CITATION: Allstate Insurance Company of Canada v. Motor Vehicle Accident Claims Fund, 2007 ONCA 61
DATE: 20070131
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COURT OF APPEAL FOR ONTARIO

LASKIN, SIMMONS, GILLESE and MacFARLAND JJ.A. and LANE J. (*ad hoc*)

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, and Regulation 283/95 made pursuant to the *Insurance Act*;

AND IN THE MATTER of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c.M.41;

AND IN THE MATTER of the *Arbitration Act, 1991*, S.O. 1991, c.17;

AND IN THE MATTER of an arbitration.

B E T W E E N :	)	
	)	
ALLSTATE INSURANCE COMPANY OF CANADA	)	**Todd J. McCarthy, for the respondent**
	)	
Applicant (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
MOTOR VEHICLE ACCIDENT CLAIMS FUND and MANITOBA PUBLIC INSURANCE	)	**David Scott, for the appellant, Motor Vehicle Accident Claims Fund**
	)	
Respondents (Motor Vehicle Accident Claims Fund/Appellant)	)	
	)	
	)	**Heard: June 13, 2006**

On appeal from the order of Justice Donald S. Ferguson of the Superior Court of Justice, dated November 2, 2005, with reasons reported at (2005), 78 O.R. (3d) 429.

LASKIN J.A.:

A. Overview

[1] This appeal and the companion appeal, *Kingsway General Insurance Company v. Ontario (Minister of Finance)*, concern the status of the Motor Vehicle Accident Claims Fund in the process for resolving disputes over the payment of statutory accident benefits to persons injured in car accidents.

[2] All Ontario residents, and in some circumstances, non-residents, injured in a car accident in this province are entitled to accident benefits. Accident benefits, or no-fault benefits as they are sometimes called, typically include payments for income replacement, rehabilitation and other medical expenses, funeral expenses, and death benefits. For cases where an injured person may claim accident benefits under more than one policy of insurance, section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8 sets out priority rules establishing which insurer must pay. If no insurance is available, the injured person may claim benefits from the statutorily-created Fund.

[3] Disputes between insurers – where liability for the payment of accident benefits is unclear – are governed by O. Reg. 283/95. Pending the resolution of any dispute, the regulation requires that the first insurer to receive a claim for benefits must pay. This requirement ensures that accident victims receive benefits promptly. Disputes over payment must then be resolved by arbitration under the *Arbitration Act, 1991*, S.O. 1991, c.17. The principal issue on these two appeals is whether the Fund is an "insurer" under regulation 283.

[4] In this appeal, the Fund paid benefits to the family of an accident victim, and sought reimbursement either from Allstate Insurance Company of Canada or Manitoba Public Insurance. Both insurers denied coverage. The Fund then commenced arbitration. Allstate objected to the arbitrator's jurisdiction on the ground that the Fund was not an insurer. The arbitrator concluded that he had jurisdiction and held that Allstate was liable for the accident benefits.

[5] On appeal, however, Ferguson J. set aside the arbitrator's award for lack of jurisdiction. He concluded that he was bound by this court's decision in *Kalinkine v. Ontario (Superintendent of Financial Services)*, [2004] O.J. No. 5138, which said that the Fund was not an insurer under regulation 283.

[6] The Fund appeals[1] and asks to reinstate the arbitrator's award. It says that it is not an insurer but contends that it can either resort to arbitration under regulation 283 or seek restitution in the courts.

[7] The respondent, Allstate, says that the Fund cannot have it both ways. If it is not an insurer, it cannot seek arbitration under the regulation; if it is an insurer, it can resort to arbitration but must comply with all provisions of regulation 283. As the Fund did not commence the arbitration within the time prescribed by the regulation, its claim for reimbursement must fail. Therefore, whether an insurer or not, Allstate contends that the Fund's appeal should be dismissed.

[8] In both this appeal and the companion *Kingsway* appeal, the parties asked us to consider the correctness of *Kalinkine*. Therefore, in accordance with this court's well-established practice, we convened a panel of five judges to hear these two appeals.

B. Background

(i) The Facts

[9] On November 19, 2002, Sandra Mattinas was killed in a two-car accident on Highway 11 near Hearst, Ontario. One of the cars was insured by Manitoba Public Insurance. The other car, in which Ms. Mattinas was a passenger, was uninsured. At the time of the accident, Ms. Mattinas had two young children and lived with her mother, Rita Mattinas, who had a valid policy of insurance with Allstate.

