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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and –

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Marianne Davies – Flaherty, McCarthy LLP
Counsel for the Applicant, Allstate Insurance Company of Canada
(hereinafter referred to as "Allstate")

Mark K. Donaldson – Dutton, Brock LLP
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company
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(hereinafter referred to as "Dominion")

ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant Jonathan Eyamie with respect to personal injuries sustained in a motor vehicle accident which occurred on June 22, 2008. As a preliminary issue, I must deal with a motion brought by Dominion to dismiss the priority application on the basis that it was not provided with Notice of Dispute

within the time requirements set out in the Dispute Between Insurers Ontario Regulation 283/95.

PROCEEDINGS

The preliminary issue with respect to notice was dealt with by way of written submissions as well as oral submissions which took place on December 14, 2016.

AGREED FACTS

1. This priority dispute arbitration commenced by Allstate Insurance Company of Canada ("Allstate") arises as a result of a motor vehicle accident that occurred on June 22, 2008 (the "Accident").

2. The claimant, Jonathan Eyamie, was 13 years old at the time of the Accident (born January 19, 1995).

3. Mr. Eyamie is represented by Tara Sweeney of Soloway Wright (Ottawa).

4. The Accident occurred at the intersection of Riverside Drive and Tremblay Road, Ottawa. Mr. Eyamie was a rear seat passenger in a vehicle that was rear-ended. The vehicle was being driven at the time by Darren Graham.

5. Mr. Graham was identified on the Motor Vehicle Accident Report as being insured by Allstate under a policy of automobile insurance bearing policy number 092978675.

6. State Farm Mutual Automobile Insurance Company ("State Farm") insured the vehicle in which Mr. Eyamie was travelling.

7. Dominion of Canada General Insurance Company ("Dominion") insured Mr. Eyamie's father, Joseph Eyamie, under an automobile policy (Policy no. 0712806) that was in place from November 2007 to November 2009.

8. On behalf of Jonathan Eyamie, an Application for Accident Benefits (OCF-1) was submitted to Allstate and received on November 22, 2013.

9. Allstate received the Motor Vehicle Accident Report on November 22, 2013.

10. As it was the first insurer to receive a completed Application, Allstate began adjusting Mr. Eyamie's AB claim.

11. The 90 day deadline for Allstate to provide Notice to all other priority insurers under s.3(1) of Ontario Regulation 283/95 was February 20, 2014.

12. The claims notes of Allstate indicate that by at least December 11, 2013, it needed to confirm priority.

13. A Notice to Applicant of Dispute Between Insurers was first sent by Allstate to State Farm under cover of letter dated January 21, 2014.

14. Allstate wrote to counsel for Mr. Eyamie on January 21, 2014, advising that Allstate was incorrectly identified as the insurer of the vehicle in which Mr. Eyamie was a passenger, and that the driver of this vehicle was insured by State Farm. Allstate further advised that either State Farm or "Mr. Eyamie's parents' automobile policy that was in force on the DOL" should respond."

15. Allstate received information from Mr. Eyamie's counsel on February 4, 2014 regarding Mr. Eyamie's father, Joseph Eyamie. The information provided to Allstate included Joseph Eyamie's name, address, date of birth, and driver's license number.

16. By letter dated February 4, 2014, State Farm acknowledged receiving the Notice to Applicant of Dispute Between Insurers that was sent by Allstate to State Farm on January 21, 2014, and refused to accept priority as it needed to "establish if [Mr. Eyamie] has any coverage under any other policies."

17. The adjuster with carriage of the file on behalf of Allstate, Molly Khandai, left a voicemail message with State Farm regarding priority status on April 17, 2014.

18. By letter dated April 22, 2014, Allstate acknowledged State Farm's letter of February 4, 2014, and denied that it was the priority insurer, explaining that the Motor Vehicle Accident Report incorrectly identified Allstate as the insurer of the vehicle in which Mr. Eyamie was a passenger.

