IN THE MATTER OF the *Insurance Act* R.S.O. 1990, c. I.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

INTACT INSURANCE COMPANY Applicant

and

SECURITY NATIONAL INSURANCE COMPANY Respondent

AWARD

COUNSEL APPEARING

Kevin R. Motley, counsel for the Applicant, Intact Insurance Company (hereinafter referred to as "Intact").

Oliver Gorman-Asai, counsel for the Respondent, Security National Insurance Company (hereinafter called "Security").

BACKGROUND TO THESE PROCEEDINGS

On February 25, 2022 the claimant was involved in a motor vehicle accident which took place on Bloomington Road West and Bathurst Street in Aurora, Ontario.

The claimant was a passenger in a 2022 Toyota Corolla which was insured by Intact under policy no. KK52DY967. The claimant's vehicle was struck from behind at a red light.

The claimant was the named insured under a policy issued by Security bearing policy no. 00118404907. This policy insured a 2013 Lexus truck/van. The policy was issued in Alberta and lists the claimant's address as 9148 Edgebrook Drive N W Calgary Alberta.

The claimant submitted an OCF-1 to Intact on June 20, 2022 claiming entitlement to statutory accident benefits.

Intact takes the position that the Security policy stands in priority to the Intact policy as the claimant was the named insured under that policy. Security takes the position that it is not subject to the Ontario priority rules as their policy is an Alberta policy and that the vehicle that it insured was not in Ontario when the accident occurred.

Security also takes the position that if the priority rules do apply to it that they were not given notice as required under Regulation 283/95 within 90 days of the receipt of the OCF-1. Intact acknowledges that but takes the position the saving provisions are applicable and that the 90 days was insufficient time for them to determine that there was another insurer liable for

priority and that they made reasonable investigations within the 90 days.

These positions of the respective insurers resulted in this arbitration being commenced in accordance with Regulation 283/95.

PROCEEDINGS

There were a number of pre-hearings. This arbitration then proceeded by way of written submissions. Counsel provided in addition to those submissions various documents that they relied upon as well as relevant case law. No oral evidence was called. The parties also filed an Arbitration Agreement.

ISSUES

The parties identified the following issues as being in dispute in this arbitration:

1. Is Security National subject to the Ontario priority rules in the circumstances of this case?

2. Is Security National the priority insurer pursuant to s. 268(2) of the Ontario *Insurance Act*?

3. Was 90 days after receipt of the claimant's OCF-1 insufficient time for Intact to determine that another insurer was liable for priority, and did Intact make reasonable investigation during those 90 days so as to trigger the saving provisions of s. 3(2) of Ontario Regulation 283/95?

DECISION

1. Security National is subject to the Ontario priority rules in the circumstances of this case and is the priority insurer pursuant to s. 268(2) of the Ontario *Insurance Act*.

2. 90 days was sufficient time for Intact to determine that another insurer was liable for priority and Intact did not make reasonable investigations during those 90 days. Accordingly, Intact has not commenced this arbitration within the timelines required under Regulation 283/95 and the saving provisions of s. 3(2) of Ontario Regulation 283/95 are not triggered.

ISSUE 1: IS SECURITY NATIONAL SUBJECT TO THE ONTARIO PRIORITY RULES

Facts

The accident that is the subject matter of this priority dispute occurred in Ontario on February 25, 2022.

Intact insured the vehicle that the claimant was a passenger in. The claimant was not a named insured or listed driver under the Intact policy.

Security issued an Alberta policy that covered the claimant's 2013 Lexus truck. The vehicle insured under the Alberta policy was not in Ontario at the time of the accident.

Security filed a Power of Attorney and Undertaking (PAU) on August 10, 1964. The PAU was still in effect on February 25, 2022.

Security in its submissions notes that it does not dispute that if the priority rules apply to it that its policy would stand in priority to the Intact policy.

Arguments of the Parties

Intact relies on the seminal decision of the Court of Appeal in this area: *Healy v Interboro Mutual Indemnity Insurance Company* [1999] O.J. 1667. In that case the plaintiff, Mr. Healy was a resident of New York State. He was insured under a policy in New York with Interboro.

Mr. Healy was in Ontario and a passenger in an Ontario-insured vehicle when he was involved in a motor vehicle accident. Mr. Healy's New York-insured vehicle was not in Ontario at that time.

The Superior Court found that Interboro as a signatory to the PAU was precluded from asserting that its policy did not contain Ontario statutory accident benefits and concluded that it was obliged to pay them to the claimant. Justice Spiegel who rendered the decision relied on *Potts v. Gluckstein* 1992 CanLII 7623.

Intact submits that the Court of Appeal upheld Justice Spiegel concluding that Interboro was obliged to pay the benefits to the claimant and ranked in priority to Guardian who insured the vehicle that he was an occupant of. Intact points to the facts that the New York vehicle was not in the province when the accident occurred and the Court of Appeal specifically found that the PAU applies even when the insured vehicle is not physically within the jurisdiction where the accident occurred.

Intact submits that *Healy v. Interboro* has not been substantially overruled and is binding on me.

Intact specifically addressed the recent decision of the Court of Appeal in *Travelers Insurance Company v. CAA Insurance Company*, 2018 ONSC 3911 CanLII.

In that case the claimant was living in Nunavut and driving a Nunavut-plated vehicle owned by the Nunavut government. That vehicle was insured with Travelers. She had regular use of the vehicle. While she was ordinarily resident in Ontario, the accident occurred in Nunavut in a Nunavut car.

