IN THE MATTER OF the *Insurance Act,* R.S.O. 1990,
c. I.8, Section 268 and all Regulations thereto;
And in particular, Ontario
Regulation 283/95 – Dispute Between Insurers

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER of an Arbitration

BETWEEN:

ACE INA INSURANCE COMPANY o/a
CRAWFORD & COMPANY CANDANA INC.

Applicant

- and -

THE INSURANCE CORPORATION OF BRITISH COLUMBIA (I.C.B.C.)

Respondent

AWARD WITH RESPECT TO PRELIMINARY ISSUE

Counsel:

Debbie Orth: Counsel for The Insurance Corporation of British Columbia (Applicant/Respondent)

Kiran Sah: Counsel for ACE INA o/a Crawford and Company of Canada Inc. (Respondent/Applicant)

Background:

This matter comes before me by way of a priority dispute pursuant to section 268 of the *Insurance Act* R.S.O. 1990, c. I.8, as amended and Ontario Regulation 283/95, as amended.

The broad issue brought before me as the Arbitrator appointed, on consent, to deal with this matter, is which as of ACE INA Insurance company (hereinafter called ACE) and The Insurance Corporation of British Columbia (hereinafter called ICBC) is the priority insurer with respect to statutory accident benefits payable to or on behalf of the claimant, Mr. Z., arising out of an accident that occurred on July 5, 2015.

A preliminary issue has been raised by ICBC as to whether ACE put ICBC on notice of this priority dispute within 90 days of having received a completed OCF-1, as required by section 3 (1) of Ontario Regulation 283/95, or if notice was not given within the 90 days whether ACE is entitled to an extension of time in accordance with section 3 (2) of the Regulation.

The Arbitration Agreement dated June 11, 2020 sets out the following questions for my determination:

I. When did ACE receive a "completed" Application for benefits within the meaning of Ontario Regulation 283/95
II. Did ACE satisfy the exception provided for in section 3 (2) (a) and (b) of Ontario Regulation 283/95

Proceedings:

This matter proceeded with a combined oral and written hearing on May 20, 2020. Counsel submitted factums and books of authority. In addition, I was provided with a Joint Book of Documents which contained relevant emails, correspondence, copies of the OCF-1's, and the transcripts of the examination under oath of Mr. Z. and of the adjuster from Crawford and Company who handled Mr. Z.'s accident benefits claim with specific reference to the priority dispute. In addition, I had a signed Arbitration Agreement.

Facts:

The following is a summary of the facts that I have drawn from or inferred from the materials before me:

Mr. Z. was involved in an accident on July 5, 2015 when he was an occupant of a rental car insured by ACE and owned by Hertz. Although it is not abundantly clear, it appears Mr. Z. was the driver of the vehicle although in places in the file he describes himself as a passenger and his friend as operating the vehicle.

The accident occurred when the vehicle crashed into a wall in a parking structure in Toronto. Mr. Z. sustained injuries to his right arm.

ICBC insures BMW Group Financial. Mr. Z.'s father, C.J., is shown as the lessee. The Certificate of Insurance indicates that the lessee resides in Vancouver, British Columbia. The Certificate of Insurance also indicates that C.J. is the principal operator. His driver's license is noted on the document.

On or about July 22, 2015, Hertz assigned Crawford and Company Canada Inc. (hereinafter called Crawford) to handle/adjust the claim on their behalf.

The adjuster assigned has worked handling accident benefit claims since 2010 and had carriage of the file throughout the relevant time period.

The adjuster's log notes, which form part of the Joint Book of Documents, indicate that calls were made to the claimant on July 25th confirming coverage. The documents sent by Hertz to Crawford included an address for Mr. Z. which was on Bedford Road in Toronto. In addition, there was a note indicating that the "renter is moving". A new address is given also in Toronto on Nicolas Street.

In a log note dated June 30, 2015, completed by the adjuster under "Disposition Plan", she notes what remains to be done: **3. confirm priority.**

The claims service manager for Crawford indicates to the Crawford adjuster handling the file that it looks as if Mr. Z. is not going to pursue an AB claim and a request is made that a 30 day closure letter be sent.

By September 23, 2015 there had been no response from the claimant and accordingly a file closure letter was sent on September 23, 2015 and Crawford closed its file.

An OCF-1 dated April 18, 2016 was received by Hertz and forwarded on to the adjuster at Crawford who received it on April 21, 2016.

ACE takes the position that the OCF-1 was incomplete as page 2 Part 4 (Details of Automobile Insurance) had not been completed.

A review of the OCF-1 indicates that Mr. Z.'s date of birth was February of 1992 making him 23 at the time of the accident. The OCF-1 further indicated that he was single. He was already represented by counsel: Oatley Vigmond LLP. His address is identified in Richmond, British Columbia on Dakota Drive. A detailed address and postal code is given. It also indicates that the claimant was employed and working and a student or recent graduate on the date of loss. The OCF-1 also provides a phone number for Mr. Z. and his legal representative.

With respect to his student status, he noted that he was at the University of Toronto at the St. George campus with the last date he attended was April 2015 taking a Bachelor of Commerce/Accounting. That same date was noted to be the date he would complete his studies.

With respect to his employment, the document shows that from 09-2014 to 04-2015 he had been a teaching assistant, part time, at the University of Toronto.

