IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT,* R.S.O. 1990, AND *ONTARIO REGULATION 283/95*

AND IN THE MATTER OF THE *ARBITRATION ACT,* S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by
THE MINISTER OF FINANCE
("THE MOTOR VEHICLE ACCIDENT CLAIMS FUND")

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Yann Grand Clement for the Applicant, Aviva

Heather L. Kawaguchi for the Respondent, MVACF

BACKGROUND:

1. SF[1] was injured when the vehicle in which she was an occupant was involved in a single-vehicle collision on May 9, 2018. The identity of the driver of the vehicle is unknown. Ms. F's grandmother was insured with Aviva Insurance Company of Canada ("Aviva") and she submitted an application for payment of benefits under the *SABS* to Aviva, claiming that she was principally dependent on her grandmother for financial support.

2. Aviva disputes that the Claimant was financially dependent on her grandmother at the time of the accident. It served a Dispute Between Insurers notice on the Motor Vehicle Accident Claims Fund ("the Fund"), contending that they were in priority to pay her claims under section 268(2)1(iv) of the *Act*.

3. Aviva then commenced arbitration against the Fund on May 10, 2021. Section 8(2)5 of *Regulation 283/95* addressing priority disputes provides that unless consented to by all parties, the hearing of the arbitration must be completed no more than two years after the arbitration was commenced. That deadline was accordingly May 10, 2023. I was not appointed to arbitrate this dispute until May 9, 2023, one day prior to the deadline.

4. Section 8(2)2 of the regulation provides that a pre-hearing must take place no later than 120 days after the appointment of the arbitrator. That deadline was September 6, 2023. An initial pre-hearing call was scheduled to take place on June 22, 2023, but Aviva's counsel could not be reached at the appointed time. I was later advised that new counsel had been retained by Aviva. Further communication with the parties resulted in the initial pre-hearing being rescheduled to February 14, 2024. The call was convened on that date, some five months after the 120-day deadline provided in the regulation.

5. The Fund contends that Aviva is in breach of the time deadlines set out in section 8(2)2 and 8(2)5 of *Regulation 283/95,* and requests that this proceeding be dismissed. The parties

[1] I have anonymised the Claimant's name for privacy reasons.

agreed that this request should be determined as a preliminary issue, based on an Agreed Statement of Facts and through an exchange of written submissions.

ISSUES IN DISPUTE:

1. Was the provision in section 8(2)5 of *Regulation 283/95* requiring that a hearing be completed within two years of the arbitration being commenced complied with in this case, and if not, what is the consequence of that breach?

2. Was the provision set out in section 8(2)2 of *Regulation 283/95* requiring that a pre-hearing be scheduled and take place no later than 120 days after the appointment of the arbitrator complied with in this case, and if not, what is the consequence of that breach?

RESULT:

1. No, the hearing was not completed within two years of the arbitration having been commenced, as required by subsection 8(2)5. As Aviva bears almost all of the fault for this breach, their application for arbitration will be dismissed.

2. No, the initial pre-hearing call did not take place within 120 days after an arbitrator was appointed, as required by subsection 8(2)2 of the regulation. Aviva was also responsible for this breach. This further supports the penalty imposed above.

EVIDENCE:

6. The parties filed an Agreed Statement of Facts, setting out the relevant dates and events. Counsel also filed detailed written submissions and cases supporting their respective positions. No *viva voce* evidence was called.

7. As set out above, Ms. F was a passenger in a car involved in a single vehicle accident on May 9, 2018. She submitted an OCF 1 form to Aviva almost two years later, on April 16, 2020, seeking payment of benefits under the *SABS*. She noted on that form that she was financially dependent on her grandmother, an Aviva insured. Aviva disputes that Ms. F was dependent on its insured, and provided written notice to the Fund of its intention to dispute its obligation to pay benefits on June 8, 2020. Ms. F was not a listed driver on her grandmother's policy.

