IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended and REGULATION 283/95 there under;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

AVIVA CANADA INC.

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Rudolph Lobl Q.C., for the Applicant

Kevin D.H. Mitchell for the Respondent

ISSUES:

1. Did Aviva comply with the notice provisions as set out in Section 3 of Ontario Regulation 283/95, and if not, do the saving provisions as set out in Section 3 (2) of the Regulation apply?

2. What are the implications of Wawanesa having received the first completed application for accident benefits from Sunita Dhalla?

DECISION:

1. Aviva did not comply with the notice provisions of Section 3 of Regulation 283/95 however the savings provisions of Section 3 (2) apply and Aviva may proceed with the arbitration.

HEARING:

The hearing in this matter was held in the city of Toronto, in the province of Ontario on November 3, 2008.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident that occurred on January 8, 2003. On that date, Ms. Sunita Dhalla, a pedestrian, was struck and injured by a motor vehicle insured by Wawanesa Mutual Insurance Company ("Wawanesa"). As a result of those injuries, Ms. Dhalla retained a paralegal, Mr. Justin Mariani, who completed and forwarded an application for Accident Benefits (OCF-1) to Wawanesa. Wawanesa received the completed application on April 28, 2003. On May 28, 2003 Wawanesa wrote to Ms. Dhalla's representative and advised that a treatment plan dated January 21, 2003 had been accepted and that treatment could begin. Wawanesa also, on May 12, 2003, sent Ms. Dhalla an OCF-9/59 Explanation of Assessment, requesting additional information in order to adjust her claim. Wawanesa received no response to their inquiry and at some point thereafter "closed" it's file by stamping "closed" on the outside cover.

Subsequent to retaining Mr. Mariani, the injured party retained the law firm of Anand & Jebb to represent her rather than Mr. Mariani. Mr. Gurcharan Anand of Anand and Jebb submitted a completed application for accident benefits (OCF-1) dated June 9, 2003 to Aviva Canada Inc. ("Aviva") received by Aviva on June 13, 2003. The application to Aviva was based on Aviva motor vehicle liability policy # TYQ2257335 with their insured being listed in the Application

for Accident Benefits as Sardar Singh. For reasons which I will go into later, Aviva took him to be the husband of Sunita Dhalla. If she was in fact the wife of Aviva's insured, this would make Aviva higher in priority than Wawanesa, and therefore responsible to pay accident benefits.

Aviva was unaware of the first application having been sent to Wawanesa and began paying benefits to Ms. Dhalla. It was not until Aviva received a letter from Ms. Dhalla's solicitors dated August 9, 2004 advising them Ms. Dhalla and "Mr. Sardar Singh Dhalla" were divorced at the time of the accident, that Aviva realized that they might not be the proper company to be paying benefits. On or about August 17, 2004, Aviva alleged that it wrote Wawanesa and put it on notice that it was looking to Wawanesa to pay the accident benefits as being higher in priority than Aviva. Wawanesa takes the position that it did not receive this notice but does concede that it received a later notice on or about December 10, 2004.

Wawanesa has declined to pay the accident benefits and accordingly this matter has proceeded to arbitration where the issues to be addressed can be stated as follows:

1. What are the implications of Wawanesa receiving the first completed application for accident benefits, if any?

2. Was Aviva's notice of intention to dispute served later than 90 days after receiving the completed application and if so do the "saving provisions" of Section 3 (2) of Regulation 283/95 apply?

I will deal with the issue of receiving the first application first.

<u>What are the implications of Wawanesa receiving the first completed application for Accident Benefits?</u>

Wawanesa concedes that it received the first application for accident benefits and made a payment for a submitted treatment plan. It submits, however, that it subsequently sent out an OCF 9/59 to the injured party requesting further information, which was never returned. Having

heard nothing further from the injured party, Wawanesa subsequently "closed" its file. It is unclear on what date Wawanesa did this, as it simply involved stamping "closed" on the outside of the file, and nothing more.