CAA insured the claimant's personal vehicle by way of an Ontario policy. Her Ontario vehicle was not involved in the accident. CAA paid her accident benefits and brought a dispute in Ontario before Arbitrator Bialkowski claiming that the Travelers policy stood in priority on the grounds that it had signed a PAU and was an insurer licensed to undertake automobile

insurance in Ontario.

Arbitrator Bialkowski found that priority rested with Travelers on the grounds that it was a signatory to the PAU and that essentially resulted in Travelers becoming an insurer in the province or territory where the claim is brought and that the loss transfer and priority provisions if any of that jurisdiction would apply.

The decision was affirmed by the Ontario Superior Court but overturned by the Court of Appeal.

Intact submits that the *Travelers v. CAA* case does not overturn the *Healy* decision. Nowhere in that case does the Court of Appeal suggest that *Healy* was wrongly decided or needed to be revised. Intact submits that the Travelers decision must be taken in the context of its facts which are distinguishable from the facts here. In the *Travelers v. CAA* case the accident occurred outside of Ontario in Nunavut in a vehicle owned by the Nunavut government and insured under a Nunavut policy. Intact points out that in this case the accident occurred in an Ontario vehicle which places the facts on all fours with the Court of Appeal's decision in *Healy*.

Intact also made submissions with respect to the Superior Court decision of Justice Chalmers in *Economical Insurance Group v. Intact Insurance*, 2021 ONSC 3249. Intact submits that there is a significant factual distinction between the *Economical v. Intact* case and the case before me. In the *Economical* case a woman had been injured in an accident in Ontario which resulted in her death.

Her daughter claimed that she sustained psychological injuries as a result of her mother's death in Ontario. The daughter resided in Alberta.

Economical insured the mother under an Ontario policy. Intact insured the daughter in Alberta under her own motor vehicle liability policy.

The daughter applied to Economical for statutory accident benefits. Economical denied the claim on the grounds that the claimant was not a “insured person” under their policy. She was not a named insured, listed driver or dependant. At the same time they commenced a priority dispute against Intact claiming that Intact was the priority insurer.

Justice Chalmers concluded that the Alberta policy did not cover the derivative claim of the daughter as a result of the death of her mother in Ontario. It is to be noted that Justice Chalmers distinguished *Healy* on the basis that the claimant was in Alberta at all material times, not in Ontario and that the daughter herself was not involved in the motor vehicle accident in Ontario but was rather a derivative claim.

Intact submits that this factual distinction is significant and again does not change the impact of *Healy v. Interboro*.

Finally, Intact referenced my decision in *Coseco v. Liberty and GMAC*: decision Arbitrator Samworth, December 21, 2018.

In that case the claimant was injured in an accident in Ontario and applied for Ontario accident benefits to Coseco which insured the vehicle that the claimant was in.

The claimant was also a named insured under a policy with GMAC. This was an American insurer that did not operate in Ontario but had signed the PAU. The vehicle insured by GMAC was not in Ontario.

I found that the decision of the Court of Appeal in *Healy v. Interboro* was applicable and that it directed me to conclude that where a motor vehicle accident occurs in Ontario and there is an out-of-province insurer whose policy covers the claimant but that that insurer has signed the PAU, that it is bound by s. 268 of the *Insurance Act* in its entirety. In other words not only is that insurer bound to pay Ontario-based statutory accident benefits but also is bound by the priority provisions under s. 268 of the *Insurance Act* and Regulation 283-95.

That decision was appealed to Justice Nakatsuru at the Ontario Superior Court and he upheld the decision, *Coseco Insurance Company v. Liberty Mutual General Insurance Company and GMAC Insurance Company*, 2019 ONSC 4918. In his decision, Justice Nakatsuru agreed with me noting that where the subject accident happened in Ontario and took place within the legislative jurisdiction of Ontario in the context of a signed PAU from GMAC that *Healey* was applied and the priority provisions applied to GMAC.

GMAC sought leave to appeal to the Court of Appeal from the decision of Justice Nakatsuru. The appeal was filed September 5, 2019. On December 13, 2019 the Ontario Court of Appeal adjourned GMAC's motion for leave to appeal until the Court had an opportunity to decide the appeal in *Travelers Insurance Company v. CAA Insurance Company* (*supra*).

Ultimately the Court of Appeal, having rendered its decision in *Travelers v. CAA*, declined to grant leave to appeal in the *Coseco v. GMAC* case. The Court of Appeal issued an endorsement on May 26, 2021 noting:

> "This motion for leave to appeal is dismissed. "

To summarize Intact's position is that *Healy v. Interboro* is still good law. It submits I am bound by *Healey* and as found previously in my decision of *Coseco v. GMAC* I should conclude that Security is bound by its PAU and the fact that the Security-insured vehicle was not in Ontario at the time is irrelevant. The accident occurred in Ontario and the claimant was in an Ontario car when the accident occurred. Intact submits Security is obliged to pay Ontario statutory accident benefits and is bound by the provisions of s. 268 of the *Insurance Act*.

Security Submissions

Security takes the position that it is not subject to the priority rules set out under the Ontario *Insurance Act* and Regulation 283-95. Security relies significantly on the fact that the vehicle that it insured under an Alberta policy was not in Ontario on the date of loss and that the claimant's address under its policy was an Alberta address.

