IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c I.8,
as amended, and Ontario Regulation 283/95 mad under the *Insurance Act;*

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

TD GENERAL INSURANCE COMPANY

Applicant

- and -

WAWANESA INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, UNIFUND INSURANCE COMPANY and THE PERSONAL INSURANCE COMPANY

Respondents

AWARD WITH RESPECT TO PRLIMINARY ISSUES

Counsel Appearing:

Benjamin Hutchinson: Counsel for TD General Insurance Company (hereinafter called TD)

Devan Marr: Counsel for Wawanesa Insurance Company (hereinafter called Wawanesa)

Michelle Mainprize: Counsel for Travelers Insurance Company (hereinafter called Travelers)

Mannaneh Duval: Counsel for Unifund Insurance Company (hereinafter called Unifund)

Background:

This matter comes before me by way of a priority dispute pursuant to Section 268 of the *Insurance Act* R.S.O. 1990 c I.8, as amended and Ontario Regulation 283/95, as amended. While the broader issue is one of priority a number of preliminary issues arose which the parties agreed should properly be determined before any determination of priority should be made under Section 268 of the *Insurance Act.*

On June 27, 2018, the Accident Benefit claimants (husband and wife) were allegedly involved in a motor vehicle accident. They both applied to TD for Statutory Accident benefits as the insurer of the vehicle in which they were travelling as passengers.

A priority Arbitration was initially brought by TD against Wawanesa. Wawanesa insured the male claimant's parents. After the Arbitration against Wawanesa was commenced, Travelers and Unifund were put on Notice. The Personal Insurance Company was also put on Notice but was released prior to proceeding with these preliminary issues

Travelers insures Dedicated Car and Truck Rentals (hereinafter called Dedicated) and it was alleged that the male claimant and/or his spouse may have been employed by this company and/or had regular use of the company vehicle.

Unifund insured Devine Services Limited (hereinafter called Devine) and TD also alleges that one or other of the claimants may have been employed by Devine and/or had regular use of the company vehicle.

Therefore, in the big picture, TD claims that one or both of the claimants had regular use of a vehicle insured either by Travelers, Wawanesa or Unifund at the time of the incident.

TD received the OCF-1 from the claimants dated August 16, 2018 on August 22, 2018. Wawanesa was put on Notice pursuant to Regulation 283/95 on October 11, 2018. There is no issue raised by Wawanesa with respect to the timing of that Notice nor with respect to the timing of the Arbitration commenced against Wawanesa on or about June 6, 2019.

Travelers and Unifund were not put on Notice until June 8, 2020. They were added to this priority dispute on or around October 26, 2020.

Both Travelers and Unifund take the position that TD does not have a right to pursue its priority claim against either of them on the basis that TD did not give written Notice within 90 days, and that TD has not met its obligation to establish that 90 days was not a sufficient period of time to make a determination that either Travelers or Unifund may be liable and in addition that TD has not met its obligation to show that it made reasonable investigations to determine if another insurer was liable within the 90-day period.

The facts relevant to the 90-day issue vis-à-vis Travelers and Unifund are different and accordingly will be dealt with separately in this decision.

To complicate matters further, Wawanesa takes the position (supported by Unifund and Travelers) that TD does not have a right to pursue its priority claim at all because TD has taken the position that the claimants were not involved in an "accident" as defined under the Statutory Accident Benefit Schedule. TD has taken the position that it was a staged accident and has terminated and denied entitlement to both claimants to Accident Benefits. Wawanesa, Travelers

and Unifund all concede/agree with TD that no accident occurred. They take the position that if there was no accident then there is no right for TD to advance a priority dispute.

The Arbitration Agreement of the parties dated July 22, 2021 sets out the two preliminary issues as follows:

> Did the Applicant serve written Notice of a priority dispute against the Respondents, Travelers Insurance Company and Unifund, within the timeframe as set out in Section 3(1) of the Dispute Between Insurers Ontario Regulation 283/95 and, if not, does the saving provision set out in Section 3(2) apply?

The Second Identified issue is as follows:

> Does the Applicant have the right to pursue a claim for priority where it has taken the position and made a determination that an "accident" has not occurred as defined under the Statutory Accident Benefit Schedule Ontario Regulation 34/10 and as a result has terminated and denied all entitlement to Accident Benefits pursuant to Section 53 of the *SABS.*

Proceedings:

All counsel filed extensive written Factums and various Books of Authorities. In addition, various Book of Documents were submitted and counsel also made oral submissions via Zoom on July 22, 2021.

I will address each preliminary issue separately.

ISSUE 1

Does the saving provision set out in Section 3(2) apply to permit TD to pursue a claim for Priority against Travelers:

Facts

The facts of this case are complex and convoluted due to the fact that TD alleges that the two claimants who advanced claims for Statutory Accident Benefits arising out of the alleged accident of June 27, 2018 were grossly dishonest and it was only through lengthy and detailed investigation that TD determined the deceptive and collusive strategies engaged by the claimants. As a result TD submits that they could not break through the deception of the claimants in sufficient time to determine that Travelers was a potential priority insurer.

There is no dispute that the claimants applied to TD for Accident Benefits submitting an OCF-1 on August 16, 2018 and received by TD on August 22, 2018. There was also no dispute that with

Travelers being put on Notice on June 8, 2020 that that was clearly outside the 90-day period. The OCF-1 indicated that neither claimant had coverage under their own policy, spouses policy, policy of someone upon whom they were dependent, a policy that lists them as a driver, an employers or a policy insuring long-term rental cars.

While both OCF-1's indicated that the claimants were employed and working there was no information provided with respect to the employer and the AB application indicates "OCF-2 to follow". Of relevance is the fact that the TD log notes indicate that as of October 15, 2018 the OCF-2's were still outstanding.

TD insured the vehicle that the claimants were allegedly passengers in on the date of loss. The named insured was reportedly a friend of the claimants.

Prior to the 90-day mark, TD had Auto Plus searches conducted on the claimants and one on the claimant's father and mother. While one of these Auto Plus searches had the name spelled incorrectly, TD points out that the search is done based on the drivers license number and that the report revealed the same information. Neither of the claimants reportedly had any insurance.

Also within the 90-day period a statement was taken of each of the claimants. This took place September 21, 2018. This was a statement and not a Statutory Declaration. Both Claimants indicated the following:

1. They did not own a vehicle prior to the accident;
2. They did not have any regular use of a vehicle prior to the accident;
3. One claimant worked as a dispatcher at a logistics company;
4. The other claimant worked as an administrator at a company;
5. The male claimant's parents live a 10-15 minute drive from their home and will drive him to a subway stop most days and he will get the TTC from there and either his mom or dad would pick him up from work and bring him home. Both parents are retired;
6. The female claimant reported that her mother-in-law would occasionally drive her to work but otherwise she takes the TTC;
7. Both claimants indicate that if the parents/in-laws were not available they might take an Uber home;
8. They would walk to a grocery store which is only 6 minutes from their house to get groceries;
9. Neither of them are financially dependent on anyone.

In addition, a drive by was arranged by TD prior to the passing of the 90-day period. This drive by was done by a TD field adjuster on September 20, 2018. At that time two vehicles were seen to be parked at the house. A Kia Forte and a Toyota Venza. The Forte is owned by Dedicated and at the date of loss was insured by Travelers. The Venza was owned by the claimant's mother and insured by Wawanesa. In addition to determining that Wawanesa insured the Toyota Venza seen

in the driveway, TD also determined through their investigations that the claimant's father and mother insured two other vehicles under the Wawanesa policy. This ultimately resulted in Wawanesa being placed on Notice with respect to possible priority based on regular use of the parent's vehicles by the claimants.

Of relevance is the fact that the drive by which identified these two vehicles took place on September 20, 2018 and the statement taken of the two claimants took place the next day. It does not appear from the information set out in the statement that any of the following information was requested or sought of either claimant:

1. Any information about the two vehicles that had been observed in the driveway on the previous day. Note: the same field adjuster who conducted the drive by also took the statements;
2. While the claimants note they did not have any regular use of any vehicle there is nothing in the statement to suggest they were asked whether they had regular use or any connection with the two vehicles seen in their driveway;
3. While both claimants gave information about their employment, they were not asked the name of the employer, or if they had access to a company vehicle.

After the statements were taken, TD did conduct MTO plate searches of the two motor vehicles that had been seen in the driveway. These searches revealed the owner of the two vehicles in the driveway was the claimant's mother.

With respect to Dedicated it is also relevant to note that Dedicated is a car and truck rental company. The named insured of TD had rented a car from Dedicated in the context of his property damage claim. This is noted in log notes from June 29 of 2018.

There is also relevant information with respect to this issue found within the TD log notes. TD clearly identified these claims as having "red flags" as early as August 24, 2018. In a log note at that time it is indicated that TD is investigating the loss through their SIU department. This suggests early on that TD had some concerns about the claimants.

On September 11, 2018, the log notes indicate TD requested social media investigations of both claimants.

By log note dated September 13, 2018 the TD adjuster discussed getting Section 33 Statutory Declarations if the signed statements that were obtained were insufficient. No Statutory Declarations were ever secured and while EUOs were arranged they did not take place until mid way though October of 2019.

With respect to the drive by the log note of September 13, 2018 clearly indicates that the purpose of the drive by is to obtain vehicle and plate information for the priority investigation.

In a log note from September 13, 2018 the adjuster also notes that based on the Auto Plus search the male claimant had three previous motor vehicle accidents.

In a log note of October 2, 2018, the adjuster notes that getting Section 33 Statutory Declarations are not required as the signed statements were secured.

Also on October 6, 2018 the adjuster's log notes indicate that they have received the two searches back for the two vehicles seen in the driveway. The adjuster notes "likely one of the parents and the other for a rental vehicle: the rental may be one used by the claimant".

This then is the extent of the investigations done by TD prior to the 90-day period running out. It resulted in the Notice to Wawanesa only.

Let us now turn to the investigations completed by TD after the 90-day period. Post 90-days TD did the following:

1. Multiple days of surveillance were conducted in February of 2019 which showed the male claimant driving different vehicles on three different days;
2. EUOs were conducted of both claimants on October 18, 2019 for AB purposes and on October 23, 2019 for priority;
3. Corporate searches were completed for Dedicated and Devine;
4. Corporate searches were completed of a company called Reload Logistics which had been identified as the claimant's employer;
5. An MTO driver's search was conducted for the male claimant;
6. A charge history report was secured for the male claimant which showed a number of previous convictions.

As a result of all these investigations, TD ultimately determined the Dedicated rental vehicle was insured by Travelers. In addition, TD determined that the claimant's cousin was the owner of the business that employed the claimant and was the owner of Dedicated. Surveillance showed the claimant and his wife driving to and apparently working at Dedicated on February 2019. They drive there in a vehicle later identified to be owned by their cousin. In addition the surveillance showed another vehicle parked in the claimant's driveway in February of 2019 and the traffic offence investigation confirmed that the male claimant was driving this vehicle on April 14, 2019 when he was charged with a traffic offence. These vehicles TD determined were all owned by Dedicated prior to the motor vehicle accident and reportedly were insured under the Travelers policy.

With respect to the information secured through the two EUOs it is sufficient to say that it confirmed there were serious concerns about the information that had been provided in previous statements through the OCF-1 and that the credibility of both claimants particularly with respect to their ownership and use of automobiles both pre and post accident was in serious doubt. This

then led TD to put Travelers on Notice. The Notice to Applicant of Dispute Between Insurers is dated June 8, 2020.

Position of the Parties:

TD

TD submits that it cannot be held to the 90-day time limit due to the gross dishonesty of the claimants. TD submits that the claimants had made multiple material fraudulent representations which include denying that they had regular use of any vehicles, not providing accurate information with respect to employment, denying that they drove prior to the accident when the male claimant was clearly driving vehicles on a regular basis before and after. TD claims that the evidence shows a "collusive strategy involving family members/family companies to enable the male claimant to drive without owning or insuring his own vehicle". TD submits that there was absolutely no way it could have identified Travelers as a potential second tier insurer within the 90-day period. TD relied on the representations of the claimants which were only discovered to be fraudulent and inaccurate after significant expense and effort.

TD further submits that their investigations in the pre 90-days were reasonable. In fact not only were they reasonable but they were extensive and far in excess of what most first tier insurers would have completed. They did not just review an OCF-1 and obtain a signed statement. TD alleges it followed up on leads even after identifying Wawanesa as a possible priority insurer.

TD submits that the facts clearly establish that due to the claimant's dishonesty that 90 days was not a sufficient period of time to determine that Travelers may be liable and that all reasonable investigations were done to make that determination within the 90-days. TD submits the investigations did not have to be perfect but had to be reasonable. TD also submits that looking at their actions in hindsight must be done with caution.

Travelers

Travelers submits that TD did not make reasonable investigations within the 90-day period. TD points to the fact that these claimants were already red flagged and being looked at by SIU. The drive by that was conducted was for the purpose of getting vehicle and plate information for priority investigation and in fact two vehicles were located. One of those vehicles was in fact a Dedicated vehicle insured with Travelers. Travelers submits that TD determined that Dedicated owned one of these vehicles yet it did not go further, and conduct a search within the 90 days to determine who the insurer of Dedicated was. Despite learning by October 3, 2018 that the Forte was owned by Dedicated, TD failed to get a Autoplus report to determine who the insurer of the Forte was and they did not conduct or arrange any other searches or investigation that would have revealed the Travelers policy. This in fact was not sought out by TD until the spring of 2020. Travelers submits that there was no reasonable explanation advanced by TD as to the failure to pursue that information within the 90-days having conducted the drive by and found the Forte.

Travelers also submits that TD failed in securing information from the two claimants. Travelers points out that when the statement was taken the TD adjuster who was aware of the vehicles in the driveway did not ask either claimants any questions about them. He did not ask who owned them, whether either had any regular use of them, why the vehicles were in their driveway, whether they had been using them before or after the accident, or even if either of the vehicles were being rented by them. Travelers also points out that the adjuster did not ask the claimants the name of the companies that they worked for. Had that question been asked then it would likely have been revealed that their employers were Reload and Devine Services which could have lead TD at a much earlier stage to an understanding of the involvement of family members in these various businesses and in the ownership of the cars.

Travelers submits that in these types of disputes that it should be remembered that insurers are sophisticated and experienced. They should be held to strict compliance with the requirements of the Regulation. Further, Travelers submits that there is nothing in the Regulation that requires the insurer who has to put the other insurer on Notice to be **correct** about that decision. Rather the insurer's obligation is to connect the necessary facts within the 90-day timeframe and then exercise due diligence in putting any insurer determined within that timeframe on Notice even though that determination or decision may ultimately turn out to be incorrect.

Travelers also submits that in light of TD's suspicions about these claimants as indicated by the log notes that they should have arranged for EUOs within the 90-days. The EUOs did not take place until October of 2019, despite the clear inadequacy of the written statements.

Finally, Travelers submits that there is no explanation as to why it took until June 2020 for Travelers to be put on Notice.

My analysis and decision on the issue will be combined with that relating to Unifund.

ISSUE 2

Does the Saving Provision set out in Section 3(2) apply to the priority dispute as against Unifund:

Many of the facts that have been set out with respect to this issue as it relates to Travelers are also relevant here. TD's position is the same and that is that due to the complex web of lies and collusion weaved by the claimants that 90-days would not have been and was not a sufficient time to identify Unifund as a potential priority insurer in this matter.

The following are the additional relevant facts with respect to the Unifund claim.

Unifund insures Devine Services limited. The female applicant reportedly was employed by Devine at the time of the motor vehicle accident. TD takes the position that she had regular use

of Devine vehicles and therefore would be a deemed named insured under their policy and rank higher than TD's policy.

The following are the facts related to what was accomplished in the 90-day period by TD.

On August 29, 2018 TD conducted an Auto Plus search on the male claimant and on September 4, 2018 on the female claimant. These searches did not show any polices for either one but the Auto Plus for the male claimant did show he'd been involved in three prior motor vehicle accidents.

Social media searches on each of them were requested by TD on September 11, 2018.

We then have the drive by that took place on September 20, 2018. That drive by did not disclose any vehicles that were owned by Devine.

The written statements were taken from the two claimants on September 21, 2018. Unifund notes that these statements were brief and pertinent questions were not asked of the female claimant as to what company she worked at as an administrator. Had she been asked, her employment with Devine presumably would have been revealed.

On October 6, 2018, TD requested an Auto Plus search on the owner of the vehicles seen in the driveway as well as the title search for the claimants' residence. Updated social media searches were also requested of the claimants.

On October 9, 2018 the title search of the claimant's residence revealed that it was owned by the parents. Drivers license searches were then requested of the parents on October 10, 2018 and Auto Plus searches were also requested. This then led to the Notice of Dispute being sent to Wawanesa that was confirmed as the parents' insurer.

None of these actions on the part of TD point them towards Devine/Unifund or revealed any information with respect to them as possible insurers. However, Unifund points to the fact that the key question of the female claimant's employment was never pursued within that 90-days.

After the 90-day period past, surveillance was conducted in February of 2019. This surveillance while disclosing the claimants entering the premises of Dedicated did not disclose any association with Devine.

It was not until the Examinations Under Oath were conducted on October 23, 2018 that the female claimant was asked who she worked for and she advised that she worked for Devine Services and confirmed that company was owned by her husband's aunt. She did deny having access to a company vehicle during her EUO.

A corporate search on October 21, 2019 revealed that the male claimant's cousin was the administrator and sole director of Devine Services.

A corporate search on November 20, 2019 revealed that same individual was also the administrator and director of Reload Logistics the male claimant's employer.

On October 23, 2019 a driver record search of the male claimant was conducted which showed he had been convicted of 4 traffic offences prior to the motor vehicle accident including one just two weeks prior to the accident itself.

Four months would then go by before TD conducted an Auto Plus search on the male claimant's cousin. This took place on February 27, 2020 and it was that Auto Plus search that revealed to TD that Unifund was the insurer for Devine Services.

Four months thereafter, TD served its Notice of Dispute on Unifund on June 8, 2020.

TD takes the position that the statements of the two claimants were more than adequate and that there was no need to ask any additional questions with respect to employment. The statements indicate that neither of them owned or regularly used motor vehicles. They also provided information as to how they got around: TTC, Uber, parents, etc. TD submits that there was nothing at this time to suggest that those signed statements could not be relied upon. Therefore TD suggests that even if they were made aware of Devine as an employer during the course of these statements that would not necessarily have led them to Unifund and putting Unifund on Notice. The two claimants denied having regular use of the vehicle and the AB insurer should be able to rely on that information.

TD submits that it was not until sometime later, well after the 90-day period that they determined that the representations of the two claimants could <u>not</u> be relied upon. It was not until the surveillance was conducted that TD became concerned and ultimately the combination of the surveillance and Examination Under Oath led them to the information that allowed them to put Devine/Unifund on Notice.

TD submits that there was no lead or avenue of investigation within the 90-day period that it did not explore.

TD submits that relying on the case Liberty *Mutual Company v. Zurich Insurance Company* [2007] 88 O.R. (3d) 629 ONSC that even if they had discovered that the female claimant was employed by Devine within the 90-day period that would not have been a sufficient basis to put Unifund on Notice. TD points to the Liberty case in that it affirms that one of the interpretations of the saving provisions set out in 3(2) is to "discourage insurers from issuing notices indiscriminately in the off chance that a priority insurer will be identified". TD submits that in keeping with this desirable interpretation, Unifund was therefore only put on Notice after TD positively confirmed that the male claimant had regularly driven the Devine company vehicles in the pre-incident period. TD

submits that it is significant that it is the male claimant that had regular use of the Devine vehicle based on their investigation and not the female claimant who only had a G1 license at the time.

Unifund submits that TD has the onus to prove that it was impossible to make a determination within the 90-days that Unifund was a possible priority insurer. Unifund submits that TD must show that it exercised reasonable due diligence within the 90-days and Unifund takes the position that TD as not met its onus.

Unifund submits that the key issue is not the number of investigations that an insurer may have undertaken within the 90-days but whether it made the right kind of investigations. If TD overlooked an avenue for investigation that could have reasonably led to a determination that another insurer may have been liable and it ignored that avenue of investigation then Unifund submits that 90-days was not an insufficient time. Unifund submits that this applies even if an insurer has been misled or sidetracked by the claimants in the underlying Accident Benefit file.

Unifund submits that TD failed to do the following within 90-days:

1. Conduct EUOs of either of the claimants;
2. To follow up and make some basic inquiries with respect to the employment of the male and female claimants;
3. To conduct a driver's record search of the male claimant. This would have revealed his prior 4 convictions.

Unifund's key position is that TD failed to investigate the lead with respect to the two claimants employment within the 90-day period and this should have been a basic avenue of investigation considering the information they had on the file and the fact that two vehicles had been seen in their driveway despite the claimants advising that they did not have access to any vehicles. Unifund therefore submits that TD cannot now rely on the saving provision of Section 3(2).

Analysis and Decision with respect to both Travelers and Unifund:

The applicable legislation in this case is Section 3 of Ontario Regulation 283/95. It set outs the various Notice obligations on an insurer who wishes to dispute priority. These are set out below:

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

(b) The insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

Numerous authorities were provided to me and relied upon by counsel. Before I turn to an analysis and conclusion some of the general legal principles that were put before me and which I rely upon relating to these issues are set out below:

1. Section 3(2) is designed to immediately engage the provision of benefits for the insured and to encourage the insurer who is providing the benefits to promptly due diligence to make a determination whether another insurer should be responsible to pay. However it is desirable to interpret the section in a way that discourages insurers from issuing Notices indiscriminately on the off chance that a priority insurer will be identified (*Liberty Mutual Insurance Company v. Zurich Insurance Company* supra).
2. The onus is on the party relying on the late Notice provisions of Section 3(2) to show that the 90-days was not sufficient time for the determination. The circumstances of each case must be examined to determine whether 90-days was or was not a sufficient time for that determination (*Liberty Mutual Insurance Company v. Zurich Insurance Company* supra).
3. If an insurer shows that it was actually impossible to have made that determination within 90-days then it will have satisfied its onus (*Liberty Mutual Insurance Company v. Zurich Insurance Company* supra).
4. Whether or not 90-days is sufficient time to make a determination that another insurer may be responsible to pay the Accident Benefit is a question to be decided on the facts of each case. The Arbitrator must decide whether the insurer had enough facts to make that determination within 90-days. If not, then the Arbitrator must next consider whether the insurer made reasonable investigations within the 90-day period (*Dominion of Canada General Insurance Company v. Certas Direct Insurance Company* [2009] O.J. 2971 ONSCJ).
5. Whether or not the insurer has been provided with accurate information by the insured is a factor in determining whether the 90-day period was sufficient (*Primmum Insurance Company v. Aviva Insurance Company of Canada* [2005] O.J. 1477 ONSCJ and *Dominion of Canada General Insurance Company v. Certas Direct Insurance* supra).
6. Investigations conducted within the 90-days must be reasonable but that is not the same as perfect. The fact that in retrospect other investigations might have been seen to be helpful does not mean the investigations that which were undertaken do not meet the test of reasonableness sufficient (*Primmum Insurance Company v. Aviva Insurance Company of Canada* supra and *Federated Insurance Company of Canada & SGU Insurance Company of Canada* re (2003 Carswell ONT 10548) Arbitrator Steven Malach September 2, 2003).

7. In determining the reasonableness and the timelines of investigations it must be remembered that insurance adjusters are extremely busy individuals working on many complex matters at the same time and thus should not be held to a standard of perfection (*Coseco Insurance Company v. Lombard insurance Company* (Arbitrator Guy Jones June 3, 2004)).
8. Regulation 283/95 sets out precise and specific terms for a scheme for resolving disputes between sophisticated litigants. Insurers deal with these disputes on a daily basis. This is an area in which there is a constant and regular flow of case law. Given the nature of these disputes and the litigants involved in these disputes the dominant consideration must be clarity and certainty to ensure a predictable and efficient scheme of dispute resolution (*Kingsway general Insurance Company v. West Wawanosh Insurance Company* (2002) 58 O.R. (3d) 251: Ontario Court of Appeal).

Having set out the general principles above, I now turn to how they apply to the facts of this case and my decision.

I appreciate that this is a case where late in the day it was determined that the two claimants lacked credibility. TD had identified this as a case with some "red flags" thus the involvement of the SIU. There was no evidence early on that the information provided by these claimants was not to be relied upon. However, even taking that into consideration, I find that TD simply did not conduct some very standard investigation into priority that one would have expected in the circumstances of this case. I also note that while TD relies on their later investigations to substantiate their claim that these individuals had regular use of the Devine and Dedicated vehicle, the fact is that the claimants to date continue to deny that is the case. Therefore, it is difficult to accept TDs argument that it was the claimants' lack of credibility in the 90-day period that led TD to lack the ability to collect the requisite information they needed to identify Travelers and Unifund. The fact is that the claimants continued obfuscate the issue in the post 90-day period yet with appropriate investigation TD was able to find Dedicated and Devine and their respective insurers.

We have two individuals who are passengers in another person's car. These individuals report that they do not have any access to any vehicles, do not own any vehicles and do not regularly use any vehicles. Yet in a drive by two cars were seen in their driveway. One a rented car and one car belonging to one of their parents.

TD knew that these individuals were both employed. I find that a reasonable adjuster even in the face of being told in their statement that they did not have regular use of a vehicle would have at least attempted to determine who their employer was and whether there might be a line of inquiry to be made from that employer with respect to possible vehicles and/or access to vehicles. As pointed out by both Travelers and Unifund neither the log notes nor the statement indicate as to what the claimants were told as to what "regular use" meant when they gave their statement. Had the TD adjuster asked these two claimants who their employers were that would have led them to Devine and to Reload Logistics. This then in turn would have led the adjuster

to find out that Devine was a company owned by the male claimant's aunt and that Reload was owned her son. Corporate searches could have been conducted as they were after this information was secured on the Examination Under Oath and would have led to Unifund as a potential insurer. No such questions were asked and therefore no leads were generated within the 90-days. I find this to be a significant failure on behalf of TD.

In addition, I do not agree with TD's submissions that the two signed statements taken of the applicants on September within the 90-days were sufficient. The log note of TD suggest that if those statements were in and of themselves sufficient then no EUO was going to be required. A review of those statements even whether it be in hindsight or at the time would clearly have indicated that they were quite inadequate for the purposes of priority which according to the log notes was the main reason for getting the statement. Again, no questions were asked about employment and not a single question asked with respect to the two vehicles seen in the driveway the day before. In my view, these statements were quite inadequate and TD should have within the 90-days made efforts to arrange for an EUO.

We know that the EUO that took place in 2019 led to some considerable information with respect to the claimants employment, the various family connections with those employers and ultimately in the case of Devine to Unifund as a potential priority insurer. It is to be remembered that it is not a test of perfection. It is not a test of correctness. TD did not have to be right in putting the insurer on Notice that they were without doubt the priority insure. There just had to be some reasonable connection with the claimants for the purposes of sending out the Notice of Dispute.

Therefore with respect to Unifund, I find that TD's failure to investigate the issue of the claimants' employment and to conduct EUOs within the 90-day period is fatal to their pursuit of priority as against Unifund. This information would have been available to them within the 90-days had some of the investigation readily available to TD had been undertaken.

As to Travelers, the same rational applies. However, there is additional reason that I find that TD cannot pursue a priority dispute against Travelers. In the case of Travelers a Dedicated vehicle was in the driveway on the date that the claims adjuster did a drive by. Despite the log note identifying the purpose of the drive by to be one to investigate priority the same adjuster who conducted the drive by did not ask any questions about the Dedicated vehicle in the driveway when he took the statements the next day. While TD suggests that it assumed that the vehicle in the driveway was a rented one and possibly rented by their own named insured, no inquiries were made to determine whether that was the case. If the car was being rented by the named insured who did not live with his two passengers then what was the rental vehicle doing in the driveway? The log note indicates the adjuster's comments that the rental vehicle "maybe one used by the claimant". However, there were no further steps taken to determine how this vehicle came to be in the driveway, what relationship if any either of the claimants had with the person driving the vehicle or whether they had rented it themselves. MTO searches were conducted

within the 90-day period which showed that the vehicle was owned by Dedicated and that TD adjuster understood that this was a rental car company.

We know that had TD pursued any inquiry with respect to Dedicated and in particular conducted an EUO prior to the 90-day period, this would have again led to the fact that Dedicated, Devine and Reload were all connected and that all of them were owned by individuals in a familial relationship with the male claimant.

In my view these inquires and in particular the EUO should have been conducted within the 90-days even in the context of TD not appreciating fully at that time its two claimants lacked credibility and that their alleged scheme had not yet been fully disclosed. TD was aware that the facts of this case were suspicious. It had been red flagged and it had been referred to SIU. These red flags should have led TD to at the very least conduct an EUO and/or ask additional questions with follow ups concerning the employment of these two individuals within the 90 days.

Therefore I conclude that TD does not have the right to pursue a priority dispute as against Travelers or Unifund on the basis that it did not put them on Notice within 90-days of receipt of the completed Application, and based on my finding that 90-days was a sufficient period to make a determination that one or other of these two insurers may be liable under Section 268 of the *Insurance Act* and that TD failed to make reasonable investigations necessary to determine that within the 90-days.

Therefore, this priority dispute as against Travelers and Unifund is dismissed with costs.

ISSUE 3

Does TD have the right to pursue a claim for priority where it has taken the position that there is no accident:

The Arbitration Agreement states that this issue to be determined is:

> "Does TD have the right to pursue a claim for priority where it has taken the position and made a determination that a "accident" had not occurred as defined under the Statutory Accident Benefit schedule Ontario Regulation 34/10 and as a result has terminated and denied all entitlement to Accident Benefits pursuant to section 53 of the *SABS*".

Relevant Facts

The claimants allege that they were involved in an accident on June 27, 2018. They claim to be passengers in a Honda Odyssey which was owned and operated by TD's named insured.

The accident is alleged to have occurred when the TD named insured was proceeding southbound on Weston Road and the third party vehicle was eastbound on Fenmar Drive and attempted to

make a right turn onto Weston Road. A collision allegedly occurred between the two vehicles at the intersection. TD received the completed OCF-1s from the two passengers on August 22, 2018. They applied to TD as the insurer of the vehicle that they were occupying when the accident occurred.

As noted previously, TDs log notes indicate getting SIU involved due to red flags on the file within a few weeks. Between August 22, 2018 and March 25, 2020 TD paid out $23,569.91 in medical and rehabilitation benefits to the male claimant and $30,015.79 in medical and rehabilitation benefits to the female claimant.

With respect to Wawanesa, TD put them on Notice on October 11, 2018 with respect to priority.

Initially, TD took the position that the claimants were principally dependant for financial support on the parents and later they withdrew that position and now claim that there is an issue with respect to regular use.

The priority dispute Arbitration was commenced by TD against Wawanesa on June 6, 2019. TD did have until October 11, 2019 to commence the Arbitration in accordance with Regulation 283/95.

An EUO of both claimants from the AB perspective took place on October 18, 2019 and then with respect to issues relating to the priority dispute a further EUO was conducted of the two claimants on October 23, 2019.

At some point during the course of the adjusting of the file TD became suspicious with respect to the nature of the accident. TD also takes the position that the two claimants engaged in deceptive and collusive strategies both with respect to their claims for Statutory Accident Benefit and with respect to avoiding having to pay insurance premiums on vehicles that they may be using.

An engineering report was completed by 30 Forensic Engineering on January 24, 2020. This report concluded that the damage found on the two vehicles involved in the accident was not consistent with any of the scenarios that had been described by the various individuals allegedly involved in this accident. In other words, none of the scenarios described by the two drivers and/or passengers were consistent with the actual damage to the two vehicles.

As a result on March 25, 2020 TD sent out a letter to each of the claimants copied to their law firm. This letter advised the claimants that TD had commissioned an engineering report and that that report confirmed that the damage found on the vehicle was not consistent with the claimants' description of the accident. Specifically, the report concluded that the accident did not happen while the vehicle in which the claimants were a passenger was proceeding straight and the third party vehicle was turning right. As a result, the letter stated:

> "In accordance with Section 53 of the Statutory Accident Benefit Schedule, please be advised that we are terminating the payment of benefits effective immediately due to the misrepresentation of your reported claim".

In addition, the letter indicated to each claimant that in accordance with section 52 they were required to repay the amounts listed in the letter that had been paid by way of benefits no later than April 20, 2020.

The letter further indicated that if repayment was not received that TD would commence actions as necessary in order to cover the amounts owed.

As of the date of the Arbitration in this matter, TD had not commenced any litigation against the two claimants seeking a repayment of the monies paid to date.

In addition, as of the date of the preliminary issue hearing in this matter the two claimants had not commenced an appeal at the Licensing Appeal Tribunal with respect to TD's position that they had not been involved in an "accident".

However, an appeal had been commenced at the Licensing Appeal Tribunal by TD's named insured. This had proceeded to a Case Conference on May 18, 2021 before Adjudicator Nathan Ferguson.

Adjudicator Ferguson's Case Conference Report indicated that there was a preliminary issue to be heard. The preliminary issue was "was the applicant involved in an "accident". The hearing on that issue is scheduled to proceed on March 30 and 31, 2022.

While TD is certainly a named party to that LAT Application, the two claimants for whom TD has paid benefits out and are the subject matter of this priority dispute are not part of that LAT hearing. Further neither Travelers, Wawanesa, nor Unifund are parties to that Application.

Finally, it must also be pointed out that the individual who is the Applicant in that hearing is in fact the driver of the vehicle in which the two claimants were a passenger.

The last relevant fact is that TD commenced its Arbitration against Travelers and Unifund on October 26, 2020 after it had put the claimants on notice that it took the position that there had not been an accident as defined under the Statutory Accident Benefit Schedule.

A review of the submissions and documents before me as well as the oral submissions indicate that neither Wawanesa, Travelers, nor Unifund dispute TD's position that the incident of June 27, 2018 was not "an accident".

The Parties positions and arguments:

Wawanesa's position is that as all the parties to this priority dispute agree that there was no "accident" then there is no dispute with respect to that fact. Further, Wawanesa argues that if there was not accident then none of the four policies can be liable to pay any Statutory Accident Benefits in accordance with 268(1) of the *Insurance Act*.

Wawanesa submits that as neither of the claimants are entitled to Statutory Accident Benefits because there was no "accident" that therefore the Statutory Accident Benefits Schedule does not apply. If there is no entitlement to benefits then there is no right to pursue a claim for priority under Section 268(1) of the *Insurance.* Wawanesa therefore submits that the priority dispute should be simply dismissed.

Wawanesa submits that for TD to be successful in this proceeding it must establish three things:

1. The claimants have recourse to Statutory Accident Benefits under TD's policy;
2. That TD has recourse under Wawanesa, Travelers or Unifund's policy; and,
3. Section 268(2) must rank Wawanesa, Travelers or Unifund higher in priority than TD.

Wawanesa submits that TD does not even get past requirement number 1. Wawanesa says as TD exercised its rights under the contract to deny coverage on the basis of "accident" and has demanded repayment that therefore there can be no priority issue under Section 268.

Therefore, Wawanesa submits that in accordance with my authority and jurisdiction under Section 43 of the *Arbitration Act* that I should make an Order terminating the Arbitration on the grounds that it has become unnecessary or impossible.

While there were some submissions as to whether not an Arbitrator has jurisdiction in a priority dispute to make rulings on matters such as whether or not there was "an accident" a review of all the parties positions suggests that there was really no dispute with respect to the fact that I do have that jurisdiction. Rather, the dispute was whether it was necessary to exercise that jurisdiction and make a determination as to whether there was or was not "an accident". As Wawanesa points out there is really no argument on that point.

TD on the other hand sets forth its position that it is really between a "rock and a hard place". When this claim first came into TD it had not determined that there was not an accident. TD submits that that really did not come to light until 2019 or early 2020. In the meantime, there was information made available to it which suggested that it was not the priority insurer and it properly acted on that and put Wawanesa on Notice within the 90-days and commenced its Arbitration in a timely fashion. The fact is by the time TD put Wawanesa on Notice and commenced its Arbitration it was still not yet aware of the fact that there may have been a staged

accident. By that time, some considerable monies had been paid out in medical and rehabilitation benefits.

TD submits that there has been no legal determination made as yet as to whether the incident of June 27, 2018 is a staged accident/not an "accident" as defined under the Statutory Accident Benefits Schedule. While it concedes that I would have the jurisdiction to make that determination, TD suggests that the priority dispute on that matter should be stayed pending the LAT hearing that is scheduled to proceed with their named insured in March of 2022. TD submits that even though the two claimants in the background of this priority dispute are not involved in that LAT hearing that a finding of whether or not an accident occurred would still be determinative.

TD also submits that the fact that it has made an in-house decision that the incident of June 2018 was not an accident is not in and of itself a determination with any binding legal effect. TD points out that it cannot rely on its own determination vis-à-vis the two claimants as to whether its entitled to have their money repaid or as to what determination there may be in any LAT proceeding. It is only when a determination is being made by an authoritative body with binding legal effect that the issue as to whether there was or was not an accident has been properly determined. Therefore, as no authoritative body has made that legally binding determination the priority dispute is therefore still alive and kicking.

Further, if the priority dispute were to be dismissed and the claimants later pursue a successful determination at the Licensing Appeal Tribunal that this was in fact an accident and by dismissing this Arbitration, TD has lost its right to pursue any claim for priority and/or for a repayment of the monies it has paid or might pay to the claimants. This is why I described TD's position as being between a rock and a hard place.

On the issue of the stay pending the proceedings at the Licensing Appeal Tribunal it is all the other insurers' positions that that is simply not appropriate as any decision made there would not be binding on the two claimants in this matter nor would it be binding on the three insurers who are not parties to that hearing.

Finally, TD submits that it should not be compelled to sacrifice its priority rights when at sometime later in the context of the Accident benefit claim takes an off coverage position for material misrepresentation. TD says that the preservation of the first tier insurer's priority rights is a legitimate and valid interest of some significant importance and must be taken into consideration by me. TD refers to the decision of Arbitrator Scott Densem in *TTC Insurance Company Limited vs. Lombard Canada*: released May 29, 2012.

Analysis and Decision:

I have concluded for reasons which I outline below that in the circumstances of all insurers accepting that the incident of June 27, 2018 was not an accident that there is therefore no dispute arising under 268 of the *Insurance Act* for me to decide and this Arbitration must be dismissed. However, I am also cognisant of the fact that at the time this priority dispute Arbitration was commenced that monies had been paid out to the two claimants and that TD had not yet taken its off-coverage position. Therefore there was a valid priority dispute commenced within the appropriate time at least as against Wawanesa. I have already found that the claims against Unifund and Travelers are to be dismissed due to the failure to put them on Notice within the 90-days and not meeting the saving provisions.

I also note the fact that no claim has been made at the Licensing Appeal Tribunal by the two claimants as against TD. However, the limitation period to commence that claim has not yet expired. I also note the fact that TD has not yet commenced its own claim against the two passengers seeking repayment of the monies that were paid to them.

I am concerned that in dismissing this Arbitration as there is no dispute pursuant to Section 268 of the *Insurance Act* that if at some later date there is a determination made by the appropriate authority that the incident of June 27, 2018 was in fact an accident that TD would have lost its right to pursue its claim for priority as against Wawanesa. I point out that in the context of this decision I make absolutely no finding as to whether Wawanesa is or is not a priority insurer under Section 268 of the *Insurance Act.*

As a result, while I am dismissing the Arbitration it is without prejudice to TDs right to reinitiate the priority dispute before me in the event that there is a finding that there was in fact an accident.

In order to ensure that the main purpose of the priority Regulation for a quick and efficient determination between insurers is still being met, I am putting a time limit on when the Application to reopen the Arbitration could be made by TD. Such an Application would have to made within 60 days of its resiling from its position with the two claimants herein that the accident did not meet the required definition under the Statutory Accident Benefits Schedule.

Turning briefly to the law in support of the conclusions that I have outlined above.

On the issue of an Arbitrator's jurisdiction to make a decision as to whether there was or was not an accident or to make decisions in relationship to issues that may flow from that question I reviewed the case of *Primmum Insurance Company v. ING Insurance Company of Canada* (2005) CANLII 11975. This was a decision of Justice D. Browne on appeal from one of my Arbitration decisions. In that case the issue was the extent of an Arbitrator's jurisdiction appointed pursuant

to the *Arbitration Act* and Regulation 283/95. Justice Browne noted that given the breadth of an Arbitrator's jurisdiction over priority disputes they can entertain an argument on any question of law that is related to the dispute.

This decision was followed by Arbitrator Scott Densem in *TTC Insurance v. Lombard Canada* (supra). In that case, Arbitrator Densem was specifically asked to determine whether or not he had jurisdiction to determine whether the incident that was the subject matter of the priority dispute was an accident as defined under the Statutory Accident Benefit Schedule.

Arbitrator Densem ruled that Section 17(1) of the *Arbitration Act* 1991 provided that he could rule on his own jurisdiction to conduct the Arbitration. Secondly, he concluded having reviewed the *Primmum & ING* decision: supra that an Arbitrator must consider the application of all parts of Section 268 of the *Insurance Act* in resolving a Section 283/95 dispute between insurers. He pointed out that Section 2(1) of regulation 283/95 references a requirement that the insurer initiating the priority dispute must be one who "paid benefits under 268". Therefore, part of the Arbitrator's role would be to decide whether the benefits had been paid pursuant to the Statutory Accident Benefits Schedule. This clearly opened up the question as to whether an accident as defined under the Statutory Accident Benefits schedule had occurred and thus whether 268 would be triggered.

I agree with Arbitrator Densem and indeed in my view I am bound by Justice Browne's decision in *Primmum*.

Therefore, while I find I have jurisdiction to make a determination as to whether there was or was not an accident that really does not answer the issue before me. None of the parties before me are arguing that there was an accident. Therefore, even though I have jurisdiction to determine that issue it technically is not before me and as all parties agree that there was no accident, Section 268 of the *Insurance Act* is not triggered at this time.

I find that my conclusions herein are also consistent with the decision of Justice Matheson in the case *Unifund Assurance Company & Security National Insurance Company (*2016) ONSC 6798. That case was an appeal from a decision of Arbitrator Bialkowski and the question was whether he had jurisdiction to determine whether an ATV being driven by the claimant in the case before him would be considered an automobile for the purposes of the *SABS* definition of an "accident". Justice Matheson noted that under each policy of insurance there must be an accident occurring before a claimant has recourse to the Statutory Accident Benefits Schedule under the *SABS*. While she overturned Arbitrator Bialkowski's decision it was not on the basis of the right to make that determination but rather that because there was only one policy that actually provided recourse to Statutory Accident Benefits that the Arbitrator erred in finding that the parties could access the priority scheme under 268(2). That scheme was only available, Justice Matheson found, if both policies provide Statutory Accident Benefits. Again, that supports in my view the approach I have taken in this case.

I also reviewed the decision of Arbitrator Bialkowski in *Coseco Insurance Company & Aviva Insurance Company* a decision of April of 2011. One of the arguments before me was the possibility of inconsistent decisions or findings as the issue of accident could be argued either in the priority dispute or at the Licensing Appeal Tribunal. In the case before Arbitrator Bialkowski, Aviva was arguing that the resolution of a priority dispute between insurers should be considered as totally distinct from any resolution of the dispute over the insured's entitlement to benefits that was before the Financial Services Commission or the courts. Arbitrator Bialkowski agreed with that legal principle. He noted that while the insured may dispute Aviva's denial of further benefits that would be an issue to be decided elsewhere and that any finding he might make in that regard would only be binding on the two insurers involved in the priority dispute and would not effect the rights of the claimant as against Aviva. While Arbitrator Bialkowski did go on to make a determination in that case as to whether an accident had occurred it was on the basis that Coseco had accepted priority and this was a dispute over the reasonableness of the payments and the context of whether or not an accident had occurred. Arbitrator Bialkowski pointed out that while his decision on whether or not there was an accident or not would effect repayment by Coseco to Aviva that his decision would not effect any ongoing entitlement that there may be as between Aviva and its insured.

I agree with Arbitrator Bialkowski and I have relied upon his approach in my decision that it would not be appropriate to simply stay this Arbitration pending a decision in the Licensing Appeal Tribunal matter where a different insured is disputing the issue of accident with TD and not the two claimants who are in the background to this priority dispute.

As to the requirement under Regulation 283/95, that an Arbitration is to be completed within 2 years, I find that there are compelling reasons in this case despite dismissing the Arbitration that TD given the right reinitiate the Arbitration as against Wawanesa only on a without prejudice basis within the time limits that I have noted above. TD commenced this Arbitration within the time requirements of the Regulation. We have completed the Arbitration at least on this preliminary issue within the timelines under Ontario Regulation 283/95. It is my view that it would be highly prejudicial to TD having commenced its priority dispute as required under the Regulation at a time that it was not aware that the incident may not be an accident to have its right to pursue its priority dispute dismissed completely in the circumstances of this case.

Award:

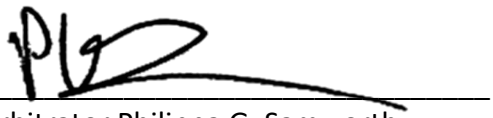
With respect to Travelers Insurance Company and Unifund Insurance Company this Arbitration is dismissed. With respect to the costs as between Travelers, Unifund and TD the Arbitration Agreement under paragraphs 4 and 5 does allow me in my discretion depending on the relative success at the hearing and taking into consideration offers to settle and the conduct of the proceeding to make an Award with respect to the expenses. However, this case is made complicated by the fact that there were different issues with respect to each insurer. I am therefore encouraging the parties to try to reach an agreement on costs and if not we will

schedule a pre-hearing to discuss costs. I am reluctant to make any Order in case there are any offers to settle that I need to consider.

With respect to Wawanesa Insurance Company the priority Dispute Arbitration is dismissed as against them but without prejudice to TD to reinitiate the priority dispute before me within 60 days of its advising the two claimants herein that it has accepted that the incident of June 27, 2018 constitutes an accident.

As to the costs between TD and Wawanesa, I take the same position as I do above and would ask counsel to try to resolve costs on their own and if not a further pre-hearing will be scheduled to then set up a costs hearing.

DATED THIS 29th day of September, 2021 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP