IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

DECISION

Appearances:

The Dominion of Canada General Insurance (Applicant): Devan Marr

Intact Insurance Company (Respondent): Amanda Lennox

Background:

This matter comes before me pursuant to the *Insurance Act, R.S.O. 1990, Section 268* and its Regulation, 283/95 to decide a priority dispute as between the Dominion of Canada General Insurance Company (hereinafter called "Dominion") and Intact Insurance Company (hereinafter called "Intact").

The matter arises out of a motor vehicle accident that occurred on April 20, 2017. On that day one Lal Mohamed Toshi was driving a motor vehicle when it was involved in an accident. It appears to be agreed amongst the parties that at the time the accident occurred Mr. Toshi was operating his motor vehicle as an Uber. The parties appear to agree, at least for the purposes of this matter, that the Uber app was on at the time the accident occurred. Mr. Toshi was the named insured on the Dominion policy of insurance. However, as he was also an Uber driver he was insured under a policy with Intact. Intact insures Raiser Operations B.V. This policy only is activated when the vehicle is being operated as an Uber.

However, this dispute is not yet about priority but with respect to a preliminary issue that has arisen in the context of the priority dispute.

Intact takes the position that Dominion failed to comply with the 90 day provisions set out in Section 3 of Ontario Regulation 283/95. As a result Intact alleges that Dominion does not have the right to pursue this priority dispute as against Intact as it has not complied with that Regulation.

Dominion takes the position that written notice of the dispute was either provided within the 90 days or argues that actual notice of the priority dispute, even if written notice was not given, constitutes proper notice under Section 3 of the Regulation.

This matter comes before me as a private arbitrator pursuant to the *Arbitration Act* on a consensual basis. The parties signed an Arbitration Agreement dated May 30, 2019.

Issues in Dispute:

According to the Arbitration Agreement the preliminary issue is "did Intact receive proper notice of Dominion (Dominion) intent to dispute priority in accordance with Ontario Regulation 283/95?"

However, in its submissions Dominion sets out two issues:

1. Did Dominion send Intact a Notice of Priority Dispute form within 90 days of the receipt of the claimant's application for accident benefits; and,

2. Whether actual notice of a priority dispute within 90 days constitutes proper notice pursuant to Section 3 of the Dispute Resolution Regulation (283/95).

This matter proceeded before me by way of a written hearing. The parties submitted submissions, including reply submissions on the part of Dominion. In addition, a Joint Book of Documents was filed which included the following:

- EUO transcript of Dominion adjuster, January 21, 2019;

- EUO transcript of Intact adjuster, January 14, 2019;

- Intact adjusting claims notes, April 24, 2017 to August 20, 2018;

- Dominion's adjusting claims notes, April 24, 2017 to December 15, 2017;

- Initial notice claim from Uber to Intact, April 21, 2017, Exhibit #1 of Intact adjuster's EUO dated January 14, 2019;

- Letter from Intact to Lal Toshi re: application package, May 3, 2017;

- OCF-1 dated May 5, 2017 submitted to Dominion;

- Letter and OCF-1 to Intact from claimant's counsel dated May 26, 2017;
- Letter from Intact to claimant dated June 1, 2017;
- E-mails between Dominion and Uber Claim Support re: time of accident and inquiry dated June 2, 2017;
- Fax cover sheet and Notice to Applicant of Dispute Between Insurers dated June 2, 2017;
- Letter from Dominion to claimant enclosing Notice of Dispute dated June 2, 2017;
- Fax confirmation from Dominion to YU Law Firm dated June 2, 2017;
- Notice to Participate and Demand for Arbitration dated May 24, 2018;
- Excerpt of Uber endorsement.

Lastly, both parties through their counsel submitted Books of Authorities for my review.

Background With Respect to the Priority Dispute Process:

Section 268 of the *Insurance Act* sets out a hierarchy of priority that is to be applied to determine which insurer is liable to pay statutory accident benefits in circumstances where a number of policies may respond.

In order to provide procedural rules with respect to Section 268 the Legislature enacted Ontario Regulation 283/95. This Regulation sets out the procedure for resolving disputes between insurers about priority in relationship to payment to accident benefits. The Regulation is mandatory and requires insurers to follow the prescribed procedure for the purposes of determining such disputes. It also outlines a procedure that requires the insurer who receives the completed accident benefit application from the insured to respond to the claim first. It provides that an insured can only file one application and that the insurer that receives that is obliged to respond to it and then follow the procedures set out under the Regulation for putting any other insurers that they claim rank in priority on notice and how that process will be dealt with.

For the purposes of this dispute the key provision of Regulation 283/95 is Subsection 3(1) which provides as follows:

> "No insurer may dispute its obligation to pay benefits under Section 268 of the *Act* unless it gives written notice within ninety (90) days of receipt of a completed application for benefit to every insurer who it claims to be required to pay under that Section."

The question here is whether Dominion gave "written notice within 90 days" of the receipt of the completed application to Intact.

The Evidence:

The key evidence before me was the transcript of an adjuster from Dominion from January 21, 2019 and her adjusting notes and the transcript of the EUO of the Intact adjuster which took place on January 14, 2019 and his adjusting notes. Also relevant were the various documents exchanged between the insured, Dominion and Intact and the documents exchanged or alleged to be exchanged between Intact and Dominion. Having carefully reviewed all those documents and submissions of counsel the key facts and chronology appear to be as follows:

1. April 20, 2017: Toshi is involved in the motor vehicle accident;

2. April 21, 2017: Uber as a result of a procedure it has set up notified Intact after business hours on Friday, April 21, 2017 that the accident had occurred. This document included the identity of the vehicle, its licence plate number, Mr. Toshi's name and the name of the passenger. The document also shows that Uber advised Intact that at the time of the accident Mr. Toshi was transporting a rider when the vehicle was struck in the rear by another vehicle;

3. April 24, 2017: Intact opened a property damage claim;

4. April 24, 2017: Dominion was notified by Mr. Toshi's broker that Mr. Toshi had been involved in an accident. Mr. Toshi had contacted his broker subsequent to the accident. An adjuster was assigned to handle the AB claim at Dominion;

5. April 24 and 25, 2017: The Dominion adjuster attempted to contact Mr. Toshi by phone without success;

6. April 24, 2017: Dominion sent an application package out to Mr. Toshi's address;

7. April 28, 2017: Intact opened an accident benefit claim and assigned an adjuster;

8. April 28, 2017: The Dominion adjuster spoke to Mr. Toshi. He confirmed that he was driving for Uber at the time of the accident. The Dominion adjuster notes in her log notes at that time her belief that Dominion was the priority insurer as Mr. Toshi was Dominion's named insured and also noted that her priority investigation was complete;

9. May 1 and 2, 2017: The Intact adjuster tried to reach Mr. Toshi without success;

10. May 3, 2017: Intact sends a standard letter and application package for accident benefits to Mr. Toshi's address;

11. May 5, 2017: Intact created an HCAI account for Mr. Toshi;

12. May 8, 2017: Dominion receives Mr. Toshi's OCF-1. The adjuster's log notes indicate that she then began to adjust the claim;

13. May 23, 2017: The Dominion adjuster receives an internal e-mail from Dominion's investigative services advising her that Intact should be placed on notice of priority for Mr. Toshi's accident. At that time she does not place Intact on notice but orders an AutoPlus report. There are no notes in the log notes I reviewed that make any reference to the adjuster receiving or reviewing an AutoPlus report;

14. May 25, 2017: Intact receives an OCF-1 from Mr. Toshi. This comes via fax from Mr. Toshi's lawyer. The actual application for accident benefits attached has in the top right-hand corner the name Dominion Canada and under Part 4 - Details of Automobile Insurance it is noted that the insurance company is Dominion. This document appears to be the same OCF-1 that Dominion received;

15. May 30, 2017: The Intact adjuster leaves a voicemail message for the Dominion adjuster indicating that he has received an OCF-1 from Mr. Toshi with Dominion's information on it via fax;

16. May 31, 2017: The Intact adjuster calls Dominion again and speaks with the Dominion adjuster. According to Intact, Dominion confirmed that it had received the OCF-1 on May 5th from the same law firm. The Intact log notes states that Intact had received it on May 25th:

> "She asked for our information and will put us on notice if the app was confirmed to be on. She is going to reach out to the law firm as well."

Dominion adjuster does not have a log note with respect to that conversation on May 31 but does have a log note with respect to the voicemail received from Intact on May 30th.

17. June 1, 2017: The Intact adjuster wrote to Mr. Toshi, copied to his lawyer, acknowledging receipt of the application for accident benefits but noting that he had already applied to Dominion earlier. Intact confirmed that they could not submit applications to multiple insurance companies. He stated:

> "You have submitted the application for accident benefits to Dominion Canada first and must claim through them until they are able to determine priority."

18. June 2, 2017: At 11:19 a.m. the Dominion adjuster enters in her notes:

"Late note, spoke with John on 5/31/17. Discussed claim with John from Intact AB - claims at Uber.com; required to put them on notification to verify that the driver was logged in at the time of the MVA - Intact policy info, fleet policy for all Uber claims: insurer: Reiser Operations B.V. policy #7J9000184 claim (specific to this claim): 5031099055 -> send e-mail to claims at Uber.com - sent NOD to Intact."

19. June 2, 2017: The Dominion adjuster sends an e-mail at 11:19 a.m. to claims at Uber.com asking for confirmation that Mr. Toshi was logged onto Uber when the accident occurred. A reply is received from Uber at 5:15 p.m. indicating that her e-mail had been submitted to Intact Insurance Company and that they (Intact) would be making the decision with respect to coverage and liability. Intact's evidence is they have no record of receiving a forwarded e-mail from Uber;

20. June 2, 2017: Dominion sent the notice to applicant of dispute between insurers signed by her and dated June 2, 2017 with an accompanying letter to Mr. Toshi. This letter was copied to YU Law Firm. The covering letter indicated that as Mr. Toshi was operating his vehicle as an Uber driver at the time of loss that Intact was therefore the priority insurer. The letter states:

"We have issued a notice of dispute to Intact on June 2, 2017."

There is a fax confirmation that this letter and document was successfully faxed to YU Law Firm through RightFax at 2:00 p.m. on June 2nd;

21. With respect to the notice of dispute alleged to have been sent to Intact, the Dominion adjuster in her examination under oath stated that she personally prepared a fax cover sheet to Intact which had a time of 3:53 p.m. on Friday, June 2, 2017. Dominion has been unable to locate a fax confirmation sheet to confirm that the fax was sent to Intact. The Intact adjuster's evidence is that the notice of dispute and fax cover sheet were never received. The Dominion adjuster's evidence from her examination under oath is that she recalls sending this specific notice of dispute. She says that she remembers personally drafting it and the cover letter and that she attended at a physical fax machine to fax the notice of dispute to Intact. She remembers this as she did not have many priority disputes at that time, possibly 10;

22. Between June 2 and August 10, 2017: The Dominion adjuster's log notes indicate that she continued to adjust Mr. Toshi's claim with no follow-up or further investigation during that time with respect to priority. On August 10, 2017 her log note indicates that she followed up with Intact with respect to the notice of dispute. She called Jonathan and spoke to him and he advised they had not received a notice of dispute. Her notes indicate that she is going to re-send it. There is no indication in the log notes that she did re-send it. Intact's

evidence is that they did not receive a re-sent notice of dispute and Dominion has been unable to locate any correspondence, fax or e-mail to confirm that the notice of dispute was re-sent;

23. August 15, 2017: The Intact adjuster tried to contact the Dominion adjuster and left her a voicemail to follow up on whether the notice of dispute had been re-sent. While this appears in Intact's log note there is no corresponding note by Dominion with respect to the voicemail or any indication that the call was returned;

24. October 24, 2017: The Intact adjuster made a log note indicating that he was closing the file. The reason for closing was:

> "No priority notice received. Close exposure."

25. December 7, 2017: Intact received a call from Dominion. The log note indicates that they wanted to know his stance on priority. The log note indicates:

> "I let him know that we never received the notice of dispute within the 90 days. I went through the dates I had spoke with the adjuster. He asked for my manager's information to discuss priority acceptance if the priority notice was sent. Provided the information."

The call from Dominion came from anew adjuster who had just taken over the file.

26. December 8, 2017: The new Dominion adjuster makes a log note indicating the following:

> "Received call back from claimant's U.M. Tyler, to discuss priority dispute notice. Tyler advised that they are not accepting priority based strictly on Regs and time lines (which they are entitled to make that decision based on). While we do have some correspondence from Uber which indicates they are setting up an AB claim on Intact's end, we did not formally send the priority dispute notice to them within the timelines nor do not have any evidence to confirm the same."

27. May 25, 2018: Dominion served on Intact a notice to participate and demand for arbitration dated May 24, 2018.

That sets out the chronology of the events but additional relevant facts come from some of the evidence given by the adjusters. One critical point is Dominion's evidence with respect to her log note for June 2, 2017 where the Dominion adjuster indicates that at 11:19 a.m. she had sent the Notice of Dispute to Intact. On her Examination Under Oath the Dominion adjuster acknowledged that that note could not be accurate. The fax cover sheet that had been

produced had a time on it of 3:53 p.m. that day. Therefore at the time she entered the note at 11:19 a.m. she had not in fact sent the Notice of Dispute. If it was sent it was later in the date at the time indicated on the fax cover sheet.

The Dominion adjuster also acknowledged that when she initially looked at the issue of priority she determined that Dominion was the priority insurer despite the fact that she knew that Mr. Toshi was operating his vehicle as an Uber at the time the accident occurred. It was not until she was advised by Dominion's investigative services that she was aware that she was wrong and that priority might rest with Intact.

The Intact adjuster on his Examination Under Oath advised that the first time he ever saw the fax cover sheet and Notice of Dispute that was referred to in the Dominion adjuster's log notes was at his Examination Under Oath on January 14, 2019. The Intact adjuster also on his EUO was quite candid in admitting that Intact was aware of the claim that they were aware that the Uber app was on but that they were waiting for the Notice of Dispute to come in before accepting priority. Intact's evidence was that if they do not receive the first OCF-1 then they wait for the Notice of Dispute to come in before he makes a determination as to whether they will take over priority. Intact requires the written notice (Notice of Dispute) before proceeding with accepting priority from another insurer.

Submissions of the Parties:

The applicant argues firstly that written notice was provided by them to Intact on June 2, 2017. Dominion argues that we should accept Dominion's evidence that she faxed a priority notice to Intact on June 2nd as per her log note. Dominion submits that the Dominion adjuster testified that she had a clear recollection of printing and sending the fax despite the fact that there is no fax confirmation sheet. They describe her as an experienced accident benefit adjuster with three years behind her. They submit her testimony makes sense and should be accepted.

Dominion argues that the Dominion adjuster would remember that she had sent this notice because she only had about ten to fifteen priority dispute files. Also she had to print the notice itself and sign it by hand and go to the fax machine and physically send it through. Based on the timing (the fax cover sheet) to do this she would have had to stay later than her usual 3:30 p.m. work day to complete that task. Again, Dominion suggests that this would make the event more memorable.

Dominion also alleges that her log notes support her testimony. On June 2nd her log notes indicate she sent the notice, she sent notice to claimant's counsel which is confirmed via a fax confirmation sheet, she mailed a copy to the claimant and she also e-mailed Uber with respect to the claim.

Dominion alleges by contrast that the Intact adjuster was inexperienced and they suggest multiple documents were unaccounted for including no e-mail copy of an OCF-1 from Mr. Toshi's counsel nor the Uber e-mail which was forwarding on the Dominion adjuster's e-mail with respect to whether or not the app was on; and, finally, the lack of the priority notice.

Dominion submits that I should look at the totality of the evidence and conclude that even though there is no fax confirmation sheet and even though Intact cannot find a copy of the priority Notice of Dispute within their file that I should accept the Dominion adjuster's evidence that she did send it. They say that this is sufficient to meet the requirements of 3(1): Providing written notice within 90 days.

Alternatively Dominion argues that if I find that written notice was not provided in that I am not satisfied that the June 2nd fax with the Notice of Dispute was sent that I should find that Intact had proper and actual notice of the priority dispute in other ways. Dominion points to the fact that Intact was aware of the claim, they knew the name of their insured, the date of loss, they'd opened up an HCAI account, they'd sent out their own application for benefits, they were aware the Uber app was on; and, that they acknowledged that but for the 90 day period if proper notice had been given they were the priority insurer in the circumstances. Dominion also points out that Intact was aware of Dominion, who they insured and that there was an active priority investigation going on. Finally Dominion suggests that I should take notice of Intact's internal policy of refusing to accept priority claims even when they know they are the priority insurer unless they have received the "Notice to Applicant of Dispute Between Insurers". Dominion argues that this frustrates the purpose of the Dispute Regulation. They argue that providing that actual notice is not a requirement under Section 3 as only written notice is required and no actual specific form. Dominion submits that the timeline shows that Intact knew that priority was disputed, were aware that they were the actual priority insurer and had all the requisite information required to accept priority well before the 90 day limit at March 25, 2017. In support of their position Dominion refers to the case of *CGU Group Canada Limited* & *Canada Life Casualty Insurance Company and Liberty Mutual Group*, a decision of Arbitrator Guy Jones in February of 2004. In that case an actual Notice to Applicant of Dispute Between Insurers was found not to have been sent. However, a letter was sent within the 90 day period in which there was wording that the applicant in that case argued was sufficient in order to meet the requirement for "written notice" pursuant to Section 3(1). Arbitrator Jones found that the letter was sufficient notice and confirmed that Section 3(1) of Regulation 283/95 does not set out any specific type of wording or specific type of written notice that is required. It simply requires that the insurer give written notice of its intent to dispute payment of accident benefits. While it is now common in the industry for the "Notice to Applicant of Dispute Between Insurers" form to be used for the written notice, it is not required under Section 3(1).

Dominion also relies on another decision of Arbitrator Guy Jones from January of 2018, *Aviva v. Pafco Insurance Company*. In that case Arbitrator Jones was again asked to look at the sufficiency of the information given in the written notice that the applicant claimed was sufficient to meet the requirements of 3(1). Arbitrator Jones pointed out that there was no requirement that the exact same form be sent to the insurer's to constitute notice to them while for the purposes of the applicant they were required to receive the "Notice of Applicant to Dispute Between Insurers" which was an approved form by the Superintendent. This is required under 4(1) of Regulation 283/95 which states:

> "An insurer that gives notice under Section 3 shall also give notice to the insured person using a form approved by the Superintendent."

As Arbitrator Jones points out, while that notice set out under Section 4(1) is to be used for the insured person there is no similar requirement that that be used for the written notice under Section 3(1).

Dominion also relies on that case as it sets out what information Arbitrator Jones feels is needed to be sufficient for the written notice under 3(1) taking into consideration that it does not set out what particulars of information is to be given by the paying insurer to the other insurers when giving notice. Arbitrator Jones finds what is needed is notice of the claim but not necessarily the details of the claim or the evidence to support it. The policy number, name, address, phone and fax numbers of the insurer initiating notice should also be required as well as the policy number of the insurer that they are claiming priority against. This should be sufficient to meet written notice and allow the limitation period to commence running.

Intact on the other hand takes the position that I should find that the Notice of Dispute which the Dominion adjuster says she sent by fax on June 2nd to Intact was in fact never sent. Intact points to a number of inaccuracies in Dominion's log notes and evidence that would support an argument that her evidence that she remembers actually sending the fax to Intact on that day cannot be an accurate recollection. Intact also submits with respect to the second argument by Dominion that Section 3(1) of Regulation 283/95 requires written notice and not actual notice and that there is an abundance of case law to confirm that the provisions of the Regulation are to be strictly applied in order to ensure certainty of process.

Turning to the first argument with respect to the June 2, 2017 letter. Intact points to the fact that the Dominion adjuster could not have been an experienced priority adjuster based on the fact that she believed that Dominion was the priority insurer and not Intact even though she already knew that the Uber app was on at the time of the accident. It was not until Dominion's investigative services advised the Dominion adjuster on May 23rd that Intact should be put on notice that the Dominion adjuster was aware that she had made an error in her initial priority analysis.

Intact also points to a number of errors or omissions in her log notes. Despite having indicated that she was going to order an AutoPlus there was nothing in her log notes that she had received or reviewed one. Intact also points out to the inaccuracy of Dominion's log note entry on June 2nd at 11:19 a.m. when she entered the note that she had sent an e-mail to claims at Uber.com and as well "sent NOD to Intact: 11:19 a.m.". Intact points out that the Dominion adjuster initially testified on her Examination Under Oath that when she entered that note on June 2, 2017 she had already sent the Notice of Dispute to Intact. She does provide a lengthy description as to how she had personally drafted the Notice, the cover letter and then attended physically at the fax machine to send it. The Dominion adjuster testified that she was relying on that log note as proof that the Notice of Dispute was sent.

However, the evidence shows, according to Intact, that while the Dominion adjuster did send the e-mail to Uber at 11:38 a.m. that the fax cover sheet for the Notice of Dispute to go to Intact had a time on it of 3:43 p.m. The Dominion adjuster had to agree that she could not have sent the Notice of Dispute as indicated in her log note at 11:19 a.m. and that that log note was wrong taking into consideration the fax cover sheet time.

Intact also points out the fact that the Dominion adjuster stated to the Intact adjuster that she was going to confirm with Uber whether the app was on at the time of the accident before placing Intact on notice. This is set out in her log notes and in her evidence. She sent the e-mail to Uber to request that confirmation at 11:38 a.m. By the time of the fax cover sheet time of 3:43 p.m. Dominion adjuster had not yet received a response back from Uber. The e-mail from Uber came at 5:17 p.m. on June 2nd indicating that they were going to forward her e-mail on to Intact and therefore it was non-responsive to the question of whether the app was on or off. June 2nd was a Friday and the Dominion adjuster's work day ends at 3:30 p.m. Intact argues that she would not have received that e-mail from Uber until Monday, June 5th. However, consistent with information that is not always recorded in the log notes is the fact there is no entry in Dominion's log notes with respect to receiving that e-mail from Uber.

Intact also points to the fact that if the Dominion adjuster did send the Notice of Dispute on June 2nd at 3:43 p.m. that there is no log note to confirm that. There is no log note confirming that she received a fax confirmation sheet. Further, Dominion is unable to produce that fax confirmation sheet.

In addition Intact points out that the Dominion adjuster followed up with the Intact adjuster on August 10, 2017 and was told that they had not yet received the Notice of Dispute. The Dominion adjuster said she would re-send it. There is no evidence in her log notes that she did nor has Dominion been able to produce any correspondence, fax or e-mail that she did and Intact continues to take the position that the first time they ever saw the Notice of Dispute was when the Intact adjuster was shown a copy of it at his EUO on January 19, 2019.

Intact argues that the onus of proof is on Dominion to show that they provided **written notice** in accordance with Section 3(1) of Regulation 283/95 and Intact argues that the evidence presented by Dominion falls well short of that. Intact also submits that Section 3(1) requires not only that the Notice of Dispute be sent but that evidence be presented to show that it was received by the insurer to which the Notice was addressed. Intact relies on the decision of *Economical Mutual Insurance Company & Belair Insurance Company of Canada*, a decision of Arbitrator Samis from May 2, 2006 in support of their position.

With respect to the argument of Dominion that Intact had actual notice and that is sufficient, Intact takes the position that in order for Section 3(1) of the Regulation to be met there must be written notice. There is no exemption under the Regulation for notice to be sufficient where there is actual notice as opposed to written notice. Intact submits that the Court of Appeal has made it quite clear that "there is little room for creative interpretation or for carving out judicial exceptions designed to deal with the equities of particular cases" when dealing with Regulation 283/95 (*State Farm Mutual Automobile Insurance Company v. Ontario (Minister of Finance) and*

Kingsway General Insurance Company v. *West Wawanoush Insurance Company* [2002] O.J. #582, Court of Appeal). Intact also alleges that in that same case the Ontario Court of Appeal actually rejected the argument that "actual notice" of a priority dispute is sufficient to discharge the notice requirements. The Court states:

> "Despite Mr. Samis' skillful and forceful argument that the respondent was aware of the appellant's intention to dispute liability, had conducted the required investigation and would suffer no prejudice if required to engage in the arbitration, I do not think that this is a case in which the Court's discretion comes into play. I agree with the conclusion of the Superior Court Judge that the Regulation provides a scheme that contemplates extensions of the 90 day notice period in certain circumstances and that by implication any general discretion a court might have to grant extensions in other circumstances is excluded."

Intact submits that while it may be aware of the claim of Mr. Toshi and have some information with respect to the claim that is irrelevant in a determination as to whether written notice as required under Section 3(1) of the Regulation was given. Intact's position is that they received no written notice of the priority dispute that would in any way meet the requirements of Section 3(1); and, in fact, they claim they received no written notice. Accordingly they argue Dominion has no right to proceed with this arbitration.

Analysis and Conclusion:

Having carefully reviewed the excellent submissions of both Dominion and Intact it is my conclusion that Dominion has failed to meet its onus to prove that they provided written notice in accordance with Section 3(1) of Regulation 283/95 and further that that Regulation requires written notice and that actual notice is not sufficient.

I accept the submissions of Intact that there is insufficient evidence for me to be able to accept that the Dominion adjuster sent a Notice of Dispute to Intact on June 2nd at either 11:19 a.m. or at 3:43 p.m. that day. Certainly there is no evidence to support her log note that she sent the Notice of Dispute to Intact at 11:19 a.m. The evidence appears to be quite contrary as the fax cover sheet that she prepared has a time on it of 3:43 p.m. on Friday, June 2nd. Dominion has been unable to produce a fax confirmation sheet with respect to that alleged fax yet were able to produce a fax confirmation sheet to confirm that earlier that day the Dominion adjuster had sent the Notice of Dispute to the applicant's counsel by fax. There is no suggestion the fax machine was not working. Despite the Dominion adjuster's belief that she remembers going over to the fax machine and faxing it over to Intact at that time, in my view there is insufficient evidence for me to be able to conclude that that in fact occurred. The behaviour of Intact's adjuster and the log notes of Intact all support the proposition that that fax was never sent. Dominion has been unable to prove that even if it had sent and for some reason the fax confirmation has been lost that it was in fact received by Intact. The Intact adjuster was quite clear, and I find his evidence to be more consistent and more credible on this point than the Dominion adjuster's, that he never received any form of written notice and particularly never received a Notice of Dispute. The Intact adjuster's actions in following up with the Dominion

adjuster in August to find out whether she had sent the Notice of Dispute and asking for her to re-send it is all consistent with Intact never having received a Notice of Dispute or written notice in any form of the dispute within the 90 day period.

In reaching this conclusion and finding that evidence is required to satisfy me that not only that the written notice was sent but also received I am mindful of the case law that has developed in the area of Section 3(1) of the Regulation. As Arbitrator Jones points out in *CGU* & *Canada Life* (supra), the priority dispute resolution process was enacted by way of Regulation after consultation with the insurance industry. It was developed as a simple, expeditious and relatively inexpensive way of determining who the appropriate insurer was for the purposes of paying accident benefits. There is no other way of resolving these disputes. The insurers must proceed to arbitration and must follow the provisions of Regulation 283/95.

In the case of *Lombard Canada Limited* v. *Royal & Sunalliance Insurance Company* (2008) Carswell ONT. 7839 [2008] O.J. #5239, Justice Strathy comments on the purpose that underlines the notice requirements set out in Section 3(1) of the Regulation. He states:

> "The seeming arbitrariness of making the first insurer initially responsible, despite the potential liability of another insurer, is compensated for by the system of notice and arbitration. The notice requirement allows the second insurer to investigate the claim, to decide whether to accept responsibility and to take appropriate investigative and loss control measures."

Of equal importance is the Court of Appeal's statement in *State Farm Mutual* v. *Ontario* (supra) at paragraph 10:

> "The Regulation sets out in precise and specific terms the 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."

I also found the decision of Arbitrator Bialkowski in *State Farm Mutual Insurance Company* & *Unifund Insurance Company* (2019) Carswell ONT. 3879 of February 28, 2019, to be helpful. In that case Arbitrator Bialkowski was asked to determine a priority dispute where there was a preliminary issue as to whether the applicant insurer had provided the Notice of Dispute to the respondent within 90 days having received the OCF-1. The facts of this case had many similarities to the one before me. Arbitrator Bialkowski noted that the issue before him was

primarily to be determined by a factual finding as to whether the written notice had been successfully faxed by State Farm to Unifund on June 2, 2015.

Arbitrator Bialkowski states at paragraph 35, and I quote:

> "A successful fax transmission sheet has repeatedly been accepted by priority arbitrators as evidence of service of a document to an insurer as reflected in the decisions of *Aviva Canada Inc.* & *Wawanesa Mutual Insurance Company re* [2009] Carswell ONT. 17083, Arbitrator Guy Jones, February, 2009 and of *Markel Insurance Company of Canada v. State Farm Insurance Company* [2011] Carswell ONT. 13200 (Arbitrator Bialkowski, August 11, 2011)."

Arbitrator Bialkowski points out that in the *Markel* decision of Arbitrator Jones that he held that a fax confirmation sheet provides prima facie proof that the document was sent and the evidentiary burden will then shift to the opposing party to prove that it was not received.

As in this case there was oral evidence given with respect to the various adjusters. There was some considerable evidence about how a fax might be successfully sent and what evidence there might be of that. Ultimately Arbitrator Bialkowski accepted the uncontradicted evidence that the fax had been successfully sent by State Farm and received by Unifund. This was technical evidence presented through the course of the arbitration and Arbitrator Bialkowski concluded that there must have been a technical problem with the Unifund fax machine. However, this did not take away from the fact that State Farm successfully presented evidence that the fax had been sent and received by the fax machine at Unifund. Accordingly the written notice requirement had been met.

I also found the decision of Arbitrator Novick, December 10, 2012, in *Economical Mutual Insurance Company* & *Lombard General Insurance Company* to be very helpful. In that case the issue was again very similar to the one before me. The adjuster gave evidence on behalf of Economical that they had mailed the Notice of Dispute to Lombard on May 27, 2009. However Lombard took the position that the Notice had never been received. The Economical adjuster insisted that the Notice was mailed out and in fact that had been indicated in her log notes. She also said she had, like Dominion adjuster, a clear recollection of the steps taken on the file because it was her first priority dispute she had ever been assigned.

Lombard's evidence was that they never received the letter that had been sent by regular mail. They called witnesses to testify to their system for receiving and sorting mail.

Arbitrator Novick concluded that the written notice was not sent in May, 2009 as alleged by Economical. She stated:

> "While the Regulation does not require that the D.B.I. notice be sent in a particular way, it is preferable for adjusters to use a method that enables its delivery to be confirmed such as fax, courier or registered mail. At the very

least, a follow-up mechanism should be in place so that a notice sent by regular mail can be confirmed as received."

This case stresses the importance of the requirement under Section 3(1) that there be evidence that the Notice was received.

However, in the case before me there is no such evidence. The evidence in my view is overwhelmingly that either Dominion adjuster never sent the fax to Intact with the Notice of Dispute or, if she did send the fax it was not successful. I conclude that the Notice of Dispute allegedly sent on June 2, 2017 was in fact not sent and was never received by Intact. Therefore the written notice requirements of Section 3(1) have not been met.

I also do not accept Dominion's argument that I should find there is actual notice and that that is sufficient. As the Court of Appeal has pointed out, this is not a regulation for creative solutions.

While I am sympathetic to Dominion's position that Intact was aware of the priority dispute, was aware of the facts surrounding it and in fact had acknowledged they might be the priority insurer, that does not take away from the strict requirement under Regulation 283/95, 3(1) that written notice be provided. I am bound by the findings of the Court of Appeal that this is a Regulation that does not allow for "creative interpretation and exceptions". We are dealing with "sophisticated insurers". This Regulation has been in place since the 1990s and Section 3(1) has not changed over the course of the years. There is a line of case law that has clearly established that written notice has been required. As Arbitrator Jones pointed out in *Aviva & Pafco* (supra) arbitrators must look at the entire scheme of the statute and Regulation 283/95. When we are considering the interpretation of this Regulation that involve disputes between these sophisticated companies it is extremely important that clarity and certainty of application be of primary concern. It is not desirable to have arbitrators or courts continually review the details of the notice given, to argue whether actual notice was received and what the components of actual notice would be. I agree with Arbitrator Jones that this would lead to uncertainty and unnecessary litigation. I therefore do not accept Dominion's argument that the information Intact received through various sources which result in actual notice of the claim sufficient to meet the requirements of Section 3(1) of written notice.

I therefore conclude that Dominion of Canada has not met the 90 day requirement for written notice under Section 3(1) of Regulation 283/95 and are therefore prohibited with proceeding with this arbitration.

Award:

On the preliminary issue as set out in the Arbitration Agreement I find that Intact did not receive proper notice of Dominion/Dominion's intent to dispute priority in accordance with Ontario Regulation 283/95.

Costs:

According to the Arbitration Agreement legal costs are to be determined by the arbitrator taking into account the success of the parties, any offers to settle, the conduct of the proceedings and principles generally applied in litigation across the courts of Ontario. The same is true with respect to the costs of the arbitrator and the expenses of the arbitration.

There are no offers to settle. While both counsel conducted themselves admirably and their submissions were excellent and this arbitration has been pursued in an efficient and expeditious manner, the fact is that Intact was wholly successful in this matter and therefore Dominion will pay to Intact their costs of the arbitration and will also pay the arbitrator's expenses.

If the parties cannot agree on costs they can contact me to schedule a further pre-hearing to set up a costs hearing.

DATED THIS 10th day of September, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP