CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	**Judge/Case Management Master**	**Court File Number**:
	Merritt J.	**CV-22-00675768-0000**

Title of Proceeding:

Economical Mutual Insurance Company Plaintiff(s)

-v-

Wawanesa Mutual Insurance Company Defendants(s)

Case Management: ☐ **Yes** If so, by whom: ☒ **No**

Participants and Non-Participants: *(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) **Economical Mutual Insurance Company**	**Jason Frost**	jfrost@schultzfrost.com	416-696-3434	Y
2) **Wawanesa Mutual Insurance Company**	**Damien Van Vroenhoven**	dvanvroenhoven@belltemple.com	416-581-8221	Y
3)				
4)				

Date Heard: *(Rule 59.02(2)(c)(iii))* **May 9, 2023**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☒ Appeal ☐ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing ☐ Telephone ☒ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested:

Economical appeals the decision of Arbitrator Novick dated December 23, 2021.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Appeal dismissed.

Costs		**fixed at $7,500.00**	**payable**
by the Applicant	**to the Respondent**	**by:**	**August 21, 2023**

Brief Reasons, if any: *(Rule 59.02(2)(b))N/A*

This is an Appeal by Economical Mutual Insurance Company ("Economical") of a decision of Arbitrator Novick dated December 23, 2021 where she held that Economical was barred from proceeding with a priority dispute with Wawanesa Mutual Insurance Company ("Wawanesa") because Economical had not given Wawanesa notice within the ninety-day notice period in s 3(1) O Reg. 283/95, and was not entitled to an extension of the ninety-day notice period, under s.3(2). She found that the saving provisions in that section did not apply to excuse the late notice provided to Wawanesa.

In my view, the Arbitrator did not make an error of law in finding that Economical did not conduct a reasonable investigation and did not hold Economical to a standard of perfection.

Background Facts

On Aug 19, 2012 Marc Dulude ("Marc") was hit by taxicab insured by Economical. On September 19, 2012 he made a claim for accident benefits under the Statutory Accident Benefits Schedule O. Reg. 34/10 to Economical and he was determined to be catastrophically impaired.

Marc was not a named insured or listed driver on any insurance policy at the time of the accident. Marc's driver's license had been under suspension for over two years at the time. He was employed by SBS furniture as a salesman.

Economical investigated whether Marc was financially dependent on another person or had regular use of a company vehicle at the time of the accident, in order to determine whether there was another insurer in higher priority to pay the claim but did not serve a Notice of Dispute Between Insurers within the ninety-day notice period.

Marc's father Jean Claude Dulude ("Jean Claude" or "father"), drove a leased 2011 Hyundai Sonata (the "Hyundai") insured by Wawanesa. The named insured on that policy was Direct Upholstery Ltd ("Direct Upholstery") a company owned by Pasquale Raviele ("Raviele"). Raviele also owned SBS Furniture. Jean Claude was listed as a "principal operator" on the policy.

On Sept 9, 2013, more than a year after the accident and well beyond the ninety-day notice period, Economical issued a Notice of Dispute Between Insurers to Marc and Wawanesa saying Marc was a deemed named insured under an insurance policy for the Hyundai because it was provided for Marc's regular use by his employer.

The Arbitration

This matter proceeded to an arbitration and the Arbitrator rendered a decision on December 23rd, 2021. The Arbitrator found that Economical was not entitled to an extension of ninety-day notice period. Given this conclusion, she did not determine whether Marc was a deemed named insured under the Wawanesa policy pursuant to s. 3(7)(f) of the SABS on the basis that the vehicle was made available for his regular use by Direct Upholstery.

At the Arbitration, Economical's position was that they did all reasonable investigations within the ninety-day period and given Marc's and the Ravieles' attempts to deceive them, there was no reasonable way for Economical

to determine, within the ninety days, that a company vehicle was being made available for Marc's regular use. At an early stage, Economical started investigating. They did Driver's license and Autoplus searches. Economical did internet and corporate searches. Economical obtained a signed statement from Marc. Economical did drive-by searches at Marc's home and an address believed to belong to his father. They retained a private investigator who contacted third parties. They tried to investigate the father and his link to various companies. They did a driver's license search on the father. Marc misled Economical about his driving history, his use of vehicles, his father's employment and use of vehicles. Economical argued that, based on the information obtained, there was no reason to continue a priority investigation but Economical did do an expedited examination under oath ("EUO"). At Marc's EUO on Dec 6, 2012 he said his father occasionally drove a Hyundai Sonata and he (Marc,) had driven it in the past. While Marc was vague on whether his father had access to or ownership of a car, Economical submitted that there was no information to suggest if he did, it was connected to Raviele or provided to Marc for regular use.

Wawanesa's position was that the investigation was not reasonable, lacked focus and obvious steps were not taken. Economical had information that the broker for the other vehicle involved in the accident Airport Taxi (or the broker's son) had contacted the Economical adjuster's manager to advise that Marc had regular use of a vehicle that was insured by his father's business and the adjuster could not offer a reasonable explanation as to why he did not call the broker himself. He did not pursue some obvious steps such as obtaining the father's date of birth and address from either Marc or SBS Furniture so that an Autoplus search could be done. The adjuster also failed to investigate the connection between the father, Direct Upholstery and Raviele. The reference in the adjuster's log note of September 14, 2012 suggesting that Marc drives a white vehicle, supposedly insured by his father's company, should have led him to reach out to Raviele (who he contacted to confirm that nature of Marc's employment) to determine the father's relationship with the companies Raviele owned. Even though Marc said, at his EUO, that his father and Raviele were close friends for many years, and Marc obtained his employment at SBS through that connection, no attempts were made to obtain information about the father from Raviele. No surveillance of Marc was done within the 90-day deadline and Marc's statement that his father drove a Hyundai and that he also drove it once or twice should have been a "red flag", but was not investigated further.

The Arbitrator found that Economical's investigation was not reasonable because there were obvious steps that should have been taken within the 90-day window.

Economical now appeals this decision on the basis that the Arbitrator made errors of law and mixed fact and law by holding Economical to a standard of perfection and misapplying the test for an extension of time for Economical to provided the priority notice to Wawanesa, and made errors of mixed fact and law by failing to properly weigh evidence of Marc's deception and Economical's efforts to identify a potential insurer in concluding that Wawanesa would have been identified within 90 days with a reasonable investigation.

Issues

The issues for this appeal are

a) Did the Arbitrator err by imposing a standard of perfection and misapplying test for an extension of time?

b) Did the Arbitrator fail to properly weigh the evidence of Marc's deception and Economical's investigation efforts?

Standard of Review

The parties agree that the standard of review is an appellate review standard meaning for errors of law the standard is correctness and for errors of fact the standard is palpable and overriding error. If there is a question of mixed fact and law with an extricable legal error the standard is correctness. If there is a question of mixed fact and law with no extricable legal error the standard of review is palpable and overriding error. An extricable error of law arises when the decision-maker fails to consider a relevant factor under the correct legal test. (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) and *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII). [2002] 2 SCR 23).

The Ninety Day Notice and Reasonableness of the Investigation

Economical's position is that the Arbitrator made an extricable error of law in applying a standard of perfection and made findings with the benefit of hindsight. Economical says the Arbitrator held it to a standard of perfection and used hindsight when finding that more surveillance should have been done, additional vehicle searches should have been done, and the father's phone number should have been obtained. Economical says it was reasonable for the adjuster to accept Marc's evidence that he was borrowing cars when convicted of the offences, not do surveillance on Marc when he was injured and unlikely to be driving, and not get the father's phone number since the evidence was the father was not working and did not have a car. Economical says, in any event, contacting the father or employer would not likely have been fruitful since they lied when interviewed after the ninety days.

Wawanesa's position is that the Arbitrator's decision is well founded in fact and law. There was ample evidence that the adjuster questioned the information provided, and it was reasonable to expect Economical to conduct further investigations. Wawanesa says the Arbitrator weighed the evidence available to Economical within the ninety-day window and did not rely on hindsight.

I find that the Arbitrator applied the correct test. She asked herself whether, in the circumstances of this case, ninety days was insufficient for Economical to have determined that Wawanesa may be in higher priority and whether the steps taken, within the ninety days, were "the reasonable investigations necessary to determine if another insurer is liable". The test is set out in the legislation.

O.Reg. 283/95 Disputes Between Insurers s 3(1) provides that the first insurer to receive notice is required, within ninety days, to give notice to every insurer it argues is required to pay benefits.

S. 3(2) is referred to as the "saving provision". It provides that an insurer may give notice after ninety days 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 is liable within the 90-day period.

The Arbitrator properly instructed herself that the test was to be applied in a strict manner according to the caselaw (para 60-61 relying on *RBC General Insurance Company v Certas Direct Insurance Company*, (unreported decision – March 30, 2009) and *Kingsway General Insurance Co. West Wawanosh Insurance Company*, 2001 CanLII 28051). She specifically said that the Applicant was not to be held to a standard of perfection (para 63).

A case-by-case analysis is required to determine whether or not ninety days is sufficient and whether a reasonable investigation has been conducted (*Allstate Insurance Company of Canada v. Belair Insurance Company*, (Arbitrator Bialkowski, April 25, 2013). Whether the insurer has been provided with accurate information is a factor to be considered. Where inaccurate information is provided, even innocently, it may still provide a basis to extend the 90 days. The utmost duty of good faith entitles an insurer to rely on information provided by its own insured. If an insurer is intentionally misled in a material way, the ninety-day period may be insufficient (*Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, 2005 CanLII 11975 (ON SC) at para 23-24).

There is a difference between cases where the insurer knows or strongly suspects that it is being misled and cases where it does not. In the former case, more investigation is required. In this case, the Arbitrator found that the adjuster suspected that Marc had access to his father's company car from the outset and did not accept Marc's evidence on the issue (para 21, 23, 24, 33, 36, 37, 40, 67 and 68).

The Arbitrator thoroughly reviewed and weighed the evidence before her. She correctly considered the evidence available to Economical within the ninety day period (*Primmum Insurance* at para. 24, 27, and 31) She was mindful that, despite misinformation from the insured, the test is whether the correct information could have been obtained within the ninety day period with reasonable investigation (para 61 and *Aviva Insurance Co. v Intact Insurance Co*. (unreported decision February 27, 2018). She found that Economical took many steps to investigate, and while it was a complex investigation and Marc misled Economical (para 62), ultimately, the

investigation fell short of being reasonable.

The Arbitrator identified several significant issues she described as “red flags”, things that “screamed out for further investigation” or “should have set off alarm bells”(para 68, 69, 76) and noted that the adjuster clearly knew he could not rely on information from Marc (para 66 - 67).

The Arbitrator may have erred in finding that conducting surveillance on Marc, shortly after he left the hospital, was an obvious step to have taken given that he was catastrophically injured and may well have been unable to drive. However this finding of fact was not the only, or even the key basis, of her decision. I do not find that it was a palpable and overriding error.

The Arbitrator found that Marc’s father Jean Claude Dulude (the “father”) and the businesses were not sufficiently investigated. She noted that, early on, the adjuster had a tip from the broker (or his son) that Marc was using his father's vehicle or a vehicle provided through his father's employer/ business but did not follow up on it (para 64-65).The tip was considered credible and Marc’s responses were not accepted by Economical at face value (para 66-68). The Arbitrator found that Marc provided contradictory information in his statement and in his EUO about his father owning a vehicle (the Hyundai). At the EUO Marc admitted to using the Hyundai in the past (para 75-76).

She also found that Economical had information that the father was employed with Direct Upholstery. Marc provided contrary information and said his father was unemployed. The Arbitrator said the adjuster knew within the ninety days that SBS Furniture and Direct Upholstery were both owned by Raviele and operated out of the same premises and this should have been investigated further (para 68-69).

The Arbitrator found that Economical should have interviewed Raviele given that Marc obtained his job through Raviele (who had a “bunch of businesses”), was his father’s friend and employer, and given that Marc was evasive regarding the owner of the Hyundai that he occasionally drove.

She also noted that only two and one half hours of surveillance was attempted at SBS Furniture, a business linked to Marc and his father and that there was no explanation for same. The Arbitrator made it clear she was not saying that surveillance is required in every case, however in view of the information received and the questions raised, it would have been an important step in a reasonable investigation (para 72).

Economical says the Arbitrator wrongly drew an adverse inference from the absence of a request for the father’s address at Marc’s EUO and says it would have been an unreasonable question. The father’s address and insurance coverage were clearly important given the inconsistent evidence Economical had within the ninety-day window. Although Marc’s counsel refused some questions about the father, they offered to provide the father’s telephone number. The Arbitrator said there was no evidence Economical pursued this lead to address the inconsistencies in the information provided (paragraph 76).

The Arbitrator also found that a reasonable investigation would have included a Convictions Report in view of Marc’s vague and inconsistent evidence about his driving convictions. This would have revealed licence plate numbers of the vehicles driven and to whom they were registered (para 73-74)

While she agreed that Economical took many steps and incurred much time and expense, the investigation was scattered and lacked focus. She found that the information which ultimately led to the location of the Wawanesa policy could have been obtained earlier if there was proper follow up within the ninety days (para 78).

I find that the Arbitrator made no palpable or overriding factual errors. The Arbitrator applied the correct legal test, considered the relevant factors and thoroughly reviewed and weighed the evidence. She concluded that the investigation was not reasonable as Economical did not take obvious steps it should have taken. She did not hold Economical to a standard of perfection.

Accordingly I dismiss the appeal from Arbitrator Novick's award.

The parties have agreed that the Respondent as the successful party is entitled to costs in the amount of $7,500.

Additional pages attached: ☐ Yes ☒ No

July 7, , 20 **23**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*