19. By letter dated July 10, 2014, Allstate wrote to State Farm denying priority and enclosing an Autoplus search for Mr. Eyamie's father. The Autoplus search was conducted on June 9, 2014.

20. By letter dated August 11, 2014, State Farm wrote to Allstate denying priority and requesting documentation to assist in determining the priority insurer.

21. On August 19, 2014, State Farm advised Allstate that Mr. Eyamie's parents had a policy with Dominion in effect at the date of loss and that it was a regular auto policy.

22. On August 19, 2014, a Notice to Applicant of Dispute Between Insurers was provided by Allstate to State Farm and purportedly provided to Dominion.

23. By letter dated the same day, August 19, 2014, State Farm responded to Allstate denying priority and noting that Mr. Eyamie's father was insured by Dominion under an automobile policy of insurance on the date of the Accident.

24. A Notice Demanding Arbitration was sent by Allstate to State Farm and Dominion under cover of letter dated November 18, 2014, which was served on State Farm and Dominion on November 19, 2014.

25. Dominion received Notice on January 6, 2015, from State Farm pursuant to section 10 of O. Reg. 283/95.

ANALYSIS AND FINDINGS

The preliminary issue herein is strictly to determine whether Dominion was provided with proper and timely Notice of the within priority dispute as required by Ontario Regulation 283/95. More specifically, the issue is whether Allstate, as the first tier insurer, which did not provide Notice to Dominion of a priority dispute within 90 days as required by section 3 of Regulation 283/95, is somehow saved by notice having been provided by State Farm (as second tier insurer) to Dominion (as third tier insurer), which it is argued by Dominion also provided Notice beyond the required time under s.10 of Regulation 283/95. To be determined is whether there is any time limit on notice of second tier insurer to a third tier insurer, and if so, what is a reasonable time for such notice.

The case law which has evolved with respect to priority disputes has given rise to terminology to identify the various insurers involved. The insurer to have first received "a completed application for benefits" is referred to as the first tier insurer. The insurers who are put on notice by the first tier insurer that they might stand in priority for the payment of accident benefits are referred to second tier insurers. The insurers who are put on notice by the second tier insurer that they might stand in priority for the payment of accident benefits are referred to as third tier insurers.

Ontario Regulation 283/95 stipulates that the first insurer to receive a completed Application for Accident Benefits must commence paying accident benefits to the applicant and put any other insurer that it believes to be of higher priority on notice within 90 days of receiving the completed application for benefits. Subject to certain strict and limited exceptions as set out in the saving provision of s.3(2), an insurer's failure to comply with the 90 day notice period is fatal to its priority dispute.

The relevant sections of Regulation 283/95 are set out below:

> 2. (1) The first insurer that receives 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.
>
> (2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010.
>
> …

> 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 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.
>
> …
>
> 7. (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed.
>
> …
>
> 10. (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).
>
> (2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).
>
> (3) The dispute among the insurers shall be resolved in one arbitration. O. Reg. 283/95, s. 10 (3).

The completed Application for Accident Benefits (OCF-1) was received by Allstate on November 22, 2013 making the 90 day deadline for Allstate to provide Notice to "every insurer it claims is required to pay" to be February 20, 2014 subject to the saving provision of s. 3(2).

Notice was not provided to Dominion until just 4 days shy of 1 year after the receipt by Allstate of the completed Application for Accident Benefits (OCF-1), on November 18, 2014.

The Notice provided to Dominion by the second tier insurer State Farm, which was provided pursuant to s.10 of Regulation 283/95, is alleged to "save" Allstate from having not conducted reasonable priority investigations to determine all potential priority insurers within the 90 day period following receipt of the completed Application for Accident Benefits.

It is the position of Dominion that a first tier insurer (Allstate) cannot be saved from its own failure to conduct priority investigations within the 90 day period pursuant to section 3 of

Regulation 283/95 by subsequent Notice being provided by a second tier insurer (State Farm) to a third tier insurer (Dominion). That is, Allstate ought not be permitted to do through section 10 of Regulation 283/95 what it was required, but failed to do, by section 3 of Regulation 283/95.

