IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, and regulation 283/95 made thereunder

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

AND IN THE MATTER of an Arbitration

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE and
WAWANESA MUTUAL INSURANCE COMPANY

Respondents

DECISION

Counsel:

Wawanesa Mutual Insurance Company (Applicant for the purpose of this preliminary issue hearing): Paul Omeziri

The Dominion of Canada General Insurance (Respondent): Christopher J. Schnarr

Intact Insurance Company (Respondent): Lori J. Sprott

Introduction

This matter comes before me pursuant to the *Arbitration Act, 1991* to arbitrate a dispute as between insurers with respect to a priority issue pursuant to the provisions of the *Insurance Act* and its regulations: Specifically Regulation 283/95 as amended by Regulation 38/10.

By way of background, this claim arises out of an accident that occurred on June 1, 2014. On that day T.A. (the claimant) was the passenger on a motorcycle owned by W.S. The motorcycle was insured under a motor vehicle liability policy issued by Intact Insurance Company (hereinafter called "Intact"). T.A. was also the named insured under a separate policy of

insurance issued by the Dominion of Canada General Insurance (hereinafter referred to as "Dominion").

T.A. was at the time of the accident legally married to J.M. J.M. owned a vehicle which was insured under a motor vehicle liability insurance policy issued by Wawanesa Mutual Insurance Company (hereinafter called "Wawanesa").

T.A. applied to Intact for statutory accident benefits. Intact put Dominion on notice and commenced an Arbitration as against Dominion claiming it was the priority insurer. Dominion subsequently put Wawanesa on notice and brought it into this already existing Arbitration.

The matter before me today is a preliminary issue. The substantive issue is whether or not T.A. and W.S. were spouses on the date of loss. However, that issue has been put on the back burner while this preliminary issue involving a limitation argument on behalf of Wawanesa is dealt with.

By way of a brief summary, Wawanesa claims that as no Arbitration was commenced as against them within one year from the date of the service of the Notice of Dispute by Intact that the claim against them is therefore statute barred. In the alternative Wawanesa argues that the *Limitations Act* applies and that the Arbitration as against Wawanesa was not commenced within two years from the date on which the claim was discovered. Finally, Wawanesa also argues that irrespective of which limitation period applies that as they were added to this Arbitration more than two years after the demand for Arbitration was made by Intact Regulation 283/95 applies to prohibit the claim being pursued against Wawanesa as the Arbitration was not completed within two years as required under Section 8(2)(5) of the Regulation.

History of the Proceedings and Relevant Facts

In light of the arguments being made with respect to the limitation period a history of the proceedings before me is relevant.

The application for accident benefits in this matter was submitted to Intact on or about June 13, 2014. The application itself identified that T.A. had a policy of insurance with Dominion insuring a 2004 Montana but that T.A. was making a claim under W.S.'s policy.

Intact, by letter dated June 20, 2014, provided Dominion with a copy of the OCF-1 and a Notice to Applicant of Dispute dated June 20, 2014 taking the position that Dominion was the priority insurer.

A statement was taken by a representative of Intact from T.A. on June 20, 2014. The statement indicates:

> "I have been married and separated. It is not a legal separation. They said six months after separation you're legally separated. It's been almost five years that I've been separated from J.M."...
>
> "I'm separated from J. and J. owned a car at the time of the accident. It's blue but I don't pay too much attention to him and I wouldn't be covered under his auto insurance. I have my own policy and pay my own insurance."

Intact served a Notice to Submit to Arbitration on Dominion dated June 1, 2015.

Dominion received a copy of T.A.'s statement noted above on or about June 19, 2015.

By letter dated November 20, 2015 I was appointed as the arbitrator to deal with this priority dispute.

The first pre-hearing took place on February 19, 2016. The issue in dispute was identified at that time as to whether T.A. was a spouse and/or principally dependent for financial support on W.S. No issue was raised at the first pre-hearing with respect to T.A.'s spousal status and potential coverage through J.M. Counsel agreed that EUOs of both J.A. and W.S. were required. It was identified that the two year time limit to complete the Arbitration pursuant to Regulation 283/95 would be June 1, 2017.

A further pre-hearing took place on November 8, 2016. Counsel advised they had unsuccessfully attempted to secure the attendance of T.A. and W.S. on EUOs. They reported that they had experienced difficulty with T.A.'s representative with respect to scheduling. A Summons was requested and issued.

The third pre-hearing took place on April 11, 2017 - by then the EUOs of T.A. and W.S. had been completed. Counsel for T.A. took part in the pre-hearing as a motion for productions had been brought by counsel for Intact. There was some issue with respect to the evidence relating to the motion for productions and it was adjourned until June 23rd. This would also allow time for counsel to reach an agreement on production with the representative for T.A. It also became clear at that time that the June 1, 2017 date was in jeopardy. I heard submissions as to whether or not the time for the Arbitration to be completed should be extended on consent. Thereafter both on consent and by way of Order I extended the time for the completion of the Arbitration to December 31, 2017.

The EUOs of T.A. and W.S. took place on January 23, 2017. Dominion takes the position that through the course of that EUO they secured information with respect to J.M. and specifically his date of birth and his driver's licence number. An AutoPlus Report was completed using J.M.'s driver's licence and that AutoPlus report identified that Wawanesa insured J.M. between

January, 2003 and January, 2018. This would encompass coverage at the time of the date of the accident.

By letter dated June 22, 2017 Dominion served on Wawanesa a Notice to Applicant of Dispute putting Wawanesa on notice that Dominion took the position that as T.A. was still legally married to their insured, J.M. on the date of loss that Wawanesa may be the priority insurer to pay statutory accident benefits to T.A. with respect to the accident of June 1, 2014. The Notice of Dispute also indicated the following:

> "We are currently in private arbitration proceedings with Intact Insurance. Ms. Philippa Samworth is the arbitrator for these proceedings and it is anticipated that the next case conference is July 20, 2017. Please assign your counsel as soon as possible..."

The Notice of Dispute also attached the AutoPlus report. No Notice to Submit to Arbitration was ever served by Dominion on Wawanesa.

The next pre-hearing took place on September 27, 2017. By the time of that pre-hearing counsel had been appointed for Wawanesa. In addition, Economical was a participant in the pre-hearing on the grounds that they insured J.M.'s employer and that he was a listed driver under that policy. There was a regular use argument that had arisen. Economical was later let out of the Arbitration. In addition, at that pre-hearing a third policy was identified with Intact which insured another company with whom J.M. may have been employed. No one appeared at the pre-hearing on behalf of Intact with respect to that policy.

At that same pre-hearing counsel advised that they required an opportunity to review the transcripts of the EUOs of W.S. and T.A. and that those had not yet been ordered. Further, it looked as if there may be a need to have EUOs on issues with respect to regular use. Once again, it became clear that an Arbitration date before December 31, 2017 was going to be impossible. There were also still production issues outstanding from T.A.'s counsel. All counsel participated (including Wawanesa's counsel) in a discussion as to whether the insurers would be consenting to again extending the time under Regulation 283/95. All counsel agreed and accordingly I ordered that the time to complete the Arbitration be extended for the second time to December 31, 2018.

The next pre-hearing took place on December 11, 2017. This time a representative of Intact was on the phone (not counsel). There was discussion as to what insurers should remain in the Arbitration. All counsel advised that all insurers still had to be kept in the Arbitration pending productions, documents and one further EUO of J.M.

The next pre-hearing took place on April 17, 2018. By that time the EUO of J.M. had been completed. All counsel agreed or were in the process of recommending that Economical be let out of the Arbitration and that Intact (with respect to J.M.'s potential employment coverage) be

let out. Counsel at that point agreed that the issue to proceed forward was whether or not W.S. and J.A. were spouses on June 1, 2014. A one day hearing on that issue was booked for October 11, 2018 in London. Timelines were laid down with respect to the submissions of materials.

A further pre-hearing took place on August 2, 2018. Between pre-hearings new counsel had been appointed for Wawanesa (same firm but different lawyer). Counsel for Wawanesa asked for some additional time to review his file and secure instructions with respect to letting Economical out of the action. Wawanesa was given 10 days to state their position. Otherwise counsel confirmed they were ready to proceed with the Arbitration on the spousal issue on October 11, 2018. There were no issues raised at that time with respect to productions, limitation periods or any other issues.

By letter dated October 3, 2018 counsel for Wawanesa requested an adjournment of the hearing or a further pre-hearing. Various reasons were given for this request but most relevant was the fact that counsel for Wawanesa had determined that J.M. may have a policy of insurance with State Farm and accordingly Wawanesa had placed State Farm on notice but they had yet to appoint counsel. As a result of this letter all counsel agreed to adjourn the Arbitration from October 11th to November 15th and that October 11th would be used for the purposes of a further pre-hearing.

At the pre-hearing on October 11, 2018 Wawanesa for the first time suggested that there were a number of potential other issues that may have to be brought forward. What these issues were were dependent on the production of various documents that Wawanesa was seeking.

However, all counsel agreed to maintain the November 15th date for the Arbitration on the spousal issue. Counsel for Wawanesa undertook to press Certas/State Farm with respect to the coverage they may have on J.M.'s vehicle. All counsel were put on notice that if Certas/State Farm was to be brought into the Arbitration a further adjournment would be required as Wawanesa wished to bring Certas/State Farm into the Arbitration.

A further pre-hearing took place on November 5th. Still outstanding at that pre-hearing was whether or not there was a policy with Certas/State Farm that covered J.M.'s motorcycle at the time of the accident. At that time Wawanesa raised for the first time that they wished to argue a limitation period and whether or not they were properly in this Arbitration. As a result of that the Arbitration scheduled for November 15th had to be adjourned again. Further, I could not set down the preliminary issue hearing as we still did not know whether Certas/State Farm would be participating. Accordingly, once again counsel had to make submissions with respect to adjourning the Arbitration on November 15th and whether the time to complete the Arbitration under Regulation 283/95 should be extended again. Dominion and Wawanesa both consented to the adjournment and to the extension of the time to complete this Arbitration by a further six months to June 30, 2019. Intact did not consent. Having heard submissions on the issue I agreed with Wawanesa that the limitation argument had to be dealt with first as the

result of that decision may result in Wawanesa not having to take part in an Arbitration on the spousal issues. I therefore adjourned the Arbitration and extended the time under Regulation 283/95.

The next pre-hearing was November 27, 2018. At that pre-hearing it was confirmed by Wawanesa that the Certas/State Farm policy would not respond to this loss as it was entered into after the motor vehicle accident and accordingly Wawanesa would not be seeking that Certas/State Farm be joined to this Arbitration. We therefore set down timelines for written submissions with respect to the limitation argument that is the subject matter of this decision. The main issue (spousal issue) was booked and remains booked for May 24, 2019 in London.

Also submitted as part of the documents relevant to the issue of the limitation period were letters from Beard, Winter (counsel for Wawanesa) dated September 13, 2018 directed to the other counsel involved in this Arbitration enclosing copies of Notices of Dispute Between Insurers to TD General Insurance Company and Certas Insurance Company that had been delivered by Wawanesa. The Notice of Dispute to TD Insurance was delivered by letter dated September 11, 2018 as was the Notice to Certas. The Notice of Dispute indicated the following:

> "Through our investigations it has come to light that T.A. was still legally married to your insured, J.M. at the time of the accident and as such we are putting your companies on notice as per Section 10 of Ontario Regulation 283/95... We are currently in private Arbitration proceedings with Intact Insurance. Ms. Philippa Samworth is the Arbitrator for these proceedings and it is anticipated that the Arbitration will occur on October 11, 2018. Please assign counsel as soon as possible."

Also provided to me as part of the materials for my review were redacted log notes from Dominion. In a log note dated June 4, 2014 under Topic we see "First notice of loss". The individual completing the note indicates that they "spoke to T". There is some description about the nature of the accident. There is then the following:

> "No access to any other insurance company"
>
> "Intact (Jeremy MacDonald, 1-877-292-4968 x. 49921) – 7 J.A. 048329A"

I pause to note that that is the policy number of Intact, the Applicant in this priority dispute and that Jeremy MacDonald is the adjuster of Intact who put Dominion on notice of the priority dispute.

There is then a further log note dated June 4th under which the heading topic is "Customer Contact". The note indicates that a call was placed to the claimant and first contact was completed. It also notes "Completed AB incident screen".

The log notes indicate a further follow-up by call to T.A. on June 13th but there was no answer and a message was left for a call back. A further call was made on June 17th and the claimant advised to call back later in the week as she was waiting for a doctor's diagnosis. On June 20th the log notes indicate "M.G. reserve open".

The log notes go on to indicate contact or attempts to contact T.A. on June 20th, July 7th and July 11th. Specifically on July 7th the adjuster advised T.A. that they would like to arrange to meet with her to get a statement with respect to the details of her loss and her injuries. On July 11th there is a further conversation with respect to the statement and T.A. notes that she is very confused due to her injuries. She says she has given all of her statements and paperwork to Intact as she thought they were dealing with her claim. She asks the Dominion adjuster to contact Intact and get the statement and paperwork from them. Dominion advised her that they would do so but that she was still obliged to give them a statement.

The log note of July 14, 2014 notes that Dominion received the Notice of Priority and completed OCF-1 from Intact. A letter is sent to Intact requesting a complete copy of the AB file including T.A.'s statement.

On August 18, 2014 the adjuster from Dominion again speaks to T.A. and tells her that they have attempted to get her statement from Intact but they are refusing to release it. T.A. says she will get back to the adjuster but she is really confused and cannot put things together very well.

In a log note of October 2, 2014 the adjuster notes that they have again followed up with T.A. They note that a number of messages have been left over the weeks and they are still waiting for a statement.

In a log note dated February 17, 2015 the adjuster notes that they called T.A., there was no answer but a voicemail was left explaining about the priority dispute and advising they need a statement from her.

In a log note of February 25, 2015 T.A. calls Dominion and advises that Intact took a statement and she may have a copy and she will send it to them if she does. However, she has trouble with memory.

A further follow-up is made on March 6, 2015 with a call to T.A. from the adjuster reminding her to send over the statement given to Intact. There was no answer and a voicemail message was left.

On or about April 24, 2015 the adjuster from Dominion wrote to the Intact adjuster, Mr. MacDonald, advising that they were unable to accept priority as they had not been provided with sufficient information with respect to T.A.'s relationship to W.S. The letter noted "We are

aware that Intact took a statement from T.A. with respect to priority and request that you provide us with same".

In a log note dated June 19, 2015 it is indicated that the Dominion adjuster received a copy of T.A.'s statement from Ms. Watson, counsel for Intact.

Position of the Parties

Wawanesa's position is that the Dominion's claim as against it is statute barred. It notes, accurately, that there are no reported cases dealing directly with this issue. Wawanesa submits that there are two possible limitation periods that would be applicable. They submit whichever limitation period I pick that Dominion would be out of time. The limitation periods are outlined below:

1. If Regulation 283/95: Dispute Between Insurers Regulation, applies then Dominion had until June, 2015 to initiate an Arbitration against Wawanesa. In this argument Wawanesa takes the position that the one year period under the Regulation for bringing in a "third tier" insurer runs, pursuant to Section 7(3) one year from the date that Dominion received Intact's Notice of Dispute. In this scenario the limitation period would begin to run in June, 2015 and expire in June, 2016;

2. If Regulation 283/95 does not apply and/or contains no applicable limitation period for a second tier insurer to add a third tier insurer to the Arbitration, then Wawanesa argues that the *Arbitration Act* applies and it provides that the *Limitation Act* applies. In those circumstances Wawanesa submits that the limitation period would begin to run on June, 2014 and would run for two years until June, 2016. June, 2014 is the date that Dominion was served with Intact's Notice of Dispute. This argument is based on a discoverability theory and that Dominion knew or ought to have known that there was a claim to be made against Wawanesa when it received the Notice of Dispute in June, 2014;

3. Wawanesa also argues that the timelines to complete the Arbitration under Regulation 283/95 (Section 8(2)(5)) were not complied with by Dominion. In this argument Wawanesa takes the position that the Arbitration was to have been completed under Regulation 283/95 by June 1, 2017: two years after the Arbitration was commenced. As Wawanesa was added beyond that date and was therefore not in a position to consent to extend the Arbitration beyond two years that Dominion was therefore in non-compliance with Section 8(2)(5) of the Regulation when it attempted to add Wawanesa to this Arbitration.

Dominion and Intact take the position that the Dominion's claim against Wawanesa is not statute barred. They submit that Dominion properly added Wawanesa to an Arbitration that

had already been commenced within the one year limitation period of Intact giving Dominion initial Notice of Dispute and this was in accordance with the timelines in Regulation 283/95.

Dominion and Intact submit that there is no time limit for a second tier insurer to add a third tier insurer to an existing Arbitration as long as that Arbitration was commenced within the timelines set out under Regulation 283/95.

They submit that the *Arbitration Act* and *Limitations Act* are not applicable and that any limitation period relevant to priority disputes are to be found and limited to those set out under the *Insurance Act* and specifically its Regulation 283/95.

Intact and Dominion submit that when Dominion served its Notice of Dispute on Wawanesa that it was merely adding Wawanesa to an already existing Arbitration and therefore there was no requirement on Dominion to add Wawanesa within the one year of its receiving Intact's Notice.

Intact and Dominion provide a line of cases which they submit supports the proposition that second tier insurers do not face the same time constraints as first tier insurers do when initiating and pursuing priority disputes.

In the alternative, if the *Limitation Act* is found to apply in the circumstances of this case, Dominion submits that notice was provided to Wawanesa within two years of its claim against Wawanesa becoming discoverable. It is Dominion's position that the claim against Wawanesa only became discoverable on the day that Dominion could identify Wawanesa as the insurer of one of J.M.'s vehicles. Dominion submits that the earliest date that it would have that information was January 23, 2017 when at the EUO of T.A. they were given J.M's date of birth which allowed them to conduct an auto search revealing Wawanesa as J.M.'s insurer at the date of loss. Dominion submits that if the claim only became discoverable on January 23, 2017 then Dominion had until January 23, 2019 to add Wawanesa and/or commence an Arbitration against Wawanesa and as it was added in June 22, 2017 it was within the two year deadline.

Lastly Dominion and Intact submit that this Arbitration should not be dismissed as suggested by Wawanesa on the grounds that it has not been completed within two years of Intact serving the Notice to Submit to Arbitration pursuant to Section 8(2)(5) of Regulation 283/95. Dominion and Intact note that the two year time limit set out under that Regulation is permissive and allows the parties to consent to an extension of the time. Dominion submits that these timelines are directory and permissive. Further Dominion and Intact submit that Wawanesa's consent was not needed initially to extend the time to complete this Arbitration as they were not then a party to the Arbitration. Further, Dominion and Intact submit that subsequent to being added to the Arbitration Wawanesa consented to the extension of the two year time limit. Lastly, Dominion and Intact point out that Wawanesa fully participated in various pre-hearings and investigations once being added into this Arbitration and only recently raised the

issue of the two year time limit. Further, Wawanesa itself investigated and sought to add two fourth tier insurers into the Arbitration in September, 2018.

I have carefully reviewed the submissions of behalf of all the parties and I am in agreement with the position of Dominion and Intact for the following reasons.

Analysis and Findings

Ontario Regulation 283/95 sets up a scheme in very specific terms for resolving disputes between sophisticated insurance litigants. This Regulation provides a scheme to deal with disputes under Section 268 of the *Insurance Act,* R.S.O, 1990, C.1.8. The Regulation underwent some significant amendments in 2010 and it is the amended Regulation that is applicable to the dispute between the insurers in this Arbitration.

Before embarking on an analysis of the relevant provisions it is worthwhile to note (as all parties to this Arbitration did) the comments of the Court of Appeal in the case of *Kingsway General Insurance Company v. West Wawanosh Insurance Company*, 58 O.R. (3d) 251 at paragraph 10 with respect to the purpose and background of this scheme:

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

In reaching my decision I have taken careful note of the words of the Court of Appeal.

Regulation 283/95 establishes a scheme whereby the first insurer who receives the application for accident benefits is obliged within a certain time period (generally 90 days) to put any other insurer on notice that it is aware of that it claims may rank in priority under Section 268 of the *Insurance Act*. Generally that first insurer has been referred to as a "first tier insurer". The insurer and/or insurers that are put on notice by the insurer that receives the first application are generally referred to as "second tier insurers". The scheme seems quite clear with respect to first and second tier insurers. The first tier insurer has 90 days from the receipt of the application for accident benefits subject to issues with respect to investigation to put the

second tier insurers on notice. If the insurers cannot agree as to who is required to pay benefits then the dispute is to be resolved through an Arbitration under the *Arbitration Act*, 1991 and that Arbitration "may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under Section 3." Section 7, which I have quoted to some extent above, is set out below:

> "Section 7(1)
>
> If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an Arbitration under the *Arbitration Act*, 1991 initiated by the insurer paying benefits under Section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed.
>
> ... (3)
>
> The Arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under Section 3."

The right of a second tier insurer to place a third tier insurer under notice is provided for in Section 10. Section 10 states as follows:

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

Finally, Section 8 provides some guide as to how the Arbitration is to be conducted. Of note in the context of this preliminary issue is Section 8(2)(5) which states as follows:

> "Unless consented to by all parties, the hearing of the Arbitration must be completed within two years after the commencement of the Arbitration."

Under Section 8(2)(4) the Arbitrator is given jurisdiction to grant an adjournment on terms he or she considers appropriate if there is cogent and compelling evidence of reasons why the hearing cannot proceed on the scheduled day.

In this particular case there is no dispute that the first tier insurer, Intact properly placed Dominion on notice both with respect to the Notice of Dispute within 90 days and initiating the Arbitration within the one year period set out under Section 7(3). The issue is whether there is a limitation period for the second tier insurer to bring in the third tier insurer; and, if so, what that limitation period may be. I find that the only limitation period set out with respect to the commencement of the Arbitration as between the insurers is the requirement that "an insurer" or the insured person commence the Arbitration no later than one year after the Notice of Dispute was given. Once that Arbitration has been commenced it is my view that it provides an umbrella to bring in third or even fourth tier insurers into the already existing Arbitration. I further find that the *Limitation Act* is not applicable to these private priority disputes and that the *Insurance Act* and Regulation 283/95 provide a complete code with respect to the priority dispute procedures including limitation periods. If find that resort is not required to either the *Arbitrations Act* or the *Limitation Act*. I find that my conclusion in this regard is consistent with the overall priority scheme set out under the Regulation.

Wawanesa argues that if there is no time limit to add a third tier insurer it would lead to absurd result. Wawanesa suggests a second tier insurer can initiate an Arbitration twenty years later against a third tier insurer. I do not see that happening based on the overall scheme of this regulation. Once an Arbitration is commenced within that one year time period subject to consent the Arbitration is to take place within two years. The Regulation clearly sets out in Section 10(3) that "the dispute among the insurers shall be resolved in one Arbitration."

It does not contemplate as suggested by Wawanesa that there would be multiple Arbitrations as between various tiers of insurers.

Section 10 itself does not set out any limitation period with respect to third or fourth tier insurers. Numerous cases have concluded that as between second, third and fourth tier insurers the requirement to give notice within 90 days of the receipt of the application for accident benefits does not apply to them but only to the first tier insurer. While this line of case is not directly on point, there are a number of comments from Arbitrators and courts that have looked at that issue that have some bearing on my decision here.

In the case of *Allstate Insurance Company of Canada & State Farm Mutual Automobile Insurance Company*, 2016, Carwell Ont., 20840 (Arbitrator Bialkowski) the issue was whether Allstate, who was the first tier insurer and had not provided notice to Dominion (a third tier insurer) within the 90 days under Section 3 of the Regulation, was saved by notice having been provided by State Farm (the second tier insurer) to Dominion the third tier insurer but outside of that 90 day period. Dominion in that case argued that in order for it to be properly a party to

a priority dispute Arbitration it had to be given notice within the same time period as the second tier insurer. Arbitrator Bialkowski concluded that that was not the case. Arbitrator Bialkowski noted that the wording of Section 10 provides no obligation on the part of the first tier insurer to provide a copy of the application, police report, AutoPlus or examination under oath transcripts which may be in its possession. Therefore, when a second tier insurer is given notice under the Regulation it may very well have no information whatsoever from the first tier insurer with respect to the relevant facts of this priority dispute. Therefore, it was noted that the second tier insurer would be in a disadvantaged position as compared to the first tier insurer.

In the case before me Dominion claims that it was in a disadvantaged position as compared to Intact. It was not given a copy of the statement from T.A. that Intact had in its possession. While ultimately it secured a copy of the statement it was a considerable period of time later (almost a year). Further, despite its best efforts Dominion was unable to arrange for its own statement from T.A. It was not until January of 2017 that Dominion knew of the date of birth of J.M. which allowed it to determine Wawanesa's involvement. This in my view is an example of why Section 10 does not set out time limits as we see in the Regulation between first and second tier insurers.

Arbitrator Bialkowski goes on to state at paragraph 43 of his decision and I quote:

> "However, the issue of whether there is a time limit created by Ontario Regulation 283/95 with respect to a second tier insurer putting a third tier insurer on notice must be determined on the basis of a reasonable interpretation of the wording of the Statute itself. Having considered the able arguments advanced on behalf of Dominion I find that a time limit does <u>not</u> exist with respect to a second tier insurer placing a third tier insurer on notice and involving them in the priority dispute. I reach this conclusion for four reasons. First and foremost, the legislators chose not to include a time limit in Section 10 as they did in Section 3 of the Regulation. I cannot help but find that had the Legislators felt that a time limit was to exist then the wording would have so indicated and the wording of Section 10 is absent any time limit... Finally, if I were to accept the position advanced by Dominion, every case would require an analysis of what information and documentation was in the hands of an insurer and when, so as to determine the reasonable period to provide notice. This case by case analysis would add another layer of unnecessary complexity to what is supposed to be a simple cost-efficient scheme to determine priority. For these reasons I am of the view that the legislation cannot be interpreted as placing a time limit on a second tier insurer putting a third tier insurer on notice."

I agree with the analysis set out by Arbitrator Bialkowski and in my view such an analysis equally applies to the one year limitation with respect to commencing an Arbitration as it does to the 90 day notice issue.

I also reviewed and found most helpful the decision of the very experienced Arbitrator Lee Samis in the case of *Markel Insurance Company* & *Co-operators General Insurance Company and Lombard Canada Ltd.* (March 31, 2011). In that case Arbitrator Samis was asked as to whether the time limits imposed under Ontario Regulation 283/95 govern the issue or whether the *Limitation Act*, 2002 provisions apply and supersede the 283/95 provisions. Arbitrator Samis concluded (see page 8) that the "only limitation provision applicable to this priority dispute is the provision found in Ontario Regulation 283/95". Arbitrator Samis noted that Regulation 283/95 has its own limitation provisions. He notes the Regulation sets out a formal time limited initial notice and commencement of Arbitration within the one year of that notice. As a limitation period is provided under Regulation 283/95 then Section 52 of the *Arbitration Act* does not apply to the Arbitration and as Section 52 of the *Arbitration Act* does not apply, the *Limitation Act* rules are not relevant to the proceeding. I agree with Arbitrator Samis and I do note with some concern that despite the fact that this Regulation was amended after Arbitrator Samis rendered his decision his comment that "The legal landscape on this issue is a Gordian knot of entanglements" is still applicable.

In the case of *Wawanesa v. Peel Mutual and Economical Mutual Insurance Company* (Arbitrator Samis, January 21, 2011 and June 21, 2011) Arbitrator Samis again was asked to look at the question of the time limit under Section 3 and whether it would apply to insurers who are brought into the priority dispute under Section 10 of the Regulation. Arbitrator Samis in that case pointed out that a second tier insurer does not enjoy the benefit of the right of an examination under oath to obtain information from the claimant that might assist in identifying higher ranking insurers that may be responsible for paying the accident benefits. He also stated the following (at page 4):

> "I conclude that blindly applying the Section 3 procedural provisions to second tier insurer actions is not consistent with the wording of the Regulation, and is insensitive to the context. To apply the Section 3 provisions to second tier insurers would give rise to an injustice, ultimately resulting in the payment of benefits by the wrong insurer. The Regulation is designed to facilitate a process that will lead to the cost of a claim being visited on the correct insurer without burdening the insured person with prosecution of priority dispute issues. It would be abhorrent to interpret the Regulation in a manner which has the opposite result unless that outcome is required by the clear and specific language of the Regulation. The language of the Regulation does not have that clarity.
>
> Section 10 does generally apply the Regulation provisions to disputes between second and third tier insurers. But this can only go so far. The Regulation provisions can only be applied to the second tier insurer to the extent that the provisions address circumstances that apply to the second tier insurer."

Having carefully reviewed Sections 3, 7 and 10 of Regulation 283/95 and the submissions of the parties herein I conclude that Arbitrator Samis' comments with respect to Section 3 not applying to second tier insurers is equally true with respect to applying Section 7(3) to second, third or fourth tier insurers.

All counsel pointed out in their submissions various rules with respect to interpretation of both the *Insurance Act* and its Regulations. I am mindful that I am to apply the "modern approach" to statutory interpretation as has been set out by the Court of Appeal in *Wawanesa Mutual Insurance Company v. AXA Insurance Company (Canada)*, 2012 ONCA 592. Specifically I understand that I am to look at the words of the *Act* in their entire context and in their grammatical and ordinary sense to ensure that the interpretation works harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. As Arbitrator Bialkowski pointed out in the *Allstate & State Farm* case (supra) this requires an Adjudicator to follow three steps:

1. They must examine the words of the provision in their ordinary and grammatical sense;

2. They must consider the entire context that the provision is located within; and,

3. They must consider whether the proposed interpretation produces a just and reasonable result.

I am satisfied that my interpretation of the relevant provisions noted above has been done in accordance with the "modern approach".

Turning briefly to Section 7(3), I felt that it was instructive that the wording of Section 7(3) makes reference to "the Arbitration... being initiated by an insurer or by the insured person". This seems to contemplate that there will be only one Arbitration initiated. This is consistent with Section 10(3) which notes that dispute among the insurers shall be resolved in one Arbitration.

Also of note was Arbitrator Bialkowski's decision in *Certas Direct Insurance Company & Security National*, 2012 Carswell Ont., 17676. This was a case in which whether the second tier insurer had placed a third tier insurer on notice within the requirements of Regulation 283/95 was in dispute. Arbitrator Bialkowski found again that the second tier insurer is not bound by the 90 day provision imposed under Section 3. At page 5 (paragraph 34) of his decision Arbitrator Bialkowski does comment on the one year limitation. In that particular case Certas had received a Notice of Dispute on January 12, 2012. Certas and counsel for Nordique (the second tier insurer) agreed to Arbitrate on January 12, 2011. Certas maintained that the Arbitration had been properly initiated at that point and that Security National (a third tier insurer) was brought into the existing Arbitration pursuant to Section 10 of the Regulation when Certas forwarded a Notice of Dispute to Security National on May 2, 2011. Certas argued that it was

joining Security National to an existing Arbitration that had already been properly commenced within the time limits and that it had no obligation to initiate a second Arbitration. Arbitrator Bialkowski found that the Arbitration of Certas as against Security National was not time barred. He made the following comment:

> "On the agreed Statement of Facts an Arbitration was commenced in a timely fashion between the first and second tier insurers. In my view the 'Notice Demanding Arbitration' served by Certas (second tier insurer) on Security National (third tier insurer) on or about August 16, 2011 merely added them to the existing Arbitration. Section 10(3) of Regulation 283/95 makes it clear that the 'dispute among the insurers shall be resolved in one Arbitration'."

I also found most helpful the decision of Justice Belobaba in *Pilot Insurance Company* v. *Royal & Sunalliance Insurance Company of Canada* [2006] 80 O.R. (3d) 308. In this case Justice Belobaba was considering an appeal from a private Arbitration decision with respect to the Arbitrator's interpretation of Section 7(2) and the Arbitrator's finding that the one year limitation period under that Section had been satisfied. While the facts of that case are certainly somewhat different than the facts before me, Justice Belobaba's comments in rendering his decision are in my view applicable to the circumstances of this case. In that case Zurich received an application for accident benefits. It served a Notice of Dispute on Pilot on June 25, 2001. In that Notice of Dispute Zurich also advised Pilot that there was a possibility that there may be coverage with the insurer of the claimant's estranged spouse. After several months of investigation Pilot, in or around October of 2001, discovered there may be coverage under an insurance policy issued by RSA. Pilot then entered into an agreement with Zurich that it was either Pilot or RSA who would be the priority insurers to the claimant and Pilot took over administering accident benefits to the claimant from Zurich. The dispute with Pilot having been resolved Zurich did not commence any Arbitration.

Pilot served its Notice of Dispute on RSA on November 6, 2001 and initiated Arbitration proceedings against RSA on October 24, 2002. RSA took the position the Pilot was out of time. While Justice Belobaba concluded that the Arbitration had not been commenced within the one year time period the reasons for that are that in order for the limitation period to have been complied with the first party insurer who commenced paying benefits to the insured must have initiated that Arbitration within one year. That is not in dispute here. However, in reaching his conclusion Justice Belobaba makes the following comments:

In paragraph 22 he notes:

> "In my view, the meaning of Section 7(2) is plain on its face. The one year limitation period begins to run from the date that the insurer paying benefits under Section 2 first gives notice under Section 3. There is no reason to adapt or modify this provision to accommodate the requirements of Section 10... The one year limitation period set out in Section 7(2) is an umbrella limitation period

> that begins to run from the date the insurer paying benefits under Section 2 first serves a Notice of Dispute under Section 3. There is nothing in the Regulation that requires or suggests that each successive insurer served with a Notice of Dispute is to be provided with its own one year limitation period in which to commence an Arbitration."

Justice Belobaba goes on to say that this approach is consistent with the requirement under Section 10(3) that the dispute among the insurers is to be resolved in one Arbitration. He also indicated that this was consistent with the insurance industry requirement that there be a clear one year limitation period that begins to run under Section 7(2). He states:

> "The overall one year limitation period in Section 7(2) begins to run from the date that the insurer paying benefits under Section 2 first gives notice under Section 3".

Lastly, it was to be noted that counsel for Pilot in that case suggested that an umbrella one year limitation period for all priority disputes would result in situations where another priority insurer may be obliged to pay millions of dollars in accident benefits because it was unable to identify and initiate Arbitration proceedings against the appropriate higher priority insurer within the one year time frame. RSA responded by submitting that that situation could be avoided as long as an Arbitration was initiated as against at least one other insurer within that one year time frame. Further RSA submitted that you would then only proceed to Arbitration when all the facts have been collected and all other priority insurers had been identified and served with a Notice of Dispute. This is exactly what has occurred in this case. Of importance is the fact that Justice Belobaba agreed with the submissions of RSA on that point and again noted that there was no reason to modify or adapt the language of Section 7(2) to allow for multiple limitation periods.

Therefore, considering the scheme of the priority Regulation as found by the Court of Appeal, the requirement that the disputes between the insurers relating to one claimant/accident shall be resolved in one Arbitration and the case law that has developed with respect to Section 10 and its lack of limitation periods, I am satisfied that Dominion's claim against Wawanesa is not time barred. Dominion added Wawanesa to a properly constituted existing Arbitration within a reasonable time after determining that Wawanesa may be a priority insurer pursuant to 268 of the *Insurance Act* and therefore the Arbitration can continue against Wawanesa.

While I have determined that the *Limitation Act* does not apply, if I am wrong, I wish to briefly address whether the bringing in of Wawanesa to the present Arbitration met the limitation period under the *Limitation Act*, 2002. I am satisfied that it did. Based on the material before me Dominion was unable to get a copy of the statement from T.A. until June of 2015 and that statement did not disclose the date of birth or the driver's licence of J.M. They were unable to persuade T.A. to meet them to give them another statement. The EUO of T.A. did not take place until January, 2017 for a variety of reasons that I have outlined. It was then that

Dominion became aware of J.M.'s birthdate which allowed them to conduct a further search and determine that Wawanesa was a potential priority insurer. This is consistent with the log notes that have been produced.

The *Limitation Act* under Section 5 sets out that a party must commence their proceeding against another within two years of a claim becoming discoverable. The *Act* provides that a claim is only discoverable when the party commencing the claim first knew:

> "5(1)
>
> i. That the injury, loss or damage had occurred;
>
> ii. That the injury, loss or damage was caused by or contributed to by an act or omission;
>
> iii. That the act or omission was that of a person against whom the claim is made;
>
> iv. That, having regard to the nature of the injury, loss or damage a proceeding would be an appropriate means to seek to remedy it.
>
> (b)
>
> The day on which a reasonable person with the abilities and in the circumstances of the person within the claim first ought to have known of the matters referred to in clause (a)."

Based on the facts as I have found them Dominion first knew that it had a potential claim against Wawanesa in January, 2017 or shortly thereafter. They brought Wawanesa into the already existing Arbitration in a timely fashion and well within two years of that date.

Lastly, on the question of whether Wawanesa should not have to participate in this Arbitration as it was added more than two years after the demand for Arbitration and therefore contrary to Section 8(2)(5) of Regulation 283/95, I find that that argument has no merit and that in any event Wawanesa is estopped from pursuing that argument. Wawanesa attorned to the jurisdiction of this arbitration when they were first brought into the Arbitration by fully participating in a series of pre-hearings. Wawanesa on at least two occasions consented to adjourning the time to complete the Arbitration pursuant to Section 8(2)(5) of the Regulation. At no time prior to their submissions on this preliminary issue did Wawanesa ever raise an issue in any pre-hearing that they should not be participating because the time limit to complete the Arbitration had passed. I agree with Arbitrator Bialkowski as set out in his decision in *Allstate Insurance Company of Canada* & *Gore Mutual Insurance Company and the Motor Vehicle Accident Claims Fund* (July 24, 2017) that the purpose of this Regulation is to ensure that the

priority dispute process once initiated is completed in a timely fashion. I agree that Section 8(2) is procedural rather than substantive and that the timelines set out therein are directory and permissive rather than mandatory. Any penalty for the breach of those timelines lies in the discretion of the Arbitrator.

In this case each and every time that the time for completing this Arbitration has been extended it has been on the consent of either the two parties who were initially the only parties to this Arbitration and thereafter with the consent of Wawanesa. Wawanesa now cannot be heard in my view to argue that the failure to complete this Arbitration within two years is a basis for the claim against them to be dismissed and I decline to do so.

Result and Order:

I conclude that the priority dispute as against Wawanesa is not statute barred and the Arbitration can proceed.

Costs:

Both Intact and Dominion seek their costs with respect to this preliminary issue hearing. As Wawanesa was unsuccessful in all branches of their argument, the costs of the Arbitration and the costs of the Arbitrator will be borne by Wawanesa. Intact and Dominion are to have their costs paid for by Wawanesa. If the parties cannot agree on costs within the next 30 days a costs hearing will be scheduled.

DATED THIS 8th day of March, 2019 at Toronto.

Philippa G. Samworth

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP

IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, and regulation 283/95 made thereunder

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

AND IN THE MATTER of a Claim for Accident Benefits by Tammy Amsinga Resulting From Injuries Sustained in a Motor Vehicle Accident Which Occurred on June 1, 2014

AND IN THE MATTER of an Arbitration

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE and
WAWANESA MUTUAL INSURANCE COMPANY

Respondents

REASONS AND ORDER

Appearances:

Intact Insurance Company (Applicant): Lori J. Sprott

The Dominion of Canada General Insurance (Respondent): Christopher J. Schnarr

Wawanesa Mutual Insurance Company (Respondent): Paul Omeziri

Reasons:

By letter dated January 15, 2019 Mr. Omeziri, counsel for Wawanesa, raised an additional issue with respect to productions that had not been raised previously. Before turning to the production request and the submissions of various counsel and my conclusions I turn first of all to a brief review of the history of this file as it is relevant for my production order.

This case arises out of a motor vehicle accident that occurred on June 1, 2014. Tammy Amsinga-Munro was a passenger on a motorcycle being driven by William Schram.

Intact insures William Schram and received the first application for accident benefits and accordingly has been paying benefits to Ms. Amsinga-Munro.

Dominion/Travelers insures Ms. Amsinga-Munro and has always confirmed that she is a named insured under their policy.

Initially the first issue was whether or not Tammy Amsinga-Munro and William Schram were spouses. If they were spouses then as she was an occupant of his vehicle on the date of loss Intact's policy would rank in priority with Dominion. I was appointed as an arbitrator with respect to this dispute in or around November 20, 2015. At the time of the first pre-hearing, the only parties to this dispute were Intact and Dominion.

The first pre-hearing took place on February 19, 2016 and the spousal issue was identified as the issue in dispute for my determination.

A second pre-hearing took place on November 8, 2016. Counsel indicated at that time they were having difficulty securing the attendance of Ms. Amsinga-Munro and Mr. Schram to undergo an EUO.

The EUO ultimately took place in February, 2017. During that time there was a change in counsel for Dominion/Travelers. At the next pre-hearing on April 12, 2017 there was a discussion with respect to a motion for productions. This motion was with respect to documents being requested from Ms. Amsinga-Munro. The motion was scheduled for June 23rd.

At that time counsel made submissions with respect to extending the time under Regulation 283/95 as the arbitration was to be completed by June 1, 2017. Based on those submissions I made an Order extending the time to complete the arbitration to December 31, 2017.

On or about July 27, 2017 I received an e-mail from counsel for the Dominion advising that there had been three policies located with respect to an individual named Jason Munro. It had been determined that Ms. Amsinga-Munro, while separated was still legally married to Mr. Munro and therefore she would be a spouse of a named insured under his policy and if she were not the spouse of Mr. Schram there may be other policies that would be obliged to respond to her claim albeit she may have to be put to an election.

A further pre-hearing took place on September 27, 2017 and at that time two new insurers had been identified with respect to Mr. Munro. The first was Wawanesa who insured the personal car of Mr. Munro and there was also Economical involved based on a possibility that Mr. Munro was a listed driver and/or had regular use of his employer's vehicle. There was a third policy that had been identified with Intact but no one attended at the pre-hearing on behalf of Intact.

Over the course of the next few pre-hearings it was determined that neither the Intact policy nor the Economical policy would respond. However, the Wawanesa policy was in effect on the date of loss and Mr. Munro was the named insured under that policy. Counsel for Wawanesa was Beard Winter.

At a further pre-hearing on December 12, 2017 it was again noted that despite best efforts due to the new insurers being added and the efforts made to determine which policy might respond that there was still insufficient time to complete this arbitration by the end of 2017. Accordingly I heard submissions again with respect to extending the time and in light of all the issues that were still ongoing I agreed and made an order extending the time to complete this arbitration to December 31, 2018. During that pre-hearing productions were discussed and as well confirmation that an EUO was going to be required of Jason Munro.

The EUO of Mr. Munro took place and a further pre-hearing was conducted on April 18, 2018. At that time counsel agreed that the key issue was whether or not Mr. Schram was the spouse of Tammy Amsinga-Munro on the date of loss. We scheduled a one day hearing to take place with respect to that issue for October 11, 2018. On the issue of productions my pre-hearing letter of the same date indicates the following:

> "I understand there are no outstanding issues with respect to productions but if something arises between now and August that may put our hearing date in jeopardy I would be pleased to schedule an earlier pre-hearing."

No counsel contacted me to indicate that there were any further production issues.

The final pre-arbitration hearing was scheduled for August 2, 2018. Just prior to that pre-hearing I received advice that while Beard Winter remained as counsel for Wawanesa, a new lawyer at Beard Winter was taking over the file. All counsel confirmed that they were ready to proceed to the arbitration on October 11th. There was no indication that there were any production issues however my pre-hearing letter indicated:

> "If something arises in terms of productions and counsel feel a further pre-hearing is required please e-mail me and we will schedule a quick pre-hearing to deal with any pre-arbitration matters that may arise before October 11, 2018."

On October 1, 2018 I received a copy of an e-mail sent by Beard Winter to other counsel advising that Wawanesa had put two additional insurers on notice by way of a Notice dated September 13, 2018. One was TD but in that e-mail of October 1 it appeared to be confirmed by counsel that the TD policy for Jason Munro had been instituted two weeks after the accident. However, there remained a question as to whether State Farm/Certas insured Mr. Munro's motorcycles. He had advised at his EUO that he had been insured with State Farm/Certas on the date of the accident.

In light of the e-mail I followed up with counsel to determine whether or not this arbitration would be proceeding on October 11th. Beard Winter (counsel, Mr. Omeziri) replied in an e-mail dated October 2nd that he believed the arbitration would go ahead as scheduled. Intact confirmed by e-mail dated October 2nd that they too intended to proceed. However, in a follow-up e-mail from Mr. Omeziri on October 2nd he advised that there was some issue with respect to the timeframe for submissions, whether Intact had filed their submissions in a timely fashion. Mr. Omeziri indicated he could not respond given his schedule over the next week and suggested that either Intact file no submissions or that the hearing be adjourned and a new timetable be agreed on. There was no issue raised in any of these e-mails with respect to any missing productions.

Following up on that e-mail Mr. Omeziri provided a formal letter requesting that the arbitration scheduled for October 11th be adjourned. By e-mail dated October 3rd I replied to counsel indicating I was very reluctant to adjourn the matter in light of how much time had already gone by and the pending date for completion of the arbitration. I did agree to adjourn but only on the condition that everyone consented and that the new date was set before the end of the year.

A further pre-hearing was then scheduled for October 11th and the arbitration was adjourned to November 15, 2018.

The letter from Mr. Omeziri dated October 3, 2018 requesting the adjournment indicated that the reasons for that were:

1. That State Farm/Certas had still not responded although they had indicated they were investigating the matter but had yet to appoint counsel or confirm coverage; and,

2. On August 16, 2018 he had requested that Intact provide a number of documents which are pertinent. Intact had agreed to provide the documents but had been unable to obtain them as of October 3rd. The letter did not indicate what documents those were.

At the further pre-hearing on October 11th Mr. Omeziri indicated that there were a number of new issues that he was now bringing forward on behalf of Wawanesa. However, whether those issues would proceed through either a preliminary issue hearing or be part of the main arbitration or indeed would be issues at all were dependent upon the production of various documents that Mr. Omeziri was seeking from Intact and others. I gave Mr. Omeziri until November 5th to collect the information he needed and to make a determination as to what issues, if any, would be dealt with prior to the arbitration proceeding on November 15th on the spousal issue. Timelines were laid down with respect to submitting Factums and a further case conference was scheduled for November 5, 2018.

At the pre-hearing on November 5, 2018 it unfortunately became clear once again that the arbitration was not going to be able to proceed on November 15th and that there were going to be new issues required to be dealt with that would require the extension of time under Regulation 283/95. Up until this pre-hearing the only issue that had ever been identified as proceeding forward was the spousal issue relating to Mr. Schram. I asked counsel to make submissions with respect to extending the time yet again. Dominion and Wawanesa both agreed to an adjournment and the extension of time for six months to June 30, 2019. Intact did not consent. However, at the time of that pre-hearing there was still the question as to whether State Farm/Certas had a policy that might respond so again very reluctantly I allowed a further six months.

The other reason for extending the time was that at that pre-hearing on November 5th Mr. Omeziri raised an issue with respect to a limitation period. Mr. Omeziri indicated that Wawanesa wanted to argue that they had not been placed on notice in a timely fashion. Wawanesa wanted to proceed with a preliminary issue hearing as to whether the failure of Intact to give notice to Wawanesa within the time period under the regulation could be corrected by Dominion/Travelers serving Wawanesa with that notice. It was therefore decided that the time would be extended, the arbitration for November 15th on the spousal issue would be adjourned sine die and a further pre-hearing was scheduled for November 22nd in order to move forward with the State Farm/Certas issue and the limitation issue.

At the pre-hearing on November 22nd Mr. Omeziri confirmed he was ready to proceed with the limitation argument on behalf of Wawanesa. It should be noted that at the previous pre-hearing Mr. Omeziri did not raise any issue with respect to any outstanding productions or productions that Wawanesa would need to move forward on their limitation argument. Similarly, at the pre-hearing on November 22nd no issues were raised. In fact, Mr. Omeziri agreed to the following timelines with respect to the preliminary issue:

1. He would serve and file a Joint Book of Documents, Agreed Statement of Facts, if possible, and a Factum and Book of Authorities by January 11, 2019;

2. Dominion would serve and file responding materials by January 31, 2019;

3. Intact would file responding materials, if any, by February 8, 2019;

4. Wawanesa had until February 18, 2019 to file any reply.

With respect to the spousal issue, it was now booked for May 24, 2019 in London in order to meet the timelines and counsel were advised there would be no further adjournments. I have carefully reviewed my notes of both the pre-hearing of November 5th and November 22nd and there is nothing in my notes or in my pre-hearing report indicating that Mr. Omeziri was raising any other issues, had productions that were outstanding, or productions that he required in order to proceed forward on either the spousal issue or on the limitation issue.

On January 15, 2019 Mr. Omeziri provided the Submissions on behalf of Wawanesa together with a Book of Documents that included five tabs as well as case law. In a second letter also dated January 15, 2019 Mr. Omeziri now indicated that an additional issue had arisen and that Wawanesa required an Order. According to the letter of January 15th Mr. Omeziri had requested log notes from Dominion and had only been provided with partial notes. He notes in the letter that an AutoPlus report indicated that Dominion may have opened up a claim in relationship to Ms. Amsinga-Munro's accident and had made a payment of $2,169.00. He therefore required the log notes from Dominion in order to determine when they became aware of a potential claim against Wawanesa, to address any argument of discoverability under the *Limitation Act*. Also, he suggests in the letter that they had previously requested the full underwriting file from Dominion on August 1, 2018. In this letter Mr. Omeziri therefore asks for an Order requiring Intact and Dominion to produce adjusters' notes from June 1, 2014 to June 30, 2015.

It is important to note that the request for these documents is filed at the same time as Mr. Omeziri's Factum and documents relating to the limitation issue.

I sent a letter to all counsel on January 22, 2019 asking for some clarification with respect to the Order requested by Mr. Omeziri and what their position was. Both counsel for Dominion and counsel for Intact indicated that they did not think it was appropriate for an Order to production to be made in the context of the preliminary issue hearing.

I therefore asked for some brief submissions with respect to Mr. Omeziri's request for productions.

Mr. Omeziri in his submissions now indicated that he was not seeking the records from Dominion but was in fact seeking records from Intact. He requested that Intact produce, subject to privilege, the following:

1. It's claims files, including log notes, internal memoranda, e-mails and other correspondence regarding the claim of Ms. Tammy Schram;

2. The updated accident benefit file and payment summary for the claim of Ms. Tammy Schram; and,

3. Intact's underwriting file for Mr. Schram.

Mr. Omeziri indicated that he wanted these documents prior to his completing his reply in the preliminary issue hearing.

In his submissions Mr. Omeziri indicated that the information was relevant for the following reasons:

1. What information did Intact have with respect to whether Dominion deflected the claim for benefits in light of the fact that they initially opened a claim for Ms. Amsinga-Munro and paid her benefits;

2. What information did Intact communicate to Dominion which may reveal when and to what extent Dominion's claim against Wawanesa was discoverable;

3. What benefits has Intact paid to Ms. Schram and what was the evidentiary basis for the payments;

4. Whether Intact properly handled the claim and only made payments to the claimant which were covered under the SABS;

5. What the claimant communicated to Intact regarding her common-law relationship to Mr. Schram;

6. Whether and to what extent Dominion and/or Intact complied with the relevant timelines under the Ontario Dispute Between Insurers Regulation;

7. What status, if any, does Ms. Schram have under Intact's policy and whether she was either added to the policy as a named insured or habitual driver;

8. What information did Mr. Schram communicate to Intact regarding his marital or living arrangements.

Mr. Omeziri went on to submit that the documents are relevant in looking at why the parties delayed in adding Wawanesa for over three years, why the arbitration was not completed within the two year deadline; what investigations occurred with respect to the claimant's relationship and marital status and how Intact handled her claim over the last four years.

By way of reply counsel for Dominion and Intact focussed on the delay in the request for these documents. They noted that there had never been a request for these documents made at the earlier two pre-hearings and, as I've noted, that Wawanesa was able to file their materials without these documents in hand. Intact also submitted that neither the underwriting file nor the log notes of Intact are relevant to the limitation issue that was raised by Wawanesa and that having put in their Submissions they cannot now seek new productions to raise new arguments in reply. I agree with the position of Intact.

Wawanesa has had more than sufficient time to determine what documents were needed in order to proceed forward with their limitation argument. There were at least two if not three pre-hearings when the documents that Wawanesa says it now needs could have been requested. If there were ongoing discussions between counsel with respect to the production

of those documents that I was not made aware of and that there was some difficulty in securing or getting those documents to be produced Wawanesa could have raised that at a pre-hearing prior to filing their Submissions and have requested an order and/or a motion for production at that time and they did not.

In looking at the reasons that are outlined by Wawanesa as to why these documents were relevant for the purposes of the limitation issue I simply do not see them as relevant. The limitation argument is not about deflection, not about what benefits should have been paid or should not have been paid on the part of Intact, nor does the limitation period have anything to do with the spousal argument that is scheduled for later.

I agree with counsel for Wawanesa that documents "that can reasonably be expected to illuminate claims handling decisions and disclose the criteria applied or disregarded" can be producible. As I indicated in my brief e-mail confirming that I was not ordering the production at this time I do see that there is relevance for these documents with respect to the spousal issue. Therefore, while I am not ordering that these documents be produced for the purposes of the narrow issue relating to the limitation period, I am prepared to order that the relevant documents be produced relating to the spousal issue. I pause here to note that I am somewhat concerned that Wawanesa does appear to be raising yet another new issue of deflection. I am going to schedule a further pre-hearing to allow counsel to address whether there is an issue of deflection being raised, if it can be raised at this late date; and, if so, how it should be dealt with.

Order

With respect to the Order I am making for production, at this time I am only looking at the remaining issue in dispute which is the spousal issue and I am prepared to Order that the following be produced:

1. Any log notes, internal memoranda, e-mails or correspondence of Intact or Dominion/Travelers (that are not subject to privilege) that reflects any information communicated by the claimant or the insured with respect to the common-law relationship with Mr. Schram. My Order in this regard would not include any communications that arose as a result of this arbitration or through counsel.

I do note that Intact's Submissions indicated that they have agreed to produce the relevant log notes redacted for reserve and privilege relevant to the spousal issue no later than March 15, 2019. Intact has therefore consented to produce the log notes but my order would include any internal memoranda, e-mails and other correspondence.

I am not making an order for the production of the updated accident benefit file and payment summary for the purpose of the spousal arbitration. It does not appear relevant. However, I note that Intact has consented to produce that in any event.

With respect to the request for Intact's underwriting file for Mr. Schram, I note that while Intact refused to produce that for the purposes of the preliminary issue hearing on the limitation issue that in their submissions they indicated they were prepared to produce the portion of the Schram underwriting file that is "relevant to the relationship between Mr. Schram and Ms. Amsinga-Munro in terms of whether she was listed as a driver or cohabitation status". I agree with Intact that the complete underwriting file is not relevant to the issues in this priority dispute and therefore I do not make an Order for any additional underwriting file other than what Intact has already indicated its agreement to produce.

I note that Intact requested costs of the Motion. I did not see any submissions from Dominion/ Travelers with respect to costs or from Wawanesa with respect to costs. At the next pre-hearing where we clarify the issues in dispute and deal with any other production requests that may come up I would ask counsel to be prepared to make submissions with respect to the costs of this production Motion brought by Wawanesa.

DATED THIS 21st day of February, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP