IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

AS REPRESENTED BY THE MINISTER OF FINANCE

Respondent

AWARD

Heard: March 7, 2013

Counsel:

Daniel Strigberger for the Applicant

Stan Sokol for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction

This arbitration involves a Statutory Accident Benefits Schedule ("SABS") priority dispute. On February 13, 2009 Janique Cookes was a pedestrian when she was struck by an automobile operated by David Partington. Ms. Cookes first applied for SABS to Economical Mutual Insurance Company ("Economical").[1] She also subsequently applied for SABS to Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance ("HMQ"). For the purposes of arbitration the parties agree that Economical received the first SABS application.

Economical has paid SABS to Ms. Cookes pursuant to its obligations under *Insurance Act* Priority Dispute Regulation 283/95 ("283/95"). It takes the position that before the accident it had terminated its policy insuring the vehicle operated by Partington, and therefore would not be ultimately responsible for the payment of SABS. Economical served a Notice of Dispute Between Insurers on HMQ within the 90 day time limit mandated by section 3 (1) of 283/95. It seeks to transfer responsibility to HMQ for the payment of SABS to Ms. Cookes, and indemnity for SABS already paid.

HMQ disputes Economical's entitlement to pursue priority against HMQ on the basis that Economical has failed to comply with the requirements of section 3 of 283/95. Economical takes the position that it has complied with the requirements of section 3 of 283/95, and that it is entitled to proceed with its priority dispute against HMQ. Economical submits that HMQ has not complied with its obligations under section 10 of 283/95.

Prior to its amendment for accidents occurring on or after September 1, 2010, section 3 of 283/95 read 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

[1] The insurer involved was actually Perth Insurance Company, a subsidiary of Economical. Throughout this Award, for ease of reference, I will refer to the insurer as Economical.

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.

Section 3 of 283/95 was amended in respect of accidents occurring on or after September 1, 2010. The following section was added to section 3:[2]

3.1 (2): Before giving a notice to the Fund under section 3, an insurer must,

(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and

(b) provide particulars to the Fund of the investigation and the results of the investigation.

The accident giving rise to the Cookes SABS claim and this arbitration occurred on February 13, 2009. Therefore, insofar as section 3 is concerned my analysis of the correct interpretation of section 3 must be based on the wording of section 3 before it was amended.

[2] Other amendments were made to section 3 but for the purposes of this arbitration this amendment is most relevant.

The Issues[3]

1. Did Nelson Financial receive proper and prior notification of the cancellation of the policy in accordance with the requirements and statutory conditions 11 and 12 of the applicable OAP 1 (Standard Automobile Policy)?

2. Did Economical comply with the requirements of section 3 of Ontario Regulation 283/95 and, if not, what are the consequences of the non-compliance?

3. Did the Fund comply with section 10 of Ontario regulation 283/95 and, if not, what are the consequences of the non-compliance?

4. Was Janique Cookes a "non-resident" at the time of the accident, such that section 25 (1) of *the Motor Vehicle Accident Claims Act* constitutes a statutory bar regarding the payment of any statutory accident benefits to this claimant? If so, is Economical entitled to reimbursement from the Fund for statutory accident benefits it has paid to Cookes?[4]

5. If it is determined that the Fund is liable to pay the claimant accident benefits under section 268 of the *Insurance Act,* what is the amount that is due from the Fund to Economical as reimbursement for benefits and expenses Economical has paid?[5]

Evidence

Counsel agreed that *viva voce* evidence was not required. The following documents were introduced into evidence at the arbitration hearing:

Exhibit 1: Arbitration Agreement, signed January 12, 2012, and March 8, 2013.

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[3] As stated in the Arbitration Agreement, signed January 12, 2012, and March 8, 2013, Exhibit 1.

[4] The parties agreed before the hearing that my decision on this issue should be deferred pending the results on issues 1, 2, and 3. Should it be necessary for me to consider this issue the parties are at liberty to introduce further evidence and submissions on this issue.

[5] This issue will be dealt with, if necessary, depending on the outcome on issues 1 through 4.

Exhibit 2: Economical's Document Brief, March 6, 2013, Tabs A – N.

Exhibit 3: HMQ's Document Brief, March 7, 2013, Tabs 1 – 23.

Exhibit 3, Tab 11: Ron Noble Insurance Limited File ("the broker's file")

Exhibit 4: Transcript of Examination under Oath of Economical's Representative, Todd Hunter.

Exhibit 5: Exhibits to Examination under Oath of Economical's Representative, Todd Hunter, Tabs 1 – 4.

Exhibit 6: January 12, 2012 letter from Economical's counsel to HMQ's counsel regarding undertakings from Examination Under Oath of Economical's Representative, Todd Hunter.

Exhibit 7: 8 page email from Economical's Counsel to HMQ's counsel dated February 13, 2013 regarding undertakings from Examination under Oath of Economical's Representative, Todd Hunter.

Analysis

Issue 1: Policy Cancellation

The accident giving rise to the SABS claim advanced to Economical occurred February 13, 2009. Economical had insured the vehicle that struck the SABS claimant, a 2002 Ford Taurus. A standard policy of automobile insurance number 4097248 was issued by Economical for the policy period February 28, 2008 to February 28, 2009. The Certificate of Automobile Insurance specifies Dave Partington as the named insured and shows Nelson Financial Group Ltd. as being the lessor/lienholder with respect to the insured vehicle.[6] The

[6] Tab 2, Exhibit 5

application for the policy was submitted through an insurance broker, Ron Noble Insurance Ltd.[7]

Mr. Partington failed to keep the premium payments for the policy current. As a result, Economical took steps to terminate the policy. Economical sent a registered letter of termination for the policy dated December 4, 2008 and registered with Canada Post the same date, indicating that the policy would terminate on January 4, 2009 unless the outstanding premium was paid. The letter was addressed to Mr. Partington. It was copied to Ron Noble Insurance Ltd., as well as the lessor of the vehicle, Nelson Financial Group Ltd.[8] Statutory Condition 12 does not require actual receipt of the termination letter by the insured. It is sufficient if the letter is registered with the post office not less than 30 days before the termination date stipulated in the letter. In this case, the evidence indicates that the registered letter of termination was received by both Mr. Partington, and Nelson Financial Group Ltd.[9] I accept this as proof of the further requirement in Statutory Condition 12 that the letter be addressed to the latest post office address as notified to the insurer.

The outstanding premium was not paid. Economical submits that it properly terminated the policy, and HMQ did not contest that submission. Based on the evidence before me, I find that Economical terminated the policy in accordance with the requirements of the Statutory Conditions 11 and 12 of the *Insurance Act.* Since the termination occurred January 4, 2009, Economical did not have a valid policy in effect for the 2002 Ford Taurus on the date of the accident. Therefore, apart from its 283/95 obligations as the first insurer to have received a SABS application, Economical did not have a statutory obligation to pay SABS to Ms. Cookes.

