IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, C. I.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

B E T W E E N :

GUARDIAN INSURANCE COMPANY OF CANADA

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL

Ms. Joan Takahashi and
Michael Calich, Esq.
Counsel for the Applicant

Aldo Picchetti, Esq.
Counsel for the Respondent

The ultimate issue in this Arbitration is to determine which of the parties is the insurer liable to pay Statutory Accident Benefits to Suleyman Adiyaman (hereinafter referred to as "Adiyaman") by reason of injuries suffered by Adiyaman in a motor vehicle accident which occurred on October 19, 1996.

Although the ultimate issue is to determine which insurer must respond to the claims of Adiyaman, the precise issue before me is whether or not Guardian complied with the notice provisions in s. 3 of Ontario Regulation 283/95.

The second issue that I must determine is whether Guardian is barred from bringing this Arbitration on the basis that the Arbitration was not initiated within one year from the time that Guardian first gave notice under s. 3. Guardian did not commence the Arbitration within that one year time-frame and takes the position that Wawanesa is estopped from raising the limitation period.

At the Arbitration Hearing, two witnesses were called. The first witness was Shelagh Brown, a senior claim representative of Halifax Insurance Company. The second witness was Michael Damm, an adjuster in the Special Investigation Unit of Lindsey, Morden, adjusters retained by Guardian to investigate the Adiyaman claim.

FINDINGS OF FACT

I make the following findings of fact based on the oral evidence at the Hearing and based on the documentary evidence filed:

(a) Adiyaman was involved in a motor vehicle accident on October 19, 1996. At the time of the accident, he was operating a 1988 Chevrolet Corsica.

(b) Adiyaman applied for benefits under the SABS by Application for Accident Benefits dated November 6, 1996. That Application was received by Lindsey, Morden on November 14, 1996 and was then forwarded on to Guardian which received it November 28, 1996.

(c) The Application for Accident Benefits was completed by Adiyaman on the basis that the Guardian policy was his own policy. The Application made reference to licence plate number 942 DDZ. In the space for "your spouse's policy", Adiyaman did not check off whether or not there was such a policy.

(d) Guardian retained Lindsey, Morden to investigate various aspects of the claim on October 30, 1996.

(e) Guardian actually insured P & S Auto Collision. The Guardian policy covered one dealer plate of P & S Auto Collision. As Ms. Brown stated in her evidence, in order for the Guardian policy to cover, a vehicle involved in an accident would have to be owned by P & S Auto Collision, with the dealer plate attached at the time of the accident.

(f) At the time of the subject accident, the dealer plate was on the 1988 Chevrolet Corsica.

(g) Michael Damm received the file from Guardian on October 31, 1996. He attended to inspect the Corsica at Nubridge Auto on November 1, 1996. When Damm attended there, Adiyaman greeted Damm.

(h) Damm took a statement from Adiyaman on November 4, 1996. Adiyaman alleged that he purchased the Corsica from Nubridge for personal use.

(i) At the meeting of November 4, 1996, Adiyaman was never asked to identify the insurer of Nubridge.

(j) At the meeting of November 4, 1996, Adiyaman indicated that his wife's car was insured by Wawanesa.

(k) Damm was suspicious of Adiyaman by reason of the fact that he found him working at the Nubridge premises on November 1, 1996 and by reason of conflicting statements given by Adiyaman in the statement taken on November 4, 1996;

(l) Damm conducted vehicle ownership searches which verified on November 22, 1996 that Nubridge Auto was the registered owner of the Corsica as at October 18, 1996 and that neither Adiyaman nor P & S Auto Collision were ever registered as owners of that vehicle.

(m) Accordingly, Damm knew or should have known as at November 22, 1996 that Guardian did not insure the Corsica operated by Adiyaman at the time of the subject accident.

(n) Damm attempted to determine the identity of the insurer of Nubridge Auto once he learned that Nubridge was the registered owner of the Corsica effective October 18, 1996. Damm attempted to reach the insurance broker for Nubridge in November 1996, January, February, March and May of 1997, until he finally reached the broker by telephone on May 28, 1997. The broker then advised Damm that on November 5, 1996, Adiyaman came in seeking to insure Nubridge Auto as at that date.

(o) Accordingly, it was not until May 28, 1997 that Damm knew the broker contacted had not arranged insurance cover for Nubridge Auto.

(p) It was not until September 25, 1997 that the solicitor for Adiyaman finally confirmed that Nubridge Auto did not have insurance coverage on the date of loss.

(q) It is clear from the evidence that Adiyaman on his Application for Accident Benefits was intent on claiming benefits under the SABS from Guardian on the basis that he was operating a vehicle owned by P & S Auto Collision at the time of the accident. Adiyaman likely knew that Nubridge Auto did not have automobile insurance coverage on the date of loss. It turns out that Adiyaman could have claimed benefits under the Wawanesa policy subject to defences which might have been raised by Wawanesa relating to the operation by Adiyaman of the Nubridge Auto vehicle.

(r) In the course of the handling of the claim, Guardian reviewed the Application for Insurance completed on behalf of P & S Auto Collision. Guardian had that Application on November 5, 1996. That Application disclosed that the spouse of Adiyaman owned a vehicle insured by Wawanesa.

(s) In a report from Mr. Damm to Guardian dated January 30, 1997 and received by Guardian shortly thereafter. Mr. Damm reported to Guardian as to his search confirming that the Corsica was registered in the name of Nubridge Auto Centre Inc. In the same report, Mr. Damm reported to Guardian that Adiyaman had several of his own vehicles insured through Wawanesa under Policy No. 7516844.

(t) In the said report of January 30, 1997, Mr. Damm, in his recommendations, set out that the vehicle involved in the accident was owned by Nubridge Auto Centre Inc. and was not insured by Guardian. Mr. Damm recommended that Adiyaman should claim under the Wawanesa policy or under a policy insuring Nubridge Auto.

(u) By November 5, 1996, Guardian had information from the Application for Insurance of P & S Auto Collision that there was a Wawanesa automobile policy under which Adiyaman could have potentially claimed benefits under the SABS.

(v) The Damm report of January 30, 1997 clearly set out that there were Wawanesa policies which could respond to Adiyaman's claims under the SABS.

(w) Guardian was focused on P & S Auto Collision and Nubridge Auto. Once Guardian determined that the vehicle involved in the accident was owned by Nubridge, Guardian focused on locating the insurer of Nubridge. Unfortunately, it turned out that there was no insurer of Nubridge as at the date of loss.

(x) Guardian was misled by Adiyaman. On the original Application for Accident Benefits, Adiyaman made no reference to his spouse's policy or any other policy, other than the Guardian policy covering P & S Auto Collision. When interviewed, Adiyaman still insisted that he had purchased the Corsica from Nubridge for his personal use. Adiyaman initially denied any connection with Nubridge Auto, notwithstanding that he was on the premises of Nubridge Auto when first seen by Damm on November 1, 1996. It later turned out that the Adiyaman's spouse was a 50 percent owner of Nubridge Auto.

(y) Within 90 days of receipt of the Application for Accident Benefits, Wawanesa was identified as an insurer of Adiyaman or his spouse. Guardian did not provide notice to Wawanesa pursuant to s. 3 of Regulation 283/95 because Guardian formed the view that it was the insurer of Nubridge Auto that ought to respond to the claims of Adiyaman.

REVIEW OF ONTARIO REGULATION 283/95

This Regulation was put into effect in order to ensure that an insured person who suffered injuries in a motor vehicle accident would be able to immediately access the benefits available under the *Statutory Accident Benefits Schedule*. Before the Regulation was effective, an insured person often had to commence a Mediation before the Dispute Resolution Group of the Ontario Insurance Commission against more than one insurer, so as to be able to access the benefits. In cases in which more than one insurer might have been called upon to pay benefits under the SABS, an insured person often faced a situation in which each of the insurers took the position that it was the other insurer that had to respond to the claims.

This Regulation makes it clear that the first insurer that receives a completed Application for Benefits is responsible to pay benefits pending the resolution of any dispute as to which insurer is required to pay benefits.

Prior to the time when this Regulation was effective, it was the Dispute Resolution Group or the Court that determined which insurer had to pay.

This Regulation removed from the Dispute Resolution Group and the Court, decision-making as to which insurer has to pay benefits in a given case. That is now to be determined by a private Arbitration, regulated by the *Arbitration Act*, 1991.

One must understand that the prime purpose of the Regulation was to see that an insured person had an insurer that would immediately respond to claims.

The Regulation thus contemplates that an insurer will pay benefits in the first instance notwithstanding that that insurer may not be the insurer that ultimately has to pay the benefits.

Having put this system into effect, the Legislators chose a 90 day period as the appropriate period of time in which the insurer paying benefits has to put another insurer or insurers on notice, if the paying insurer takes the position that another insurer is ultimately responsible to pay the benefits in a given case.

It appears that a time limit of 90 days was chosen so that the insurer that ultimately has to pay, can take over management of the claim at an early time, since claims can amount to substantial sums of money. If an insurer has to ultimately pay the benefits, that insurer will want to manage the claim in the way that that insurer manages all claims.

In the case of Canadian General Insurance Company v. AXA Insurance Company, a Decision of The Hon. P.T. Galligan, Q.C. dated December 19, 1996, Mr. Galligan, in a similar case, states:

> "It seems to me that when the regulatory authority chose a 90 day period for notice, it did so in recognition of the importance of the right of the insurer, who will ultimately be responsible for payment, to have control of the claim from a very early stage."

The Regulation in s. 3(2) has a relief provision. It recognizes that in some cases, the 90 day period will not be a sufficient period of time in which to determine that another insurer or insurers may have to pay ultimately. If that is so, and if the paying insurer made

reasonable investigations, within the 90 day period, the time for giving notice to another insurer may be extended.

In the Canadian General Insurance Company v. AXA Insurance Company case, Canadian General paid benefits to the Applicant for a period of approximately two years, before Canadian General came upon facts, on a file audit, which raised a question as to whether the Applicant was a dependant of her father, the insured, in order to qualify for benefits under the Canadian General policy. Canadian General put AXA on notice more than two years after the receipt of the completed Application for Accident Benefits. Mr. Galligan determined that Canadian General knew from the outset that the Applicant was an occupant of a vehicle insured by AXA. Canadian General knew that there was a potential insurer who might be liable to pay benefits, from the outset. In those circumstances, Mr. Galligan concluded that Canadian General had not satisfied the onus upon it to show that the 90 day period was not a sufficient period of time for it to make a determination. Mr. Galligan did not extend the time for notice.

It is clear in that case, however, that both of the insurers were potential payors. Canadian General was the insurer of the Applicant's father. The Canadian General policy did cover dependants. In addition, the Applicant was an occupant of the vehicle insured by AXA.

In another Decision dealing with "notice", Bruce Robinson rendered a Decision in Unifund Insurance Company v. Simcoe and Erie General Insurance Company, decided May 1, 1997. In that case, Unifund insured a personal vehicle owned by the Applicant for benefits. On the date of loss, the Applicant was operating a cab insured by Simcoe and Erie. The Applicant misled Unifund as to the circumstances under which he operated the cab so that Unifund simply paid the benefits and hardly considered, initially, that Simcoe and Erie ought

to have responded to the claim. Approximately one year after receipt of the Application for Accident Benefits, Unifund finally put Simcoe and Erie on notice.

In the Unifund v. Simcoe and Erie case, Mr. Robinson underlined the fact that the onus rested with the first insurer receiving an Application for Accident Benefits to establish that the 90 day period allowed for notice was not a sufficient period of time and that that insurer had made the reasonable investigations within the 90 day period. Mr. Robinson, in effect, criticized the investigation by the first insurer and the delay by that insurer in completing the investigation. He determined that the Regulation set out a "specific course of action for insurers to sort out their priority disputes in a timely fashion".

It should be noted that in the Unifund v. Simcoe and Erie case, Unifund did insure the personal vehicle of the Applicant. In addition, Simcoe and Erie did insure the cab operated by the Applicant.

The only two decided cases dealing with notice under Regulation 283/95 are those referred to above. In the Canadian General v. AXA case, the father of the Applicant paid premiums covering accident benefits such that if the Applicant was his dependant, coverage would be provided under the Canadian General policy. The owner of the vehicle in which the Applicant for benefits was an occupant, paid a premium to cover occupants of the vehicle who might be entitled to benefits under the SABS, if those occupants were not insured elsewhere.

In the Unifund v. Simcoe and Erie case, the owner of the cab paid a premium for accident benefits coverage so that if the Applicant was a regular user of the cab, he would be entitled to claim benefits under the SABS. Furthermore, the Applicant himself was a named

insured on another vehicle insured by Unifund and paid a premium for accident benefits coverage to cover himself.

One can contemplate instances, in addition to the one before me, in which it will be difficult to determine whether the time for notice under s. 3(2) ought to be extended. What decision will be made in a case in which an Applicant is a passenger in one vehicle and does not disclose that he has a vehicle of his own or that his spouse has a vehicle, when the paying insured does not discover another potential insurer until two years or three years later?

CONCLUSIONS

In the subject case, Guardian insured P & S Auto Collision. In the final analysis, the vehicle operated by the Applicant Adiyaman was not owned by P & S Auto Collision. No vehicle insured by Guardian was involved in the accident.

Mr. Adiyaman submitted an Application for Accident Benefits to Guardian on the basis that the vehicle which he was operating was owned by P & S Auto Collision. That turned out not to be the case.

No person who qualifies as an insured person under the Guardian policy was entitled to benefits under the SABS as a result of the subject accident.

When premiums were paid for accident benefits coverage on the Guardian policy, coverage under the SABS was to be provided to a regular user of the vehicle owned by P & S Auto Collision and to passengers in that vehicle, which passengers did not have coverage elsewhere. The premium was not intended to extend coverage to those in the position of Adiyaman in this case.

How then can it be argued that Guardian should ultimately be responsible to pay benefits in this case. Yet, by reason of Ontario Regulation 283/95, Guardian was called upon to respond, in the first instance, to the claims of Adiyaman.

It can be argued that the onus was then on Guardian to comply with s. 3 of the Regulation and to give appropriate notice to Wawanesa or every other potential paying insurer, within 90 days of the receipt by Guardian of a completed Application for Accident Benefits.

By reason of Ontario Regulation 283/95, an insurer who has no connection to an accident can be called upon to pay benefits, if that insurer is not careful.

In this case, Guardian knew within the 90 day period, that Wawanesa insured a vehicle owned by the spouse of Adiyaman. That should have alerted Guardian to place Wawanesa on notice immediately, in order to protect Guardian's position. By early February 1997, having received the report from Michael Damm, Guardian was aware of the fact that the vehicle operated by Adiyaman, was not owned by P & S Auto Collision. Guardian then had it underlined by Mr. Damm that Wawanesa was a potential payor. Guardian was distracted by the fact that it appeared that the insurer of Nubridge was the insurer that ought to respond to the claim. Guardian proceeded to attempt to hunt down that insurer. In that regard, it appears from the evidence that Mr. Damm could have proceeded more quickly on that part of the investigation and that he probably should have been able to complete that part of the investigation within the 90 day time frame.

Ms. Takahashi argues on behalf of Guardian that the 90 day period was not a sufficient period in which to make a **final** determination as to which insurer ought to pay. She acknowledges that Wawanesa had been identified but argues that it appeared that the insurer of

Nubridge was the insurer that ought to have responded and that it was not verified until after the 90 day period that Nubridge had no insurance. She argues that Guardian made reasonable investigations within the 90 day period since Guardian within that time frame, determined that the vehicle involved in the accident was owned by Nubridge and not P & S Auto Collision. She points out that Adiyaman misled Guardian by initially advising that the vehicle involved was owned by P & S Auto Collision and by initially denying that he had any connection with Nubridge at all.

What makes this case different than the other two cases referred to, is the fact that Adiyaman did not qualify as an insured person under the Guardian policy unless he was the regular user of a vehicle owned by P & S Auto Collision. He did not qualify as an insured person under the Guardian policy since the vehicle involved was not owned by P & S Auto Collision. Those facts make this case different than the other two cases.

I am being asked by Wawanesa to make a literal and strict interpretation of s. 3(2) in a case in which Guardian should never have been called upon to pay benefits at all.

The true fact is that Wawanesa, in equity, should be the insurer that ultimately pays the benefits.

I am critical of the course taken by Guardian. As soon as Guardian learned that the vehicle involved in the accident was owned by Nubridge Auto, and not by P & S Auto Collision, Guardian should have immediately put Wawanesa on notice. Guardian could have continued the investigation to identify the insurer of Nubridge Auto even if Guardian had been put on notice.

If an insurer puts another insurer on notice under this Regulation, there is a time frame of one year from the provision of notice to commence an Arbitration. Accordingly, even if Guardian had put Wawanesa on notice in November 1996, Guardian could have completed its investigation in respect of Nubridge before commencing any Arbitration.

Notwithstanding my criticism of Guardian, it is my conclusion that I will extend the time for notice in this case beyond the 90 day time frame. As it turned out, that 90 day time frame was not a sufficient period of time to allow Guardian to identify the insurer of Nubridge Auto. Further, Guardian did not delay its initial investigation. The investigation was commenced within a couple of weeks of the accident. The investigations made were reasonable, although they could have been completed more efficiently, and on a more timely basis.

If I did not extend the time for notice by invoking s. 3(2), that would mean that an insurer that ultimately had absolutely no responsibility to pay benefits would wind up paying the benefits nonetheless. That result would not be an equitable one. Nonetheless, by reason of the provisions of s. 3(2), I have not had to apply provisions of s. 31 of the *Arbitration Act*, 1991 which allows me to decide a dispute in accordance with the law, including equity.

The issue before me was to decide whether Guardian may give notice in this case after the 90 day period. I have concluded that Guardian may give notice after the 90 day period and that the notice ultimately given by Guardian was appropriate in this case.

The matter of the quantum to be recovered was not before me at this stage of this Arbitration. Had that issue been before me, I would have determined that any interest on amounts due from Wawanesa to Guardian run only from the date that notice was actually provided by Guardian to Wawanesa.

In some of these cases, the insurer that had been processing the claim will attempt to recover various expenses from the insurer that ultimately has to pay. I have not rendered a Decision as to whether the paying insurer can recover such expenses from the insurer ultimately responsible. However, in this case, on these facts, if such expenses were recoverable, I would have allowed such expenses to run only from the date of notice and not before.

A second issue in this case arises by reason of the fact that this Arbitration was not commenced within one year from the time that Guardian first gave notice to Wawanesa. The notice in this case was dated June 20, 1997. I find that Wawanesa is estopped from raising the limitation provisions of s. 7 of the Regulation since Wawanesa, through its claims personnel, led Ms. Takahashi to believe that Wawanesa was taking over carriage of the claims advanced by Mr. Adiyaman.

COSTS

In the circumstances of this case, I decline to award costs of the Hearing to Guardian, notwithstanding that I have determined the notice provision in favour of the position advanced by Guardian.

I am of the view that the proper disposition in respect of the fees and expenses of the Arbitrator is to have those fees and expenses split with one-half being paid by each of the parties.

Had Guardian put Wawanesa on notice as a potential payor early on, the Hearing could have been avoided. On the other hand, at the initial Pre-Hearing in this case, it appeared that Wawanesa was conceding all issues pending a review of file documents. At a later time,

the issue of notice was raised and at an even later time, the limitation period in s. 7 of the Regulation was raised.

Counsel may speak to me if difficulties arise in sorting out the quantum to be paid by Wawanesa to Guardian.

DATED this 5th day of August, 1999.

Stephen M. Malach, Q.C.