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:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE

Applicant

- and -

LOMBARD INSURANCE COMPANY OF CANADA

Respondent

ARBITRATION DECISION

COUNSEL:

John Friendly for the Applicant

Linda M. Kiley for the Respondent

ISSUES:

1. Can the Fund's notice to Lombard of its intention to dispute its obligation to pay benefits to Mr. Berhe beyond the ninety days provided in subsection 3(1) of *Regulation 283/95* be excused by the 'saving provisions' in subsection 3(2) of the Regulation?

2. If so, do I have the jurisdiction to order Lombard to reimburse the Fund for costs it has incurred in investigating this matter?

RESULT:

1. No, the Fund's late notice to Lombard cannot be excused by the provisions in subsection 3(2), and it is therefore precluded from pursuing Lombard for priority.

BACKGROUND:

This matter arises out of an incident that took place in the parking lot at the Galleria Mall on Dufferin Avenue in the City of Toronto, on June 30, 2007. After leaving the Price Chopper grocery store in the mall, Yohannes Berhe got on his bicycle, started riding and collided with a vehicle insured by Lombard Insurance Company of Canada ("Lombard") in the parking lot. While there are differing versions of what took place prior to the collision, it appears that Mr. Berhe was fleeing from a mall security guard at the time.

Mr. Berhe alleges that he sustained injuries as a result of this collision. He forwarded an application for accident benefits to the Motor Vehicle Accident Claims Fund ("the Fund"). The Fund has paid benefits to Mr. Berhe, but claims that Lombard is in higher priority to pay benefits under the priority scheme set out in section 268(2) of the *Insurance Act*.

Lombard does not deny that it is in higher priority to pay benefits to Mr. Berhe. It argues, however, that the Fund is not entitled to pursue it under *Regulation 283/95* as it did not provide notice of its intention to do so within ninety days, as required by section 3 of the Regulation.

The parties disagree both about when the ninety day period should begin, as well as whether the "saving provisions" found in subsection 3(2) of the regulation apply in these circumstances.

HEARING:

The arbitration hearing was held on May 7 and 8, 2009, in Toronto, Ontario pursuant to the provisions of *Regulation 283/95* of the *Insurance Act* and the *Arbitration Act,* S.O. 1991.

RELEVANT PROVISIONS:

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;*
>
> *b. the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.*

THE EVIDENCE:

As expected in this type of case, the evidence focused on the various steps taken by the adjusters retained by the Fund to determine priority at different points in time. The key dates are not in dispute: the Fund acknowledged receipt of Mr. Berhe's Application for Accident Benefits form (OCF 1) on October 26, 2007, and put Lombard on notice of its

intention to dispute its obligation to pay his claim on June 5, 2008. No police report was submitted with the application, as is required by Part 11 of the OCF 1 for applications made to the Fund.

The Fund retained CGI Adjusters Inc. ("CGI") to adjust Mr. Berhe's claim. Counsel for the Fund filed several documents outlining the efforts made by the various individuals from CGI who were involved with the claim, including detailed computer "log notes" evidencing the steps taken to investigate priority and adjust Mr. Berhe's claim. The Fund called two witnesses to provide *viva voce* evidence at the hearing – John Scott, a field adjuster with CGI (now called Claims Pro Inc.) who was assigned to Mr. Berhe's claim in February 2008, and Devyn Pawley, a claims administrator with the Fund who was also involved with this claim.

I was advised that Komal Shellikeri, the initial CGI field adjuster who handled Mr. Berhe's claim from late October 2007 to early February 2008, was unable to testify as she was out of the country at the time of the hearing due to a family emergency. Counsel for the Fund relied on the computer log notes for that period, as well as the various letters sent by Ms. Shellikeri to outline the steps she took over the few months following the receipt of Mr. Berhe's application by the Fund.

While the log notes filed indicate that Mr. Berhe contacted several people at both CGI and the Fund to complain about the manner in which his claim was being handled, there were three main "players" involved in the priority investigation. I will set out the relevant evidence relating to each of their efforts in turn.

First CGI adjuster

Mr. Berhe's application was forwarded to the Fund by Humberto Geovo, a law clerk at Injury Claims Specialists ("ICS"). Ms. Shellikeri was assigned to adjust the claim, and on October 29, 2007, she sent out three letters acknowledging receipt of the application. The first was addressed to Mr. Berhe advising that the Fund would require a signed statement, various authorisations to release information, and a police report to assist in determining

his entitlement to benefits under the *SABS.* A second letter to Mr. Berhe confirmed that an application to the Fund is incomplete without a police report and advised that his eligibility for benefits could not be determined unless a complete police report was provided. The third one was sent to his representative, Mr. Geovo, and repeated that Mr. Berhe's claim could not be assessed without the required police report. Ms. Shellikeri also inquired about the claimant's availability to provide a signed statement "to confirm the details of the loss".

Aside from requesting that Mr. Berhe and his representative provide the police report, the log notes indicate that Ms. Shellikeri also asked her assistant to request it on November 1. That request was returned a few weeks later advising that the officer's name, badge number and plate number would be required before the request could be fulfilled.

Mr. Geovo responded to Ms. Shellikeri's earlier letter on November 13, 2007 acknowledging her request for a police report. He advised that ICS had already requested it, and would forward a copy upon receipt of the report.

Ms. Shellikeri also made a few attempts to schedule a meeting with Mr. Berhe in order to obtain a signed statement. The computer log notes for the period indicate that she called ICS to determine Mr. Berhe's availability to do this on November 19 and 23. When no response was received, she asked her assistant to do so on December 11. The assistant's note indicates that she called Mr. Geovo's office on that date, but the outgoing voice mail message advised that the office was closed for the day.

Ms. Shellikeri's involvement in the matter seems to end on January 2, 2008. I note that by that date, more than two months after Mr. Berhe's application was submitted to the Fund, no information beyond that contained on the OCF 1 form itself had been provided to the Fund.

A copy of Mr. Berhe's application for benefits was filed into evidence. The form indicates that the location of the accident was "E/B on Dufferin Street and Dupont". The

description provided of the accident is - "I was a cyclist travelling E/B on Dufferin Street, suddenly I was struck by a vehicle". It indicates that the accident was reported to the police on June 30, 2007, the date it occurred, and that the officer's name, badge number and police department involved was "to follow". At Part 11 of the form, the part specified to be completed for applications made to the Fund, Mr. Berhe indicates that the MVA (Police) Report had been requested. The application is signed by Mr. Berhe, and is dated either October 7 or 17, 2007.

Other evidence filed at the hearing reveals that all of this information is incorrect. A police "Incident Report" that was ultimately forwarded to Mr. Scott, as well as Mr. Berhe's own statement that was subsequently obtained by Mr. Scott, indicate that the collision between Mr. Berhe's bicycle and the stationary vehicle took place in the parking lot of the Galleria Mall, and not while Mr. Berhe was travelling eastbound on Dufferin Street, as indicated in the application. The Incident Report also reveals that the accident was not reported to the police on June 30, as indicated in the application, but rather that Mr. Berhe attended the Police 14th Division office on July 10, 2007 to report that he had been involved in a collision at the Galleria Mall while driving his bicycle on June 30. He apparently advised the officer that he required a report from the police in order to "process his claim for treatment" from a physiotherapist.

The report also refers to an earlier police investigation of the incident of June 30th. It states that Mr. Berhe was fleeing from mall security at the time that he collided with the car, as he had been involved in a theft at the Price Chopper grocery store. Mall security apprehended him at the scene of the collision and turned him over to the police, who subsequently released him without any charges being laid. The Incident Report also notes – "given the reportee's past history of involvement with the police, including being charged with public mischief, the reporting officer submits this incident report". Finally, the report indicates that no further action would be taken by the police.

It is clear from the Incident Report that by the time Mr. Berhe completed the Application for Accident Benefits form on either October 7 or 17, he clearly knew that despite his

request that a MVA police report be issued to assist him in claiming accident benefits, the police had decided not to do so. Despite this fact, he indicated on his application that the officer's name and badge number was "to follow", and that the MVA Report had been requested. Mr. Berhe continued with this misleading behaviour by not advising Ms. Shellikeri, despite her numerous letters advising that the application would not be considered complete and treatment plans would not be considered until a police report was received, that the police had decided not to issue a MVA report.

Second CGI adjuster

As set out earlier, the Incident Report was provided to Mr. Scott by Mr. Berhe on February 11, 2008, when Mr. Scott took over adjusting Mr. Berhe's claim from Ms. Shellikeri. A cover letter addressed to Mr. Berhe from the Toronto Police Service was also forwarded with the report. This letter is dated September 20, 2007, and refers to a complaint having been made by Mr. Berhe about the conduct of a police officer. The letter advises that the Complaints Administration Branch had determined that no action would be taken with regards to the complaint.