The Crawford adjuster sent a letter dated April 21, 2016 to Mr. Z. at his Richmond, British Columbia address. The letter noted that the Application for Accident Benefits (OCF-1) had been

received late, with no reasonable explanation for his failure to notify the insurer within 7 days of the circumstances that gave rise to his accident benefit claim. It also noted that the OCF-1 was incomplete and that a complete Application was required. The letter only makes reference to page 2 Part 4 (Details of Auto Insurance) with respect to the completeness of the Application.

In addition, the letter requests that various information or documentation is to be provided in accordance with Section 33 within 10 business days. This includes such requests as a driver's license, a written explanation for his failure to make a claim in a timely fashion, the OCF-2: Employer's Confirmation of Income, documents related to employment, a police report and various hospital and clinical notes and records.

Of significance to this preliminary issue is a request that he complete a statutory declaration. A copy of the statutory declaration was put in evidence. It is 13 pages long with 115 questions. While there are questions in this document with respect to Mr. Z.'s possible marital status and whether he has any dependants, there are no questions that would speak to whether or not he is a dependant on someone else such as a parent. The majority of the questions deal with requests for information concerning the circumstances of the loss, his employment, his housekeeping duties, collateral benefits and his injuries.

Turning back to the log notes, the adjuster makes an entry on April 21, 2016 confirming her awareness that the claimant's current address is in Richmond, British Columbia.

On April 22, 2016 the adjuster conducts what she describes as a "priority search". This involves a driver's license and insurance history search.. These searches were performed with the information Crawford had been provided including the claimant's name, date of birth and the Toronto address. The search results received on April 28 did not indicate any record of a driver's license.

On April 28, 2016 the adjuster received a phone call from Mr. Z.'s legal representative. They indicated that they had a call with their client that day. He had had surgery. After surgery she noted that he had returned to China to his parents. He was a student who had just graduated and was scheduled to begin a Master's program in September. He had been employed as a teaching assistant with a contract running from September 2014 to April 2015. Counsel also indicated that Mr. Z. is "out in BC – living in Kelowna – looking for OT services through Rehab Management Inc.". Retroactive attendant care will be claimed.

On May 2, 2016 the claimant's representative sent a letter to Crawford indicating that the reason Mr. Z. had failed to submit his benefits in a timely matter was because after surgical intervention at Mount Sinai Hospital, he had left for China to be cared for by his family and returned to Canada on April 3, 2016. In that same letter an amended and signed OCF-1 was submitted. This new OCF-1 indicated on Part 4 page 2 that there was no other policy for insurance available to the claimant. Specifically, the application indicated there was not a

policy available based on any person on whom Mr. Z was dependant. This document was received on May 2, 2016 and according to ACE, if the 90 days runs from this document the 90 days falls on July 31, 2016. ICBC calculates this from May 4th (when they say it was received) which takes the 90 days to August 2, 2016.

The adjuster's log notes indicate that she followed up with the claimant's representative on May 12th. On May 19th the law firm confirmed that the statutory declaration had still not been received. Prior to this time by email dated April 30, 2016 Mr. Z.'s representative had sent an email to the adjuster suggesting that instead of a statutory declaration which includes a significant number of questions and will be time intensive that the adjuster consider getting a statement instead. Counsel in her email states "I am aware that you have IA's in BC and I suspect that I can attend by phone for the interview please consider and respond."

The Crawford adjuster responds to this email confirming a statutory declaration is required.

On May 26, 2016 the adjuster received a report from an occupational therapist indicating that the claimant was living with his parents in Richmond, BC and he was intending to return to school to complete his Master's degree in September. On June 3, 2016 ACE/Crawford received an OCF-6: Expenses Claim Form. The address on this documents was different than the address on file. A call was made to the claimant's representative and she indicated that she would confirm with the claimant what the new address was.

On June 3, 2016 the claimant's representative called to confirm that the mailing address was the one as indicated on the OCF-1 in Richmond, British Columbia.

On June 21, 2016 the adjuster followed up with the claimant's representative indicating that the statutory declaration as well as some other documentation and information requested had still not been received. The insurer now was requesting an examination under oath. The email indicates "in order to make the necessary arrangements for same, please confirm if you wish for the EUO to be completed in British Columbia or Ontario."

The claimant's representative responds on the same day indicating that the statutory declaration was still in the process of being completed. She did remind the adjuster that they had offered to give a signed statement as that would be more efficient. She also indicated that an examination under oath was "overkill" and did not believe it was warranted.

The adjuster responds to the claimant's representative by email June 22nd noting that she has reviewed the issue with the insurer and the insurer requires an examination under oath based on late reporting, as well as details, injuries etc. She asks that it be confirmed which province it should be set up in. Priority is not mentioned.

In or around this time (June 2016) the log notes also indicate that the adjuster is in the process of scheduling Section 44 assessments to address income replacement benefits and notes that the claimant resides in Richmond, British Columbia.

In an entry in the log notes dated June 23, 2016 under heading Priority the adjuster notes that she has completed a ISB search – driver's license search and there is no record, no driver's license located. She notes it is confirmed he is a student from China studying at the University of Toronto with no Ontario driver's license. There is also reference to an examination under oath and no response having being received to the statutory declaration request.

By June 28, 2016 the adjuster had received an Attendant Care Assessment from Rehabilitation Management Inc. dated June 22, 2016 which provided a series of Form 1's (Assessment of Attendant Care Needs). This assessment indicated that the claimant was living with his mother in British Columbia.

By email dated July 4, 2016 the claimant's representative indicated that a letter was coming by courier which would include some medical records but also confirm the preference that the examination under oath be done by video conference. She also noted that Mr. Z. would be moving in mid to late July.

Crawford then referred this matter to counsel to schedule an examination under oath and act on their behalf with respect to conducting an examination under oath. Three days later, the retained counsel sent a letter dated July 7, 2016 to Mr. Z. and his representative notifying them of the retainer and a request to schedule the examination under oath noting that it was to be arranged by way of video conference and that they would take care of arrangements with a reporting center in Richmond, British Columbia.

ACE's counsel sent out a further letter on July 22, 2016 to the claimant's representative in which a request is made to provide particulars with respect to any other insurance that may be available to their client. Counsel notes that the issue of priority remains undetermined. The letter states the following:

> "Delaying your client's examination under oath may prejudice my client with respect to a claim that another insurer could have priority of the accident benefit claim. While we are prepared to be reasonable, I am hopeful that you will be able to provide me with any and all information that you have or may obtain with respect to any travel insurance available to your client, please advise whether or not your client's parents have any motor vehicle insurance available to them in China or otherwise…".

In the interim the representative for the claimant had also advised Crawford (July 11th) that they would not now be submitting a statutory declaration as the examination under oath would be scheduled and that their client was expected to move to Williamsburg, Virginia to pursue a Master's degree in late July.

On July 19, 2016 Oatley Vigmond wrote to counsel for ACE at which time a request was made for an extension for scheduling the examination under oath given Mr. Z.'s plan to move to Virginia and because his school and holiday schedule was unknown. ACE's counsel's letter of July 22, 2016 referred to above was responsive to that request confirming that they agreed to a brief extension as long as in the interim the particulars noted above were provided. A follow up of August 10, 2016 to schedule the examination under oath was noted.

By letter dated August 10, 2016 the claimant's representative wrote to ACE's counsel noting that they had communicated to Mr. Z with respect to the issue of priority. He confirmed that he did not own or lease a vehicle, that he was not listed as a driver on any policy of insurance, he was not married and was not common-law. The letter went on to state the following:

> "With respect to dependency, Mr. Z. confirms his parents generally supported him financially with respect to his studies and life experience. His parents have residences in China and Vancouver and travel between the two locations. He believes his parents own vehicles in both China and Vancouver. He does not know the details of any active insurance policies in either county.".

In addition the letter provides Mr. Z.'s mother's name (J.W.) and provides her address and telephone number. Her address is the same as Mr. Z.'s in Richmond, British Columbia.

On receipt of this information, the Crawford adjuster requested that Mr. Z.'s representative have his mother sign a consent, which they felt was required, to obtain information of any polices that the mother might have in British Columbia. This request was sent via email and indicated the information was required in order to continue the priority investigation as the Examination under oath had not yet been completed.

On August 18, 2016, ACE was made aware of the claimant's new address in Williamsburg, Virginia although it was requested that the correspondence and cheques continue to be sent to the Richmond, British Columbia address.

On September 8, 2016 the Crawford adjuster sent an email to the claimant's representative indicating that the signed consent from his mother had not yet been received and it was required in order to obtain her insurance history search. There were follow up requests for the signed consent made by the Crawford adjuster either by phone or email on September 8th, October 3rd, October 20th and November 15th. At the same time counsel for ACE was continuing to communicate with Mr. Z's representative to schedule the examination under oath. Possible dates included dates in November or December of 2016.

The Examination under oath then was scheduled unilaterally to take place on Tuesday, January 17th via video conference with the claimant to attend at a location in Virginia. This was confirmed by ACE's counsel by letter dated December 20, 2016.

On January 3, 2017 the claimant's representative sent a request to counsel for ACE to cancel the scheduled examination under oath advising the claimant was completing his internship in Washington, DC and that it would run from January 3, 2017 to March 10, 2017. The request was to schedule the examination under oath after that date.

On January 5, 2017 the Crawford adjuster sent another email to the claimant's representative reminding them that they had still not received the consent they had asked for to be signed by the claimant's mother.

On January 6, 2017 the examination under oath that had been set for January was rescheduled, on consent, to March 23, 2017. The letter confirming this also noted that the inability of Mr. Z. to attend the examination under oath had prejudiced the insurer's ability to investigate the issue of priority and as well the numerous requests for the signed consent from the mother had still gone unanswered.

On January 10, 2017 the claimant's representative emailed the consent signed by the mother.

On January 11, 2017 the Crawford adjuster made a request for a priority search based on the consent from the mother. The search was done under her name. The results of this search was received on March 22, 2017 (an ISB insurance history search) noting no policies were found in place as of the date of loss.

The examination under oath took place on March 23, 2017 via video conference. The Crawford adjuster was an observer. The claimant advised that in his view he was financially dependent on his parents. He provided both his parents' names and an undertaking was given to provide a complete insurance history for both parents from 2014 to 2015 and to confirm if an auto policy was in effect on the July 5, 2015 date of loss. This undertaking, amongst others, was confirmed by letter dated April 13, 2017 from counsel for ACE.

On April 24, 2017 Crawford received a letter from the claimant's representative attaching a policy of insurance from the ICBC in the name of BMW Group Financial, a division of BMW Canada Inc., as the lessor and showing C.J. as the lessee. The address was on Chestnut Street in Vancouver. This policy was in effect on the date of loss.

On April 25, 2015 a Notice to Applicant of Dispute Between Insurers was prepared by the Crawford adjuster and sent to ICBC on April 26, 2017.

There was an examination under oath conducted of the adjuster from Crawford on October 1, 2019. What follows is some of the relevant facts to this decision that I have drawn from the transcript of this examination under oath. The adjuster confirmed that at no time since she was assigned the file, up until the Notice of Dispute was sent out, did she do any of the following:

- She did not pick up the phone and call someone at the claimant's representative's office and ask them specific questions relating to the priority dispute/insurance information of Mr. Z.'s parents
- She never wrote a letter to Mr. Z. directly with specific questions such as "do your parents have a policy of insurance in British Columbia or do your parents own a car"
- She never thought to put the ICBC on notice by way of a general letter as she believed she required a policy number or insured information to accompany the letter although she acknowledged that she was aware that the ICBC was the only insurance company issuing automobile policies in British Columbia;
- She did not, although she acknowledged she could have, send out an independent adjuster to meet with Mr. Z., in British Columbia, to secure a statement or to have the independent adjuster go through the statutory declaration with Mr. Z.
- Having received the name of Mr. Z.'s mother and her telephone number she did not contact the mother directly in any way, and particularly by phone, to ask if she or other family members had a policy of insurance with ICBC or owned a car
- Prior to the examination under oath, she did not write to the claimant, the claimant's mother or the claimant's representative and ask for a copy of any policy of insurance in the name of Mr. Z.'s parents
- She did not agree to take a statement as suggested by the claimant's representative and maintained that she required the statutory declaration to be completed
- When she rejected the original OCF-1 she agreed that the only thing that she asked for which would relate to the priority of payments was the completion of the statutory declaration and for page 2 Part 4 to be completed of the OCF-1

Applicable Legislation:

Section 3 of Ontario Regulation 283/95 - "Disputes Between Insurers" sets out the various notice obligations upon an insurer with respect to disputing priority. These are set out below:

> 3 (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.
>
> 3 (2) An insurer may give notice after the 90-day period if,
>
> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
>
> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

Position of the Parties:

ICBC takes the position that the 90 day period runs from either the receipt of the first OCF-1 or from the receipt of the amended OCF-1. The first OCF-1 was received April 19, 2016 and ICBC says in that case 90 day notice would have to be given to ICBC by July 20, 2016. No notice was given.

If you take the date the amended OCF-1 was received on May 4, 2016 then the 90 day period would run to August 2, 2016 and ICBC did not receive notice on that date either. ICBC submits that those are the only two dates that should be considered. ICBC submits that either of those OCF-1's constituted a completed Application. They argue that the documents were complete and functionally adequate for legislative purposes. They argue that ACE, by its conduct, treated the second OCF-1 as complete noting that the log notes show that they were able to start adjusting the file including setting reserves, arranging Section 44 assessments, receiving attendant care, Form 1's and responding and dealing with OCF-18's. The OCF-1 was sufficient to show where Mr. Z. lived, his employment status and age. Therefore ICBC takes the position that the Application was complete at the latest by May 4, 2016.

ICBC submits that the next question to determine is whether the 90 day period running to either July 20, 2016 or August 2, 2016 was sufficient time for ACE to secure the information needed with respect to priority and put another insurer, in this case ICBC, on notice. ICBC submits that the onus is on ACE to establish that the 90 days was not enough time to get the information they required. ICBC submits that had ACE made a few inquiries that they would have been able to secure the necessary information within the 90 days. Specifically, ICBC submits that ACE was aware that the claimant was a recent graduate, 23 years of age, living in British Columbia and as such should have made a phone call to the claimant's representative, arranged for an independent adjuster to take a statement or even send a letter out with specific questions directed towards securing copies of polices that may exist with his parents. Finally ICBC submits that the adjuster's insistence on a statutory declaration in lieu of other avenues of inquiry point to the insurer not making reasonable inquires with the 90 day period. ICBC submits that with a few simple inquiries ACE could have easily determined the existence of the father's policy with ICBC.

ICBC submits that if I am satisfied under 3 (2) that 90 days was not a sufficient period of time for ACE to make a determination that another insurer may be liable that the second part of the test under 3 (2) (b) is not met. ICBC submits that the onus rests with ACE that they must also show that they made reasonable investigations necessary to determine if another insurer was liable within the 90 day period in order to be granted the exception under section 3 (2) of the Regulation. ICBC submits that ACE has not met that onus and points to the adjuster's failure to do any of the following within the 90 days:

1. Arrange for a statement to be taken by an independent adjuster
2. Set up an examination under oath

3. Write to the claimant or phone or write his representative with specific questions that would have related to principal financial dependency on his parents and the existence of any insurance policies in the parents name
4. Send the letter to ICBC even though no specific policy could be provided

ICBC points out that within the 90 day period, the only things that were done by ACE were to request a statutory declaration in which there were no questions relevant to financial dependency on parents, have a drivers license search conducted of Mr. Z. and conducted an insurance history search of Mr. Z. ICBC submits that within the 90 days after the receipt of the OCF-1 that ACE was in receipt of a number of facts that should have alerted them to a financial dependency issue that they should have followed up on. This included a report from an occupational therapist indicating that he was living with his mother in British Columbia since April of 2016, that he was a recent graduate and that Mr. Z. resided in British Columbia.

ICBC submits that the exception under section 3 (2) should only be granted in limited circumstance. An insurer is entitled to know that they are going to be responsible for making payments for statutory accident benefits early and thus with respect to priority the exception set out in section 3 (2) should operate strictly. Lastly, ICBC submits that where the claimant or his representative are uncooperative or unhelpful in providing timely responses to requests that is insufficient for granting an extension under 3 (2).

ACE argues that a completed OCF-1 was not received until after the claimant participated in the examination under oath on March 23, 2017. ACE submits that the first OCF-1 was incomplete as it did not contain a completed Part 4 relating to other automobile insurance. ACE submits that the amended OCF-1 was still incomplete as it had inaccurate information with respect to Part 4 / other insurance coverage available. It was only after the examination under oath and the provision of the policy not in the name of either Mr. Z. or his parents but in the name of a leasing company that a generally complete and functionally adequate Application was provided to ACE to allow them to identify that there was another insurer who may have priority. Accordingly, the notice delivered to ICBC on April 26, 2017 fell within the 90 days post examination under oath of March 23, 2017. Alternatively, ACE argues that if one takes the date for commencing the 90 day period after the receipt of the OCF-1 in 2016 (either the first or the amended version) that ACE took reasonable investigations within the 90 days to attempt to determine whether there was another policy but that 90 days was insufficient to make that determination and it could not be done until the examination under oath took place in March of 2017. The facts that ACE relies upon and the arguments that are made with respect to the issues above are set out below:

Ace points out the fact that there were numerous addresses provided for Mr. Z. The initial claim from 2015 showed addresses in Toronto. He was then shown to have addresses in Richmond and Kelowna, British Columbia. ACE was also told by Mr. Z.'s representative that he had returned to China for some period to be cared for by his family. Therefore where Mr. Z. was actually residing on the date of loss was unclear. ACE points out the fact that the date of

loss was July 5, 2015 but no actual Application for benefits was received until April/May of 2016. ACE therefore could not be sure where Mr. Z. resided back in 2015 when this accident occurred and that there was nothing in the OCF-1 that would trigger any belief that Mr. Z might be dependent on parents.

ACE argues that there was nothing in the information received within the 90 day period to lead ACE to believe that a 23 year old graduate with a Bachelor of Commerce and Accounting would be financially dependent on anyone. Particularly when his OCF-1 indicated he was not and the OCF-1 indicated he had been employed up until shortly before the motor vehicle accident.

ACE submits that after receiving the initial OCF-1 it conducted a comprehensive analysis with respect to priority including a driver's license search, an insurance history search on Mr. Z., requesting repeatedly a detailed statutory declaration, requesting an examination under oath, requesting confirmation of the claimant's residency and ultimately through their counsel seeking confirmation of any and all polices that were available to the claimant, his parents and his spouse. ACE submits that all this was done prior to July 31, 2016 which they suggest is the end of the 90 day period running from the receipt of the second OCF-1 which they say was received on May 2, 2016.

ACE submits that it was not until August 10, 2016 that they were provided with the information with respect to the claimant's mother's name and possible financial dependency.

ACE takes the position that they could not have sent a letter to the ICBC because they did not have the policy information until August 2016 or the mother's name. ACE further submits that they were unable to determine whether a policy existed in British Columbia until a signed consent was received from the claimant's mother. ACE point's to the fact that driver's license searches done on Mr. Z.'s mother and father came up negative with respect to any polices in effect on the date of loss. ACE submits that the adjuster cannot be held to a standard of perfection and that one must be cautious in making decisions based on hindsight. ACE also points to the efforts made to secure cooperation from Mr. Z.' s representative and the repeated failure to have the statutory declaration completed, and multiple delays with respect to scheduling the examination under oath.

ACE does not appear to take issue with the position by the ICBC as to the onus. ACE submits that in all the circumstances and in particular considering the misinformation provided to it, the late application, and the efforts actually made by the adjuster within the relevant timeframe that ACE should be granted the exception under section 3 (2) (b) or in the alternative that ACE had until June 21, 2017 to put ICBC on notice as the completed Application was not received until March 23, 2017 and ACE therefore met the 90 day requirement.

Analysis: Law and Application to the Facts:

There are really three questions that have to be answered in the context of this preliminary issue Hearing.

The first is when did ACE receive a completed application. Once I determine the date that the completed application was received the next question is whether ACE gave ICBC written notice with respect to the priority dispute within 90 days of the receipt of the completed Application. If I find that ACE did not give notice within the 90 days, then I move on to the last question or questions and that's whether ACE falls within the exception under 3 (2). ACE will only fall under the exception if they establish that 90 days was not a sufficient period of time to determine that another insurer was liable (in this case ICBC) under Section 268 of the Act and **that ACE establishes that they made reasonable investigations to determine if another insurer was liable within that 90 day period. With respect to the latter, ACE must satisfy both components of the test.**

Before turning to an analysis and my conclusion, a review of some general legal principles applicable to these issues are outlined below:

With respect to the issue of a completed Application, I note the case of *Intact Insurance Company v Federated Insurance Company of Canada* (2013) ON SC 6868 a decision of Justice Di Tommaso from October of 2013. Justice Di Tommaso concluded that a completed Application is one that is:

a) Generally complete;
b) Functionally adequate for its legislative purpose; or,
c) Treated as complete based on the conduct of the first insurer.

Justice Di Tommaso also pointed out that there is a difference as to what constitute a completed Application to trigger the first insurer's obligation to pay benefits to the person as opposed to a priority issue and that is whether there is sufficient information to start the 90 day notice period running.

In *Ontario (Minister of Finance) v. Pilot Insurance Company* (2012 ON CA 33, 1090 O.R. (3d168)) The Ontario Court of Appeal also provided some guidance on Section 2 and Section 3 of the regulations insofar as the question of what is a completed Application is concerned. Some of the key points from that case are set out below:

1. A functionally adequate Application that is a completed application under Section 3 is one where the insurer has sufficient information to notify another insurer that it is disputing liability to pay the benefits and this starts the 90 day Notice period running.

2. The Court of Appeal pointed out that the analysis does not end there. The court pointed out that where an insurer received an inadequate application but treated it as if it is completed or fails to act diligently to obtain information that is missing from the Application that the 90 day clock will start to run when the insurer fails to fulfill its obligations to take steps to ascertain the missing information.

Turning now to some general legal principles with respect to the 90 day issue. I have carefully reviewed a number of Arbitrator Bialkowski's decisions in this area. In particular, in the case of *Security National Insurance Co. and Intact Insurance Co., Re, 2018 CarswellOnt 8599* (Decision: May 18, 2018) Arbitrator Bialkowski sets out at paragraph 92 general legal principles that he found were applicable to the 90 day issue. I set those out below and note that I agree with Arbitrator Bialkowski that these are the key legal principles for an Arbitrator to apply in determining preliminary issue cases such as this:

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

   State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) [2001] O.J. No. 1115 (Ont. S.C.J.))

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

   Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co., [2009] O.J. No. 2971 (Ont. S.C.J.)

   Primmum Insurance Co. v. Aviva Insurance Co. of Canada [2005] O.J. No. 1477 (Ont. S.C.J.)

   Coseco Insurance Co. and Allstate Insurance Co., Re [2001 CarswellOnt 10987 (Ont. Arb. (Ins. Act))] (Arbitrator Stephen Malach, November 15, 2001)

   Liberty Mutual Insurance Co. v. Zurich Insurance Co. (2007), 88 O.R. (3d) 629 (Ont. S.C.J.)

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

   Primmum Insurance Co. v. Aviva Insurance Co. of Canada, supra

Dominion Of Canada General Insurance Co. v. Certas Direct Insurance Co., supra

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

   Primmum Insurance Co. v. Aviva, supra

   Federated insurance Co. of Canada and CGU Insurance Co. of Canada, Re [2003 CarswellOnt 10548 (Ont. Arb. (Ins. Act))] (Arbitrator Stephen Malach, September 2, 2003)

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

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

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

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

The parties all agree that ACE has the onus of showing that 90 days was not a sufficient period of time to make a determination that another insurer was liable and that they made reasonable investigations necessary to determine if another insurer was liable within that 90 day period.

Having set out the general principles I now turn to my analysis and conclusions.

Completed Application:

I find that the completed Application was received by ACE on May 4, 2016. This was the second or amended OCF-1 which now included the information that there were no other insurance policies available to the applicant. I find that this Application was generally complete, functionally adequate for its legislative purpose and most importantly was treated as complete based on ACE's conduct. By May 4, 2016, ACE was aware that Mr. Z. was a student who had just graduated, was 23 years of age, had been employed on a part-time basis but was not employed on the actual date of loss and lived in British Columbia. They were also aware prior to the receipt of the second Application that through a driver's license search that Mr. Z. did

not have an Ontario or British Columbia driver's license. They were also aware that Mr. Z. had returned to China to his parents but was now living out of British Columbia in Kelowna (this through a phone call from his representative). They were also aware that he was represented by an experienced law firm Oatley Vigmond.

With this information, ACE began to adjust the file. Over the next few months they dealt with treatment plans, applications for attendant care and issues such as qualification for income replacement benefits or non-earner benefits.

The one fly in the ointment for ACE was that the amended OCF-1 did not indicate that there was any other policy of insurance available to provide coverage to Mr. Z. I acknowledge that this was inaccurate information. This is not unusual considering the complexity of insurance coverage in this province. While I appreciate that inadvertent misrepresentations of information pose problems for insurers attempting to scroll through the complexity of priority entitlement it is not definitive. Within the Application and other information provided to ACE there was sufficient information for them to not only adjust the benefit side of the file but to recognize that further inquiries needed to made on the priority dispute. Indeed, the adjuster herself recognized that by pursuing the statutory declaration and ultimately an examination under oath. While an actual insurer was not identified on the OCF-1 the facts relating to Mr. Z.'s life and limited background were sufficient to trigger a recognition that there was likely to be an insurer relating to Mr. Z's parents and that there was a potential line of inquiry to be made with respect to dependency. In my view ACE clearly recognized that and acted on that information as well as adjusting the file on receipt of the amended OCF-1 and treated it as functionally complete for all purposes.

I reject ACE's submissions that the functionally complete OCF-1 was not received until the examination under oath took place in March of 2017. ACE's very own actions indicated that that was not the case. Further, to make such a finding would really result in the priority dispute provisions having no teeth. Both Arbitrators and Courts have pointed out that Section 3 is to operate strictly. An insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits (*Canadian General Insurance Company v. AXA Insurance* (1996), 1996 Carswell 8921). While there have been some cases where an examination under oath had been found to be the key date where the information was provided to commence the 90 day period running this is not one of those cases. In my view, as will be clearer when we move on to looking at the 90 day issue, it was unreasonable for ACE to wait until March of 2017 to conduct an examination under oath. The information that they say came from the examination under oath to complete the Application in my view was reasonably available well before that time with appropriate inquiries.

I therefore conclude that the completed Application was received on May 4, 2016 and that the 90 day period was therefore up on August 2, 2016. The evidence is clear that notice was not given by ACE to ICBC with respect to the priority dispute between May 4, 2016 and August 2, 2016. This then brings us to the next issue.

Was 90 Days a sufficient period of time for ACE to determine ICBC may be liable under Section 268:

I conclude that 90 days was a sufficient period of time for ACE to have made a determination that ICBC may be liable.

While I recognize that the OCF-1, once completed, did not indicate that there was any other insurance available that in my view was not a justification for ACE to put the issue of priority aside. Indeed, ACE's own actions indicated that they did not and were still continuing to pursue the issue of other potential insurance through various inquires. The difficulty I find is the nature of the inquires by ACE and what they did or did not do within that 90 day to collect the information they needed to determine if there was another insurer. While I appreciate that that is to some extent relevant to the second part of the test, it is also determinative as to whether 90 days was sufficient time.

ACE was aware that Mr. Z. did not have a driver's license. Further, there did not appear to be any evidence at that time that Mr. Z. was employed on the date of loss or had regular use of a car in light of his lack of a driver's licence. ACE was also aware that Mr. Z. was not married and therefore it would seem unlikely that there would be a spousal priority claim although, still something to be explored. He was 23 years old. He was from China. He had completed his university degree and had been employed only on a part-time basis. He was living in British Columbia. These were all red flags that would have led a reasonable insurer to conclude that the most promising line of inquiry in terms of priority would be whether or not Mr. Z. was dependant on anyone who may have had insurance on a car in place at the time of the accident. Other than a common-law spouse this line of inquiry would take an insurer to Mr. Z.'s parents.

ACE was also aware that Mr. Z. had returned to China to his parents and in fact that was one of the explanations for his late Application. They were also aware he was back in Canada in British Columbia and residing with his mother.

With that information, what did ACE do to determine whether Mr. Z.'s mother or father owned a vehicle or were in some way insured under a policy in British Columbia that could be accessed by Mr. Z. if he were dependant. Before even going to the question of dependency, ACE would have wanted to determine that there was a policy of insurance that could be accessed first. If neither of Mr. Z.'s parents had drivers licenses or owned vehicles or had any auto insurance then it would not matter whether Mr. Z. was or was not dependent.

ACE was very focused on securing the statutory declaration which had been sent to his representative to complete at the same time they were asking for a completed Application for Accident Benefits (letter April 21, 2016). The statutory declaration was part of the materials before me. A careful review of that document indicated that there were no questions within

the document that would identify Mr. Z.'s parents or ask questions about what insurance coverage they had or questions about dependency. I struggle therefore with the adjuster's evidence that she did not pursue any other lines of inquiry because she wanted the statutory declaration completed. That was ACE's preferred process. Even if the statutory declaration had been completed, and returned to ACE within the 90 days, there would have been no information in that about his parents as those questions were not asked. ACE declined Mr. Z.'s representative's suggestion that a statement be secured. Further, it was not until July of 2016 that ACE decided to pursue an examination under oath. While counsel were retained within the 90 day period ACE does not appear to have made any significant efforts to ensure that the examination under oath took place before August 2nd.

There were a number of occasions where ACE had an opportunity to speak to or write to Mr. Z.'s representative. In reviewing those letters and conversations prior to August 2nd, not one specifically asked for the following:

1. To provide the contact information of Mr. Z.'s parents;
2. Did Mr. Z.'s parents own a vehicle that was insured on the date of loss;
3. To provide a copy of any policy of insurance in place for Mr. Z's parents on the date of loss; or,
4. Did the parents have regular use of a car through their employment.

Similarly, no letters were sent to Mr. Z. asking these questions. Counsel for ACE did send a letter out outlining these broad areas. Unfortunately ACE did not follow up or press forward with an examination under oath when counsel's letter was unanswered.