Aviva takes the position that Wawanesa received the first completed application for accident benefits and commenced paying the benefits and did not question its priority position. Accordingly, in Aviva's view, Wawanesa should not be allowed to take the position that Aviva is precluded from disputing priority because Aviva failed to comply with the 90 day notice provisions set out in Section 3 (1) of Regulation 283/95. Aviva's argument is really twofold. Firstly, that Wawanesa received the first application did not challenge priority and therefore should continue to pay. This argument is based on Section 2 of Regulation 283/95, which states:

> 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.

The Insurance Act and Regulation 283/95 do not speak to a situation where more than one application is sent to different insurers, and payments are made by both, who are each potentially unaware that the other is paying separate benefits. Clearly it is not desirable that there be multiple applications to different companies. This could lead to confusion and make the system unmanageable and lead to delays in payments to injured parties.

Counsel were unable to direct my attention to any cases directly on this point. It is perhaps trite to say that each case must be decided on its own particular set of facts, but that is particularly so in this case. Here we have what appears to have been a fairly innocent set of facts where a paralegal sent out an application for accident benefits to the company that it thought was in priority. They paid for a treatment plan. Wawanesa then asked for further information, received no response, and assumed that no further claim was being made and accordingly closed their file. The injured party then hired a new lawyer who understood that Ms. Dhalla was married to Mr. Singh and sent a completed application to Aviva based on the policy of Ms. Dhalla's assumed husband, Mr. Singh, who was Aviva's insured.

At the hearing, counsel for Aviva brought to my attention that a tort adjuster for Wawanesa, Mr. Trevor Cleveland, on October 24, 2003, wrote to Aviva's accident benefit adjuster on this file, Mr. Ng, requesting a copy of Aviva's accident benefit file for the purpose of their ongoing tort investigation. I note that Mr. Cleveland's letter says that it was Wawanesa's second request for this information and accordingly there was obviously previous contact with Aviva by Wawanesa. It was the evidence of Ms. Cathy Stevens, the accident benefit adjuster handling the file for Aviva, whose evidence I accept, that she called Wawanesa to find out who to send the information to. At that time she was not advised that Wawanesa had also received a completed application for accident benefits and had actually paid benefits. Ms. Stevens, on November 14, 2003, sent Wawanesa the requested information.

Counsel for Aviva, at the hearing, pointed out that at the time of the communication between Ms. Stevens and the Wawanesa tort adjuster, in October/November of 2003, Wawanesa was aware that both they and Aviva had opened accident benefit files and Wawanesa should have told Aviva this. In support of this proposition Aviva's counsel points to Wawanesa's Computer Activity Log notes, that certainly, by May of 2003, indicate that there had been an accident benefits file opened by Wawanesa and indeed payments made. It is undisputed that these log reports were available to both tort and accident benefits adjusters at Wawanesa. It is worth noting, however, that not all activities are entered into the log report. Counsel for Aviva submits that Wawanesa, at very least, in the full corporate sense, knew that it had opened an accident benefit file when it contacted Aviva and had an obligation to tell Aviva of this. Aviva's counsel suggested that Wawanesa's actions, by failing to tell Aviva that they had received the first completed application, amounted to a deflection of the file, and as such Wawanesa should be responsible for all accident benefit payments.

If the evidence showed that a Wawanesa adjuster had in fact deliberately deflected the file to Aviva, I would agree with Aviva's position. Clearly if a company knowingly keeps from another company the fact they had received a first completed application for the purpose of avoiding payment of the accident benefits, this would constitute deflection and would not be allowed. The difficulty that I have in this particular case is that I have no evidence that the Wawanesa tort adjuster, when contacting Aviva, was aware of Wawanesa's having received the first completed

application for accident benefits. What appears to have happened is the Wawanesa tort adjuster simply contacted the Aviva adjuster and I am not prepared to conclude on the evidence that he had viewed the activity log and knew of the first completed application to Wawanesa.

The second part of Aviva's argument regarding Wawanesa's receipt of the first completed application is that Wawanesa, having received the first completed application ought not to be allowed to use Section 3 (1) of Regulation 283/95 to defeat Aviva's claim. Section 3 (1) of Regulation 283/95 states:

> 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.

