

IN THE MATTER of s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Regulation 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

CERTAS DIRECT INSURANCE COMPANY

Applicant

and

**TD INSURANCE – MELOCHE MONNEX, AVIVA INSURANCE COMPANY
AND THE MOTOR VEHICLE ACCIDENT CLAIMS FUND**

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

Counsel Appearing

Christeena Lucknauth for the Applicant, Certas Direct Insurance Company (hereinafter called Certas).

Matthew Nieuwland for the Respondent, TD Insurance – Meloche Monnex (hereinafter called TD).

BACKGROUND

This matter comes before me in the context of a priority dispute between two insurers in accordance with s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95 as amended.

On April 10, 2022 the claimant was involved in a motor vehicle accident. She submitted a claim for statutory accident benefits to Certas. Certas takes the position that TD is the priority insurer with respect to the payment of benefits to this claimant.

However, TD has raised a preliminary issue. TD takes the position that this arbitration should fail as Certas failed to provide its Notice of Dispute Between Insurers in accordance with s. 3 of Ontario Regulation 283/95. TD submits that the notice was served outside the required 90-day period and further submits that the saving provisions of s. 3 of the Regulation are not applicable in the circumstances of this case.

This matter proceeded before me by way of written submissions. I also received a Book of Documents which included various letters between Certas and the claimant and her counsel, copies of various OCF-1s, copies of Certas' log notes, an Occupational Therapy Report dated May 3, 2022 a Statutory Declaration completed by the claimant, an AutoPlus report, communications between Aviva and Certas with respect to the cancellation of an Aviva policy and the transcripts of the examination under oath of the claimant from February 13, 2023. Both counsel also submitted case law.

APPLICABLE LEGISLATION

Section 3 of Ontario Regulation 283/95 pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8 sets out the notice obligations with respect to an insurer who wishes to dispute priority. The relevant sections 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.

- (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 s. 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."

Also relevant to this preliminary issue is the definition provided in the Regulation with respect to what is a "completed application". The Regulation sets out:

"'completed application' means a completed and signed application."

ISSUES

The parties provided an Arbitration Agreement signed October 7 and November 15, 2024. It identified the following issues for my consideration:

- (a) Did Certas Direct meet its notice obligations under s. 3(1) of Ontario Regulation 283/95 - by placing TD Insurance on notice of the subject priority dispute, within 90 days of the receipt of the OCF-1?
- (b) Notwithstanding the above, can Certas Direct give notice pursuant to s. 3(2) of Ontario Regulation 283/95 after the notice period?

- (i) Was 90 days a sufficient period of time for Certas Direct to make a determination that another insurer or insurers are liable under s. 268?
- (ii) Did Certas Direct make the reasonable investigations necessary to determine whether another insurer was liable within the 90-day period?

AWARD

As I set out below, I have concluded that Certas did meet its notice obligations under s. 3(1) of Ontario Regulation 283/95. Certas received a completed application when it received the Police Report in this matter on September 30, 2022 and accordingly its Notice of Dispute served October 5, 2022 is within the 90-day time period. Therefore, Certas can proceed to a hearing on whether Certas or TD is the priority insurer with respect to payments for statutory accident benefits to the claimant arising out of the accident of April 10, 2022.

FACTS

On January 4, 2022 the claimant's father, who was the named insured on Certas' policy covering a 2013 Dodge Ram truck, unfortunately passed away.

On January 31, 2022 the deceased's wife called Certas and advised that her husband had passed away and that she wished to cancel the policy. The policy was changed to the "state of" and cancelled. The cancellation letter is dated February 1, 2022 with an effective date of February 1, 2022 and the reason for the cancellation was that insurance was not required on the vehicle any further. There was also a refund-issued.

On April 10, 2022 the claimant was involved in a motor vehicle accident. The claimant is the daughter of the deceased.

The first OCF-1 dated April 18, 2022 was submitted by claimant's counsel, Diamond & Diamond to Certas on that same date. While the OCF-1 identified an accident date of April 10, 2022, the description of the accident suggested that this was a rear-end collision that occurred on the 401 when the claimant was rear-ended by an 18-wheeler. This description in fact did not pertain to the accident of April 10, 2022 but to an earlier accident from August 2021.

On April 20, 2022 Certas spoke to the claimant's legal representative and determined that the information on the OCF-1 was incorrect. The representative advised that the claimant was in hospital in intensive care. On April 20, 2022 Diamond & Diamond sent another OCF-1 to Certas, this time relating to the April 10, 2022 date of loss.

The OCF-1 did not indicate whether the accident was reported to the police. It did not provide a police officer's name or a badge number or whether they attended the scene or a collision reporting centre. However, there was a Schedule A attached to the OCF-1 which did provide a

detailed description of the accident. The injuries indicated that they were "serious life-threatening injuries" including a broken left foot, lacerated kidney, fractured right cheekbone, fractured orbital bone on the right eye, broken ribs, broken nose and a hairline fractured jaw.

Relevant to this preliminary issue the Schedule A also indicated the following:

"Third party driver drove away but has apparently since been found.

A witness somehow got his plate number and the police contacted client's mother on Sunday to say they found the driver."

Under part 4 of the OCF-1 (details of automobile insurance) the claimant checked off that she was claiming under the policy of a person upon whom she was dependent. However, no policy information was provided at all. She did not provide the name of the policyholder, the insurance company or any other information. No information was provided about the other car involved in the accident.

However, the first OCF-1 with the incorrect information with respect to the accident did provide Certas' policy D4797993 and the name of the claimant's mother as the policyholder. That OCF-1 also indicated she was claiming as a dependant on Certas' policyholder.

On April 21, 2022 there was another phone call between Certas and the claimant's legal rep and at that time there was some discussion that the claimant's father had died and that there had been a vehicle transfer after her father's death. There was some discussion that the claimant may have an auto insurance policy of her own and it was also reported that she was estranged from her mother.

On April 27, 2022 Certas directed a letter to the claimant copied to her counsel entitled "Dispute Between Insurers". In that letter Certas indicated that they needed further information in order to understand who may be responsible to pay statutory accident benefits. The claimant was asked:

1. Do you have any automobile insurance and if so provide automobile insurance details?
2. Do you own or have use of a vehicle for work or personal use and if so provide details?
3. Do you have a spouse? If so provide the name, date of birth and automobile insurance details.
4. Are there any individuals upon whom you may be dependent either financially or for care and if so provide their legal name, date of birth and auto policy details?

Also on April 27, 2022 a claims advisor spoke to the claimant's representative and was advised that the claimant had told her counsel that the Certas policy was not in force. Diamond &

Diamond advised that they were now in the process of obtaining the Police Report and more information about the claimant's driver's licence and insurance and that they will be getting back to Certas.

On April 28, 2022 Certas sent a letter to the claimant entitled "Incomplete Form". This letter referenced the fact that the claimant had not properly signed her OCF-1 and they requested a properly signed document.

On that same day Certas conducted a ISB driver's licence name search of the claimant.

Also on April 28, 2022 Diamond & Diamond sent Certas a letter which included information about the claimant's driver's licence (a picture was provided) and advice that she had been insured under a policy with Aviva bearing policy A96894999PLA. Copies of the Certificate of Insurance were included. The letter also advised that on the date of loss that the claimant was driving her own car which was a 2008 Nissan Altima Coupe 2.5. The Aviva policy shows that that vehicle was insured under their policy with a policy effective date of October 29, 2021. The Diamond & Diamond letter also indicated **"At this time the Police Report has been requested and will be provided to your office on a future date."**

Certas now commenced its investigations into whether or not the Aviva policy would be in priority to the Certas policy under s. 268 of the *Insurance Act*.

First of all, Certas obtained an Autoplus Gold report. This came in on April 29, 2022 and it indicated that the Aviva policy had been cancelled for non-payment on March 8, 2022.

In the meantime, Diamond & Diamond responded to Certas' previous letter requesting some additional information. On May 3, 2022 Diamond & Diamond advised that their client was a single woman who owned her own vehicle insured with Aviva and provided that policy number. However, the letter also confirmed that the Aviva policy had been cancelled due to her lack of payment after her father passed away suddenly. The letter also advised that their client was not dependent on anyone financially or for care.

At the same time, Diamond & Diamond returned the same OCF-1 with an appropriate signature by the claimant.

On May 4, 2022 Certas put Aviva on notice with respect to priority. It served them with a Notice to Applicant of Dispute Between Insurers which indicated that the claimant had an insurance policy with Aviva on the relevant date of loss.

On May 10, 2022 Certas sent out to the claimant and her counsel a statutory declaration for the claimant to complete which requested detailed information that would assist Certas in their continuing investigation of priority.

On May 18, 2022 Certas received a letter from Aviva of the same date advising that they had

received a Notice of Dispute but they would not accept priority as their policy had been cancelled effective March 8, 2022.

As a result of that information from Aviva, Certas put MVACF on notice (the Motor Vehicle Accident Claims Fund) by letter dated June 6, 2022 enclosing a Notice to Applicant of Dispute Between Insurers. This document indicated that some investigation had been taken place but no other insurance policies had been identified for the claimant and that the Certas policy had been cancelled before the date of loss.

On June 9, 2022 Certas spoke with the claimant's legal representative and the claimant. The claimant made some statements during the course of the telephone call. She advised that on the date of loss she resided with her mother and her sister. She denied being listed on any other policies. She said after her father's sudden death in 2022 she did not pay her premium and Aviva cancelled her policy. She denied being dependent on anyone and confirmed she had been employed since March 6, 2022.

On June 13, 2022 the Motor Vehicle Accident Claims Fund responded to Certas and denied priority. It also requested a copy of the Police Report and other documents relating to Certas' investigation.

On June 14, 2022 Certas wrote to the claimant and her counsel requesting **a copy of the Police Report.**

On June 16, 2022 Certas conducted an ISB driver search of the claimant's mother and found no record.

On June 23, 2022 Certas wrote to the claimant and her counsel requesting information with respect to any vehicles in her mother's household on the date of loss in light of the information that the claimant had been residing with her mother at that time. There were follow-up phone calls to the legal representative from Certas on June 22 and 28 when messages were left.

On July 7, 2022 Diamond & Diamond e-mailed the Certas adjuster advising "I am working on obtaining the information you requested."

On July 8, 2022 Certas sends out yet another follow-up letter to Diamond & Diamond focusing on the information they have requested concerning the vehicles in the claimant's mother's household.

On July 20, 2022 Diamond & Diamond e-mailed Certas to advise that in fact the claimant did not reside with her mother at the time of the accident and that she lived in an apartment close by.

As this was a discrepancy between what the claimant had said in the phone call statement, the Certas representative made a phone call to the lawyer's office to seek clarification. She was advised that the claimant and her mother have a broken relationship and that the mother wants

nothing to do with the claim. When asked for information, she does not provide any. This was confirmed in a follow-up e-mail from Diamond & Diamond on July 21, 2022 where Certas was advised "Her mother will not provide me with her insurance information. ... I cannot force the client's mother to provide me with her policy number and vehicle particulars."

At this point Certas decided to retain counsel to conduct a priority examination under oath.

In the meantime, in September 2022 Certas followed up with Aviva for copies of the cancellation documents relating to the claimant's own policies.

The EUO was scheduled for February 13, 2023.

On September 29, 2022 Certas followed up with the claimant and her counsel again requesting "the Police Report related to the accident of April 10, 2022".

On September 30, 2022 Diamond & Diamond provided a copy of the Police Report. The Police Report provided the name of the other driver and that that person was insured under a policy with TD Insurance Direct bearing policy no. 00129058303. Notably the motor vehicle accident report did not indicate that there were any witnesses to the accident and did not set out any witness names.

It is also notable that the claimant did in fact, presumably through her counsel, complete the requested statutory declaration. This document indicated that she was single on the date of loss. She advised she was not dependent for financial support or care on anyone at the time of the accident. She confirmed she did not have regular use of a company vehicle. With respect to the question "If your vehicle collided with any other vehicle please provide known details about other vehicles including make, model, colour, licence, name of driver and registered owner", the claimant did not provide any information.

With respect to whether the accident was investigated by the police, the claimant did confirm that it was and identified the investigating officer as "Emily Skleryk ". However, she did not indicate what police force this individual was with. It should be noted that the Police Report indicates that the investigating officer is in fact Jualin Tombs with OPP.

By letter dated October 5, 2022 Certas put TD on notice of the priority dispute serving a Notice to Applicant of Dispute Between Insurers identifying TD and its policy number. The document was dated October 5, 2022 and noted that the claimant has no valid policies in force on the date of loss and accordingly priority rests with the other insurer involved in the accident: TD.

TD responds by letter dated November 14, 2022 advising that the 90-day period to put them on notice had expired taking the position that the OCF-1 was dated April 20, 2022 received May 3, 2022 and the Notice of Dispute on October 5, 2022 did not fall within the required 90 days.

Counsel who had been appointed by Certas to handle the EUO with the claimant responded to

TD by letter dated November 23, 2022 outlining their position with respect to the receipt of the completed application as well as the reasonable investigations they had conducted and invited a representative of Aviva to attend the EUO that was to be scheduled. A Notice to Submit to Arbitration was served at the same time.

It was on November 28, 2022 that counsel for Certas received the cancellation documents from Aviva to support their position that the claimant's policy had been properly cancelled. Even then there were still questions about whether it had been delivered by registered mail and questions that were asked about tracking numbers and mailing timelines.

The EUO with the claimant took place on February 13, 2023. Counsel for Certas and TD were present. The EUO confirmed that the claimant was not living with her mother on the date of loss. Questions put to the claimant made it clear that inconsistent information had been provided through OCF-1s, information through her counsel and various statutory declarations. The EUO covered relevant information to do with issues relating to dependency and available policies. At one point the claimant is asked for an undertaking for her mother's full name and contact particulars. The claimant's counsel states (see page 42):

"We can provide the mother's name and phone contact. I believe that my client she has already answered the question ... and by way of another clarification her mother is not that supportive, this is why my client she lives in the basement she lives separately, so if you will try to get any information from her mother good luck, but there is no way that we could get any information from her mother because she was unco-operative since the beginning of this claim."

The claimant herself comments on that at page 43:

"I would like to say something. My lawyer did try to - there is no need to roll your eyes, it is my right to say something, right. So my lawyers did try to reach my mother to speak to her about different subjects multiple multiple times but my mother did not want to participate at all seeing that I was not living with her, she wasn't to be involved. So if you do try to call she is not going to answer. Just letting you know now."

Also in the EUO the claimant was asked whether her mother has an auto policy and she does confirm that her mother has a car but she does not know who her auto insurance is and on the issue of her mother's co-operation again at page 45 the claimant states:

"As I mentioned my lawyers did try to reach out to my mom and they were actually were asking about that information and my mom did not want to provide anything as she has nothing to do with it, I was not living with her, like I was not a child I live on my own, she does not want to be involved, so she did not provide me with any information."

At the EUO the claimant indicated that she thought her mother owned a Jeep or an SUV. She does not know what kind. She does not know the plate number. She did not know the colour. When counsel for the claimant was asked again for an undertaking for the name of the mother's auto insurance policy and the policy information, her counsel confirmed that the mother had never provided it to her and it would be impossible to get that information because the mother refused to co-operate.

POSITION OF THE PARTIES

Position of Certas

It is the position of Certas that it received a completed "application" on September 30, 2022 when it received the Police Report from counsel for the Applicant which identified the other vehicle involved in the accident, the name of the owner and its insurer, TD. Certas submits that the first OCF-1 cannot be relied upon as a completed application as it incorrectly provided information about the accident.

Certas also submits that the second corrected OCF-1 which was received on April 20, 2022 did not constitute a functionally complete application for the purposes of priority as it did not provide sufficient information to identify any other insurer that may stand in priority to Certas. It did not provide information about the other vehicle, the name or identity of the investigating officer or the division they were with, it did not provide information about any other policies that the claimant may have access to and specifically it did not provide a copy of the Police Report.

Certas submits that this is on all fours with the decision in *Unifund Assurance v. Certas Home & Auto Insurance*, 2023 ONSC 1377. In that case Justice Robert Centa upheld a decision from Arbitrator Samworth concluding that for an application to be completed it must be:

1. generally complete,
2. functionally adequate for its legislated purpose, or
3. treated as complete based on the conduct of the first insurer.

Justice Centa noted that an application would be considered functionally adequate for its legislative purpose (in that case priority) if it provides the insurer receiving it with sufficient information to notify another insurer that it is disputing liability to pay statutory accident benefits. As in this case, the Applicant in the Unifund case did not provide any information with respect to the owner of the vehicle she was in when the accident occurred, who the driver was or any insurance information. That information did not become available until the Police Report was provided by counsel for the Applicant.

Certas acknowledges that the OCF-1 it received in April 2022 was functionally complete for the purpose of the payment of benefits and to that end Certas commenced paying benefits as required under Regulation 283/95. However, Certas submits that it was not functionally complete for the purpose of a priority dispute until the necessary information was received

providing the name and owner of the other vehicle involved in the accident as well as their insurance information.

Certas also takes the position that if I find that they received a completed application in April 2022, that the saving provisions of s. 3 would be applicable. Certas submits that it was diligent in its investigation. It pursued all avenues including providing a statutory declaration to the claimant, sending letters requesting information with respect to other policies, finding and pursuing Aviva, putting MVACF on notice and conducting driver's licence searches. Certas submits that all that constitutes reasonable investigations during the 90-day period and that 90 days was simply not a sufficient time period in order to get the necessary information to identify TD and put TD on notice.

Certas submits that when looking at the saving provisions of s. 3 that an insurer must establish its diligence in its investigations but it is not to be held to a standard of perfection keeping in mind that insurance adjusters are busy individuals working on complex matters (see *Commonwell Mutual Insurance Company v. Certas Home & Auto Insurance* (Arbitrator Bialkowski, February 24, 2020)).

Certas also notes that it was provided with misleading and/or inaccurate information by the claimant and her legal representative. There was unclear information about dependency, unclear information as to where she was residing on the date of loss, let alone the continued inability of the claimant to provide any information with respect to her mother's available insurance due to the mother's reluctance to co-operate at all as shown through the claimant's counsel and her own answers at the examination under oath.

Certas submits that it was not unreasonable for them to rely upon the claimant's counsel and their undertaking to provide a copy of the Police Report. Certas points out that they followed up a number of times with the claimant's counsel with respect to the status of securing the Police Report. Certas submits that for it to have secured the Police Report it would have had to obtain an authorization from the claimant and submit a freedom of information request. As Certas was not a party to the accident, if it was then denied the request it would have to bring a motion to secure the Police Report. Certas points to the decision in *Ontario (Minister of Finance) v. Pilot Insurance Company*, 2012 ONCA 33 as an example of the difficulties one can encounter in securing a Police Report. Certas submits the fastest way for it to get the Police Report was through the claimant's representative.

Finally, Certas points out that the claimant in this case had serious injuries. She was hospitalized for nearly six weeks post-accident as described in her EUO. She had a number of fractures. This should also be considered when looking at reasonable investigations and access to information.

Certas therefore asks for an order that they be permitted to proceed with this arbitration on the grounds they have complied with their obligations under s. 3 of Regulation 283/95.

Position of TD

Key to TD's submissions is the Schedule A that was attached to the Applicant's second OCF-1 submitted by her counsel on April 20, 2022. TD points to the information in Schedule A that while the third party had driven away from the scene of the accident, it had later been found. Schedule A notes "A witness got the plate number and contacted the client's mother to advise that the driver was found." TD takes the position that the information as to the third party driver and the plate number could have been readily available to Certas had they contacted the claimant's mother to ask her the name of the driver and the plate number. TD submits that Certas did not have to wait for the Police Report and that a proper investigation after reviewing Schedule A to the OCF-1 would have led them to make the appropriate enquiries of the mother, secure the plate number and name of the driver and then through an appropriate search information TD would have been located. TD submits that there is no evidence that Certas tried to get this information from the mother, from the claimant or from her counsel with reference to what was set out in Schedule A.

TD submits that Certas also failed to arrange an early EUO when that information, amongst other, could have been canvassed within the 90 days after receiving the OCF-1 in April 2022.

TD also suggests that Certas's efforts to follow up with Diamond & Diamond to get them moving on getting a copy of the Police Report were inadequate.

TD submits that there is no indication that there were any meaningful investigations into identifying the third party driver outside the request for the Police Report within the 90 days of receiving the April 2020 OCF-1.

With respect to the completed application, TD's position is that a functionally adequate application was in fact received on April 20, 2022. TD submits that that OCF-1 with the Schedule A attached had sufficient information to allow Certas to start tracking down other potential insurers. With an OCF-1 containing a reference to a witness who possessed identifying information of the third party driver including the plate number, TD submits it cannot be said that the OCF-1 was therefore not functionally adequate. TD therefore submits that Certas failed to put TD on notice within 90 days of receiving a completed application as required under s. 3(1) and as such should be barred from proceeding with this application for arbitration.

Certas' Reply

Certas provided some detailed reply particularly with respect to the issue relating to the information concerning the alleged witness in the schedule attached to the OCF-1 submitted in April 2022. Certas points to the fact that the information on that schedule says "The police contacted client's mother on Sunday to say they found the driver." Certas submits that that does not say that the police told the claimant's mother the name of the driver, the plate number or any information with respect to the witness who apparently provided the police with the plate number. Certas submits that there is no evidence whatsoever that the claimant's mother had any information available to her that would assist Certas in tracking down the third party driver

and owner, the plate number and ultimately TD Insurance. All that can be taken from the Schedule A information is that the mother knew that the driver had been found.

Certas points to the fact that the Police Report does not list a witness. Certas also suggests that it would have been highly unlikely for the investigating officer to have released a witness's name or contact information to the claimant's mother.

Certas also submits that there is no evidence presented by the respondent at all that would support their position that contacting the claimant's mother would have resulted in obtaining the third party information sooner than they did through the receipt of the Police Report. Certas points to the fact that the claimant and her legal representative made it quite clear that the claimant's mother was non-co-operative and was not interested in providing any information. Certas submits that there is no evidence that if they had contacted the mother she would have been any more co-operative with Certas than she was with her own daughter and her daughter's counsel.

Certas reiterates its position that there were no additional viable enquiries for it to make in order to get the necessary information to identify the other driver and his or her plate number and that it was reasonable for them to wait for counsel for the claimant to provide the Police Report which then resulted in there being a completed Application.

ANALYSIS AND DECISION

I find that this case is extraordinarily similar to my earlier decision in *Unifund Assurance Company v. Certas Home & Auto (supra)* upheld by Justice Centa on February 27, (2023 ONSC 1377). In this case, Certas was provided with an initial OCF-1 that was clearly inaccurate in dealing with another accident. The second OCF-1 that they received on April 20, 2022 was also sorely lacking in information. It is described as an amended OCF-1 and presumably intended that some of the information in the previous OCF-1 was going to be relied upon. For example, the first OCF-1 set out the name of the claimant's mother and the Certas policy number while the second OCF-1 did not have that information. However, neither OCF-1 had any information with respect to the other vehicle involved in the accident. This was clearly critical to Certas who knew that their policy had been cancelled at the request of the deceased's wife after her husband had died.

The OCF-1 did not indicate if the accident had been reported to the police. It did not provide the officer's name or badge number. While the Schedule A did reference the third party driver having been found through the assistance of the witness, I agree with Certas' submissions that there was no evidence before me to suggest that anyone, including the claimant's mother, had any information with respect to the name of the driver and owner of the vehicle or the plate number, let alone who the insurer was. Even the claimant, in her Statutory Declaration from May 2022, despite whatever communications she may have had with her mother with whom she had some limited communication, did not reflect any information to assist Certas in identifying the other driver and owner of the vehicle. The only information provided was the alleged name of the investigating officer and that was not accurate.

As I found in the *Unifund v. Certas* case (*supra*), I see nothing wrong with Certas' decision to pursue the Police Report by requesting it from claimant's counsel. While waiting for the Police Report Certas made reasonable investigations into other avenues of priority such as dependency, access to the potential policy with the mother, finding and collecting information about the Aviva policy as well as putting insurers on notice such as MVACF and Aviva.

Certas conducted driver's licence searches, asked for statutory declarations, sent out various requests to counsel for the claimant and even had discussions with the claimant together with her counsel on the telephone.

In my view, it was only when the Police Report was received on September 30, 2022 that Certas had a functionally adequate Application for Accident Benefits with sufficient information for Certas to determine the identity of the other vehicle and its insured and thus start the 90-day notice period moving forward.

Therefore, I agree with Certas that the application was only complete for the purposes of priority when Certas received the Police Report on September 30, 2022.

I find the decision of Justice Perell in the case of *Ontario (Minister of Finance) v. Lombard Insurance Company*, 2010 ONSC 1770 to be helpful.

In that case the claimant was on a bicycle being pursued by a security guard. He claimed to sustain some injuries and applied to the Motor Vehicle Accident Fund reporting that he had been hit by a car. Actually his bicycle had hit a stationary vehicle in a parking lot while he was trying to get away from security guards. No police report was attached to the OCF-1 submitted to MVACF.

MVACF, through a variety of sources, ultimately managed to get a report confirming how the incident occurred and secured the licence plate of the stationary vehicle. This allowed them to find out who insured the car and they served the Notice of Dispute but it was well after the 90 days after the receipt of the OCF-1.

Justice Perell concluded that when the Fund received the OCF-1 on February 11, 2008 that it was not provided with enough information to allow it to give notice to any other insurer under s. 3(1). The receipt of the OCF-1 triggered the obligation of the Fund to start seeking that information elsewhere but it did not result in a situation where the Fund would be deemed to have received a completed application for the purpose of priority.

Justice Perell carefully distinguished between receiving a completed application for the purpose of commencing payment of statutory accident benefits and for the purposes of pursuing investigation into priority. While the Fund had enough information to start adjusting and paying accident benefits on the receipt of the OCF-1, it did not have enough information to serve the Notice of Dispute. Rather, the OCF-1 triggered the duty to investigate.

I also found of assistance the decision of the Ontario Court of Appeal (Justice La Forme) in *Ontario v. Pilot (supra)*.

In that case a cyclist was injured by an unidentified motorist. He had no insurance of his own so he submitted his OCF-1 to the Fund. Again no Police Report was attached as he had been unable to obtain one.

The Fund immediately took steps to try to determine who the insurer of the striking vehicle was. This included steps such as taking a statement from the cyclist who informed the Fund that she had actually made a 911 call. The Fund obtained a court order to get particulars of the 911 call which identified the driver of the vehicle. Further investigation allowed them to conclude that Pilot insured the striking vehicle and Pilot was put on notice. However, this was more than 90 days after the receipt of the OCF-1.

While the Court of Appeal ultimately found that the Fund had not provided appropriate notice, that conclusion was not related to the issue of when a completed application was received. In fact, the Court of Appeal found the Fund did not receive a functionally adequate application until it received the 911 calls. The Court of Appeal set out that a completed application for the purposes of priority under Ontario Regulation 283/95 is one that is:

1. Generally complete,
2. Functionally adequate for its legislative purpose, and
3. Treated as complete based on the conduct of the first insurer.

The Court of Appeal indicated that as soon as an insurer has sufficient information to notify another insurer that it is disputing liability to pay, that the 90-day notice then begins to run. The Court noted that this interpretation advances the goal of resolving disputes between insurers in a timely and efficient manner.

The last case I note in support of the conclusions I have set out herein is the decision of Justice Robert Centa in *Unifund v. Certas (supra)* upholding my initial decision in that case.

As pointed out earlier, the facts of that case are remarkably similar, if not almost identical to the facts before me here.

Justice Centa noted in paragraph 48 that the legislative purpose of requiring a "completed application" is to ensure that an insurer has the information it needs to perform its legislative obligations under s. 2 to commence paying benefits and to exercise its legislative rights with respect to priority disputes under s. 3 of Regulation 283/95. He points out that a completed application can be different for the purposes of s. 2 and for the purposes of s. 3.

Justice Centa concluded that he saw no error in my approach. He noted that the *Pilot* case had been identified as instructive in terms of the authorities and agreed with the disjunctive three-part test set out in that case.

Justice Centa noted in the case before him that no information had been provided in the OCF-1 with respect to the driver and owner of the other vehicle, whether it was insured or any insurance information. Justice Centa concluded that I committed no error in determining that that was not a complete application/OCF-1.

Justice Centa noted that Unifund did not receive a completed application until it had sufficient information to notify another insurer that it was disputing liability to pay the benefits and that was when it received the Police Report.

I therefore conclude that the completed application in this case was received on September 30, 2022 and that therefore the Notice of Dispute served on TD on October 5, 2022 is within the 90-day period set out under s. 3 of Regulation 283/95 and accordingly Certas can proceed with its claim against TD.

If I am wrong with respect to when the completed application is received and an earlier date is determined to be the date that the completed OCF-1 is received, then I would have extended the 90-day period and permitted Certas to access the saving provisions of s. 3(2).

I conclude that in the circumstances of this case 90 days would not have been a sufficient period of time to make a determination that another insurer was liable under s. 268 of the *Insurance Act*. I also find that within that 90-day period Certas made all reasonable investigations necessary to determine if another insurer was liable and that information was simply not available to them absent the receipt of the Police Report.

AWARD

Therefore, with respect to the questions set out in the Arbitration Agreement, the following is my decision.

- (a) Yes, Certas met its notice obligations under s. 2(1) of Ontario Regulation 283/95 by placing TD Insurance on notice of the subject priority dispute within 90 days of the receipt of the OCF-1.
- (b) Notwithstanding the above, Certas can give notice pursuant to s. 3(2) of Ontario Regulation 283/95 after the 90-day period as I find 90 days was not a sufficient time for Certas to make a determination that another insurer was liable under s. 268. I also find with respect to question 1(b)(ii) that Certas did make reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

COSTS

According to the Arbitration Agreement, payment of legal costs and the arbitration expenses are to be determined by the arbitrator taking into account the success of the parties and the offers

to settle the conduct of the proceedings and the principles generally applied in litigation before the courts in Ontario.

I am not aware of any offers to settle. I find that Certas was successful in this preliminary issue dispute and accordingly TD should pay Certas' legal costs and disbursements, if any, and also TD is responsible for paying the expenses of the arbitrator and of the arbitration itself, if any.

The parties cannot agree on costs, they should let me know and we can schedule a further pre-hearing to discuss a costs hearing.

DATED THIS 16th day of April, 2025 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', with a long horizontal line extending to the right.

Arbitrator Philippa G. Samworth
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