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

MOTOR VEHICLE ACCIDENT CLAIMS FUND, and the NORTH WATERLOO FARMERS MUTUAL INSURANCE COMPANY, and JEVCO INSURANCE COMPANY

Respondents

AWARD

Heard: July 16, 2013

Counsel:

Kevin D. H. Mitchell for the Applicant, Economical Mutual Insurance Company

Cindy Dickinson for the Respondent, North Waterloo Farmers Mutual Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This priority dispute arbitration arises out of a motor vehicle accident occurring on July 16, 2009. The Statutory Accident Benefits ("SABS") claimant, Brandan Collens, was operating a pickup truck when he collided with a tractor hauling a utility trailer. Mr. Collens suffered a brain injury and has been found to be catastrophically impaired pursuant to the SABS definition.

Through counsel retained to represent the Collens family (Smitiuch Injury Law), Mr. Collens' parents applied for SABS on behalf of their son. The first application (OCF 1) was submitted, unsigned, to the respondent, Jevco Insurance Company ("Jevco") on August 4, 2009. Jevco responded to the SABS application advising that although it was preparing to set up a SABS claim file, its policy was canceled over six months before the accident.Mr. Collens was a named insured on this policy and but for the cancellation it would have taken priority over any other policy involved in this matter.

Within days, through counsel, Mr. Collens' parents subsequently applied to the Applicant ("Economical") for SABS.Economical insured Mr. Collens' parents. Mr. Collens was an excluded driver under that policy. Economical was not aware of the application submitted to Jevco. It believed that it had received the first SABS application so it commenced handling the claim and paying SABS to Mr. Collens.

Jevco made no payments on Mr. Collens' SABS claim. All parties ultimately accepted that Jevco's policy had been properly canceled. As a result, this arbitration

[1] The information in this introduction is taken from both the verbal and written submissions of the parties, and the Exhibits. The facts are either agreed to by the parties or they are not in dispute.

was dismissed, on consent, without costs against Jevco by my order dated May 22, 2013.

This matter proceeded before me on the basis that Economical was the first insurer to receive a completed SABS application, within the meaning of Regulation 283/95.

Economical subsequently served a Notice of Dispute between Insurers ("NDBI") on Jevco, and The Motor Vehicle Accident Claims Fund ("MVACF"). Economical took the position that Mr. Collens was an excluded driver under its policy[2], and he was not a dependent of his parents.[3] Therefore, its policy would not apply for the payment of SABS because he was not an "insured person" as defined in the SABS.

Jevco maintained its policy cancellation defence. MVACF advised that it would not involve itself in a dispute where it appeared that there was coverage under some insurance policy. After receiving documents from Economicalconfirming the cancellation of Jevco's policy, MVACF served the Respondent ("North Waterloo") with a NDBI.After MVACF's NDBI to North Waterloo, Economical also placed North Waterloo on notice that it was seeking to transfer responsibility for the payment of SABS to Mr. Collens to North Waterloo.

Arbitration under Regulation 283/95 was commenced by Economical against Jevco and North Waterloo. There is no issue in this arbitration with respect to the timeliness of the commencement of arbitration.

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[2] This would only limit the SABS payable, but not eliminate entirely the responsibility to pay SABS.
[3] After arbitration had commenced and evidence was developed on the dependency issue, it was agreed for the purposes of the issues to be decided by me that Brandan Collens was **not** a dependent of his parents.

The timeliness and validity of the various NDBI served form the basis for the priority issue in this arbitration, and the relevant details will be dealt with in my analysis of the matter.

The Issues[4]

(a) As between Economical and North Waterloo, which insurer is responsible to pay SABS to Brandan Collens arising out of a motor vehicle accident occurring on July 16, 2009?

(b) If the answer to issue (a) above is North Waterloo, what is the amount to be paid by North Waterloo to Economical, if any?

(c) What is the amount of interest owing upon the amount determined in respect of issue (b), if any?

(d) What is the quantum of costs and which party has the burden of payment?

The arbitration hearing and submissions to date have dealt with only the determination of the priority insurer.Further evidence and submissions may be required to address issues of quantum.

The Evidence

*Viva voce*evidence was not required. The following documents were introduced into evidence at the arbitration hearing:

Exhibit 1: Document Brief of North Waterloo, Tabs 1 – 16.

[4] See paragraph 1 (a), Exhibit 5 (Arbitration Agreement).

Exhibit 2: Autoplus Search on Brandan Collens (Submissions of Economical, Tab 2).

Exhibit 3: Economical Adjusting Note, August 13, 2009 (Submissions of Economical, Tab 21).

Exhibit 4: OPCF 28A – Excluded Driver, October 7, 2008 (Submissions of Economical, Tab 7).

Exhibit 5: Arbitration Agreement, Signed July 11, 2013.

Analysis

I find that the following facts have been established from the evidence in the documentary exhibits.

Smitiuch Injury Law sent Mr. Collens' SABS application to Economical by facsimile on August 11, 2009. A copy of the application was date stamped by Economical as received on August 12, 2009. On August 13, 2009 Economical sent a letter to Jevco enclosing a NDBI, the Niagara Regional Police Report ("the police report"), and an AutoPlus report.[5]The letter indicates that MVACF, Brandan Collens, and Smitiuch Injury Law were sent a copy of the letter.The NDBI indicated that Economical designated Jevco as the first insurer notified to pay benefits, and MVACF as the second insurer notified to pay benefits.

Exhibit 3 is a typewritten note from the Economical SABS claims file dated August 13, 2009, authored by the Economical adjuster handling the SABS claim, Adrien Kirchner. In the second paragraph of this note Mr. Kirchner explains his reasoning

[5] Exhibit 1, Tab 3.

behind issuing the NDBI against Jevco and MVACF, but not North Waterloo. The relevant part of the note reads as follows:

> - Autoplus has been rec'd back confirming that veh which clmnt was operating at the time of loss (as per police rprt) is insd under the Jevco w/pol period of Nov 8/08-09. Called Jevco who advised that pol was in fact cancelled in January of this year, however, underwriter would not provide further details. Have issued dispute between insurers to Jevco & MVACF as precaution. Did not place North Waterloo Mutual on notice as TP involved was a 2003 Massey Ferguson Farm Tractor which is not plated, licensed for the road, and would be insd under a Farm Policy (as opposed to an automobile insurance policy).

MVACF sent an August 19, 2009 letter to Economical in response to Economical's August 13, 2009 letter.[6] In its August 19, 2009 letter MVACF stated in part, "*This letter will confirm receipt of your Notice of Dispute between Insurers addressed to Jevco Insurance and the Motor Vehicle Accident Claims Fund*."

Jevco sent a September 29, 2009 letter to Economical providing evidence that the Jevco policy was cancelled before the accident.[7]

Economical sent an October 8, 2009 letter to MVACF enclosing both the Jevco September 29, 2009 letter, and the documentation enclosed with the letter confirming cancellation of the Jevco policy before the accident.[8]

MVACF sent an October 19, 2009 letter to Economical acknowledging receipt of Economical's October 8, 2009 letter.[9] MVACF advised in its letter that it had assigned

[6] Exhibit 1, Tab 4.
[7] Exhibit 1, Tab 6.
[8] Exhibit 1, Tab 7.
[9] Exhibit 1, Tab 8.

investigation of the claim to ClaimsPro Inc. MVACF also indicated it needed the following information:

1. Copy of the full police report
2. Copy of the Application for Accident Benefits, and date on which you were presented with the above claim.
3. Claimant's statement, Field adjusters reports, medical reports, and other relevant documentation.
4. Full details into the investigations conducted to determine what otherinsurer or insurers are liable to pay in priority to the MVAC Fund, as is required under section 3 of the DBI regulation.

Economical sent a January 4, 2010 letter to MVACF.[10]In response to MVACF's request, Economical enclosed the police report, and Mr. Collens' SABS application.Economical indicated that it would release a complete copy of Mr. Collens SABS file once it had his consent to do so.

With respect to MVACF's request for details of Economical's investigation for priority insurers, Economical confirmed that it had verified no coverage existed under its own policy, and that there was documentation to confirm the cancellation of the Jevco policy (already sent to MVACF with Economical's October 8, 2009 letter).

No mention was made in the letter of Economical's belief that the North Waterloo policy cited on the police report was a "*Farm Policy*", not a motor vehicle liability policy. Economical did state however, "*No other potential insurers were identified*."

[10] Exhibit 1, Tab 10.

MVACF sent a January 26, 2010 letter to North Waterloo placing North Waterloo on notice of MVACF's intention to dispute priority with North Waterloo regarding the obligation to pay SABS to Brandan Collens.[11]

Counsel for Economical sent a May 7, 2010 letter to North Waterloo asking for details of the nature of North Waterloo's insurance coverage on the tractor and trailer involved in the accident with Mr. Collens. The letter also placed North Waterloo on notice of Economical's intention to dispute priority with North Waterloo regarding the obligation to pay SABS to Brandan Collens in the event that the North Waterloo policy was a motor vehicle liability policy.[12]

Economical commenced arbitration against MVACF on May 7, 2010, against MVACF and North Waterloo on May 27, 2010, and against MVACF, North Waterloo, and Jevco on July 8, 2010.[13]

Counsel for North Waterloo wrote to counsel for Economical July 14, 2010. Amongst other things the letter confirmed that North Waterloo insured the trailer involved in the accident with Mr. Collens pursuant to a policy of motor vehicle liability insurance (which therefore provided SABS coverage).[14]

As I have indicated, there is no dispute that arbitration was commenced within the required time limit set out in section 7 of Regulation 283/95.The issue of whether

[11] Exhibit 1, Tab 11.
[12] Exhibit 1, Tab 13.
[13] The Notices commencing arbitration, although not exhibits, can be found at tabs 13, 14, and 15 of Economical's submissions.
[14] This letter was not made an exhibit, but there is no dispute about the coverage of the North Waterloo policy attested to by the letter.

North Waterloo will have to take over Mr. Collens' SABS claim will be resolved by determining whether North Waterloo has been served with a valid NDBI.

Economical submits that North Waterloo is the highest priority insurer pursuant to section 268 (2) 1. iii. of the *Insurance Act*.

Economical acknowledges that it did not serve a section 3 notice on North Waterloo within 90 days. Economical did notify North Waterloo of its intention to dispute priority May 7, 2010, well outside of the 90 day limitation period in section 3 (1). Economical did not seek relief in this arbitration pursuant to section 3 (2) to validate its May 7, 2010 notice.

The May 7, 2010 notice given by Economical to North Waterloo did not satisfy the requirements of section 3 (1). If Economical is to be successful in this arbitration it must establish that the August 13, 2009 NDBI Economical served on Jevco and MVACF is, in combination withthe January 26, 2010 NDBI served by MVACF on North Waterloo, sufficient to satisfy the requirements of the Regulation to dispute priority with North Waterloo.

MVACF was not an active participant in the arbitration, although it was originally a party to the arbitration. MVACF was released from the arbitration because it was acknowledged by all parties that the outcome of this arbitration would result in either Economical or North Waterloo being responsible to pay SABS to Mr. Collens. Notwithstanding the dismissal of the arbitration against MVACF for cost saving reasons, the arbitration proceeded with the agreement of all parties as if MVACF was a party

throughout for the purposes of determining whether MVACF's January 26, 2010 NDBI issued against North Waterloo was valid.

Economical must first establish that it issued a valid section 3 notice under Regulation 283/95 by serving Jevco and MVACF, but not North Waterloo,*via* its August 13, 2009 letter. Economical submits that this notice was well within the 90 day requirement for service of such a notice, and that the service of this notice validly initiated the priority dispute mechanism under section 3. The process was then continued against North Waterloo by MVACF under section 10.

Economical argues that the requirements of the priority dispute regulation have been satisfied because section 10 of the Regulation provides for the situation where a potential prior insurer (North Waterloo) has not been named by the first insurer giving notice under section 3 (Economical). The insurer receiving the section 3 notice(MVACF) who wishes to take the position that other insurers (excluding Economical) are prior to it must notify those other insurers. MVACF did that by serving a notice on North Waterloo. I have recited below the wording of section 10:

> 10 (1) If an insurer who receives a notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers.
>
> (2) This Regulation applies to other insurers given notice in the same way that it applies to the original insurer given notice under section 3.
>
> (3) The dispute among the insurers shall be resolved inone arbitration.

Economical submits that the combined operation of section 3 and section 10 of Regulation 283/95 is designed to facilitate the identification of the highest priority section 268 insurer, and involve that insurer in the priority dispute resolution process. The purpose of the priority dispute Regulation is to ensure that the highest priority section 268 insurer is the insurer who is ultimately responsible to pay SABS.

Economical relies upon arbitrator Shari Novick's decision in *Co-operators General Insurance Company v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance (aka Motor Vehicle Accident Claims Fund)*[15] to support its position that it is not necessary to include in the NDBI every potential prior insurer, to issue a valid section 3 (1) NDBI. It is also not required pursuant to section 3 (1) to conduct a reasonable, or indeed any investigation to identify potential priority insurers.This decision has been affirmed by the Ontario Superior Court.[16]A motion for leave to appeal the decision to the Court of Appeal was dismissed.[17]

One of the premises of Economical's argument that was accepted by the arbitrator and the court is that Section 10 of 283/95 would be redundant if the first insurer to give notice under section 3 was required to identify and include in its NDBI every potential prior insurer. Instead, section 3 requires only that the first insurer to give notice under section 3 name an insurer or insurers "*who it claims*" is required to pay SABS.

In this case, Economical submits that it has satisfied the requirements of section 3 (1), as confirmed by *Cooperators v. HMQ*, because it named Jevco and MVACF in its

[15] January 9, 2013, ("*Co-operators v. HMQ*").
[16] 2014 ONSC 515, Justice Pollak.
[17] June 13, 2014, Hoy, ACJO, Cronk, and Pepall, JJ.A.

NDBI, two insurers who it claimed were responsible to pay SABS. Its failure to name North Waterloo does not invalidate its NDBI, even though Economical was awarebefore it served its NDBI only on Jevco and MVACF that the police reportidentified North Waterloo as the insurer of the tractor and trailer involved in the accident with Mr. Collens.

Having initiated the dispute resolution process by issuing a valid NDBI under section 3 (1), Economical submits that the NDBI issued by MVACF against North Waterloo was a valid NDBI under section 10, properly involving North Waterloo in the priority dispute, and leading to the legal conclusion that North Waterloo is the highest priority section 268 insurer.

North Waterloo submits that Economical's August 13, 2009 NDBI was invalid because it failed to name North Waterloo as a potentially prior insurer. If Economical's NDBI was invalid, then it is irrelevant to consider whether MVACF's NDBI to North Waterloo was valid because Economical is not permitted to pursue priority against North Waterloo if it has not issued a proper section 3 (1) NDBI.

North Waterloo takes the position that there is support in the case law for the argument that an insurer issuing a section 3 (1) NDBI must exercise reasonable diligence and judgment in making its decision to name the responding insurers in the NDBI. It cannot ignore potential prior insurers of whom it has knowledge. The insurer giving a section 3 (1) notice has an obligation to other insurers who have a sufficient nexus to the parties, to involve them in the process at an early stage so that they can make decisions concerning their exposure, and take appropriate steps to address it.

North Waterloo relies on*Kingsway General insurance Company v. West Wawanosh Insurance Company*[18], a decision of the Court of Appeal dealing with the validation of a section 3 (1) NDBI pursuant to section 3 (2). North Waterloo submits that the following passage from the decision about the operation of Regulation 283/95 should be equally applicable to the application of section 3 (1), as it is to section 3 (2).

> 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…Clarity and certaintyof application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records…There is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.[19]

North Waterloo submits that the following analysis of the court in *Liberty Mutual Insurance Company v. Zürich Insurance Company*[20]with respect to the application of section 3 (2) should also be used in the interpretation of section 3 (1).

> 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…
>
> 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…

[18] [2002] O.J. No. 528 (C.A.),("*Kingsway v. West Wawanosh*").
[19]*Kingsway v. West Wawanosh*, para. 10.
[20] (2007), 88 O.R. (3d) 629 SCJ ("*Liberty v. Zurich*") paras. 14, 15, 16, 17, and 19.

> 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…
>
> 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…
>
> The circumstances of each case must be examined to determine whether 90 days was not a sufficient time for the determination…

It must be noted that both *Kingsway v. West Wawanosh*, and *Liberty v. Zürich* were concerned specifically with the section 3 (2) requirements to validate a section 3 (1) NDBI issued against a particular insurer beyond the 90 day time limit. They did not deal with the requirements to issue a valid section 3 (1) NDBI insofar as which insurers must be named in the NDBI. That issue had not been squarely raised before an arbitrator or the court until*Co-operators v. HMQ*.

North Waterloo seeks to limit the *ratio* of *Co-operators v. HMQ*. It argues that Justice Pollak's affirmation of arbitrator Novick's decision should be confined to the conclusion that a section 3 (1) NDBI issuing insurer is not required to conduct a reasonable investigation into the existence of potential priority insurers to issue a valid NDBI.That requirement only exists in section 3 (2), and must be satisfied by a section 3 (1) NDBI issuing insurer who seeks to validate its NDBI where the NDBI has been issued beyond the 90 day time limit against a particular insurer.

North Waterloo submits however, that the decision does not go so far as to say that the section 3 (1) NDBI issuing insurer can omit the names of potential prior insurers

of whom it is aware, name only potential priority insurers of its own choosing, and still issue a valid NDBI.

In support of this submission North Waterloo relies upon a decision of mine in*Economical Mutual Insurance Company v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance*[21]

In *Economical v. HMQ*,I agreed with arbitrator Novick's conclusion in *Co-operators v. HMQ*, that section 3 (1) of Regulation 283/95 (as it then was) does not require a section 3 (1) NDBI issuing insurer to conduct a reasonable, or indeed any investigation into the existence of potential prior insurers before naming a responding insurer or insurers in its NDBI.[22]

I further held, also concurring with arbitrator Novick, that the case law interpreting section 3 (2) was not applicable to the interpretation of section 3 (1). In a situation where the section 3 (1) NDBI issuing insurer has served its NDBI on a particular insurer within 90 days, it is irrelevant to consider the requirements to be met under section 3 (2) to validate a section 3 (1) NDBI issued outside the 90 day time limit.

North Waterloo in its submissions did invite me to reconsider my conclusion on these points. I have not changed my view, and in any event I think it is academic given Justice Pollak's affirmation of arbitrator Novick's conclusions on these issues in *Co-operators v. HMQ.*

[21] March 28, 2013 ("*Economical v. HMQ*").
[22] The changes to the SABS regulation in September, 2010 now require a section 3 (1) NDBI issuing insurer to complete a reasonable investigation for other potentially prior insurers before naming HMQ as a responding insurer in its NDBI.

The part of my decision in *Economical v. HMQ* relied upon by North Waterloo involves the opinion I expressedthat the wording of section 3 (1), "*every insurer who it claims*" does not give subjective, unfettered discretion to the section 3 (1) NDBI issuing insurer to name only insurers of its choosing, and not name potential prior insurers whom it has identified. By identified, I stated that the section 3 (1) NDBI issuing insurer must have actual knowledge of a potential prior insurer, not merely constructive knowledge. The essence of my view as expressed in *Economical v. HMQ* was that the section 3 (1) NDBI issuing insurer was obliged to include every potential prior insurer of whom it had actual knowledge when it was issuing its NDBI, to comply with the requirements of section 3 (1). For subsequent ease of reference in these reasons, I will refer to this interpretation of section 3 (1) I proposed in *Economical v. HMQ* as the "actual knowledge" test.

North Waterloo submits that the evidence in this case is undisputed that Economical knew about the existence of North Waterloo as a potential prior insurer from the outset, since it had the police report which described North Waterloo as the insurer of both the tractor and trailer involved in the accident with Mr. Collens.

North Waterloo submits that this was sufficient information to fix Economical with actual knowledge of a potential prior insurer with a nexus to the parties. In any event it was clear from Exhibit 3 that Economical knew about North Waterloo, and made a conscious decision not to include North Waterloo in its NDBI.

North Waterloo submits that it was not necessary for Economical to be correct if it had named North Waterloo as a responding insurer in its NDBI. If it had turned out

that North Waterloo did not have a policy of motor vehicle liability insurance providing SABS coverage on the tractor and/or trailer, then the arbitration would simply have been dismissed against North Waterloo on the merits. By not naming North Waterloo however, Economical failed to satisfy the requirements of section 3 (1) on the basis of my actual knowledge test, and the objective of bringing in all possible prior insurers at the earliest stage in the proceedings.

I will deal first with Economical's response to these points as it relates to my actual knowledge test opinion on the requirements of section 3 (1) as expressed in *Economical v. HMQ*.

Economical stresses that the wording, "*who it claims*" imports a subjective element to the exercise of identifying possible prior insurers. Therefore, even if an "actual knowledge" test is appropriate, one must consider what was in the mind of the section 3 (1) NDBI issuing insurer in considering whether a possible prior insurer has been identified, and needs to be included in the NDBI.

Economical argues that its adjuster turned his mind to whether the North Waterloo policy could have any application to these circumstances – i.e. would provide SABS as a motor vehicle liability policy. The adjuster concluded that North Waterloo's policy was a "Farm policy", not a motor vehicle liability policy, and therefore would not provide SABS. Despite the fact that this conclusion was incorrect, looking at the situation strictly from the standpoint of the section 3 (1) NDBI issuing insurer – Economical, there was no other potential prior insurer apart from Jevco and HMQ, who were both named in the August 13, 2009 NDBI.

To put it another way, Economical did name in its August 13, 2009 NDBI every insurer of whom it had actual knowledge that it believed could be a potential prior insurer for the purposes of section 268 of the *Insurance Act*. Economical did not claim that North Waterloo was a potential prior insurer because it did not believe North Waterloo had a policy of motor vehicle liability insurance. Therefore,Economical was not required to name North Waterloo in the August 13, 2009 NDBI.

Economical's other argument is that the actual knowledge test I proposed in *Economical v. HMQ* is moot, given the subsequent Superior Court decision in *Cooperators v. HMQ*.

Economical submits that the *ratio* of *Co-operators v. HMQ* is not limited, as suggested by North Waterloo, to the conclusion only that the section 3 (1) NDBI issuing insurer is not required to conduct a reasonable, or any investigation for potential prior insurers before issuing its NDBI. Economical submits that Justice Pollak's decision affirms arbitrator Novick's overall interpretation of section 3 (1) of Regulation 283/95. Effectively what that means is that as long as a section 3 (1) NDBI issuing insurer names in its NDBI a potential prior insurer, and serves that insurer within 90 days from receiving the OCF-1, it has complied with the requirements of section 3 (1).

I would say in jestthat for personal reasons I would like to agree with North Waterloo's support for my "actual knowledge" test, and with Economical's creative interpretation of how that test could be applied. I have to conclude however, that looking at Justice Pollak's decision in its entirety, it must be interpreted in accordance with

Economical's submission outlined in the preceding paragraph. My "actual knowledge" test, as Economical's counsel diplomatically phrased it, is moot.

A careful examination of the facts of *Co-operators v. HMQ* leads me to conclude that although there may be some fine distinctions from the facts of this case, they are distinctions without a difference for the legal import of the court's affirmation of arbitrator Novick's interpretation of section 3 (1).

Like the case before me, In *Co-operators v. HMQ*there was information in the police report that was available to the parties well before the expiry of the 90 day limitation period indicating another, potential prior insurer who was not named in Cooperators' NDBI. It is apparent from arbitrator Novick's findings of fact[23] that there was information on the police report a TTC streetcar was "involved in the incident", and would therefore have been a potential prior insurer. Arbitrator Novick found that the police report was available to the parties July 23, 2010. This was about five weeks after the OCF-1 was submitted to Co-operators on June 18, 2010, but well within the 90 day limitation for issuing a NDBI.

Therefore, even though Co-operators issued a NDBI naming only HMQ on July 21, 2010, once Co-operators had seen the police report it would have actual knowledge of the potential involvement of the TTC streetcar, and it could have issued a further NDBI naming the TTC within plenty of time to comply with the 90 day limitation which did not expire until September 18, 2010.

[23] *Cf.* page 4 of her decision.

Arbitrator Novick found that there was additional evidence of Co-operators' knowledge of the involvement of the TTC streetcar well before the expiry of the 90 day limitation period. She found that the log notes from the Co-operators' adjuster[24]assigned to handle the claim recorded a conversation between the Co-operators' insured and the adjuster wherein the Co-operators' insured stated that the SABS claimant had *"…walked into traffic to get on to a streetcar.*"

It appears from the decision that the Co-operators adjuster did not turn his or her mind to the significance for priority purposes of the fact that the TTC streetcar was, as Co-operators later admitted in the arbitration, "involved in the incident".Nevertheless, there is no doubt that the evidence indicates Co-operators had actual knowledge of the TTC streetcar well within the 90 day limitation period.

In my view this is effectively no different than what occurred in this case. Economical had knowledge of North Waterloo because North Waterloo had been designated on the police report as the insurer of the tractor and trailer. Although the Economical adjuster did advert to the fact that North Waterloo had to be considered as a potential prior insurer, he concluded (erroneously) that North Waterloo did not have a motor vehicle liability policy, and thus did not have to be included in the NDBI.

In this case, and in *Co-operators v. HMQ*, although the reason the potential prior insurer (North Waterloo, and TTC) was not included in the NDBI issued within the 90 day time limit is different (erroneous conclusion about policy v. failure to appreciate significance of street car involvement), there was clearly actual knowledge on the part of

[24] The date of the notes is not specified, but the context suggests that they were made shortly after Co-operators received the OCF-1 on June 18, 2010, and in any event well within the 90 day limitation period.

the NDBI issuing insurer (Economical, andCo-operators,) of the existence of the potential prior insurer well within the 90 day limitation period.

In reviewing the arguments advanced by the parties in *Co-operators v. HMQ*, arbitrator Novick noted that the essence of Co-operators' position, the position that she ultimately found to be the proper interpretation of section 3 (1), was as follows:

> The gist of Mr. Strigberger's (counsel for Co-operators) argument is that even if Co-operators had been aware within 90 days that the TTC vehicle was involved in the incident and would therefore potentially be in higher priority than it or the Fund to pay Mr. Trieu's claim, Co-operators met its obligations under the regulation by providing timely notice to the Fund…
>
> Mr. Strigberger contends 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. He submits that 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 that submission... The words "who it claims" in section 3 modify the requirement imposed on first insurers…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 would not have been included. The fact that they appear in the provision in my view must mean that he first insurer has some discretion in this regard.

In adopting the "discretionary" approach to the issuance of a section 3 (1) NDBI, arbitrator Novick referenced the reasoning of arbitrator Samis in *Wawanesa v. Peel Mutual and Economical Insurance*.[25]

In *Wawanesa v. Peel and Economical*, arbitrator Samis said the following:

[25] January 28, 2011 ("*Wawanesa v. Peel and Economical*").

> The first tier insurer is motivated to commence proceedings against the higher ranking insurer, but is not required to commence proceedings against the highest ranking insurer. Given the time constraints imposed it is entirely possible that the first tier insurer will overlook the potential involvement of other higher ranking insurers. The result is that the first tier insurer may well implead, as a second tier insurer, a company that, in turn, should be able to assert another, higher ranking, insurer has responsibility.

With respect to these comments of arbitrator Samis, arbitrator Novick stated:

> I agree with this statement. It acknowledges the reality that the first insurer is often juggling many tasks at once, and that it is often difficult to gather all relevant information relating to which other parties are potentially in priority. Section 10 of the regulation permits the second tier insurer – in this case the Fund – to provide notice to another insurer or if it takes the view that another insurer is in equal or higher priority to it. It is not constrained by the ninety-day limit set out in section 3, as determined by arbitrator Samis.

Arbitrator Novick's interpretation of section 3 (1) is summed up in the following paragraph from her Award in *Co-operators v. HMQ*:

> The first insurer receiving an application for benefits has many obligations – it must pay benefits and adjust the claim fairly and in good faith. It may also conduct an investigation to determine whether any other insurers are in higher priority. Given the challenges faced by the first insurer in this regard, section 3 requires that it provide notice within ninety days **to another party** that it asserts is higher in priority, not to all potential parties.[26]

In my opinion Justice Pollak's affirmation of arbitrator Novick's decision goes further than simply holding that Co-operators, a section 3 (1) NDBI issuing insurer, did not have to conduct a reasonable investigation before naming HMQ in its NDBI under the Regulation as it then was. This was really a secondary finding, in addition to the

[26] At page 10 (my emphasis).

main conclusion that arbitrator Novick had correctly interpreted section 3 (1) by holding that Co-operators had complied with the requirements of section 3 (1) by issuing a NDBI naming another insurer who it claimed was in priority to Co-operators.

Justice Pollak's agreement with this interpretation of section 3 (1), and section 10 of Regulation 283/95 is evidenced by the following passages from Justice Pollak's decision:

> It was argued (by HMQ) that TTC Insurance potentially had priority over the Fund for the relevant benefit claims, and that as Co-operators had not given it a priority dispute notice, Co-operators was in breach of s. 3 (1) of the Regulation…[27]
>
> The arbitrator rejected the Fund's submission and held that Co-operators had complied with section 3 (1) of the Regulation by giving the Fund a priority dispute notice...[28]
>
> The thrust of the Fund's objections is that the Legislature cannot have intended the first insurer to have a discretion as to which insurer is to be served with the notice of dispute…[29]
>
> With respect to the interpretation of s. 3 of the Regulation, the key phrase is "who it claims is required to pay". If Co-operators claims that only one other insurer has priority, it needs to give notice to that insurer only. It has no obligation to give a priority dispute notice to every insurer that might have priority over it.[30]

[27] At paragraph 2.
[28] At paragraph 4.
[29] At paragraph 8.
[30] At paragraph 10.

> The arbitrator held that the inclusion of the words "who it claims" in s. (3) of the Regulation was meant to give the first insurer the right to choose which insurer, allegedly in higher priority, it gives notice to.[31]
>
> With respect to the issue of whether the arbitrator erred in law in interpreting the regulation and statute I agree with the arbitrator's interpretation.[32]

In my opinion, the facts of the case before me are sufficiently similar to the facts as found in *Co-operators v. HMQ*, to make the statements of the law set out by Justice Pollak equally applicable to the case before me.

Justice Pollak's decision renders it unnecessary to consider whether the section 3 (1) NDBI issuing insurer had actual, or even constructive knowledge of a potential prior insurer or insurers other than those named in the NDBI it issued. In my opinion the law as stated in *Co-operators v. HMQ* is that provided the section 3 (1) NDBI issuing insurer names at least one insurer who it claims stands in priority to it (and the claim does not have to be correct) within 90 days of being served with the OCF-1, the NDBI satisfies the requirements of section 3 (1) and the NDBI is valid.

I am supported in my interpretation of the Court's affirmation of arbitrator Novick's decision in *Co-operators v. HMQ* by the fact that the Court of Appeal declined to grant leave to hear an appeal of Justice Pollak's decision. One would have thought that if the Court of Appeal felt that there was some merit in a different interpretation of section 3 (1), it would have heard the appeal.

[31] At paragraph 17.
[32] At paragraph 25.

Therefore, for the purposes of this arbitration, I conclude that the August 13, 2009 NDBI issued by Economical, naming Jevco and MVACF as responding insurers was a valid NDBI pursuant to section 3 (1) of Regulation 283/95.

I must now deal with the issue of whether HMQ's January 26, 2010 NDBI naming North Waterloo as a potential prior insurer was valid.

To be valid, in my opinion HMQ's January 26, 2010 NDBI must satisfy the requirements of section 10 of Regulation 283/95. Section 10 reads as follows:

> 10. (1) If an insurer who receives a notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers.
>
> (2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3.
>
> (3) The dispute among the insurers shall be resolved in one arbitration.

In my opinion section 10 (1) is satisfied by HMQ's January 26, 2010 NDBI. HMQ disputed its obligation to pay benefits on the basis that North Waterloo was a higher priority insurer. HMQ gave North Waterloo notice as required by the section.

The issue concerning the validity of HMQ's January 26, 2010 NDBI arises out of section 10 (2). North Waterloo submits that the terms of section 10 (2) require HMQ to have served its NDBI on North Waterloo within 90 days of having been served with Economical's August 13, 2009 NDBI. There is no doubt that if North Waterloo is correct in its interpretation of the application of section 10 (2), then HMQ's NDBI would be out

of time, since it was served about two and a half months outside of this 90 day period which would have expired November 13, 2009.

Other factors which may have been relevant to a consideration of when (if at all) a 90 day time limit for HMQ to issue its NDBI against North Waterloo were not in dispute in this arbitration.

Economical conceded that the evidence established HMQ received the police report indicating North Waterloo as the insurer of the tractor and trailer involved in the accident with Mr. Collens, when it received a copy of Economical's August 13, 2009 NDBI.[33]

It was also conceded by Economical that the information in the police report identifying North Waterloo as the insurer of the tractor and trailer involved in the accident with Mr. Collens was sufficient to provide HMQ with a "functionally adequate" application for the purposes of determining priority.

The concession made sense since the only information HMQ required to perform a search which confirmed the existence of a motor vehicle liability policy issued by North Waterloo covering the trailer involved in the accident, was the identification of North Waterloo on the police report as the insurer of the trailer.[34]

The only issue left for me to consider on this aspect of the case, is whether the 90 day time limit set out in section 3 (1) of Regulation 283/95 also applies to a section 10 insurer issuing a NDBI.

[33] See Exhibit 1, Tab 3.
[34] For a further discussion of the law in this area see *HMQ v. Pilot Insurance Company*, 2012 ONCA 33.

The resolution of this issue involves interpreting the meaning and effect to be given to section 10 (2).

Economical submits that it is only a section 3 (1) insurer who is constrained by the 90 day time limit to issue a valid NDBI against another insurer who it claims has higher priority. Economical argues that there is no limitation period in Regulation 283/95 that applies to a section 10 insurer who has received a NDBI from a section 3 (1) insurer, and who wishes to issue its own NDBI to dispute priority with another insurer. The only limitation period that would apply is the one that applies to the entire process which is found in section 7 (3) of the Regulation. This section requires that arbitration to resolve the priority dispute must be commenced within one year from the time that the insurer paying benefits under section 2 issues a section 3 (1) NDBI.

In support of its submission Economical relies on the decision of arbitrator Samis in *Wawanesa v. Peel and Economical*.[35]This is the one case of which I am aware, or which has been referred to me by counsel, that is directly on point. There are other cases which I will discuss, but for various reasons the comments they contain concerning this issue are technically *obiter dicta*.

Arbitrator Samis refers to the first insurer who receives a SABS application and begins paying benefits as the “first tier insurer”. He refers to the insurer who receives a NDBI from the first tier insurer pursuant to section 3 (1), as the “second tier insurer”. Arbitrator Samis stated the issue in *Wawanesa v. Peel and Economical* in the following terms:

[35]*Supra*, note 25.

> This case raises the procedural problems which arise when a second tier insurer identifies yet another insurer that is even higher ranking…than the second tier insurer…
>
> The procedural question which this raises in this instance is whether or not the second tier insurer, must meet the same procedural hurdles as the first tier insurer must meet when initially giving notice to the other insurers. The regulation requires the first tier insurer who has received the completed application to notify other insurers within 90 days…

Arbitrator Samis concludes that the 90 day time limit applicable to the section 3 (1) insurer (the first tier insurer) issuing a NDBI does not apply to a second or subsequent tier insurer who issues a NDBI.

Arbitrator Samis concludes that one must read section 2, and section 3 of Regulation 283/95 together, to properly identify the insurer to whom the 90 day limitation period for issuing a NDBI is intended to apply. Section 2 of the Regulation makes the first insurer who receives a completed SABS application responsible to pay SABS until any priority dispute is resolved. He notes that in section 3 of the regulation the trigger for the commencement of the 90 day limitation period to issue a NDBI is the receipt of a completed SABS application. Since it is only the first insurer who receives a completed SABS application which is responsible to pay SABS pending the resolution of a priority dispute, logically then, it would only be the first insurer receiving the completed SABS application which would be bound by the 90 day limitation period to issue a NDBI.

Arbitrator Samis points out that there is no limitation period specifically set out in section 10 of the Regulation that would be applicable to the second, and subsequent tier insurer. He notes that as a matter of law limitation periods are to be strictly

construed.Limitation periods in statutes need to be explicitly stated, and clearly applicable in the circumstances. They should not be inferred or incorporated by reference where the context is equivocal.[36]

Arbitrator Samis states that there are good policy reasons to support this interpretation of the Regulation. The second tier, or subsequent tier insurer receiving a NDBI from the section 3 (1) first tier insurer does not have the same ability under the Regulation to obtain information that would be relevant to the priority issue. The second tier or subsequent tier insurers do not receive completed SABS applications. They do not have the benefit of other SABS provisions that the first tier insurer has that would assist in generating relevant priority information.

He notes that section 6 of the Regulation[37] does provide for some means of information gathering for any insurer involved in the priority dispute process, but it lacks an enforcement mechanism, and is therefore a "*poor tool*" to produce priority information in a short timeframe.

Arbitrator Samis emphasizes that one of the purposes of the Regulation is to fairly resolve priority disputes. This purpose would not be achieved by importing the 90 day limitation to issue a NDBI from section 3, into section 10.

> …To apply the section 3 provisions to second tier insurers would give rise to an injustice, ultimately resulting in the payment of benefits by the wrong insurer. The regulation is designed to facilitate a process that will lead to the cost of a claim being visited upon the correct insurer, without burdening the

[36] Arbitrator Samis makes reference to the decision of Arbitrator Robinson in *CAA v. AXA*, May 21, 2010, in support of this conclusion.
[37] "*The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act.*"

> insured person with prosecution of priority dispute issues. It would be abhorrent to interpret the regulation in a manner which has the opposite result unless that outcome is required by the clear and specific language of the regulation. The language of the regulation does not have that clarity.

Arbitrator Samis' decision in *Wawanesa v. Peel and Economical* was applied by Arbitrator Bialkowski in *Certas Direct Insurance Company (The Personal Insurance Company of Canada) v. Security National Insurance Company*.[38]

Arbitrator Bialkowski agreed with and applied Arbitrator Samis' reasoning, stating as follows:

> ...arbitrator Samis outlines the information and sources of information available to a 1st tier insurer that would not necessarily be available to a 2nd tier insurer and the burden that a 90 day limit to provide notice would impose on a secondary insurer…
>
> If the legislators had intended a 90 day notice requirement on 2nd tier insurers it could easily have used specific (wording) of such obligation in s. 10 of Ontario Regulation 283/95…
>
> In reaching this decision, I have considered the comments of Arbitrator Jones in State Farm v. Lloyd's of London, et. al (January 2002), which would suggest that a 2nd tier insurer has the same notice obligations as a 1st tier insurer, but point out that his comments were *obiter* and that his ultimate decision did not turn on the analysis of that issue. I prefer the analysis of Arbitrator Samis in Wawanesa (*supra*).

I would note here that technically Arbitrator Bialkowski's comments approving of Arbitrator Samis' decision in *Wawanesa v. Peel and Economical*, were, as he remarks about those of Arbitrator Jones in *State Farm v. Lloyd's of London*, *obiter dicta*.

[38] February 2, 2012 ("*Certas v. Security National*").

Although the applicability of the section 3 (1) 90 day limitation period to section 10 was an issue raised before Arbitrator Bialkowski, his decision on the point was rendered moot by his conclusion that the respondent insurer, Security National, did not have a valid motor vehicle liability policy in place at the time of the accident, so it would not have had priority ahead of the applicant, Certas, regardless of how the 90 day limitation issue was determined.

North Waterloo submits that HMQ, as a section 10 NDBI issuing insurer is bound by the same 90 day limitation period prescribed for the section 3 (1) NDBI issuing insurer.

In support of its argument that relies upon the referenced comments of Arbitrator Jones in *State Farm v. Lloyd's of London*. Arbitrator Jones' case turned on the issue of whether State Farm was entitled to proceed with arbitration against Lloyd's and other insurers. The determination of this issue depended on whether State Farm's section 3 (1) NDBI could be validated pursuant to section 3 (2), the NDBI having been served more than 90 days after receipt by State Farm of the SABS application.

As was pointed out by Arbitrator Bialkowski in*Certas v. Security National*, Arbitrator Jones' comments on the issue of whether the section 3 (1) 90 day limitation period also applied to section 10 NDBI issuing insurers were *obiter dicta*, because Arbitrator Jones concluded that State Farm's late issued NDBI could not be validated by section 3 (2), so it was not necessary to determine whether any subsequent NDBI's issued were valid.

Since Arbitrator Jones did not have to make a determination on the issue, his comments are brief and simply express his view on the matter, without any specific analysis. He stated:

> Some time was spent at the hearing discussing the notices given by the subsequent insurers once they were notified of a claim against them. This is governed by section 10 (2) of the Regulation 283/95 which states: "This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3". While it is not essential that I make a determination of this issue, given my findings above, I am of the view that section 10 (2) of regulation 283/95 envisages each insurer, once having (received) notice, has 90 days to give notice to another insurer, or rely upon the saving provision of section 3 (2) of the Regulation.

North Waterloo also relies for its position, perhaps with even greater emphasis, on comments made by Justice Belobaba in *Pilot Insurance Company v. Royal & Sun Alliance Insurance Company of Canada*.[39]

Pilot v. Royal & Sun Alliance involved an issue of whether arbitration had been commenced within one year from the time the first insurer paying benefits issued its section 3 (1) NDBI. It did not deal directly with the issue of whether the 90 day limitation period in section 3 (1) for issuing a NDBI, is applicable to a NDBI issued under section 10.

The resolution of the issue involved deciding whether the limitation period set out in section 7(2)[40] gave each insurer served with a NDBI one year from that date to commence arbitration, or whether there was only one limitation period – one year from the date that the section 3 (1) NDBI issuing insurer served its NDBI.

[39] 80 O.R. (3d), 308 ("Pilot v. Royal & Sun Alliance").
[40] Now section 7 (3).

Justice Belobaba concluded that there was only one limitation period, and that the arbitrator was incorrect in modifying the language of section 7 (2) to allow each insurer served with a NDBI a one year limitation period to commence arbitration. He concluded that section 7 (2) was, "*plain on its face*". The limitation period began to run from the date the insurer paying benefits under section 2 issues its section 3 (1) NDBI, and that this limitation period applied to every insurer served with a NDBI.

In my opinion, another reason not mentioned by Justice Belobaba that the section 7 (2) limitation periodto commence arbitration must apply in this way to the entire priority dispute resolution process is found in section 10 (3). This section specifically requires that the dispute among the insurers shall be resolved inone arbitration. If there can be only one arbitration for all insurers involved, it makes sense that there can be only one limitation period applicable to that arbitration.

It was in commenting upon the interaction of section 7 (2), and section 10 (2),that Justice Belobaba made the comments relied upon by North Waterloo. He stated:

> There is no reason to adapt or modify this provision (section 7 (2)) to accommodate the requirements of s. 10. The latter simply confirms that the provisions in the Regulation, such as the 90-day notice rule in s. 3 or the one-year limitation period in s. 7 (2) apply to insurers C, D, and E, in the same way that they apply to insurer B.

Justice Belobaba's comments about the application of the 90 day notice limitation period in section 3 (1) are*obiter dicta*, and they are not binding on me with respect to the issue in this arbitration.

It may well be that the comments were made in passing without a thorough consideration of the statutory provisions relevant to the 90 day limitation period issue because it was not necessary for the decision. In any event, I am unable to agree with his apparent conclusion that the 90 day limitation period to serve a NDBI applies to every insurer involved in a priority dispute.

I am of the opinion that Arbitrator Samis' interpretation that the 90 day limitation period in section 3 (1) to serve a NDBI applies only to the first insurer to receive a completed SABS application who pays benefits, is correct.

I agree with Arbitrator Samis' analysis of why the policy reasons behind the priority dispute purpose of the Regulation support this interpretation. More importantly however, I believe that the wording of the Regulation itself supports this interpretation.

In my opinion, a careful examination of the wording of section 10 (1) and (2) demonstrates that there is no 90 day limitation period to issue a NDBI imposed upon the section 10 insurer.

As a foundation for my analysis, I have reproduced below portions of section 2, section 3, and section 10 of the Regulation, highlighting and underlining the important wording identifying the different insurers the Regulation contemplates can be part of the priority dispute process:

> 2. **The first insurer that receives a completed application for benefits** is responsible for paying benefits…
>
> 3. (1) **No insurer may dispute** its obligation to pay benefits…**unless it gives written notice within 90 days of receipt of a completed application for benefits…**

10. (1) If an **insurer who receives a notice under section 3** disputes its obligation to pay benefits on the basis that **other insurers, excluding the insurer giving notice**, have equal or higher priority under section 268 of the Act, it shall give notice to **the other insurers**.

(2) This Regulation applies to **the other insurers given notice** in the same way that it applies to **the original insurer given notice under section 3**.

Reading section 2, and section 3 (1) together, leads to the conclusion that **the first insurer that receives a completed application for benefits** under section 2, is the same insurer in section 3 (1) who must give notice **within 90 days of receiving the completed application for benefits**, if it wishes to dispute priority.To use Arbitrator Samis' terminology, this is the first tier insurer.

In section 10 (1), **the insurer who receives a notice under section 3**is the second tier insurer who receives a notice from the first insurer receiving the completed SABS application – the first tier insurer.

The **other insurers** referred to in section 10 (1) are insurers who are given notice by the second tier insurer. These are what I will term third tier insurers. They clearly do not include the first tier insurer, or the second tier insurer.

The words in section 10 (1),**excluding the insurer giving notice**, refer to the first tier insurer who served the section 3 (1) NDBI.

What section 10 (1) says in effect, is that the second tier insurermust serve a NDBI on third tier insurersif it wishes to dispute priority with them, but the second tier

insurer is not required to serve a NDBI on the first tier insurer to dispute priority with the first tier insurer.

Rules of statutory interpretation require that terms within a statute, especially within the same section of a statute, be given the same meaning, unless the statute stipulates otherwise. Therefore, the term “other insurers” in section 10 (1) and (2) must be given the same meaning. In section 10 (2), the term, **other insurers given notice** must refer to the third tier insurers who have been served with a NDBI by the second tier insurer.

One must be very careful in reading the concluding words of section 10 (2), **the original insurer given notice under section 3**. This description does not refer to the first tier insurer, it refers to the second tier insurer, because it is the second tier insurer who is given notice under section 3 (1) by the first tier insurer. The corresponding description of the second tier insurer found in section 10 (1) is, **the insurer who receives a notice under section 3**.

I am of the view that unfortunately, the drafters of the legislation have created the potential for confusion and misinterpretation by failing to use the same description of the second tier insurer in both section 10 (1), and section 10 (2).

It is deceptively easy to misconstrue “original” in section 10 (2) as a reference to the first tier insurer, rather than the second tier insurer. The error is reinforced if the reader, with such a mistaken belief, is influenced by the reference in section 10 (1) to the first tier insurer as the “insurer giving notice”, and misreads the section 10 (2) word “given”, as “giving”.

Either or both of these errors could result in the incorrect interpretation of the subsection, and the mistaken conclusion that the intent of the section was to impose the same requirements on all insurers serving NDBI, as are imposed on the first tier insurer issuing a NDBI pursuant to section 3 (1). Read properly however, it will be seen that section 10 (2) makes no reference whatsoever to the first tier insurer.

Although principles of statutory interpretation require that each word in a statute be given meaning, and that redundancy is not to be assumed, I can come to no other conclusion but that adding the word “original” to the description of the second tier insurer in section 10 (2) is redundant.The second tier insurer has already been defined in section 10 (1) as “the insurer who receives a notice under section 3”. In section 10 (1), a definitional distinction is drawn between that insurer, and the “other insurers” who can be put on notice by the insurer who receives a notice under section 3. It is unnecessary, for the purposes of describing the second tier insurer in section 10 (2) to include the word “original”. The subsection would have the same meaning if the word “original” were omitted.

In my opinion, the drafters of the legislation would have been much better served to repeat in section 10 (2), the description of the second tier insurer used in section 10 (1) (“the insurer who receives a notice under section 3”). It is confusing to employ different descriptions of the second tier insurer within consecutive subsections of the same section, and it increases the likelihood of misinterpretation of the legislation.

Section 10 (2) says nothing more than Regulation 283/95 applies to third tier – “other insurers”, in the same way that it applies to second tier insurers – insurers who receive a section 3 (1) NDBI from a first tier insurer.

The purpose of section 10 (2) is to provide the means for the other insurers – the third tier insurers given notice by the second tier insurer (the “original insurer given notice under section 3”) to bring into the priority dispute additional insurers with whom they wish to dispute priority, if those insurers have not already been named in a previous NDBI.

In other words, the objective of section 10 (2) is to ensure that the legislation facilitates the dispute resolution purpose of the priority dispute regulation – to identify all potential priority insurers, and make the payment of SABS the responsibility of the highest priority section 268 insurer.

In summary, it is my opinion that section 10 (2) does not impose a 90 day limitation period for insurers subsequent to the first insurer to receive a completed SABS application, to issue a NDBI. The subsection makes no reference, either directly or by inference, to the first tier insurer, let alone to the 90 day limitation period imposed upon the first tier insurer applying to second, and subsequent tier insurers.

There is nothing in the rest of section 10, nor indeed in any other part of the Regulation, which imposes the 90 day NDBI service limitation period for the section 3 (1) insurer on the second tier insurer who receives a NDBI from the section 3 (1) insurer.

If there is no section in the Regulation imposing the section 3 (1) 90 day NDBI service limitation period on a second tier insurer, then a section in the Regulation which says second tier and third tier insurers should be treated alike under the Regulation cannot possibly impose by inference a limitation period on every insurer subsequent to the first insurer who receives a completed SABS application.

Apart from section 10 (2) giving “other insurers” the same means to bring previously uninvolved insurers into the dispute as are provided to second tier insurers, one might ask what other sections of Regulation 283/95 apply to third tier “other insurers” in the same way that they apply to the second tier insurer.

In my opinion the sections would include section 6, which would entitle the “other insurers” to the same information from the SABS claimant (the insured person) to which the first and second tier insurers would be entitled.

The other insurers would also be governed by the same limitation period set out in section 7 (3) requiring arbitration be commenced to resolve the dispute among the insurers within one year from the date the first tier insurer served its section 3 (1) NDBI. This is confirmed by Justice Belobaba’s decision in *Pilot v. Royal & Sunalliance*.

Section 10 (3) requiring the dispute among the insurers to be resolved in one arbitration would also apply to the “other insurers”.

Apart from section 10, and these sections of the Regulation which have general application to all insurers involved in the priority dispute, there is no other section which has specific application to the “other insurers”.

In my view, neither the second tier insurer, nor the third tier “other insurers” could be brought within the terms of section 3 (1) of the regulation. That subsection applies to the first insurer who has received a completed application for SABS, and therefore must commence paying SABS to the SABS applicant – the first tier insurer.

I echo Arbitrator Bialkowski’s comment in *Certas v. Security National*, that had the legislature wished to impose the 90 day limitation period to serve a NDBI on all insurers subsequent to the first insurer to receive a completed SABS application, it could easily have done so with an explicit provision to that effect, as it did in section 3 of the Regulation for the first tier insurer.

I will go further and say that given the nature of limitation periods and their treatment under the law, in my opinion very clear wording would be required to find that such a limitation period existed for second and subsequent tier insurers. The Regulation does not contain clear wording to that effect, so my conclusion is that an insurer serving a NDBI pursuant to section 10 of the Regulation is not constrained by the 90 day limitation period stipulated in section 3 (1).

Therefore, on this issue I conclude that the January 26, 2010 NDBI issued by MVACF naming North Waterloo was a valid NDBI, and that North Waterloo was properly brought into the priority dispute process in Regulation 283/95.

My conclusions on the issue of the validity of the relevant NDBI lead to the legal result that North Waterloo is the highest priority insurer pursuant to section 268 of the *Insurance Act*, and is responsible for the payment of SABS to Brandan Collens.

Should the parties need to continue the arbitration process to resolve issues of reimbursement quantum and interest, they should advise my Coordinator so that appropriate arrangements can be made for a telephone conference to discuss further proceedings.

Conclusion

1) North Waterloo is the insurer responsible to pay SABS to Brandan Collens arising out of the July 16, 2009 motor vehicle accident.

2) Economical, as the successful party, is entitled to recover from North Waterloo its arbitration costs including its share of the arbitrator's fees and disbursements. Should the parties be unable to agree on the quantum of costs, or if there are matters in connection with the quantum of costs about which the parties wish to make submissions, I invite them to contact my Coordinator to schedule a telephone conference to discuss arrangements to deal with the costs issue.

Dated at Toronto, January 7, 2015

_____

Scott W. Densem

Arbitrator