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, as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY and NORTHBRIDGE GENERAL INSURANCE CORPORATION

Respondents

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Joseph Lin and Dana Yoon for the Respondent, Intact

Greg Bailey and Laura Dickson for the Respondent, Northbridge

BACKGROUND:

1. Larry Petrunak was struck by a car as he was walking outside of his truck in the early morning hours of March 13, 2015. He had previously driven a load of frozen chickens from the south eastern United States to a business called Jane's Fine Foods on Orlando Drive in Mississauga, Ontario. He was told to park his truck and await his turn for delivery. At some point after doing so he left the vehicle, and was struck by a car driving on Orlando Drive. He sustained serious injuries and has been determined to be catastrophically impaired under the *Schedule.*

2. Mr. Petrunak's wife was a named insured under a policy issued by Co-operators' Insurance, and his application for payment of accident benefits was submitted to them. Co-operators' investigation revealed that Mr. Petrunak also owned a motorcycle that was insured under a policy issued by Intact Insurance. The Co-operators provided notice to Intact of its intention to dispute its obligation to pay benefits to Mr. Petrunak, pursuant to section 3 of the Regulation.

3. The tractor trailer that Mr. Petrunak was driving on the day of the accident was owned by Elgin Motor Freight and insured by Northbridge Insurance. The Co-operators' adjuster wrongly assumed that it was insured by Economical Insurance, based on the results of an Autoplus search. She provided notice to them as well, which was later withdrawn. Once it was determined that Northbridge actually insured the truck that Mr. Petrunak was driving on the day of the accident, Intact provided notice to them under section 10 of the Regulation. Co-operators did not provide notice to Northbridge under section 3.

4. Northbridge concedes that its insured made a vehicle available for Mr. Petrunak's "regular use" at the time of the accident, and that he would therefore be a deemed named insured under their policy. The parties agree that the Claimant was also an "insured person" under both the Intact policy insuring his motorcycle, and his wife's policy with Co-operators. Given that he would have recourse to all three insurers for the payment of accident benefits under section 268(2) 2(i) of the Act, a determination of whether he was

an "occupant" of the tractor trailer at the time of the accident is required. If so, section 268(5.2) of the *Act* dictates that Northbridge would be in highest priority to pay his claim.

5. Northbridge disputes that Mr. Petrunak was an "occupant" of the truck at the relevant time. It also contends that even if it is determined that he was an occupant of that vehicle, the fact that Co-operators failed to provide notice of its intention to dispute its obligation to pay benefits to Northbridge within the ninety days prescribed in section 3 of the regulation prevents it from pursuing Northbridge for priority.

ISSUES:

1. Was the Claimant an "occupant" of the Northbridge insured vehicle at the time of the accident, such that section 268(5.2) of the *Insurance Act* requires him to seek accident benefits from Northbridge ?

2. If so, can Co-operators rely on the notice provided by Intact to Northbridge under section 10 of *Regulation 283/95,* or is its failure to itself provide notice to Northbridge under section 3 of the regulation fatal to its claim ?

3. If Co-operators cannot rely on Intact's notice to Northbridge under section 10, do the 'savings provisions' in section 3(2) of the regulation apply ?

4. If the Claimant was not an occupant of the Northbridge insured truck, has he exercised his right to "elect" under section 268(4) or (5) of the *Act* ?

RESULTS:

1. Yes, the Claimant remained a driver of the Northbridge insured tractor trailer at the time of the accident and was therefore an "occupant" of that vehicle. Section 268(5.2) of the Act requires that he claim accident benefits from Northbridge.

2. Co-operators can rely on the notice provided to Northbridge by Intact pursuant to section 10 of the regulation. Northbridge is accordingly the priority insurer.

3. Not applicable.

4. Not applicable.

THE EVIDENCE:

6. The parties filed a Partial Agreed Statement of Facts touching on the issues outlined above. Three witnesses were also called to testify at the hearing. Many documents were filed upon which the parties relied, including transcripts from Examinations Under Oath conducted of various parties. I will summarise the relevant evidence on the "occupancy issue" first.