8. The Claimant was examined under oath by a representative for Aviva on April 16, 2021.

9. Aviva then served a Notice to Participate and Demand for Arbitration on the Fund on May 10, 2021. I pause to note that the timelines set out in section 3(1) and section 7(3) of *Regulation 283/95* were complied with to that point.

10. The Fund's Claims Examiner responded to the arbitration notice served as follows:

> *This email confirms receipt of your Notice of Arbitration.*
>
> *We responded to the Notice of Dispute in June 2020 requesting the investigation and*
> *back up documents as required under Regulation 283.95, including the police report. I am unclear how we can assess and assume priority when we have not received any*
> *information to support why we are priority. The Notice of Dispute cover letter advises the claimant may be financial dependant on the policyholder (which is the claimant's grandmother) but no update was received until your letter.*
>
> *Under the circumstances, would you kindly defer the appointment of an Arbitrator and forward the necessary documents for us to appoint an adjuster and advise our position?*

11. No documents or evidence has been filed to indicate whether the parties exchanged any further communication from May 2021 when they had the above exchange, and early May 2023, when the evidence confirms that both parties retained counsel.

12. Counsel for the Fund sent an email to counsel for Aviva on May 5, 2023, advising that her client would not consent to extend the two-year limitation set out in subsection 8(2)5 of the regulation.

13. Counsel also exchanged correspondence regarding the appointment of an arbitrator. An agreement was reached to retain my services on May 9, 2023, and my office was contacted the following day. My assistant provided my availability for an initial pre-hearing call, and all parties agreed on May 11, 2023 that an initial pre-hearing would be convened on June 22, 2023 at 9 a.m. A letter confirming my appointment and the time of the pre-hearing call was forwarded by my office to counsel for both parties on May 15, 2023.

14. I called counsel for the Fund at the appointed time on June 22nd. I attempted to contact Aviva's counsel by telephone, but was unable to reach her. I sent an email message to counsel for Aviva, advising that I was trying to reach her, and asking whether she could be reached at another phone number. I did not receive any response.

15. Later that day, my office was advised that Mr. Grand Clement, Aviva's current counsel, had been retained to pursue this dispute on Aviva's behalf. An email from his office advised "we spoke to Aviva, they clarified with us there was no pre-hearing scheduled."

16. Mr. Grand Clement wrote to me later that day to confirm his retainer, and to advise that he had a call scheduled with his client the following day. He advised that he would be back in touch once he confirmed his instructions. No further communication was received from his office through the rest of June, or in July or August.

17. My office subsequently reached out to counsel for both parties on September 20, 2023 to ask whether they were prepared to schedule a pre-hearing call. No response was received. Further emails were sent on October 4 and November 16, 2023, asking whether counsel would like to arrange a pre-hearing call. Counsel for Aviva responded on November 16th and advised that he was trying to obtain the police file. He subsequently responded on November 26, 2023 and advised that he had received instructions to request a pre-hearing call. The first pre-hearing call was accordingly scheduled on February 14, 2024.

18. The initial pre-hearing call did take place on February 14, 2024. A second call took place in late March 2024. Counsel for the Fund advised during those discussions that she intended to challenge Aviva's right to pursue this dispute, given its breach of the timelines set out in section 8(2)5 and 8(2)2 of *Regulation 283/95.* The parties agreed that this issue should be determined by an exchange of written submissions, based on an Agreed Statement of Facts and the documents compiled.

RELEVANT PROVISIONS:

Insurance Act

268. *(2) The following rules apply for determining who is liable to pay statutory accident benefits:*

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.*

Statutory Accident Benefits Schedule (SABS) – definitions (s.3)

"insured person" means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile

Ontario Regulation 283/95

8. *(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:*

1. *If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.*

2. *A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.*

3. *Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.*

4. *The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.*

5. *Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration.*

PARTIES' ARGUMENTS:

Fund's submissions

(i) Breach of two-year deadline for completing arbitration – section 8(2)5

19. The Fund contends that this proceeding should be dismissed, as the two-year deadline for completing the arbitration has not been met. Counsel noted that subsection 8(2)(5) of the regulation states that the arbitration hearing must be completed within two years of the arbitration having been commenced unless the parties consent to extend that deadline. She pointed out that the Fund has explicitly declined to consent to an extension, and that she had advised Aviva of this prior to the expiry of the two-year deadline.

