IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended 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 :

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

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(hereinafter referred to as "TD")

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Counsel for the Respondent, Intact Insurance Company
(hereinafter referred to as "Intact")

PRELIMINARY ISSUE – 90 DAY NOTICE AND SAVINGS PROVISION

[1] 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, Chang Yan Zou, with respect to personal injuries sustained in a motor vehicle accident which occurred on February 8, 2014. The preliminary issue before me is essentially a motion brought by the Respondent Intact to dismiss the Applicant TD's priority application for failing to provide a Notice of Dispute in a timely fashion in accordance with s. 3 of O. Reg. 283/95.

PROCEEDINGS

[2] The preliminary issue determination proceeded on the basis of Document briefs, Examination Under Oath transcripts, Books of Authority and Written submissions in April and May 2018.

APPLICABLE LEGISLATION

[3] Section 3 of Ontario Regulation 283/95 - "Disputes Between Insurers" sets out the notice obligations upon an insurer with respect to disputing priority:

> **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).
>
> (1.1) If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.
>
> (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).

FACTS AND FACTUAL FINDINGS

[4] This arbitration arises from a motor vehicle – pedestrian accident that occurred on February 8, 2014, near the intersection of Gerrard Street and Carlaw Avenue in Toronto.

[5] The claimant is Chang Yan Zou.

[6] Following the accident, the claimant applied for accident benefits from TD on the basis that he was dependent on TD's insured. TD has denied that the claimant was dependent on its insured and claims that the insurer of the striking vehicle, Intact, stands in priority. In accordance with the "pay now, dispute later" provisions of O. Reg. 283/95, TD has paid statutory accident benefits to the claimant and now seeks to recover from Intact on the basis that Intact stands in priority to TD, according to the priority hierarchy set out in s. 268 of the *Insurance Act*.

[7] Notice of Dispute was served upon Intact 111 days following receipt of the OCF-1 Application for Accident Benefits. This was some 21 days beyond the 90 day requirement

under s. 3(1) of *O.Reg. 283/95*. At risk of oversimplification, the issue before me is whether TD took reasonable steps within 90 days to identify the insurer of the striking vehicle so as to take advantage of the "savings provision" set out in s. 3(2) of the *Regulation*.

[8] The facts below ought be viewed in light of the issues outlined above.

90 Day Notice Period *(February 20, 2014 to May 21, 2014)*:

[9] The OCF-1, dated February 13, 2014, was received by TD on February 20, 2014. It was filled out by Vivian Zhou. It described the claimant as married and employed. It indicated that he was not covered by his own policy of automobile insurance or that of his spouse or employer. He was applying under a person on whom he claims he was dependent, Jin Feng Huang, insured by Meloche Monnex (TD) under policy number 72833932. The application indicated that the accident was reported to the police and the officer's name "is to be determined (to be provided)".

[10] The handling adjuster at TD had opened a new claim for the claimant on February 13, 2014. He spoke to the claimant's legal rep that day who advised that an OCF-1 had been forwarded.

[11] The adjuster noted in a log note dated February 14, 2014 that he was awaiting follow up documents as discussed with the legal rep the day before. The documents listed were an Authorization and Direction from the legal rep, the OCF-1 and other supporting medical documents.

[12] In the log note dated February 18, 2014, the adjuster noted the next steps as following up with the OCF-1 and hospital records. He left a message with the legal rep that the OCF-1 and other medical documents had not been received.

[13] On February 18, 2014, counsel for Mr. Zou, unbeknownst to the TD adjuster at that time, requested from the Toronto Police Service the Motor Vehicle Accident Report on an urgent basis. A requisite executed Authorization permitting the release of the police report was provided along with the request. It was sent to Toronto Police Service by mail.

[14] The OCF-1 was received by TD on February 20, 2014. The letter accompanying the OCF-1 indicated that the claim was being sent to TD as the claimant was said to be dependent on their insured. The claimant's legal representative also indicated that she would obtain additional documentation and forward it to TD. The letter states:

> "We confirm that we will request a copy of the complete file from our client's family physician, St. Michael's Hospital, a decoded OHIP Summary, income tax returns and a copy of the police report and will provide you with a copy of this material upon receipt of same pursuant to the provisions of Section 33 of the Schedule. " [emphasis added]

[15] The log note dated February 24, 2014 refers to receipt of the OCF-1, as well as the Authorization and Direction. The legal rep advised that the claimant did not have a valid insurance policy or access to a corporate vehicle and that he lived with and was financially dependent on his daughter and son-in-law, insured with TD. TD disputes the fact that the claimant was principally financially dependent on its insureds. The log note indicates that the legal rep will provide the clinical notes and records of the GP and hospital and a copy of the police report. The next steps were noted as priority investigation and to follow up with the OCF-3 and medical documents.

[16] In my view, it was clear that TD was fully aware that a priority investigation was required as early as February 20, 2014, the day it received the application for accident benefits. If principally financially dependent on their insured, the claimant would meet the definition of "insured" under the TD policy, which would place them in priority to the insurer of the striking vehicle Intact according to the priority scheme set out in s. 268(2) of the *Insurance Act*. TD knew or ought to have known that it had to identify the owner and driver of the striking vehicle and that the best source of that information would be the investigating police officer or the police report prepared by the officer.

[17] On February 24, 2014, an Autoplus report was requested by TD for the claimant. This was presumably part of the priority investigation referred to above. An Autoplus search is used to see if an individual is a named insured or listed driver on any automobile policy in Ontario.

[18] On March 4, 2014, the adjuster spoke to the legal rep about the OCF-3 and the claimant's discharge plans.

[19] The log note dated March 10, 2014 indicates the adjuster received some documents from St. Michael's Hospital on March 4, 2014. Included was an Emergency Department Preliminary Result which described the claimant as stepping out of the TTC and was hit by a vehicle going 40 km/h and "multiple bystanders called 911".

[20] On March 10, 2014, the TD adjuster log note indicates that based on searches with the claimant's driver's license number as Z6789-12005-20110, no policies were found where the claimant was shown as a named insured or listed driver.

[21] A log note dated March 24, 2014 and noted as "priority review" states there was no policy found under the Autoplus Gold search for the claimant's driver's licence and that "priority will fall on us based on investigations so far.". With a negative search, it even became more important to identify the owner and operator of the striking vehicle and determine the existence of available automobile insurance.

[22] At this point, it is clear to me that the TD adjuster ought to have realized that he needed the police report or information from the police as to any insurance on the striking vehicle or driver of the striking vehicle.

[23] On March 27, 2014, the adjuster left a message with the legal rep requesting an update on the claimant's status. There is no mention of requesting the Motor Vehicle Accident Report.

[24] On April 8, 2014, the legal rep left the adjuster a message that the claimant was being discharged. The adjuster called the legal rep back and left a message about the OCF-19, attendant care benefits and OCF-18s. There was no request for the status of the Motor Vehicle Accident Report.

[25] On April 15, 2014, 54 days post receipt of the OCF-1, the adjuster left a message with the legal rep "requesting a callback so as to discuss police report (reqd for priority)".

[26] The adjuster had a telephone call with the legal rep on April 16, 2014. The legal rep advised the police report was not yet received and she sent to TD a copy of her request to the police for same. Again, the request was made February 18, 2014, on an urgent basis. The request was made even before TD had received the OCF-1. With just a little more than a month remaining to satisfy the 90 day notice requirement, the issue which arises is whether there was any obligation on the TD adjuster to make independent attempts to obtain the police report or attend at Toronto Police Services with the information available to identify and make arrangements to interview the investigating police officer. A police collision report can be obtained either by mail request or by attending Toronto Police Services with information available.

[27] During the above telephone conversation with the claimant's legal representative, the adjuster recorded the license plate number of the third party provided by the legal rep as 9532KA. An issue exists as to whether the adjuster was provided the incorrect number or whether there was simply an error in transcribing. The name of the police constable and badge number was not yet known at that time.

[28] There is no mention in the above log note of the adjuster inquiring how the legal rep was able to obtain the license plate number of the third party vehicle, where this information was received from and a copy of whatever note or card existed with the licence number on it.

[29] A license plate search for 9532KA ordered by TD on April 22, 2014 produced results on May 6, 2014 for Thomas J. Cooper, residing at 75 Patience Crescent in London. It was for a commercial vehicle with a gross weight of 3,000kg. The plate registration was August 24, 2001 with a validation tag start date of September 10, 2011 and expiring on September 9, 2012, with the subject accident occurring on February 8, 2014.

[30] On April 23, 2014, the adjuster left a message with the legal rep about taxis but did not inquire about the Motor Vehicle Accident Report.

[31] On April 23, 2014, 62 days post receipt of the OCF-1, the adjuster sent a s. 33 request to the claimant inquiring about any available polices to determine priority of payment. This letter was clearly for information to assist the priority investigation. Section 33 of the Statutory Accident Benefits Schedule requires a claimant to provide requested information with respect to an accident benefit claim. A failure to comply can result in the suspension of certain benefits.

[32] On April 28, 2014, the adjuster noted that the plate search report was not yet received and an e-mail was sent requesting the status of same.

[33] On April 28, 2014, the adjuster noted the police report was not yet received. With approximately one month to go before expiry of the 90 day notice requirement, no steps were taken to obtain a police report independent of simply relying on the efforts of the claimant's legal representative in that regard.

[34] An Autoplus Gold report dated April 28, 2014 for Thomas Cooper shows the latest carrier as RBC, cancelled on May 15, 2013. Vehicles listed include different types of Ford vehicles, a Cadillac Deville and a Hyundai Coupe.

[35] There is no record of any follow up by the adjuster with the legal rep to find other possible sources of insurance for this third part driver or owner.

[36] A log note dated April 29, 2014 confirms receipt from the legal rep of a CD of the clinical notes and records from St. Michael's Hospital under cover dated April 14, 2014.

[37] In correspondence dated May 3, 2014, the legal rep responded to the s. 33 request and enclosed a copy of the claimant's driver's license. She also advised the claimant did not have access to an automobile insurance policy through employment or through his spouse.

[38] A log note dated May 6, 2014, 75 days post receipt of the OCF-1, labelled "priority investigation" refers to the above letter from the legal rep. Again, there is no reference to requesting the Motor Vehicle Accident Report independent from the request made by the claimant's counsel back in February.

[39] The log note dated May 6, 2014 refers to the above plate search and Autoplus Gold reports for Thomas Cooper. The adjuster seems to have concluded based on these reports that there was no current policy for the third party vehicle. He decided to send notice of priority dispute to the Fund because the OCF-1 indicated that the claimant was working, so he may not be financially dependent on his daughter.

[40] The log note dated May 6, 2014 notes the police report not yet received. There is no reference to requesting the Motor Vehicle Accident Report.

[41] The Fund was put on notice via cover letter dated May 6, 2014 and faxed on May 8, 2014. TD advised in the Notice that it had determined that the claimant was not financially dependent and has no insurance coverage available to him.

[42] The log note dated May 8, 2014 refers to notice being sent to the Fund and also to follow up with the Ambulance Call Report. Once again, there is no reference of follow up in trying to obtain a copy of the Motor Vehicle Accident Report independent of the efforts of claimant's counsel.

[43] The Fund responds on May 14, 2014 that TD is required to complete a reasonable investigation to determine if any other insurer is liable to pay in priority to the Fund before putting the Fund on notice as per s. 3.1(2) of the Dispute Between Insurers Regulation 283/95. Further, that particulars and results of the investigation must be provided. In particular, a copy of the full police report, complete underwriting file, claimant's statement, field adjuster's reports, medical reports, other relevant documentation and full particulars of the investigation conducted were requested.

[44] The Fund also requested via its independent adjuster, Claimspro on May 21, 2014 from TD, a copy of the full police report, as well as statements, field adjuster reports, medical reports and other relevant documentation required as per s. 3.1(2).

[45] At no time prior to the expiry of the 90 day notice period did TD attempt to obtain a copy of the police report independent of the request made by the claimant's solicitor, or attend Toronto Police Services with the information that was available to identify the name of the investigating police officer and arrange for an interview.

Post 90 Day Period (May 22, 2014 onwards):

[46] A log note dated May 29, 2014 notes the police report is not yet received. There is no reference to any request for the Motor Vehicle Accident Report independent of efforts by counsel for the claimant.

[47] The log note dated June 5, 2014 refers to a review of the clinical notes and records from St. Michael's hospital, sent from the legal rep under cover dated April 14, 2014 and received April 29, 2014. The Emergency Department Preliminary Result is again noted, which refers to the claimant stepping out of the TTC when struck and that "multiple bystanders called 911". There is also reference to the Ambulance Call Report no. 41102 dated February 8, 2014, indicating he was struck by a Sedan vehicle and that a bystander witnessed the entire incident. There was no obvious damage to the front bumper of the Sedan and airbags did not deploy.

[48] The log note dated June 6, 2014 refers to a telephone conversation with the legal rep. The legal rep sent via e-mail a copy of the police report indicating the third party license plate number was 953ZKA (different form the 9532KA earlier provided by the claimant), with driver

noted as Vinh Tu, insured by Intact. The police report is dated March 4, 2014. There is no evidence as to how long the police report had been in the possession of claimant's counsel.

[49] The log note dated June 9, 2014 notes the priority dispute was discussed, with Notice to be sent to Intact as third party information was made available only on June 6, 2014.

[50] The log note dated June 10, 2014 refers to an Autoplus for Vinh T. Tu, confirming an insurance policy with Intact.