It is further submitted by the moving party Dominion that, given the factual circumstances of the within dispute, State Farm ought to be held to a 90 day Notice Requirement under s.10 of Regulation 283/93.

Now dealing with the specific facts of this case, it is the position of Dominion that Allstate did not conduct sufficient priority investigations within 90 days of receiving the completed Application for Accident Benefits (OCF-1), apart from reviewing the Motor Vehicle Accident Report. Had Allstate conducted such investigations, including the simple step of obtaining an Autoplus search on Mr. Eyamie's parents given that Mr. Eyamie was a minor (he was 13 years old at the time of the accident), it would have been able to identify Dominion as a potential priority insurer, and would therefore have been able to provide Notice to Dominion within 90 days as required by s.3 of Regulation 283/95.

The claims notes of Allstate that have been provided indicate that by at least December 11, 2013, which was within the 90 day Notice period, it needed to confirm priority.

Thereafter, Allstate wrote to counsel for Mr. Eyamie on January 21, 2014, advising that Allstate was incorrectly identified as the insurer of the vehicle in which Mr. Eyamie was a passenger, and that the vehicle was actually insured by State Farm. Allstate further advised that either State Farm or "Mr. Eyamie's parents' automobile policy that was in force on the DOL" should respond.

On the same date, January 21, 2014, Allstate served State Farm (the identified insurer of the vehicle in which the claimant was a passenger) with a Notice of Dispute well within the 90 day period required by s.3.

At this point, Allstate was aware of other potential priority insurers in addition to State Farm, namely the insurer, if one existed, of the parents of the infant claimant, given the likelihood that the claimant was likely principally financially dependent upon his parents, thereby making the claimant an "insured" on the parents' policy, placing that insurer in higher priority

to the insurer of the vehicle in which the claimant was a passenger. Still, no Autoplus search or other investigations appear to have been completed by Allstate at that time.

Subsequently, Allstate received information from Mr. Eyamie's counsel on February 3, 2014, regarding the infant claimant's father, Joseph Eyamie, so as to permit it to conduct priority investigations, should it have chosen to do so. The information provided to Allstate included Joseph Eyamie's name, address, date of birth, and driver's license number. This information was provided to Allstate 17 days prior to the expiration of the 90 day notice requirement of s.3.

By letter dated February 4, 2014, State Farm acknowledged receiving the Notice to Applicant of Dispute Between Insurers that had been sent by Allstate to State Farm on January 21, 2014, and refused to accept priority as it needed to "establish if [Mr. Eyamie] has any coverage under any other policies."

Nothing further happened until the adjuster with carriage of the file on behalf of Allstate, Molly Khandai, left a voicemail message with State Farm regarding priority status on April 17, 2014.

By letter dated April 22, 2014 – which was now beyond the 90 day deadline under s.3 of Regulation 283/95 – and was 91 days from the date of Notice provided to State Farm – Allstate acknowledged State Farm's letter of February 4, 2014, and denied that it was the priority insurer, explaining that the Motor Vehicle Accident Report incorrectly identified Allstate as the insurer of the vehicle in which Mr. Eyamie was a passenger.

Again and still, there is no indication that Allstate or State Farm had conducted any priority investigations by the time of April 22, 2014.

By letter dated July 10, 2014, Allstate wrote to State Farm again denying priority. It had by now however, conducted an Autoplus search for Mr. Eyamie's father, which was provided to State Farm. The Autoplus search was conducted on June 9, 2014.

However, Allstate incorrectly reported to State Farm that Mr. Eyamie's father, Joseph Eyamie, did not have any automobile insurance available to him. This was now 230 days from the receipt of the Completed OCF-1 by Allstate and 170 days from Notice being provided to State Farm.