While Security acknowledges the *Healy* case it takes the position that *Healy* was overturned by *Travelers v. CAA* (*supra*). Security submits that the Court of Appeal in *Travelers v. CAA*, it held that the proper interpretation of the provisions of part VI of the *Insurance Act* (automobile insurance coverage) is that the Act only applies to policies issued in other provinces when the insured vehicle is operated in Ontario. It submits that the Court determined in that case that part VI does not apply to vehicles that are not located in Ontario at the time of the accident and are not required to be insured in Ontario (reference paragraph 32 of the Decision).

Security also submits that the law with respect to the PAU has been changing over the years since the decision in *Healy*. Security references *Unifund Insurance Company v. Insurance Corporation of British Columbia* [2003] 2 S.C.R. 63, a decision of the Supreme Court of Canada. In that case Ontario residents were visiting British Columbia and driving a rental vehicle when they were involved in an accident involving a heavy commercial vehicle. The claimants were Ontario residents and were named insureds under the Unifund policy in Ontario. They applied for statutory accident benefits. Unifund took the position that the loss transfer provisions under s. 275 of the *Insurance Act* were applicable and commenced a claim for loss transfer as against ICBC.

The Supreme Court of Canada in that case concluded that the loss transfer provisions did not apply in the circumstances of that case noting that the accident occurred out of the province of Ontario with an ICBC heavy commercial vehicle and a rental car also insured in British Columbia. Security acknowledges that this case is distinguishable as the PAU that had been signed by ICBC specifically excluded applicability to accidents that occurred in British Columbia but otherwise relied on the court's comments as to the purpose of the PAU. Justice Binnie emphasised that the PAU is to assure that someone injured in an automobile accident will get the same statutory guarantees whether the relevant automobile policy was made in Ontario or in another participating jurisdiction. The PAU was about providing coverage for injured individuals and “not about helping insurance companies” (see paragraphs 99 to 100).

Security also relies on the *Travelers v. CAA* case (*supra*). It points out that the court in that case provided a different approach to what constitutes an “Ontario insurer”. Security points out that the Court of Appeal concluded that Travelers was not considered to be an Ontario insurer for the purposes of priority provisions despite the PAU and the fact that it issued policies in Ontario. It notes that the Court of Appeal referenced Justice Binnie's decision and noted that the PAU is “pro-compensation, consumer protection function” and that its purpose is not to help insurers but to protect insureds.

While Security acknowledges that the facts of *Travelers* are distinguishable from this case it relies on the principle that the PAU should not be used to assist insurers who are seeking reimbursement.

Security also relies on Justice Chalmers's Decision in *Economical v. Intact* (*supra*). Security takes the position that this case is on all fours with the case before me and cannot be distinguished by the mere fact that it is a derivative claim as opposed to a direct claim by the injured insured. Security submits that this case is important as it was a post-*Travelers v. CAA* case and reflects a change-in-law and approach to priority disputes based on that decision of

the Court of Appeal.

Security points to paragraphs 18 to 21 of Justice Chalmers's Decision. He noted that the vehicle of the claimant (daughter) did not have to be registered in Ontario. He concluded that s. 268(1) of the *Insurance Act* was not deemed to apply statutory accident benefits to the Alberta policy on the basis that the Alberta vehicle was not being operated in Ontario. Further, he noted that the claimant did not sustain injuries in a motor vehicle accident in Ontario. Therefore, he concluded that the Alberta policy was not subject to the dispute resolution process or the priority rules set out in the Ontario *Insurance Act*.

Security submits that while *Economical v. Intact* involves a derivative claim as opposed to a claim by the named insured, that the court did not draw any distinction between a claim for accident benefits made by an applicant directly involved in an accident and an applicant making a claim for accident benefits who was not directly involved.

Intact Reply

Intact submits that *Healy v. Interboro* still stands and that there is no requirement that the claimant's insured vehicle be in Ontario at the time of the accident for the out-of-province insurer to be bound by the Ontario priority provisions under the *Insurance Act* and the Regulation. With respect to the *Unifund v. ICBC* comments from Justice Binnie about the purpose of the PAU, Intact submits that *Unifund v. ICBC* was a loss transfer matter and not a priority claim. It was not about proper placement of a claim with the insured's own policy but rather about indemnification between two insurers based on vehicle size and classifications.

With respect to *Travelers v. CAA*, Intact submits that the scope of that decision referencing the purpose of the PAU was merely to firmly disagree with Arbitrator Bialkowski and his conclusion that the mere signing by an insurer of the PAU was in and of itself sufficient for the Ontario priority rules to apply to an accident that occurred outside Ontario. The Court of Appeal specifically held that the mere signing of the PAU alone did not create that connection.

Intact submits that the PAU remains meaningful in interprovincial priority disputes and does have a consumer protection applicability even in the priority dispute context. Intact submits that a named insured chooses to contract with a specific insurer for a variety of reasons that may go beyond the mere price. It may include customer service, past experience. familiarity or the insurer's reputation. Intact submits that the interprovincial applicability of the Ontario priority rules will assist an insured in being reunited with their home policy where they have inadvertently applied to a more distant insurer.

DECISION AND ANALYSIS

As I found in my decision *Coseco Insurance Company v. Liberty Mutual General Insurance Company and GMAC Insurance Company* (decision Arbitrator Samworth, January 31, 2022), I find that the decision of the Court of Appeal in *Travelers v. CAA* does not overturn *Healy v. Interboro* and I am still bound by the result in *Healy v. Interboro*.

The *Travelers v. CAA* case is distinguishable on the grounds that the accident occurred in

Nunavut in a Nunavut vehicle under a Nunavut policy. In this case the accident occurred in Ontario in an Ontario vehicle which factually places it within the *Healy v. Interboro* criteria as opposed to *Travelers v. CAA*.