[51] 110 days after receipt of the OCF-1, a Notice to Applicant of Dispute Between Insurers was sent to Intact on June 10, 2014 and received on June 17, 2014.

[52] It is clear from the available evidence that the police report contained sufficient information to confirm the available insurance on the striking vehicle.

[53] In response to the request from Claimspro above for information about the full details of the investigation, the adjuster forwards the accident benefits file on June 18, 2014.

[54] On July 21, 2014, Intact responds to the Notice of Dispute and requests when the OCF-1 was received.

[55] The log note dated July 24, 2014 refers to the above correspondence from Intact. The adjuster at TD left a message to discuss the reason Notice was sent to Intact, noted as "OCF-1 was recd on Feb 20, 2014, however Police Report was completed late and legal rep made PR available on June 6, 2014 (PR was dated March 4, 2014)". There is no mention of any independent requests made by TD for the Motor Vehicle Accident Report.

[56] On July 31, 2014, Claimspro again requested that TD provide a full copy of the police report and the other previously requested information.

[57] TD advised Intact via correspondence dated August 12, 2014 that the OCF-1 was received on February 20, 2014. The police report was completed by Thawer Shafraz on March 4, 2014 and was made available to their office only on June 6, 2014. There is no mention of any independent requests made by TD for the Motor Vehicle Accident Report.

[58] Intact advised TD on August 25, 2015 that the Notice of Dispute was received outside of the 90 day limitation period and the accident benefits claim will be closed. TD provided to Intact on January 6, 2014 a Demand to Submit to Arbitration.

Examination Under Oath

[59] An Examination Under Oath took place on November 10, 2016 of a TD representative, who was produced instead of the handling adjuster noted above.

[60] She admitted that the first request for the police report was April 16, 2014 from the claimant's legal rep.

[61] When asked when the police report was requested again, she referred to the log note dated April 28, 2014 indicating it was not yet received. She admitted that there was nothing in the log note indicating any request or further inquiry had been made.

[62] She admitted that the log note did not say anything about any further action or inquiries taken, other than noting it was still not received and that there was nothing confirming another request was made on April 28, 2014.

[63] She admitted that all actions taken would be in the log notes.

[64] She claimed the next request for the police report was May 29, 2014, based on a log note of same date indicating it was not received yet. She admitted that there was no reference to an actual request for it by e-mail or correspondence.

[65] She admitted she did not see the 90 day limitation period noted in the log notes.

[66] When asked if different steps are taken investigating a priority dispute for a pedestrian-vehicle collision, she answered that "well, with vehicles maybe would be easier because there's license plates on the vehicles, driver license, policy for both drivers so it would be clear, but with pedestrians it's --- I believe that there's more investigation needed to find out who is this person".

[67] When asked if clinical notes and records were requested, in particular the Ambulance Call Report, she answered that "I don't know if it's related to priority dispute".

[68] When asked what other steps were taken to identify the third party aside from requesting the police report from claimant's counsel, the answer was the plate search on the incorrect license plate number.

[69] When asked if there was any sort of inquiry made as to the delay with the police report being filled out, the answer was there was nothing in the notes and there was no other sort of documentation aside from the log notes indicating when it was received.

[70] She admitted the only notation of a request for the police report was in conversation with the legal rep.

[71] She admitted there was no reason indicated for the delay with the investigating officer filing the police report or the delay in the receipt of the police report by claimant's counsel.

[72] She admitted there was no information asked about when the legal rep received a copy of the police report, just that is was provided on June 6th and "that's all".

[73] All of the information the handling adjuster had on this file was in the log notes.

[74] She admitted there was no request to the police by TD for any information such as the police log notes.

[75] When asked if it was possible the handling adjuster was given the correct plate number and documented it wrong in the notes, she advised that “all I can tell you is what is in the notes”.

[76] There were no further inquiries to the legal rep about the plate number after the initial Autoplus search.

[77] There were no inquiries made about whether there were cameras at the intersection where the accident took place.

[78] It was confirmed that there would be no other information kept other than what was in the log notes.

[79] It was confirmed there were no other times the police report was requested other than what was in the log notes.

[80] It was confirmed that there were no other means considered to try to get a copy of the police report other than asking the legal rep for a copy.

[81] It was confirmed that there were no independent inquiries to determine when the police officer completed the police report.

[82] It was confirmed via undertakings that the copy of the e-mail providing the police report was not kept, that the adjuster had no other information regarding the priority dispute investigation other than set out in the log notes, that there is no other information regarding provision of the plate number other than in the log note dated April 16, 2014, and that the plate number was just given to him via telephone with no follow up for written confirmation.