The adjuster for Allstate at the time, Molly Khandai, incorrectly noted that “at the time of the loss Jonathan Eyamie had no Auto insurance coverage available to him.” She was further incorrect to note that the Autoplus search for Joseph Eyamie “shows no valid policy on the date of loss.” The Autoplus did show a policy with the Dominion that was in effect for the period of November 2007 to November 2009, which was renewed as of November 7, 2008. The Policy holder was Joseph Eyamie and the Policy no. was 0712806. Thus, as of June 9, 2014, Dominion claims Allstate was aware (or should have been aware) that Joseph Eyamie was insured under an automobile policy issued by the Dominion. State Farm would have been aware of this as of July 10, 2014 when it received the Autoplus search. Still, Notice was not provided to Dominion.

Thereafter, by letter dated August 11, 2014, State Farm wrote to Allstate denying priority and requesting documentation to assist in determining the priority insurer.

Then, on August 19, 2014, a Notice to Applicant of Dispute Between Insurers was provided by Allstate to State Farm and was purportedly provided to Dominion. However, the letter was faxed to Dominion at number 1-800-263-6027, which is not associated with Dominion, but is connected to a number of insurance brokers. There is no record of the August 19, 2014 letter and enclosed Notice to Applicant of Dispute Between Insurers having been provided to the Dominion on this date.

By letter dated the same day, August 19, 2014, State Farm responded to Allstate denying priority and noting that Mr. Eyamie’s parents had a policy with Dominion in effect at the date of loss and that it was a regular auto policy.

A Notice Demanding Arbitration was sent by Allstate to State Farm and Dominion under cover of letter dated November 18, 2014, which was served on State Farm and Dominion on November 19, 2014. This would have been Dominion’s first notice of a potential priority claim as it might be inferred that if there was a Notice Demanding Arbitration there must be a priority dispute underway.

Following this Notice, the priority dispute was first addressed by Dominion by Pamela Ground on November 24, 2014. This was the first entry in Dominion’s claims notes. Ms. Ground noted that there was “no indication on file to suggest that The Dominion has ever been put on notice for priority dispute.”

Clearly Dominion had received a Notice Demanding Arbitration before it had received a Notice of Dispute but obviously realizes that there must have been a priority dispute underway.

Dominion received Notice of Dispute on January 6, 2015, from State Farm pursuant to section 10 of O. Reg. 283/95. Dominion points out that this was 410 days following the receipt by Allstate of the completed Application for Accident Benefits on November 22, 2013, and 350 days from when State Farm received Notice from Allstate on January 21, 2014.

Dominion maintained that such delay is not in keeping with what ought to be the strict time lines that the legislation requires and relies on the appeal decision in *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* (2007) 88 O.R. (3d) 629, where Justice Perell completed a thorough analysis of the caselaw relating to s.3 of Ontario Regulation 283/95. According to Justice Perell (at para. 14 - 18):

> 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…
>
> 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…
>
> 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…
>
> 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…
>
> 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.

Justice Perell further noted (at p.5) that "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."

From the foregoing, the following principles have been established according to Dominion with respect to a first tier insurer: (a) the 90 day Notice provision operates strictly; and (b) the

first tier insurer must promptly exercise due diligence and make reasonable investigations to make any determination of any potential priority insurers.

However, it should be kept in mind that Justice Perell was dealing with s. 3(2) and not s.10.

Furthermore Dominion takes the position that a similar 90 day notice requirement or at least a reasonable period to provide notice given the facts of each case ought be imposed upon a second tier insurer giving a third tier insurer pursuant to s.10.

The difficulty with the position advanced by Dominion is that there are four decisions already dealing with that issue which have all concluded that there is no time limit on a second tier insurer putting a third tier insurer on notice. Many of the arguments advanced by Dominion here were also advanced in those cases. The four cases are:

> Wawanesa v. Peel Mutual and Economical Mutual Insurance Company
> (Arbitrator Samis - January 28, 2011 and June 21, 2011)
>
> Certas Direct Insurance Company v. Security National Insurance Company
> (Arbitrator Bialkowski - February 2, 2012)
>
> Economical v. MVACF
> (Arbitrator Densem – January 7, 2015)
>
> The Co-operators v. Perth Insurance, Aviva Canada, Intact Insurance Company, TD Insurance Company
> (Arbitrator Bialkowski - February 3, 2015)

In the first of these cases, Arbitrator Samis held that the time limit under s.3 to provide notice to other insurers did not apply under s.10 of Regulation 283/95. The reason for this was because the type of information and sources of information available to first tier insurers would not necessarily be available to a second tier insurer. Arbitrator Samis believed that this would place an undue burden on a second tier insurer. According to Arbitrator Samis (at p. 3-4):

> "It is argued before me that this provision requires me to apply the section 3 time limit for notification not only to a notice under section 3, but also to a notice under subsection 10(1). I find this unpersuasive. Aside from the obvious fact that the regulation does provide for the notices in two different sections, only one of which is subject to the 90 day limit, sub-section 10(2) applies the regulation provisions to other insurers already "given notice" only in the same way that it applies to the original (first tier) insurer.

> The first tier insurer is entitled to receive a completed application. The second tier insurer does not necessarily have a completed application, and certainly it is not a condition precedent to its liability as contemplated re first tier insurers. In short, it is impossible for the Regulation to apply to the second tier insurers "in the same way" that it applies to the original (first tier) insurer.
>
> To apply the Notice rule to the second tier insurer vis-à-vis a third tier insurer does not fit within the provisions of the regulation. The second tier insurer is necessarily not the "first insurer," nor is it the insurer paying benefits under section 2. The second tier insurer is not entitled to be in receipt of a completed (or any) application from the SABS claimant. The second tier insurer does not enjoy the benefit of SABS sections 31 and 32 that allow the SABS insurer to obtain information from the claimant that might assist in identifying higher ranking insurers that should be shouldering the burden of payment.
>
> While meeting the 90 day deadline might be challenging for the first tier insurer, that standard of response seems completely unsuitable when cast over an insurer that lacks the most basic access to information that might be critical to impleading the ultimately responsible insurer. I don't overlook the provisions of section 6 of the regulation in this regard, but note the lack of any compliance parameters that might give hope for a prompt and fulsome response to inquiries made by an insurer that is not administering the claim. At best section 6 is a poor tool if it is to be used to ferret out priority information in a short time frame.
>
> I conclude that blindly applying the section 3 procedural provisions to second tier insurer actions is not consistent with the wording of the regulation, and is insensitive to the context. To apply the section 3 provisions to second tier insurers would give rise to an injustice, ultimately resulting in the payment of benefits by the wrong insurer. The regulation is designed to facilitate a process that will lead to the cost of a claim being visited upon the correct insurer, without burdening the insured person with prosecution of priority dispute issues. It would be abhorrent to interpret the regulation in a manner which has the opposite result unless that outcome is required by the clear and specific language of the regulation. The language of the regulation does not have that clarity.
>
> Section 10 does generally apply the regulation provisions to disputes between second and third tier insurers. But this can only go so far. The regulation provisions can only be applied to the second tier insurer to the extent that the provisions address circumstances that apply to the second tier insurer. As the second tier insurer does not, in the context of the SABS regulation or other provisions, have the right to receive a completed application, and is not the "first insurer," section 10 cannot be fairly read as applying the very strict provisions of section 3 to the second tier insurer." [emphasis added]

The crux of Arbitrator Samis' decision was based on the fact that the second tier insurer would unlikely have access to the kind or type of information and documentation available to the first tier insurer to conduct a thorough priority investigation, and so cannot be held to the same 90 day deadline. Conceivably, the second tier insurer might only have the Notice itself and no completed Application for Accident Benefits and no right to examine the claimant through the provisions of the Statutory Accidents Benefits Schedule as they are only available to the insurer presented with the application for accident benefits. The wording of

section 10 provides no obligation on the part of the first tier insurer to provide the application, police report, Autoplus search or Examination Under Oath transcript which may be in their possession. Obviously, the second tier insurer would be in much disadvantageous position to that of a first tier insurer.