[10] On July 25, 2003, Rita Mattinas applied to the Fund for death and funeral benefits under the *Statutory Accident Benefits Schedule*, O. Reg. 403/96. The Fund paid $20,202 to the Mattinas family. It then sought reimbursement from either Allstate or Manitoba Public Insurance. In August and September 2003, the Fund put each insurer on notice of a priority dispute. Although all parties agree that the Fund was entitled to recover from one insurer or the other, each insurer denied liability.

[11] In November 2004, over a year after having given notice of the dispute, the Fund served both insurers with a notice of commencement of arbitration under the *Arbitration Act, 1991*. The notice referred to the following passage from Kennedy J. in *Ontario (Minister of Finance) v. ING Halifax* (2003), 15 C.C.L.I. (4th) 281 (Ont. Sup. Ct.) on the right of the Fund to use the arbitration provisions of regulations 283:

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[1] This court granted leave to appeal as required by section 49 of the *Arbitration Act, 1991*.

> It is clear in law that the Fund is not an insurer, but does pay accident benefits when there is no insurance. The Regulation is mandatory for insurers but permits the Fund to avail itself of the dispute resolution process to efficiently determine priorities and (if necessary) claim repayment of accident benefits. The regulation does not oust the Fund's substantive rights to claim restitution either directly or by implication.

(ii) The Arbitration

[12] Norman Freedman, an experienced personal injuries lawyer, conducted the arbitration. He dismissed Allstate's preliminary jurisdictional objection, and held that because he was asked to decide a priority dispute between two insurers, he had jurisdiction under the regulation. He also noted that the insurers had withdrawn their objection that the Fund did not institute arbitration proceedings within the one-year period prescribed by section 7 of the regulation. According to the arbitrator "it was conceded that the Fund was not bound by the time limits set in the regulation."

[13] The arbitrator then turned to the merits of the dispute between Allstate and Manitoba Public Insurance. He found that "at the time of her death, Sandra Mattinas was principally dependent for financial support" on her mother, Rita Mattinas. Therefore, Ms. Mattinas was an insured person under her mother's policy. Rita Mattinas' insurer, Allstate, was thus obliged to reimburse the Fund.

(iii) The Appeal Decision of Ferguson J.

[14] Before the arbitration began, all parties agreed that each could appeal from the arbitrator's award on a question of law or mixed fact and law. Allstate appealed both the arbitrator's holding on his jurisdiction and his finding of dependency. Ferguson J. dealt only with the issue of jurisdiction.

[15] He concluded, correctly in my view, that he was bound to apply this court's holding in *Kalinkine*. As *Kalinkine* had held that the Fund was not an insurer under the regulation, Ferguson J. concluded that Allstate was not required to submit to an arbitration initiated by the Fund. Accordingly, he set aside the arbitrator's award.

[16] Having so concluded, however, Ferguson J. then explained why he disagreed with this court's holding in *Kalinkine*. In his opinion, although regulation 283 was not well-drafted, properly interpreted the term "insurer" included the Fund. He gave four reasons for his opinion:

- The overall scheme for paying accident benefits contemplates the Fund being treated as an insurer for the purpose of determining who should pay

the benefits, which would include the issue of determining whether the Fund or an insurer should pay;

- The clear intent of the Lieutenant Governor-in-Council is that the term "insurer" in regulation 283 includes the Fund;
- The provisions of regulation 283 would be frustrated or made very cumbersome if the term "insurer" is not construed to include the Fund; and
- The court is obliged to interpret the regulation in a manner most likely to facilitate the scheme intended by the legislature and the Lieutenant Governor-in-Council.

[17] As will become apparent, I agree with Ferguson J. and substantially for his reasons, that the Fund is an insurer under regulation 283.

C. The Legislative Scheme

[18] Three pieces of legislation bear on the question whether the Fund is an insurer for the purpose of the mandatory arbitration provisions of regulation 283: the priority rules in section 268(2) of the *Insurance Act*; section 6 of the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c.M.41; and, regulation 283 itself.

(i) The Priority Rules: Section 268(2)

[19] Section 268(1) of the *Insurance Act* deems that every motor vehicle liability insurance policy shall provide for the payment of statutory accident benefits as set out in the *Schedule*. When an injured claimant has recourse to more than one insurance policy, section 268(2) sets out the priority rules for determining who is liable to pay. The Fund is the payor of last resort where no insurance policy is available. Section 268(2) provides:

> The following rules apply for determining who is liable to pay statutory accident 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.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

[20] In this case, Sandra Mattinas was the occupant of an uninsured car. However, because she was principally dependent on her mother, she was an insured person on her mother's policy, making Allstate liable to pay her benefits under section 268(2)(2)(i) of the Act.

(ii) Section 6 of the *Motor Vehicle Accident Claims Act*

[21] The Fund was established under the *Motor Vehicle Accident Claims Act.* It is largely financed through fees paid by licensed Ontario drivers. As is evident from the

priority rules under the *Insurance Act*, a principal purpose of the Fund is to alleviate financial hardship for persons who are injured in a car accident and who have no recourse to any insurance policy for the payment of accident benefits.

[22] Section 6(1) of the *Motor Vehicle Accident Claims Act* states that a person who has recourse against the Fund for the payment of accident benefits under section 268 of the *Insurance Act* may apply to the Superintendent of Insurance for the payment of benefits out of the Fund. Importantly, if a person does have recourse against the Fund, then section 6(2)(a) of the Act deems any reference to "insurer" in the *Statutory Accident Benefits Schedule* to be a reference to the Fund. Section 6(2)(a) provides:

> If a person has recourse against the Fund under section 268 of the *Insurance Act*,
>
> (a) a reference to an insurer in the Statutory Accident Benefits Schedule shall be deemed to be a reference to the Fund and a reference to an insured person shall be deemed to be a reference to the person who has recourse against the Fund.

In other words, for the purpose of paying accident benefits, the legislation considers the Fund to be an insurer.

(iii) O. Reg. 283/95

[23] O. Reg. 283/95 came into effect in May 1995. As with many regulations concerning automobile insurance, this regulation was passed after consultation with the insurance industry. The regulation, which is titled "Disputes Between Insurers," governs the resolution of disputes over which insurer is required to pay accident benefits under section 268 of the *Insurance Act*. Section 1 of the regulation makes the dispute resolution process under the regulation mandatory:

> 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.

[24] The regulation has two main purposes. The first purpose is to ensure that injured persons receive accident benefits promptly, despite any disputes between insurers over who should pay these benefits. Section 2 of the regulation provides that the first insurer to receive an application for accident benefits must pay pending resolution of any dispute over its liability to do so:

> 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.

[25] The second main purpose of the regulation is to provide for the resolution of insurer disputes by arbitration under the *Arbitration Act, 1991*. Previously these disputes were resolved by the Ontario Insurance Commission. Under section 7(1) of the regulation, they are now to be resolved by private arbitration:

> 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*.

[26] Under section 7(2), either an insurer paying benefits under section 2, any other insurer alleged to be liable for these benefits or, in certain circumstances, an insured person, can initiate an arbitration.

[27] The regulation imposes time limits for disputing liability to pay benefits and initiating arbitration. Under section 3(1), an insurer wishing to dispute its obligation to pay benefits, must give notice to every other insurer alleged to be liable within 90 days of receiving an application for benefits. Under section 3(2), the 90-day period may be extended if certain conditions are met. Under section 7(2), "no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3." Arbitration and the time limits for initiating it are intended to ensure the prompt and cost-effective resolution of disputes over payment.

[28] In contrast to section 6(2) of the *Motor Vehicle Accident Claims Act*, there is no provision in regulation 283 deeming the Fund to be an insurer for the purpose of resolving disputes over the payment of accident benefits. The Fund, however, is expressly included in the resolution process. Section 11 of the regulation addresses the situation where the Fund receives an application for accident benefits:

> If the Motor Vehicle Accident Claims Fund receives an application for benefits, sections 4 and 5 do not apply and the insured person is not entitled to initiate or participate as a party in an arbitration under section 7.

[29] Section 4 provides that "an insurer that gives notice under section 3 shall also give notice to the insured person." Section 5 addresses the insured person's response to the notice under section 4. Therefore, under section 11, if the Fund receives an application for benefits, the insured is not entitled to participate in any dispute over who should pay the benefits.

[30] Having regard to this statutory and regulatory scheme for the payment of accident benefits and for resolving disputes over who should pay them, I turn to this court's decision in *Kalinkine* and to the main issue on the appeal: whether the Fund is an insurer under regulation 283.

D. Analysis

(i) This Court's Decision in *Kalinkine*

[31] In *Kalinkine*, this court was faced with the converse of the issue on the two appeals before us. In *Kalinkine* the issue was not whether the Fund was an insurer under regulation 283, but whether the Fund could sue in the courts to recover from an insurer benefits it had paid to an accident victim.

[32] The facts in *Kalinkine* were unusual. The insurer, The Personal Insurance Company of Canada, did not dispute its obligation to pay benefits or the amount that it was required to pay. Instead – at odds with Allstate's position in this appeal and contrary to Kingsway's position in the companion appeal – Personal asserted that the Fund was bound by the mandatory arbitration provisions of regulation 283. The motion judge, Tulloch J., disagreed. He held that the Fund was entitled to seek restitution in the court.

[33] In a brief endorsement, this court dismissed Personal's appeal. The panel gave two reasons:

> First, s. 1 of the Regulation establishes that it applies only to "insurers" that are required to pay [Statutory Accident Benefits] under s. 268 of the *Insurance Act*. The Fund is not an "insurer" for the purpose of the *Insurance Act* or the Regulation.
>
> …
>
> Second, and in any event, nothing in the Regulation purports to remove the Fund's right to seek restitution through the courts in a proper case. … Section 11 affects the rights of

> insured persons in defined circumstances, not the substantive rights of the Fund.

In the appeal before us, although disagreeing with *Kalinkine*, the appeal court judge applied its reasoning and set aside the arbitrator's award.

(ii) Is the Fund an Insurer Under O. Reg. 283/95?

[34] This is the central question on this appeal. The Fund submits that it is not an insurer. It contends, however, that where it has a dispute with a licensed insurer over the payment of accident benefits, it can either initiate arbitration under regulation 283 or sue for restitution in the courts. In my view, that contention is not tenable. Both its title and section 1 stipulate that the regulation applies to disputes between "insurers." Under section 7(2) of the regulation, only an "insurer" can initiate arbitration. Thus, I think that Allstate's position on this appeal is correct: either the Fund is an insurer under the regulation and bound by all its provisions, or it is not an insurer and cannot take advantage of any of the provisions of the regulation. If it is an insurer, it must arbitrate, not litigate, any dispute. If it is not an insurer, absent any agreement to arbitrate, it must litigate disputes with licensed insurers over the payment of accident benefits.

[35] For reasons I will outline, I have concluded that the Fund is an insurer under regulation 283. It must arbitrate disputes over the payment of accident benefits, and in doing so, is bound by all the provisions of the regulation. I have also concluded that in the rare case, such as *Kalinkine* itself, where there is no dispute to be arbitrated, the Fund may sue for restitution in the courts.

[36] Whether the Fund is an insurer under regulation 283 is a question of interpretation. The principles of statutory interpretation are well established. I take those same principles to apply to the interpretation of a regulation made under a statute. To quote the principle of statutory interpretation repeatedly cited by the Supreme Court of Canada, the word "insurer" must "be read in [its] entire context and in [its] grammatical and ordinary sense harmoniously with the scheme" and object of the regulation, and the intention of the Lieutenant Governor-in-Council. The "entire context" includes the regulation's enabling statute, the *Insurance Act*, and the other relevant legislation, the *Motor Vehicle Accident Claims Act*. See for example *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at para. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26 and *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 at para. 36. The court presumes that the statutory and regulatory provisions work together. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 272, 282-283.

[37] Literally, of course, the Fund is not an insurer. "Insurer" is defined in the *Insurance Act* to mean a "person who undertakes or agrees or offers to undertake a contract." The Fund does not meet this definition. However, in the interpretation of statutes or regulations, the literal or ordinary meaning of a word is not always determinative. See *Chieu*, *supra*, at para. 34. That is because its meaning flows, at least partly, from the statute's, or in this case the regulation's, context and purpose. Interpreted in this light, I conclude that the Fund is an insurer for the purpose of resolving disputes over the payment of accident benefits. Both the overall context and purpose of the legislative and regulatory scheme, and the immediate context, the wording of regulation 283, support this conclusion.

(a) The Overall Context and Purpose

[38] Section 268 of the *Insurance Act*, section 6(2) of the *Motor Vehicle Accident Claims Act* and O. Reg. 283/95 comprise an integrated legislative and regulatory scheme for the payment of accident benefits. The Fund plays a vital, indeed an essential role in that scheme. It is liable for accident benefits when an accident victim has no recourse to a policy of insurance. It is deemed to be an insurer for the purpose of paying those accident benefits. Yet, as this case and the companion Kingsway appeal demonstrate, inevitably there will be disputes between the Fund and other insurers over who is liable to pay.

[39] To say that the Fund is an insurer when it pays benefits, but not when it disputes its liability to pay them, runs directly contrary to the main purposes of the scheme: the prompt delivery of accident benefits to injured persons and the timely and cost-efficient resolution of disputes over who should pay those benefits.

[40] Putting the Fund outside the dispute resolution provisions of regulation 283 so that it must either sue an insurer or be sued by an insurer in the courts makes little sense. I cannot think that either the insurance industry, which was consulted on this regulation, or the Lieutenant Governor-in-Council who passed it, intended such a result.