ANALYSIS AND FINDINGS

[83] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[84] As the claimant Chang Yan Zou was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to “non-occupants” are applicable. They are set out in Section 268(2) of the *Insurance Act*, which is set out as follows:

[85] 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 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
>
> [emphasis mine]

[86] The bolded sections above would make the insurer of the striking vehicle responsible for the payment of statutory accident benefits, provided the claimant was not an “ insured” under some other policy.

[87] Subsection 268(5) of the *Insurance Act*, R.S.O. 1990, c.I.8 provides that:

> (5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

[88] The accident benefits claim was presented to TD on the basis that the claimant was principally financially dependent upon their named insured. TD denies dependency and claims that Intact, as insurer of the striking vehicle, stands in priority. The issue before me is to determine whether notice was provided to Intact within the time prescribed by s. 3 of O. Reg 283/95. Notice was provided beyond 90 days required by s. 3(1), so the analysis therefore centres on whether Dominion satisfies the saving provision of s. 3(2).

[89] Pursuant to s. 3(2) of the Priority Regulations, an insurer is permitted to provide notice beyond the 90 day notice deadline if:

> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under s. 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.

[90] The moving party Intact maintained that TD did not take reasonable investigations to find whether another insurer may stand in priority within the 90 day period and that TD has failed to show that 90 days was not a sufficient time to determine whether Intact stood in priority. Intact takes the position that upon receipt of the OCF-1 the task, as far as priority was concerned, was to determine whether the owner or driver of the striking vehicle had valid automobile insurance. The best source of information that could lead to such determination would be the police report or the information obtained by the investigating police officer in that regard. In most circumstances, the police report and the police investigation notes would identify the owner and operator of the vehicles involved and the insurance information provided. Intact claims that TD's investigation was inadequate in many ways:

- The adjuster left five voicemail messages and had four telephone conversations with the legal rep about the claim. Only two of those voicemails and/or conversations refer to requesting a copy of the Motor Vehicle Accident Report from the legal rep.

- There were no independent attempts by TD to request a copy of the Motor Vehicle Accident Report, other than passively relying on the legal rep to provide a copy.

- There is no reference that the adjuster requested a copy of the Motor Vehicle Accident Report through ServiRap, a tool insurers regularly use to obtain such reports. There is no evidence of using any other tools or means to independently obtain a copy of the Motor Vehicle Accident Report.

- TD did not inquire if there were any surveillance cameras at the intersection where the accident occurred.

- There is no reference that TD requested a statement from the claimant or any family members or witnesses for details about the accident and the third party driver.

- TD did not use an investigator or field adjuster to try to find out information about the third party driver.

- The clinical notes and records from St. Michael's provided within the 90 day period refer to the Ambulance Call Report noting multiple bystanders, and these records were not reviewed until after the 90 day limitation period.

- The legal rep was able to obtain from some source in the 90 day period a license plate number for a third party driver. There was no request for confirmation of where or how this was obtained, a request for copy of same in writing, or any follow up to verify accuracy of the plate number.

- There was no follow up with the legal rep about possibly dealing with an uninsured driver and no inquiry about other possible sources of insurance for this third party driver.

[91] TD in response, has submitted that it recognized at an early stage that a priority investigation was required. They take the position that the evidence and log notes support a finding that a reasonable investigation was conducted and that the TD adjuster was entitled to rely on the urgent request of claimant's counsel of Toronto Police Services for a copy of the police report which would have indicated the name of the driver/owner of the striking vehicle and available insurance, as claimant's counsel was fully co-operative with providing requested information and documentation throughout. TD takes the position that it would not have been able to obtain the police report any sooner than claimant's counsel. TD claims to have met the standard of "reasonableness" and should not be held to as standard of "perfection".

[92] The general legal principles applicable to the issue before me include :

The purpose of the 90 day period is to permit the insurer who first receives a completed Application for Benefits to gather factual information which will allow it to determine whether another insurer is responsible to pay the benefits.

> *State Farm Mutual Automobile Insurance Company of Canada v. Ontario* (*Minister of Finance)* [2001] O.J. No. 1115

Whether or not 90 days is a sufficient time to make a determination that another insurer may be responsible to pay the accident benefits is a question to be decided based on the facts of each case. The arbitrator must decide whether the insurer had enough facts to make a determination within 90 days. If not, the arbitrator must then consider whether the insurer made reasonable investigations within the 90 day period.

