

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8, as amended and
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT***

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 :

ACE OF AMERICA INSURANCE COMPANY

Applicant

- and -

SECURITY NATIONAL o/a TD MELOCHE MONNEX INSURANCE COMPANY
and ING INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Ruth Henneberry
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J. Jason Kerr
Counsel for the Respondent, Security National Insurance Company o/a
TD Meloche Monnex Insurance Company

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ISSUE

In this priority dispute, did ACE comply with the 90 day notice requirement set out in Section 3(1) of Ontario Regulation 283/95 with respect to the Respondent ING?

SUMMARY OF RELEVANT FACTS

This Arbitration arises from a motor vehicle accident which occurred on October 28, 2006. At the time of this accident the claimant, John Bezunhe, was a passenger in a rental automobile owned by Dollar Thrifty Automotive Group. At all material times, the rental automobile was

insured with ACE, pursuant to policy number DLQ047269A2. As a result of injuries sustained in the accident, the claimant made application for statutory accident benefits to ACE. In accordance with the provisions of the Statutory Accident Benefits Schedule, ACE has been paying statutory accident benefits to the claimant.

In this Arbitration, ACE seeks a declaration that ING is the priority insurer. The claimant, John Bezunhe, was a listed driver pursuant to ING policy number 730502942, issued to Fast Fence Inc.. The claimant was an employee of Fast Fence Inc. and it is alleged that he had regular use of a company vehicle insured by ING.

On or about November 2, 2006, the claimant's former legal representative, Mike Okojie of Grace & Associates, faxed a completed Application for Accident Benefits (OCF-1), amongst other documents, to Dollar Rental. In part 4 of the OCF-1, the claimant indicated that he was not insured under his employer's policy (e.g. company car), but did indicate in the OCF-1 that he was employed by Fast Fence Inc., located at 61 Melford Drive, Scarborough, Ontario, as a driver/installer. This documentation was faxed on November 2, 2006 to the independent adjuster in the United States retained by ACE.

In or about November 6, 2006, ACE or its U.S. independent adjuster, retained the services of McLarens Canada to adjust the claimant's statutory accident benefits claim and to investigate priority. Claims adjuster, Giovanni Rocca, was assigned on behalf of McLarens Canada.

On December 13, 2006, adjuster Rocca met with the claimant and his interpreter, obtaining a handwritten sworn statement. The signed statement confirmed that the claimant was employed full-time by Fast Fence Inc. as a labourer and driver and that he was a listed driver under his employer's policy of insurance. On or about December 13, 2006, adjuster Rocca also received and reviewed the employer's confirmation of income form (OCF-2) from Fast Fence Inc..

On January 14, 2007, adjuster Rocca delivered a Notice to Applicant of Dispute Between Insurers Form to TD via facsimile. TD was the insurer of a vehicle that the claimant is alleged to have an ownership interest in. There is no issue with respect to the timeliness of the notice to dispute with respect to the claim against TD.

By way of correspondence dated February 1, 2007, adjuster Rocca wrote to Fast Fence Inc. requesting, amongst other things, insurance particulars for Fast Fence Inc.. This correspondence was sent to Fast Fence Inc. by fax on February 1, 2007. Fast Fence Inc. immediately proceeded to fax a copy of Rocca's letter to its insurance broker.

On February 2, 2007, Fast Fence's insurance broker faxed a copy of adjuster Rocca's correspondence to ING. A "new claim" was opened at ING on February 5, 2007. A February 13, 2007 ING diary entry indicates "no need to have McLarens send us a Notice of Dispute app", arguably indicating that it had notice of ACE's intention to dispute priority and that a further formal Notice to Dispute was not necessary.

LAW

An individual involved in a motor vehicle accident may have accident benefit coverage available to him or her from more than one policy of motor vehicle insurance. The rules for determining which of those insurers stands in priority to pay the individual is set out in

Section 268 of the Insurance Act, R.S.O. 1990, c.l.8. If a dispute arises as to which of two or more insurers ought to be responsible for payment of accident benefits to the individual, then the insurers look to the dispute resolution scheme as set out in Ontario Regulation 283/95 – Disputes Between Insurers to resolve that issue.