The Court of Appeal in *Travelers v. CAA* stated that when reviewing the provisions of s. 224 and 226 of the Ontario *Insurance Act* in conjunction with s. 268, that those provisions properly interpreted make it clear that part VI of the Ontario *Insurance Act* does not apply to a Nunavut vehicle being operated by a claimant in Nunavut at the time of the accident because that vehicle was not required to be insured in Ontario. Again I stress that the accident in this case occurred in Ontario and it seemed to be a key factor of the Court of Appeal decision in *Travelers* that the accident occurred in Nunavut.

Perhaps most notable however is the Court of Appeal's footnote with respect to *Healy v. Interboro*.

To understand the footnote it is important to look at the Court's statement at paragraph 35:

> "But the priority rules stipulated by s. 268 only apply if both insurers are subject to those rules. Section 268(1) provides that it applies to 'every contract evidenced by a motor vehicle liability policy'. To understand what this means, one must turn to the definition of 'contract' under Section 224(1) that section refers to Ontario policies and to policies issued extra provincially by insurers who file an undertaking in Ontario (Section 224(1)(b) the extent to which extra provincial policies are caught by Section 224(1)(b) is generally limited by Section 226.1 to situations where the vehicle that is registered and insured extra provincially is actually operating in Ontario."

This is the paragraph that I believe leads Security to make its submissions with respect to the necessity for the priority provisions to apply to it that their Alberta-insured vehicle must have been in Ontario when the accident occurred.

However, this does not take into consideration the Court of Appeal's footnote to paragraph 35 which I set out below:

> **"I note that part VI of the Ontario Insurance Act also applies to a foreign insured when they are injured in any vehicle driven in Ontario through the operation of the PAU: Healy v. Interboro Mutual Indemnity Insurance Company (1999) 44 O.R. (3d) 404 [1999] O.J. 1667 (Court of Appeal)."**

This footnote in my view is a clear direction from the Court of Appeal in *Travelers v. CAA* that *Healy v. Interboro* is still good law and that when an accident occurs in Ontario with a foreign insurer that has filed a PAU, that s. 268 of the *Insurance Act* and Regulation 283/95 apply to that insurer.

I note that the Court of Appeal declined to grant leave to appeal from my decision in *Coseco v. Liberty and GMAC* (*supra*) after having decided *Travelers v. CAA* and that footnote is in my view an indication as to why the Court of Appeal declined to grant leave to appeal in that

decision.

I therefore conclude that *Travelers v. CAA* did not overturn the decision of the Court of Appeal in *Healy v. Interboro* and I remain bound by that decision as well as by the decision of Justice Nakatsuru in *Coseco v. Liberty and GMAC*.

I also agree with Intact with respect to the effect of the decision in *Economical v. Intact* from Justice Chalmers. I again refer to my decision in *Coseco v. Liberty Mutual and GMAC* from January of 2022 when I reviewed Justice Chalmers's Decision in the context of that case.

In that case I found that the decision of Justice Chalmers was distinguishable. Justice Chalmers found that my decision in *Coseco v. Liberty and GMAC* was distinguishable as the claimant was in Ontario. I concluded that his decision was also distinguishable as the claimant in that case lived in Alberta, was in Alberta when the accident occurred and did not sustain injuries in an Ontario accident. I find that this decision does not assist Security in its submissions.

I therefore conclude that the *Travelers v. CAA* case has not overturned the *Healy* decision and accordingly Security is bound by the provisions of s. 268 of the *Insurance Act* and Regulation 283/95 and as such is the priority insurer with respect to the claimant herein.

ISSUE 2: WAS 90 DAYS SUFFICIENT TIME FOR INTACT TO DETERMINE ANOTHER INSURER WAS LIABLE FOR PRIORITY AND DID INTACT MAKE REASONABLE INVESTIGATIONS DURING THOSE 90 DAYS? IS S. 3(2) OF ONTARIO REGULATION 283-95 TRIGGERED?

FACTS

Intact received the OCF-1 dated February 28, 2022 on June 20, 2022. The OCF-1 under part 4: Details of automobile insurance indicated that the policy under which the claimant was seeking coverage was the vehicle in which he was riding at the time of the accident as a passenger. On the document, when asked if he is covered by any automobile insurance with a spouse, dependant, listed driver, employer's policy or rental cars, the claimant does not check off either the yes or no boxes. The document indicates that he is married. His address is shown as 162 Timberline Trail in Aurora. No representative is indicated.

The log notes indicate that Intact was notified of the accident on February 25, 2022. Their insured advised that the accident had taken place and that there was one passenger in the vehicle. The notes indicate that neither the insured nor his passenger spoke any English. The OCF-1 indicates that the claimant speaks English.

The log notes submitted to me are then redacted until an entry of June 27, 2022. The adjuster's notes indicated that they had received the OCF-1 on June 20 and it included an OCF-3. The note summarizes the OCF-1 and then under priority indicates the following: “Under investigation who passenger is to named insured.” There is no other suggestion with respect to what investigation is being done at that time in terms of priority.

On June 27, 2022 the adjuster attempted to conduct a driver's licence search in Ontario using

the claimant's name. The search results came back on June 28 and showed no record.

The next relevant entry is July 26, 2022 which is described as a transfer file review. This note indicated that previous documents had been received prior to the receipt of the OCF-1 including an OCF-23 received March 30, 2022. The note indicates that the driver's licence search had shown zero results. There was no Police Report. Under action plan it reads the following: "Request FCR statement/stat dec for priority investigation."

On August 9, 2022 the adjuster indicates that she has called the clinic where the claimant is attending for treatment. Her note indicates the purpose of the call is to "Investigate who the claimant is." However, no one was available. She left a voicemail with a callback number and notes she will try again in a couple of days if she does not get a response.

On August 16, 2022 the log note indicates that there is a roundtable review and that an FCR statement is needed for priority. The note indicates that they need to set up an interpreter as the claimant speaks Mandarin and this is approved.

On August 17, 2022 the adjuster speaks with someone at the clinic. He advises that the claimant is a friend of the named insured but they are not related. He says the claimant has mentioned to him that he does not have any car insurance of his own. Apparently he has just moved to Toronto and does not live with his parents but he does have a spouse. The adjuster notes "Planning to request FCR once we have consent to find out spouse's name and if they have a policy of their own." Later in the day on August 17 the adjuster attempts to make a call with the claimant using an interpreter but he did not answer.

On August 18 the adjuster and the claimant managed to make contact with a translator. The claimant said he needed to call at a different time but he did tell her that he has his own car insurance and a spouse with insurance as well. He consents to giving an FCR statement and the adjuster sends out a request for that.

On August 18, 2022 shortly after speaking with the claimant the log note indicates "Notice of new task." Within the body of this log note it indicates that an interpreter will be needed. While he can speak some English, he was still confused. She asks that the date of birth, driver's licence and policy information for his own policy and his spouse's policy be confirmed.

On August 22, 2022 a Mandarin-speaking field adjuster from Intact contacted the claimant to secure a statement. The note indicates as follows: "I called the claimant. I spoke to him in Mandarin. He had no idea why I called and why I requested a statement. I explained priority to him in detail, with examples. He said his wife is in Alberta. He said he answered these priority questions when filling out the OCF form. He declined to provide a statement on this matter."

By letter dated August 23, 2022 Intact wrote to the claimant at his Aurora address. Priority relevant information was requested to be provided no later than September 6, 2022. This included the following:

- Full name of your spouse

- Address of your spouse
- Date of birth of your spouse
- Your driver's licence
- Spouse's driver's licence
- Statuary Declaration

Attached to this letter was a four-page document entitled “Statutory Declaration Questions.” There were 22 questions which dealt with marital status, ownership of various vehicles, regular use, driver's licence information and dependency. The request was styled as a s. 33(1) request pursuant to the SABS. This document was sent by regular mail. The document was written in English. The evidence is clear that the claimant did not comply with any of the requests and did not complete the Statutory Declaration.

Also relevant is a log note in or around the time of this letter dated August 22, 2022 in which the adjuster notes under priority that the statement had been declined by the claimant. The note indicates “90 days is approaching. D/L search has been completed and has not come back with any results however, I spoke with claimant on the phone and he said he was driving and could not talk therefore he must have a D/L.”

On August 24, 2022 Intact’s investigator was asked to conduct a drive-by of the claimant's listed address in Aurora to search for vehicles. The drive-by took place on August 24 but there were no vehicles in the driveway. The investigator indicated he would attempt one more drive-by within the next two weeks. A further drive-by took place on August 30 and this time the investigator saw a vehicle in the driveway with Alberta plates bearing licence number BJP2118. He recommended an Autoplus be run on the vehicle licence plate. The following day a licence plate search was conducted by the adjuster but there were no results.

On September 6, 2022 the adjuster attempted to contact the claimant with a Mandarin translator again. He answered the phone and she identified that she was from Intact. Once the translator translated that, the claimant immediately hung up.

On September 8, 2022 there is a log note referencing “Priority committee recap.” This claim had apparently been referred to the priority committee and a meeting had been held. The note reads as follows:

> “Following our meeting, it was determined that an EUO would not be completed in time, and we did not anticipate that the claimant would show up for this - recommending to continue to try and get the wife's information in order to send the NOD to protect the 90 day timeline - send incomplete app response - refusing to provide information about spouse policy as the claimant has been non-compliant, there may be an argument to extend the 90 days. Please ensure to document all investigate steps in your file in order to strengthen our case in the event we need to dispute the 90 day timeline.”

The next day on September 9 the adjuster sent the claimant another s. 33 request by mail requesting the same information it had on August 23, 2022. This letter was also in English and sent to the claimant's Aurora address. It requested that the information be provided no

later than September 16.

On September 12, 2022 the adjuster again managed to get the claimant on the phone with an interpreter. She asked for his wife's date of birth, address and full name and the claimant responded that he does not need to provide that information. The adjuster attempted to explain that this information was needed for priority and that his benefits would be suspended until the information was secured. The claimant responded he had a legal rep and that he told him that priority information. The adjuster noted that Intact had not received any notice that the claimant had a legal rep and a direction and authorization had not been submitted. The claimant responded that he did not want to give an authorization to let them speak to his rep. There was some further discussion and the claimant continued to refuse to provide his spouse's information. The call ended with the claimant saying he would reach out to his rep to see why they had not yet contacted Intact and requested that the rep provide information.

The 90-day period expired September 19, 2022.

The next communication with the claimant was September 21, 2022, again a phone call with an interpreter. The claimant repeated he had given his insurance information to his legal rep but he could not tell the adjuster who that rep was. The claimant again said he would not give the information over the phone but he would tell his legal rep to do so. He purported to suggest he did not know the law company he was using nor the name of his representative. The adjuster indicates “I will follow up weekly.”

On September 21, 2022 a further s. 33 letter was sent out requesting the priority information. On September 23 the log notes indicate the adjuster entered a “Interval note (26 weeks).” This summarized what had gone on over the previous months in terms of the priority dispute. The adjuster notes: “Priority is with his own policy however he has refused to provide it.” The only plan on moving forward on priority is to “follow up on priority issues weekly and if authorization for release of information is not received by mid-October to suspend benefits.”

On September 30 the adjuster tried to contact the claimant again with an interpreter but there was no answer. The interpreter left a voicemail message

On October 6, 2022 the adjuster again tried to contact the claimant and there was no answer. She left a voicemail.

On October 13, 2022 the adjuster successfully contacted the claimant. He declined to provide that information over the phone and said he had asked the clinic to fax it to them. He said the clinic had his car information and they tried to send them a copy of it. He was advised nothing had been received and he said he would call them and ask them to send it.

The adjuster contacted the clinic on October 19, 2022. The clinic advised that they had sent over his policy information by fax. The adjuster confirmed it had not been received and they advised that they would refax it and e-mail.

A follow-up call was made to the clinic on October 24 but they were not available. An urgent

message was left saying the information had still not been received and requesting that it be sent over.

Similarly on October 27 the adjuster contacted the clinic and there was no answer and a message was left.

On November 14 the adjuster connected with the clinic again to ask them to send the insurance information and confirming it had still not been received. The clinic repeated that they had faxed it over. The adjuster provided them again with her e-mail and the clinic indicated that they would be sending it over.

Finally in a log note of November 18, 2022 the adjuster indicates that she received the policy information with respect to the claimant on November 14, 2022, presumably from the clinic. Her note indicates "Sending priority dispute even though we are after the 90 days with the hope that TD will accept since the claimant was extremely non-compliant."

On November 18, 2022 Intact delivered to TD its Notice of Dispute.

RELEVANT LEGISLATION

The applicable legislation in this case is s. 3 of Ontario Regulation 283/95. It sets out the various notice obligations on an insurer who wishes to dispute priority under s. 268 of the *Insurance Act*. The provisions are set out below:

> "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.
>
> 3 (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."

POSITION OF THE PARTIES

A. <u>Intact</u>

Intact's position is that they meet both parts A and B of Regulation 283/95 s. 3(2). Intact submits that 90 days was not sufficient time for them to determine the name of either the claimant's own insurance company in Alberta or his spouse's insurance. Intact also takes the position that within the 90-day period they did make reasonable investigations and therefore the saving provisions should be triggered. Intact's position is primarily based on the

uncooperative experience they had with the claimant. They also point to the fact that he did not speak English. Further, misleading or inaccurate information was provided in the OCF-1. They also point out that the claimant failed to respond to s. 33 notices. Lastly, Intact submits that there was really no other source of this information other than the claimant. Therefore if the claimant was not cooperative there was little that Intact could do.

Intact submits that the case law dealing with the 90-day issue has established that an insurer in these circumstances must show that they have made reasonable investigations but perfection is not required. In addition, Intact submits I should recognise that adjusters are extremely busy and handling more than one complex matter at a time.

Intact also submits that if they can show that it was impossible to make a determination that there was a new insurer within the 90-day period, then they will have satisfied the onus that 90 days was not sufficient time to make that determination. Intact submits that with an uncooperative insured who does not speak English and who after numerous attempts of contacting him by phone, with an interpreter and through correspondence, he still declined to provide the required information, that there was no other way Intact could have determined the existence of the Alberta policy.

Intact recognises that it has the onus to show that 90 days was not sufficient time for the determination. Intact points to the efforts made by the adjuster to contact the insured personally, contact the insured with the assistance of an interpreter, arrange for the insured to give a statutory declaration with the interpreter, sending out s. 33 notices, conducting driver's licence searches, conducting a drive-by and contacting the clinic where the insured was attending to see if information was forthcoming from the clinic.

Intact submits that there was no point in setting up an examination under oath as the claimant's behaviour would support a reasonable assumption that the claimant would not attend an EUO and would not be cooperative.

Intact points out that the OCF-1 did not provide accurate information. While he identified that he was married, he did not fill in any of the boxes confirming he had his own automobile insurance under which he was a named insured in Alberta. This Intact submits was misleading and it was not until August 18 that Intact had confirmation that the claimant did have his own insurance. From August 18 on forward, the claimant consistently declined to provide that information suggesting that there were other sources and remained uncooperative.

Intact submits that all these facts point to a triggering of the saving provisions and that it should be permitted to proceed with its arbitration as against Security.

B. <u>Security</u>

Security does not disagree with the factors that are to be looked at with respect to determining whether the 90-day period is applicable or whether the saving provisions are triggered. Security acknowledges that one must look at whether there were reasonable investigations and that an insurer should not be held to a standard of perfection. However, Security submits that the facts do not support that Intact conducted reasonable investigations

within the 90-day period and also submits that had those reasonable investigations been done, that Intact would have had more than sufficient time within the 90 days to get the information it required.

Security points to the following facts:

1. In the log note of June 27, 2022 (seven days after the OCF-1 had been received), while priority is noted to be a concern, there is no plan of investigation despite the fact that the OCF-1 showed the claimant was married and part 4 had not been completed.

2. While the log note of July 26, 2022 notes the need for a statutory declaration to investigate priority, no steps were taken to conduct that until August 18, 2022.

3. A s. 33 notice requesting relevant priority information and asking for a statutory declaration to be completed was not sent until August 23, 2022. It was sent by regular mail and in English.

4. No effort was made to set up an EUO within the 90-day period. In fact, on September 8, 2022 Intact decided not to pursue an EUO as they were concerned it could not be set up prior to the 90-day deadline and they did not think the claimant would attend.

5. The first time the adjuster attempted to contact the claimant directly is not until August 18, 2022, almost 60 days after the receipt of the OCF-1.

6. Intact should have recognised, based on the driver's licence set out on the claimant's OCF-1, that he was not licensed in Ontario (the licence number was noted as 144441-698).

7. Ultimately the claimant was not uncooperative in that he agreed to provide his policy information through his treating clinic. Intact failed to pursue the clinic in a reasonable fashion to secure that information.

Security submits that if Intact had called the clinic or the claimant earlier than mid-August they would have learned about the existence of the claimant's policy or his spouse's policy much sooner and could have started their investigations and efforts to have the claimant cooperate sooner. Security submits that Intact failed to make even the most basic investigations such as calling the claimant until mid-August and that that does not constitute a reasonable timeframe. The same is true with respect to Intact's efforts to collect information through s. 33 requests. It was too little too late.

Lastly, Security submits that Intact was aware that this accident had occurred when it was notified of the accident by its insured on February 25, 2022. Intact knew at that time that an accident had taken place and that there was a passenger in the vehicle. Intact had also received an OCF-23 from the claimant on March 30, 2022. While all this happened prior to the receipt of the OCF-1, Security submits that it should have triggered Intact to start its investigations including contacting the claimant or the clinic as that information would have

been set out on the OCF-23.

C. Intact's Reply

Intact responds that the log notes clearly show significant effort and diligence made by Intact to investigate this matter. With respect to the EUO, Intact notes that it is not a trivial matter to arrange. It must be assigned to counsel, a date scheduled, an interpreter be involved and arrangements made with the claimant. Intact submits that even if they had made an effort to schedule an EUO, that it was highly unlikely the claimant would have attended.

Intact submits that its adjuster made considerable efforts to contact the claimant by phone or by mail. She made considerable efforts to get the clinic to provide the policy information once she was aware the clinic had it and the log notes show a frustrating lack of response and a lack of administrative competence on the clinic side.

Intact also submits that Security's critical analysis of Intact's efforts to collect the necessary information to determine priority fails to take into consideration the numerous files that the Intact adjuster would typically be working on and in essence holds Intact to an unrealistic standard of perfection under a microscopic retroactive scrutiny.

ANALYSIS AND DECISION

Numerous authorities were provided to me by both counsel. I set out below the general legal principles that were contained in that case law and upon which I rely in making my decision with respect to this issue:

1. The onus is on the party relying on the late notice provisions of s. 3(2) to show that 90 days was not sufficient time for the determination. The circumstances of each case must be examined to determine whether 90 days was or was not a sufficient time for that determination. *Liberty Mutual Insurance Company v. Zurich Insurance Company*, 2007 CanLII 254080 (ONSC).

2. Whether or not an insurer has been provided with accurate information by the insured is a factor in determining whether the 90-day period was sufficient. *Primmum Insurance Company v. Aviva Insurance Company of Canada*, 2005 CanLII 11975 (ONSC).

3. Investigations conducted within the 90 days must be reasonable but that does not mean they have to be perfect. The fact that in retrospect other investigations might have been seen to be helpful does not mean that the investigations that were undertaken do not meet the test of reasonableness. *Primmum v. Aviva*, *supra*.

4. In determining the reasonableness of the investigation and the timelines of the investigation one must remember that insurance adjusters are extremely busy individuals. They are working on many complex matters at the same time and should not be held to a standard of perfection. *Coseco Insurance Company v. Lombard Insurance Company* (Arbitrator Guy Jones, June 3, 2004).

5. Regulation 283/95 sets out precise and specific terms for a scheme for resolving disputes between sophisticated litigants. This is an area in which there is a constant and regular flow of case law and insurers deal with these disputes daily. Given that, the dominant consideration must be clarity and certainty to ensure a predictable and efficient scheme of dispute resolution. *Kingsway General Insurance Company v. West Wawanosh Insurance Company*, 2002 58 O.R. (3d) 251 Ontario Court of Appeal.

6. If an insurer shows that it was actually impossible to have made the determination within the 90 days then it will have satisfied its onus. *Liberty v. Zurich supra*.

7. S. 3(2) of Regulation 283/95 is designed to immediately engage the provision of benefits for the insured and to encourage the insurer who is providing the benefits to promptly make efforts to determine whether there is another insurer who should be responsible to pay. However, it is desirable that this section be interpreted so that it discourages insurers from issuing notices indiscriminately on the off-chance that a priority insurer will be identified. *Liberty v. Zurich supra*.

Having set out the general principles above, I now apply them to the facts of this case and the rationale for my decision.

I am persuaded by Security's submissions that based on the information available to it, Intact failed to start its investigations within a reasonable time after receiving the OCF-1 and that those investigations were lacking. While I agree that the claimant did fail to provide some information and once contacted was not overly cooperative, I do not find that that is sufficient to conclude that Intact could not have made further investigations that were reasonable and determine the existence of the Alberta policy prior to the 90-day period.

Intact received the OCF-1 on June 20, 2022. It already knew that this claimant existed and had some preliminary information about him through an OCF-23 and through information received by their actual named insured. While I do not agree with Security that I should take into consideration what Intact did prior to the receipt of the OCF-1, I do agree that the fact that Intact knew on March 30, 2022 that the claimant was submitting an OCF-23 and the information that it contained is relevant. Otherwise, I find that it is the receipt of the OCF-1 that triggers the 90-day period and one must look at the investigation done after the receipt of the OCF-1.

While the OCF-1 was received on June 20, there was nothing in the log notes to suggest that any sort of priority investigation was commenced. The first log note thereafter that was not redacted was June 27, 2022. It did not make any reference to the fact that the OCF-1 had not been completed with respect to what other insurance may have been available. By that I mean the questions had just not been answered at all. Further, there is no reference to the fact that the OCF-1 shows that the claimant is married. All that the log note indicates is that the investigation seems to be focused on who the passenger is to the named insured. I agree with Security that at the very least Intact should have been investigating or seeking more information about the claimant's marital status, who his spouse was and what policy of insurance she may have.

Other than the failed driver's licence search in Ontario on June 27, it does not appear Intact conducted or directed any priority investigations until August 9, 2022. We do have the log note of July 26 which references an action plan to get a statutory declaration for priority investigation. However, by August 9 it does not appear that any efforts have been made to move forward with a statutory declaration.

The August 9 log note indicates the adjuster is still focused on "who the claimant is". She tries calling the clinic to get more information.

By August 16, nearly 60 days after the receipt of the OCF-1 in the face of clear information in an OCF-1 that the claimant is married, Intact has not done any of the following:

1. Tried to phone the claimant.
2. Tried to contact their named insured to get more information about the claimant.
3. Tried to schedule a statutory declaration by phone.
4. Set up an EUO.
5. Send out a s. 33 letter requesting information needed for priority.

These are not unusual investigations to conduct or arrange in the circumstances here and Intact was clearly aware that there was a possible other policy that would rank in priority with the claimant's spouse.

On August 17 the adjuster speaks to someone at the treating clinic who confirms that the claimant has a spouse but advises the insurer that the claimant does not have any car insurance of his own. This is clearly inaccurate information with respect to the claimant's own insurance but should have clearly directed Intact to make at least some effort to track down the spouse's name and insurance policy. Again the key source of this information will be the claimant himself. As of August 17 there has still been no contact with the claimant by phone, by mail or through a possible scheduling of an EUO. On August 17 the adjuster attempts to call the claimant with an interpreter but he does not answer.

Finally on August 18 the adjuster and the claimant have a conversation through a translator and now Intact is made aware that not only does the claimant have a spouse with insurance but that he has his own car with insurance. There is no indication on August 18 in this conversation that the claimant will not be cooperative and in fact he agrees to give a statement.

On August 22 the field adjuster attempts to secure a statement with a Mandarin interpreter and here non-cooperation of the claimant begins. He does answer a few questions but then declines to provide a statement. We are now less than 30 days off the 90-day period.

Despite the information from August 18 that the claimant has his own insurance, I find that Intact makes minimal efforts to collect that information. With the claimant having refused to provide a statement on August 22, the insurer could have anticipated that the claimant may not respond to their s. 33 letter of August 23. They know he does not speak English or has minimal English and the letter is in English. Even though the 90-day period is a few weeks off, I find that it would have been reasonable for Intact to have attempted to schedule an EUO at

this time. I find that they should have thought of using the EUO earlier but at the very least when they found out the claimant had his own insurance policy as well as a possible spousal policy, I find that Intact should have used one of the most effective tools in their priority toolkit, and that is to require the claimant to attend and give evidence under oath. It is not necessary that an EUO be conducted by a lawyer. This can be conducted by an adjuster. Intact appears to have just given up on getting information from the claimant and that is certainly clear in the log note of September 8, 2022.

There is also no effort to contact their own named insured to see if he can secure the claimant's cooperation and provide some assistance. There were no further efforts to contact the clinic who seemed to have some information about the claimant.

It was not until August 24 that a drive-by was conducted.

On September 12, 2022 the adjuster again contacted the claimant by phone with an interpreter at which time he continued to refuse to provide his spouse's information and suggested he had a legal rep. There was nothing done by the adjuster between September 12 and September 19 when the 90-day period expired. In fact, the next effort to do anything with respect to priority was not until September 21.

While there is no doubt that the claimant was less than cooperative, I find that Intact did not make enough effort to try to get the information from the claimant through an early s. 33 notice immediately after they had received the OCF-1 which lacked information and identified the spouse or arranging an early EUO. I have taken into consideration the fact that the Intact adjuster probably had many other files. However, the running of the 90 days in this case was up front and centre with Intact based on the adjuster's notes and they were aware of the potential implications that they faced with a late 90-day notice in the circumstances of this case.

I therefore conclude that while Intact certainly made efforts to investigate priority, that they fell short of making reasonable investigations. I find that had they sent out earlier s. 33 notices or made efforts to conduct an EUO, contact the named insured or the clinic, that it is probable they would have secured the information they needed to put another insurer on notice. Therefore, I find that 90 days was sufficient time for Intact to determine that another insurer was liable and I further find that Intact did not make reasonable investigations during those 90 days and accordingly the saving provisions of s. 3(2) of Ontario Regulation 283/95 are not triggered.

ORDER

In light of my findings with respect to the second issue, this arbitration is therefore dismissed.

COSTS

Intact was successful on the first issue before me but Security was successful on the 90-day issue which resulted in this arbitration being dismissed.

If the parties cannot agree on both the disposition with respect to costs and the quantum of

costs within the next 60 days, I would ask them to contact me and we can schedule a pre-hearing to deal with the cost issue.

DATED THIS 15th day of July, 2024 at Toronto.

Arbitrator Philippa G. Samworth
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