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 :

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
as represented by THE MINISTER OF FINANCE
(the "MOTOR VEHICLE ACCIDENT CLAIMS FUND")

Applicant

- and -

JEVCO INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Andrew Choi – Loudon & Sterling LLP
Counsel for the Applicant, the Motor Vehicle Accident Claims Fund
(hereinafter referred to as the "Fund")

Rohit Sethi – Intact Insurance Company
Counsel for the Respondent, Jevco Insurance Company
(hereinafter referred to as "Jevco" although now Intact)

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 Aleeshia Bonnell, with respect to personal injuries sustained in a motor vehicle accident which occurred on November 20, 2012.

The preliminary issue to be dealt with is whether the Applicant is precluded from proceeding with the priority dispute on the basis that the arbitration hearing was not completed within the two year time line set out in s.8(2)(5) of Ontario Regulation 283/95 which governs, as its name implies, “Disputes Between Insurers” such as a priority dispute as we have here.

PROCEEDINGS

This matter proceeded on Factums, Agreed Statement of Facts, Document Briefs and oral submissions which took place on June 12, 2017.

OVERVIEW

Aleeshia Bonnell and Amanda Goncalo were occupants of a Honda Accord when it crashed on November 20, 2012 in a single vehicle accident. Both Aleeshia Bonnell and Amanda Goncalo applied to the Fund for accident benefits. The vehicle was owned by Chris James. An insurance search indicated the vehicle was insured by Jevco (now Intact) at the time of the accident. The Fund’s adjuster, Claimspro, sent priority dispute notices to Jevco in each of the two accident benefits claims. The priority dispute notice for Ms. Bonnell’s claim was sent to Jevco on June 25, 2013. Arbitration was initiated by letter of February 12, 2014.

Jevco accepted priority for the claim of Ms. Goncalo on January 27, 2017, but there continues to be a dispute regarding Ms. Bonnell’s claim. Jevco takes the position that the Fund’s claim should be dismissed because the arbitration herein was not completed within two years after its commencement, contrary to the requirement under s.8(2)(5) of Ontario Regulation 283/95, as amended for accidents occurring after September 1, 2010.

FACTS

Ms. Aleeshia Bonnell, at age 24, was injured in an automobile accident on November 20, 2012. At the time of the accident, she was an occupant in a 2005 Honda Accord owned by Chris James. Jevco has been unable to locate Chris James.

At the time of the accident, there was a second occupant in the 2005 Honda Accord by the name of Amanda Goncalo, who was also injured in the same accident.

Ms. Bonnell submitted an application for accident benefits to the Motor Vehicle Accident Claims Fund (the "Fund") on March 6, 2013, through her lawyers Gosai Law.

Ms. Goncalo also submitted an application for accident benefits to the Fund on August 15, 2013, through her paralegal from the Accident Resolution Group.

On or about June 14, 2013, Claimspro (the independent adjusting firm acting on behalf of the Fund) received a letter from Ms. Bonnell's lawyers enclosing the police report in respect to the subject accident. The police report identified Chris James as the owner of the 2005 Honda Accord in which the claimant was an occupant. On June 24, 2013, Claimspro conducted an Autoplus search for Chris James and found that he was a named insured under policy HOAP321436 issued by Jevco. Claimspro, on behalf of the Fund, sent a priority dispute notice to Jevco on June 25, 2013 in respect of Jevco policy HOAP321436 issued to Mr. James.

On August 27, 2013, Claimspro obtained the Ministry of Transportation records for Chris James which confirmed that he owned a 2005 Honda passenger vehicle bearing licence plate # BKLT293 which is noted on the police report as having been the vehicle involved in this incident.

On November 21, 2013, Claimspro sent a follow-up priority dispute notice to Jevco.

On January 7, 2014, Claimspro sent a further follow-up priority dispute notice to Jevco.

On January 9, 2014, Claimspro received a call from Guida Fernandes of Jevco with respect to the claim of Ms. Goncalo. Ms. Fernandes advised that they were trying to get in contact with their insured but were unable to reach him. Jevco had been and continues to be unable to locate their insured Chris James. Jevco also advised in this telephone conversation that their investigation would continue.