In *Certas*, Arbitrator Bialkowski came to the same conclusion that there was no time limit on when a second tier insurer could put a third tier insurer on notice. He adopted the reasoning of Arbitrator Samis in *Wawanesa*. He further indicated that if a time limitation were intended to be placed on the second tier insurer, the legislators could easily have placed such time limit in wording of s.10 but chose not to. Section 10 provides no express words as to a time limit on a second tier insurer giving notice to a third tier insurer. He went on to explain why the absence of a time limit on notice to a 3rd party insurer would unlikely cause any significant delay to the loss transfer process and writes:

> "The Respondent Security National argues that if one were to accept Arbitrator Samis' reasoning, a 3rd tier insurer could possibly be put on notice by a 2nd tier insurer some ten to fifteen years after the 2nd tier insurer's receipt of the Notice of Intention to Dispute. On a practical level, this is unlikely to happen. No insurer wants to be saddled with the obligation of adjusting or paying benefits to a claimant when some other insurer might stand in priority. On a practical level, insurers will complete an investigation as quickly as possible, once put on notice by a 1st tier insurer, to determine if some other insurer stands in priority. The burden of having to adjust a claim and pay benefits is sufficient motivation to an insurer to determine whether another insurer stands in priority at the earliest possible date. The delay here of 16 months is, in my experience involving priority disputes, an anomaly and that 2nd tier insurers normally place potential 3rd tier insurers on notice as quickly as possible so as not to be saddled with the obligation to adjust and pay benefits while investigating whether another insurer stands in priority. If the legislators had intended a 90 day notice requirement on 2nd tier insurers it could easily have used specific working of such obligation in s. 10 of Ontario Regulation 283/95 as set out above."

Dominion takes the position that the facts in the case here are different than the cases outlined above and should lead to a different result. Allstate put State Farm on notice on January 21, 2014 well within the 90 day requirement of s.3. Keep in mind that Allstate had been mistakenly shown as the insurer of the vehicle in which the claimant was a passenger. It determined that State Farm was the actual insurer. The Allstate adjuster's log notes as early as December 2013 indicate that they were aware of priority issues that needed to be investigated. Dominion maintained that Allstate had the police report and knew that the claimant was an infant. They ought to have assumed the infant was dependent on his parents and if the parents had automobile insurance it would stand in priority to the insurer in

whose vehicle which the claimant was simply an occupant. On February 3, 2014 (73 days following the receipt of the completed application for accident benefits), Allstate was provided by claimant's counsel with the full name, date of birth, address and driver's licence number of the claimant's father. Dominion claims that Allstate should have immediately completed an Autoplus search which would have identified Dominion as the father's automobile insurer. Simply stated, Allstate was in a position to identify Dominion within 90 days of having received the application for benefits and therefore should be precluded from advancing its priority claim. The Autoplus search was not conducted until June 2014. Dominion claims that the rationale of the *Wawanesa* decision of "blindly" applying the time requirements of s.3 do not apply here since Allstate had the information needed to identify both priority insurers within 90 days and ought to have placed both on notice at that time. Not having done so should bar Allstate's claim against Dominion as notice was provided well beyond 90 days namely January 6, 2015.

On the evidence before me I am satisfied that with reasonable efforts, Allstate could have identified the insurer of the infant claimant's father either within 90 days or soon thereafter and well within the saving provision of s. 3(2). I further accept the fact that there is a certain unfairness in the circumstances of this particular case. However, the issue of whether there is a time limit created by Ontario Regulation 283/95 with respect to a second tier insurer putting a third tier insurer on notice must be determined on the basis of a reasonable interpretation of the wording of the statute itself. Having considered the able arguments advanced on behalf of Dominion I find that a time limit does <u>not</u> exist with respect to a second tier insurer placing a third tier insurer on notice and involving them in the priority dispute. I reach this conclusion for four reasons. First and foremost, the legislators chose not to include a time limit in s.10 as they did in s.3 of the Regulation. I cannot help but find that had the legislators felt that a time limit was to exist then the wording would have so indicated and the wording of s.10 is absent any time limit. Secondly, the concerns of Arbitrators Samis and Bialkowski as to the limited information in the hands of a second tier insurer and its ability to obtain the necessary information is real. The Statutory Accident Benefits Schedule requires a claimant to provide to the insurer that an application is sent with, if requested, a statutory declaration and attend an Examination Under Oath to obtain additional information (and information as to possible priority insurers), failing which the insurer is not obligated to pay benefits. This tool to obtain necessary information at risk to claimant of benefits not being paid is not available to a second tier insurer. In addition, there is nothing in the

