**IN THE MATTER OF THE *INSURANCE ACT*,**
**R.S.O. 1990, c. I. 8, Section 268 AND**
**REGULATION 283/95 THEREUNDER**

**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 :

JEVCO INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

# DECISION

## COUNSEL

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(hereinafter referred to as "Jevco")

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(hereinafter referred to as "Wawanesa")

## ISSUES

In the context of a priority dispute pursuant to s. 268 of the Insurance Act R.S.O. 1990, c. I.8, the preliminary issues before me involve the 90 day notice requirement upon an insurer which seeks indemnity from another insurer it feels stands in priority. More specifically the preliminary issues before me are:

a) as between Jevco and Wawanesa, which insurer is responsible to pay statutory accident benefits to Mr. Khusseeall;

(b) when did Jevco receive a completed Application for Statutory Accident Benefits; and,

(c) is Jevco able to rely on Section 3(2) of Regulation 283/95 in putting Wawanesa on notice that Wawanesa is the priority insurer more than 90 days after receipt of the Application for Benefits.

**LAW**

The "Priority Rules" contained in s. 268(2) of the Insurance Act sets out the hierarchy to determine which insurer is liable to pay statutory accident benefits to a claimant. In the case before me the claimant was a bicyclist and therefore a "non-occupant" of a motor vehicle at the time of the collision. For non-occupants of a vehicle, the non-occupant of a vehicle has recourse firstly against the insurer of an automobile in respect of which the non-occupant is an "insured". If the claimant was not an "insured" under a policy of motor vehicle insurance then the insurer of the striking vehicle would then stand in priority:

> *Section 268 (2) – Liability to pay – The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> *2. In respect of non-occupants,*
>
> *i. The non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,*
> *ii. If recovery is unavailable under subparagraph I, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,*
> *iii. If recovery is unavailable under subparagraph I or ii, the non-occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,*
> *iv. If recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.*

The definition of "insured person" is contained within the *Statutory Accident Benefits Schedule – Effective September 1, 2010*.

> *"insured person" means, in respect of a particular motor vehicle liability policy,*
>
> *(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,*
>
> *(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or*
>
> *(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,*
>
> *(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or*

> *(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario;*
>
> *Statutory Accident Benefits Schedule – Effective September 1, 2010, O. Reg 34/10, s. 3(1),*

Relevant to the present fact situation is that under the *Statutory Accident Benefits Schedule* "insured person" includes, *inter alia*, the spouse of the named insured. In the case before me it was alleged and eventually admitted, that although separated for several years, the claimant was still married to Jacqueline Goncalves who was insured with Wawanesa. Accordingly, as an "insured person" under the Wawanesa policy, Wawanesa would stand in priority to the insurer of the striking vehicle Jevco provided it met the notice requirements set out in the governing legislation.

Regulation 283/95, sets out the specific details that govern how a dispute is to be processed and provides for an Arbitration with regards to this dispute, to be in accordance with guidelines set out in the Arbitrations Act, 1991, S.O. 1991, c.17, as amended.

> *Ontario Regulation 283/95 – Disputes Between Insurers, reads as follows:*
>
> *"1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O.Reg.283/95, s.1.*
>
> *2. The first insurer that received a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O.Reg.283/95, s.2.*
>
> *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. O.Reg.283/95, s.3(1).*
>
> *(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. O.Reg.283/95, s.3 (2).*

The crucial issue in the case before me is whether Jevco has met the notice requirements of section 3 as outlined above.

**FACTS**

This dispute arises out a motor vehicle accident occurring on July 1st, 2011. Khusseeall Khusseeall was operating a bicycle when struck by a motor vehicle owned and operated by Daniel Balvers, which vehicle was insured by Jevco. Mr. Khusseeall had no automobile insurance policy of his own. He applied to Jevco for statutory accident benefits.

The Application for Accident Benefits, together with OCF-5 and OCF-10 were forwarded by letter from Mr. Khusseeall's solicitor, Daniel Balena, dated August 8th, 2010. Such letter was received by Jevco on August 10th, 2011. With respect to marital status, the Application for Accident Benefits indicated that he was separated at the time of the accident. The information provided did not include an OCF-3 (Disability Certificate).