Aviva submits that Wawanesa has failed to comply with its obligation under Section 2 of Regulation 283/95 by failing to pay benefits after receiving the first completed application, and accordingly cannot raise the 90 day notice period as a defence. In support of this proposition it relies on my decision in Liberty Mutual Insurance Company vs. The Commerce Insurance Company, (unreported decision of Arbitrator Jones, released July 6, 2000), upheld on appeal by Mr. Justice Lissaman [2001] O.J.No. 5479. With the greatest of respect, I am of the view that there are significant differences between the two cases and the principle that I set out in that case does not apply to this set of facts. In Liberty vs. Commerce, the respondent, Commerce, not only received the first completed application but, upon repeated occasions, insisted on not paying and telling the injured party to go to Liberty. There actions were deliberate and amounted to deflection and as such I held that they could not rely on the failure by Liberty to serve a notice of dispute within 90 days. What we have in this case is significantly different. Wawanesa received the first application and paid. The did not refuse to pay any further requests by the injured party, but rather the injured party stopped making demands of them. In addition, I have held, as a fact, that Wawanesa's tort adjuster did not deliberately or knowingly fail to disclose that Wawanesa had received a first completed application. If I had decided that Wawanesa did in fact hide this, then they might well be barred from relying on Section 3 (1), however those are not the facts of this case and I reject Aviva's submissions in this regard.

Did Aviva fail to comply with the 90 day notice provisions and if so do the saving provisions of Section 3 (2) of Regulation 283/95 apply?

Aviva received a completed Application for Accident Benefits on or about June 13, 2003. It did not send its notice of intention to dispute to Wawanesa until August 17, 2004, at the earliest. The parties agree that Aviva did not give Wawanesa written notice within 90 days of receiving the completed application for accident benefits and therefore Aviva was not in compliance with Section 3 (1) of Regulation 283/95. It therefore remains to be determined if the "saving provisions" of Section 3 (2) of Regulation 283/95 apply. That section states:

> (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.

As the courts and numerous arbitrators have noted, this is a two part test requiring not only that 90 days was not sufficient time to determine that another insurer may liable but also that the insurer made reasonable investigations during the 90 day period.

I will deal first whether 90 days was a sufficient period of time to make the determination that another insurer may have been liable, but in doing so, deal with facts which may apply to both parts of the test as they are intertwined.

In commencing this investigation it is important to realize that the test is not one of perfection, but one of reasonableness. With the benefit of hindsight, almost any investigation could be completed within 90 days. It is essential to remember when reviewing what was done that the we examine what the reasonable accident benefit adjuster would have done at the time, with the fact situation they were confronted with.

In this particular case, Aviva received the application for accident benefits on June 13, 2003. It was assigned to an accident benefit adjuster by the name of Andy Ng. The application was in the

name of Sunita Dhalla and in the top right hand corner of the application she checked off the box that indicated that she was married. Also on the top right corner she put in the policy number TYQ2257335, which, as it turns out is an Aviva motor vehicle liability policy with Mr. Sardar Singh. On page two of the application Ms. Dhalla indicated that she was covered under her spouse's policy and below that on the form she indicated that the policy holder was Sardar Singh and again gave the Aviva policy number. She also indicated on the application that she had no policy of her own, nor a policy held by someone on whom she was a dependant, and she was not a listed driver.

Ms. Dhalla gave her address on the application, as 7706 Benavon Road, Mississauga, which as it turns out, is the same address as Mr. Singh, Aviva's insured.

On July 3, 2003, Aviva's adjuster, Mr. Ng, sent an "Explanation of Benefits" to the applicant's counsel requesting, among other things, why the application for benefits had been sent to them so long after the accident.

While Mr. Ng received some of the requested material from the applicant's solicitor, he did not receive a response to his inquiry concerning the late application for benefits and accordingly on August 6 and September 3, 2003 he made further requests for that information. In this letter of September 3, 2003, Mr. Ng reminded the applicant's solicitor of the duty of the applicant to provide information pursuant to Section 33 of the Statutory Accident Benefits Schedule. I also note that Mr. Ng had assigned a road adjuster, Thourla Moore, to obtain a signed statement from the applicant, which was to, among other things, "confirm with the claimant whether she carried any policy from somewhere else". Ms. Moores "Productivity Report" was filed as an exhibit at the hearing and reveals that Ms. Moore left eight separate messages with the applicant's solicitor's office between July 4 and July 21, 2003 in an effort to set up a meeting to take a statement. Finally, on September 5, 2003, the applicant's solicitor wrote to Aviva enclosing a statutory declaration, which had been drafted by Ms. Dhalla's counsel. The declaration stated that she resided at 7706 Benavon Road, Mississauga, which is Mr. Singh's address. The declaration also refers to the Aviva's policy in response to who her automobile insurer is.

At some point during the 90 day period after receiving the completed application for benefits Aviva received the motor vehicle accident report completed by the investigating police officer, which indicated that Ms. Dhalla resided at 7706 Benavon Road, Mississauga.

On or about September 13, 2003, the 90 day period from Aviva having received the completed application expired. For the purposes of the chronology, I note that the new Aviva adjuster on the file, Ms. Cathy Stevens, on November 20, 2003 received an explanation from the applicant's lawyer as to why the application was late – they had assumed that the previous paralegal had submitted the accident benefit forms but when they were "retained on June 8, 2003 it was ascertained that Ms. Dhalla had not received any benefit forms".

It was not until a letter dated August 9, 2004 from the applicant's solicitor, received by Aviva on or about August 17, 2004, that Aviva was actually advised that:

> It has recently come to our attention Mr. Sardar Singh Dhalla and Mrs. Sunita Dhalla were divorced at the time of this car accident. Therefore Part 4 of the original application for accident benefits is incorrect. However, Mrs. Dhalla was dependant upon Mr. Dhalla at the time of this car accident. Mrs. Dhalla does not have access to any other auto coverage.
>
> We enclose herein our amended application for accident benefits.

On or about the same day as receiving this information, Ms. Stevens testified that she forwarded a "Notice of Dispute Between Insurers" to Wawanesa and the applicant's solicitor. There is a factual dispute as to whether or not Wawanesa received this and subsequent correspondence from Aviva, which I will deal with later in this decision.

Having summarized the essential facts of this case, it now remains to determine if the two-part test set out in Section 3 (2) of Regulation 283/95 has been satisfied. Turning first to whether 90 days was sufficient time to make the determination that another insurer was liable, previous arbitrators and the courts have held that if an applicant has provided misleading information to the insurer, this may be taken into account when considering if Section 3 (2) is to be invoked (see Primmum Insurance Company vs. Aviva Insurance Company of Canada, [2005] O.J. No. 1477 (S.C.J.).

With the benefit of hindsight, what appears to have happened is that Ms. Dhalla had been divorced from her husband Mr. Singh, and Ms. Dhalla had moved from 7706 Benavon Road to 7662 Benavon Road. There she apparently resided with Mr. Mahotta in a common-law relationship. On the date of the accident, however, she moved back to the 7706 Benavon Road residence. During the 90 notice period, the Aviva adjuster was dealing with a situation where the applicant had indicated on the application for benefits that she was married, she lived at the Aviva insured's residence and claimed under her "spouse's" policy and gave the Aviva policy number. They also received the statutory declaration advising that she lived at 7706 Benavon Road, Mississauga and that her insurer was Aviva, citing Mr. Singh's policy number. Furthermore, the police report confirmed the applicant was living at the Aviva insured's residence. Given all this information it not at all surprising that the Aviva adjuster concluded she was covered under Mr. Singh's policy as the spouse of their insured.

Wawanesa points to a number of "red flags" that they say should have alerted Aviva to the fact that Ms. Dhalla was not married to Mr. Singh at the time the accident and should have realized this within the 90 day period. They note that on August 29, 2003, Aviva received a psychiatric report written by Dr. K.B. Walsh dated August 19, 2003. On page seven of the twelve-page report, Dr. Walsh wrote:

> She [Mrs. Dhalla] said that she was married in 1985 and that she came to Canada in 1996. It would appear that her husband was here while she was in India and that he sponsored her here. She said that he had children by a previous marriage. She stated that while the relationship broke up five or so years ago, that they were still not divorced. She said that he visits her place at times but that she has no involvement with his children. She stated that he does not pay any support for her children. She said that she was in a new relationship for four or five years and that her common-law husband does not have any children.

Wawanesa suggests that this information should have alerted Aviva to the fact that Ms. Dhalla was not longer married to Mr. Singh and that they should have investigated further. With respect, I do not agree. To begin with, the statement in Dr. Walsh's report is somewhat vague and is factually incorrect in some regards. Certainly it does not jump out at one, upon first reading, that Mr. Singh and Ms. Dhalla are no longer married. One must also remember that this report was written to determine Ms. Dhalla's functional abilities, not for determining priority. Simply because a somewhat vague statement is found in a twelve page report which is prepared for a

different purpose does not automatically mean that the insurance adjuster should have followed up on that point. To do so would be very close to demanding perfection rather than simple reasonableness. One must remember that accident benefit adjusters are extremely busy individuals dealing with not only issues of priority but also entitlement, etc. They are subject to numerous very tight timelines imposed by regulation. In the circumstances of this case, I am satisfied that the adjuster acted reasonably and to expect the adjuster to have acted on that statement in light of all the other evidence would be to set too high a standard.

Wawanesa also points to Aviva's failure to obtain a fully signed statement from Ms. Dhalla regarding the priority situation as a reason why Section 3 (2) of Regulation 283/95 should be not invoked. I disagree. At least three letters and eight phone calls were made to the applicant's solicitor requesting the information and a meeting to obtain a signed statement. Eventually they received a statutory declaration, which, while it did not provide all the information that Aviva might have liked, it tended to support the information that Aviva already had. Certainly it did not suggest that there might have been another insurer responsible to pay accident benefits.

In light of the particular facts of this situation outlined above, I am satisfied that 90 days was not sufficient time for a reasonable adjuster to make a determination that another insurer was potentially liable. I am also satisfied that Aviva made reasonable investigations necessary to determine if another insurer was liable within the 90 day period. While each case is to be determined by its own peculiar facts, it strikes me that the Aviva adjuster did what was reasonable in the circumstances. They had information in the application for accident benefits, the police report and the statutory declaration which all suggested that their insured was the spouse of Ms. Dhalla. They sent multiple letters and made numerous phone calls to attempt to confirm the situation. While the benefit of hindsight further investigation could have been made and the true facts might have come out. The same can be said in most cases. Again the test is one of reasonable and not perfection.

Counsel for Wawanesa has submitted that even if there was insufficient time for Aviva to have determined there was another insurer responsible to pay accident benefits within the 90 day period, there were further "red flags" that Aviva should have noticed after the 90 day period and

before Aviva finally put Wawanesa on notice. In essence Wawanesa takes the position that Aviva should therefore not be allowed to precede with the arbitration for failure to follow up on further leads after the 90 days and secondly, when they did come to that determination, they still delayed too long in putting Wawanesa on notice. This essentially raises two issues: (1) what further information did Aviva receive and, (2) when did Aviva put Wawanesa on notice?

In terms of further information received, Wawanesa points to a surveillance report dated May 25, 2004 from King-Reed and Associates to Aviva Canada, received by Aviva on or about June 1, 2004. It would appear that Aviva has arranged some surveillance of the applicant in order to determine her activity level. In the surveillance report the investigator observed Ms. Dhalla putting an item of clothing on a rail at 7706 Benavon Road, Mississauga. The investigator also noted, however, that he had a conducted a Ministry of Transportation search, which listed Ms. Dhalla residence as 7662 Benavon Road, Mississauga, rather than 7706 Benavon Road, Mississauga. The investigator noted, however, that he had observed Ms. Dhalla at 7706 Benavon Road, Mississauga and that perhaps 7662 might have been a previous address or an input error on the Ministry's part.

Wawanesa also notes that Aviva received an "occupational therapy in-house/functional assessment" dated May 26, 2004 and received by Aviva on or about June 3, 2004. In that twenty page report there are a few statements that Wawanesa submits that should have put Aviva on notice that the information that they had was incorrect and Aviva should have followed up on it immediately. I note the assessment took place at 7706 Benavon Road, Mississauga. On page one of the report, it states that:

> Sardar Singh [Aviva's insured] the client's relative and the owner of the house where the client currently resides, was present during the in home assessment.

On page eight of the report, the writer states:

> On the evening of the accident the client and her family reportedly moved from the basement into their current residence. Sardar Singh, the client's relative, owns the residence. At the time of the in home assessment, the client's husband was in India for one month.

Wawanesa takes the position that the cumulative effect of these two reports is that Aviva should have realized Mr. Singh was not Ms. Dhalla's husband and should have immediately investigated the matter further. I do not agree. The investigator's report was at best inconclusive and since Ms. Dhalla was observed at 7706 Benavon Road, Mississauga, there really was no real point in investigating further. The occupational therapist's report is with the benefit of hindsight, more revealing and could be read to suggest that Mr. Singh and Ms. Dhalla were no longer married. One must remember, however, that this information was contained in two paragraphs of a twenty-page report, which was not prepared for priority purposes, but rather to assess the functional abilities of the applicant. It was prepared some sixteen months after the accident. To expect an adjuster to pick up on a few somewhat vague comments in a lengthy report, prepared for totally different reason some months after the accident is far more than can be expected of a reasonable adjuster. If they were expected to be able to review matters in that detail, they would never be able to handle the many complex and demanding issues they are required to do within very short timelines. To do so would be to demand near perfection and that is not the test.

It was the evidence of the Aviva adjuster, Cathy Stevens, that she first became aware that Mr. Singh and Ms. Dhalla were not married at the time of the accident on or about August 17, 2004 when she received a letter dated August 9, 2004 from Ms. Dhalla's lawyer stating:

> It has recently come to our attention Mr. Sardar Singh Dhalla and Mrs. Sunita Dhalla were divorced at the time of this car accident.

Ms. Stevens testified that she immediately sent a letter, dated August 17, 2004 putting Wawanesa on notice that it was disputing priority. She sent a copy of the notice and covering letter to Ms. Dhalla's lawyer.

Ms. Stevens testified that she received no response so she sent a further letter to Wawanesa on November 9, 2004 requesting a response. On November 16, 2004 Ms. Stevens called Wawanesa and left a message for a Ms. Christine Saveski, a Wawanesa adjuster, to call her regarding Wawanesa's position on priority. Finally on December 7, 2004, Ms. Stevens sent copies of her

correspondence by fax to Wawanesa. She also sent a letter dated December 7, 2004 to Wawanesa setting out the payments made and requesting confirmation that Wawanesa would take over the handling of the file.

Wawanesa takes the position that it did not receive any of the letters from Ms. Stevens until December 10, 2004 when it received the December 7, 2004 letter as well as the August and November letters.

Wawanesa takes the position that even if Aviva was not reasonably aware of the matrimonial situation until it received the letter from Ms. Dhalla's lawyer in August 2004, there was an almost four month delay until December 10, 2004 when Wawanesa received notice and accordingly Section 3 (2) ought not to apply and Aviva should not be allowed to proceed with this claim.

I do not accept that Wawanesa did not receive notice until December 10, 2004. Ms. Stevens testified at the hearing in a very open and forthright manner. I have no hesitation in accepting her testimony that she sent the letters and notices. A computer screen printout was filed as an exhibit at the hearing, which shows that Ms. Stevens created a notice of dispute form re: Dhalla on August 16, 2004. Ms. Dhalla's solicitor advised in writing that he received that Ms. Steven's letter of August 17, 2004 concerning the notice of priority dispute although not the notice itself. Also filed at the hearing was a fax confirmation sheet dated December 7, 2004, which shows that she faxed five pages to Wawanesa, the first page of which was a copy of her letter to Wawanesa of November 9, 2004. Wawanesa says that they have no record of receiving this fax, although they agree that the fax confirmation sheet does show it was sent to Wawanesa's fax number.

The fact Wawanesa is unable to explain why they have no record or copy of Ms. Steven's fax of December 7, 2004 leads me to the conclusion that their record retention system was less than perfect on this occasion. I had the opportunity to observe Ms. Stevens on the witness stand and found her to be a totally credible witness. I accept that she sent the letters and notices as she testified and that Wawanesa received notice shortly after August 17, 2004. As such there was no undue delay in giving notice. In light of all the above I am satisfied that Aviva has met the test as set out in Section 3 (2) or Regulation 283/95 and therefore ought to be allowed to proceed with the arbitration.

If the parties are unable to agree with regard to any outstanding issues, I may be spoken to.

Dated at Toronto, this _____ February 2009.

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M. Guy Jones

Arbitrator