IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT, R.S.O. C.1.8 and ONTARIO REGULATION 283/95;*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GUARANTEE COMPANY OF NORTH AMERICA

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Shawn MacDonald for the Applicant

Greg P. Bailey for the Respondent

ISSUE:

1. Do the 'savings provisions' in subsection 3(2) of *Ontario Regulation 283/95* apply to excuse the late notice provided by Guarantee of its intention to dispute its obligation to pay benefits to the Claimant to Kingsway?

BACKGROUND:

1. Jacquie Rondeau was injured when the pickup truck in which she was an occupant collided with a police cruiser at an intersection in Ottawa on November 12, 2003. The driver of the pickup truck was Marc Durocher.

2. Ms. Rondeau did not own a car and did not have a valid driver's license at the time of the accident. She was not a spouse or dependent of a named insured on an auto policy. The police MVA report indicates that the pickup truck driven by Mr. Durocher was uninsured, and that the police cruiser involved in the accident was insured through a fleet policy issued by Guarantee Company of North America ("Guarantee") to the City of Ottawa.

3. Ms. Rondeau submitted an Application for payment of accident benefits to Guarantee on December 18, 2003. They accepted the application and have paid benefits to her and on her behalf.

4. Kingsway General Insurance Company ("Kingsway") insured Mr. Durocher under a standard auto policy with a policy term of December 4, 2002 to December 4, 2003. Kingsway attempted to cancel the policy for non-payment of premiums, and sent a registered letter to Mr. Durocher on July 9, 2013, purporting to cancel the policy effective August 8, 2003. The letter was returned to Kingsway unclaimed on August 5, 2003.

5. Both Ms. Rondeau and Mr. Escobar, the police officer that was driving the other vehicle involved in the accident, brought tort actions against Mr. Durocher and the Guarantee Company, under the uninsured motorist provisions of the Guarantee policy.

6. In the course of the tort actions, it was brought to Kingsway's attention that it had failed to comply with a statutory condition in attempting to cancel the Durocher policy. Kingsway accepted that the cancellation was therefore invalid, and agreed to provide Mr. Durocher with a defence in the tort actions.

7. Ms. Rondeau's counsel advised Susan Wallace, the City of Ottawa claims adjuster involved in adjusting the claim (on behalf of Guarantee), of this development in March 2008. Guarantee then provided written notice to Kingsway on March 31, 2008 that it was disputing its obligation to pay accident benefits to the Claimant, contending that Kingsway was in higher priority to pay benefits to Ms. Rondeau under section 268(2) of the *Act.*

8. Kingsway accepts that its policy would be in higher priority to respond to the claim, but submits that as notice was provided well beyond the ninety days permitted in section 3 of *Regulation 283/95*, Guarantee should be barred from pursuing this priority dispute.

9. Guarantee relies on the 'savings provisions' in subsection 3(2) of the regulation. It claims that the circumstances in this case are such that ninety days was not a sufficient time within which to make a determination that another insurer was liable, and that it made reasonable investigations within the ninety-day period.

THE EVIDENCE:

10. None of the relevant facts are in dispute, and neither party called any *viva voce* evidence at the hearing. The parties filed a comprehensive Agreed Statement of Facts, which I have appended to the end of this decision. Counsel also consented to the filing of other documents at the hearing which they referred to in their submissions.

11. Counsel had conducted Examinations Under Oath of Susan Wallace, the senior claims investigator with the City of Ottawa who was assigned to adjust Ms. Rondeau's claim on behalf of Guarantee, and Cecil Jaipaul, a representative of Kingsway / Jevco Insurance, prior to the hearing. The transcripts of these examinations were referred to and relied on by counsel as well.

12. The Agreed Statement of Facts filed is quite detailed and sets out all of the relevant facts. I will not repeat them here, but will highlight the key points relating to the information obtained by Guarantee (through the City of Ottawa) in their investigation into priority:

13. Ms. Rondeau's accident benefits claim was assigned to Susan Wallace, a senior claims investigator with the City of Ottawa on December 4, 2003. Ms. Wallace was also assigned to adjust the claim of Police Constable Escobar, who was the driver of the other vehicle involved in the incident. She explained that Guarantee insures the City of Ottawa's vehicles, including its fleet of police cruisers, and that the City has in-house claims staff who are delegated authority from Guarantee to handle claims, up to a certain deductible amount, on their behalf.

14. A statement was obtained from Ms. Rondeau on December 10, 2003. It indicated that she did not own a vehicle and that her G1 license had expired. She also advised that she was neither a listed driver on any auto policy, nor a dependent of anyone named on a motor vehicle liability policy.

15. Ms. Wallace testified at her examination under oath that she spoke with Police Constable Desjordy on December 4. She stated that Constable Desjordy advised her that there was an expired "MTO tag" on the Durocher vehicle, which she understood to mean that the license plate sticker had expired. He also told her that he had spoken to a Kingsway representative and had been advised that Mr. Durocher's policy with Kingsway had been cancelled effective August 8, 2003, about three months prior to the accident.

16. Ms. Wallace also stated that Constable Desjordy provided her with the name and telephone number of the insurance broker involved, Marc Lebrun. She called Mr. Lebrun, who confirmed that the coverage provided to Mr. Durocher under the Kingsway policy had been cancelled for non-payment of premiums prior to the accident. She asked Mr. Lebrun for a copy of the cancellation notice sent, which he forwarded to her by fax.

17. Ms. Wallace confirmed that Guarantee received the Claimant's OCF 1 form on December 18, 2003. She reviewed the form and noted that Ms. Rondeau's answers were consistent with what she had provided in her statement with regard to not having coverage under other insurance policies. I note that the application was received after Ms. Wallace had spoken with Constable Desjordy and a statement had been taken by the Claimant. The parties agree that

no further priority investigations were conducted by Ms. Wallace or anyone else at either Guarantee or the City of Ottawa after December 18, 2003.

18. Ms. Wallace acknowledged that she did not conduct an Autoplus search on either Ms. Rondeau or Mr. Durocher. She did not speak to anyone at Kingsway about the Durocher policy within ninety days after receipt of the application for benefits, and did not make any direct inquiries of Mr. Durocher regarding the existence of any other insurance coverage on his vehicle. When asked why she had not done so, Ms. Wallace replied that she felt that she had sufficient information in her file to indicate that the Kingsway policy was not in force at the time of the accident, and that the vehicle remained uninsured.

19. The next event of significance occurred in January 2008, more than four years later. Ms. Wallace had continued to adjust both accident benefits claims arising out of the accident in the interim period, save for a period during which she was on a maternity leave. Counsel filed a copy of a letter from Colin Empke, coverage counsel for Kingsway in the tort claims, to Helmut Broadman, tort counsel for the Fund, dated January 8, 2008. Mr. Empke confirms in the letter that Kingsway would be "assuming the defence of Durocher from the MVACF", and that Kingsway will not take the position that the policy was cancelled for non-payment of premiums. The letter also explicitly states that Kingsway "acknowledges its policy was valid and subsisting on the date of loss".

20. Ms. Wallace received a fax from Patrick Murphy, counsel for Ms. Rondeau, on March 12, 2008, advising that Kingsway had taken over Mr. Durocher's defence in the tort claim. On March 31, 2008, Ms. Wallace wrote to the Casualty Claims Manager at Kingsway advising of the circumstances outlined above, and enclosing a Notice to Applicant of Dispute Between Insurers, the police MVA report and the fax that she had received from the broker attaching the Notice of Cancellation of Mr. Durocher's policy.

21. The evidence suggests that Kingsway had failed to include a refund with the Notice of Cancellation sent out to Mr. Durocher, in contravention of one of the statutory conditions applicable in the case where an insurer cancels a policy.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Ontario Regulation 283/95

> ***3.*** *(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.*
>
> *(2) An insurer may give notice after the 90-day period if,*
>
> *(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and*
>
> *(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.*

PARTIES' ARGUMENTS:

22. Counsel made thorough arguments on the issue, referring to the relevant facts and evidence and the case law on the applicability of subsection 3(2) to an insurer's late notice. I have considered all of their submissions and briefly summarize them below:

Guarantee

23. Counsel for Guarantee acknowledged that his client bore the onus of proving that both branches of the test set out in section 3(2) have been met, but submitted that the evidence in this case supports that conclusion. The main thrust of his argument was that his client acted properly in relying on representations made by Kingsway, and that when Ms. Wallace was advised that Kingsway had cancelled Mr. Durocher's policy, it was reasonable for her to assume that the cancellation was valid.

24. Counsel noted that it took Kingsway almost two years from the time its cancellation was subsequently challenged, to the point that it acknowledged that it had not complied with all of the statutory conditions. In light of that timeframe, Mr. MacDonald contended that Guarantee

should be excused from not making that determination within ninety days, as referenced by section 3(2)(a), and that Kingsway's argument in that regard cannot be sustained.

25. Mr. MacDonald also submitted that Ms. Wallace's efforts in investigating the priority issue met the standard of a reasonable investigation as required by subsection 3(2)(b). He noted that despite the fact that the police MVA report indicates that Mr. Durocher's vehicle was uninsured, she continued to investigate that point by discussing the matter with both Constable Desjordy and the insurance broker, and requesting that a Notice of Cancellaiton of the policy be sent to her.

26. Counsel submitted that it was reasonable for Ms. Wallace to have relied on Constable Desjordy's statement that he had identified a Kingsway policy in the course of his investigation that had been issued to Mr. Durocher, but had then determined that it was cancelled prior to the date of loss. He noted that Ms. Wallace would have been aware that the Ottawa police was investigating the matter, given that Police Constable Escobar had suffered serious injuries in the same accident, and that her reliance on the information obtained should be considered with this in mind.

27. Counsel referred to Arbitrator Samis' statements in the *Farmer's Mutual v. Co-operators Insurance* decision (dated July 3, 2009) to the effect that the regulation requires that an insurer's investigation be "reasonable and nothing more", and that the regulation should not be interpreted as requiring insurers to be "suspicious of circumstances that are not suspicious, nor should we encourage probing investigation that is either immaterial or disproportionate to the matters under consideration." He submitted that in the circumstances of this case, there was no reason for Guarantee to be suspicious to the point of not being able to rely on Kingsway's representations to a police officer that it had cancelled its own policy.

Kingsway

28. Counsel for Kingsway submitted that it is clear from the case law that section 3(2) is to be interpreted strictly, and referenced Justice Nordheimer's comments in *State Farm v. HMQ;*

HMQ v. West Wawanosh (2001) CanLii 28051 (ONSC) to the effect that "no unfairness is visited upon the parties by insisting on strict compliance with the notice requirements" (at para.22).

29. Counsel contended that ninety days was sufficient time for Guarantee to have made a determination that another insurer was liable in this case, as Ms. Wallace's evidence clearly indicates that she had decided within the ninety-day period that Kingsway's attempt to cancel Mr. Durocher's policy was valid. He referred to Justice Nordheimer's comment in the *West Wawanosh* case, *supra,* to the effect that the provision does not require that the determination be correct and that the focus of the provision is on the ability to make the determination.

30. Mr. Bailey also argued that Ms. Wallace did not make the reasonable investigations necessary within the ninety-day period, as required by subsection 3(2)(b). He noted that while Ms. Wallace acknowledged at her examination under oath that insurer's cancellations get challenged on occasion, she did not request the Kingsway underwriting file to confirm the validity of the cancellation, or investigate whether a refund had accompanied the Notice of Cancellation that was sent to Mr. Durocher. He contended that her failure to do so, and her decision not to either contact Mr. Durocher or conduct an Autoplus search on him falls short of the standard required.

31. Counsel also submitted that Mr. Durocher may have obtained coverage subsequent to the policy having been cancelled by Kingsway, and that Ms. Wallace ought not to have assumed that he did not do so.

32. Finally, counsel for Kingsway submitted that it would have been prudent for Ms. Wallace to have issued a notice to Kingsway in a timely manner, as she knew that the Kingsway policy had been in place three months prior to the accident, and that if valid, it would put Kingsway in higher priority. He stated that in cases where policies are alleged to have been cancelled shortly before an accident, a prudent insurer should put the "cancelling insurer" on notice of a priority dispute and then decide within the one-year deadline permitted by the regulation whether to proceed to arbitration.

33. Mr. Bailey cited Arbitrator Rudolph's decision in *Axa Insurance v. Co-operators* (upheld on appeal by Nordheimer, J., May 3, 2001) in support of the above comments. He contended that given the fact that cancellations are often challenged in the context of priority disputes, an insurer should serve a notice in any case in which there is uncertainty.

ANALYSIS & FINDINGS:

34. Having considered the evidence before me as well as the parties' submissions, I conclude that Guarantee has satisfied the heavy onus it faces to demonstrate both that ninety days was not a sufficient time to make a determination that another insurer was liable under section 268, and that it made the reasonable investigations necessary to determine if another insurer was liable within the ninety-day period, as required by section 3(2). I have analysed the evidence against the backdrop of a few general principles that have evolved in the jurisprudence on this issue, summarised by Justice Perell in *Liberty Mutual v. Zurich Insurance* (2007) CanLii 54080 (ONSC).

35. Justice Perell states that Section 3(2) is designed to encourage the first insurer who receives an application to "promptly exercise due diligence to make a determination whether another insurer should be responsible to pay" benefits. He tempers that, however, by stating that it is desirable to interpret the provision in such a way "as to discourage insurers from issuing notices indiscriminately, in the off chance that a priority insurer will be identified". (at para. 16)

36. I agree with this statement. While the ninety-day requirement is an onerous burden on claims adjusters and can cause insurers who suspect there might be another insurer in higher priority to send out a DBI Notice without any solid reason for doing so, the underlying reason behind the provision must be kept in mind. It is to allow the true priority insurer to adjust the file as early as possible, so that the important decisions that are required to be made in the early stage of adjusting a file can be made by the proper party.

37. If it is clear that a first insurer who receives an application is not the priority insurer, early notice under section 3 of the regulation should be provided. However, if insurers who simply suspect the possibility that another insurer may be in higher priority develop the habit of issuing

a notice, without doing a thorough investigation, the system will become overloaded and will not function in the efficient manner contemplated by the priority regulation.

38. Justice Perell also reiterated what many arbitrators and judges have stated in earlier cases that while the first insurer is required to make a reasonable investigation, perfection is not required and the reality that adjusters are extremely busy and handle several complex matters at once should be recognised. (at para.17). He sums up the requirements imposed by section 3(2) as follows: (at para. 23):

> *…an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all of the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.*

39. The facts of this case are somewhat unusual. The notice was provided by Guarantee not just a few weeks or months after the expiry of the ninety-day period, but some four years later when Kingsway's cancellation of the policy was challenged in the context of a tort claim. When all of the evidence is considered, I find that due diligence was exercised and that the circumstances justified Ms. Wallace requiring more than ninety days to make her determination that Kingsway was in higher priority. Accordingly, I find that Guarantee has satisfied both branches of the test set out in subsection 3(2) and that the 'saving provisions' apply.

40. In many cases, including this one, an insurer' late notice is provided, at least in part, because an insured or a third party provides information that is either inaccurate or misleading. The misrepresentation can be intentional, but is often accidental or without intention. In *Primmum Insurance v. Aviva Insurance Company of Canada* [2005] O.J. No. 1477 Justice Ducharme addresses this issue in the context of whether ninety days was sufficient time for an insurer to make a determination as raised by section 3(2)(a). He states that "the only issue under section 3(2)(a) is whether the receipt of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case."

41. I find that it was reasonable for Ms. Wallace to have relied on the information initially provided to her regarding the cancellation of the policy. I note that when she was later advised that that information was incorrect, she acted reasonably quickly in providing notice to Kingsway of the priority dispute. The fact that the information regarding the invalidity of the cancellation was communicated to her well outside of the 90-day period results, in my view, in that period being insufficient for her to make the determination that Kingsway was liable under section 268.

42. There is no suggestion in this case that Kingsway intentionally misled Guarantee regarding the cancellation of Mr. Durocher's policy. It is clear that its representatives believed that the Notice of Cancellation purporting to cancel the policy effective August 8, 2003 for the non-payment of premiums was valid, as did the broker involved. Its underwriting notes show that Kingsway representatives advised both the police and a representative of Motors Insurance that the policy had been terminated prior to the date of the accident.

43. Even though it was ultimately revealed that the policy was improperly cancelled, the evidence suggests that it took almost two years from the time of the first inquiry made by counsel in the tort claim, and the time that Kingsway's coverage counsel confirmed that the policy was valid on the date of loss. I therefore find that it does not lie in Kingsway's mouth to argue that Ms. Wallace should have gone behind the representations by Kingsway, and conducted a detailed investigated into whether all of the statutory conditions were met within ninety days, when Kingsway had clearly failed to do so initially, and then took the time that it did to acknowledge its error.

44. Counsel for Guarantee contends that when inaccurate information is provided to a first insurer by another insurer, as was the case here, rather than by an insured or their representative, the argument that the section 3(2)(a) requirement is met is stronger. I agree. Insurers should be able to rely on representations made by other insurers, and should not be expected to test the veracity of each statement or fact presented, in the way that they likely would if the information was provided by an insured.

45. In *TD Home & Auto Insurance v. Markel Insurance Company* (Arbitrator Samis, August 24, 2011), Markel issued a Notice to Applicant of Dispute Between Insurers to TD, after receiving a claimant's application for benefits for injuries sustained while he was an occupant in a vehicle insured by Markel. Markel advised that the Claimant was not a listed driver on its policy, and contended that he was likely a deemed named insured under the TD policy, TD was in higher priority to pay the claim. Based on this representation, TD accepted priority. When the claims file was then forwarded to TD, it contained information that confirmed that the claimant was in fact a listed driver on the policy at the time of the accident. TD withdrew its acceptance of priority, and when Markel contended that it could not do so, TD issued a DBI Notice to Markel.

46. The matter proceeded to arbitration. Counsel for Markel contended that TD should have conducted more extensive investigations before accepting priority. Arbitrator Samis commented as follows:

> *In a sense, Markel is arguing that TD should not have accepted the representations that Markel made to it. In the context of an intercompany dispute where one insurer has made an express representation about a material fact, which would be expected to be well known to the insurer making the representation, I do not think it is reasonably required for another insurer to make any further inquiry. It is entitled to accept the representation, in this case about whether …(the claimant) was a listed driver.*
>
> (at p. 6)

47. I agree with Arbitrator Samis' comments, and find that the facts in this case are analogous to the ones in his case. In my view it is "twisted logic" to say that the insurer who mistakenly represents that a claimant is not a listed driver on its policy can turn around and resist priority for his claim on the grounds that the insurer who accepted priority should have investigated the matter more thoroughly. In the same vein, if an insurer attempting to cancel a policy misses the fact that it has not complied with a statutory condition, it cannot resist priority on the basis that the first insurer to whom it made the misrepresentation should have (a) ignored a representation that it was in a unique position to make and (b) picked up on the technical breach that it had not. To do so would be contrary to the spirit of the regulation and the expectation of good faith dealings among insurers.

48. I am also satisfied that Ms. Wallace conducted a reasonable investigation within ninety days, for the purposes of section 3(2)(b). After noting that the Durocher vehicle was listed as "uninsured" on the police MVA report, she spoke with a police officer who was investigating the matter as a result of another constable having been injured in the same accident. Constable Desjordy advised Ms. Wallace that Kingsway had cancelled the policy prior to the date of the accident, and provided her with the name of the broker involved.

49. Ms. Wallace took the further step of contacting the broker, to confirm that the policy had purportedly been cancelled. She then requested that he provide her with a Notice of Cancellation. She reviewed the notice received, and based on the information received, determined that the Kingsway policy had been cancelled.

50. I find it was reasonable for Ms. Wallace to have relied on the representations communicated to her that the policy was cancelled. It is clear from the case law that an adjuster's investigation should not be reviewed in hindsight and considered through the lens of the new information received. While she acknowledged at her examination that insurer's cancellations may get challenged and determined to be invalid, it was appropriate for her to have relied on the information that she received from Constable Desjordy and from the broker. There was no reason for her to be suspicious about the information received, and while she could have contacted Mr. Durocher directly to confirm the cancellation, I find that that places the bar well above the standard of a "reasonable investigation" required by the regulation.

CONCLUSION:

51. For the reasons expressed above, I find that Guarantee has satisfied both requirements set out in section 3(2) of the regulation and is not barred from pursuing Kingsway for priority.

52. My understanding is that this finding will end the matter, and that Kingsway will accept priority to pay Ms. Rondeau's claim. If I am incorrect in this assumption, I invite counsel to advise me and a further hearing date will be set in order to determine the merits of the claim under section 268(2) of the *Act.*

COSTS:

53. In accordance with the parties' Arbitration Agreement, Guarantee is entitled to recover its legal costs of this proceeding on a partial indemnity basis. If counsel cannot agree on the quantum owing, I may be contacted in order to discuss the exchange of submissions on this point.

54. As Kingsway is the unsuccessful party, I will forward my account to Kingsway for the arbitration fees and expenses incurred to date, under separate cover.

DATED at TORONTO, ONTARIO this _20th__ DAY OF DECEMBER, 2013.

_____

Shari L. Novick
Arbitrator

AGREED STATEMENT OF FACTS

Background – The Motor Vehicle Accident

1. The claimant, Jacquie Rondeau, was involved in a motor vehicle accident on November 12, 2003, in the City of Ottawa (the "Accident"). At the time of the Accident, Ms. Rondeau was a passenger in a 1996 GMC Sierra pick-up truck that was being driven southbound on O'Connor Road by Marc Durocher. As Mr. Durocher entered that roadway's intersection with Argyle Street, he collided with a police cruiser that was being driven eastbound by Claudio Escobar.

2. The Motor Vehicle Accident Report arising from the Accident reported that Mr. Durocher's pick-up truck was uninsured and that Mr. Escobar's police cruiser was insured by the Guarantee Company of North America (the "Guarantee Company"). (Pages 3 and 4 of **Tab "1"**).

Insurance Policy – The Guarantee Company of North America

3. On November 12, 2003, the Guarantee Company insured the City of Ottawa, including its fleet of police vehicles, pursuant to a fleet policy of automobile insurance.

4. Pursuant to an agreement between The City of Ottawa and the Guarantee Company, the City of Ottawa adjusted claims, including those for accident benefits, while those claims remained within the City of Ottawa's deductible with the Guarantee Company.

5. Following the Accident, Ms. Rondeau and Mr. Escobar each filed applications for accident benefits with the Guarantee Company. Ms. Rondeau and Mr. Escobar also commenced actions in tort against the Guarantee Company, on the basis of the uninsured motorist provisions of the Guarantee Company's policy insuring the City of Ottawa Police.

Insurance Policy – Kingsway General Insurance Company

6. Kingsway General Insurance Company ("Kingsway") insured Mr. Durocher under a standard Ontario policy of automobile insurance with a policy term of December 4, 2002 to December 4, 2003.

7. By way of registered letter dated July 9, 2003, Kingsway attempted to cancel Mr. Durocher's policy effective August 8, 2003 for non-payment of premium. (Page 29 of **Tab "2"**).

8. The registered cancellation letter was returned to Kingsway unclaimed on August 5, 2003 (Page 30 of **Tab "2"**).

9. On November 27, 2003, Kingsway underwriter Ann Pinter sent a facsimile to "Cons. Feldman" of the Ottawa Police Force. Ms. Pinter noted that Mr. Durocher had been insured under "pol. #KGHOAC5138" but that that policy had been "cancelled on Aug.8/03 12:01 a.m. (as per attached) by registered letter for non payment" (pages 32 through 33 of **Tab "2"**).

10. An undated Kingsway underwriting document titled "Iww Explorer KGHOAC5138" includes the following information:

Due Date	User	Completed	Activity	Note
2003/05/14	Pinter, Ann	Y	Task	crc. Info is faxing today by the broker
2003/05/16	Gilani, Khalid	Y	Task	nsf pymt charged on CRC on May 15/03 for $377.24, policy reinstated
2003/05/23	Mota, Laudalina	Y	Task	C.T – EFFECTIVE MAY 14/2003 CHANGE OF ADDRESS
2003/08/05	Mota, Laudalina	Y	Task	RECEIVED RETURNED REG. LETTER @ KINGSWAY MARKED "UNCLAIMED" ON AUG 5/2003. ADDRESS CONFIRMED TO BE THE SAME.
2003/11/27	Pinter, Ann	Y	Task	letter faxed to constable , Feldman at (613-760-8003) advising policy is terminated, it is on DMS, along with the copy of R/L
2003/12/12	Xueying Qi, Grace	Y	Task	Kevin from Motor Ins. called. Asking if the policy still in force told him no
2006/02/01	Pinter, Ann	Y	Task	Helmut Brodman, called (a lawyer), from Ottawa, to have a statement about this policy, Paulette advised me to forward his e-mail to Mark Fonseca

(page 34 of **Tab "2"**)

11. Kingsway subsequently determined that it had failed to comply with a statutory condition in cancelling Mr. Durocher's policy and, as a result, agreed to provide him with a defence in the tort actions commenced against him.

12. There is no evidence that Ms. Mota, Ms. Pinter or Ms. Qi took any additional steps in relation to the cancellation of Mr. Durocher's policy or to the inquiries made by

Constable Feldman or "Kevin from Motor Ins.", aside from those detailed in the "Iww Explorer" document.

The Guarantee Company of North America - Priority Investigation

13. On or about December 4, 2003, City of Ottawa claims manager Maureen Graham assigned Mr. Escobar's and Ms. Rondeau's claims for accident benefits to senior claims investigator Susan Wallace.

14. On or about December 4, 2003, Ms. Wallace spoke with Constable Desjordy of the Ottawa Police. Constable Desjordy advised Ms. Wallace that the Ottawa Police had spoken to Kingsway and during that conversation had been advised that Mr. Durocher's policy had been cancelled effective August 8, 2003. Constable Desjordy also advised Ms. Wallace that Mr. Durocher's insurance broker was "Carr & Company" (Page 38 of **Tab "3"**).

15. On December 4, 2003, Ms. Wallace spoke with insurance broker Marc LeBrun of Carr & Company. Mr. LeBrun advised her that Mr. Durocher's insurance policy had been cancelled. He also faxed Ms. Wallace a copy of the Registered Notice of Cancellation dated July 9, 2003 and a copy of the Cancellation Advice Notice (Pages 5 through 7 of **Tab "3"**).

16. On December 10, 2003 Ms. Wallace obtained a signed statement from Ms. Rondeau. (Pages 8 through 13 of **Tab "3"**).

17. On December 18, 2003 the City of Ottawa received a signed completed OCF-1 Application for Accident Benefits from Ms. Rondeau. Under Part 4 of the OCF-1, titled "Details of Automobile Insurance", Ms. Rondeau stated that she was not covered under any of automobile insurance policies listed. (Pages 14 through 18 of **Tab "3"**).

18. Ms. Wallace took no further steps to investigate priority after December 18, 2003.

19. Ms. Wallace did not run an AutoPlus search or any other searches on Ms. Rondeau or Mr. Durocher.

20. Ms. Wallace did not make any direct inquiries with Mr. Durocher regarding the existence of any insurance coverage on his pick-up truck.

21. There is no evidence that alternative insurance coverage for Mr. Durocher's pick-up truck existed on November 12, 2003.

22. No one other than Ms. Wallace conducted any priority dispute investigation on behalf of the City of Ottawa or the Guarantee Company.

Discovery that the Kingsway Policy May Have Been Valid on the Date of Loss

23. On January 31, 2007, Ms. Graham, the claims manager who assigned Ms. Wallace Ms. Rondeau's accident benefit claim, noted in a reporting letter that "Kingsway may have improperly cancelled" Mr. Durocher's policy, that "coverage may be available" and that "we are waiting for the Funds response". (Pages 30 and 31 of **Tab "1"**).

24. On January 8, 2008, W. Colin Empke, coverage counsel for Kingsway, sent a letter to Helmut R. Broadman, who the parties understand to have been tort counsel for the Motor Vehicle Accident Claims Fund. In that letter, Mr. Empke, amongst other things, stated the following:

    - that Kingsway was "assuming the defence of Durocher from the Motor Vehicle Accident Claims Fund" and had appointed David Bertschi as defence counsel;
    - that Kingsway confirmed that Mr. Durocher's policy had been cancelled for non-payment of premium but that Kingsway acknowledged that the policy was valid and subsisting on the date of loss; and
    - that Kingsway was "not presently aware of any breaches of condition which may affect Durocher's rights of indemnity under the policy or the limits available"

    (Pages 26 and 27 of **Tab "3"**).

25. On March 12, 2008, Ms. Wallace received a fax from Patrick Murphy, counsel for Ms. Rondeau, advising that Kingsway had taken over Mr. Durocher's defence in the tort matter (Page 28 of **Tab "3"**).

26. On, March 31, 2008 Ms. Wallace wrote to Lee Mohammed of Kingsway and enclosed a copy of the fax received from Carr & Company, the police report, a Notice to Applicant of Dispute Between Insurers and the liability to pay sections of the *Insurance Act* (Page 32 and 33 of **Tab "3"**).

27. On or about October 2, 2008, this priority dispute arbitration was commenced by The Guarantee Company.