Regulation identifying the information and documentation that a first tier insurer must provide to second tier insurer. As I have indicated earlier, the legislation does not set out any requirement upon the first tier insurer to provide a copy of the application, a police report, an Autoplus report or, for that matter, any of the documentation or information in its possession. Clearly, the second tier insurer does not have the same tools and access to information that a first tier insurer would have and accordingly would have a more difficult time identifying an insurer standing higher in priority. Thirdly, I am satisfied that the risk upon a second tier insurer having to adjust and pay benefits while trying to identify a third tier insurer is sufficient to insure that in most circumstances there will not be a significant delay in the priority process. Finally, if I were to accept the position advanced by Dominion, every case would require an analysis of what information and documentation was in the hands of an insurer and when, so as to determine the reasonable period to provide notice. This case by case analysis would add another layer of unnecessary complexity to what is supposed to be simple, cost efficient scheme to determine priority. For these reasons I am of the view that the legislation cannot be interpreted as placing a time limit on a second tier insurer putting a third tier insurer on notice. It is more important that the proper party to pay the accident benefits is identified. As Arbitrator Samis wrote in *Wawanesa* (supra):

> "To apply the section 3 provisions to second tier insurers would give rise to injustice, ultimately resulting in the payment of benefits by the wrong insurer. The regulation is designed to facilitate a process that will lead to the cost of a claim being visited upon the correct insurer, without burdening the insured person with prosecution of the priority dispute issues. It would be abhorrent to interpret the regulation in a manner which has the opposite result unless that outcome is required by the clear and specific language of the regulation. The language of the regulation does not have that clarity."

I agree with Arbitrator Samis. The importance of identifying the correct priority insurer is more important than applying a time requirement for notice not specified in clear and specific language in s.10.

In reaching my decision I am satisfied that the *Insurance Act* and the *Regulation* are to be interpreted according to the "modern approach" to statutory interpretation as set out in the Ontario Court of Appeal decision in *Wawanesa Mutual Insurance Company v. Axa Insurance (Canada*) 2012 CanLii 592 ONCA. This approach requires that "the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". It requires adjudicators to follow three steps:

1) They must examine the words of the provision in their ***ordinary and grammatical sense***;

2) They must consider the ***entire context*** that the provision is located within; and

3) They must consider whether the proposed interpretation produces a ***just and reasonable result***.

In examining the words of s.10 of Ontario Regulation 283/95 and the absence of any wording creating a time limit for putting a third tier insurer on notice, I am satisfied that no such time requirement exists. Furthermore, the practicalities of the priority scheme are such that a second tier insurer will likely act quickly to avoid being saddled with adjusting and paying benefits that another third tier insurer ought be paying benefits. In my view the present situation is neither unjust nor unreasonable. I find that there is no time limit on when a second tier insurer has to place a third tier insurer on notice of a priority dispute. I find that Dominion has received proper and timely notice of the priority dispute herein.

ORDER

On the basis of my findings, I hereby dismiss the motion brought by Dominion.

I order that State Farm and Allstate be entitled to their costs with respect to the motion on a partial indemnity basis.

I order that Dominion pay the arbitration costs with respect to the motion herein.

DATED at TORONTO this 19th)

day of December, 2016.)

KENNETH J. BIALKOWSKI
Arbitrator