Mr. Scott testified that Mr. Behe called him on February 11th to ensure that he had received the report. He was able to persuade Mr. Berhe to meet with him on the following day, to take a signed statement. It appears that Mr. Berhe was no longer represented by ICS at that point in time.

Mr. Scott testified that he met with Mr. Berhe on February 12, and was able to obtain a partial statement from him. He explained that in the midst of Mr. Berhe recounting what had occurred, he insisted that Mr. Scott accompany him to the Galleria Mall so that he could show him where the incident had taken place. While at the mall, Mr. Scott spoke with a security guard, who confirmed that a record had been made of the June 30th incident. He advised, however, that he was unable to provide it to him, and that it would have to be obtained from the mall's property manager.

Mr. Scott subsequently wrote to the property manager on February 18 and March 4, 2008 requesting copies of any notes or investigations conducted by the mall relating to the incident. When he did not receive a response, he followed up with a phone call. The manager advised Mr. Scott that she would pass his request on to their lawyer for review. He testified that he was subsequently advised on March 31 that his request had been denied, and that the mall would not be forwarding him any information. Mr. Scott testified that he requested the Fund to appoint counsel on April 2, so that a formal request for the mall records could be made.

In the interim, armed with the police officer's name and badge number indicated on the Incident Report, Mr. Scott requested further information from the police. On March 31 he received a response indicating that his request could not be fulfilled, and that he should contact "Access & Privacy" for further information. Mr. Scott followed up with a letter to the police on April 4, as instructed. He testified that on October 10, 2008, well after the Fund had provided it notice to Lombard, he received a copy of the same Incident Report that Mr. Berhe had provided to him in early February.

Mr. Scott also interviewed the owner of the Price Chopper grocery store on April 21. He testified that the manager recalled the incident involving Mr. Berhe, and that his version of what had transpired in the store prior to the collision occurring in the parking lot differed significantly from what Mr. Berhe had told him when he took his statement. I will not delve into the details of these competing versions of events, as they have no bearing on the issues in dispute in this arbitration.

Fund lawyer

The evidence indicates that as a result of Mr. Scott's request that a lawyer be appointed to obtain the mall's records, Ms. Pawley, the claims administrator at the Fund, assigned counsel to the file on April 8. The log notes filed indicate that Mr. Scott continued to adjust Mr. Berhe's claim, but that he did nothing further to investigate priority other than the steps outlined above. The document brief filed by the Fund contains a letter sent by

counsel for the Fund addressed to the manager of the grocery store, the mall property manager and the security supervisor of the mall on May 29, 2008. It requested all concerned to review any reports or information in their possession regarding the June 30th incident, and to advise whether they had either the licence plate number or any insurance information for the vehicle involved in the collision with Mr. Berhe.

A law clerk at the Fund's legal branch was contacted by the head of security at the mall on June 3, and was provided with the license plate number of the vehicle. This information was then used to run the usual searches, and the vehicle was identified as having been insured by Lombard on the date in question.

As stated above, formal notice was provided by the Fund to Lombard on June 4, 2008, and was received in Lombard's offices on June 5.

ARGUMENTS & ANALYSIS:

(i) When does the ninety-day period in section 3(1) of the Regulation begin in this case?

Before determining whether the ninety-day period should be extended, I must determine when that period is deemed to have begun. Section 3 of the regulation provides that an insurer has 90 days from the receipt of a completed application for benefits to give notice of its intention to dispute its obligation to pay a claim. Counsel for the Fund referred to Part 11 of the Application for Accident Benefits form, and noted that it provides that an application to the Fund is not complete until three additional documents are provided – a Notice of Collection of Personal Information Form completed and signed by the claimant, a document called Form 3, and a MVA Police report. He contended that in view of these requirements, the Fund cannot be said to have received a "completed application for benefits" as set out in section 3(1) until each of these documents are provided.

Mr. Friendly submitted that this amendment to the OCF 1 form was passed in October 2003, and was triggered by the recognition that the Fund was disadvantaged in its

attempts to investigate priority under the regulation. He contended that unlike insurance companies who decide to investigate priority, the Fund begins the process without any information about the claimant and with no connection to any of the parties involved. He submitted that the inclusion of Part 11 on the OCF 1 was an attempt by the regulators to "level the playing field" with respect to the investigation of priority disputes, as the information contained in a police report is often the only information that the Fund has to go on.