20. Ms. Kawaguchi contended that the use of the word "must" in subsection 8(2)5 signals 'an imperative requirement'. She submitted that on a plain and ordinary reading of the provision, the failure to complete an arbitration within two years should accordingly result in the proceeding being dismissed. Counsel noted that unlike subsection 8(3) of the regulation addressing the timing of the hearing itself, which subsection (4) provides can be adjourned if the criteria set out are met, there is no provision that modifies the time line set out in subsection

8(5). She submitted that the legislators must have accordingly intended that an arbitrator be permitted to extend the time for certain steps in the process when provided for in the regulation, but should not be able to do so if no such provision exists.

21. The Fund argues alternatively that if section 8(2)5 of the regulation does provide arbitrators with the discretion to extend the timelines specified, I should still dismiss Aviva's application for arbitration in light of Arbitrator Bialkowski's decision in *MVACF v Jevco Insurance* (June 16, 2017). She acknowledged that the arbitrator determined in that case that the timelines in section 8(2) are directive and permissive, rather than mandatory. She contended, however, that when the factors set out are considered and applied in this case, it is clear that the timeline for completing the arbitration should not be extended.

22. Counsel listed the seven factors outlined by Arbitrator Bialkowski in the *Jevco* case and highlighted that the Fund has not contributed to any of the delays in this case, nor "acquiesced to the pace of the process". She emphasised that only two parties are involved in the dispute, and that the sole issue is one of financial dependency, which is not particularly complex. Finally, counsel argued that the Fund would be prejudiced by Aviva's delay in pursuing this arbitration, if it was determined to be in priority and had to take over adjusting the claim.

(ii) Breach of 120-day deadline for convening a pre-hearing – section 8(2)2

22. Counsel for the Fund also urged me to dismiss this case because the requirement to convene a pre-hearing call within 120 days of my appointment was not met. She noted that section 8(2)2 provides that a pre-hearing call "must be scheduled and take place no later than 120 days after the appointment of the arbitrator", and that as I was appointed on May 9, 2023, an initial pre-hearing call should have taken place by no later than September 6, 2023. Counsel submitted that while a pre-hearing was initially scheduled to take place on June 22, 2023, well within the prescribed time, she was available but no one from Aviva attended. She contended that the pre-hearing accordingly did not "take place", and that Aviva was in breach of the requirement.

23. Ms. Kawaguchi noted that while efforts were made to reschedule the call once it was determined that Aviva had appointed new counsel, Mr. Grand Clement advised that he would be speaking to his client the next day and would advise "if we need to reschedule". She contended that this comment suggested that Aviva might have chosen not to proceed with the application, and that this impression was confirmed when Aviva's counsel did not respond to the various requests by my office to reschedule the call between late June and November 2023. Counsel noted that the initial pre-hearing eventually took place on February 14, 2024, well past the 120-day deadline imposed by section 8(2)2. She submitted that even if Aviva's last-minute change of counsel and a miscommunication between its representative and Mr. Grand Clement's office explained why no one was available to participate in the call scheduled for June 22, 2023, another seventy-six days remained before the expiry of the 120-day deadline, during which a call could have been convened.

24. Ms. Kawaguchi referred to Arbitrator Bialkowski's decision in *Unifund Assurance Company v. Wawanesa Insurance* (April 8, 2015), addressing this issue. She acknowledged that the arbitrator did not accept the respondent's argument that the arbitration should be dismissed because the pre-hearing call was not convened within the 120-day deadline, but noted that he stated that it is within an arbitrator's discretion to dismiss the claim, if that is supported by the facts and circumstances. Counsel noted that the initial pre-hearing call in the *Unifund* case took place over one year before the two-year deadline for completing an arbitration, while the first pre-hearing in this case occurred nine months after the expiry of this deadline. She argued that this has caused undue delay in the process, and potential prejudice to her client, and urged me to conclude that the arbitration should be dismissed.

Aviva's submissions

(i) Breach of two-year deadline for completing arbitration - section 8(2)5

25. Counsel for Aviva urged me not to accept the Fund's argument that this proceeding should be dismissed, contending that this position is not supported by the legislation or the relevant case law. He submitted that the deadlines in section 8 of the regulation have been found

to be directory and permissive, rather than mandatory, and that when the circumstances in this case are considered against the factors set out in the *MVACF v Jevco, supra,* decision, it is clear that a dismissal of the arbitration would not be appropriate.

26. Counsel highlighted that Arbitrator Bialkowski rejected the respondent's contention in the above case that the arbitration should be dismissed, and instead chose to impose costs and interest penalties on the applicant, who he determined was principally responsible for the delays. He suggested that only the most "outrageous fact situations" were meant to merit dismissal of a priority dispute, and that this was not the case here.

27. Mr. Grand Clement disputed the Fund's contention that this case involves a "simple issue", with little complexity. He noted that the details surrounding the accident remain unclear, including the identity of the driver, and that the Claimant has been difficult to reach. He pointed out that an Examination Under Oath had to be conducted and various documents requested in order to establish the basic facts. He highlighted the fact that financial information relevant to the question of principal dependency was only provided to Aviva in October 2023. He argued that all of these factors led to delays in the process, and justify an extension of the timelines provided in the regulations.

28. Counsel for Aviva also highlighted the request in the Fund's Claims Examiner's email to the Aviva representative in May 2021, reproduced above, that the appointment of an arbitrator be deferred. He argued that the Fund has accordingly waived its right to claim that Aviva did not "move the proceeding along fast enough", and that its argument should be rejected.

(ii) Breach of 120-day deadline for convening a pre-hearing – section 8(2)2

28. Counsel for Aviva submits that the evidence suggests that a pre-hearing call did occur on June 22, 2023, and that the 120-day timeline was accordingly adhered to.

29. Counsel argues alternatively that if that is not the case, Aviva should not be barred from proceeding with this arbitration if the first pre-hearing call did not take place within the time lines provided. He suggested that the delay in convening the initial pre-hearing call can be explained by the fact that Aviva had to retain new counsel around the time of the call that was scheduled to take place in June 2023, and that his office was trying to obtain further productions. He contended that these are both reasonable justifications for the delay.

30. Mr. Grand Clement cited Arbitrator Bialkowski's statement in the *Unifund* case that only the most "outrageous fact situations" merit the dismissal of a priority claim brought under *Regulation 283/95,* and argued again that this was not one of those cases.

Reply submissions – Fund:

31. Counsel for the Fund replied that Aviva's submission regarding the difficulties experienced in determining the identity of the driver of the vehicle, and other details surrounding the accident are not supported by the evidence filed. She stated that more importantly, Aviva has not explained why these factors, or the fact that an EUO had to be conducted (which was done before the arbitration was commenced) prevented an arbitration hearing from being completed within the two-year timeline provided in the regulation. She contended that Aviva's actions in failing to comply with both of the timelines cited constitute an undue delay in pursuing this dispute, and that they should be barred from proceeding with this claim.

32. Counsel also disputed Aviva's submission that the suggestion by the Fund's Claims Examiner that the appointment of an arbitrator be deferred resulted in the Fund waiving its right to claim that Aviva has not proceed with this dispute in a timely manner. She noted that Aviva did not at any point advise that it disagreed with the suggestion to defer the appointment of an arbitrator. She also noted that section 8(2)1 of the regulation provides an applicant with the right to appoint an arbitrator unilaterally, if a respondent does not respond to the notice served within thirty days, and highlighted the fact that the regulation does not provide any time deadline for an arbitrator's appointment. She argued that Aviva's submission that the Fund had somehow contributed to the delay because of this suggestion should accordingly be rejected.

ANALYSIS & DECISION:

33. Section 8 was added to the set of "rules" for conducting priority disputes contained in *Regulation 283/95* in September 2010. It complements the timelines that had previously existed for parties pursuing priority disputes, including section 3(1), which requires an insurer who intends to dispute its intention to pay benefits under the *SABS* to provide notice to another insurer(s) within ninety days of receiving a completed application for benefits, and section 7(3), which provides one year from the date that the section 3 notice was served to confirm that an arbitration is being commenced.

34. The "new provisions" in section 8(2) specify the timing of the steps that follow the commencement of the arbitration under section 7. Subsection 1 states that if a respondent does not respond to the notice commencing an arbitration within thirty days of receiving it, the arbitrator named in the notice is deemed to be appointed. Subsection 2 requires that a pre-hearing call must take place within 120 days after the arbitrator is appointed, and subsection 5 provides that an arbitration hearing must take place within two years of the date that the arbitration was commenced. It is clear from the above provisions that the drafters of the regulation intended that all steps in a priority dispute proceed in a timely fashion.

35. Only two "opt outs" are provided among the various time deadlines referenced above – subsection 8(2)4 permits an arbitrator to adjourn a scheduled hearing date if cogent and compelling evidence is presented to justify why the hearing cannot proceed on the scheduled day, and subsection 8(2)5 allows an extension of the two-year deadline for completing the arbitration if all parties consent to do so. It is not clear why the drafters chose to include this flexibility for these particular steps in the process and not others; it may signal their acknowledgment that delays may be caused by unexpected and valid reasons, and despite the collective interest in having these disputes arbitrated as quickly as possible, this should not be done at the expense of the parties' ability to marshal the relevant evidence to present at an arbitration.

36. As noted by counsel in their submissions, these provisions have been found to be "permissive and directive", rather than mandatory. That does not change the fact that all of the above sections provide fairly tight timelines that the parties must adhere to while engaged in a priority dispute. There are a few reasons for this, one of which is that if an insurer or the Fund will be taking over a claim from another insurer, either because it agrees to do so after relevant information is provided, or it is ordered to do so by an arbitrator, it is best that this change happen sooner rather than later. *SABS* claims can be complex, and often require many adjusting decisions to be made. Undoubtedly, these are best made by the priority insurer. As well, if priority disputes were permitted to proceed over an indeterminate period of time, it could potentially take years to clarify who the proper parties are, what the priority issues are and what evidence needs to be compiled in order to determine these issues. This would pose a real risk that important evidence would be lost or no longer be available.

37. The gist of Aviva's argument in this case is that the prescribed timelines should be extended because the delays were not that serious, the case is complicated, the Fund bears some responsibility for the delay, and the timelines in question have been found not to be mandatory. Counsel also suggested that an initial pre-hearing call was held on June 22, 2023, so there was no breach of subsection 8(2)2.

38. I find it easy to dismiss this last argument. In my view, a pre-hearing call requires the participation of counsel or a representative from each party involved in the arbitration, especially if there are only two parties. The initial pre-hearing call is an important step in the arbitration process – it is when the issues are identified, parties' preliminary positions are shared, and discussions are held regarding what productions are required and whether Examinations Under Oath are needed. None of this took place on June 22, 2023. I was able to contact counsel for the Fund, but my efforts to reach Aviva's counsel by phone and email went unanswered. I have no trouble concluding that my brief discussion with counsel for the Fund did not constitute an initial pre-hearing call. That that did not occur until February 14, 2024, some five months after the 120 day deadline provided for in subsection 8(2)2 of the regulation.

39. I approach Aviva's other arguments mindful of the courts' comments in earlier cases regarding the consequences of an insurer's failure to abide by a deadline provided in the regulation. Justice Nordheimer stated in *State Farm Mutual Automobile Insurance Company v. Ontario (Ministry of Finance)* [2001] 53 O.R. (3d) 436 that insurers should be expected to strictly comply with the requirements in *Regulation 283/95* as they are sophisticated and experienced participants in the industry, with advisors of the highest quality available to assist in determining their rights and obligations. This decision was appealed to the Court of Appeal. In dismissing the appeal, Appeal Justice Sharpe stated that insurers who are subject to the regulation are sophisticated litigants who find themselves regularly involved in disputes with each other, and that "clarity and certainty of application are of primary concern". He added "given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases". I take these comments to be a clear direction from the courts that insurers are expected to strictly comply with the provisions in the regulation, and that arbitrators should not accede to equitable arguments presented at arbitration.

40. The case law addressing the application of the particular timelines in subsection 8(2)5 and 8(2)2 of the regulation is surprisingly thin. Both parties cited Arbitrator Bialkowski's decisions in *Unifund v. Wawanesa, supra,* and *MVACF v Jevco, supra,* in which these issues were raised and discussed. Neither of these decisions have been appealed, and the courts have yet to weigh in on when or what penalties should be imposed on parties responsible for serious breaches of these provisions. Arbitrator Bialkowski noted that section 8(2) of the regulation does not set out a penalty for a breach of the timelines provided, and suggested that the type of penalty imposed should be in the arbitrator's discretion, based on the "particular circumstances before the arbitrator and the arbitrator's finding as to which party or parties were responsible for the breach". I agree with that statement.

41. Arbitrator Bialkowski set out several factors to consider in determining whether an applicant insurer should be barred from proceeding with an arbitration. He provided the following seven factors in his non-exhaustive list (at p.11):

1. *Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?*

2. *Was it practical to complete all necessary steps (production exchange, completion of EUOs, satisfaction of undertakings provided, obtain co-operation and production of documents from non-parties) to be in a position to complete the hearing within two years of the commencement of the arbitration?*

3. *Did the complexity of the dispute (number of parties, involvement of 3d tier insurers, etc) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?*

4. *Has the Respondent been prejudiced by the delay?*

5. *Did the Respondent advise it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?*

6. *Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?*

7. *Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?*

42. Reviewing the evidence filed in this case against these listed criteria, I find that the Fund did respond to the Notice of Arbitration it received from Aviva in a timely manner. The Fund's representative responded quickly to the Notice forwarded by Aviva on May 10, 2021, and noted in her email confirming its receipt that the Fund had requested the documentation supporting Aviva's contention that the Fund was in higher priority almost one year earlier when they received Aviva's "DBI Notice". She requested that the relevant documents be forwarded so that an adjuster could be appointed and the Fund's position confirmed. I have not been provided with any documents or evidence indicating if or when Aviva responded to that request.

43. The second factor raises the question of the timing of the usual steps undertaken to obtain information from third parties, such as Examinations Under Oath and production of documents, and their impact on the parties' ability to complete the arbitration within the permitted two years. I have no evidence regarding the timing of document production in this case. I note that an EUO of the Claimant took place in April 2021, one month before Aviva commenced arbitration and the "two-year clock" began to tick, so that clearly could not have contributed to the delay in completing the arbitration. I also note from the documents filed that Aviva had counsel engaged in this dispute from the time that the arbitration was commenced in May 2021.

44. The parties expressed differing views regarding the complexity of the proceeding. From the evidence provided, I do not find it to be particularly complex. There are only two parties involved, and the sole issue is whether Ms. F was principally dependent for financial support on her grandmother, the Aviva insured. This question is likely the most frequent issue raised in priority disputes under section 268(2) of the *Act*, and while each case may involve different details, the overall approach taken to questions of dependency is fairly straightforward. Aviva contends that the circumstances surrounding the incident and the identity of the driver are unclear, though counsel for the Fund contends that there is no evidentiary basis to support these allegations. I agree with the Fund's submission that Aviva has not explained how these factors may have prevented Aviva from prosecuting the priority dispute within two years of it being commenced, or affected their ability to participate in a pre-hearing call within 120 days of my appointment.

45. I also find on the evidence before me that the Fund did not "acquiesce to the pace of the proceeding" nor is there any documentation to support an argument that its conduct meaningfully contributed to any of the delays. One of the documents filed is an email message from counsel for the Fund to Aviva's initial counsel, dated May 5, 2023 (a few days before the expiry of the two-year period), referencing a telephone discussion they had had the previous day, and confirming that the Fund would not consent to extend the two-year deadline in subsection

8(2)5. Counsel for the Fund notes in that message that Aviva had received the claim more than three years earlier, and had conducted the Claimant's EUO over two years prior. She stated "while MVACF was prepared to postpone the appointment of an arbitrator while Aviva continued to investigate priority, at this point my client will not agree to extend any limitations". In my view, this makes it clear that the Fund did not acquiesce to the pace of the proceeding or participate in any of the delays to that point.

46. On the question of prejudice, counsel for the Fund argues that her client is prejudiced by the delay and by Aviva's failure to provide information about the financial dependency issue, and regarding the AB claim itself. She notes that she was only advised that the Claimant had applied for "CAT status" at the March 29, 2024 pre-hearing call, and that she did not receive Ms. F's *SABS* file until some time after that call. She contends that her client would be prejudiced if they were required to take over adjusting a potential "CAT claim" more than six years after the accident. She also submits that given the usual practice of reviewing documents or evidence reflecting a claimant's financial circumstances for the one-year period prior to the accident, an analysis of financial dependency here would require collecting evidence from as far back as May of 2017. She suggests that relevant documents may no longer be available and witnesses' recollection of Ms. F's circumstances at that point in time will likely have faded.

47. I generally agree with this contention. While it may not be unusual for counsel retained to represent a respondent in a priority dispute to find out important details about the underlying AB claim during the pre-hearing process, I acknowledge that it will often be very difficult to collect evidence related to a claimant's potential dependency seven or eight years later. This would likely impair the Fund's ability to properly analyse dependency, and in my view, would cause prejudice.

48. A close review of the documents filed reveal that Aviva proceeded with reasonable dispatch in the early stages of this claim, from the point that they received Ms. Froman's application until the commencement of the arbitration. They did not receive a completed OCF 1 form from the Claimant until April 2020, almost two years after the accident. Aviva put the Fund

on notice within ninety days of that date, and an EUO was conducted of Ms. F within one year of receiving her application for benefits. The Notice of Commencement of Arbitration was then sent in May 2021, within the one-year deadline provided in section 7(3) of the regulation. Aviva clearly complied with the required timelines up to that point. However, the evidence filed suggests that Aviva "dropped the ball" over the two years and a few months that followed.

49. As noted above, there is no indication from the evidence filed that Aviva took any steps between the time it served the Fund with Notice of Arbitration in May 2021, to early May 2023, when its counsel contacted counsel for the Fund to discuss the selection of an arbitrator. I am frankly baffled by this two-year gap. I was appointed to arbitrate this dispute only *one day before the expiry of the two-year deadline provided for completing an arbitration in subsection 8(2)5.* This is highly unusual, and made it next to impossible to adhere to the deadline. In my experience it is also unusual to have a pre-hearing call scheduled, confirmed by letter from the arbitrator's office on a mutually agreed upon date approximately six weeks later, and then not have counsel for one of the parties available on that date, with absolutely no warning or notice being provided, as happened here.

50. While there may have been a valid reason for Aviva to have retained new counsel to pursue this dispute in May 2023, right around the time of the initial pre-hearing call, that has not been shared with me. In any event, it should have been clear to Aviva once new counsel was retained shortly after the missed call that another pre-hearing should be scheduled on an urgent basis. Instead, it took three requests from my office, and a period of five months, for Aviva's counsel to respond to a request that a pre-hearing call be scheduled. While I appreciate that lawyers have busy practices and many demands on their time, the provisions in *Regulation 283/95* require that certain steps be followed in pursuing a priority dispute within a certain time. In my view, when an applicant fails to abide by the timelines without providing evidence to explain and justify the delays, a significant penalty for breaching these requirements should be imposed.

51. Arbitrator Bialkowski stated in *MVACF v Jevco, supra,* that when an arbitration is commenced, the two-year limitation for completing the hearing ought to be diarized by the applicant, and that if the respondent does not accept priority within a reasonable time, the applicant insurer should assume that priority is not being accepted. He also stated that "steps need to be taken to appoint an arbitrator, leaving sufficient time to complete all that is necessary so that an arbitration can be completed within the two years ". I agree with these statements. Arbitrator Bialkowski goes on to state that while the obligations in section 8(2) apply to both parties, it is the primary obligation of the applicant "who, for the most part, can control the pace of the proceeding", but that "in considering any penalty to be imposed, the conduct of the responding party must be considered".

52. I have given much thought to the nature of the penalty that should be imposed in these circumstances. Considering the evidence before me, I find that the circumstances outlined above represent an extreme delay, most of which, if not all, falls at Aviva's feet. Unlike the above case, in which Arbitrator Bialkowski determined that the respondent Jevco's conduct significantly contributed to the delay, that is not the situation here. As stated above, there is nothing in the evidence filed to support Aviva's contention that the Fund is responsible for any part of the delay in this case.

53. Contrary to counsel for Aviva's contention, I find that the note from the Fund's representative suggesting that the appointment of an arbitrator be deferred in order for the Fund to receive the documents they had requested a year earlier from Aviva, and assign an adjuster to investigate and provide its position, did not contribute toward the delay. I find that request to have been an attempt to be practical and to potentially save costs and time. As noted by counsel for the Fund, if Aviva was keen to proceed to the next step at that point in time, it could have disregarded the request, and relied on subsection 8(2)1 to suggest an arbitrator, who would then be deemed to be appointed thirty days later.

54. When all of the above factors are considered, I conclude that Aviva should be barred from proceeding with this dispute, given that its actions resulted in a breach of subsection 8(2)5 of

Regulation 283/95. I find that Aviva is also solely responsible for the breach of subsection 8(2)2 of the regulation. While the breach of subsection 8(2) alone would not have led me to the conclusion to bar Aviva from proceeding with this dispute, the combined effect of these two breaches of the regulation in my view justify a dismissal of Aviva's application for arbitration.

55. Echoing Justice Nordheimer's words in *State Farm v. Ontario (Minister of Finance),* Aviva is a sophisticated party involved in disputes of this type on a daily basis and who has access to expert legal advisors. The fact that it is responsible for the repeated delays outlined above persuades me that this extreme remedy is justified, in light of the underlying purpose of section 8(2) that parties who initiate priority disputes should proceed through the regulated steps in compliance with the clearly stated timelines.

56. For all of the reasons expressed above, I grant the Fund's request that Aviva should be barred from proceeding with this arbitration.

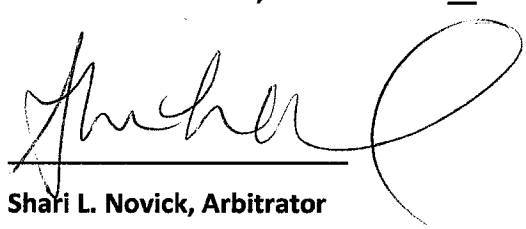
ORDER:

The application for arbitration is hereby dismissed.

COSTS:

Given the result above, the Fund is entitled to costs of this proceeding on a partial indemnity basis. If the parties cannot agree on the quantum payable, I invite them to contact me by email and a process will be arranged to determine this issue.

DATED at TORONTO, ONTARIO this __25th___DAY OF FEBRUARY, 2025.



Shari L. Novick, Arbitrator