IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 and *REGULATION 283/95*, as amended

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Darrell March for the Applicant

Pamela Blaikie for the Respondent

BACKGROUND:

Charangan Thangarajah was injured when the car in which he was a passenger was involved in a single vehicle accident, while travelling on Highway 11, near Huntsville, Ontario on March 24, 2007.

Mr. Thangarajah had been involved in two other collisions in February of 2007. He was twenty-one years old, and lived with his parents at that time. His father was a named insured on an auto policy issued by Wawanesa Mutual Insurance Company ("Wawanesa"). He submitted his applications for the payment of accident benefits to Wawanesa, claiming to be financially dependent upon his father.

Wawanesa paid benefits to Mr. Thangarajah in relation to the February accidents. During the course of its investigation into the March 24th accident, it became apparent that the Claimant was employed on a full-time basis, which led Wawanesa to question whether he was in fact financially dependent upon his father. After receiving a copy of the police report relating to the accident, the adjuster served a Notice of Dispute Between Insurers on Security National Insurance Company ("Security National"), the insurer of the vehicle in which the Claimant was an occupant at the time of the accident, alleging that it was in higher priority to pay the claim pursuant to section 268(2) of the *Insurance Act.*

Wawanesa received the Claimant's completed application for benefits on May 18, 2007. It served the Notice to Security National on September 4, 2007, more than ninety days later. Security National accordingly argues that Wawanesa is prevented from pursuing it for priority, given the requirement in section 3(1) of *Regulation 283/95* that such notices must be sent within ninety days of receiving the completed application. Wawanesa contends that the 'saving provisions' of section 3(2) of the regulation excuse its late provision of notice, and should be found to apply.

Counsel agreed that this question should be determined as a preliminary issue, and a hearing was convened to address the issue.

PRELIMINARY ISSUE:

1. Is Wawanesa's late notice to Security National of its intention to dispute its obligation to pay benefits to Mr. Thangarajah excused by the 'saving provisions' in subsection 3(2) of *Regulation 283/95* ?

RESULT:

1. No, Wawanesa's late notice cannot be excused by the operation of subsection 3(2) of the regulation, and it is accordingly precluded from pursuing Security National for priority of this claim.

ARBITRATION HEARING:

An arbitration hearing was convened before me, Shari L. Novick, on October 8, 2010, pursuant to the *Arbitration Act,* 1991 S.O. , c. 17.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of the matter:

Regulation 283/95

> ***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.*
>
> ***(2)*** *An insurer may give notice after the 90-day period if,*
>
> *(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and*

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

EVIDENCE:

Domenica Oliverio is a "senior accident benefits field adjuster", and has been with Wawanesa since 1981. She was the sole witness called to testify at the hearing.

Ms. Oliverio advised that she was initially assigned to adjust the claims filed by both the Claimant and his mother arising from an accident that took place on February 8, 2007. She contacted their legal representative and arranged to meet with the Claimant on April 9th, and with his mother on the following day, in order to obtain their signed statements. When Mr. Thangarajah did not appear at the scheduled time, she called him and was advised that he was not able to attend their meeting as he had been injured in a subsequent accident in late March. She stated that that was the first time that she became aware that the Claimant was involved in a further accident.

Ms. Oliverio returned to the representative's office the following day to meet with the Claimant's mother, as scheduled. When she asked how Mr. Thangarajah was feeling, she recalled his mother mentioning that he had also been involved in an accident on February 14, 2007. Ms. Oliverio testified that when she asked for details of the March accident, the Claimant's mother would only say that her son had been a passenger in a friend's vehicle, but would not provide either the name of the driver or the insurer of the vehicle. The Claimant's representative was also unable to provide any useful details of the March accident. The Claimant's mother did advise Ms. Oliverio that her son lived with her, and that he had a full-time job, but she would not provide any information about where he worked or how much he earned.

Ms. Oliverio testified that she subsequently received a Treatment Plan for Occupational Therapy services referencing the claim number assigned to the February accident, but relating to the injuries allegedly suffered by the Claimant in the March accident. She advised the representative that the claims had to be kept separate, and that she had not yet

received official notification of the March accident. Shortly after that, she received a completed Application for Accident Benefits (OCF 1) form relating to the March 24th accident. There is no dispute that the application was received on May 18, 2007, and that the 'ninety-day period' began to run on that date.

The application received contained information that appeared to be inconsistent. The Claimant ticked off the box indicating that he was covered as a dependent on his parents' policy, but also indicated that he worked at two jobs – a part-time job (thirty hours per week) earning $360 as a delivery person, as well as a full-time job as a courier (earning $875). Ms. Oliverio acknowledged that upon reviewing the OCF 1 she identified that there was a potential "dependency issue", and that she had ninety days within which to determine whether another insurer would be in higher priority to pay the claim. She admitted under cross-examination that she neither diarised the deadline, nor noted the end of the ninety-day period in the file.

Ms. Oliverio testified that she sent the standard "AB package" to the Claimant's representative on May 24, 2007. On May 30th, she sent a letter requesting that an Employer's Confirmation of Income form (OCF 2) and a Disability Certificate (OCF 3) be provided as well. Despite her concern that the information contained in the application raised a dependency issue, and that she needed to make inquiries regarding any other insurer that may have priority, she did not request that a copy of the police report be provided.

Ms. Oliverio subsequently wrote to the Claimant and his representative on August 8, 2007, just eight days shy of the ninety-day deadline. Her letter acknowledged receipt of a Disability Certificate, but advised that no income replacement benefits would be paid until an OCF 2 was submitted. This letter also makes no reference to or request for the police MVA report.

Ms. Oliverio did not make any attempts to meet with the Claimant to take a signed statement from him, after receiving the OCF 1 Form in May. She explained that instead,

she decided to ask her counsel to conduct an examination of Mr. Thangarajah, pursuant to section 33 of the *SABS*. Her notes indicate that she called counsel with this request on June 25, and that an examination date was subsequently scheduled for September 28, 2007. Ms. Oliverio acknowledged under cross-examination that she had not turned her mind to the fact that the ninety-day period would expire on August 16, 2007, and that the date scheduled for the examination was several weeks beyond that deadline.

When asked about her efforts to obtain a copy of the police report, Ms. Oliverio testified that she recalled having asked the Claimant's representative for a copy during a telephone conversation they had on May 30, 2007. There is no mention of this in her log notes for that day, although she testified that she did recall asking for it. On July 23, 2007 she wrote to counsel for the Claimant and requested the name of the police officer involved, the badge number and division, as well as the names of the parties involved, so that she could attempt to secure a copy of the report.

The evidence indicates that before receiving a response to this letter, her assistant wrote to the Huntsville OPP office on July 25, and requested a copy of the report. Despite the fact that neither the Claimant's consent nor the identity of the driver was provided, the OPP forwarded the report to Ms. Oliverio on August 13th. She explained that this was the first time that she became aware that Security National was the insurer of the vehicle that was involved in the accident.

Approximately three weeks later, on September 4, 2007, Ms. Oliverio served Security National with notice of Wawanesa's intention to dispute its obligation to pay benefits to Mr. Thangarajah. Unfortunately, this was nineteen days after the ninety-day deadline had passed. Ms. Oliverio acknowledged that she did not receive any new information between the date she received the police report and the date on which she served the Notice.

PARTIES' SUBMISSIONS:

Counsel for Security National submitted that Wawanesa had not satisfied either branch of the two-pronged test set out in subsection 3(2) of the regulation, and that they should accordingly be precluded from proceeding with the arbitration. She contended that Ms. Oliverio was in possession of all of the necessary information required to determine that another insurer may be "liable under section 268 of the Act" within ninety days, and therefore was in breach of subsection (a). She also contended that the actions taken by Wawanesa did not meet the standard of "reasonable investigations necessary" that is required by subsection (b).

Ms. Blaikie cited the Court of Appeal's comments in *Kingsway General Insurance* v. *West Wawanosh Insurance,* (2002) 58 O.R. (3d) 251, to the effect that the purpose of section 3 of the regulation is to promote clarity and certainty, and that as sophisticated participants in the process, insurers should be held to strict compliance with the regulatory provisions.

Counsel pointed out that it was clear from the outset of the investigation that there was a dependency issue, and that priority would have to be investigated. She argued that it was also known at an early stage that the Claimant was an occupant in a friend's vehicle, and that the identity of the insurer of that vehicle would need to be determined, with the easiest manner of obtaining that information being to request a copy of the police report.

Ms. Blaikie noted that Ms. Oliverio received the police report on August 13, 2007, and contended that at that point she had all of the information that she required in order to send out a Notice of Dispute Between Insurers. She argued that the fact that she waited three weeks to do so is fatal to Wawanesa's right to proceed with the arbitration.

Counsel for Wawanesa contended that 90 days was not a sufficient period of time within which to have made a determination that Security National may be responsible to pay

benefits to the Claimant in this case. Mr. March referred to the lack of co-operation on the part of the Claimant's mother, who was evasive about both the details of the accident and her son's employment earnings when she met with Ms. Oliverio in April, 2007. He noted that the Claimant's representative was also not forthcoming with information, and that various requests for information went unanswered.

Mr. March submitted that Ms. Oliverio was left with some information suggesting that priority needed to be investigated, but without sufficient information to determine upon whom a Notice of Dispute should be served. He referred to Justice Perell's comments in the appeal decision in *Liberty Mutual Insurance v. Zurich Insurance* 2007 CanLii 54080 (Ont S.C.J.) to the effect that subsection 3(2) should be interpreted in "such a way as to discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified".

Mr. March also contended that the investigation conducted by Ms. Oliverio was proactive, and met the standard required by section 3(2)(b) of the regulation. He noted the various steps taken within the ninety-day period, highlighting the fact that she contacted the Claimant's representative on May 30, 2007, within two weeks of receiving the application, to request the required information, and that while still waiting for the representative to provide details to facilitate the ordering of the police MVA report, Ms. Oliverio took a 'shot in the dark' and had her assistant request the report from the OPP without that information. He suggested that even after receiving the report, some unanswered questions remained, and contended that the case law dictates that an adjuster's investigation should not be reviewed with the benefit of hindsight, but rather should be assessed on the basis of what was known at the time.

Finally, counsel for Wawanesa noted that the cases also provide that adjusters should not be held to a standard of perfection, and that the fact that their attention is often divided among many complex files must be acknowledged. (*Primmum Insurance v. MVACF, unreported decision of Arbitrator Jones, August 18, 2005)* He pointed out that the Notice sent out to Security National was sent only three weeks after the ninety-day deadline, and

that no prejudice was suffered by its late receipt. He referred to Ms. Oliverio's evidence regarding the many other responsibilities that she had during the summer of 2007 over and above the usual handling of files, and urged me to find that she had conducted a reasonable investigation that met the required standard.

FINDINGS & ANALYSIS:

As stated above, I find that on the evidence provided, Wawanesa has not met the onus it faces to prove that ninety days was not a sufficient time within which to make a determination that Security National may be responsible to pay benefits to Mr. Thangarajah. It is therefore precluded from pursuing Security National for priority, by operation of subsection 3(2)(a) of *Regulation 283/95*.

Each case must be determined on its own facts, and considered against the established legal and jurisprudential backdrop. The case law on this issue is clear – the 'savings provisions' in subsection 3(2) are to be strictly applied, and can only be invoked when both branches of the test are met. Undoubtedly, an insurer seeking to rely on these provisions faces a heavy onus. As stated by Justice Perell *in Liberty Mutual Insurance v. Zurich, supra,* the rationale behind the strict operation of the section is that in order for the system to operate effectively, an insurer must be made aware at an early stage whether or not it will be adjusting a claim (at p. 3).

While counsel in this case made submissions on both branches of section 3(2), the focus of the analysis is on subsection (a), namely whether or not ninety days was a sufficient time in which to determine that another insurer was liable to pay benefits. I find Justice Nordheimer's comments in *Kingsway General v. West Wawanosh* (2001) 53 O.R. (3d) 436 to be instructive on this point (at para. 30):

> *There is nothing in the section that purports to require correctness as a part of the determination. It simply stipulates that the insurer must make a determination within 90 days unless reasonable investigations undertaken within that time have made a determination impossible. The section is not intended, in my view, to deal with the issue of the correctness of the determination but simply the ability to make the*

> *determination. In that regard, the section is really directed toward the ability of the insurer to gather the necessary factual information to make a determination as to whether its policy or the policy of another insurer should answer for the benefits to be paid.*

I take from this excerpt that the question to be asked is simply whether the first insurer has been able to gather the required facts that would permit a determination to be made within ninety days regarding whether another insurer may be in higher priority to pay the claim. The evidence in this case demonstrates that despite the initial confusion surrounding the various accidents that the Claimant was involved in, and the fact that his mother and representative were not forthcoming with all of the information that may have been requested, Ms. Oliverio was able to determine that Mr. Thangarajah earned over $1200 per week at the time of the accident. That suggests that it was unlikely that he was financially dependent upon his parents. Ms. Oliverio also knew within ninety days of having received the application that Security National insured the vehicle that he was an occupant in at the time of the accident.

In *Liberty Mutual vs. Zurich, supra,* Justice Perell stated that –

> *…an insurer seeking to deliver a notice after ninety days must show both that it exercised due diligence and also that there was something in all of the circumstances that would justify requiring more than ninety days to make a determination about whether to issue a notice to a particular insurer.*

I am unable to find that something in the circumstances of this case required more than ninety days to make a determination to put another insurer on notice. In fact, Ms. Oliverio acknowledged in her evidence that she had no further information on the date that she sent the notice out to Security National than on August 16, 2007, the last day of the ninety-day period. Counsel for Wawanesa contended that some unanswered questions remained even after she received the police report, and while this may be true, her acknowledgement that nothing further was received between her receipt of the report and the date on which she sent the (late) notice does not support this argument and is fatal to Wawanesa's claim.

Ms. Oliverio testified about the many responsibilities she faced during the period in question. While I am sympathetic to the plight of adjusters who are required to adjust many complex claims, conduct priority investigations, oversee co-workers' files while they are away, and undergo training on new computer systems (as Ms. Oliverio was) the regulation and associated case law makes it clear that the ninety-day time limit must be strictly enforced.

Accordingly, for the reasons expressed above, I find that Wawanesa is precluded from pursuing this arbitration against Security National.

COSTS:

The parties' Arbitration Agreement provides that the costs of the arbitration shall be borne by the unsuccessful party. I leave it to counsel to agree to the amount of costs payable by Wawanesa to Security National; if no agreement can be reached, I invite counsel to make brief written submissions to me and I will fix the quantum.

DATED at TORONTO, ONTARIO this _____ DAY OF JANUARY, 2011.

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Shari L. Novick
Arbitrator