(b) The Immediate Context: The Wording of Regulation 283/95

[41] The provisions of regulation 283 expressly include the Fund. Section 11 addresses the cases where the Fund receives an application for benefits and states that in those cases "the insured person is not entitled to initiate or participate as a party in an arbitration under section 7." Section 11 is important in supporting the conclusion that the Fund is an insurer under the regulation for at least three reasons.

[42] First, as the appeal court judge said at para. 49 "[i]f the mandatory arbitration process prescribed by Regulation 283 did not apply when the Fund has paid benefits there would be no reason to include this section in the Regulation." In other words, if the Fund

has no role in the dispute resolution under the regulation, section 11 would be unnecessary.

[43] Second, in cases where the Fund does receive an application for benefits, section 11 contemplates arbitration to resolve any dispute between the Fund and one or more insurers over liability for those benefits. Moreover, section 11 contemplates that the Fund will initiate that arbitration. I say that because presumably, if the Fund receives an application for benefits, consistent with its obligation to pay accident victims promptly, it will do what it did in the present case: pay the benefits and then dispute its obligation to do so. Under section 11, that dispute is to be resolved by arbitration under the regulation. But, under section 3 of the regulation, only an insurer can give notice of a dispute, and under section 7(2) only an insurer can initiate arbitration. Thus, to dispute its liability and to initiate arbitration, the Fund must be treated as an insurer.

[44] Third, sections 3, 4 and 11 of the regulation work together only if the Fund is considered an insurer. If an insurer receiving an application for benefits under section 2 wishes to dispute its obligation to pay, then under section 3 it must give notice of that dispute to every insurer it alleges is liable. Under section 4, "[a]n insurer that gives notice under section 3 shall also give notice to the insured person." Section 11, however, stipulates that section 4 does not apply where the Fund receives an application for benefits. Implicitly then, section 3 does apply. Thus, when the Fund receives an application for benefits and wishes to dispute its obligation to pay, it must give the section 3 notice but not the section 4 notice. But the section 3 notice, as I have said, is a notice required to be given by an insurer.

[45] Thus, to make sense of the various provisions of regulation 283 and to make them work coherently and consistently, the Fund must be treated as an "insurer" for the purpose of resolving disputes over the payment of accident benefits.

(c) *Kalinkine* Revisited

[46] I return to our court's decision in *Kalinkine*. As I have said, the facts were unusual. Indeed, there was no real "dispute" because the insurer, Personal, conceded its liability to pay benefits and the amounts of those benefits. It challenged only the forum in which the Fund sought reimbursement.

[47] In its reasons, however, this court did say that the Fund was not an insurer under regulation 283. I consider that statement to be incorrect. The Fund is an insurer under regulation 283 and, where it disputes its obligation to pay benefits, it must resolve that dispute, not in the court, but in accordance with the arbitration process under the regulation.

[48] In *Kalinkine*, this court said that regulation 283 did not preclude the Fund from seeking restitution in the courts "in a proper case." I agree. *Kalinkine* itself was a proper case because there was nothing to arbitrate. Whether there are other "proper cases" need not be decided on these appeals.

(iii) The Timeliness of the Arbitration

[49] Allstate submits that if the Fund is an insurer under regulation 283, then, like any other insurer it must comply with the time limits set out in the regulation. I agree with this submission.

[50] Allstate also contends, however, that the Fund initiated arbitration beyond the one-year period prescribed in section 7(2) of the regulation, and thus the arbitrator had no jurisdiction to consider its claim for reimbursement. This contention has some merit but before the arbitrator Allstate withdrew this argument. It cannot revive this argument on appeal. I would not give effect to it.

(iv) The Issue of Dependency

[51] The arbitrator found that Allstate was liable for accident benefits because the victim of the accident was financially dependent on her mother and therefore an insured person under her mother's policy with Allstate. Allstate appealed the arbitrator's finding of dependency. The appeal court judge did not deal with the issue because he set aside the award for lack of jurisdiction. In this court, Allstate did not renew its attack on the arbitrator's finding of dependency. Thus I have no basis even to consider setting aside that finding.

E. Conclusion

[52] In *obiter* comments, the appeal court judge expressed the view that *Kalinkine* was wrongly decided and that the Fund is an insurer under regulation 283. I agree. I would therefore allow the appeal and restore the award of the arbitrator.

[53] Although I would do so, I have largely agreed with Allstate's position, not with the Fund's position. I therefore do not consider that this is an appropriate case for costs and I would make no order for costs.

RELEASED: JAN 31 2007
JIL

"John Laskin J.A."
"I agree Janet Simmons J.A."
"I agree E.E. Gillese J.A."
"I agree J. MacFarland J.A."
"I agree D. Lane J. (*ad hoc*)"