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[7] Exhibit 3
[8] Tab K, Exhibit 2
[9] Tabs L and M, Exhibit 2

Issue 2: Section 3, 283/95 Compliance

This has become the central issue to this arbitration for two reasons. First, Economical's policy was properly terminated and therefore, apart from its obligation to pay benefits to Ms. Cookes under section 283/95, it is not an insurer with an obligation to pay SABS under section 268 of the *Insurance Act*. No other insurer is a party to this arbitration, so if Economical is entitled to maintain its priority dispute HMQ will have to pay SABS.[10]

Secondly, it has been determined that at the time of the accident, Dominion of Canada ("Dominion") was the insurer of Nelson Financial Ltd., the lessor and owner of the vehicle that struck Ms. Cookes.[11]. Neither Economical nor HMQ have served Dominion with a Notice of Dispute Between Insurers. Dominion is not a party to this arbitration so it is not within my mandate to determine the potential liability of Dominion. Suffice it to say however, that it is by no means clear Dominion would have any liability to pay SABS at this point.

Economical received Ms. Cookes' SABS application on February 27, 2009. Economical served a Notice of Dispute Between Insurers on HMQ asserting that HMQ had priority for the payment of SABS to Ms. Cookes because before the accident Economical had terminated its policy of insurance on the vehicle that struck Ms. Cookes. One of the Notices of Dispute Between Insurers in the exhibits is dated April 2, 2009. This appears to be a draft, unsigned version.[12] Another copy of The Notice of Dispute Between Insurers signed by Economical's adjuster is dated April 24, 2009.[13] It appears that this was the version served on HMQ on April 28, 2009.[14] In any event it is not disputed by HMQ that the Notice of Dispute Between Insurers was served within the 90 day time period required by section 3 of 283/95.

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[10] This may be subject to the residency issue, but the parties have agreed that this issue will be deferred for further consideration, if necessary, so I will not deal with it in this Award

[11] Tab 21, Exhibit 3

[12] Tab G, Exhibit 2

[13] Tab 3, Exhibit 3

[14] Tab 4, Exhibit 3

Economical submits that it has satisfied the requirements of section 3 of 283/95 by serving the Notice of Dispute between Insurers on HMQ within the 90 day time limit. Economical submits that section 3 (1) is essentially a limitation period section. It does nothing more than stipulate a time within which the first insurer must serve a Notice of Dispute Between Insurers to commence priority dispute proceedings. There is no requirement in section 3 (1) of 283/95 that the insurer serving the Notice of Dispute Between Insurers conduct a reasonable investigation to determine the identity of other potential higher priority insurers. Economical argues that, strictly speaking, section 3 (1) of 283/95 does not set out the requirement for any investigation before an insurer may serve a Notice of Dispute Between Insurers.

Economical argues that it is only in the event the first insurer fails to serve its Notice of Dispute Between Insurers within the 90 day time limit, and consequently seeks relief under the saving provisions of section 3 (2) of 283/95 to continue priority dispute proceedings that the issue of whether the first insurer has conducted reasonable investigations becomes relevant. In that case, the insurer must satisfy an arbitrator that it has conducted reasonable investigations within the 90 day period to determine whether another insurer was liable, and that 90 days was not sufficient time to make a determination that another insurer or insurers is liable, before relief from the 90 day time limit can be granted.[15]

In support of its position, Economical focuses on the specific wording of section 3 (1) that requires the insurer who wishes to commence priority dispute proceedings serve, *"... every insurer who it claims is required to pay..."*. Economical submits that this wording allows the first insurer to choose which higher priority insurer or insurers to serve with a Notice of Dispute Between Insurers at its discretion. It is not obliged to serve every insurer who might have priority.

[15] Section 3 (2) (a), (b), and (3), 283/95

Economical argues that it would place an impractical burden upon the first insurer if within 90 days it was required to make a definitive determination of every insurer who might have priority in any given case and serve all such insurers. Economical submits that this is where section 10 of 283/95 comes in. It is effectively a "backup" to section 3. The first insurer who receives a SABS application has much to do when it receives the SABS application. It must begin managing the claimant's SABS claim while at the same time trying to ascertain whether there is any other insurer or insurers that might have priority. Section 10 requires any insurer served by the first insurer who wishes to dispute its obligation to pay on the basis that other insurers have equal or higher priority serve those other insurers with a Notice of Dispute Between Insurers. Presumably with both the first insurer and any insurer who has thus been involved in the dispute looking for other potentially prior insurers, it increases the likelihood that the proper priority insurer will be discovered.

In this case then, Economical submits that once it had served its Notice of Dispute Between Insurers within the 90 day time limit, HMQ had an obligation under section 10 of 283/95 to serve any insurer or insurers it felt would stand in priority to it. In this case, that insurer would be Dominion.

HMQ asserts that section 3 (1) of 283/95 requires the first insurer to conduct a reasonable investigation to determine the identity of another higher priority insurer or insurers and then serve all potential higher priority insurers it identifies as a result of that investigation. If the insurer does not conduct a reasonable investigation as described, and the insurer serves a Notice of Dispute Between Insurers on HMQ when there is a higher priority insurer or insurers whom the serving insurer has failed to identify, HMQ submits that in these circumstances the first insurer has not complied with section 3 of 283/95, and is not entitled to proceed with a priority dispute against HMQ.

In support of its position HMQ also references the wording of section 3 (1), and the construction of section 3 as a whole. HMQ submits that section 3 (1) uses mandatory language requiring the first insurer to serve "*every*" insurer

that a reasonable investigation discloses may have higher priority to pay SABS. Use of the word *"every"* implicitly requires the first insurer to conduct reasonable investigation to determine higher priority insurers. If the section intended that the first insurer had a general discretion whether to do any investigation, and to select whichever insurer it chose to serve with a Notice of Dispute Between Insurers rather than all potentially prior insurers, the section would have used the word "any", rather than "*every*".

HMQ submits that the words "*who it claims*" must be read with reference to the context that should be applied to the use of the word *"every"*. The phrase, "*...who it claims...",* HMQ argues, is intended to address the standard of proof required before the first insurer can issue a Notice of Dispute Between Insurers. In effect, the wording is intended to permit the first insurer to properly issue a Notice of Dispute Between Insurers after it has conducted a reasonable investigation upon which it has based a conclusion about another insurer or insurers who should pay SABS. The first insurer need not be correct in fact about the priority status of another insurer it serves, it only needs to have conducted a reasonable investigation to support its subjective conclusion that the other insurer has priority. The first insurer must then serve all potentially prior insurers that its reasonable investigations have disclosed.

HMQ submits that section 3 (1) and 3 (2) must be considered together to be given proper meaning. It would make no sense, argues HMQ, to make proof of reasonable investigations seeking other priority insurers within 90 days a requirement for an insurer to be allowed to serve a Notice of Dispute Between Insurers after 90 days, if it were not implicit that such investigations are required to properly serve a Notice of Dispute Between Insurers within 90 days. To not infer a reasonable investigations requirement for section 3 (1) would simply encourage the indiscriminate serving of Notices of Dispute Between Insurers within 90 days, which is of particular concern to HMQ since HMQ could be served in every case. This would place an onerous burden of investigation on HMQ to determine whether there were any priority insurers or else be stuck

with the SABS claim. In an extreme case, the first insurer might simply "dump" the claim on to HMQ by doing no investigation itself, serve HMQ with a Notice of Dispute Between Insurers, and let HMQ do the work of finding other priority insurers.

I can summarize the positions of the parties on this issue as follows:

Economical:

- It satisfied the requirements of section 3 (1) of 283/95 by serving HMQ with a Notice of Dispute Between Insurers within 90 days from the date that it received a completed SABS application.
- For the purposes of satisfying the requirements of 3 (1) neither reasonable investigation, nor indeed any investigation for higher priority insurers was necessary before serving the Notice of Dispute Between Insurers on HMQ. Evidence of reasonable investigations within 90 days is only relevant if the first insurer is seeking relief under 3 (2) (a) and (b) from the 90 day time limit to serve its Notice of Dispute Between Insurers.
- Once served with Economical's Notice of Dispute Between Insurers, pursuant to section 10 of 283/95 HMQ was required to serve its own Notice of Dispute Between Insurers on other insurers it contends have higher priority if it wishes to dispute its liability to pay SABS with Economical on this basis.

HMQ:

- Economical is not permitted to pursue its priority dispute against HMQ because it did not conduct a reasonable investigation to identify higher priority insurers before serving its Notice of Dispute Between Insurers on HMQ. A reasonable investigation would have identified Dominion as a higher priority insurer whom Economical should have served with a Notice of Dispute Between Insurers. Therefore, it did not satisfy the

requirements of section 3 of 283/85 and its Notice of Dispute Between Insurers is invalid.

- Since Economical's Notice of Dispute Between Insurers served on HMQ is invalid, there is no need to consider any section 10 issues with respect HMQ.

I will begin my analysis of this issue by noting that its resolution turns on the proper interpretation of section 3 of 283/95. It is trite law that the words of a statute must be given their plain and ordinary meaning. An adjudicator must also attempt to give meaning to each word that is used in a statute and not assume redundancy. The general approach to statutory interpretation is described in Driedger's *Construction of Statutes*, as follows:

> ...The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [16]

Our Court of Appeal has given us some specific guidance as to how 283/95 should be interpreted and applied. In *Kingsway General Insurance Company* v. *West Wawanosh Insurance Company* it was stated:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers... Given this regulatory setting, there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases.[17]

In dealing with a section 7 (2) limitation period case under 283/95 Justice Belobaba interprets the Court of Appeal's comments as follows:

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[16] 2nd edition, 1983, at page 87
[17] (2002), 58 O.R. (3d) 251 (Ont. C.A.), at p. 10

> The Court Of Appeal explained the importance of preserving certainty and clarity in the application of Reg. 283/95... The 'creative interpretation' of the Regulation was strongly discouraged.[18]

Mindful of these principles of statutory interpretation and the above-noted directions of our courts with respect to how 283/95 should be applied, I will address the parties' arguments.

HMQ has argued that it is important to consider section 3 of 283/95 as a whole in deciding whether Economical has satisfied its requirements. I agree with that submission, but going one step further I think it is most important to consider the main purpose of 283/95 in interpreting its individual sections.

Justice Laskin stated the purpose of section 283/95 in *Kingsway General Insurance Company Insurance Company* v. *Ontario (Minister of Finance)*[19] as follows:

> Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies section 2 is that the first insurer to receive an application for benefits must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay...

Many court and arbitral decisions have made similar comments with respect to the operation of section 283/95. Plainly, the main purpose of the regulation is to ensure that SABS are provided to injured accident victims without disputes between insurers delaying the process. The remainder of 283/95, starting with section 3, deals with how those disputes between insurers should be resolved, and the highest priority insurer determined.

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[18] (2006) 80 O.R. (3d) at 313-314

[19] 84 O.R. (3d) 507

In my opinion, just as the overriding concern of 283/95 is the timely provision of SABS to accident victims, section 3 deals with how an insurer who is required to pay benefits under section 2 may seek to recover its payments. The focus of section 3, at least as it was written before the September 2010 amendments, is on the insurer who is paying section 2 benefits, not on an insurer who may be served with a Notice of Dispute Between Insurers. The section does not create any direct obligations on the first insurer to a second insurer, it only stipulates a time period for the service by the first insurer of a Notice of Dispute Between Insurers on other insurers.

I agree, in part, with the position taken by HMQ with respect to the wording in section 3 (1), "*every insurer who it claims*". With the exception of the suggested implied requirement of "reasonable investigation", I prefer HMQ's analysis on the meaning of these words to that offered by Economical.

If it was intended that the first insurer have complete discretion as to which potential priority insurers it had identified to serve with a Notice of Dispute Between Insurers, then the word "*every*" would not have been used. A different word such as "any" – as suggested by HMQ, or "an", would have been appropriate.

I also agree that the words "*who it claims*" are not intended to give a unfettered discretion to the first insurer to serve a Notice Of Dispute Between Insurers on any priority insurer it may have identified, and leave others out at its choosing. HMQ's interpretation that the words are intended to permit the issuance of a valid Notice of Dispute Between Insurers by the first insurer without it having to prove definitively on a balance of probabilities that the insurer or insurers served is actually in priority, strike me as a more sensible interpretation of the words given the objective of section 3 – to try to get responsibility for the payment of SABS into the hands of the highest priority insurer.

I cannot however, agree with HMQ's position that section 3 (1) creates a statutory obligation on the first insurer to conduct a reasonable investigation before issuing a Notice of Dispute Between Insurers. Section 3 focuses on what the first insurer must do to properly start the priority dispute process. To do so it must issue its Notice of Dispute Between Insurers within 90 days. There is no wording in section 3 (1) that establishes a legal obligation on the first insurer to conduct any investigation, let alone reasonable investigation, before doing so.

HMQ submits that one must read sections 3 (1), and (2) together, and if one does so it makes sense to read section 3 (1) to require that the first insurer conduct a reasonable investigation before it can issue a valid Notice of Dispute Between Insurers. I disagree. As I have indicated, in my opinion the focus of section 3 is on the first insurer, and not on the second or other insurers served with the Notice of Dispute Between Insurers. The way the section is worded is that the first insurer is put to certain tests in the event that it has failed to issue its Notice of Dispute Between Insurers in accordance of section 3 (1). If it does not issue its Notice of Dispute Between Insurers within the 90 day time limit then its Notice is not valid unless it meets the tests set out in section 3 (2). One of those tests clearly articulated in section 3 (2) is to establish that it conducted reasonable investigations to determine the identity of higher priority insurers.

The first insurer may suffer the consequences of having a late served Notice declared invalid if it cannot meet the section 3 (2) tests. That does not support however, reading into section 3 (1) wording that is not there to create a legal duty on the first insurer, essentially for the benefit of second or other insurers, to conduct an investigation of a certain quality before a Notice of Dispute Between Insurers can be validly issued. The saving provisions of section 3 (2) are there for the benefit of the first insurer in the event that it needs relief from the 90 day time limit to issue a Notice of Dispute Between Insurers. They are not there to protect or create legal obligations on the first insurer to second or other insurers regarding investigations to be conducted before a valid Notice of Dispute Between Insurers can be issued.

In summary, there is a major difference between what section 3 legally requires of the first insurer to issue a valid Notice of Dispute Between Insurers, and what in practice is likely to occur in most cases.

In practice, an insurer required to pay a SABS claim pursuant to section 2 of 283/95 will usually conduct an investigation to determine whether there are higher priority insurers before issuing the Notice. The reason for this however, does not arise out of a statutory duty to other insurers to conduct an investigation of a certain quality. In my opinion section 3 (1) cannot be interpreted in this way. There is no reference to a requirement for any investigation in section 3 (1), let alone that the first insurer has an obligation to other insurers to conduct such investigation before it can serve a valid Notice of Dispute Between Insurers.

The reason the first insurer would conduct a reasonable investigation for other priority insurers is a practical one. The first insurer is motivated to find another insurer who may have to indemnify it and take over further payments on the claim. It is economic self-interest that drives the first insurer's efforts to find priority insurers, not statutory duty.

The first insurer can decide that it will not undertake reasonable investigation to find priority insurers, but it chooses to do so at its own financial peril. It would not make sense however, for the first insurer to purposely conduct shoddy or no investigation, and fail to identify another insurer upon which to serve a Notice of Dispute Between Insurers. To do so would mean that the first insurer could very well get stuck with a claim in a situation where proper investigation might have turned up the correct, higher priority insurer. Clearly that would not be in the best interests of the first insurer.

In the course of their submissions both counsel referred me to a number of cases. Both counsel also agreed however, that there is only one case that

could be on point with respect to the issue before me.[20] Other cases have made some general comments about the interpretation of section 3 of 283/95, but having reviewed them carefully I do not find any of them particularly helpful. Every case considering the issue of whether the first insurer had conducted a reasonable investigation for higher priority insurers was a case that involved the first insurer not having issued its Notice of Dispute Between Insurers within the 90 day time limit, and seeking relief under section 3 (2). In one case the insurer had not even fulfilled its obligation to pay SABS first and dispute later.[21] That is not the situation here. Economical fulfilled its section 2, 283/95 obligations to begin paying SABS to Ms. Cookes, and issued its Notice of Dispute Between Insurers within the 90 day time limit.

The cases referred to me were decided on whether the first insurer had satisfied the tests in section 3 (2) (a) and (b) to obtain relief from the section 3 (1) 90 day time limit and validate its Notice. They do not deal in any respect with the issue of whether section 3 (1) should be read to include a legal requirement on the first insurer to conduct a reasonable investigation for higher priority insurers to issue a valid Notice of Dispute Between Insurers.

I will now comment on the one decision that is more relevant to the issue before me, *Cooperators General Insurance Company* v. *Majesty the Queen in Right of Ontario as represented by the Minister of Finance (aka Motor Vehicle Accident Claims Fund)* (*Cooperators v. HMQ).*[22]

In that case private Arbitrator Novick was required to decide as a preliminary issue what in general terms is the same issue that is before me – the correct interpretation of section 3 (1), before the September 1, 2010 amendments. The issues placed before arbitrator Novick were not, however framed exactly the same way as those the parties have asked me to decide.

[20] *Cooperators v. HMQ*. As will be seen for my comments which follow however, I do not believe that the section 3 (1) issue was presented the same way in that case as it is in the case before me.

[21] See *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Company*, [2009] I.L.R. I-4779 (*Lombard v. Royal & SunAlliance)*

[22] Arbitrator Novick, January, 2013

The one issue that gave rise to the section 3 (1) interpretation discussion was framed thusly:

> ... Was Cooperators required to provide written notice of its intention to dispute its obligation to pay benefits to Mr. Trieu to the TTC in accordance with section 3 of Regulation 283/95?

There is a subtle but perhaps an important difference between this statement of the issue and the way the section 3 (1) issue has been presented to me. In *Cooperators v. HMQ,* the question of reasonable investigation was not presented directly as a matter of statutory interpretation as it was here. HMQ argued that Cooperators ought not to have been able to proceed with its priority dispute because it failed to serve the TTC, an acknowledged higher priority insurer than HMQ, with a Notice of Dispute Between Insurers. It was argued incidentally in support of this legal submission that a reasonable investigation would have disclosed the existence of the TTC as a priority insurer.

Technically then, HMQ's argument was not, as it was before me, that section 3 (1) should be interpreted to include an obligation on the first insurer to conduct a reasonable investigation before it can validly issue a Notice of Dispute Between Insurers. It was that Cooperators should have identified the TTC as a priority insurer, whether this was accomplished by reasonable investigation or not, and served the TTC with a Notice of Dispute Between Insurers. Cooperators' failure to do so invalidated its Notice.

Framing the issue this way essentially meant HMQ was arguing that a first insurer must identify and serve all potential priority insurers to satisfy the requirements of section 3 (1). As I understand HMQ's argument that is not the position it is taking before me. HMQ submitted to me that the onus on the first insurer is not so high as to require it to correctly identify and serve all potentially prior insurers. Section 3 (1) should be read however, to include an obligation on the first insurer to conduct a reasonable investigation to determine the identity of priority insurers, and to serve all such insurers it identifies as a result of that

reasonable investigation. It follows from this then that if the first insurer misses a potentially prior insurer and does not serve that insurer, it can still maintain that its Notice of Dispute Between Insurers otherwise served is valid if it can demonstrate persuasive evidence of having conducted a reasonable investigation.

Considering the foregoing, Arbitrator Novick did not have to decide whether section 3 (1) should be read to include the requirement on the first insurer to conduct a reasonable investigation before issuing a Notice of Dispute Between Insurers. She had to decide whether the first insurer has the obligation under section 3 (1) to identify and serve all potentially prior insurers.

It was in this context that Arbitrator Novick considered the section 3 (1) wording "*who it claims*". She concluded that this phrase cannot mean the first insurer must identify and serve all potentially prior insurers to comply with the requirements of section 3 (1). She goes on to describe the challenges faced by the first insurer to start dealing with a SABS claim and identify priority insurers within 90 days, and she concludes that:

> If the drafters of the regulation had intended to impose the obligation on a first insurer to provide notice to every potential insurer that could be in priority, those words ("who it claims") would not have been included. The fact that they appear in the provision in my view must mean that the first insurer has some discretion in this regard...section 3 requires that (the first insurer) provide notice within 90 days to another party that it asserts is higher in priority, but not to all potential parties".

She accepted Cooperators submission that:

> ...an insurer should be found to have complied with section 3 as long as it provides timely notice to an insurer who it claims is in higher priority to it...it is essentially a subjective exercise, and that if with the benefit of hindsight other insurers are later found to be in priority, there should be no penalty to the first insurer for not having provided notice to every last possible priority insurer.

I agree with the conclusion reached by Arbitrator Novick that section 3 (1) does not require the first insurer to identify all potential prior insurers and serve all of those insurers with a Notice of Dispute Between Insurers. That would clearly be too onerous a standard to impose upon a first insurer who wishes to pursue a priority dispute. It would also render redundant section 10 of 283/95 which imposes an obligation on a second insurer served with a Notice of Dispute Between Insurers who wishes to dispute its priority to serve other insurers it claims have higher priority. It would not be necessary for the second insurer to do this if the first insurer had the obligation of finding and serving all prior insurers.

The one possible difference of opinion I might have with Arbitrator Novick's view is in the interpretation of the "*who it claims*" wording. As I have already indicated, I do not think that these words should be considered in isolation. In my opinion it is necessary to look at the full phrase, "... *every insurer who it claims...*" to properly interpret the meaning of the words. I think that HMQ's interpretation of these words as presented to me in this case is the correct one, without including any implied obligation on the first insurer to conduct a reasonable investigation. When considered together, the words should not be read to create a subjective discretion in the first insurer to serve its own choice of any potentially prior insurers it has identified. It must serve every potentially prior insurer it has identified. It may well be that Arbitrator Novick in using the word "discretion" (in the first quote from her reasons that I have referred to on page 19) simply intended to say, as she said elsewhere in her reasons, that the first insurer did not have to perfectly identify and serve all priority insurers to be found to have issued a valid Notice of Dispute Between Insurers. If this is what she meant then I agree with her.

Another issue that was addressed in *Cooperators* v. *HMQ* was the concern for the unique position of HMQ as the "payor of last resort". HMQ argued in that case as it did here that not interpreting section 3 (1) as requiring first insurers to conduct reasonable investigation for higher priority insurers left

HMQ vulnerable to the "claims dump" situation. The concern is that the first insurer will do no or inadequate investigation for possible prior insurers and then simply serve HMQ with a Notice of Dispute Between Insurers. If HMQ wants to dispute its liability to pay SABS it will then have to do the investigation that the first insurer should have done, thus relieving the first insurer of both the investigation work, and the risk of not finding a priority insurer.

As a matter of policy, I would say that it is always best if the priority dispute can be worked out so that the highest priority insurer pays. I would also agree with HMQ's position, and Arbitrator's Novick's remarks in *Cooperators* v. *HMQ*, that as a matter of policy insurers should not conduct cursory investigations and lazily dump claims/or investigation responsibilities on HMQ. One must not presume however, that this is what is going to happen, just because it can happen. As I have said, insurers have a significant amount of economic self-interest in conducting proper investigations to determine whether there is another insurer who should take over responsibility for the payment of a SABS claim and reimburse them. I think one must also presume, until the contrary is proven in any given case, that insurers will act towards each other, and towards HMQ, in good faith in conducting their affairs.

I would note too, that the "claims dump" on HMQ cannot occur in every SABS claim. It can only potentially happen in situations where the first insurer takes the position that it did not have a policy in effect at the time of the accident. This can occur for various reasons, the most common of which is policy cancellation. If the first insurer does have a valid policy, then no matter where it otherwise stands on the section 268 (2) priority scale, it would always be higher than HMQ so there would be no point in serving HMQ in those circumstances. This certainly limits the number of situations where HMQ would be served with a Notice of Dispute Between Insurers.

I would also venture to suggest that even in the "no policy" cases the first insurer will, as it did here, conduct an investigation for other priority insurers and not simply dump the claim on HMQ. There is no guarantee until there is an

arbitral finding that the defense of policy cancellation will be found valid. If it is not the first insurer will always be higher in priority to HMQ. Investigation for priority insurers thus make sense for the reasons of economic self-interest that I have previously referred to.

It must also be remembered that regulation 283/95 was drafted with the primary concern of how to get SABS into the hands of injured accident victims as quickly as possible. As originally drafted it may not have contemplated the type of concern HMQ is expressing in this case. It is arguable that 283/95 was drafted without being clear that it would apply to HMQ. For the longest time HMQ also took the position in SABS priority disputes that it was not an insurer and so the terms of 283/95 should not apply to it. Eventually the law developed that for the purposes of 283/95, HMQ was an insurer, but this was quite some time after 283/95 was in effect.[23]

In any event, legislation must be interpreted the way it is written. HMQ's position that section 3 (1) should be interpreted to include the requirement on the first insurer to conduct a reasonable investigation for priority insurers before it can serve a valid Notice of Dispute Between Insurers would require reading into the section words that are not there, to address a problem that is essentially limited to HMQ. To do so would violate the courts' direction not to creatively interpret 283/95, and not to carve out a judicial exception to deal with the perceived equities of a particular case.

It would appear to me that in large measure HMQ's concerns have been addressed by the September 1, 2010 amendment of section 3. Obviously however, this amendment cannot be retroactively applied.

I have set out below a paraphrased version of how, in my opinion, section 3 (1) should be interpreted. I have included comments, where appropriate, relevant to the issues presented to me in this case:

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[23] See, for example, the comments of Justice Strathy in *Lombard v. Royal & SunAlliance*, at paras. 20, 45. The September 1, 2010 amendments have changed this yet again.

- An insurer wishing to pursue a priority dispute against another insurer or insurers must serve its Notice of Dispute Between Insurers within 90 days of receiving a completed SABS application.
- The insurer is not legally required to conduct any investigation to determine potential priority insurers, but it is obliged to serve a Notice of Dispute Between Insurers within 90 days on every potentially prior insurer which it has identified, not just its own discretionary selection from those potentially prior insurers it has identified. By "identified" I mean that there is evidence the insurer has actual, not merely constructive knowledge of a potential priority insurer. Put another way, the test would be whether the insurer "knew" of the identity of a potentially prior insurer, not whether the insurer "ought to have known" of the identity of a potentially prior insurer.

Applying this analysis to the facts of this case, the evidence indicates Economical was presented with a completed application for SABS by Ms. Cookes. As required by section 2 of 283/95, Economical began dealing with the SABS claim. Economical did conduct an investigation on the priority issue. It communicated on the priority issue with HMQ.[24] Economical took a statement from Ms. Cookes which addressed, amongst other things, whether there could be other, higher priority insurance available to her.[25]

HMQ had also been served on March 5, 2009 with a SABS application by Ms. Cookes.[26] This was within days of the SABS application having been served on Economical. HMQ started its own priority investigation and had actually taken a statement from Ms. Cookes dealing with the same issues before Economical obtained its statement.[27]

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[24] Tab F, Exhibit 2
[25] Tab H, Exhibit 2
[26] Tab B, Exhibit 2
[27] Tab 2, Exhibit 3

The evidence indicates that Economical did not identify Dominion as a potential higher priority insurer within 90 days from the date that it was served with Ms Cookes's SABS application. In fact, Economical never identified Dominion as a potential higher priority insurer. Dominion was not identified as a potential higher priority insurer until the end of 2011 or early 2012, as a result of investigation conducted by HMQ.[28]

I remind the reader that the reason I am reviewing this evidence is not for the purpose of deciding whether Economical conducted reasonable or any investigations to determine the identity of potential priority insurers. I have already found that Economical did not have a statutory duty under section 3 (1) to conduct such investigations before it could issue a valid Notice of Dispute Between Insurers.

The purpose of reviewing this evidence is to determine whether Economical identified Dominion as a potential priority insurer within 90 days of being served with Ms. Cookes SABS application. As I have indicated, the evidence discloses that Economical never identified Dominion as a potential higher priority insurer.

Had Economical identified Dominion as a higher priority insurer, or had, for example, Economical identified another insurer in addition to Dominion as a potentially prior insurer, then in my opinion Economical would have been required by section 3 (1) to have served both Dominion and the other insurer with a Notice of Dispute Between Insurers. If Economical had only served one of these insurers with a Notice of Dispute Between Insurers after it had identified both Dominion and another insurer as potentially prior insurers, then it would not have complied with the terms of section 3 (1).

Since there is no evidence that Economical identified Dominion as a potential higher priority insurer within 90 days of being served with Ms. Cookes' SABS application, I therefore conclude that Economical complied with the

[28] See footnote 37

requirements of section 3 (1) of 283/95 as it then was, having issued a Notice of Dispute Between Insurers to HMQ within 90 days of receiving Ms. Cookes' SABS application.

Issue 3: Section 10, 283/95 Compliance

This issue has been raised in respect of whether HMQ has satisfied any obligations it has pursuant to section 10. HMQ has argued that it does not have any section 10 obligations in this case because Economical failed to comply with the requirements of section 3 (1).

I have found that Economical did comply with the requirements of section 3 (1), and therefore its Notice of Dispute Between Insurers served on HMQ was valid. This gives rise to section 10 obligations on HMQ. If it wishes to dispute with Economical its obligation to pay SABS on the basis that other insurers have priority it must give notice to those other insurers.

HMQ has not served a Notice of Dispute Between Insurers on any other insurer alleging that such insurer is higher in priority. On the facts before me, the insurer to be served would have been Dominion, the insurer of the lessor/owner of the vehicle that struck the SABS claimant.

Dominion is not a party to this arbitration. I cannot make any findings binding on Dominion with respect to what could or could not happen if Dominion was served by HMQ with a Notice of Dispute Between Insurers, so I will refrain from any further comment in that regard.

The only relevance that Dominion not having been served with a Notice of Dispute Between Insurers has for the issues between the parties in this arbitration, is that the only way HMQ can now dispute priority with Economical is to argue that Economical is estopped by its conduct from proceeding with its priority dispute. That argument was advanced before me by HMQ in the

alternative to its position that Economical had failed to comply with the requirements of section 3 (1).

The basis for the estoppel argument is that Economical either negligently or purposely failed to provide to HMQ information relevant to the priority issue that it had in its possession, thereby preventing HMQ from learning the identity of the prior insurer Dominion before it was out of time to serve a Notice of Dispute Between Insurers on Dominion. For the purposes of this argument HMQ submitted that a section 10 insurer must serve its Notice of Dispute Between Insurers on every priority insurer it identifies within 90 days of being served with the first insurer's Notice of Dispute Between Insurers.

The issue of whether HMQ is correct in this interpretation of the time period within which a section 10 insurer must serve a Notice of Dispute Between Insurers is not an issue I must decide in this arbitration. Therefore, I will make no comment on the issue other than to observe that the law on this point may not be fully settled. There are two arbitral decisions of which I am aware that state a section 10 insurer is not bound by the same 90 day time limit for serving a Notice of Dispute Between Insurers that the first insurer must satisfy.[29]

There is however, some judicial comment (technically *obiter dicta* as far as the section 10 issue is concerned), suggesting that both the 90 day time limit for serving a Notice of Dispute between Insurers, and the Section 7 (2) limitation period for commencing an arbitration apply to every insurer involved in a section 283/95 dispute, not just to the first insurer.[30]

For my purposes, to deal with the estoppel argument as advanced by HMQ in this case my examination of the evidence can be limited to the first 90 days after HMQ received Economical's Notice of Dispute Between Insurers.

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[29] *Wawanesa Mutual Insurance Company v. Peel Mutual Insurance Company and Economical Insurance Company,* Arbitrator Samis, January 28, 2011; *Certas Direct Insurance Company v. Security National Insurance Company,* Arbitrator Bialkowski, February 2, 2012.

[30] *Pilot Insurance Company v. Royal & Sunalliance Insurance Company of Canada*, (2006) 80 O.R. (3d), 308, per Belobaba J. at p. 313.

That is the time period HMQ considered relevant for obtaining information from Economical as it was dealing with the priority dispute.

I will start my analysis on this issue by reiterating that section 3 of 283/95, as it existed before the September, 2010 amendments, is a section that focuses on what a first insurer must do to issue a timely Notice of Dispute between Insurers. It does not set out any obligations that the first insurer has to second or other insurers with respect to investigating for priority insurers, sharing information it has on priority issues, or respecting any other kind of obligations.

I conclude therefore, that there is no statutory duty in section 3 of 283/95 (nor for that matter in any other section of 283/95) that imposes an obligation on the section 2 insurer to provide information with respect to priority issues to other insurers.

As I have commented with respect to the reasonable investigation issue however; in my experience insurers are anxious to share information about which they are aware concerning priority issues since it is in their best interests to find a higher priority insurer for the SABS claim. If they can get help finding one they are usually quite prepared to cooperate with each other.

If there is any duty then on Economical as the first insurer to HMQ as the second insurer regarding the provision of priority information it can only arise as a matter of equity, perhaps analogous to the duty to act in good faith that insurers and their insureds owe each other. In my opinion, to the extent there is such a duty at best it can be no more than a duty not to intentionally mislead or be indifferent to the point of bad faith with respect to HMQ's priority inquiries. To place a higher duty on an insurer in Economical's position would effectively be reading into 283/95 obligations on the part of first insurer to second insurer that are not specified in the regulation.

Even if it could be said that there was a sufficient relationship between the first insurer, Economical, and the second insurer, HMQ, such that HMQ had a right to expect that representations provided to it by Economical were neither

negligently nor intentionally inaccurate, there still would have to be evidence of detrimental reliance upon any such representations to create an estoppel. For the reasons that follow, I see no evidence of detrimental reliance on the part of HMQ on any representations Economical made to HMQ with respect to the existence of a priority insurer. To the contrary, the evidence indicates that HMQ doggedly pursued its own priority investigation without reliance upon what Economical did or did not do.

Therefore, I will examine the facts in this case to determine whether in the first 90 days after it had served its Notice of Dispute Between Insurers on HMQ, there is any evidence of deliberate efforts on the part of Economical to impede a priority investigation by HMQ, or conduct that could be construed as being so indifferent to HMQ's efforts to find a priority insurer that it would breach a duty of good faith, to the extent Economical did have such a duty to HMQ.

Economical received Ms. Cooke's SABS application on February 27, 2009.[31] Economical's claims notes indicate that its documented handling of the application commenced March 4, 2009.[32] The notes indicate that the adjuster handling the claim was immediately aware the policy on the vehicle involved in the accident had been canceled effective January 4, 2009.

On March 23, 2009 Economical's adjuster received a telephone message from an adjuster representing HMQ. The note indicates that the adjuster was calling regarding "*a.b status*". By this time HMQ had received a SABS application from Ms. Cookes.[33] The Economical claims notes indicate that Economical's adjuster responded to this telephone message within two hours, leaving a message for HMQ's adjuster advising that Economical did not have a valid policy of insurance in force on the date of loss. This representation has turned out to be accurate.

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[31] Tab B, Exhibit 2
[32] Tab F, Exhibit 2 for this note, and the other notes referred to herein
[33] Documentary evidence indicates that HMQ received the SABS application on March 5, 2009 – Tab B, Exhibit 2

The Economical claims notes indicate that on March 24, 2009 a driver's license search was requested by Economical as well as an "insurance history". The note for March 25, 2009 indicates that Economical continued to investigate priority. The note states in part, "... *In addition to insurance search require statement to r/o dependent etc.* <u>*if no other insurer*</u> (arbitrator's emphasis), *claim to go to MVACF...".* Again I stress that I am reviewing this evidence not for the purposes of evaluating the quality of the investigation Economical conducted, but to determine whether it had actual knowledge of the identity of a possible priority insurer within the first 90 days of being served with Ms. Cookes' SABS application, and whether it was taking a "good faith" approach to its dealings with HMQ. The tenor of the foregoing note indicates to me that this was not a "claims dump" situation. Economical was making efforts to locate a priority insurer before serving a Notice of Dispute Between Insurers on HMQ. The reasonableness or adequacy of those efforts is not, for the reasons I have previously outlined, any part of the test that must be met for the purposes of section 3 (1).

On March 26, 2009 the Economical claims notes indicate that an insurance history was received and it was determined that Ms. Cookes had no insurance available.

A further note on March 26, 2009 indicates that Economical's adjuster initiated contact with HMQ's adjuster. The note of 4:52 PM reads in part as follows:

> (spoke with) Lindsey at claims pro
>
> discussed claim
>
> statement has already been provided to claims pro from claimant
>
> Lindsey wanted to confirm when we received the application
>
> confirmed March 5, they received application on March 10

> Lindsay is aware we have no coverage – policy is not valid at the time of the loss and in addition they are aware claimant has no other insurance available to her, however they are waiting for us to respond as we received application first ...
>
> Lindsay is still doing her investigation

A note in Economical's claims file at 12:54 PM, April 2, 2009 reads, in part, as follows, "... *Police report ordered, policy not in force on the date of loss –mvacf adjuster is aware, however we received application first – appears named insured has no other insurance available.*"

Notes in Economical's claims file through April and May, 2009 indicate that Economical continued to adjust Ms. Cookes' SABS claim. The next contact between HMQ and Economical disclosed in the Economical claims file appears to be on or about May 5, 2009 following receipt by Economical of an April 30, 2009 letter from HMQ's adjusters. The letter requests various information from Economical all of which has to do with Ms. Cookes residency status and her injuries. HMQ has asserted that this letter went unanswered, but there was no information requested in this letter that would be relevant to the question of whether there could be another, prior insurer.[34]

Notes throughout the months of June and July, 2009 indicate that Economical continued to adjust Ms. Cookes' SABS claim. By the end of July, 2009, 90 days had passed from the time Economical served its Notice of Dispute Between Insurers on HMQ. The only request for information by HMQ during the 90 day time period that does not appear to have been answered by Economical is the April 30, 2009 letter referred to above. As indicated, even had this letter been answered promptly it would not have advanced the investigation for a priority insurer in the least. Another insurer such as Dominion would have been prior to HMQ in any event, whether or not there was a non-residency defense available to HMQ.

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[34] Tab 4, Exhibit 3

I am unable to conclude that in failing to respond to this letter within 90 days of serving its Notice of Dispute Between Insurers on HMQ Economical has either deliberately attempted to obstruct HMQ's investigation into the priority issue, or that Economical has been so indifferent to HMQ's position that it has acted in bad faith.

In fact, the Economical claims notes support the contrary conclusion. It is evident from the notes that the adjuster assigned to handle Ms. Cookes' SABS claim was significantly occupied during this time with the details of the claim. There is also a note in Economical's claims file July 24, 2009 that appears to address HMQ's request for information in the April 30, 2009 letter from its adjusters. The note states "*Claims pro for MVACF requesting additional info. MIL* (Economical's adjuster) *attempting to obtain and will confirm auth to release on file.*"

This suggests to me that Economical was attempting to get the information requested by HMQ, although perhaps not as quickly as HMQ would have liked. As stated, it would not have affected the search for a priority insurer anyways.

Having reviewed the documents introduced into evidence in this arbitration I conclude that there is no evidence of any request for information by HMQ of Economical within 90 days from the date by which HMQ had been served with Economical's Notice of Dispute Between Insurers that was relevant to the investigation of whether there could be another, prior insurer. There is also no indication that any of the information Economical voluntarily provided to HMQ on the priority issue during this time was inaccurate, and relied upon by HMQ to its detriment.

As I have indicated, the evidence indicates the contrary. It appears to me that Economical was cooperative with HMQ from the outset. There were several communications and an exchange of information early on in the claim. It is also noteworthy that in the early stages of the claim there was some question

as to whether Economical or HMQ had received the first SABS application. Economical was aware that HMQ had received a SABS application and that it was conducting its own priority investigation. The only request for information that HMQ made within the first 90 days after it had received Economical's Notice of Dispute Between Insurers that did not receive a prompt response would not have made any difference to the insurance priority investigation in any event.

HMQ stressed repeatedly before me that Economical could have easily determined that there was the potential for insurance on the vehicle being operated by Mr. Partington at the time of the accident simply by looking at its own Certificate of Insurance. Had Economical adverted to the fact that Nelson Financial Ltd. appeared on the Certificate as the lessor/owner of the vehicle it had insured, it ought to have contemplated that there could have been a lessor's contingent insurance policy that covered the vehicle. Indeed there was, and Dominion turned out to be the lessor's contingent insurer.

While all of that may be true, the evidence shows that Economical did not discover that Dominion was the lessor's contingent insurer. Based on my interpretation of the operation of section 3 (1), it is irrelevant to whether Economical served a valid Notice of Dispute Between Insurers on HMQ, that Economical could have or should have identified Dominion as a potential prior insurer.

On the question of how readily apparent the existence of Dominion as a lessor's contingent insurer should have been, I would observe that HMQ, an equally sophisticated entity as Economical insofar as the operation of the insurance priority dispute regulation 283/95, and section 268 (2) of the *Insurance Act* is concerned, made no request of Economical for a copy of Economical's Certificate of Insurance in respect of the vehicle involved in the accident until January 13, 2010.[35] This is almost 6 months after the expiry of the

[35] Tab 7, Exhibit 3

90 day time limit that HMQ asserts applies to its entitlement to serve a Notice of Dispute Between Insurers on an insurer it claims has priority.

Although it is not strictly necessary for my decision on the estoppel issue as argued by HMQ, I will review some of the developments occurring more than 90 days after HMQ was served with Economical's Notice of Dispute Between Insurers.

By letter dated June 16, 2010 HMQ requested a copy of the broker's file.[36] This was provided to HMQ by counsel for Economical by letter dated November 30, 2010. It was the information contained in the broker's file that first alerted HMQ to the existence of Nelson Financial Ltd. as the lessor/owner of the vehicle that had been involved in the accident with Ms. Cookes. Of significance, the broker's file also contained numerous references to the vehicle identification number (VIN) of the vehicle. At that point HMQ had all of the information it ultimately used to determine that Dominion was the lessor's contingent insurer of the vehicle involved in the accident. There was no need for HMQ to rely on Economical to provide further information.

It was not until just over one year later however, at the end of 2011, or in early 20212 that HMQ used this information to make telephone inquiries resulting in HMQ being able to obtain from the receiver of Nelson Financial Ltd. a copy of the Certificate of Insurance confirming Dominion's lessor's contingent policy on the vehicle.[37]

Once HMQ discovered the existence of Dominion it elected not to serve a Notice of Dispute Between Insurers on Dominion. Instead, it has taken the position throughout that Economical should have discovered the existence of Dominion and served Dominion with a Notice of Dispute Between Insurers.

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[36] Tab 10, Exhibit 3
[37] The source of this information is paragraph 29 of HMQ's Memorandum of Fact and Law, and Tab N, Exhibit 2

Therefore, although it is not strictly necessary for my decision, in my opinion there is nothing in the evidence that supports estoppel based on Economical's conduct between the end of July, 2009, and the end of 2011. HMQ clearly continued to pursue its own investigation of priority during that time. It did not rely to its detriment on any erroneous representations made to it by Economical about the existence or nonexistence of another priority insurer.

The key information it relied upon to track down Dominion – the broker's file, was requested and received from Economical in November, 2010. HMQ had this information in its possession for over a year before acting on it in November or December, 2011. Economical could hardly be blamed for this.

Having found that in the 90 day time period after HMQ was served with Economical's Notice of Dispute Between Insurers the evidence does not support HMQ's estoppel argument, and that Economical did not act in bad faith towards HMQ, I conclude that Economical is not precluded on these grounds from proceeding with its section 3 priority dispute against HMQ.

It follows that HMQ has not satisfied its section 10 obligations requiring it to have served a Notice of Dispute Between Insurers on Dominion as a prior insurer, to dispute with Economical its obligation to pay SABS. The language of section 10 is mandatory. It requires an insurer who receives a notice under section 3 to serve the other insurers it alleges have equal or higher priority if it disputes its obligation to pay benefits on the basis that there are other equal or higher priority insurers.

Conclusion

For the foregoing reasons I conclude as follows:

1. Economical properly terminated policy number 4097248 in accordance with Statutory Conditions 11 and 12 of the *Insurance Act* before the February

13, 2009 accident giving rise to Ms. Cookes' SABS claim. Therefore, Economical had no section 268, *Insurance Act* obligations to pay SABS.

2. Economical complied with the requirements of section 3 (1) of 283/95, as it existed prior to September 1, 2010, by serving a Notice of Dispute Between Insurers on HMQ within 90 days from Economical's receipt of Ms. Cooke's SABS application.

3. Economical is **not** prevented from pursuing its priority dispute with HMQ pursuant to section 3 (1) of 283/95 on the grounds of estoppel or bad faith.

4. HMQ failed to comply with the requirements of section 10 of 283/95. It is **not** entitled to dispute with Economical its obligation to pay SABS on the basis that other insurers have equal or higher priority, because it has not served the other insurers (in this case, Dominion) with a Notice of Dispute Between Insurers.

5. Economical has been successful with respect to issues 1, 2, and 3 of the arbitration. Regulation 283/95, section 9, states that the cost of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful party or parties to the arbitration. Should the parties wish to make submissions concerning costs I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for costs submissions.

March 28, 2013

Scott W. Densem, Arbitrator