Section 1 of Ontario Regulation 283/95 – Disputes Between Insurers, requires all disputes as to who should pay an injured party's benefits under Section 268 of the Insurance Act to be settled in accordance with the Regulation.

Section 2 sets out who should pay pending the resolution:

“The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the Act.”

Section 3 sets out the notice requirements of an insurer seeking to pass priority for payment to another insurer. It reads as follows:

“3(1) No insurer may dispute its obligation to pay benefits under Section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that Section.

(2) An insurer may give notice after the 90 day period if,

(a) 90 days was not a sufficient 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.”

If the insurers cannot agree as to who is required to pay benefits, Section 7 of Ontario Regulation 283/95 requires the dispute to be resolved through an arbitration under the Arbitration Act, 1991, S.O. 1991 c.17.

ANALYSIS AND FINDINGS

The Respondent ING takes the position that ACE is in breach of Section 3(1) of Ontario Regulation 283/95 in that notice to it was not received until early February 2007, with the 90 day limitation period having expired on January 31, 2007. Although only a few days late, ING takes the position that the limitation period must be strictly construed.

The Applicant ACE takes the position that it did not receive a “completed application” as required by Section 3(1) of the Regulation until such time that it received information that the claimant Bezunhe was a listed driver in a policy of insurance providing coverage to vehicles operated by him in the course and scope of his employment with Fast Fence Inc.. Such information was provided by the claimant on December 13, 2006. ACE therefore claims that the 90 day notice period would then terminate on March 13, 2007. Since ING had notice of

the priority claim in early February 2007, ACE has complied with the notice provisions of Section 3(1) of the Regulation.

The difficulty that I have in arbitrating this preliminary issue is the fact that there appears to be judicial support for the positions taken by each of the parties. In fact, there are what might appear to be conflicting decisions on the point by the same judge.

At risk of oversimplification, it appears that what I must determine is whether the limitation period set out in Section 3(1) of the Regulation begins to run with receipt of the Application for Accident Benefits (OCF-1) or whether it begins to run from the date that the insurer receives a "functionally adequate" application for benefits, which would include sufficient detail for it to determine whether another insurer might stand in priority.

I will first review the case law relied upon by the Respondent ING which claims that it received notice outside the 90 day period set out in section 3(1).

The Respondent ING has referred me to the decision of Primum Insurance Co. v. Aviva Insurance Co. of Canada (2005) O.J. No.1477 (S.C.J.). This was an appeal from an Arbitration Decision wherein the Arbitrator concluded that Primum had breached Section 3(1) of the Regulation and had not conducted the necessary reasonable investigations so as to rely on Section 3(2)(b) of the Regulation. On appeal before Mr. Justice Ducharme of the Ontario Superior Court of Justice, the Appellant Primum submitted that the 90 period was not sufficient because it was given inaccurate information by the insureds which prevented Primum 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 Primum was intentionally misled by its insureds and that even if the misrepresentation or non disclosure was not intentional, if the insurer relies on the incorrect or incomplete information in determining liability, then for the purposes of Section 3(2)(a) of the Regulation, the 90 day period is not sufficient time to make the determination. The Respondent took the position that the possibility of incorrect information is the reason that insurers are permitted 90 days to make their determination of liability. The Respondent took the position that the insurer seeking to rely on Section 3(2) must demonstrate that the evidence was not available to them within the 90 day period and that the evidence was available to Primum, if only they had asked the correct questions. Mr. Justice Ducharme concluded that with respect to Section 3(2)(a), the principal issue is not whether the non disclosure or misinformation provided to the Appellant was the result of dishonesty or some other more innocent reason. Rather, the only issue under Section 3(2)(a) is whether the receipt of the inaccurate information renders the 90 day period insufficient for the investigation of the particular case. He held that it was for the insurer who seeks to rely on Section 3(2) to demonstrate why, in the particular case, the non disclosure or misrepresentation made the 90 period inadequate. It was concluded that the 90 day period was more than enough time to conduct an investigation that the Appellant's problem was that they did not do so. Mr. Justice Ducharme then proceeded to deal with the reasonable investigations necessary to satisfy Section 3(2)(b) of the Regulation. He concluded that in making such assessment of reasonableness, it is appropriate to consider both what was done to investigate the claim, as well as what was not done. He ultimately concluded that with a proper investigation that was available to the insurer within the 90 day period, it could have obtained the necessary information to determine the other priority insurer. He agreed with the Arbitrator's Decision that Primum had failed to satisfy the requirements of Section 3(2)(b) of Regulation 283/95.

