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

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and –

THE WAWANESA MUTUAL INSURANCE COMPANY

Respondent

A W A R D

Counsel:

David Murray
Counsel for the Applicant (Responding Party), Allstate Insurance Company of Canada ("Allstate")

Tim Gillibrand and Julianne Brimfield
Counsel for the Respondent (Moving Party), The Wawanesa Mutual Insurance Company ("Wawanesa")

Issues:

This Arbitration involves a priority dispute between insurers. The parties agreed to proceed with a series of preliminary issues which were refined and agreed upon through a series of pre-arbitration teleconferences as follows:

(a) Did Allstate put Wawanesa on notice of this priority dispute in accordance with Section 3(1) of Ontario Regulation 283/95?;

(b) If the answer to question (a) is "No", is Allstate entitled to maintain this Arbitration on the basis of the saving provisions in Section 3(2) of Ontario Regulation 283/95?;

(c) Did Allstate initiate this Arbitration against Wawanesa in accordance with Section 7 on Ontario Regulation 283/95?.

Evidence:

The following documents were marked as Exhibits at the hearing which proceeded before me on Tuesday, December 4, 2018.

Exhibit 1 – Document Brief of the Respondent, Wawanesa Mutual Insurance Company

Exhibit 2 – Production Brief of the Applicant

Exhibit 3 – Supplementary Document Brief of the Respondent.

It was agreed between the parties, as this matter progressed through the pre-arbitration process, that Wawanesa would be the moving party in relation to the preliminary issues hearing and that Wawanesa would bear the onus or burden of proof in relation to the preliminary issues to be determined by me.

In broad strokes, a priority dispute arises when there are, or may be, multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268(2) of the *Insurance Act* sets out the rules to be applied to determine which insurer is liable to pay accident benefits. Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

***Insurance Act**, R.S.O. 1990, c. I.8, Section 268 (2)*

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Ontario Regulation 283/95 (the "Regulation") provides that if an insurer intends to dispute it is highest in priority, then it must provide notice to all other insurers within 90 days. An insurer may give notice after the 90 day period if such insurer can satisfy a two part test:

(a) 90 days was not a sufficient period of time to make a determination that another insurer is liable under Section 268 of the *Insurance Act*, and,

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

On the assumption that the insurer gave timely notice to one or more other insurers, then the priority dispute must be resolved by way of a private arbitration which must be initiated within one year of the notice being given under Section 3 of the Regulation.

As against the foregoing basic legal backdrop, I now turn to the facts which are not particularly contentious.

This priority dispute arises out of a motor vehicle accident that occurred on March 5, 2014 in Scarborough, Ontario. At that time, Mr. Winston Roshane W.[1], (also or more frequently described as Mr. Roshane W.) was a passenger in a Hyundai motor vehicle being driven by Ahmad G. The Hyundai was insured with Wawanesa.

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[1] By reason of privacy concerns, the claimant's last name, together with the last names of others involved in the claim, are not reflected in these reasons.

The claimant's lawyer submitted an Application for Accident Benefits (OCF-1) to Allstate dated March 11, 2014 and received on March 12, 2014. The document provided some inconsistent information as the claimant's date of birth was indicated to be October 11, 1998 on the first page of the application but the authorization and direction indicated his date of birth to be October 11, 1992. The former would have the claimant being 15 years of age; the latter, which was ultimately correct, would have the claimant being 21 years of age. The application was signed by Sueanne R. (Ms. R was apparently the claimant's legal guardian). At the time of the accident, the claimant was living with Ms. R and his grandmother.

The claimant applied to Allstate as Allstate issued a policy of automobile insurance to the claimant's mother, Sharon L. The application contained some information but other information was absent. For example, the investigating police officer's name and badge number was not provided. However, the application does indicate that the accident was reported to the police, being Toronto Police Services. The application indicates that the claimant was applying to Allstate, being his mother's insurer, as a dependent and confirms that he was not an occupant of this automobile at the time of the accident. Later in the application, it seems to suggest that the claimant was riding in the Allstate vehicle at the time of the accident. All of that said, it was immediately apparent to Allstate, as reflected in adjusting notes prepared on March 12, 2014, that the claimant was a passenger and that the vehicle within which he was riding was not insured by Allstate.