On February 12, 2014, Claimspro sent a letter to Jevco entitled "Notice of Commencement of Arbitration". The letter clearly refers to the Bonnell claim only. Both the Fund and Jevco agreed that the letter initiated arbitration in accordance with the Regulation.

On April 29, 2014, Sunil Manocha of Claimspro called the Jevco claims department, at which time Jevco confirmed receipt of the letter of February 12, 2014 commencing the arbitration according to the log notes.

On July 9, 2014, Sunil Manocha of Claimspro called the Jevco claims department, at which time he attempted to leave a message to the adjuster regarding the priority dispute. The call is referred to in Claimspro's claim notes.

On July 9, 2014, Claimspro sent a further follow-up priority dispute notice to Jevco. The letter entitled "Priority Dispute Notice – 4th Follow Up" indicated that if a response was not received in the next 15 days, the file would be assigned to counsel.

On July 30, 2014, Claimspro received a voicemail from Guida Fernandes of Jevco with respect to the claim of Ms. Goncalo. Ms. Fernandes advised that she had requested a copy of the underwriting file and would continue her investigation. She indicated that she would respond shortly to the priority dispute. Not having received a timely response the Fund took no steps to appoint an arbitrator or to move the dispute forward at this time.

On April 30, 2015, Claimspro received a call from Guida Fernandes of Jevco who advised that Jevco was still investigating priority. A request was made by Jevco for the accident benefits files of both claimants. The accident benefits file and log notes were not forwarded until July 2016, some five months after the February 12, 2016 expiry of the two year limitation to complete the arbitration according to s. 8(2)(5). The call is referred to in the log notes of both adjusters.

Correspondence was exchanged between representatives of the Fund and Jevco in the period of May 1, 2015 to June 24, 2016.

Date	***From***	***To:***	***Page No.***
May 1, 2015	Guida Fernandes	Susannah Fraser	1
May 20, 2015	Susannah Fraser	Guida Fernandes	3
July 20, 2015	Rohit Sethi	Sunil Manocha	4
January 19, 2016	Susannah Fraser	Guida Fernandes	5
January 20, 2016	Guida Fernandes	Susannah Fraser	6
January 28, 2016	Rohit Sethi	Susannah Fraser	7
January 29, 2016	Susannah Fraser	Rohit Sethi	7

January 29, 2016	Rohit Sethi	Susannah Fraser	8
January 29, 2016	Susannah Fraser	Rohit Sethi	8
January 29, 2016	Rohit Sethi	Susannah Fraser	9
February 2, 2016	Susannah Fraser	Rohit Sethi	9
February 2, 2016	Rohit Sethi	Susannah Fraser	10
February 9, 2016	Susannah Fraser	Rohit Sethi	11
February 11, 2016	Rohit Sethi	Susannah Fraser	12
February 22, 2016	Susannah Fraser	Rohit Sethi	12
February 22, 2016	Rohit Sethi	Susannah Fraser	13
February 23, 2016	Susannah Fraser	Rohit Sethi	13
February 23, 2016	Rohit Sethi	Susannah Fraser	14
May 30, 2016	Rohit Sethi	Susannah Fraser	15
May 31, 2016	Susannah Fraser	Rohit Sethi	15
May 31, 2016	Rohit Sethi	Susannah Fraser	16
June 7, 2016	Susannah Fraser	Andrew Choi	16
June 23, 2016	Andrew Choi	Rohit Sethi	17
June 24, 2016	Andrew Choi	Rohit Sethi	18

On May 20, 2015, Claimspro forwarded the Application, priority questionnaire, signed statement and Examination Under Oath transcript of the claimant Goncalo to the adjuster for Jevco. No Examination Under Oath had ever been completed with respect to the subject Bonnell claim. At this time no documentation was forwarded with respect to the smaller Bonnell claim.

By e-mail dated July 20, 2015 and some seven months prior to the two year time frame for completion of the arbitration hearing, Rohit Sethi advised that he had been retained as counsel by Jevco to defend the priority claim. However, the reference line only referred to the Goncalo claim.

On January 19, 2016, Claimspro advised the adjuster for Jevco by e-mail that unless they received a response to the Bonnell priority claim they would be appointing counsel.

By e-mail dated February 2, 2016, counsel for Jevco asked Claimspro by e-mail when arbitration was initiated and requested all investigation, notices and correspondence between the Fund and Wawanesa (one of the insurers the Fund thought might stand in priority). By letter dated February 9, 2016, Claimspro provided the correspondence requested in the letter of February 2, 2016 and indicated that the Fund would be proceeding with the arbitration against Jevco.

The two year limitation to complete the arbitration set out in s. 8(2)(5) of Ontario Regulation 283/95 would have expired on February 12, 2016, subject to any discretion the arbitrator may arguably have to extend same. As of that date, the Fund had yet to appoint counsel.

By e-mail dated February 23, 2016, counsel for Jevco suggests that the Fund appoint counsel.

On June 27, 2016, Kenneth J. Bialkowski was retained to act as Arbitrator in the priority disputes of both Aleeshia Bonnell and Amanda Goncalo.

The Bonnell accident benefits file was received at Jevco on July 14, 2016.

The first pre-arbitration conference took place on July 15, 2016. Counsel for Jevco identified the expiry of the two years set out in s. 8(2)(5) O. Reg. 283/95 as a basis for the denial of the Bonnell claim. The two years with respect to the Goncalo claim was to expire on August 6, 2016. The arbitrator advised counsel that his calendar would be re-arranged to accommodate a hearing before August 6, 2016, unless agreement could be reached on extending the two year requirement. The extension was ultimately granted by Jevco with respect to the Goncalo claim. It was agreed that the arbitration would proceed on April 27, 2017. The Goncalo claim was settled in some fashion prior to the scheduled arbitration. It was agreed that the arbitration of the preliminary issue in the Bonnell claim would take place on June 12, 2017, on the basis of an Agreed Statement of Facts and Document Briefs.

ANALYSIS AND FINDINGS

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor

vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits in a situation like this, where the claimant was an occupant of a motor vehicle. Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
>
> *(ii) If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii) If recovery is unavailable under (1) or (2), the 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund*.

On the basis of this priority hierarchy, Jevco, as insurer of the vehicle in which the claimant was an occupant (s.268(2)(ii)), would stand in priority to the Fund (s.268(2)(iv)) unless it could be established that the claimant was “an insured” (s. 268(2)(i)) under some other policy of automobile insurance.

Disputes Between Insurers O.Reg. 283/95 sets out the process and procedure by which two or more insurers determine disputes with regards to priority of payment of accident benefits.

Section 8(1) and (2) of Disputes Between Insurers O.Reg. 283/95 set out the relevant procedural rules for when a pre-hearing and arbitration are to be completed:

> ***8.*** *(1) Except as provided in this Regulation, the Arbitration Act, 1991 applies to an arbitration under this Regulation. O. Reg. 283/95, s. 8 (1).*
>
> *(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:*
>
> *1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.*

> *2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.*
>
> *3. Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.*
>
> *4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.*
>
> *5. Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration. O. Reg. 38/10, s. 9.[emphasis mine]*

The Respondent Jevco takes the position that the MVACF is precluded from proceeding with this priority dispute as the hearing was not completed within the two years prescribed above.

It was the Fund's position as Applicant that s. 8(2)(5) is not in the nature of a limitation period and a claim is not barred if the arbitration hearing is not completed within two years. The consequences of a failure to meet the two year time limit are in the discretion of the arbitrator. The directive to complete the arbitration within two years as set out in s. 8(2)(5) the Fund argued applies to both parties, and a claim should not be dismissed if the delay is caused fully or in part by the responding insurer, in this case Jevco.

In this case, the Fund submitted that the delay was caused mostly, if not entirely, by Jevco. Jevco did not initially respond to the letter of February 12, 2014 which initiated arbitration. After repeated follow-ups, Jevco advised in July 2014 that it was investigating priority. In April and May 2015, Jevco advised that it was still investigating priority. Since Jevco said it was still conducting its investigation and did not actually deny priority, the Fund, according to the submissions made, did not take steps to get an arbitrator appointed (since involving an arbitrator would give rise to a potentially unnecessary legal expense if it turned out there was no genuine issue to be arbitrated as the Fund believed to be the case). Jevco continued not to communicate a position on priority and therefore in June 2016, the Fund decided to arrange for an arbitrator to be appointed in conjunction with both claimants. The Fund maintained that Jevco insured the vehicle in which Bonnell was an occupant and it made no sense for the Fund to be paying Ms. Bonnell's claim. According to the Fund, there ought to have been no genuine issue regarding priority and Jevco should have accepted priority long ago. However, according to the Fund, Jevco wishes to take advantage of its own lack of

response and delays to defeat the Fund's claim. The Fund claimed that It would be grossly unjust to permit Jevco to do so.

A review of the jurisprudence would indicate that there are only two decisions that deal with the application of section 8(2). The first is *The Co-operators v. Perth Insurance* (Arbitrator Bialkowski – February 3, 2015). The second is the decision in *Unifund Assurance Company and Wawanesa Insurance* (Arbitrator Bialkowski - April 8, 2015).

In *Co-operators,* the Applicant Co-operators received a completed Application for Accident Benefits on May 9, 2012 and proceeded to serve a Notice of Dispute and a Demand for Arbitration to Perth Insurance on June 1, 2012. There was no response to the demand for arbitration until November 19, 2013, when Perth sent a letter to Co-operators advising that they denied they were in priority. Perth subsequently took steps to place Intact, Aviva, and TD (as 3rd tier insurers) on notice on December 20, 2013. On March 6, 2014, counsel for the Co-operators wrote to all four parties advising that they had been retained to proceed with the arbitration proceedings. No explanation was provided as to the delay between Co-operator's Demand for Arbitration on June 1, 2012 and their counsel's letter of March 6, 2014, some 15 months later. After considering the conduct of the parties, the arbitrator found that the failure to complete the arbitration within two years of the commencement of the arbitration did not preclude the arbitration from proceeding. He ordered that Perth, Aviva, and TD which had taken the position that the dispute ought be dismissed, equally pay the costs of Co-operators with respect to the preliminary issues on a partial indemnity basis and the costs of the arbitrator.

In his findings, the arbitrator cited Perth's failure to respond to Co-operators in a timely fashion as a reason for not being able to complete the arbitration within the two years:

> *"If Perth had responded in a timely fashion to Co-operators Demand for Arbitration of June 1, 2012 and in a timely fashion served its Notice of Dispute on the 3rd tier insurers there would have been plenty of time to exchange productions, complete EUOs and complete the arbitration within two years and there would have been no need for me to deal with the limitation issues herein."*

In considering the conduct of the parties, the arbitrator indicated that despite Co-operators delay in assigning counsel to proceed with the arbitration, it was actually Perth's failure to

respond in a timely fashion that placed Co-operators in peril of missing the two year limitation for completing the hearing:

> *"The delay by Co-operators after making the formal demand for arbitration is concerning, however it would have been avoided if Perth would have responded in a timely fashion to Co-operators Demand for Arbitration of June 1, 2012 by either an acceptance of priority or putting forward the names of arbitrators that they would consider. In addition, delay, like that which occurred here, places the first tier insurer in peril of missing the two year limitation in completing the hearing after the arbitration was commenced."*

It is important to note though that there are factual differences between those in *Co-operators* and the case before me. In *Co-operators* counsel were appointed with two years of the Notice to Arbitrate and prepared to proceed with the arbitration. Here, counsel was not appointed until after the two years had expired. In *Co-op*erators, the Applicant had provided the second tier insurer with the documentation and information to allow it to determine if another insurer stood in priority to it. Here, the accident benefits file was not provided until long after the two year limitation for completing the hearing had passed. Furthermore, in *Co-op*erators the 2nd tier insurer Perth brought three 3rd tier insurers into the arbitration before the expiry of the two year limitation. The added complexity of the involvement of 3rd tier insurers and the need to have Examinations Under Oath completed with respect to the dependency issues raised by the 2nd tier insurer against the 3rd tier insurers, made it impractical to have the hearing completed within two years. The differences between the two cases are considerable.

In the second case that I have referred to, *Unifund v. Wawanesa,* the arbitrator stated that the purpose of s.8(2) is to ensure that "the dispute resolution process once initiated is completed in a timely fashion." After a careful analysis of the jurisprudence, the arbitrator concluded that the timelines set out in s.8(2) of the Regulation were directive and permissive rather than mandatory. The arbitrator stated at p. 8:

> *"Unlike the time limitations set out in s.3 with respect to notice of dispute and s.7 with respect to commencement of the dispute, the time limitations set out in s.8 apply to both parties. The section does not say the Applicant must arrange the pre-arbitration hearing within 120 days or the Applicant must complete the arbitration within two years."*

Section 8(2) of the Regulation does not set out a penalty for breach of timelines. In *Unifund v. Wawanesa*, the arbitrator held that "the imposition of some penalty or consequence for a breach of the timelines ought to rest in the discretion of the arbitrator in a priority dispute based on the particular circumstances before the arbitrator and the arbitrator's finding as to which party or parties were responsible for the breach."

I am of the view there are several factors to consider in the determination of whether the Applicant's right to proceed with the arbitration is precluded for not having the hearing completed within two years of the commencement of the arbitration, or the determination of the appropriate penalty, if any, if dismissal is inappropriate. Some of these factors are:

1. Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?
2. Was it practical to complete all necessary steps (production exchange, completion of Examinations Under Oath, obtain satisfaction of undertakings provided, obtain co-operation and production of documents from non-parties, etc.) to be in a position to complete the hearing within two years of the commencement of the arbitration?
3. Did the complexity of the dispute (number of issues, number of parties, involvement of 3rd tier insurers, etc.) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?
4. Has the Respondent been prejudiced by the delay?
5. Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?
6. Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?
7. Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?

The case herein did not involve multiple parties. The issue was a simple one; namely, was the claimant Bonnell "an insured" under any other policy so as to stand in priority by reason

of s. 268(2)(i) rather than Jevco's position in s. 268(2)(iii) being the "insurer of the vehicle in which the claimant was an occupant". Clearly, there was a breach in that the arbitration hearing was not completed within two years. In fact, the Applicant the Fund had yet to retain counsel when the two years expired. The penalty for the breach, if any, ought be determined in these circumstances on the basis of an analysis of the conduct of the parties involved and the extent to which the responding party is prejudiced by the delay caused by the breach.

The initial priority dispute notice with respect to the claim of Ms. Bonnell was sent to Jevco on June 25, 2013. Several follow up letters were sent to Jevco which went unanswered. Claimspro (adjuster for the Fund) sent out its Notice of Commencement of Arbitration letter on February 12, 2014. It was not until April 30, 2015 that Jevco responded by way of a telephone call wherein Jevco advised they were still investigating priority and requested production of the complete accident benefits files of both claimants. Jevco did not provide a written response to the Fund's notices until May 1, 2015, some 15 months after the commencement of the arbitration. In their May 1, 2015 letter, Jevco advised that they were still investigating priority, but only referred to the claim of Ms. Goncalo. Certain requests were made for specific documentation with respect to the Goncalo claim. With respect to the claim of Ms. Bonnell, Jevco had not expressly indicated whether they were denying priority or provided any reasons for a denial which it would rely on for purposes of the arbitration.

Even if we assume that Jevco's letter of May 1, 2015 was meant to address both the claims of Ms. Goncalo and Ms. Bonnell, the Fund has submitted that Jevco's failure to complete its priority investigation in a timely manner is the main reason, if not the only reason, that the arbitration could not be completed within the two year limitation period as set out in section 8(2)(5) of the *Regulation*. Jevco's letter indicates that it was still conducting its priority investigation in May 2015, some 15 months after the Fund sent its letter initiating arbitration in accordance with the Regulation. The Fund took the position that if Jevco had completed its priority investigation in a timely manner, there would have been plenty of time to exchange productions, complete any necessary EUOs, and complete the arbitration within the two years and relies on the decision in *Co-operators* in this regard.

In light of Jevco's conduct, the Fund submitted that its adjusters acted reasonably given the circumstances. Following delivery of the Notice of Commencement of Arbitration in February 12, 2014, they continued to follow up with Jevco with respect to priority and responded to

requests for information in a timely fashion. If Jevco required further information from the Fund to aid in their investigation, they should have requested such information much earlier than the initial request that was made in their letter of May 1, 2015. At that time, there was only nine months left to complete the arbitration within the two year period.

With respect to the Fund's failure to appoint counsel within the two year period, it claimed that it was reasonable to wait for Jevco to conclude its priority investigation, which was still ongoing as of May 2015, before deciding whether they needed to appoint counsel. From a practical standpoint, it did not make sense for the Fund to incur the costs of retaining counsel if there was no denial of priority and no identified issues in dispute.

The Fund pointed out that Jevco never made a demand for a hearing within the two years. Furthermore, any delay in appointing counsel to represent the Fund in relation to the priority dispute of Ms Bonnell's claim did not result in any prejudice to Jevco.

According to the Fund, the failure on the part of Jevco to complete its priority investigation in a timely manner and respond to the claim itself has resulted in the need to deal with the two year limitation issue by way of this hearing. This hearing would not have been necessary if Jevco had responded in a timely fashion by either accepting priority of Ms. Bonnell's claim or providing the Fund with its reasons for denial. As stated in *Unifund v. Wawanesa*, the time limitations set out in s.8 apply to both parties. Jevco cannot seek to rely on section 8 as a bar from proceeding with the arbitration when they themselves have failed to comply with the time limitations by way of their conduct. Given the circumstances of this case, the Fund has taken the position that a dismissal of the priority dispute would be unfair and highly prejudicial to the Fund. The Fund submitted that it is in the best interests of justice to proceed with the arbitration on the merits.

On the basis of the jurisprudence outlined above, I am satisfied that the time requirements set out in s. 8(2)(5) are permissive and not mandatory, thereby providing the arbitrator with discretion to be exercised where circumstances permit. I am also of the view that the obligation to complete the arbitration hearing applies to both parties and their conduct must be viewed against the very reason why s. 8(2)(5) was included in the Regulation, namely to "ensure that the priority dispute resolution process once initiated is completed in a timely fashion". Whether discretion is exercised to extend the two year requirement depends on the

facts of each particular case. Here we have a situation where the required completion of the arbitration of the Bonnell claim expired with the Applicant only appointing counsel four months beyond the expiry of the expressed time limit. Such delay cannot be condoned and is contrary to the very purpose of s.8(2)(5) to "ensure that the priority dispute resolution process once initiated is completed in a timely fashion". To start the process more than two years after the arbitration was commenced and some 3½ years after the accident itself is clearly unreasonable. When an arbitration is commenced, the two year limitation for completion of the hearing ought be diarized. In the absence of a response from the Respondent accepting priority in a timely fashion, it ought be assumed that priority is not being accepted and steps ought be taken to appoint an arbitrator, leaving sufficient time to complete all that is necessary so that an arbitration can be completed within the two years. Should issues then arise making the completion of the hearing within two years impractical without fault of one of the insurers, then agreement can be reached on extending the time or a motion brought to extend the time. To find that there was no breach on the part of the Fund defeats the purpose of the legislation. There was clearly a breach on the part of the Fund. I am of the view that although the overall obligations set out in s.8 apply to both parties, it is the primary obligation of the Applicant who, for the most part, can control the pace of the proceeding. However, in considering any penalty which ought be imposed, the conduct of the responding party must be considered.

I have also considered the proposition that there must be proportionality between the breach and the consequences imposed on the breaching party. I have noted that when assessing fairness and proportionality, the courts have held that there is no unfairness visited upon parties who are insurance companies by insisting on strict compliance with notice requirements. Insurance companies are sophisticated and experienced participants in the insurance industry and have advisors of the, as noted in *State Farm Automobile Insurance Company v. Ontario (Ministry of Finance)* [2001] OJ No. 1115 at paragraph 22, "highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime".

The Fund, as a sophisticated participant, ought to have been aware of its rights and particularly its obligations under the scheme, as well as the requirement for compliance with the Regulation. It therefore ought to have been aware that in order to complete a hearing within two years, it must retain counsel long before the two years expired. It also ought to

have been aware that an arbitrator needed to be retained, a pre-hearing or pre-hearings must be conducted, Examinations Under Oath perhaps needed to be completed and productions needed to be exchanged prior to proceeding to the hearing itself. The penalty imposed on these facts must act as a deterrent to other insurers merely sitting back where no response is received to its Notice to Arbitrate and not co-operating in providing the responding insurer with a copy of the non-privileged portions of its accident benefits file, a copy of the payment summary and the results of the investigation it has conducted with respect to attempting to identify other priority insurers. This would enable the responding insurers in a timely fashion to establish appropriate reserves and depending on the amount involved in the dispute, determine the extent of the investigation required to investigate priority. The extend of such investigation often depends on the amount in issue.

The Fund cannot point blame at Jevco for its speed in investigating priority with respect to the Bonnell and Goncalo claims because this delay was in part created by the Fund's unwillingness to share information critical to Jevco's assessment of risk, its setting of reserves and its investigation into possible defences to the priority dispute. Jevco submitted that no reasonable insurer would have accepted priority without first examining the accident benefits files, analysing the amounts paid and reviewing any and all investigation conducted by the Applicant into priority.

It appears that the Fund refused to share anything with Jevco in relation to the Bonnell claim until July of 2016. The Fund refused to provide summaries of the benefits paid to Goncalo and Bonnell until July of 2016. The Fund also refused to provide Jevco with copies of the accident benefits files and log notes until July of 2016. The information being requested by Jevco was only produced once counsel was retained by the Fund in June of 2016. Finally, Jevco was unaware of the involvement of Echelon, Unifund and RSA in relation to the Bonnell claim until it reviewed the Bonnell log notes provided in July 2016. It was thought initially by the Fund that these three insurers might also stand in priority, but ultimately decided on the basis of their investigation that they did not.

Jevco, as with any 2nd tier insurer, is in a position of disadvantage when investigating priority. It has limited to no access to the claimant; it has limited information about the claimant; and therefore has a limited ability to investigate priority against other insurers. In such a scenario, it is not unreasonable or unfair in my view for Jevco to not accept priority. In

my view, Jevco ought to have been provided with a copy of the non-privileged portions of the accident benefits file and the information regarding the Fund's priority investigation with respect to Echelon, Unifund and RSA which it had put on notice. Jevco's adjuster made a request for the claimants' accident benefits files in April 2015. Another request was made by counsel for Jevco in July 2015. This was not provided by the Fund until July 2016, long after the two year limitation to complete the hearing had expired.

Jevco has submitted that they are prejudiced as the delay created by the Fund has affected Jevco's ability to investigate priority against other insurers, as well as its ability to defend the accident benefits claim advanced by Bonnell. Jevco claims that its ability to investigate these priority issues may have been prejudiced by the passage of time, potential fading of memories and the inability to locate its insured. Jevco has admitted that at this point in time there is no actual prejudice that can be demonstrated but claims there ought to be a presumption that memories have faded and witness evidence will be less reliable. According to Jevco there is a presumption of prejudice created by the time that has passed and the Fund has not introduced any evidence that witnesses, their memories and or relevant documents have been preserved during this time. This prejudice, according to Jevco, cannot be compensated for by costs or suspension of pre-judgement interest.

The difficulty I have in considering the prejudice arguments advanced by Jevco is that they have not tendered any evidence in this proceeding as to what investigation they did in fact complete and specific details as to any roadblock encountered that resulted from the delay caused by a breach of s.8. Jevco now has the full accident benefits file of the claimant Bonnell. It includes an OCF-1 which indicates there was no other insurance available to her, she was not dependent on anyone or had an employer's vehicle made available to her. It also included a statement provided by her dated April 3, 2013, in which the issues of dependency and other possible insurers were canvassed. It too confirmed she was not dependent on anyone nor had other insurance available. However, the truth of these statements has not been challenged by way of an Examination Under Oath and a review of financial and other documentation that may show that she was principally financially dependent on her father, with whom she was living with at the time of the accident, despite collecting welfare. Potential prejudice does exist. Actual prejudice may only come to light if Jevco chooses to proceed with Examinations Under Oath if the matter is allowed to proceed. What also must be considered is that if Jevco now completes its investigation and

Examinations Under Oath and is able to identify an insurer standing in higher priority, it is not too late to involve them in the proceeding. There exists a body of jurisprudence confirming that there is no time limit on a 2nd tier insurer putting a 3rd tier insurer on notice and involving them in the ongoing arbitration.

In my view, Jevco cannot be criticized for not accepting priority until it was in a position to determine if another insurer may have stood in priority to Jevco. The Fund has failed to provide any reasonable explanation for not taking steps to appoint counsel and an arbitrator within a reasonable time following its service of the Notice to Arbitrate so that a hearing could be meaningfully completed within two years of the commencement of the arbitration. The suggestion that it was attempting to save unnecessary legal costs until Jevco had made a firm denial is in my view insufficient. Looking at the Bonnell claim retrospectively, the Fund ought to have provided a copy of the non-privileged portions of the accident benefits file when requested, including the investigation of other insurers in possible priority and a payment summary. The OCF-1 executed by the Applicant includes in Part 11 a consent for the insurer to collect information and disclose such information to other insurers who may be liable in law for amounts being paid by the insurer first having received the claim. The Fund's adjuster ought to have followed with what he threatened to do in his letter of July 9, 2014, namely appoint counsel who would then take steps to appoint an arbitrator. The arbitrator, by way of Order or by obtaining the co-operation of the parties, would ensure that relevant productions were exchanged in a timely fashion, leaving more than a year for completion of Examinations Under Oath and any further priority investigations. At the same time, the conduct of Jevco cannot be ignored. It did not respond to the Fund's Notice of Dispute despite numerous follow-ups. It did not respond in writing to the Fund's Notice to Arbitrate for 15 months after it was delivered. I have no difficulty finding that Jevco's conduct contributed to the delay. In the final analysis, the Fund has breached the primary obligation upon it to move the arbitration forward with dispatch and should be responsible for some penalty for the breach of s. 8(2)(5) as a deterrent to other insurers taking a similar approach. Given the conduct of Jevco as a contributing factor to the delay and the inability to show actual prejudice at this time, the penalty at this time should not include a dismissal of the claim. Should Jevco decide to proceed with a further investigation of the claim and actual prejudice be demonstrated, a further penalty, including possible dismissal of the claim, can be considered. For the time being, I find it appropriate to award the costs of the determination of this preliminary issue to Jevco on a partial indemnity basis, despite the

Fund's success in avoiding a dismissal of the claim, and requiring the Fund to pay the arbitrator's costs of the determination of this preliminary issue as sufficient penalty when one considers that the claim presently involves a mere $7,000 or so and has been dormant for some time. Furthermore, if the Fund is able to establish that the Jevco is the insurer standing in highest priority, then no interest is payable beyond February 12, 2016, the date the arbitration hearing ought to have been completed. A further penalty can be considered if it can later be shown that there was actual and meaningful prejudice suffered by Jevco as a result of the delay. It is premature to make such determination at this time. The dispute is to continue on the merits in the meantime.

ORDER

I hereby order that:

1. The priority dispute with respect to the Bonnell claim is to continue on the merits;

2. The Fund pay to Jevco its legal costs with respect to the arbitration of this preliminary issue claim on a partial indemnity basis;

3. The Fund pay the arbitrator's costs with respect to the arbitration of this preliminary issue;

4. In the event the Fund is successful in demonstrating that priority rests with Jevco, no interest is payable beyond February 12, 2016 on the amount of indemnity found at that time.

DATED at TORONTO this 16th)

day of June, 2017.)

KENNETH J. BIALKOWSKI
Arbitrator