"Occupancy issue"

7. The parties agree that Mr. Petrunak was struck by a Toyota driven by Mr. Wenyu Xin on March 13, 2015. While there is differing evidence on exactly where the Claimant was on the road when he was struck, the parties agree that he had parked his truck on the north side of Orlando Drive after arriving at Jane's Fine Foods, and that he left the truck at some point after that. They also agree that the Xin vehicle was coming from the opposite direction from which the truck was facing, and that it sustained damage to its passenger (right) side hood and windshield as a result of its collision with the Claimant. Mr. Petrunak came to rest in the middle of the road after being hit.

8. Beyond these facts, the evidence differs regarding what transpired in the moments before the accident. As a result of the injuries suffered, Mr. Petrunak has no recollection of his actions before being struck by the Xin vehicle. The Police MVA Report states that Mr. Petrunak exited his truck parked on the north side of Orlando Drive and attempted to cross the roadway when Mr. Xin's car struck him in the "centre of the roadway". This is at odds with the evidence provided by Adrian Nicholls, a witness called by Co-operators, who insisted that he saw the Claimant walking alongside his truck on the north side of the street shortly before being hit. It is also inconsistent with Mr. Xin's recollection of what transpired.

9. Mr. Nicholls works for Jane's Fine Foods and has been loading trucks at the Orlando Drive location for approximately nine years. He explained that drivers arriving with full loads are required to check in with the supervisor upon arrival, and if the loading docks are full, are asked to either park their trucks in the yard or on the street until a spot becomes available. Mr. Nicholls recalled coming out of the shipping area on the morning in question to turn on an air conditioning unit in a truck parked near one of the delivery doors. He stated that he saw the Claimant's truck parked on the north side of Orlando Drive and could see that a person was in the cab. He noticed that the truck's lights were on. He testified that he then saw the person exit the cab and walk alongside the truck toward the back of the vehicle, after which he heard a loud "bang".

10. Mr. Nicholls testified that he did not see the collision from where he was standing, but that he ran out to the road after hearing the impact. He recalled speaking to the Claimant while he was on the ground, and then going to seek help. The witness stated that he did not see Mr. Petrunak cross the street, and insisted that he was walking alongside his truck, within one metre of it when he was struck. When he was shown the pictures of the damage sustained to the Xin vehicle indicating that the car had large dents in the right front corner, suggesting that the Claimant was crossing the street from the Jane's side to the side where his truck was parked, Mr. Nicholls did not waiver from his view that Mr. Petrunak had been walking alongside his truck on the north side of the street.

11. Mr. Nicholls gave a statement to the investigating police officer after the accident, which was essentially consistent with his evidence outlined above. One interesting difference is that he told the officer that after initially spotting the Claimant, he turned his back and seconds later "I saw the white car hit the man that was walking". When he was asked where Mr. Petrunak was when he got hit, the statement indicates that he told the police officer that "he was close to the back of the truck standing next to the truck on his side of the road".

12. Mr. Xin, the driver of the car that struck the Claimant, was also called to testify at the hearing. He explained that he had been driving to work that morning along Orlando Drive when he saw a truck with its headlights on, parked on the opposite side of the street. He stated that it was before 7 a.m. and was dark outside. He recalled initially seeing a "black shadow" crossing the street from his right to his left side. He stated that when he passed the point where the truck was parked, he was able to see more clearly that it was a person passing in front of his car. He testified that while he swerved to the left to avoid striking Mr. Petrunak, the right front corner of his car hit him.

13. Mr. Xin insisted that the Claimant was crossing the street from the Jane's side of the street on his right to the side that the truck was parked, although he acknowledged that the police MVA report indicates he was crossing in the opposite direction. He stated that Mr. Petrunak ended up lying in the middle of the road, a bit to the right of the yellow dividing line. He testified that the Claimant was wearing dark clothing, and denied that he was wearing a reflective safety vest, as Mr. Nicholls had stated. Mr. Xin explained that the headlights of the truck had blinded him and that he was not able to see the Claimant crossing the street.

14. The Partial Agreed Statement of Facts filed by the parties provides that a FDA "tag" was placed over the seal of the truck's cargo doors at the rear of the truck at the place of origin. At the time of the accident the tag was still intact, indicating that Mr. Petrunak had not yet delivered his load.

15. The parties filed copies of the records documenting communications between Mr. Petrunak and the dispatcher at Elgin Motor Freight over the truck's satellite messaging system. These records show that various messages were exchanged on March 12, after the Claimant picked up the load of chickens, and that the truck crossed the border just before 3 a.m. on March 13. Mr. Petrunak then advised at 5:43 am that he had arrived at the consignee and was told to wait in the street. He communicated that the staff would "check the boxes at 8 am". The last message received from the truck that day was sent by the Claimant at 5:48 am.

16. The Police MVA Report notes the time of the accident as 6:40 a.m. As stated above, due to the injuries he suffered, Mr. Petrunak had no recollection of what he had been doing in the hour or so between his last communication with the dispatcher at 5:48 am and the time of the accident.

Evidence related to "notice issue"

17. The accident occurred on March 13, 2015. The completed OCF 1 form was not received by Co-operators until April 21, 2015. While the Statement of Agreed Facts filed indicates that July 28, 2015 would be the 90th day after Co-operators received the claimant's OCF 1, a reference to the calendar confirms that the ninety-day period would have actually expired on July 21. Nothing turns on this fact.

18. The parties also agree that an Autoplus report indicating that Mr. Petrunak's name appeared on policies issued by Intact, Co-operators and Economical was received by Co-operators on May 12, 2015. Co-operators provided written notice of its intention to dispute its obligation to pay benefits to Economical on May 25, 2015. Economical acknowledged receipt of this by letter on June 1, 2015 and advised that it would investigate the claim. That letter identified Economical's insured as "Wag-Mar Transpo". The parties agreed that Leanne Darke, the Co-operators' adjuster investigating the matter, assumed that Wag-Mar Transpo and Elgin Motor Freight were the same or related companies, and that she made no inquiries or conducted further any searches to confirm this.

19. Co-operators also provided a Notice of Dispute Between Insurers to Intact on May 25, 2015. The parties agree that Co-operators subsequently initiated arbitration against both Economical and Intact on August 9, 2015. Through counsel it subsequently retained, Economical advised counsel for Co-operators on September 29, 2015 that the Claimant had stopped working for its insured Wag Mar in October 2014, a few months before the accident, and that he was not therefore insured under the Economical policy at the relevant time. Counsel for the Claimant subsequently advised counsel for Co-

operators on October 1, 2015 that the truck that Mr. Petrunak was driving on the day of the accident was actually insured with Northbridge.

20. The parties agree that Intact then provided notice to Northbridge under section 10 of *Regulation 283/95* on October 2, 2015. This was the only notice received by Northbridge. Co-operators then initiated arbitration against Northbridge on October 5, 2015.

21. Further evidence on this issue was provided by Leann Darke, the claims adjuster with Co-operators who was assigned to this file. She confirmed that she received the OCF 1 form on behalf of Mr. Petrunak on April 21, 2015, and noted at that time that his employer was listed as Elgin Motor Freight. She called the company to inquire about insurance coverage for the truck, but was told that they would not provide this information to her. She testified that she asked the Claimant's wife about this as well, but that she could not provide an answer. Mr. Petrunak's injuries were serious, and he was unable to assist.

22. Ms. Darke requested that a search be conducted, resulting in the Autoplus report referred to above. A copy of that report indicates that the Claimant was named on policies issued by Intact and Co-operators, and also on a commercial policy with Economical. Ms. Darke explained that as the Economical policy that appeared in the Autoplus report was a commercial policy, she thought it was likely that Economical insured the truck that Mr. Petrunak was driving on the date of the accident. Based on this belief, she forwarded a DBI notice to Economical on May 25, 2015.

23. Ms. Darke acknowledged that Economical's letter responding to the notice she sent identified their insured as "Wag-Mar Transpo". She testified that she thought that Wag-Mar Transpo was a related company to Elgin Motor Freight, but acknowledged that there was no firm basis for this belief. She stated that she had formed the belief that the truck was insured by Economical, and that she did not take any steps to locate any other insurers for the truck within the ninety day period after receiving the OCF 1 form. When

asked why she was so certain that this was the case, she responded that the Autoplus indicated that it was a commercial policy, and that despite various exchanges she had with the Economical adjuster assigned to investigate the matter, she was never advised that they did not insure the truck.

24. Counsel for Co-operators also noted that at the time of Co-operators' receipt of the OCF 1 form, Mr. Petrunak was in intensive care at the hospital and that his wife Jean was managing his claims on his behalf, with the assistance of counsel. When Jean was asked at her Examination Under Oath why she had chosen to submit her husband's claim to Co-operators, she explained that there were two vehicles at their home that were insured with Co-operators. She added that the Claimant drove a motorcycle that was insured with Intact, but that she had forgotten about the existence of that policy at the time.

RELEVANT PROVISIONS:

The following provisions are relevant to the issues in this case:

Insurance Act:

> ***268(2)*** *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,*
>
> ***(4)*** *If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.*
>
> ***(5)*** *Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.*

(5.1) *Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.*

(5.2) *If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*

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.*

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.*

DETERMINATION OF OCCUPANCY ISSUE:

25. Counsel argued the occupancy issue first, and followed with their submissions on the notice / election issues. I will address these questions separately as well.

26. There are three 'branches' to the definition of "occupant" in section 224(1) of the Act. A person will be considered an occupant if he is either the driver of an automobile, a passenger in the automobile, or a person getting into, onto or out of an automobile. The parties agree in this case that the only way that Mr. Petrunak would be an "occupant" of the Northbridge insured vehicle is if he is found to be the driver of the truck.

27. The parties' arguments drew heavily from the case law that has evolved on this issue. Counsel referred to two Ontario Court of Appeal decisions in which the definition of "occupant" in section 224 of the *Act* was closely analysed. It is helpful to summarise the facts and findings in these cases before considering the arguments presented by counsel.

Axa Insurance v. Markel Insurance Co. of Canada

28. The Court of Appeal's decision in *Axa Insurance v. Markel Insurance Co. of Canada [2001] O.J. No. 294* overturned the appeal decision of the Superior Court, and restored the arbitration award issued by Arbitrator Fidler. The claimant in that case, a Mr. Ferguson, was an owner operator of a tractor trailer, insured by Markel. He drove his loaded truck to a steelyard to make a delivery. He stopped the truck outside the loading bay, and left the vehicle. While standing approximately thirty feet from his truck, a piece of wood flew off another tractor trailer that was leaving the loading bay, struck him in the head and killed him.

29. Mr. Ferguson's dependents applied to AXA, the insurer of his personal vehicle, for payment of accident benefits under the *Schedule.* AXA pursued Markel for priority, claiming that Mr. Ferguson remained an "occupant" of the truck at the time of the incident. As he was a named insured under the Markel policy covering the truck, Markel would be in higher priority to pay his claim by virtue of section 268(5.2) of the *Act*. Arbitrator Fidler agreed and determined that the claimant remained an "occupant" of the vehicle at the time of the incident, despite the fact that he was not inside the truck when he was struck by the flying piece of wood. That decision was reversed on appeal.

30. Writing for the Court of Appeal, appeal Justice Goudge agreed with the arbitrator that Mr. Ferguson remained a driver of his vehicle while he stood outside of his truck. While the definition of "occupant" in section 224(1) of the *Act* suggests that there must be some degree of physical connection with the vehicle for a person to be considered its driver, he stated that it does not require them to actually be driving the vehicle at the time

of the incident. He emphasized that parties should consider the status of the person claiming benefits, rather than their precise location or the activity that they were engaged in at the time.

31. Justice Goudge noted that section 268(5.2) of the *Act* refers to a person being an occupant of a vehicle "at the time of the incident". He concluded that this suggests that the status of driver or passenger does not attach permanently to a person, but rather may vary depending on the circumstances. He stated that the question becomes whether, keeping the above considerations in mind, an objective observer of the incident would "answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor trailer". He concluded that Mr. Ferguson met the definition of "driver" at the time of the incident, as he was in close proximity to the vehicle when he was struck, had driven the truck to the yard and would have driven it away after unloading, if the incident had not taken place. In that sense, he retained control over the vehicle at the point that he was struck.

McIntyre Estate et al. v. Scott et al.

32. This case involves an analysis of the term "passenger" that forms part of the definition of "occupant" in section 224(1) of the *Ac*t. Ms. McIntyre was a passenger on a motorcycle driven by her husband. The couple pulled off onto a shoulder of the Don Valley Parkway under an overpass when it started to rain. They got off the motorcycle, and intended to wait out the rainstorm under the shelter of the overpass. After a few minutes, Ms. McIntyre walked back to the motorcycle in order to retrieve some dry clothing from the saddlebag, and was struck by an uninsured motorist and seriously injured. Her husband Joseph was also struck and killed in the incident.

33. Joseph was the named insured under a policy insuring the motorcycle, issued by Jevco. He was also a named insured under an auto policy issued by Pilot, insuring two other vehicles. The parties agreed that if Ms. McIntyre was an "occupant" of the motorcycle at the time of the accident, Jevco would be liable to pay her claims. If she was not, liability would be shared between Jevco and Pilot. The motion judge ruled that

she was not an "occupant" at the time, as she was not "in or on" the motorcycle at the point at which she was struck. Pilot appealed the decision.

35. Justice Sharpe wrote the Court of Appeal's ruling, reported at (2003) 68 O.R. (3d) 45. He disagreed with the motion judge's finding that the word "passenger" as defined in section 224(1) of the *Act* is restricted to a person who is actually, physically in or on the vehicle at the time of the accident. He referred to Justice Goudge's findings in *Axa v. Markel, supra,* and stated that a consistent approach must be taken when interpreting the terms "passenger" and "driver", as they both appear in the definition of "occupant". He agreed that both terms identify a person's status, rather than the physical activity that they are engaged in at the time.

36. Justice Sharpe concluded that Ms. McIntrye met the definition of a "passenger" at the time of the accident, and reversed the lower court's decision. In endorsing the "objective observer" approach suggested in *Axa v. Markel, supra,* he stated:

> *In my view, an objective observer of the accident would describe Deborah McIntyre as a passenger of the motorcycle at the time she was struck by the uninsured driver. Her presence at the scene of the accident was entirely explained by the fact that she was a passenger on the motorcycle. She and her husband had stopped by the roadside to avoid the rain. She intended to resume the journey as soon as the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. Finally, she did not engage in any other activity except to wait for the rain to abate.*
>
> (at para. 19)

37. I am clearly bound by the above decisions and the analyses undertaken.

38. Counsel also referred to my decision in *Intact Insurance v. Unica Insurance (2016) Carswell Ont 14915.* In that case, the evidence disclosed that the claimant drove his vehicle to the side of the highway in order to help a friend whose vehicle had become disabled. He was working as a mechanic at the time, and the evidence suggested that his assistance was sought in that capacity. After arriving at the scene, he called a tow truck driver that he knew for assistance. Several minutes later, while he and the tow truck

driver were discussing how best to position the disabled vehicle to be towed, a van insured by Unica struck the tow truck. That impact pushed the tow truck forward toward the claimant, and caused his injuries.

39. I determined that the claimant in that case ceased to be the driver of his vehicle once he approached his friend's disabled car, and began to take steps to plan how to extricate that vehicle from its awkward place on the shoulder of the highway. Finding that he was engaged in a series of activities that were completely unrelated to his vehicle over the course of several minutes, I determined that his status shifted from that of a "driver" of his vehicle, to that of a mechanic and supportive friend. I also determined that in that sense, the underlying facts differed from those that the Court of Appeal faced both in *Axa v. Markel, supra,* and *McIntyre v. Scott, supra,* and merited a different conclusion.

40. I now turn to the parties' submissions on the "occupancy issue" in this case.

41. While the Claimant has no recollection of his actions in the hours leading up to the accident, there are three different versions of where he was on the roadway before being struck by the Xin vehicle. Mr. Nicholls testified that he saw him walking from the front of his truck to the rear of the vehicle, the police report states that he was crossing Orlando Drive from the north side of the street where his truck was parked to the south side, and Mr. Xin stated that Mr. Petrunak was crossing from the south side of the street in front of Jane's Fine Foods to the north side when he appeared in front of his vehicle.

42. The pictures showing the damage sustained by the car driven by Mr. Xin suggest that the Claimant was crossing the street from the Jane's side back to the north side of the street where his truck was parked. However, I need not delve into a detailed analysis of all of the evidence on this point, despite the fact that much time was spent on this issue at the hearing. The case law is clear that some degree of physical connection or proximity to the vehicle is required in order to ground a finding that a claimant remained the "driver" of that vehicle. I find that any of the above versions place Mr. Petrunak in sufficiently

close proximity to the truck to satisfy the requirement that he maintained a physical connection to the vehicle.

43. The question then becomes whether on the facts established, the Claimant maintained the status of a "driver" at the time of the accident. I find that an objective observer would consider Mr. Petrunak to be the driver of the truck at the time. Counsel for Northbridge noted that the records from the truck's satellite messaging system establish that Mr. Petrunak arrived at Jane's prior to 6 am and last communicated with the dispatcher almost one hour prior to the accident. He contended that it was not clear what he was doing for the hour before he was struck, and that he had clearly left the truck parked on the street. He urged me to find that Mr. Petrunak was more accurately described as a pedestrian at the point at which he was hit by Mr. Xin's vehicle.

44. I cannot agree with this contention. While it is not clear exactly what Mr. Petrunak did for the hour preceding the accident, it is reasonable to assume that he remained in the general vicinity of the truck. The headlights were illuminated at the time of the accident, and all of the witnesses save for Mr. Xin testified that he was wearing his reflective safety vest at the point that he was struck. More importantly, there is nothing to suggest that he gave up control of the vehicle. The truck's load had not yet been delivered and the evidence suggested that Mr. Petrunak was scheduled to do so at 8 am. Given that the truck was parked on the street, he would have had to drive to the unloading area at Jane's, park in the appropriate spot, and ensure that the chickens were properly unloaded. I find that Mr. Petrunak was in the midst of the delivery at the time that he was struck, and that an objective observer would conclude that he retained the status of "driver" of the vehicle at that time.

45. Counsel for Northbridge contended that Mr. Petrunak's delivery tasks were distinct from those that he performed as a driver of the truck. He suggested that if he had been crossing the street from the Jane's office to go back to the truck after submitting the required paperwork to the office, that should not be seen as a task related to his role as "driver". Again, I must disagree. A truck driver's delivery duties are an integral part of

the job, and given the Court of Appeal's analysis in *Axa v. Markel, supra,* the suggestion that a truck driver changes his status when he delivers paperwork related to the delivery cannot be sustained. The facts in this case are very similar to those in Axa v. Markel, and the same result is warranted. In my view the circumstances in this case are distinct from those presented in the *Intact v. Unica, supra,* decision cited above, as the claimant in that case drove to the place on the side of the highway where the car was stuck as a helpful friend, rather than in a professional capacity, which involves additional expectations and duties.

46. I therefore find that the Claimant was an "occupant" of the Northbridge insured vehicle at the time of the accident, and that section 268(5.2) of the Act applies. That provision operates as a "tie breaker" in the event that a claimant qualifies as an "insured" under more than one policy, as is the case here. It requires the person to claim benefits from the insurer of the vehicle in which he or she was an occupant, yielding the result that Northbridge should be handling Mr. Petrunak's claim.

47. The matter, however, does not end there. Northbridge claims that it did not receive proper notice of Co-operators' intention to dispute its obligation to pay benefits to Mr. Petrunak, and that Co-operators cannot therefore succeed in shifting priority to Northbridge. I will address this issue below.

LACK OF SECTION 3 NOTICE TO NORTHBRIDGE:

48. The parties agree that Co-operators did not provide notice under section 3 of *Regulation 283/95* to Northbridge. Notice was provided to Intact and Economical, and arbitration was later commenced. Economical was subsequently let out of the proceeding, as set out above. Importantly, Intact provided written notice to Northbridge under section 10 of the regulation on October 2, 2015. Co-operators then initiated arbitration against Northbridge a few days later.

49. Counsel for Northbridge claims that Co-operators cannot "piggyback" on the section 10 notice provided by Intact. He contends that section 3 of the regulation requires

Co-operators to have provided notice to "every insurer who it claims is required to pay" benefits under section 268 of the *Act,* and that its failure to provide a notice to Northbridge is fatal. Counsel argued that to allow Co-operators to rely on the notice provided by Intact allows them to do indirectly what they are not permitted to do directly, and that this could not have been the intention of the drafters of the regulation.

50. Mr. Bailey argues that while section 10 of the regulation permits a second tier insurer that receives a notice of dispute from a first insurer to "tag" another insurer that it claims is in higher priority to it, its presence should not operate to the benefit of the first insurer. He contended that a first insurer should only be able to pursue an insurer put on notice under section 10 by a second tier insurer in circumstances where the second tier insurer is on a higher priority "rung" than the first insurer. He noted that Intact was on the same priority "rung" as Co-operators, and that Ms. Darke ought to have identified Northbridge as the insurer of the truck that Mr. Petrunak drove, rather than Economical. He submitted that her failure to do so within ninety days of receiving the OCF1 form should result in a finding that Co-operators cannot pursue Northbridge for priority.

51. Counsel for Northbridge also contended that a second tier insurer should not be able to use its right to provide notice under section 10 to another insurer to effectively "save" a first insurer who missed the ninety-day deadline to provide notice under section 3. He noted that section 10(1) provides a second tier insurer the right to "dispute its obligation to pay benefits" if it feels that other insurers "have equal or higher priority under section 268 of the Act". Counsel argues that this language makes it clear that it is designed solely to operate for the benefit of the second tier insurer.

52. Counsel for Co-operators contends that his client complied with the requirements in section 3 and section 7 of the regulation. He noted that Ms. Darke conducted an Autoplus search in a timely manner, and provided notice to the insurers that were identified as having Mr. Petrunak listed or named on their policies well before the ninety day deadline imposed by section 3. Despite having received its notice on June 1, Economical did not advise Ms. Darke until the end of September that it did not insure the

truck that Mr. Petrunak was driving. Counsel argued that Ms. Darke acted reasonably, and that she complied with the language in section 3(1) by providing notice to the insurers that she felt may be in priority to pay benefits.

53. Mr. Strigberger noted that the language in section 3(1) merely requires an insurer in Co-operators' position to give notice to every insurer "who it claims is required to pay" benefits under section 268. There is no explicit requirement to give notice to the highest ranking insurer, or to every insurer potentially in higher priority. There is also no explicit requirement that a section 3 notice only be provided to an insurer on a higher "rung", as claimed by counsel for Northbridge. Mr. Strigberger argued that if this were the case, section 10 would be redundant.

54. Counsel for Co-operators noted that section 10(1) of the regulation allows a second tier insurer to provide notice to other insurers whom it perceives to be in higher priority, and that section 10(2) provides that the regulation applies to these insurers in the same way as if they received a notice under section 3. He argued that this acknowledges that the determination of priority may play out in a few different steps.

55. Mr. Strigberger added that Intact was not merely saving his client by providing the notice that they did to Northbridge. He suggested that Intact would likely have wanted to ensure that Northbridge was included in the arbitration in the event that an Arbitrator might ultimately find that the application for benefits submitted to Co-operators did not constitute a valid election under section 268(5.1) of the *Act.*

56. I have been asked to consider the extent of the requirement on a first insurer to provide notice under section 3 in an earlier case. In *Co-operators General Insurance Company v. Ontario (*2013) CarswellOnt 16186, affirmed 2014 ONSC 515, Co-operators sent a section 3 notice to the Motor Vehicle Accident Claims Fund, claiming that its policy was not in force at the time of the accident. It was subsequently determined that a TTC vehicle was involved in the accident and that the TTC could be the priority insurer. Co-operators did not provide notice to the TTC, and the Fund did not forward notice to

them under section 10. Counsel for the Fund argued that Co-operators should have provided notice to the TTC, and that it should not be permitted to pursue the Fund in these circumstances.

57. I made the following comments in that case:

> *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.*
>
> (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.*

The Fund appealed my findings, and the decision was upheld by Justice Pollack.

58. I find that the same reasoning applies in this case. I appreciate counsel for Northbridge's contention that it seems unfair to allow Intact to essentially "save" Co-operators by indirectly doing what Co-operators had failed to do directly. However, when the priority scheme set out in the regulation is considered as a whole, I find that this is permitted. A priority investigation is often like chasing a moving target. As Ms. Darke's evidence revealed, inquiries directed at potential priority insurers can be frustrated, and information is revealed slowly and in a piecemeal fashion. That reality must be balanced against the public policy concern of ensuring that individuals who are in need of benefits receive them on a timely basis.

59. The regulation addresses this balance by requiring a first insurer to provide notice to insurers who it claims are in higher priority to pay within ninety days of receiving an application for benefits. It then permits those insurers, who have the benefit of more time and a singular focus, to bring in other insurers that they feel are in equal or higher priority. Section 10 clearly spells out that once added, all parties must participate in one arbitration process.

60. I find that if the drafters of *Regulation 283/95* had intended that the first insurer only be permitted to provide notice to an insurer on a higher priority "rung", they would have used clear words to convey that message. In my view, a close reading of section 3

and section 10 do not lead to that conclusion. Instead, these provisions acknowledge the reality that determining priority may take a few steps. Section 3 is designed to "get the party started". Section 10 allows that once the fun begins, others may join in and it does not really matter who arrived with whom, and at what time.

61. I therefore find that Co-operators' failure to provide notice to Northbridge under section 3 of the regulation in these circumstances is not fatal to its claim that Northbridge is in higher priority to pay Mr. Petrunak's claim.

62. Given this finding, I need not address the parties' arguments on whether the savings provisions in section 3(2) of the regulation apply. I also need not delve into the evidence and submissions regarding whether or not a valid "election" was made.

ORDER:

I hereby order as follows:

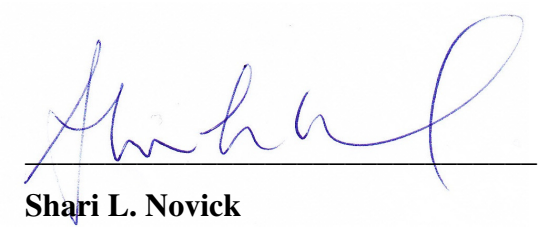
1. Northbridge is the priority insurer and is required to pay Mr. Petrunak's claims, by virtue of section 268(5.2) of the *Act.*

2. Northbridge shall reimburse Co-operators for the benefits it has paid to date, plus applicable interest, subject to any arguments on the reasonableness of the payments made. If Mr. Petrunak's claim remains open, it should take over adjusting the claims.

COSTS:

Given the result, Northbridge is required to pay the legal costs incurred by Co-operators and Intact on a partial indemnity basis. I leave it to the parties to determine the exact amounts owing. If counsel cannot agree on the amounts to be paid, I invite them to contact me and a process will be arranged for this issue to be determined.

DATED at TORONTO, ONTARIO this __17th_DAY OF JANUARY, 2018.



Shari L. Novick

Arbitrator