On March 27, 2014, Allstate sent a letter to the claimant's counsel requesting a variety of documents. Interestingly, Allstate did not request a copy of the police report which presumably would have indicated the insurer of the vehicle within which the claimant was riding. Allstate's letter of March 27, 2014 does not request an authorization to obtain the police report nor does it request the name and badge number of the investigating police officer. There is no evidence before me that this authorization or this information was requested of the claimant subsequently apart from a meeting between the claimant and Allstate's independent adjuster, discussed below.

Allstate's log notes indicate, as early as March 27, 2014, an awareness of a potential priority dispute. Allstate, on an internal basis, considered obtaining the police report but believed they would require a consent form, signed by the applicant, and the police officer's name and badge number.

Allstate wrote to the claimant on April 1, 2014. Allstate acknowledged receipt of the OCF-1 and an OCF-3 (Disability Certificate). Allstate requested additional information from the claimant pursuant to Section 33 of the Statutory Accident Benefits Schedule (SABS) including medical records, employment records and the claimant's driver's license. Allstate did not raise any objections as to the form, content or completeness of the initial OCF-1 (a copy of which is marked as Appendix "A" to this Award).

On April 1, 2014, Allstate retained an independent adjuster to obtain a statement from the claimant. Allstate asked the independent adjuster to "make note of the time restrictions for PRIORITY" and Allstate prepared an "agenda/diary" with a reminder to follow-up on priority. This was marked as urgent with a diary date of April 25, 2014 (which diary date bears no relationship to the 90 day time limit to initiate a priority dispute).

Interestingly, when Allstate retained the independent adjuster, it advised the adjuster to "make note of the time restrictions for priority – and that the [statutory declaration] has questions related to the specific file concerns". There is no evidence before me as to when Allstate and/or the independent adjuster considered to be the start of, or completion of, the 90 days to put another insurer on notice. However, it would appear that Allstate was aware of a potential priority dispute and the need to act in a timely fashion.

On the record before me, which includes an examination under oath of a representative of Allstate on January 29, 2018 and an affidavit from the same individual, sworn December 3, 2018, there is no indication that Allstate ever created a 90 day diary date in relation to the anticipated priority dispute. Allstate, having already received an OCF – 1, was alive to a potential issue of priority. This could have been anticipated as early as the adjusting note of March 12, 2014 and certainly when the independent adjuster was retained on April 1, 2014 and an agenda/diary reminder was made.

The independent adjuster obtained the claimant's statement on May 8, 2014 in the offices of the claimant's lawyers. At the time, the claimant advised that he was in a vehicle "driven by Ahmed". The statement indicates that the claimant's lawyer "has all information about the accident and the vehicle which I was a passenger in".

On May 12, 2014, the independent adjuster sent an email to the paralegal working at the claimant's lawyer's office which indicates, "As discussed during the meeting, please provide us with a copy of the police report in your file". There was no deadline set out in the email for production of this document. There was no explanation given in the email for the importance of the document. There was no follow-up by the independent adjuster or by Allstate.

Allstate and the independent adjuster made an effort to investigate the priority by conducting a "drive-by" of the claimant's residence. They identified a vehicle parked in the driveway but subsequent investigations reveal that the vehicle was not associated with the claimant or any member of his family.

The applicant delivered a further Application for Accident Benefits (OCF-1) dated May 21, 2014 and received by Allstate on June 6, 2014. The application appears to be identical to the initial application, described above, save for the fact that this application was signed by the claimant himself. The application was provided under cover of a letter from the claimant's counsel which indicates that as the claimant does not require a litigation guardian, the new OCF-1 has been signed by the claimant himself.

Allstate had been actively adjusting the claimant's accident benefits claim prior to receipt of the second OCF-1 being received. Allstate had apparently received, approved and paid for some 10 treatment plans. Allstate had issued 5 – 6 payments toward the claimant's accident benefits claim prior to receipt of the second application for accident benefits (OCF-1).

I note that nowhere in the evidence before me does Allstate ever indicate to the claimant that it considered the first OCF-1 to be incomplete. The same comment can be made regarding the second OCF-1 (which appears to be identical to the first but for the difference in signatures). While it is true that Allstate, through the independent adjuster, did obtain a statement from the claimant on May 8, 2014, Allstate did not invoke or rely upon Section 33 of the SABS which allows for the insurer to obtain a statutory declaration and/or examination under oath with a view toward obtaining either the police report or all of the information set out in the police report. I appreciate that Allstate did reference Section 33 of the SABS in its letter of April 1, 2014 when it requested 9 separate items from the claimant (hospital and medical records, etc.).

Allstate's first request for the police report was in a letter of June 25, 2014. As a result, the claimant's lawyer produced the police report under cover of letter dated July 2, 2014 (apparently unsuccessfully faxed on that date but successfully faxed to Allstate on July 11, 2014). The police report identifies the driver of the vehicle as Ahmad G., the owner as Bibi A.H. and the insurer as Wawanesa Mutual Insurance Company.

Allstate placed Wawanesa on notice regarding the within priority dispute by letter dated July 11, 2014. Allstate's position, as set out in the letter, is that the claimant does not reside with Allstate's insured, is not a listed driver on the Allstate policy and is not dependent on Allstate's insured. As a result, the higher priority insurer would be Wawanesa (the insurer of the vehicle within which the claimant was riding as a passenger).

On December 11, 2014, Allstate served a Notice to Applicant of Dispute Between Insurers Form on the claimant. There is no issue in relation to the timing or adequacy of notice to the claimant.

On July 6, 2015, counsel for Allstate wrote to Wawanesa as follows:

> "Please be advised that we have been appointed to act for Allstate Insurance with respect to the priority matter in respect of the accident benefit claim of Roshane W. arising from a motor vehicle accident which occurred on March 5, 2014.
>
> We propose that Mr. Scott Densem be appointed as Arbitrator in respect of this matter.
>
> We look forward to hearing from you."

This letter appears to have been sent by facsimile to Wawanesa on the same date.

Counsel for Allstate, not having heard from Wawanesa (or perhaps out of an abundance of caution), issued a Notice of Application in the Superior Court of Justice at Toronto on July 10, 2015 requesting an Order appointing Scott Densem as an Arbitrator in relation

On September 1, 2015, Justice Wright issued an Order, on the consent of the parties, appointing me as an arbitrator pursuant to the Regulation.

Law:

As indicated above, the issue before me on this preliminary issues hearing is whether Allstate gave written notice within 90 days of receipt of a **completed application** for benefits to Wawanesa and, if not, whether 90 days was insufficient time to make a determination that another insurer was higher in priority to Allstate and that the insurer made reasonable investigations necessary to determine the other insurer within the 90 day period. The Regulation was amended in 2010, applicable to the within dispute, by providing a definition for "completed application". The Regulation defines "completed application" to mean a completed and signed application. "Application" is defined to mean an application for accident benefits (OCF-1). The importance of these definitions will be discussed later in this Award.

Overall, the Regulation sets out the scheme for resolving disputes in precise and specific terms which not only provide certainty and clarity to insurers but also requires them to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Overall, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.[2]

The Regulation governs all limitation periods applicable to priority disputes.[3]

The time limits for initiating Arbitration are intended to ensure the prompt and cost effective resolution of disputes.[4]

An insurer who fails to provide notice in accordance with Section 3 of the Regulation will be precluded from proceeding to Arbitration on the merits of a dispute. Similarly, an insurer who provides notice in accordance with Section 3, but fails to comply with the

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[2] Kingsway General Insurance Co. v. West Wawanosh Insurance Co., 2002 Can LII 14202 (Ontario Court of Appeal)
[3] Markel Insurance Company v. Co-Operators General Insurance Company and Lombard Canada Ltd. (Arbitrator Lee Samis, March 31, 2011)
[4] Allstate Insurance Company of Canada v. Motor Vehicle Accident Claims Fund, 2007, Ontario Court of Appeal, 61 (Can LII)

Section 7 timeline to initiate Arbitration, will be precluded from proceeding to an Arbitration on the merits of a dispute. [5]

Counsel for Allstate submits that the definition of a "completed application" outlined in the Regulation is consistent with Section 32 of the SABS which governs an insured's initial application for statutory accident benefits. This section of the SABS refers to the completion of an application for accident benefits by the "person who intends to apply for one or more benefits". It also requires that an OCF-1 be "completed" and "signed" by the claimant, failing which the claimant may not be entitled to receive statutory accident benefits.

While there may be similarities between the definition of a "completed application" in the Regulation and the content of Section 32 of the SABS, they are not identical and the Regulation does not refer to the SABS. It would have been a simple matter for the regulators to define "completed application" in a manner to require that the application be signed by the claimant or their legal representative (to allow for claims to be made by minors, persons under disability, etc.). The Regulation does not require this. Moreover, Allstate must have considered the initial OCF-1 to have been complete as it approved and paid at least six treatment plans.

Wawanesa takes the position that the OCF-1 received on March 12, 2014 by Allstate was, in fact, a completed application for accident benefits, thus triggering the 90 day timeline. Wawanesa submits that the OCF-1, described above, meets the definition of completed application in the Regulation. Wawanesa relies on the Court of Appeal for Ontario's decision in *Ontario (Minister of Finance) v Pilot Insurance Co.* which confirmed that a "completed application" is an OCF-1 that is:

(a) genuinely complete;

(b) functionally adequate for its legislated purpose; or

(c) treated as complete based on the conduct of the first insurer.

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[5] Ontario (Minister of Finance) v. Pilot Insurance Co., 2012 ON C.A., 33 (Can LII) and Pilot Insurance Company v. Royal & SunAlliance Insurance Company of Canada, 2006, Can LII, 5310 (Ontario Superior Court)

A genuinely complete application is one that is filled out on the Application for Accident Benefits form and contains any required attachments. The OCF-1 received by Allstate on March 12, 2014 was on the required form and it was signed.

Allstate urges me to reject or place limited weight on case law decided prior to the amendment of the Regulation effective September 1, 2010 which defines "completed application".

Allstate submits that the amendment to the Regulation, effective September 1, 2010, providing a definition for "completed application", constitutes a marked departure such that any of the case law preceding the amendment should be disregarded or considered cautiously. While there can certainly be cases where this submission may be true (one example could be a letter sent by the claimant or their legal representative which is attempted to be construed as an application for Statutory Accident Benefits; another example could be where an OCF-18 (Treatment Plan) is attempted to be construed as an application), the facts of the case before me are not amendable to the submission made by counsel for Allstate.

The fact is, and I so find, that Allstate received a genuinely completed application on the appropriate form (OCF-1 – Application for Accident Benefits) and it was signed.

Moreover, the application was "functionally adequate". It provided sufficient particulars to reasonably assist Allstate with processing the application, identifying the benefits to which the applicant may be entitled and assessing the claim. As noted above, Allstate had received and approved numerous claims for benefits and had paid numerous claims for benefits. Allstate did not advise the claimant that it considered the first OCF-1 received by Allstate to be incomplete.[6]

For purposes of priority, a functionally adequate application need not have the complete and exact priority information to specifically identify a priority insurer. This "standard of perfection" would render the 90 day reasonable investigation timeline and saving

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[6] ING Insurance Company of Canada v. TD Insurance Meloche Monnex, 2010, ON C.A. 559 (Can LII) Ontario v Pilot, *supra*

provisions to be absurd. Rather, a functionally adequate application need only provide sufficient information to allow reasonable priority investigations to begin. [7]

As I have noted, above, the first OCF-1 received by Allstate contained sufficient information for Allstate to start adjusting the claim. The application was treated as complete, based on the conduct of Allstate. Allstate adjusted the claim for accident benefits and did not raise any objections to the OCF-1 being incomplete. I find that Allstate received sufficient information to trigger the 90 day time limit as its internal notes and the involvement of the independent adjuster were directed, *inter alia*, to the priority dispute.

Allstate submits that there is no basis for imputing common law tests into statutory provisions where the legislate has clearly designed the provisions so as to replace the common law. As I have indicated above, this argument, which focuses on the definition of "completed application", would have greater force if Wawanesa was pointing to a document, other than an OCF-1, as the triggering event for the calculation of 90 days. This is not that case. Likewise, if the OCF-1 which was submitted to Allstate was not signed and if there was law made prior to the amendment to the Regulation to excuse this omission, it would be an appropriate submission. However, the OCF-1 received by Allstate on March 12, 2014 was signed and this satisfies the amended definition in the Regulation.

Saving Provisions in Section 3(2) of the Regulation:

Pursuant to Section 3(2) of the Regulation, an insurer may provide written notice to another insurer beyond the 90 period if this timeframe was not sufficient to make a determination that another insurer is liable under Section 268 of the *Insurance Act* and the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

In determining whether 90 days was sufficient, arbitrators must ask whether the insurer was able to gather the necessary facts within that timeframe. An insurer is not required to demonstrate that it was "impossible" to make this determination within 90 days.

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[7] Waterloo Insurance v. Wawanesa Mutual, 2014 ON S.C. 533 (Can LII)
Jevco Insurance Co. v. Wawanesa Mutual Insurance Company, (Decision of Arbitrator Kenneth Bialkowski, December 21, 2014)

Rather, it must show that it exercised due diligence and that the circumstances required more than 90 days to make a determination. It is important that this issue be determined from the perspective of the insurer since it is its predicament or circumstances that are the measure of whether or not there was sufficient time to conduct an investigation. [8]

The mere fact that an insurer had the means to make a determination within the 90 day period is not a conclusive factor. Even if an insurer had access, within the 90 day period, to the information needed to make a determination that another insurer had priority, the insurer may still be able to show that the 90 day period was not a sufficient time. Adjusters are dealing with many files at the same time and what may appear to be very obvious and straight forward upon reflection may not have been obvious and straight forward at the time that a claim was adjusted.[9] This is not a case where the insurer can demonstrate that it was misled by the claimant, either deliberately or innocently.

However, there are other factors which include what the insurer knew and did not know in the circumstances, what the insurer could and could not do in the circumstances, the completeness and accuracy of the application forms, the cooperation from provided by the interested parties, the number of potential insurers and the press or other demands on the adjuster's time. An investigation conducted by an insurer must be reasonable, not perfect.

Counsel for Allstate urges me to resist the temptation to review the relevant events through the lens of hindsight though that is exactly what I must do to determine whether the 90 day period was not sufficient and whether the insurer made reasonable investigations within the 90 days period.

Allstate submits that the determination of whether an insurer made the reasonable investigations necessary under Section 3(2)(b) of the Regulation is a fact-driven process and must be determined on a case-by-case basis. Opinion evidence is not required in order to establish this as it deals with non-technical facts and **common sense inferences** [emphasis added].

I find that it was obvious and apparent to Allstate almost immediately upon receipt of the first OCF-1 that the claimant was an occupant of a vehicle other than the vehicle insured

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[8] Liberty Mutual Insurance Co. v Zurich Insurance Co., (2007) 88 O.R. (3d) 629
[9] Liberty Mutual Insurance Co. v Zurich Insurance Co., *supra*

by Allstate. Similarly, I find as a fact that Allstate was aware of a potential priority dispute no later than April 1, 2014. Obviously, this knowledge or awareness on the part of Allstate emanates or originates from the first OCF-1 received on March 12, 2014. This OCF-1 was sufficiently complete to allow Allstate to approve some 10 claims for accident benefits and to pay some 5 – 6 claims for accident benefits prior to receipt of the second OCF-1. Moreover, and more relevant for purposes of the within arbitration, the first OCF-1 was sufficient for Allstate to appreciate that there was a priority dispute requiring a duly diligent investigation.

Allstate did not request the police report from the claimant until June 25, 2014. This request was made of the claimant but copied to the claimant's counsel. It would appear that claimant's counsel attempted to fax the police report on July 2, 2014 (this is the date of the letter but the fax number for Allstate appears to be inaccurate). Ultimately, this letter was successfully sent by fax to Allstate on July 11, 2014. I have received no evidence from Allstate as to why an earlier request for the police report was not made by Allstate of the claimant with a copy to the claimant's counsel (as compared to the email exchanged between Allstate's independent adjuster and the claimant's paralegal, discussed below).

While it is true that Allstate's independent adjuster met with the claimant on May 8, 2014 in the claimant's lawyer's office, the statement indicates that "my lawyer has all information about the accident and the vehicle which I was a passenger in". I have not received any evidence from Allstate or from the independent adjuster as to why the police report was not requested then and there. I note that the independent adjuster did request a copy of the police report in an email sent to the claimant's paralegal on May 12, 2014. I have received no evidence as to why no follow-up was sent by the independent adjuster to the paralegal or to the lawyer or why no correspondence was sent by Allstate in advance of June 25, 2014. I have not received any evidence as to why the content of the police report, identifying Wawanesa as the insurer of the vehicle within which the claimant was riding, was not requested of the claimant or of the claimant's paralegal despite the statement indicating that this information is in the possession of the claimant's lawyer.

Allstate has not discharged the onus or burden of proof that the 90 day period was not a sufficient period of time to make a determination that another insurer was liable to pay

benefits. Moreover, I find as a fact that Allstate did not make reasonable investigations necessary to determine if another insurer was liable. Allstate could have and should have made a request for the police report from the claimant, with a copy to his counsel, well in advance of June 25, 2014.

Did Allstate Initiate this Arbitration Against Wawanesa in Accordance with Section 7 of the Regulation?

In the event my analysis or findings, above, are found to be incorrect, I turn to Section 7 of the Regulation which requires the priority dispute to be resolved through an arbitration under the *Arbitration Act*, 1991, initiated by the insurer paying benefits, and that the arbitration may be initiated no later than one year after the day the insurer paying benefits first gives notice under Section 3. In this case, Allstate gave first notice to Wawanesa on July 11, 2014.

The question is whether the letter sent by counsel for Allstate on July 6, 2015 satisfies the obligation to initiate proceedings under the *Arbitration Act*, 1991. Section 23 of the *Arbitration Act*, 1991, provides that an arbitration proceeding may be commenced "in any way recognized by law". Wawanesa acknowledges receipt of correspondence from counsel for Allstate on July 6, 2015. Wawanesa argues that the correspondence was not a "clear notice to participate or demand for arbitration" since it did not contain the words "demand", "participate" or "arbitration".

Counsel for Wawanesa acknowledges that there must be an overt step taken toward the Arbitration process. There should be no uncertainty in the mind of the recipient as to whether or not the arbitration process is being invoked. It contemplates a communication emanating from the applicant to the respondent demanding participation in arbitration that is specific and direct.[10]

I find as a fact that the letter sent by counsel for Allstate dated July 6, 2015 satisfies the foregoing requirements. Counsel identified Allstate as the intended applicant and described the priority matter. Counsel for Allstate proposed an arbitrator for resolution of the dispute. This letter follows previous correspondence and communications between

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[10] Markel v Co-Operators, supra
State Farm Mutual Insurance Co. v. Echelon General Insurance Co., (Decision of Arbitrator Shari Novick, December 2008)

Allstate and Wawanesa in relation to the intended priority dispute. I reject Wawanesa's suggestion that it was "not at all clear that Allstate intended to demand Arbitration". Similarly, I reject the submission that it was incumbent on Allstate to utilize key words such as "demand", "participate" or "arbitration" to initiate the arbitration process. A flexible standard should be applied in determining whether or not an arbitration has been initiated by a party since "the only two statutory and regulatory pronouncements that guide the parties' behaviour in this regard are worded as broadly as can be imagined". This standard is a "fairly low threshold". [11]

In *Motor Vehicle Accident Claims Fund v. State Farm Mutual Automobile Insurance Company,* counsel for the Fund sent a letter to State Farm noting that she had been retained "to represent them with respect to the Dispute Between Insurers"; she sought to "finalize the arrangements for Arbitration" and to arrange for a conference call to "address the selection of Arbitrator". Arbitrator Bialkowski found that this process represented an "overt step" required to "set the wheels in motion for the Arbitration process". [12]

For these reasons, I find that Allstate has satisfied the procedural requirements of Section 7 in the event that I am found to be incorrect regarding the first OCF-1 triggering the 90 days (which expired on June 10, 2014).

I find that Wawanesa has satisfied the onus or burden upon it to prove that Allstate received a completed application on March 12, 2014. As a result, the 90 days within which to give notice to Wawanesa expired at the end of the day on Tuesday, June 10, 2014.

I find that Allstate has failed to discharge the onus or burden upon it to prove that 90 days was not a sufficient period of time to make a determination that another insurer was higher in priority. I further find that Allstate has not discharged the onus or burden upon it to prove that Allstate made reasonable investigations necessary to determine the existence of the other insurer within the 90 day period.

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[11] Her Majesty the Queen in Right of Ontario, as Represented by the Minister of Finance v. Dominion of Canada General Insurance Company (Arbitration Award of Arbitrator Shari Novick, December 2014).
[12] Motor Vehicle Accident Claims Fund v. State Farm Automobile Insurance Company (Decision of Arbitrator Kenneth Bialkowski, August 31, 2105)

I remain seized of this matter to address the issue of costs if counsel are unable to work this out. I order that Allstate pay the costs of the Arbitrator in accordance with the terms of the executed Arbitration Agreements.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration some 3 years ago through to its conclusion and wish to thank counsel for their thoughtful, comprehensive and intelligent submissions.

Dated at Toronto this 19th day of December, 2018.

Vance H. Cooper, Arbitrator