Mr. Friendly argued that in light of the above, the ninety-day period should not be found to have begun on October 26, 2007, the date that the Fund acknowledged receipt of Mr. Berhe's application. He suggested that it was open to me to find that the ninety-day period never actually started in this case, as a police MVA report was never received. He also submitted that it was possible that it started when Mr. Scott finally received a response to his request for further information from the police on October 10, 2008, when the Incident Report that he had previously received from Mr. Berhe was provided. Finally, Mr. Friendly also allowed that the ninety-day period could be considered to have started when the Incident Report was faxed to Mr. Scott on February 11, 2008.

Lombard took the position that the 'ninety-day clock' should start on October 23, 2007, the date the OCF 1 form was received by the Fund. Counsel for Lombard submitted that arbitral case law supports a broad interpretation of the phrase "completed application for benefits", and contended that the Fund had enough information by the time it received Mr. Berhe's application to properly assess the claim.

In my view, the requirements of the OCF 1 form are clear – when a claimant submits an application for benefits to the Fund, he or she must provide the two extra forms listed in Part 11, as well as the police MVA report. If the police report is not submitted with the OCF 1, I find that the Fund is correct in maintaining that they have not received a completed application for benefits. I appreciate that there will be circumstances in which a police report may not be easily obtained, and it would be unfair to penalise a claimant by not requiring the Fund to pay benefits to them pending its receipt of the report. That is

not the issue before me in this case, however, and I will not comment on the Fund's obligation in that context.

My sole focus here is on the requirement imposed by section 3(1) of Regulation 283/95 on an insurer to provide notice to another insurer who it claims is in higher priority to pay a claim, within ninety days of receiving a completed application for benefits. It is now settled law that the Fund is "an insurer" for the purpose of the regulation, but in view of the requirements set out in Part 11 of the OCF 1 form, the date on which it receives a completed application for benefits within the meaning of section 3 may well be different than the date that an insurance company would be considered to have.

I accept Mr. Friendly's submissions regarding the reasons underlying this distinction. An insurance company that receives an application for accident benefits will generally have some connection to a person involved in the accident that gives rise to the claim for benefits. The claimant may be their own insured, a spouse or dependent of their insured, or a passenger in a vehicle they insure. They may be a cyclist or a pedestrian who was struck by a vehicle that they insure. Or, they could also be someone who another insurer alleges has the "regular use" of a company vehicle under section 66 of the *SABS* that they insure. In most of these scenarios, an insurance company can call upon its connection with the party involved in the accident to confirm that the accident took place, and to provide information that would be useful for a priority investigation.

The Fund does not have that benefit, or access to that information. It can only rely upon the details of the accident provided by the claimant. The only evidence available to corroborate basic information such as whether another vehicle was involved, and if so, who insures that vehicle, is the police report.

Accordingly, I find that the receipt of Mr. Berhe's application by the Fund on October 26, 2007, which did not attach a police report, did not constitute a "completed application for benefits". As such, the ninety-day clock cannot be said to have started on that date. I note that Arbitrator Robinson reached the same conclusion, in the case of *Her Majesty the*

Queen (the Fund) vs. Unifund Assurance and TD General Insurance (unreported decision, dated April 10, 2008). In that case the Fund received the claimant's application on one date, the Form 3 and Notice of Collection of Personal Information was provided a couple of weeks later, and the police report two weeks after that. It was this latter date on which the police report was received that the arbitrator determined was the time at which the ninety days provided for in section 3 of the regulation should start to run.

When, then, should the ninety-day period begin to run in this case?

The facts here are unusual, in the sense that the police actually never issued a motor vehicle accident report as a result of Mr. Berhe's collision with the vehicle insured by Lombard. It appears from the Incident Report created by the police in July after Mr. Berhe's visit to the station, and from the mall security notes eventually produced to Mr. Scott, that the police officer summoned to the scene by mall security focused on the criminal aspect of the incident and did not consider there to have been an incident requiring the issuance of a standard MVA police report. When Mr. Berhe subsequently realised that he would be required to produce such a report in order to have his physiotherapy treatment funded, he attended at the police station to request one. It is not clear what transpired during that visit, but from the evidence filed, it appears that a decision was made by the police office addressing his request to take no further action, and no MVA report was issued on that occasion either.

While the Incident Report generated from that visit contains some useful information about what transpired on June 30th, it is clearly not a Motor Vehicle Accident (Police) Report as contemplated in Part 11 of the OCF 1 form. Notably, it does not contain any information about the car that Mr. Berhe collided with. It would have been clear to Mr. Scott, however, and therefore to the Fund, that as of February 11, 2008 when this report was forwarded by Mr. Berhe that there would be no MVA police report forthcoming. I find that the application was deemed to be "completed" at this point in time, and that the ninety-day period should therefore begin on February 11, 2008.

Given the above, the ninety-day period would have ended on May 11, 2008. Notice was not provided by the Fund to Lombard until June 5, however, some three and a half weeks after that date. In accordance with section 3 of the regulation, the Fund is precluded from pursuing Lombard unless they can prove that the saving provisions in section 3(2) should be invoked.

(ii) Can the Fund rely on the saving provisions in section 3(2) of the Regulation?

The party seeking to rely on this provision must prove that both parts of it apply – namely that ninety days was not a sufficient period of time to make a determination that another insurer is liable under section 268 of the Act, and that it made reasonable investigations within that period to attempt to make that determination. It is a difficult test to meet, and the courts have sent a clear message that section 3(2) should be strictly construed.

However, the particular facts of each case must be determined, and considered against the standard set out in the provision. In his review of the case law on this issue in the appeal decision in *Liberty Mutual Insurance vs. Zurich Insurance* (2007) 88 O.R. (3d) 629, Justice Perell concluded that while an insurer is required to make reasonable investigations, their efforts should not be held to a standard of perfection (at para. 17).

Counsel for the Fund submitted that ninety days was not a sufficient time within which to make a determination on priority in this case, and that the Fund therefore meets the first branch of the test set out in section 3(2)(a) has been satisfied. He cited the many misrepresentations made on Mr. Berhe's application for benefits, including the incorrect location of the accident (public street versus privately owned mall parking lot), the fact that the police report had been requested and that the relevant police information was "to follow" (although he was already in possession of a report and letter from the police advising that no MVA report would be issued), and his description of the incident suggesting that he was an innocent victim (as opposed to the police and mall security version of events, which was that Mr. Berhe had just committed a criminal act).

Mr. Friendly also cited Justice Ducharme's comments in the case of *Primmum Insurance vs. Aviva Canada* [2005] O.J. No. 1477 relating to the application of section 3(2)(a), in a case where a claimant misrepresents material facts to an insurer. Justice Ducharme states that in circumstances where a claimant has intentionally misled an insurer, the 90 day period "might be insufficient in the circumstances", and finds that "inaccurate reporting of material facts by an insured may adversely impact the ability of an insurer to gather the requisite facts needed to assess the liability of the various potentially involved insurance policies rendering the 90 day period insufficient." (at para. 24)

Mr. Friendly outlined the many efforts made to obtain a signed statement from Mr. Berhe, as well as his general lack of co-operation, manipulative behaviour and difficult manner, all of which are evident from a review of the log notes filed. He submitted that the only information available to the Fund to start a priority investigation is the objective details they receive from a claimant in a signed statement, and the description of the vehicle involved and its insurer that is usually provided by a police report. He contended that when neither of these resources are available, as was the case here, it is extremely difficult to proceed very far, if at all, along a priority investigation.

Counsel for Lombard submitted that ninety days was certainly a sufficient period within which to make a determination on priority in this case. She cited the comments of both Justice Nordheimer in the initial appeal decision in the *Kingsway General vs. West Wawanosh* case [(2001) 53 O.R. (3d) 436] that it would not be unfair to insist on strict compliance with the notice requirements in the regulation, as well as the Court of Appeal's oft-cited statement that the regulatory setting "leaves little room for creative interpretations or carving out judicial exceptions ..to deal with the equities of particular cases" [58 O.R. (3d) 251]. She contended that the rationale behind the ninety-day time limit must be kept in mind, namely that it is important to have the insurer who will ultimately be adjusting the claim and paying the benefits involved at an early stage, so that they can conduct the investigations they deem necessary and process the claim in their usual manner.

Ms. Kiley submitted that Ms. Shellikeri was not as persistent as she should have been in her initial efforts to obtain a statement from Mr. Berhe, and that Mr. Scott did not follow up with the police after receiving the incident report on February 11, by calling to inquire about the licence plate number of the car involved in the incident.

Given my determination above that the ninety-day period in this case began on February 11, 2008, I will not address Ms. Shellikeri's efforts on this file, which all took place prior to that date. It is therefore Mr. Scott's actions on the file, as well as those of counsel for the Fund who was assigned to obtain the mall records that must be considered.

As discussed above, Mr. Scott was aware by February 11, 2008 that he would not be able to obtain a "standard" police MVA report, as the Incident Report clearly stated that no further action would be taken. Yet, he also knew that a motor vehicle had been involved in the collision, and that if that vehicle was insured at the time, that insurer would be in higher priority then the Fund to pay Mr. Berhe's claim.

Mr. Scott had two potential leads to determine the plate number of the vehicle (and hence whether insurance was in place at the time of the accident) – the security personnel at the Galleria mall, and the police. In the ensuing days, he pursued both of these leads diligently. He went to the location of the incident and spoke to the mall security guard, and was advised that they had kept a record of the incident. When he was told that it could not be provided to him by security, he wrote to the property manager of the mall a few times to request any notes or reports made. He telephoned her to follow upon the letters sent when he did not receive a reply. He subsequently interviewed the owner of the Price Chopper grocery store who had witnessed the incident. He also submitted a request for more information from the police, and followed up with them in writing when advised several weeks after his request was submitted and refused that he needed to contact "Access and Privacy".

When he was subsequently advised by the mall's security manager that they were not prepared to provide any information, he requested that the Fund appoint counsel so that a

formal demand for their records could be made. This request was accepted, and counsel was appointed shortly afterwards.

As stated above, the ninety-day period would have expired on May 11, 2008. At that point in time, Mr. Scott had not yet received a response from the police to his request for more information. He was also waiting for counsel for the Fund to take the necessary steps to obtain the mall records. I cannot find fault with Mr. Scott's efforts in this ninety-day period. He made diligent efforts to pursue the required information, and had reached the point where he could only wait to see whether his efforts would bear any fruit.

On the other hand, I was not provided with any real explanation for why counsel for the Fund, who was assigned to the file on April 8 by Ms. Pawley, did not send the letter requesting information from the mall until May 29. The gap between being assigned the file to sending the letter is over seven weeks, or precisely fifty-one days. That is over half of the allowable ninety-day period. The letter sent by counsel is brief and straightforward, and essentially asks the various people it is addressed to to review their reports and advise whether they have either the licence plate number or any other information that would help identify the insurer of the parked vehicle involved in the collision with Mr. Berhe.

The letter yielded almost immediate results. Three business days after it was sent, a law clerk at the Fund was contacted by the head of security at the mall, and was provided with the plate number of the vehicle in question. Mr. Scott conducted a search, determined that Lombard was the insurer of the vehicle involved, and sent out the requisite notice, within a day or two of receiving the information.

Counsel for the Fund at the hearing suggested that I should not inquire into what transpired during that fifty-one day gap between counsel being assigned to the file, and the letter being sent, as that was protected by solicitor-client privilege. He suggested that it would have taken time to analyse the situation and determine the best approach to

follow to obtain the information. He stated that the correct approach had clearly been followed, given that the letter that was sent yielded instant results.

I cannot agree with this submission for two reasons. First, I think it best to avoid the lure of reviewing a party's actions in this context solely through the lens of hindsight. More importantly, the Fund bears a heavy onus under section 3(2)(a) to prove that ninety days was not sufficient in which to make a determination that another insurer was liable. As cited above, the courts have pronounced that the notice requirements should be strictly adhered to, and that there is little room for carving out exceptions. Against that judicial backdrop, it is essential that any information that can be provided to indicate what transpired during the crucial ninety-day period should be tendered into evidence. The privilege asserted here was the Fund's to waive, and I find that their failure to do so, which effectively leaves a gap of over fifty days unexplained, is fatal to their argument that the "saving provisions" should apply.

In light of my finding that the Fund has not proven that 90 days was not sufficient in which to make a determination under section 3(2)(a), I need not consider whether reasonable investigations were made, as provided in section 3(2)(b).

Finally, in view of the above result, I make no findings regarding my jurisdiction to order repayment of the costs incurred by the Fund in investigating this matter.

DATED at TORONTO, ONTARIO this _____ DAY OF OCTOBER, 2009.

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Shari L. Novick
Arbitrator.