IN THE MATTER OF an Arbitration under the *Arbitration Act*, 1991, and pursuant to the provisions of Section 268 of the *Insurance Act*, and Ontario Regulation 283/95 THEREUNDER

AND IN THE MATTER of an Arbitration

BETWEEN:

SCOTTISH & YORK INSURANCE COMPANY

Applicant

- and -

BELAIR DIRECT INSURANCE COMPANY/NORDIC INSURANCE COMPANY and ZURICH INSURANCE COMPANY

Respondents

DECISION WITH RESPECT TO MOTION FOR PRODUCTIONS

COUNSEL

Derek Greenside – Kostyniuk & Greenside
Counsel for the Applicant, Scottish & York Insurance Company Ltd.
(hereinafter referred to as "Scottish & York" or "S&Y")

Leanne Zawadzki – Intact Insurance Company
Counsel for the Respondent, Belair Direct Insurance Company/Nordic Insurance Company
(hereinafter referred to as "Belair")

Kevin Adams – Rogers Partners LLP
Counsel for the Respondent, Zurich Insurance Company
(hereinafter referred to as "Zurich")

ISSUE - PRODUCTION OF COMMUNICATIONS BETWEEN SOLICITORS

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, the issue before me is the production request by Zurich of communications between the solicitors of Scottish & York and Belair.

PROCEEDINGS

[2] This motion proceeded by way of written submissions.

BACKGROUND

[3] Shelbie Kerr (Claimant) was a passenger in a U-Need-A Cab taxi when it was rear-ended by another vehicle insured with Scottish & York (S&Y) under policy A42902700 PLA. The driver of the taxi identified himself as Zahedur Rahman.

[4] Aviva Insurance obtained an AutoPlus Gold Report, on December 24, 2015, which confirmed that the owner (Ataur Rahman) of the vehicle, in which the claimant was a passenger, was insured under Belair Direct Insurance policy 6477397 at the time of the accident on December 16, 2015.

[5] A Notice of Dispute Between Insurers was served by Scottish & York on Belair in compliance with the 90 notice requirements of s. 3 of *O. Reg 283/95.*

[6] Arbitration proceedings were commenced against Belair Direct Insurance (Intact Insurance) based on the assumption that the vehicle in which the claimant was an occupant was insured with Belair. Counsel appointed on behalf of Belair (Leanne Zawadzki) subsequently advised that Belair Direct Insurance does not insure taxis and produced a Certificate of Automobile Insurance corresponding to policy 6477397, confirming insurance on a 2004 Pontiac Montana SE and not the 2015 Toyota Camry that the claimant was a passenger in at the time of the accident.

[7] Subsequent investigation, completed by counsel for Aviva (Derek Greenside) by way of a Freedom of Information request to the City of London, confirmed that the taxi in which the claimant was an occupant, namely a 2015 Toyota Camry, was insured under Zurich Insurance policy sev.s.14.

[8] There have been no direct communications between solicitor Zawadzki's principal at Belair Insurance and solicitor Greenside's principal at Aviva Insurance concerning the involvement of Zurich Insurance in the within priority Application. Solicitor Greenside provided solicitor Zawadzki with the records he had received from the Corporation of the City of London and Belair Direct Insurance sent their Notice of Dispute Between Insurers and Notice to Participate and Demand for Arbitration to Zurich Insurance Company Ltd..

[9] Zurich seeks production of all communications between counsel for Scottish & York and counsel for Belair Insurance, as well as any communications between their respective principals, in connection with the Notice of Dispute delivered by Belair Insurance to Zurich Insurance pursuant to section 10 of Ontario Regulation 283/95. Given that there were no direct communications between the respective principals, the sole issue for consideration is whether the solicitors representing Scottish & York and Belair Insurance should be

compelled to produce any communications between solicitor Zawadzki and solicitor Greenside.

ANALYSIS AND FINDINGS

[10] Scottish & York put Belair on notice of this priority dispute within 90 days of have received a completed application for benefits pursuant to s.3 of *O.Reg. 283/95.*

> **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. O. Reg. 283/95, s. 3 (1).
>
> (1.1) If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.
>
> (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. O. Reg. 283/95, s. 3 (2).
>
> (2.1) If the dispute relates to an accident that occurred on or after September 1, 2010, the Fund may give a notice under subsection (1) after the 90-day period and is not required to comply with subsection (2). O. Reg. 38/10, s. 4.
>
> (3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

[11] Belair then purported to put Zurich on notice pursuant to s.10 of *O. Reg. 283/95.* It is Zurich's position that Belair's notice to Zurich should be considered invalid.

Section 10 of *O.Reg. 283/95* states:

> 10. (1) **If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act**, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).
>
> (2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).
>
> (3) The dispute among the insurers shall be resolved in one arbitration.
>
> [emphasis added]

[12] Zurich submitted that Belair is not and will not be obligated to pay benefits to the claimant in this case because it did not insure the vehicle in which the claimant was an

occupant. Indeed, Belair has no connection to the claimant and was well aware of that before it gave notice to Zurich. Consequently, Belair is not an insurer which is "liable to pay accident benefits" to the claimant in accordance with s.268(2) of the *Insurance Act*. It follows, therefore, that Belair is not in position to deliver a notice under s.10 because the denial of its obligation to pay benefits has no connection to Zurich being "equal or higher priority under s.268" to Belair.

[13] Put another way, Zurich claimed that Belair had no priority rank based on the s.268(2) priority hierarchy, so it cannot assert that it disputes its obligation to pay benefits on the basis that Zurich has "equal or higher in priority under section 268 of the Act.". Therefore, Belair cannot be considered a "second-tier" insurer entitled to give notice under s.10. Therefore, any notice Belair purports to deliver in accordance with s.10 should be considered invalid according to Zurich.

[14] Further, Zurich has claimed that the notice which Belair gave to Zurich in this case is of different quality and type than the notice of a second-tier insurer under s.10. To illustrate this point, Zurich suggests that it is helpful to examine the rationale applied in those decisions where it was determined that no time limit applies to an insurer's notice under s.10. Notably, in those decisions, fairness to the second-tier insurer was a key consideration, as arbitrators recognized that:

- there is limited information in the hands of a second tier insurer and its ability to obtain the necessary information to identify other insurers standing higher in priority is restricted.

- the risk upon a second tier insurer having to adjust and pay benefits while trying to identify a third tier insurer is sufficient to ensure that in most circumstances, there will not be a significant delay in the priority process.

  [see, for example, *Wawanesa Mutual Insurance Company v. Peel Mutual Insurance Company and Economical Insurance Company* 2011 CarswellOnt 19009; *Allstate Insurance Company of Canada v. State Farm Mutual Automobile Insurance Company and The Dominion of Canada General Insurance Company* 2016 CarswellOnt 20840]

[15] Zurich has claimed that in this case, Belair's impaired ability to investigate is not a consideration. Belair did not rely on its own investigations to identify Zurich, rather it was S&Y whose investigation eventually identified Zurich. Similarly, there is no risk that Belair will be left having to adjust and pay benefits (since it has no connection to the claimant), so there is no corresponding injustice/risk to avoid.

[16] Zurich submitted that what constitutes a valid notice under s.10 must include consideration of:

- the basis upon which the insurer giving the notice disputes its obligation to pay;
- the source of the information/investigation leading to the delivery of the s.10 notice;
- whether any injustice or unfairness is sought to be averted by the insurer delivering the notice (i.e. the motivation of the insurer purporting to give that notice); and
- whether the s.10 notice is part of a greater scheme to circumvent the 90 day notice provisions applicable to the first insurer to receive a completed application (and the details of that scheme).

[17] Zurich submitted that S&Y's reliance on Belair's notice is a clear attempt to circumvent the 90 day notice rule which applies to S&Y, as the s.10 notice will not protect or benefit Belair in any way. The fact that counsel for S&Y is arguing that the Belair notice is valid while counsel for Belair is not taking an active role, illustrates that Belair has no real interest in the issue. There is no chance of unfairness being visited upon Belair if its notice is found to be invalid.

[18] It was Zurich's position that S&Y should not be permitted to shelter under Belair's notice in order to cure its own procedural defect. To do so would encourage other insurers to deliberately place an unrelated (but friendly) insurer on notice of a priority dispute within the 90 day notice period, knowing that the friendly "second-tier" insurer has the ability to place "third-tier" insurers on notice later.

[19] According to Zurich, to permit this type of co-operation amongst insurers for the purpose of avoiding the 90 day notice requirement would completely undermine the priority dispute resolution system, whose "dominant consideration must be clarity and certainty to ensure a predictable and efficient scheme". [See Court of Appeal in *Kingsway General Insurance Co. v. West Wawanosh Insurance* [2002] O.J. No. 528 (CA)]. In order to avoid this result, Zurich submitted that there must be some limits placed on what constitutes valid notice under s.10 of *O.Reg.283/95* and the circumstances surrounding the delivery of a s.10 notice must be scrutinized in order to determine its validity.

[20] Zurich submitted that the communications between counsel for S&Y and counsel for Belair (and communications between their respective principals), which lead to the delivery of Belair's notice to Zurich are relevant to the dispute regarding the validity of Belair's notice, as those communications will inform the tribunal regarding: the basis of Belair's dispute of its obligation to pay benefits; the source of the information leading to the delivery of Belair's notice; Belair's motivation to avoid injustice (or otherwise); and whether Belair's notice is part of a greater scheme to assist S&Y in avoiding its 90 day notice requirement. Zurich therefore has sought production of such communications and its costs of this motion.

[21] In response, Scottish & York has claimed that there certainly was a connection or nexus between the claimant and Belair, as Belair would have been obliged to administer the accident benefits claim and pay all eligible accident benefits, had Belair been the first insurer to receive the completed OCF-1. The driver of the taxi in which the claimant was an occupant identified the taxi as U-Need-A Cab taxi #185, owned by one Ataur Rahman, which was subsequently determined through the investigation which was completed by S&Y (because they were the first insurer to receive the completed OCF-1), to be insured with Belair (subsequently determined to be incorrect) and then later by Zurich Insurance. Belair would have been the insurer "liable to pay accident benefits" in accordance with section 268 of the *Insurance Act* had they been the insurer receiving the completed OCF-1. Belair would have completed the same investigation and subsequently determined that the taxi was actually insured by Zürich Insurance. Scottish & York submitted that that there was a "connection" between the claimant and Belair Insurance in the sense that a nexus, sufficient to compel Belair to accept and administer the accident benefits claim, existed.

[22] Scottish & York submitted that Belair's motivation for sending their Notice of Dispute Between Insurers and Notice to Participate and Demand for Arbitration to Zurich insurance, pursuant to section 10 of Ontario Regulation 283/95 (notice by a 2nd tier insurer to a 3rd tier insurer), is irrelevant to the legal issue as to whether Belair has jurisdiction to send those Notices.

[23] Aviva further submits that there is nothing inappropriate in two insurers co-operating to achieve the goal of having the priority insurer, ultimately responsible for paying accident benefits, pay those benefits and the suggestion that there has been some impropriety on the part of either Scottish & York or Belair Direct, is without merit. Aviva submits that there was no co-operation "for the purpose of avoiding the 90 day notice requirement.... to undermine the dispute resolution system" but rather, submit that there was co-operation between the two insurers to involve the insurer who should ultimately be responsible for payment of the accident benefits claim.

[24] Scottish & York further submitted that the communications which Zurich Insurance is seeking production of, are protected by litigation privilege. The Arbitration had already been commenced by Scottish & York Insurance Company Ltd. against Belair Direct Insurance Company before Zurich Insurance became involved, so there was clearly not only contemplation of litigation, litigation had already commenced. The proposed communications would be the product of work product privilege and would involve the common interest, shared by Scottish & York and Belair, of having Zurich Insurance also participate in the Arbitration.

[25] The issue of s.10 notices to 3rd tier insurers has been dealt with in previous jurisprudence and a review is helpful to the determination herein of Zurich's production request. Such analysis will assist as to the relevancy of the communications sought by Zurich.

[26] Firstly, there are a series of cases all concluding that there is no time limit on a second tier insurer putting a third tier insurer on notice. They include:

> Wawanesa v. Peel Mutual and Economical Mutual Insurance Company
> (Arbitrator Samis - January 28, 2011 and June 21, 2011)
>
> Certas Direct Insurance Company v. Security National Insurance Company
> (Arbitrator Bialkowski - February 2, 2012)
>
> Economical v. MVACF
> (Arbitrator Densem – January 7, 2015)
>
> The Co-operators v. Perth Insurance, Aviva Canada, Intact Insurance Company, TD Insurance Company
> (Arbitrator Bialkowski - February 3, 2015)
>
> Allstate Insurance Company of Canada v. State Farm Mutual Automobile Insurance Company, The Dominion of Canada Insurance Company
> (Arbitrator Bialkowski - December 19, 2016)

[27] The arguments advanced in these cases were essentially that the first tier insurer, with proper investigation, could have identified the third tier insurer within 90 days and failed to do so. Such argument has been consistently rejected. The position advanced here by Zurich is somewhat different. They claim that the notice to the second tier insurer was invalid as the second tier insurer did not stand higher in the priority hierarchy than the first tier insurer. However, such argument was advanced in *Co-operators General Insurance Company v. Intact Insurance Company, Northbridge General Insurance Corporation* 2018 CarswellOnt 877. It was rejected by Arbitrator Novick:

> "I find that if the drafters of Regulation 283/95 had intended that the first insurer only be permitted to provide notice to an insurer on a higher priority "rung", they would have used clear words to convey that message. In my view, a close reading of section 3 and section 10 do not lead to that conclusion. Instead, these provisions acknowledge the reality that determining priority may take a few steps. Section 3 is designed to "get the party started". Section 10 allows that once the fun begins, others may join in and it does not really matter who arrived with whom, and at what time."

[28] The decision of Arbitrator Novick was appealed and reported at *Northbridge v. Intact* 2018 ONSC 7131. Justice Diamond could not find the Arbitrator's decision unreasonable and the appeal was dismissed. I am bound by this decision and must reject the proposition advanced by Zurich that notice can only be valid if given to an insurer standing higher in priority.

[29] With the backdrop of this jurisprudence, I must determine whether communications between the solicitor for Scottish & York and the solicitor for Belair are relevant to the issues before me. I find on the facts before me that they are not and I am not prepared to order their production. I am satisfied that the notice by S&Y to Belair was proper and in good faith. The information provided by the operator of the taxi was that it was owned by Ataur Rahman. An Autoplus search conducted by Scottish & York showed that he was insured by Belair. It was

only when advised by counsel for Belair that Belair did not insure taxis that further investigation was conducted by way of a Freedom of Information Request of the City of London, which showed Zurich as insurer of the taxi and although Ataur Rahman was the plate lessor, the taxi was actually owned by 1874676 Ontario Inc.. This, in my view, was not part of a greater scheme to circumvent the 90 day notice applicable to the first insurer to have received a completed application for benefits. Scottish & York in good faith thought that Belair was the insurer based on the information provided by the operator of the taxi and an Autoplus search.

[30] There is merit to the argument advanced by Zurich that it would be wrong for an insurer to deliberately place an unrelated (but friendly) insurer on notice of a priority dispute within 90 days, knowing the friendly "second tier" insurer has the ability to place "third tier" insurers on notice without a time limitation, while it completed an investigation that ought to have been completed within 90 days. On different facts, the communications in issue may be relevant in circumstances where there is no valid nexus between the first and second tier insurers. For example, a company that markets insurance under several different corporate entities had a scheme to simply put a brother company on notice where an adjuster had neglected to complete a proper investigation within 90 days, so as to avoid a notice limitation. Such circumstances would likely be dealt with by application of an arbitrator's jurisdiction for equitable remedies as set out in s. 31 of the *Arbitration Act* and find such notice invalid as an abuse of process. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute. I find that there was nothing of the sort here. Scottish & York had a valid reason to put Belair on notice. I do not believe that the motivation of Belair putting Zurich on notice is relevant, given the jurisprudence set out above and the communications sought by Zurich are not relevant, given the jurisprudence set out above and therefore no requirement for the communications to be produced.

[31] In *Wawanesa v. Peel Mutual and Economical Mutual Insurance Company* (Arbitrator Samis - January 28, 2011 and June 21, 2011), Arbitrator Samis wrote:

> "To apply the section 3 provisions to second tier insurer's would give rise to the injustice**, ultimately resulting in the payment of benefits by the wrong insurer. The regulation is designed to facilitate a process that will lead to the cost of the claim being visited upon the correct insurer, without burdening the insured person with prosecution of the priority dispute issues.** It would be abhorrent to interpret the regulation in any manner which has the opposite result unless that outcome is required by the clear and specific language of the regulation. The language of the regulation does not have that clarity."

[32] I am of the view that the importance of identifying the correct priority insurer is more important than applying a time requirement for notice not specified in clear and specific language in section 10 or, as is the case here, exploring the rationale of a second tier insurer putting a third tier insurer on notice pursuant to section 10, provided there was a *bona fide*

basis for the first tier insurer putting the second tier insurer on notice. As I have indicated, I do not believe that on the existing jurisprudence the communications between counsel for Scottish & York and Belair are relevant to the priority dispute here and therefore need not be produced.

ORDER

[33] On the basis of the aforesaid, I hereby order:

1. The Zurich motion for production is hereby dismissed;

2. Zurich is to pay the legal costs of S&Y of this motion on a partial indemnity basis;

3. Zurich is to pay the Arbitrator's costs of the motion.

DATED at TORONTO this 1st)

day of October, 2019.)

KENNETH J. BIALKOWSKI
Arbitrator