While I appreciate that there was confusing information being provided to ACE with respect to various addresses for Mr. Z. there is no doubt that within the 90 days and early in the 90 days ACE was aware that at that time Mr. Z. was residing in British Columbia with his mother. Counsel for ACE points out that that information was as of April 2016 and did not necessarily apply to the circumstances in 2015 when this accident occurred. While that may very well be true, no inquiries were made by ACE to determine that. In order to principally dependent for financial support on someone, in accordance with the Statutory Accident Benefits Schedule, the individual does not have to reside with those individuals. In 2015 Mr. Z. was a student recently unemployed, one of the most typical cases for a financial dependency argument based on parental support. Again, the fact that ACE wanted to get this information relating to the parents reflects the fact that they were aware that financial dependency was a potential live issue in terms of priority.

Also within the 90 days, there was no request made by ACE to be given the name and address of the parents so that information could be sought directly from the parents. There was no request made to have permission to speak directly to Mr. Z. to ask him those questions. The ACE adjuster had conversations with service providers in British Columbia and questions were not asked of them with respect to Mr. Z.'s mother with whom he was clearly living. ACE did not

arrange for an independent adjuster to go and take a statement or try to meet with Mr. Z. or his mother to collect this information. Yet, Ace was able to arrange Section 44 assessments in British Columbia or work on getting them arranged within the 90 day period.

I do take notice of the fact that the policy of insurance that was ultimately produced was not in the name of Mr. Z.'s mother or father. It was in the name of a leasing company. Mr. Z.'s father was shown as lessee. However, that policy was in place and in effect in July of 2015. It was promptly produced by Mr. Z.'s representative shortly after the examination under oath in March of 2017. The examination under oath took place on March 23rd and on April 24, 2017 ACE received a letter from the claimant's representative attaching the insurance policies of the claimant's parents for 2014 and 2015 and confirmed that they were in place on the date of loss. I can only draw from this that had that specific question been asked and pressed within the 90 day period that a quick result would have been secured from the claimant's representative. in other words, had appropriate and reasonable inquires been made, by ACE, within the 90 day period information would have been available to them to confirm that there was a policy with Mr. Z.'s father with the ICBC in effect on the date of loss and a timely notice could have been provided in accordance with the Regulation.

ACE points to many other problems they encountered outside of the 90 day period that contributed or supports their position that 90 days was not enough time. This includes the difficulty in getting the examination under oath scheduled because Mr. Z. through his representative requested that it be rescheduled a number of times due to his personal circumstances. I could not find any evidence to suggest that the examination under oath could not have been arranged between May 4, 2016 and August 2, 2016. I do not find the later delays to be relevant. Further, ACE made much of the fact that it took a long time to get a signed consent via Mr. Z.'s representative from his mother in order to be able to access certain information. ACE points out that it wasn't until August 10th that they received information pertaining to financial dependency and the name of the claimant's mother became available. Of significance is not only that the claimant's mother's name became available but her phone number became available. I could see no evidence that any call was ever made to the mother. Repeated follow ups (a total of 6 between August 10, 2016 and April 10, 2017) to get the signed consent of the mother back is not in my view a reasonable effort to pursue information relating to priority. ACE believed that the mother's consent was necessary in order to do a history search to determine whether there were any policies in effect with the ICBC. Surely a telephone call to the mother to ask if she or her husband had an automobile policy or a car in British Columbia would have made more sense than doggedly pursuing a consent that when ultimately received did not disclose any information because the consent was only for the mother and did not include the father who actually had the policy in place.

Lastly, there was much made of the fact that ACE did not make any efforts to contact ICBC to determine whether they had a policy or could advise ACE of whether there was a policy available. ICBC suggested that ACE should have written to ICBC as it was the only insurer in the province and put them on notice within the 90 day period of a potential priority dispute albeit

that that notice would not have been specific as to who the insured was or the policy number. I agree with ACE that had that been done we would probably be here arguing whether that notice would have been considered incomplete or insufficient and not properly served within the time period. I also agree with ACE that Regulation 3 (2) should not (as Justice Perell points out in *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* 88 OR (3d) 629, 2007) that one must interpret Section 3 (2) in such a way as to discourage insurers from issuing notices indiscriminately on the off chance that a priority insurer is identified. While I appreciate ICBC's point that in this case there was only one insurer that would have been notified, I do not find that would have been a reasonable course of action by ACE in these circumstances.

Therefore taking all the facts and the relevant law and principles as noted above into consideration it is my finding that 90 days was a sufficient time to determine that another insurer may have been in priority. Further, if I am wrong on that issue, as can be seen from my analysis above, I also conclude that with respect to the second part of the test that ACE did not make reasonable investigations necessary with respect to potential priority within the 90 day period.

Order:

Based my findings, I thereby order that:

1. ACE did not receive a "completed" OCF-1 – Application for Accident Benefits within the meaning of Section 3 (2) (a) of Ontario Regulation 283/95 until May 4, 2016;
2. ACE had until August 2, 2016 to put ICBC on notice with respect to priority;
3. ACE did not put ICBC on notice with respect to priority within the 90 days;
4. 90 days was a sufficient period of time for ACE to make a determination that another insurer may be liable under Section 268 of the *Insurance Act;* and,
5. Ace did not make reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

Therefore this Arbitration is dismissed as notice was not provided within the required time. ACE is to pay the legal costs of ICBC on a partial indemnity basis. ACE is also to pay the costs of the Arbitrator, ICBC having been wholly successful in this matter.

If counsel cannot agree on the quantum of costs, within the next 90 days they are to notify me so that a costs hearing can be scheduled.

DATED THIS 19th day of June, 2020 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP