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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CO-OPERATORS' GENERAL INSURANCE COMPANY

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE (aka Motor Vehicle Accident Claims Fund)

Respondent

DECISION ON PRELIMINARY ISSUES

COUNSEL:

Daniel Strigberger for the Applicant

Stan Sokol for the Respondent

BACKGROUND:

Vuong Trieu stepped off the curb at the corner of Bathurst Street and Dundas Street West in Toronto, intending to board an approaching TTC streetcar on June 10, 2010. He was injured when his head was struck by the passenger-side mirror of a Chevrolet Express van that was driving in the curb lane adjacent to the streetcar. Mr. Trieu did not have a driver's license, and neither he nor his spouse were insured under any auto policies.

The van that struck Mr. Trieu was driven by Percival Harrison, and was not insured on the date of the accident. Mr. Harrison was a named insured under a policy issued by Co-operators' General Insurance Company ("Co-operators") that covered two other vehicles that he owned. Mr. Trieu submitted an Application for payment of accident benefits to Co-operators' on June 12, 2010. Co-operators' accepted the application and began to adjust the file. It then provided written notice to the Motor Vehicle Accident Claims Fund ("the Fund") of its intention to dispute its obligation to pay benefits to Mr. Trieu on July 19, 2010, in accordance with section 3 of *Regulation 283/95*.

Co-operators' did not provide notice under section 3 of the regulation to any other insurers.

The Fund contends that the TTC streetcar was a "involved in the incident from which the entitlement to no-fault benefits arose" as set out in section 268(2)(2)(iii) of the *Insurance Act,* and that it is therefore in higher priority to pay Mr. Trieu's claim than would be the Fund. The Fund has not provided notice to the TTC under *Regulation 283/95.* It takes the position that Co-operators' is obliged to do so, and as it has not, it should be barred from proceeding with the priority dispute.

The parties agreed that this issue should be determined as a preliminary matter.

Prior to the start of the hearing, counsel for Co-operators' conceded that the TTC streetcar was "involved in the incident from which the entitlement to no-fault benefits

arose". He also candidly admitted that Co-operators' did not conduct any investigation into the TTC vehicle's involvement in the incident within ninety days of receiving Mr. Trieu's application. Mr. Strigberger argued that regardless of this fact, Co-operators' had discharged its obligations under section 3 of the regulation by providing its notice to the Fund, and that section 10 of the regulation requires that the Fund provide notice to the TTC, if it asserts that TTC is in equal or higher priority to pay the claim.

ISSUES:

This decision addresses the following preliminary issues:

1. Was the TTC streetcar "involved in the incident from which entitlement to no-fault benefits arose", as set out in section 268(2)(2)(iii) of the *Insurance Act*?

2. If so, was Co-operators' required to provide written notice of its intention to dispute its obligation to pay benefits to Mr. Trieu to the TTC in accordance with section 3 of *Regulation 283/95* ?

3. Do the provisions in subsection 3(2) of the regulation apply in these circumstances?

RESULT:

1. **Yes –** as conceded by Co-operators'.

2. **No**. Co-operators' complied with section 3 of the regulation by providing notice to the Fund.

3. **No.** As there is no dispute that Co-operators' provided notice to the Fund within ninety days of having received Mr. Trieu's application, subsection 3(2) is not applicable.

EVIDENCE:

The parties exchanged many documents during the course of this process, prior to the hearing. These were filed at the hearing and referred to by counsel. In addition, three witnesses were called to testify at the hearing – Police Constable Richard Hopton (the investigating police officer), Fred Yee (the driver of the TTC streetcar), and Percival Harrison, the driver of the van that struck Mr. Trieu. Given the concession made by Co-operators' at the outset of the hearing regarding the TTC's involvement in the incident in question, none of the evidence tendered was germane to the issues that remained in dispute, which are not factual but call for interpretive determinations.

The evidence before me sets out the following background facts – the side mirror of the van driven by Mr. Harrison struck Mr. Trieu in the head as he stepped off the curb to board the approaching TTC streetcar. The MVA Report prepared by Constable Hopton lists only the Harrison vehicle in the top section of the report. Further down the page under the heading "Synopsis", it states that a pedestrian "stepped onto the roadway prematurely to board streetcar and was struck by V1's passenger side-view mirror". A partial report was provided to the parties at the accident, which did not contain any reference to the TTC vehicle. The full report would have become available to the parties on July 23, 2010.

The OCF 1 Application form submitted by Mr. Trieu is dated June 12, 2010. It appears to have been received by Co-operators' on June 18, 2010. In the section asking for a brief description of the accident, Mr. Trieu wrote "stand at bus stop and get hit by a car". The log notes from the Co-operators' adjuster initially assigned to the claim record a conversation between Mr. Harrison and the adjuster, in which Mr. Harrison advised that a "pedestrian had walked into traffic to get on to a streetcar". The claim was subsequently assigned by Co-operators' to an Independent Adjuster, and A Notice to Applicant of Dispute Between Insurers was sent by that IA to the Fund on July 21, 2010. The reasons provided for the Notice state – "The Co-operators' does not insure the vehicle involved in the accident. The vehicle involved was not insured at the time of the accident. Mr. Trieu is not licensed to drive and does not have priority elsewhere."

Arbitration was commenced by Co-operators' in November 2010. Subsequent correspondence between counsel that was filed with me indicates that the issue of which party should provide notice to the TTC was debated and not resolved.

RELEVANT PROVISIONS:

Insurance Act - Section 268(2)(2)

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 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.

Ontario 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.

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

(2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3.

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

PARTIES' ARGUMENTS:

Co-operators' position

Mr. Strigberger submitted that it was clear from the outset that the Chevrolet van driven by Mr. Harrison was not listed on the Co-operators' policy, and that neither the OCF 1 form received from the Claimant nor the copy of the partial MVA Report received from the investigating police officer made reference to a TTC streetcar having been involved. He noted that the Claimant had also provided a sworn statement to Co-operators', in which he advised that he did not recall anything about how the accident happened. Counsel contended that given the above, and the fact that neither Mr. Trieu nor his spouse had drivers' licenses, it was reasonable for Co-operators' to have concluded that it was not in priority to pay the claim, and that its only recourse would be to pursue the Fund for priority.

Mr. Strigberger submitted that in any event, section 3(1) of the regulation provides that in order for an insurer to be able to dispute its obligation to pay benefits to a claimant, it must only provide notice to "every insurer who it claims" is required to pay benefits within ninety days of receipt of an application. He argued that these words do not mandate that a first insurer must provide notice to every insurer who may have priority over it, but simply to the one (or few) that it alleges are higher placed on the 'priority ladder'. He cited Arbitrator Samis' finding in *Wawanesa Mutual v. Peel Mutual and Economical Insurance* (dated January 28, 2011) that while a first tier insurer is

"motivated to commence proceedings against a higher ranking insurer, it is not required to commence proceedings against the highest ranking insurer" (at p. 3) in support of this argument.

Mr. Strigberger urged me to find that Co-operators' had satisfied its obligations on a plain reading of the wording of section 3. He noted that while the amendments to *Regulation 283/95* that apply to accidents occurring on or after September 1, 2010 require insurers to complete reasonable investigations in order to determine whether any other insurers are liable to pay benefits in priority to the Fund, those provisions do not apply in this case as the incident in question took place in June 2010.

In addition, Mr. Strigberger contended that a plain reading of section 10 of the regulation supports Co-operators' position in this case. He noted that in clear and mandatory language, that section directs an insurer receiving notice under section 3 – the Fund in this case – to give notice to other insurers (the TTC, in this instance) if it disputes its obligation to pay benefits on the basis that other insurers have equal or higher priority. He cited Arbitrator Samis' analysis in the *Wawanesa v. Peel Mutual and Economical* case, *supra,* that a 'second tier' insurer need not meet the onerous ninety-day notice requirement that a 'first tier insurer' is obliged to, and submitted that the Fund was therefore not constrained by the passage of time with regard to its right to provide notice to the TTC and bring them into this proceeding.

The gist of Mr. Strigberger's argument is that even if Co-operators' had been aware within ninety days that the TTC vehicle was involved in the incident and would therefore potentially be in higher priority than it or the Fund to pay Mr. Trieu's claim, Co-operators' met its obligations under the regulation by providing timely notice to the Fund and that section 10 of the regulation requires that the Fund then provide notice to the TTC once the streetcars' involvement became known to the parties. He also contended that subsection 3(2) of the regulation is inapplicable to this discussion, as notice was provided within ninety days to the Fund.

Fund's position

Mr. Sokol submitted that any issues that arise under *Regulation 283/95* must be considered with the overall legislative and regulatory scheme in mind, and specifically noted that while the *Motor Vehicle Accident Claims Act* stipulates that the Fund is potentially responsible to pay accident benefits to claimants, it is the "payor of last resort".

Mr. Sokol also contended that when I consider the question of whether Co-operators' met its obligations to provide notice under section 3 of the regulation, I should not only review the words of subsection 3(1), but should also take into account the requirements outlined in subsection 3(2), specifically with regard to whether Co-operators' conducted a reasonable investigation within ninety days of receiving a completed application from Mr. Trieu. He argued that Co-operators' did not conduct a reasonable investigation in this case, and that the words of section 3 as a whole require a first insurer who receives an application to give notice to every other insurer that may be in priority. He submitted that Co-operators' has not fulfilled this basic obligation, and should therefore be barred from proceeding with this priority dispute.

Counsel for the Fund noted that Co-operators' received the completed police MVA Report indicating that the TTC streetcar was involved in the incident in September 2010. He submitted that if that document was received by Co-operators' more than ninety days after receiving Mr. Trieu's application, they ought to have immediately put the TTC on notice, suggesting that they would have had a strong argument for having their late notice excused, given the delay in the provision of the completed report. In any event, the Fund argues that because Co-operators' did not comply with section 3, they must suffer the consequences of their decision not to provide notice to the TTC, and that their failure to do so should not be visited upon the Fund.

Mr. Sokol advised that the Fund's position on the merits of the case is that as Co-operators' insures Mr. Harrison's two other vehicles, it is in priority to pay Mr. Trieu's claim pursuant to the "Other Automobile" provisions contained in section 2.2.3 of the

OAP 1. While he acknowledged that section 10 of *Regulation 283/95* provides that a party receiving notice under section 3 should provide notice to an insurer in equal or higher priority, he stated that as Co-operators' is already in higher priority to the Fund by virtue of section 2.2.3, the Fund was not required to have taken any further steps.

ANALYSIS & FINDINGS:

I agree that when analysing section 3 and section 10 of *Regulation 283/95* the broader context in which these provisions operate must be kept in mind. The relevant sections of the *Insurance Act*, the *Statutory Accident Benefits Schedule* and the OAP 1 all form part of the overall context within which priority disputes are arbitrated. I don't dispute Mr. Sokol's contention that the provisions of the *Motor Vehicle Accident Claims Act* must also be kept in mind.

Having said that, the provisions of *Regulation 283/95* are straightforward and dictate how priority disputes are to be approached and arbitrated. Section 2 requires that a first insurer receiving a completed application must pay benefits to the claimant, as long as some "nexus" exists. If that insurer contends that another insurer is in higher priority to pay the claim, section 3 of the regulation provides that notice may be given to another insurer or insurers. Section 3(1) imposes a relatively tight timeframe within which that notice must be provided. If the insurer receiving such a notice is not prepared to assume priority and takes the position that yet another insurer is in equal or higher priority to it, it is directed by section 10 to provide notice to that insurer and all aspects of the dispute are to be resolved in one arbitration.

Mr. Strigberger contends that an insurer should be found to have complied with section 3 as long as it provides timely notice to an insurer who it claims is in higher priority to it. He submits that it is essentially a subjective exercise, and that if with the benefit of hindsight other insurers are later found to be in priority, there should be no penalty to the first insurer for not having provided notice to every last possible priority insurer. I agree with that submission. The words "who it claims" in section 3 modify the requirement imposed on first insurers, and cannot be ignored. In keeping with the rules of statutory

and regulatory interpretation, each word in a provision must be assumed to have a purpose and contribute to its overall meaning. If the drafters of the regulation had intended to impose the obligation on a first insurer to provide notice to every potential insurer that could be in priority, those words would not have been included. The fact that they appear in the provision in my view must mean that a first insurer has some discretion in this regard.

Priority determinations often come down to a quest for accurate information. That can take time. The underlying purpose of the priority regulation is to ensure that claimants receive the benefits that they are entitled to and are not forced to wait, while insurers investigate the fine points of difficult factual or legal questions relating to issues that often arise in these cases over financial dependency, cancellation of insurance policies or whether a company vehicle was made available for a claimant's "regular use". The first insurer receiving an application for benefits has many obligations – it must pay benefits and adjust the claim fairly and in good faith. It may also conduct an investigation to determine whether any other insurers are in higher priority. Given the challenges faced by the first insurer in this regard, section 3 requires that it provide notice within ninety days to another party that it asserts is higher in priority, but not to all potential parties. As Arbitrator Samis stated in *Wawanesa v. Peel and Economical, supra,* -

> The first tier insurer is motivated to commence proceedings against a higher ranking insurer, but is not required to commence proceedings against the highest ranking insurer. Given the time constraints imposed it is entirely possible that the first tier insurer will overlook the potential involvement of other higher ranking insurers. The result is that the first tier insurer may well implead, as a second tier insurer, a company that, in turn, should be able to assert another, higher ranking, insurer has responsibility.
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> (at p. 3)

I agree with this statement. It acknowledges the reality that the first insurer is often juggling many tasks at once, and that it is often difficult to gather all relevant information relating to which other parties are potentially in priority.

Section 10 of the regulation permits the second tier insurer – in this case the Fund – to provide notice to another insurer if it takes the view that another insurer is in equal or higher priority to it. It is not constrained by the ninety-day limit set out in section 3, as determined by Arbitrator Samis. I note that the language in section 10 is mandatory – if the second tier insurer alleges that another insurer is higher on the section 268 priority ladder it "shall give notice to the other insurers". In my view, that provides a full answer to the Fund's argument in this case, and requires the Fund to have provided notice to the TTC in this case.

Mr. Sokol argued that insurers should not be permitted to conduct cursory investigations and "dump" claims on the Fund. I agree with that statement, and support the policy reasons underlying it. Insurers should never forego a proper investigation that may identify other priority insurers simply because they think there is an argument to be made that the Fund is responsible to pay benefits under section 268(2) of the *Act*. The Fund should be the "payor of last resort", and insurers should not lazily direct DBI Notices to the Fund.

However, I am not persuaded that this is what occurred in this case. It was not immediately apparent on the documentation available to Co-operators' at the time it forwarded its notice to the Fund that a TTC streetcar was involved in the incident. If this accident had occurred on or after September 1, 2010, Co-operators' may not have met the onus placed on insurers by section 3.1 of *Regulation 283/95*, which requires that a reasonable investigation be completed in order to determine whether any insurers are liable to pay benefits in priority to the Fund. I make no finding in this regard. As the incident took place in June 2010, the amendments to the regulation do not apply.

The parties also made submissions on whether subsection 3(2) has any application in these circumstances. Again, given the clear wording of the provision, I find that it is only applicable to a situation in which notice is provided by an insurer after the ninety-day

period has expired. The parties agree in this case that the Fund received notice from Co-operators' well within the allowable timeframe and accordingly, it has no bearing on the issues before me.

For the reasons expressed above, I dismiss the preliminary issues raised by the Fund, and find that Co-operators' may proceed with the priority dispute.

I will have my assistant schedule a further pre-hearing call with counsels' offices so that a hearing on the merits can be arranged and discussed.

COSTS:

Given the result, the Fund shall pay the costs incurred by Co-operators' relating to this preliminary issues hearing on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, I will review brief written submissions on the matter.

The Fund is also responsible for the arbitration fees and all disbursements incurred related to this preliminary issues hearing. I will direct my account to Mr. Sokol's attention, under separate cover.

DATED at TORONTO, ONTARIO this ____ DAY OF JANUARY, 2013.

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Shari L. Novick
Arbitrator