbitration requires a deponent to certify that all information in the Application and its attachments are true and complete. A deponent cannot swear the truth to a blank document filled in after the fact. The form also requires that the deponent certify that the representative has been provided with full authorization to discuss all issues in dispute and settle any and all of the issues in dispute. In the absence perhaps of exceptional circumstances such as a pending expiring limitation period (which is not the situation in this case), one would expect such authority to be current to the date the Application is completed.

I am further not persuaded, with the same caveat noted above regarding the limits of my jurisdiction, that the Arbitrator erred in finding as a fact that the Appellant caused expenses to be incurred without reasonable cause, as the legal expenses of this proceeding all flowed from the commencement of the arbitration without requisite authority.

Regarding the allegation of bias, Director Sachs, in *Kahkesh and Lloyd's Non Marine Underwriters* (OIC P-000378, August 19, 1992), held that the test for bias is:

> .. whether, taking all considerations into account, the arbitrator closed her mind to being persuaded, or prejudged the issues so as to preclude the acceptance of representations to the contrary and denied a party a fair hearing.

I am not persuaded that the Arbitrator closed her mind to being persuaded, prejudged the issues or denied the parties a fair hearing. The legislature, not the Arbitrator, determined that pursuant to subsection 282(11.3), clause 282(11.2)(a) of the *Insurance Act* applies only to non-lawyers. The Arbitrator, in making her findings which are under appeal, relied on the Appellant's own documentation and his failure to address her key concerns, namely, whether Mr. Sebamalai authorized the commencement of the arbitration and who should pay Royal's expenses.

I am also not persuaded that it was improper, especially in the circumstances of this case, that the Arbitrator raised the question of whether the Appellant should bear Royal's requested legal costs. While Royal did not initially seek compensation directly from the Appellant, Royal's written submissions dated April 28, 2005 argued that Mr. Sebamalai had used the dispute resolution scheme with wanton disregard, "whether personally or through his legal representative."

Accordingly, I am not persuaded that the Arbitrator erred in the exercise of her discretion to require the Appellant to pay Royal's legal costs, or that she based her decision on irrelevant considerations or on inadequate evidence. The quantum of those legal costs was not challenged. Accordingly, the appeal is dismissed and the Arbitrator's orders of October 31, 2005 and November 1, 2006 are confirmed.

IV. EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Lawrence Blackman Director's Delegate	June 2, 2008 Date