On August 16th, 2011, Jevco retained an independent adjuster, ProFormance Adjusting Solutions, to obtain a statement from Mr. Khusseeall.

On August 16th, 2011, Jevco wrote to Khusseeall Khusseeall and his solicitor, advising, *inter alia*, that they were awaiting a completed OCF-3 (Disability Certificate) in order to determine entitlement to benefits.

On September 2nd, 2011, Jevco received the report of its independent adjuster, ProFormance Adjusting Solutions and the statement of Khusseeall Khusseeall. In the statement of Khusseeall Khusseeall, Mr. Khusseeall indicated that he had been separated for six to seven years and that his spouse's name was Jacqueline Gonsalves, but that he did not know her whereabouts nor could he remember her date of birth. He indicated that she owned a vehicle when they lived together. The report of ProFormance recommended that Jevco "initiate investigation to find claimant's spouse to address priority of payment".

On September 7th, 2011, Jevco wrote to Mr. Khusseeall requesting information regarding his spouse's insurance coverage and, her address, date of birth and any other relevant information.

A task note prepared by Jevco's adjuster on September 7, 2011 confirmed she was aware of the 90 day time limit but noted the last day to serve notice was December 10, 2011. (As you will see in the Analysis section of this Decision, the December 10, 2011 date was an error in calculation on the adjuster"s part.)

On September 12th, 2011, Jevco conducted an Auto Plus Search on Khusseeall Khusseall to determine whether he had any policies of automobile insurance under which he was listed. No policies were found.

On September 30th, 2011, Jevco conducted a Canada 411 Search for Jacqueline Gonsalves in Ontario. There were more than twenty results.

On September 30th, 2011, Jevco wrote to Khusseeall Khusseeall and his solicitor, again requesting information on Mr. Khusseall's spouse.

On October 3rd, 2011, Jevco received a letter from the solicitor of Khusseeall Khusseeall, Daniel Balena, advising that Mr. Khusseeall is not married and there is no other coverage available.

On November 22nd, 2011, Jevco received the OCF-3 (Disability Certificate) dated November 17th, 2011 from Mr. Khusseeall's treating physician, Dr. Lai.

On November 30th, 2011, Jevco wrote to Daniel Balena and Mr. Khusseeall, requesting, *inter alia*, proof that Mr. Khusseeall and his former spouse, Jacqueline Gonsalves, were divorced.

On December 5th, 2011, Jevco received correspondence from Daniel Balena indicating that Mr. Khusseeall and his wife had separated in 2002 but had not divorced.

At some point in time Jevco retained an investigator, Intrepid Investigations, to ascertain the whereabouts of Mr. Khusseeall's estranged spouse, Jacqueline Gonsalves. The adjuster testified on her Examination Under Oath that it was sometime in October 2011 but there was no documentary evidence before me to confirm this. On or about December 7th, 2011, the investigator determined the whereabouts of Jacqueline Gonsalves and vehicle information for her. Intepid Investigations were able to determine her address, date of birth, driver's licence number and the make and licence plates of two vehicles she potentially owned. On December 13th, 2011, Jevco performed a plate search on Jacqueline D. Gonsalves, thought to be the estranged spouse of Mr. Khusseeall.

Once the plate research was received, on December 19th, 2011, Jevco performed an Auto Plus Search on Jacqueline Gonsalves and determined that she was insured under a policy of insurance with Wawanesa.

On the same date, being December 19th, 2011, Jevco sent a facsimile transmission to Wawanesa with a Notice of Application of Dispute Between Insurers, claiming that Wawanesa was the priority insurer.

Simultaneously, on December 19th, 2011, Jevco sent a letter and Notice of Application of Dispute Between Insurers to Mr. Khusseeall, his counsel and to Wawanesa, claiming that Wawanesa was the priority insurer.

Wawanesa has produced a Certificate of Insurance confirming that it had issued a policy of automobile insurance insuring Jacqueline Gonsalves for the period June 17th, 2011 – June 17th, 2012.

On July 10th, 2014, counsel for Jevco wrote to counsel for Wawanesa, asking, *inter alia,* for confirmation that Wawanesa accepts that Khusseeall Khusseeall and Jacqueline Gonsalves remained married as of the date of the motor vehicle accident giving rise to the within action.

On August 14th, 2014, counsel for Jevco wrote to counsel for Wawanesa again, requesting acceptance of the above.

On August 20th, 2014, counsel for Wawanesa admitted on behalf of Wawanesa that Khusseeall Khusseeall and Jacqueline Gonsalves were spouses as of the time of the motor vehicle accident giving rise to the within arbitration.

**ANALYSIS AND FINDINGS**

I will first deal with the issue as to when Jevco first received a completed application for benefits. An insurer need only give notice of a priority dispute within 90 days of receiving a completed application for benefits. Ontario Regulation 283/95 "Disputes Between Insurers", Insurance Act, R.S.O. 1990, c. I.8,

> *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.*

An "application" is defined in the Regulation as an Application for Accident Benefits (OCF-1). A "completed application" is a completed and signed Application for Accident Benefits.

> *"application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule;*
>
> *"completed application" means a completed and signed application;*
>
> *Ontario Regulation 283/95 "Disputes Between Insurers", Insurance Act, R.S.O. 1990, c. I.8*

Mr. Khusseeall submitted what Wawanesa claims was a completed and signed Application for Accident Benefits, which was received by Jevco on August 10, 2011.

Jurisprudence would indicate that a "completed application" for the purposes of section 3 of the Regulation can also be either genuinely complete, functionally adequate or treated as complete based on the conduct of the first insurer. In *Ontario (Finance) v. Pilot Insurance Company (Ontario v. Pilot)*, 2012 ONCA 33 (CanLII), it is noted at para 42,

> *"I would adopt the approach that has developed through the jurisprudence -- particularly as set out by Perell J. in Lombard -- to determine when an insurer has received a "completed application" for the purposes of s. 3 of O. Reg. 283/95. That is to say, and as I will discuss below, a completed application is one that is (1) genuinely complete; (2) functionally adequate for its legislated purpose; or (3) treated as complete based on the conduct of the first insurer."*

The Application for Accident Benefits (OCF-1) submitted by Mr. Khusseeall was according to Wawanesa genuinely complete for the purpose of the Regulation. It was completed on the required OCF-1 form, it was signed and dated and all of the required parts, including marital status, were completed. Wawanesa maintains that Application for Accident Benefits was functionally adequate for the purposes of determining priority when received by Jevco on August 10, 2011.

I have been referred to the following passage:

> *"Consistently, a functionally adequate application constitutes a "completed application" under s. 3. An insurer is not permitted to rely on shortcomings in written documentation as grounds for claiming that the 90-day notice period has not commenced. As soon as the insurer has sufficient information to notify another insurer that it is disputing liability to pay the benefits, the 90-day notice period starts running."*
>
> *Ontario v. Pilot, 2012 ONCA 33 (CanLII), para 50*

In *Wawanesa Mutual Insurance Co. v. Waterloo Mutual Insurance Co. 2014 ONSC 533 (CanLII)* it was determined that a functionally adequate application need not provide complete and exact priority information to specifically identify a priority insurer and insurance policy. This standard of perfection would render the reasonable investigation and saving provisions under the Regulation absurd. As such, a functionally adequate application need only provide sufficient information to allow reasonable priority investigations to begin.

From the date Mr. Khusseeall's Application for Accident Benefits was received by Jevco on August 10, 2011, it was apparent that Mr. Khusseeall likely had a spouse and could potentially have coverage under his spouse's policy, if there was one. It is also clear that from Jevco's adjuster's task note of September 7, 2011, that Jevco was proceeding with adjusting the claim on the basis that a completed application for benefits was received on August 10, 2011.

> *"Another principle that has developed in the jurisprudence involves circumstances where the first insurer receives an inadequate application but is treated as if it had received a completed application because of its conduct. Waiver, estoppel, delay and deflection have all been seized on as examples of such conduct."*
>
> *Ontario v. Pilot, 2012 ONCA 33 (CanLII), para 58*

Wawanesa takes the position that on August 10, 2011, Jevco received completed application for benefits that triggered the start of the 90 day notice period pursuant to the Regulation. As such, Jevco had until November 8, 2011 to provide the required notice to Wawanesa.

Wawanesa also provides an alternate argument as to when a completed application was received. In the alternative, Wawanesa submits that Jevco received a functionally adequate application when it received Mr. Khusseeall's signed statement on September 2, 2011. This signed statement confirmed Mr. Khusseeall was separated from his spouse, provided her name and confirmed that she had owned a vehicle while they were together. This information clearly provided Jevco with the ability to proceed with further reasonable investigation to locate her and to identify whether Ms. Gonsalves had a vehicle and an insurance policy.

Therefore, if the 90 day period began running as of September 2, 2011, Jevco had until December 1, 2011 to provide notice to Wawanesa.

I am satisfied on the evidence before me that Jevco received a "completed Application for Accident Benefits" on August 10, 2011 and certainly by the time it received the signed statement from the claimant on September 2, 2011.The notice of dispute between insurers was served on December 19, 2011. This was more than 90 days after Jevco received the completed Application for Accident Benefits of Mr. Khusseeall and more than 90 days after it received the signed statement from the claimant identifying the name of his wife. Therefore, Jevco must rely on the saving provisions contained in section 3(2) of the Regulation in order to be successful in this arbitration.

The case law indicates that the onus is on Jevco to prove that its investigations were reasonable in all the circumstances of the case. Counsel for Jevco admits that this onus must be satisfied by Jevco.

The information provided by Mr. Khusseeall on his OCF-1 indicated he was separated and not divorced. This information was confirmed and his wife's name was provided in Mr. Khusseeall's signed statement of September 2, 2011. It was only the one letter from an administrator at Mr. Khusseeall's legal representative's office that indicated he was not married. No proof of divorce was ever provided.

Despite admitting that there was a suspicious discrepancy between Mr. Khusseeall's OCF-1, signed statement and the letter dated October 3, 2011 from his legal representative, theJevco adjuster did nothing at all to independently to solve the obvious discrepancy as to marital status. Jevco's adjuster reported that she made several undocumented phone calls to Mr. Balena's office, but did not send a follow-up letter until November 30, 2011 seeking proof that Mr. Khusseeall was not married.

The fact that Jevco was provided with some misleading information (information from the claimant's counsel initially that the claimant was not married and was divorced) and there may have been some delay in the claimant's lawyer in responding to requests for marital status information is not enough, in my view, to rely on the saving provisions in section 3(2) of the Regulation. There are two leading cases that deal with an insurer being provided with misleading information or facing a lack of cooperation. These cases also provide an overview as to when the saving provision of s. 3(2) ought to be applied.

The decision of Primmum Insurance Co. v. Aviva Insurance Co. of Canada (2005) O.J. No.1477 (S.C.J.) was an appeal from an Arbitration Decision wherein the Arbitrator concluded that Primmum had breached Section 3(1) of the Regulation and had not conducted the necessary reasonable investigations so as to rely on Section 3(2)(b) of the Regulation. On appeal before Mr. Justice Ducharme of the Ontario Superior Court of Justice, the Appellant Primmum submitted that the 90 period was not sufficient because it was given inaccurate information by the insureds which prevented Primmum from obtaining the necessary facts which would have enabled it to determine that it was not liable to pay statutory accident benefits. The Appellant argued that Primmum was intentionally misled by its insureds and that even if the misrepresentation or non-disclosure was not intentional, if the insurer relies on the incorrect or incomplete information in determining liability, then for the purposes of Section 3(2)(a) of the Regulation, the 90 day period is not sufficient time to make the determination. The Respondent took the position that the possibility of incorrect information is the reason that insurers are permitted 90 days to make their determination of liability. The Respondent took the position that the insurer seeking to rely on Section 3(2) must demonstrate that the evidence was not available to them within the 90 day period. The Respondent maintained that the evidence was available to Primmum, if only they had asked the correct questions. Mr. Justice Ducharme concluded that with respect to Section 3(2)(a), the principal issue is not whether the non-disclosure or misinformation provided to the Appellant was the result of dishonesty or some other more innocent reason. Rather, 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. He held that it was for the insurer who seeks to rely on Section 3(2) to demonstrate why, in the particular case, the non-disclosure or misrepresentation made the 90 period inadequate. It was concluded that the 90 day period was more than enough time to conduct an investigation that the Appellant's problem was that they did not do so. Mr. Justice Ducharme then proceeded to deal with the reasonable investigations necessary to satisfy

Section 3(2)(b) of the Regulation. He concluded that in making such assessment of reasonableness, it is appropriate to consider both what was done to investigate the claim, as well as what was not done. He ultimately concluded that with a proper investigation that was available to the insurer within the 90 day period, it could have obtained the necessary information to determine the other priority insurer. He agreed with the Arbitrator's Decision that Primmum had failed to satisfy the requirements of Section 3(2)(b) of Regulation 283/95.

The Respondent also refers to the decision of Liberty Mutual Insurance Co. v. Zurich Insurance Co. (2007) 88 O.R. (3d) 629. The facts of that case involved a 13 year-old bicyclist who came into collision with an automobile. An application for accident benefits was made to the insurer of the automobile. The application form stated that the boy lived in Markham and indicated incorrectly that there was no other insurance policy of any person on whom the boy was dependant. The insurer began investigations to determine whether there was a priority insurer. The insurer took 19 different investigation methods, including communications and attempted communications with the boy and his mother and their lawyers and even surveillance of the vehicles parked at the boy's home. As a result of the investigation, the insurer served Notice to Dispute on the insurer of the father's vehicle, alleging that it was priority insurer obliged to pay benefits to the boy. The notice was sent 55 days past the deadline. Although the Arbitrator acknowledged that the insurer faced a definite lack of co-operation and spent a great deal of time and effort to overcome this problem, it was nevertheless his conclusion that 90 days was not an insufficient period of time. On appeal, Justice Perell completed a thorough analysis of the caselaw relating to Section 3 of Ontario Regulation 283/95. Justice Perell writes:

> *"14. The case law of arbitrators and of courts about section 3(2) establishes several principles. Section 3(2) is to operate strictly, because an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits: Canadian General Insurance Co. v.AXA Insurance Co. [1996 CarswellOnt 5821 (F.S.C.O. Arb.)] (Galligan, December 19, 1996); State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2001), 53 O.R. (3d) 436 (Ont. S.C.J.); affd. (2002), (sub nom. Kingsway General Insurance Co. v. West Wawanosh In Co.) 58 O.R. (3d) 251 (Ont.C.A.); Primmum Insurance Co. v. Aviva Insurance Co. of Canada, [2005] O.J. No.1477 (Ont. S.C.J.).*
>
> *15. Section 3(2) is designed to immediately engage the provision of benefits for the insured and to encourage the insurer who is providing the benefits to promptly exercise due diligence to make a determination whether another insurer should be responsible to pay: Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company (Malach, August 5, 1999); Axa Insurance Company v. Co-operators Insurance Company (Rudolph, May 1, 2000).*
>
> *16. It is, however, desirable to interpret s.3(2) in such a way as to discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified: CGLI Group (Canada) Ltd. v. Zurich Canada (Jones, October, 2001).*
>
> *17. The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time: Ontario Municipal insurance Exchange (OMEX) v. Liberty Mutual Insurance Company (Jones, October 2000); Coseco Insurance Company v. Allstate Insurance Company (Malach, November 15, 2001); ING Halifax Insurance Company v. Liberty Mutual Insurance Company*

*(Malach, January 2, 2002); Federated Insurance Company of Canada (Malach, September 2, 2003); Coseco Insurance Company v. Lombard Insurance Company (June 3, 2004).*

*18. The onus is on the party relying on the late notice provisions of s.3(2) to show that 90 days was not a sufficient time for the determination.*

*19. The circumstances of each case must be examined to determine whether 90 days was not a sufficient time for the determination: CGU Group (Canada) Ltd. v. Zurich Canada, (Jones, October, 2001); State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company (Jones, January 2002).*

*20. From these principles, the question emerges of how an insurer may satisfy the onus of showing that 90 days was not a sufficient time for a determination. Given the fact-specific nature of the inquiry, it is not surprising that the cases about s.3(2) are contentious, and there are examples where the insurer has satisfied the onus of showing that 90 days was not sufficient: Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company (Malach, August 5, 1999): Ontario Municipal Insurance Exchange (OMEX) v. Liberty Mutual Insurance Company (Jones, October 2000); Coseco Insurance Company v. Allstate Insurance Company (Malach, November 15, 2001); Federated Insurance Company of Canada (Malach, September 2, 2003); Coseco Insurance Company v. Lombard Insurance Company (June 3, 2004).*

*21. And there are cases, where the insurer has failed to meet the onus: Canadian General Insurance Company v. Axa Insurance Company (Galligan, December 19, 1996); Unifund Insurance Co. v. Simcoe & Erie General Insurance Co. (May 1, 1997), Robinson Member (F.S. Trib.); State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2001), 53 O.R. (3d) 436 (Ont. S.C.J.), sub. nom. West Wawanosh v. Kingsway General Insurance Company, reversing (Malach, April 6, 2000); Axa Insurance Company v. Co-operators Insurance Company (Rudolph, May 1, 2000); CGU Group (Canada) Ltd. v. Zurich Canada, (Jones, October 2001); Primmum Insurance Company v. Aviva Insurance Co. of Canada (Ont.S.C.J.); State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company (Jones, January 2002).*

*22. However, one situation seems clear. If the insurer shows that it actually was impossible to make a determination within 90 days, then it will have satisfied the onus of showing that 90 days was not a sufficient time for a determination: Coseco Insurance Company v. Allstate Insurance Company (Malach, November 15, 2001); Federated Insurance Company of Canada (Malach, September 2, 2003).*

*23. A review of the case law reveals however, that something less than proving that a determination was impossible within 90 days will suffice to satisfy the onus. Put somewhat differently, 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 the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.*

*24. Section 3(2)(a) is directed toward the ability of the insurer to gather the necessary facts to make a determination within 90 days: State Farm*

*Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2001), 53 O.R. (3d) 436 (Ont.S.C.J.); affd. (2002), (sub nom. Kingsway General Insurance Co. v. West Wawanosh Insurance Co.) 58 O.R. (3d) 251 (Ont.C.A.); Primmum Insurance Co. v. Aviva Insurance Co. of Canada, [2005] O.J. No.1477 (Ont. S.C.J.).*

*25. The co-operation or non-co-operation of the accident victim or the insured and any advertent or inadvertent misrepresentations of information are relevant but not in themselves determinative of whether the insurer had sufficient time: Primmum Insurance Company v. Aviva Insurance Co. of Canada, [2005] O.J. No.1477 (S.C.J.).*

*26. In Primmum Insurance Co. v. Aviva Insurance Co. of Canada, supra, Ducharme, J. addressed the relevance to the determination of whether the insurer had sufficient time to make an investigation of the circumstance that the insured had misrepresented the facts. Ducharme, stated in para. 27:*

*Having reached the conclusion I have with respect to s.3(2)(a), it should be clear that the principal issue is not whether the non-disclosure or misinformation provided to the appellant was the result of dishonesty or some other more innocent reason. Rather the only issue under s.3(2)(a) is whether the receipt of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case. It is for the insurer who seeks to rely on s.3(2) to demonstrate why, in the particular case, the non-disclosure or misrepresentation made the 90) day period inadequate.*

*27. In Primmum Insurance Co., Justice Ducharme was commenting about a case where the insurer was confronted with a problem about non-disclosure or inaccurate disclosure of information during the investigation, but I would generalize his comment to say that there may be other factors that are relevant to determine whether the 90-day period was a sufficient time, but the issue remains whether those factors make the 90-day period insufficient in any particular case.*

*28. It seems to me that what the insurer knew and did not know, what the insurer did and did not do, and what the insurer could and could not do in the particular circumstances are all relevant factors to the determination of whether the insurer had sufficient time to make a determination that another insurer is obliged to pay the benefits. In State Farm Mutual Automobile Insurance Company v. Lloyd's of London Insurance Company (Jones, January 2002), without intending to be exhaustive, Arbitrator Jones identified the completeness and accuracy of the application form, the cooperation provided by the interested parties, the number of potential insurers, and the press of other demands on the adjuster's time as relevant factors."*

In the final analysis, Mr. Justice Perell concluded that notwithstanding the fact that the investigations that the insurer undertook were reasonable, it had not shown that 90 days was insufficient to identify another insurer that might stand in priority. He concluded that it was not impossible for Liberty to find out about the claimant's natural father within 90 days, despite the difficulties with which it was confronted because of the confusing names, multiple addresses, misinformation and competing demands of work. This case clearly indicates how difficult it is to meet the saving provisions of s.3 of the *Insurance Act.*

In my view, a thorough investigation should have been instigated immediately by Jevco upon receiving the OCF 1 on August 10, 2011 indicating that the claimant was separated. The insurer of a spouse of a claimant would stand in priority to the insurer of the striking vehicle. A statement from the claimant was quickly obtained identifying the name of his spouse. Further information was sought from the claimant's solicitor who initially indicated that the claimant was not married and was divorced. Jevco received this information on October 3, 2011 by way of letter dated September 30, 2011. Jevco takes the position that the time clock for the 90 day notice requirement only started on October 3, 2011 when the discrepancy as to marital status was confirmed. I cannot accept this argument. In my view the time clock began to run when Jevco received the OCF 1 indicating that the claimant was separated (as opposed to being divorced) and certainly no later than when the name of the spouse was identified in the signed statement from the claimant on September 2, 2011. At that time Jevco had the information that was used at a much later date to quickly identify the spouse's insurer. I am satisfied that such information could have been obtained with reasonable effort within the 90 day window.

On December 5, 2011, Jevco received confirmation from the claimant's solicitor that Mr. Khusseeall was, in fact, not divorced. At some point in time Jevco hired an investigator. The adjuster testified on her Examination Under Oath that it was sometime in October 2011that the investigator was hired but there was no documentary evidence before me to confirm this. Perhaps it was just a coincidence that the Intrepid investigation took place the day after Jevco got written confirmation that the claimant was separated and not divorced. The report from Intrepid Investigations Inc. indicates that their investigation was conducted and completed on December 6, 2011. This identified the spouses address and date of birth. It remains unclear as to exactly when Intrepid was retained to locate and obtain information with respect to Jacqueline Gonsalves. If it really was sometime in October that an investigator was retained, as suggested by the adjuster in her Examination Under Oath, then follow up with the investigator ought to have been completed with the rapid approach of the 90 day limitation. There is no evidence before me that follow up with the investigator was made. Furthermore, there is no evidence before me of a reasonable explanation for any delay in obtaining the information by Intrepid once retained for that purpose. There is no evidence before me as to how simple or how difficult it was to obtain the information with respect to Jacqueline Gonsalves once retained for that purpose. If Intrepid was retained as early as October I would have expected to hear evidence from them as to the difficulties they faced between late October and December 6, 2011. Simply stated, if there was a reasonable explanation as to why they could not have obtained the information in a timely fashion I would have expected evidence from them in that regard. Jevco has failed the onus in satisfying me that 90 days was an insufficient period of time in which to secure the necessary information.

If the investigator Intrepid was only retained on December 5, 2011, when Jevco received written confirmation from the claimant's solicitor, then the investigation was simply initiated too late. It ought to have been initiated at a much earlier date. It ought to have been initiated as soon as the conflict became apparent and claimant's counsel was not providing proof of divorce in a timely fashion. The OCF 1 received August 10,2011 indicted that the claimant was separated. The written statement of the claimant received by Jevco September 2, 2011 indicated that he had been separated for 6 or seven years and provided name of his wife. I find that it was reasonable to initially seek confirmation from claimant's counsel as to marital status, as was done. However, when conflicting evidence was received from claimant's counsel on October 3, 2011, steps ought to have been taken to independently determine the marital status issue. 90 days from receipt of the OCF 1 would make the time limit for putting Wawanesa on notice was November 8, 2011. 90 days from receipt of the signed statement from the claimant confirming that he was separated and providing the name of his wife would make the time limit for putting Wawanesa on notice was December 1, 2011. Either way, there was sufficient time (one or two

months) to independently verify marital status. If there was a reasonable explanation for not being able to obtain that verification in this timeframe then that evidence is simply not before me.

Based on the results of the Intrepid investigation provided to Jevco on December 7, 201, Jevco requested an Autoplus Search. The report was received on December 19, 2011 and it identified the Wawanesa policy of Ms. Gonsalves. Therefore, Jevco was able to identify Wawanesa as a potential priority insurer within 14 days of receiving the letter confirming Mr. Khusseeall was not legally divorced. However, Jevco had knowledge of a potential spouse as of August 10, 2011 and had direct knowledge of Ms. Gonsalves as of September 2, 2011.

I cannot help but find that Jevco could easily have requested the investigations, ultimately performed by Intrepid Investigation Inc. in December 2011, as early as September 2, 2011, when Jevco first received Mr. Khusseeall's signed statement providing the name of his wife or at least soon thereafter. In fact, the investigation report enclosing the signed statement of Khusseeall back in early September recommended that Jevco "initiate investigation to find claimant's spouse to address priority of payment". Jevco completed some investigation by trying to get information from the claimant"s solicitor but with clock ticking ought to have done more within the 90 day notice period. I find that Ms. Gonsalves' particulars could have been obtained in a much more timely fashion, well within the 90 day notice period. Had Intrepid Investigations Inc. been retained on September 2, 2011 or soon thereafter, the evidence indicates that Wawanesa would have been identified as a priority insurer well within the 90 day time frame described in the Regulation.

I conclude that 90 days was sufficient time for Jevco to perform these investigations, however, Jevco chose not to pursue any additional reasonable investigations other than attempted communications with the claimant's solicitor until the time limit to provide notice had already expired or was about to expire. I find that alternative methods of locating the spouse, like retaining Intrepid, ought to have been done at an earlier stage.

Simply stated, if Jevco was unsure of Mr. Khusseeall's marital status, all avenues of investigation should have been pursued within the 90 day time frame, rather than relying solely on Mr. Khusseeall's legal representative to provide this information. Furthermore, Mr. Khusseeall was unable to provide any more detailed information about his wife than was already contained in his signed statement. Therefore, in my view and as I have indicated earlier, Jevco was in receipt of all the information it required to continue with their reasonable investigations by September 2, 2011 and if steps to obtain information regarding Jacqueline Goncalves and insurance available to her were initiated at that time the identity of available insurance would have been would have been known well within 90 days.

In reaching my decision, I must remain cognizant of the words at page 5 the decision of Justice Perell in *Liberty v. Zurich* (supra):

> *"Section 3(2) is to operate strictly, because the insurer is entitled to know at an early stage that it will be managing and responsible for payment of benefits."*

I find that Jevco has not satisfied the requirements of section 3(2). Jevco has failed to meet the notice requirements of the Insurance Act as contained in Ontario Regulation 283/95 "Disputes Between Insurers".

**ORDER**

In light of the findings aforesaid, I hereby order that the application herein is dismissed. I order that Jevco pay Wawanesa's legal costs of this arbitration on a partial indemnity basis. I order that Jevco pay the arbitrator's costs.

DATED at TORONTO this 21st )

day of December, 2014. )

KENNETH J. BIALKOWSKI
Arbitrator