> *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co.* [2009] O.J. No. 2971
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> *Primmum Insurance Co. v. Aviva Insurance Co. of Canada* [2005] O.J. No. 1477
>
> *Coseco Insurance Company v. Allstate Insurance Company* (Arbitrator Stephen Malach, November 15, 2001)
>
> *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* (2007) 88 O.R. (3d) 629

Whether or not the insurer has been provided with accurate information by the insured is a factor in determining whether the 90 day period was sufficient.

> *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, supra
>
> *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co.*, supra

Deciding whether or not reasonable investigations were made during the 90 day period is also dependant on the facts of each case. However, investigations must be "reasonable", which is not the same as perfect. The fact that in retrospect, other investigations might have been seen to be helpful does not mean the investigations which were undertaken do not meet the test of reasonableness.

> *Primmum Insurance Co. v. Aviva*, supra
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> *Federated Insurance Company of Canada v. CGU Insurance Company of Canada* (Arbitrator Stephen Malach, September 2, 2003)

In determining the reasonableness and the timeliness of investigations, it must be remembered that insurance adjusters are extremely busy individuals working on many complex matters at the same time. They should not be held to a standard of perfection.

> *Coseco Insurance Company v. Lombard Insurance Co.* (Arbitrator Guy Jones, June 3, 2004)

Where little or no reliable information is available upon which to conduct follow-up investigations, minimal investigations may be found to be reasonable.

> *Ontario (Minister of Finance) v. Co-Operators General Insurance Company* (Arbitrator B. Robinson, February 22, 2002)

Where the Applicant or the representative indicates on the Application for Accident Benefits that no other insurance is available when in fact such coverage is available, then such misinformation serves to mislead the insurer.

> *Coachman Insurance Company v. ING Insurance Company of Canada* (Arbitrator Stephen Malach, March 1, 2007)

[93] In reaching my decision, I have taken into consideration the possibly misleading information provided by the claimant's legal representative with respect to the plate number of the striking vehicle. Furthermore, I recognize that insurance adjusters are extremely busy individuals working on many complex matters at the same time. I accept that they should not

be held to the standard of perfection, but should be held to the standard of reasonableness in the circumstances. However, I am persuaded by two appellate decisions referred to above establishing that 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. These two cases demonstrate the lengths an insurer must go through to prove that they took reasonable steps during the crucial 90 day period, even in the face of a lack of co-operation on the part of the claimants and misinformation provided.

[94] The first case is that of *Liberty Mutual Insurance Co.* v. *Zurich Insurance Co.* (2007) 88 O.R. (3d) 629. In that case, a 13 year-old claimant was riding a bicycle when he was struck by a vehicle insured with Liberty. At the time of the accident, the claimant was living with his father who was on a trip to China. Liberty received the Application for Accident Benefits on July 4, 2001. The 90 day notice period would therefore expire on October 2, 2001. The Application for Accident Benefits incorrectly listed the claimant as residing with his mother and that he was not covered under any policy of insurance. Liberty undertook 19 different methods to attempt to determine whether there was another policy that would respond which focused on attempted communications with the mother, communications with the claimant's solicitors office and surveillance of vehicles that were parked at the mother's home. The claimant's mother and counsel were non-co-operative. However, the evidence disclosed that on July 14, 2001, the claimant's father returned from his trip to China and the Court accepted that his vehicle would likely have been parked in his driveway. On August 22, 2001, Liberty received a copy of the Motor Vehicle Accident Report which indicated that the claimant in fact, resided with his father at the address shown on the police report, at which point Liberty contacted counsel for the claimant for an explanation as to the discrepancy. No answer was forthcoming. Keep in mind that the 90 day period expired on October 2, 2001, leaving Liberty over a month to see if the father had automobile insurance at the date of the claimant's accident.

[95] On November 1, 2001 (about a month after the expiry of the notice period), an investigator attended at the father's home, where they discovered that the father had a vehicle and that the claimant was a dependent on his father. On December 12, 2001, Liberty sent its notice to Zurich with respect to this priority dispute, which was just a little over two months past the limitation period.

[96] The Court found as a matter of fact that the mother had intentionally misled Liberty, that there was documentation that indicated that the claimant resided with his mother and that counsel for the claimant had been non-co-operative. Indeed, the Court found that the lengths that Liberty had undertaken to locate another insurer were extraordinary. Despite these findings of fact, the Court found that Liberty had notice by August 22, 2001 (on account of the Motor Vehicle Accident Report) that the claimant may have been residing with his father. Armed with this information, the Court found that Liberty ought to have sent a representative to the father's home where they might have seen the father's vehicle in the driveway and determined the insurer of the vehicle (Zurich). The Court found that Liberty ought to have been able to make these determinations within 90 days and that since they did not, they were prohibited from proceeding with the priority dispute.