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

*"14. The case law of arbitrators and of courts about section 3(2) establishes several principles. Section 3(2) is to operate strictly, because an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits: Canadian General Insurance Co. v. AXA Insurance Co. [1996 CarswellOnt 5821 (F.S.C.O. Arb.)] (Galligan, December 19, 1996); State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2001), 53 O.R. (3d) 436 (Ont. S.C.J.); *affd.* (2002), (sub nom. Kingsway General Insurance Co. v. West Wawanosh In Co.) 58 O.R. (3d) 251 (Ont.C.A.); Primum Insurance Co. v. Aviva Insurance Co. of Canada, [2005] O.J. No.1477 (Ont. S.C.J.).*

15. Section 3(2) is designed to immediately engage the provision of benefits for the insured and to encourage the insurer who is providing the benefits to promptly exercise due diligence to make a determination whether another insurer should be responsible to pay: Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company (Malach, August 5, 1999); Axa Insurance Company v. Co-operators Insurance Company (Rudolph, May 1, 2000).

16. It is, however, desirable to interpret s.3(2) in such a way as to discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified: CGLI Group (Canada) Ltd. v. Zurich Canada (Jones, October, 2001).

17. The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time: Ontario Municipal insurance Exchange (OMEX) v. Liberty Mutual Insurance Company (Jones, October 2000); Coseco Insurance Company v. Allstate Insurance Company (Malach, November 15, 2001); ING Halifax Insurance Company v. Liberty Mutual Insurance Company (Malach, January 2, 2002); Federated Insurance Company of Canada (Malach, September 2, 2003); Coseco Insurance Company v. Lombard Insurance Company (June 3, 2004).

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

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

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

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

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

23. A review of the case law reveals however, that something less than proving that a determination was impossible within 90 days will suffice to satisfy the onus. Put somewhat differently, an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.

24. Section 3(2)(a) is directed toward the ability of the insurer to gather the necessary facts to make a determination within 90 days: *State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance)* (2001), 53 O.R. (3d) 436 (Ont.S.C.J.); affd. (2002), (sub nom. *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.*) 58 O.R. (3d) 251 (Ont.C.A.); *Primum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No.1477 (Ont. S.C.J.).

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

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

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

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

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

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

These two cases referred to me by the Respondent 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.

The Applicant has referred me to two cases which would suggest that the 90 day notice period does not begin to run until such time as the insurer has received a "functionally adequate" completed application. The Applicant ACE takes the position that it did not receive

a “functionally adequate” completed application until such time that it received information as to the claimant being a listed driver on a policy of insurance with respect to vehicles owned by his employer and regularly used by him. This took place on December 13, 2006 so that the limitation would be extended to mid-March 2007, long after ING was aware of ACE’s intention to dispute priority.

In Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Lombard Insurance Company of Canada [2010] 100 O.R. (3d) 51, 2010 ONSC 1770 (Ont.Sup.Ct.), This matter involved an accident benefits claim presented to the Motor Vehicle Accident Claims Fund (“Fund”). The accident occurred on June 30/07. The Fund received an OCF-1 (application for accident benefits) on October 26, 2007. This was not accompanied by a police report as required in claims involving the Fund. On February 11, 2008 the adjuster for the Fund was provided with an incident report as prepared by the police as opposed to a motor vehicle accident report as the latter had never been prepared by the police. On February 12, 2008 the adjuster met with the claimant and finally realized that despite his previous requests for a motor vehicle accident police report none had ever been prepared. Details of the vehicle involved in the incident and insurance particulars did not become available to the Fund until June 3, 2008 with notice of priority dispute being sent to Lombard on June 4, 2008. Mr. Justice Perrell in dealing with Section 3(1) of the Regulation, concluded that the Fund did not receive a “completed application” until it was provided with enough information to allow it to give notice of a dispute under the Regulation. He essentially concluded that a completed application was an application that completed its purpose for providing the essential information for an insurer to assume its obligations and to exercise its rights. In other words, as argued by the Applicant’s solicitor, the notice did not begin to run until a “functionally adequate” completed application had been provided to the insurer. Mr Justice Perrell concluded that the “completed application” was not received until June 3, 2008 so that notice to Lombard was provided in a timely fashion.

It should be noted that this decision of Mr. Justice Perrell appears on it’s face to be in conflict with his earlier 2007 decision in Liberty Mutual Insurance Co. v. Zurich Insurance Co. (supra). It would appear that counsel arguing the appeal in Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Lombard Insurance Company of Canada [2010] 100 O.R. (3d) 51, 2010 ONSC 1770 (Ont.Sup.Ct.)(supra) did not bring his earlier decision to his attention. This may be because what constitutes a “completed application” in claims against the Fund is different from what is considered a “completed application” in cases not involving the Fund. I will deal with this in greater detail later in this decision.

In Ontario (Minister of Finance) v. Pilot Insurance Co., Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Pilot Insurance Co. and Kingsway Insurance General Insurance Co. [2010] I.L.R. 1-5058, 2010 ONSC 5361 (Ont. Sup.Ct.), Mr. Justice Cumming also dealt with the issue as to what constituted a “completed application”. In that Decision, Grzanka was a bicyclist who was struck by an unknown motor vehicle. As such, he applied for benefits from the Motor Vehicle Accident Claims Fund (the “Fund”) on March 7, 2007, but did not attach a police report, as required. Eventually, an investigator on behalf of the Fund determined that a 911 call had been made by the driver who hit Grzanka, but the Fund was only able to obtain the specifics of that call after bringing a court motion on September 8, 2008. At that time, it was determined that the Respondent, Pilot Insurance Company (“Pilot”), insured the vehicle that struck Grzanka and the Fund put Pilot on notice. An Arbitrator found that the Fund did not comply with subsection 3(1) of Ontario Regulation 283/95 and did not provide timely notice to Pilot, and therefore the Fund was responsible for

paying Grzanka's benefits. The Fund appealed. The issue was the appropriate legal principles to apply in determining the meaning and operation of "completed application" in subsection 3(1) of the Regulation. Mr. Justice Cumming allowed the appeal. He held that the Fund never received a "completed application" (the requisite OCF-1 Form, accompanied by a police report), nor did the Fund receive a "functionally adequate" application for the purposes of subsection 3(1) until it received the 911 record. The court concluded that before the Fund had received the 911 record, it did not have sufficient information to determine who was the insurer of the unidentified motorist involved in the accident with Grzanka. As such, the limitation period did not begin to run until September 8, 2008. Mr. Justice Cumming relied on the decision of Mr Justice Perell in Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Lombard Insurance Company of Canada [2010] 100 O.R. (3d) 51, 2010 ONSC 1770 (Ont.Sup.Ct.) (supra) in reaching his decision.

As I have indicated previously, there appears to be on it's face judicial support both for the theory put forward by the Applicant and for the theory put forward by the Respondent. I am of the view that the approach put forward by the Respondent is the appropriate approach in the circumstances. I am of the view that the 90 day notice period begins to run in a case not involving the Fund on receipt of the Application for Accident Benefits (OCF-1). The insurer then has a 90 day period to complete its investigation to determine whether there might be another insurer that would stand higher in priority. The insurer would have even a longer period of time to provide notice if it can demonstrate that the 90 day period was insufficient despite a reasonable investigation.

It is interesting to note that the two cases put forward by the Applicant are both cases involving the Fund. Part 11 of the Application for Accident Benefits (OCF-1) applies specifically to accident benefit claims presented to the Fund and places additional requirements on claimants to provide additional documentation and information. It reads as follows:

PART 11 – MOTOR VEHICLE ACCIDENT CLAIMS FUND

"You and your representative acknowledge that you have the responsibility to investigate and apply to all potential insurers to which the applicant may have recourse BEFORE submitting an application to the Motor Vehicle Accident Claims Fund (MVACF).

You and your representative acknowledge that the application MUST INCLUDE a completed:

- *NOTICE OF COLLECTION OF PERSONAL INFORMATION FORM, signed and attached**
- *Form 3 – Section 6 MVACF Application for Statutory Accident Benefits, signed and attached**
- *Motor Vehicle Accident (Police) Report, attached*

*Before the applicant can make an application for the payment of accident benefits from the MVACF. (*These forms are available at www.fsco.gov.on.ca)*

I certify that I have read this part and understand that this application for accident benefits is not complete until the required forms are completed, signed and provided to the MVACF.

 Name of Applicant or Substitute
 Decision Maker (please print)

 Signature of Applicant or Substitute
 Decision Maker

Date _____

It is clear that in claims involving the Fund, an application is not complete until such time as this additional documentation and information is provided. The Notice of Collection of Personal Information Form allows the Fund or its agents to collect information from the claimant's employer and other possible insurers. The Form 3 requires information as to what other possible insurance may be available to the claimant. It requires the claimant to sign a statement confirming that he or she has investigated and determined the identity and insurance particulars with respect to all vehicles involved in the accident. There may well be policy reasons (the Fund being the insurer of last resort) why claims involving the Fund ought to require such additional information before the claimant certifies that the Application for Accident Benefits is complete. In my view the approach taken by Mr. Justice Perell in Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Lombard Insurance Company of Canada [2010] 100 O.R. (3d) 51, 2010 ONSC 1770 (Ont. Sup. Ct.) (supra) and Mr. Justice Cumming in Ontario (Minister of Finance) v. Pilot Insurance Co., Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Pilot Insurance Co. and Kingsway Insurance General Insurance Co. [2010] I.L.R. 1-5058, 2010 ONSC 5361 (Ont. Sup. Ct.) (supra) is restricted to claims involving the Fund and the special requirements of Part 11 of the OCF-1 as to what constitutes a "completed application". These two cases are distinguishable from the notice requirements in accident benefit claims not involving the Fund.

As I have indicated, to accept the approach put forward by the Applicant, namely that a "functionally adequate" completed application is required to start the running of the limitation period would essentially render meaningless that set out in section 3(2) of the Regulation. There would be no need for an extension of the limitation period beyond 90 days if the limitation period did not begin to run until the other possible priority insurer was identified (i.e. a functionally adequate application having been received). Furthermore, I am of the view that clarity and certainty of application are of primary concern. I am of the view that an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits. To find that the clock does not begin to tick until a "functionally adequate" application is in the hands of the insurer, would essentially create an open-ended limitation period that does not meet the principles enunciated above. In the decision of Primum Insurance Co. v. Aviva Insurance Co. of Canada (supra), Mr. Justice Ducharme deals with the purpose of Regulation 283/95 and quotes the Ontario Court of Appeal Decision in State Farm Mutual Insurance Co. v. Ontario (Minister of Finance) (2002) 58 O.R. (3d) 251, where it is stated at page 255:

"The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this

Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.”

At page 5 of his decision, Mr. Justice Perell in Liberty Mutual Insurance Co. v. Zurich Insurance Co. (supra) writes:

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

Canadian General Insurance Co. v. AXA Insurance Co. [1996 CarswellOnt 5821 (F.S.C.O. Arb.)] (Galligan, December 19, 1996); State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2001), 53 O.R. (3d) 436 (Ont. S.C.J.); affd. (2002), (sub nom. Kingsway General Insurance Co. v. West Wawanosh In Co.) 58 O.R. (3d) 251 (Ont.C.A.); Primmum Insurance Co. v. Aviva Insurance Co. of Canada, [2005] O.J. No.1477 (Ont. S.C.J.)”

In my view, an open-ended limitation period does not provide the clarity and certainty of application, nor does it allow an insurer to know at an early stage that it might be managing and might be responsible for payment of benefits. In all of the circumstances, I am of the view that the approach set out in Primmum Insurance Co. v. Aviva Insurance Co. of Canada (supra) and Liberty Mutual Insurance Co. v. Zurich Insurance Co. (supra) most appropriately meets the legislative intent of section 3 of Ontario Regulation 283/95 with respect to claims not involving the Fund and gives meaning to section 3(2) of the Regulation. I am of the view that the legislative intent of section 3 of Ontario Regulation 283/95 was to provide an insurer, having received a completed Application for Accident Benefits – OPCF-1, 90 days within which to complete an investigation to determine whether some other insurer might stand in priority and to allow an extension of that time period where the insurer was able to show that a reasonable investigation had been completed and that 90 days was an insufficient period of time to make a determination that another insurer was responsible.

Applying these legal principles to the facts at hand, I find that ACE received a “completed application” on November 2, 2006 when Dollar Rental faxed the Application for Accident Benefits (OCF-1) provided by the claimant’s legal representative to the U.S. adjuster for ACE. There is a date stamp bearing the name of the U.S. adjusting firm and the date November 2, 2006. I find that the U.S. adjusting firm was the agent for ACE and is deemed to have received the application on November 2, 2006. There were inaccuracies in the application. The claimant indicated in the application that he was not covered under any other insurance policy including any policy on vehicles owned by his employer. I find that on December 13, 2006 (42 days following receipt of the completed application), ACE learned that the claimant worked as a labourer and driver for Fast Fence Inc. and that he was a listed driver under a policy of insurance with respect to a vehicle or vehicles that he regularly used in the course and scope of his employment. ACE had approximately 47 days in which to determine the identity of that insurer. ACE knew or ought to have known on December 13, 2006 that Fast Fence Inc. ought to be approached to determine the insurer of the vehicle or vehicles operated by the claimant in the course and scope of his employment with Fast

Fence Inc.. ACE, through its adjuster Rocca, did not make that request until February 1, 2007. I find that ING received notice of the priority dispute on February 2, 2007 when the broker for Fast Fence Inc. forwarded adjuster Rocca's letter of February 1, 2007 requesting insurance particulars and referencing the priority dispute. The limitation period set out in section 3(1) expired on January 31, 2007. Within a few days of the request for insurance particulars, ING had opened a new file and had posted reserves. I am satisfied that if adjuster Rocca had approached Fast Fence Inc. on December 13, 2006 when the claimant advised that he was a listed driver on his employer's policy, ACE would have identified ING as the insurer in short order and well before the January 31, 2007 expiry of the limitation period. In the circumstances, I find that ACE breached section 3(1) of the Regulation. ACE did not deliver notice within the 90 days prescribed by s. 3(1). I find that 90 days was not an insufficient period of time to make a determination that another insurer might be liable under Section 268 of the Act. I further find that ACE's investigation was not reasonable in the circumstances and that steps ought to have been taken quickly once it learned on December 13, 2006 that the claimant was a listed driver under a policy issued to his employer with respect to a vehicle that he regularly used. In my view, the identity of the insurer of the Fast Fence Inc. vehicles was readily available if only a request had been made in a timely fashion and therefore cannot benefit from the saving provisions of s. 3(2). Notice was not delivered within 90 days as required by s. 3(1) of the Regulation. The inaccuracies in the initial application did not make the 90 day period inadequate as the insurance information was available, if requested in a timely fashion, similar to the situation in Primum Insurance Co. v. Aviva Insurance Co. of Canada (2005) O.J. No.1477 (S.C.J.) (supra). The same analysis in my view ought apply.

It should be kept in mind that even if I were to have found that ACE did not breach section 3(1) of Ontario Regulation 283/95 with respect to ING, ACE would still have to demonstrate that Bezunhe had regular use of the Fast Fence Inc. vehicle "that was being made available to him at the time of the accident" before ING might be considered priority insurer by reason of the deemed named insured provisions of Section 66 of the Statutory Accident Benefits Schedule, Ontario Regulation 403/96.

ORDER

I hereby order that ACE is time-barred from pursuing ING for a declaration of priority by reason of its breach of section 3(1) of Ontario Regulation 283/95 and its failure to satisfy the requirements of section 3(2) of Ontario Regulation 283/95. I hereby order that ACE pay the costs of ING on a partial indemnity basis and the costs of the Arbitrator with respect to this preliminary issue.

DATED at TORONTO this 11th)
 day of March, 2011.)

KENNETH J. BIALKOWSKI
 Arbitrator