[97] In the final analysis, Mr. Justice Perell concluded that notwithstanding the fact that the investigations 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 the adjuster's competing demands of work.

[98] 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 s. 3(1) of the *Regulation* and had not conducted the necessary reasonable investigations so as to rely on the saving provision set out in 3(2) of the *Regulation*. In this case, the 17 year-old claimant was a passenger in a stolen vehicle. In her Application for Benefits, she indicated that she was living with her mother and common-law stepfather and dependent on them. Primmum proceeded to accept this information and began paying accident benefits on the basis that the claimant was an "insured person" under their policy as being principally financially dependent on their named insured or spouse of their named insured. It was later learned from a medical report served six or seven months later, that the claimant was living with her boyfriend at the time of the accident and was on Social Assistance, at which time notice was sent to Aviva but well beyond the 90 days required by s. 3(1).

[99] 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 being provided 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. Aviva 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 and 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.

[100] These two cases stand for the proposition that despite misinformation or lack of co-operation on the part of the insured, the true test is whether the correct information could be obtained with reasonable investigation within the 90 day period. These two Appellate decisions clearly place a very heavy onus on insurers to complete a thorough investigation within 90 days of having received an application for benefits, even if it is to satisfy itself that the information provided in the application is accurate. I feel bound by the heavy onus that the Appellate courts have established. In applying this heavy onus to the facts before me, I cannot help but conclude that TD is unable to satisfy the requirements of the saving provision set out in s. 3(2). I find that 90 days was sufficient time to determine the identity of the operator / owner of the striking vehicle and that he had valid automobile insurance at the time of the accident. I find that TD failed to make reasonable investigations within the 90 day period.

[101] On the facts before me, an experienced accident benefits adjuster once satisfied that the claimant was not principally financially dependent on their insured, as was the case here, ought to have immediately recognized that the insurer of the striking vehicle in this pedestrian knockdown case would stand in priority. In ordinary circumstances, the task of identifying the owner and operator of the striking vehicle and available insurance would be a simple task. As I have indicated the police report normally contains such information. In hindsight, the police report here identified the owner/operator of the striking vehicle and the available insurance. In my view the TD adjuster was obligated to make all reasonable efforts to obtain the police report and/or obtain information from the investigating police officer within the 90 days rather than simply relying on the efforts of claimant's counsel. We know now that the police report was prepared on March 4, 2014, some 12 days after TD received the completed OCF-1 and 78 days prior to the expiry of the 90 day notice requirement. There is no evidence before me as to when claimant's counsel came into possession of the police report or explanation for the apparent delay in receiving same. Although satisfied that it was not unreasonable for TD to rely on the request made by claimant's counsel initially, there came a time when it became reasonable to make their own efforts to obtain the police report themselves or attempt to identify the investigating police officer and arrange for an interview. This was not done and accordingly I do not believe reasonable steps were taken within 90 days to identify an insurer standing higher in priority. As a result, the savings provision of s. 3(2) of the Regulation is not available to TD. Anyone experienced in personal injury insurance litigation ought to know that a police report can be obtained by way of mail request or by attending personally at Toronto Police Services with the information at hand. Here TD had the type of occurrence, date of the incident, the identity of one of the parties and the location of the accident. The initial OCF-1 confirmed that the accident had been investigated by the police. In hindsight, we know that claimant's counsel was able to obtain the police report with the information at hand. I am of the view that once 60 days of the notice period

had expired and with only 30 days left, TD's adjuster ought to have made immediate steps to obtain the police report independent of claimant's counsel's efforts. Attendance at Toronto Police Services by the adjuster, a field adjuster or an independent adjuster was in order to obtain the police report or identity of the investigating police officer so that he or she could be interviewed. To a lesser extent, TD can be criticized for not obtaining a statement from the claimant or an Examination Under Oath to determine all information in the possession of the claimant or his representatives as to the owner/ operator of the striking vehicle. In the end result, I find that TD did not take reasonable steps within 90 days to identify an insurer standing higher in priority.

[102] My findings find support in the decision of *State Farm Insurance Companies v. ACE INA Insurance and Halifax / ING Insurance Company* (Arbitrator Samis – August 22, 2011), which also dealt with a situation where an insurer did not independently seek a copy of the police report, but relied on the efforts of claimant's counsel. In *State Farm*, the claimant presented his accident benefits claim to State Farm, who had only become the claimant's automobile insurer a week or so after the accident giving rise to his accident benefits claim. Like the case here, the claimant was a pedestrian struck by an automobile. The accident occurred on September 4, 2008. The OCF-1 was received by State Farm on October 31, 2008. The time to provide notice would therefore have been the end of January 2009.

[103] Initial telephone contact with the claimant on November 17, 2008 indicated that the claimant had a copy of the police report and information as to the identity of the driver of the striking vehicle. On November 20, 2008, a letter was sent to the claimant with a copy to his solicitors requesting information pursuant to s. 33 of the SABS. In particular, a request was made for:

1. A copy of the police report;
2. Identification particulars of the driver of the vehicle;
3. The insurance particulars of the vehicle that struck the claimant.

[104] No attempt was made to obtain the police report independent of the efforts of claimant's counsel. Follow ups for the requested information were made on January 22 and January 26, 2009. The 90 day notice period expired at the end of January 2009. A copy of the police report was forwarded to State Farm on February 3, 2009 and reviewed on February 17, 2009. State Farm immediately put ACE INA and ING on notice the same day, but unfortunately a few weeks beyond the 90 day notice period. Arbitrator Samis concluded that it was unreasonable for State Farm not to have obtained a police report directly or made reasonable efforts to obtain same. Arbitrator Samis writes at page 10 of his decision:

> "However, the absence of any other line of inquiry or any attempt of obtaining the police report appears to me to have been an inadequate course in view of the obvious nature of the priority dispute that it faced."

[105] Arbitrator Samis dismissed State Farm's priority dispute application with costs on the basis that State Farm was unable to meet the requirements of the savings provision of s. 3(2) of the *Regulation*.

[106] TD has referred me to the decision of *Ontario (Minister of Finance) v. Co-operators General Insurance Company* (Arbitrator Robinson - February 22, 2002). This is also a case where the police report did not appear until after the 90 day notice period. I find the facts of that case distinguishable and note that the decision was rendered long before the two appeal decisions in *Liberty* and *Primmum,* above which established the very heavy onus on insurers to complete a reasonable investigation within 90 days and the requirement that the 90 day notice requirement must be strictly complied with.

[107] In *Ontario (Minister of Finance)* the claimant, like the case before me, was a pedestrian. Initially, the family of the claimant did not have the identity of the operator of the striking vehicle. The accident occurred on November 8, 1999. There was also some confusion initially as to the date of the accident. Claimant's counsel did have the names and badge numbers of the investigating officers. Claimant's counsel attempted to obtain a police report but to no avail. An accident benefits claim was presented to the Fund. No response was made by Toronto Police to the requests for an accident report. A second application was made in June 2000, this time with the correct accident date. The response from Toronto Police in July 2000 was that there was "no report". It was not until January 2001 that the sister of the claimant obtained information that a Carol Choo was the driver of the striking vehicle. There is no indication as to how she obtained that information. Claimant's counsel forwarded a letter to the suspected driver and was then contacted by the driver's insurer, Co-operators. The Fund then put Co-operators on notice of the priority dispute, but well outside the 90 day period. On these facts, Arbitrator Robinson found that the Fund met the savings provisions of s. 3(2) of the Regulation to proceed. Unlike the case before me where the police report was prepared shortly after the accident, the parties in *Ontario (Minister of Finance)* were told that there was simply "no report". Any efforts to obtain a report by the Fund, as opposed to claimant's counsel, would likely have received the same response. I find the facts in Arbitrator Samis' decision in *State Farm* to be far more similar to the facts before me and incorporate the mandate set out in the appeal decisions in *Liberty* and *Primmum* as to the strict requirement to complete a reasonable investigation within 90 days, despite misinformation that may have been provided. Given the mandate set out in the appeal decisions of *Liberty* and *Primmum*, I would not be surprised that the result would have been different if presented today. In my view, the adjuster for the Fund ought to have arranged an interview with the investigating officers to obtain the identity of the driver/owner of the striking vehicle and any available insurance.

[108] The facts in *State Farm* are ever so similar to those in the case before me and I, like Arbitrator Samis, feel that the insurer's failure to make any independent attempt to obtain the police report or identity of the investigating police officer so as to arrange an interview within 90 days, was an inadequate course and the result should be the same as that determined by Arbitrator Samis, namely a failure to meet the requirements of the savings provisions of s. 3(2) of the *Regulation* and a dismissal of the Applicant's priority application.

ORDER

[109] On the basis of the findings aforesaid I hereby order:

1. That the priority dispute application of TD is hereby dismissed;

2. That TD pay to Intact the legal costs of this arbitration on a partial indemnity basis;

3. That TD pay the Arbitrator's account.

DATED at TORONTO this 18th)

day of May, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator