IN THE MATTER OF *the Insurance Act*, R.S.O., 1990, c. I. 8, as amended,

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY O/A CHIEFTAIN INSURANCE

Applicant

and

FEDERATED INSURANCE COMPANY OF CANADA

Respondent

Heard November 16, 2011

Counsel:

Daniel Strigberger for the Applicant

Jonathan Schwartzman for the Respondent

Introduction:

The parties retained me as Arbitrator pursuant to the *Arbitration Act,* R.S.O. 1991, and Regulation 283/95 to determine which of the applicant and the respondent has the highest priority to pay statutory accident benefits pursuant to the Statutory Accident Benefits Schedule (SABS) to Jasmandeep Mangat arising out of a March 13, 2008 motor vehicle accident.

Factual Background to the Issues:[1]

The claimant, 11-year-old Jasmandeep Mangat, was injured while a passenger in a Dodge Caravan owned by Punjab Auto Sales Inc. The vehicle was insured by Federated Insurance under a Garage Automobile Policy issued to Punjab Auto Sales Inc. The claimant's father, Inderjit Mangat, was a director and officer of Punjab Auto Sales Inc. The claimant was principally dependent on his father for financial support and care.

Inderjit Mangat owned personal vehicles that were insured by Chieftain Insurance, a subsidiary of the respondent. Mr. Mangat was a named insured on the Chieftain policy. For ease of reference I will refer to the insurer of Mr. Mangat's personal vehicles as Dominion.

Inderjit Mangat was a 50% owner of Punjab Auto Sales Inc. He worked at the dealership which bought and sold used vehicles. The dealership had 60 to 70 vehicles in the lot. Mr. Mangat drove some of these vehicles for business purposes during business hours. After business hours he would normally drive one of these vehicles to his house. On the weekend and during off hours he used his personal vehicles that were insured with Dominion. The claimant would also be a passenger in some of the dealership's vehicles time to time.

Keys for the vehicles were kept at the dealership in a lockbox. Both Inderjit Mangat and his business partner, Mohinder Lamba, had access to the lockbox. Both were able to access the Punjab Auto Sales Inc. premises and the lockbox at their discretion at any time.

On the afternoon of the accident Inderjit Mangat gave the keys to the Dodge Caravan to Komal Lamba so that she could drive the claimant and Ms. Lamba's brother home. Then he closed the dealership for the day. He was not at the dealership when the accident occurred. The accident occurred when Ms. Lamba was driving from the Mangat residence to the Lamba residence with the claimant and her brother in the car.

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[1] These facts are taken from an Agreed Statement of Facts marked as Exhibit 1 at the arbitration hearing.

The Issues:

1) Which of Dominion Insurance and Federated Insurance has the highest priority obligation to pay SABS to Jasmandeep Mangat, pursuant to section 268 of the *Insurance Act*?
2) Was Jasmandeep and/or Inderjit Mangat a deemed named insured under the garage automobile policy issued to Punjab Auto Sales Inc. by Federated Insurance, by operation of section 66 (1) (a) of the SABS.

Both policies provided SABS coverage. Since Jasmandeep Mangat was an occupant of the vehicle insured by Federated it would take priority by operation of section 268 (5.2) of *The Insurance Act* if the terms of section 66 (1) (a) of the SABS apply, and either Jamandeep or his father, Inderjit, (or both) is a deemed named insured under the Federated Insurance policy.

The Law:

Section 66 (1) (a) of the SABS states as follows:

(1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity;

The result in this case turns on whether an automobile owned by Punjab Auto Sales Inc. and insured by Federated Insurance was, at the time of the accident, being made available to Jasmandeep Mangat and/or Inderjit Mangat for their regular use at the time of the accident.[2]

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[2] see section 66 (1) (a) of the SABS

Section 66 (1) (a) of the SABS requires that the automobile be made available by a corporation, unincorporated association, partnership, sole proprietorship, or other entity. This is not an issue in this case. If a vehicle was being made available to Jasmandeep and/or Inderjit Mangat it was being made available by Punjab Auto Sales Inc., a corporation.

With respect to the meaning of the words "regular use", the following propositions can be derived from the case law:

1) "regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular, or out of ordinary, or special"[3]

2) the language of section 66 (1) (a) does not require that the use be frequent, exclusive (in the case of fleets), or personal, to be regular.[4]

3) "regular use" has been defined in several arbitration decisions as being use that is "habitual, normal and recurred uniformly according to a predictable time and manner." However, the cases where the individuals have been found not to be regular users" of the subject vehicles were only those cases where the characterization of the use was "irregular at best and out of the ordinary" ...[5]

4) "regular use" does not require that the person for whom the vehicle is being made available be driving or operating the vehicle being made available. The person could be a pedestrian, or even a passenger in someone else's car. [6]

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[3] see *Canadian General Insurance Company* v. *State Farm Mutual Insurance*, [1957] O.R. 257, (C.A.), as quoted in the *Personal Insurance Company* v. *ING Insurance Company of Canada* (unreported decision of Madam Justice Morrissette, June 12, 2007), court file number 53141, at paragraph 26.

[4] *Resiner v. Liao* (1995) O.J. No 2489 (Ont. C.A.), *State Farm Mutual Automobile Insurance Company v. Kingsway General Insurance Company* (Arbitrator Samis, October 20, 1999), *Schneider v. Maahs et al.*2001, CanLII 3018 (ONCA).

[5] See *Zürich Insurance Company* v. *Personal Insurance Company*, 2009 CanLII 26362 (ONSC), at page 9, and the cases referred to therein.

[6] *Wawanesa Mutual Insurance Company* v. *Royal and SunAlliance Insurance Company*, (Arbitrator Jones, May 13, 2009) at page 5; *ACE-INA Insurance* v. *The Cooperators General Insurance Company*, (2009), CanLII 13625, (ONSC), at para. 19.

5) The wording of section 66 (1) (a) requires an examination of whether a vehicle is available for regular use, not whether there was actual regular use of the vehicle. The section does not appear to require that the individual actually uses the vehicle regularly but rather that it is made available should he wish to use it regularly. Actual use is evidence of the availability of the vehicle. [7]

6) "regular use" within the meaning of section 66 (1) (a) is not limited in its operation to users of vehicles who are employees of the Corporation making the vehicle available for use - the section speaks of an "individual", not an "employee".[8]

With respect to the meaning of the words "at the time of the accident", the following propositions can be derived from the case law:

1) Section 66 (1) (a) is not like a floating charge. It does not confer a portable status that remains with the insured. The status is only conferred at, and for, a moment in time, namely the time of the accident. By amending section 66 (1) (a) to include the words "at the time of the accident", and inserting the word "being" next to the phrase "made available", the legislature intended to extend coverage to an individual only where the insured vehicle is contemporaneously being made available for his regular use.[9]

2) Courts and arbitrators have looked at the pattern of use, amongst other evidence, to ascertain whether, at the time of the accident, the company had made the vehicle available to the claimant for "regular use". An adjudicator must look back from the date of the accident to examine the nature of prior use. To limit the inquiry into the nature of use solely to the day of the accident, or the days immediately preceding the accident, would result in an artificial exercise

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[7] *Unifund Assurance Company* v. *St. Paul Fire & Marine Insurance Company*, Arbitrator Samworth, August 9, 2000, at p. 10, *State Farm v. Kingsway, supra,* note 4.
[8] *Zürich Insurance Company v. The Personal Insurance Company, supra*, note 5, at page 11.
[9] *ACE-INA Insurance v. The Cooperators General Insurance Company, supra*, note 6, pp. 4-5.

and ignore material evidence regarding the pattern of use leading up to the day of the accident.[10]

Analysis:

I will first address the issue of whether a Punjab Auto Sales Inc. vehicle was, at the time of the accident, being made available to Jasmandeep Mangat for his regular use. Jasmandeep Mangat was an 11-year-old boy at the time of the accident. For the purposes of the SABS analysis counsel have agreed that he was a dependant of his father, Inderjit Mangat. He had nothing to do with the business of Punjab Auto Sales Inc.. The only evidence before me concerning any connection between Jasmandeep Mangat and the vehicles of Punjab Auto Sales Inc. is the statement in paragraph 9 of the Agreed Statement of Facts, "Jasmandeep would also be a passenger in some of the dealership's vehicles from time to time. This was unbeknownst to Federated."

We know that at the time of the accident Jasmandeep was a passenger in a Dodge Caravan, a vehicle owned by Punjab Auto Sales Inc.. The law is clear that he does not have to be driving or otherwise operating the vehicle to be using it. He could have regular use of the vehicle by being a passenger in the vehicle. I believe the law is also clear that he did not have to have regular use of the Dodge Caravan specifically for section 66 (1) (a) to apply. As long as one or more of the vehicles in the fleet owned by Punjab Auto Sales Inc. were being made available to him then he could have had "regular use" of a vehicle.

Dominion's counsel argues that in accordance with the law I have recited earlier, Jasmandeep had available to him a Punjab Auto Sales Inc. vehicle for his regular use at the time of the accident. It is submitted that the actual use of the Dodge Caravan by Jasmandeep on the afternoon of the accident is evidence of his regular, and habitual use of the vehicles because it was one of those "times" that he was making regular use of the vehicles.

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[10] *Zurich Insurance Company v. The Personal Insurance Company, supra*, note 5, at para 43.

Federated's counsel disagrees, and submits that there is insufficient evidence to conclude that Jasmandeep had Punjab Auto Sales Inc. vehicles available to him for his regular use. He further submits that to find Jasmandeep a deemed named insured in the circumstances would go far beyond what was intended by the drafters of section 66 (1) (a).

From the standpoint of applying section 66 (1) (a), in my view it does not matter whether Federated Insurance knew or did not know that Jasmandeep Mangat was a passenger in Punjab Auto Sales Inc. vehicles from time to time. I have difficulty however, in concluding that being a passenger in a Punjab Auto Sales Inc. vehicle "from time to time" is sufficient evidence to establish that Jasmandeep Mangat had Punjab Auto Sales Inc. vehicles available to him for his regular use. The case law establishes that use does not have to be frequent to be regular. The majority of cases also demonstrate however, that the courts look for evidence of routine, habitual use that occurs according to a predictable pattern to conclude that use is regular.

In the absence of evidence of some type of connection with the operation of the Punjab Auto Sales Inc. business, or an indication of control over the use of the business vehicles (neither of which of course, would I expect to find in the case of an 11-year-old boy), and without better evidence of the nature and pattern of Jasmandeep Mangat's use of Punjab Auto Sales Inc. vehicles, I am not prepared to find in this case that being a passenger "from time to time" is sufficient to constitute "regular use" within the meaning of what is intended by section 66 (1) (a). The scant evidence on the issue is equally capable of being interpreted as irregular use. Dominion has the burden of proof on a balance of probabilities to establish regular use by Jasmandeep. I do not believe the burden has been met.

Therefore, I conclude that Jasmandeep Mangat is not a deemed named insured under the Federated Insurance policy because the evidence does not support a finding that his situation satisfies the section 66 (1) (a) criteria.

I will now deal with the same issue as it concerns Inderjit Mangat. Mr. Mangat was a director and officer of Punjab Auto Sales Inc., a company which bought and sold

used vehicles. He was a 50% owner of the company. His company had an inventory of about 60 to 70 vehicles. Mr. Mangat drove the vehicles during business hours, and he would normally drive one of the Punjab Auto Sales Inc. vehicles home after business hours.

At home, during off hours, and on the weekends, Mr. Mangat would drive his personal vehicles that were insured with Dominion.

The keys for the Punjab Auto Sales Inc. vehicles were kept at the dealership in a lockbox when the business was closed. Mr. Mangat, and his business partner, Mr. Lamba, had access to the dealership and the keys for the Punjab Auto Sales Inc. vehicles at any time.

On the day of the accident Mr. Mangat gave the keys to the Punjab Auto Sales Inc. Dodge Caravan to Komal Lamba so that she could drive his son, Jasmandeep, and Komal's brother home. This information in the Agreed Statement of Facts is followed by the sentence, "He then closed the dealership for the day." Although I do not believe that it is necessary for my conclusions that follow, should it be important I infer from this evidence that Mr. Mangat was at his dealership when he gave permission to Komal Lamba to take the Punjab Auto Sales Inc. Dodge Caravan, and that this occurred during business hours.

The essence of the position advanced by Dominion in respect of Inderjit Mangat focuses on the fact that as a principal of the Punjab Auto Sales Inc. company, Mr. Mangat had standing authority over the handling of the dealership's vehicles at all times. He emphasizes that either Mr. Mangat or his business partner had access to any of the Punjab Auto Sales Inc. vehicles whenever they wished. Their access was not limited to using the vehicles during business hours, but instead, as principals of the company they were able to make whatever use of the vehicles they wanted to whenever they wished to do so. To emphasize this point counsel references the evidence that Mr. Mangat normally drove a Punjab Auto Sales Inc. vehicle to his home after business hours. Therefore, counsel for Dominion argues that the vehicles of Punjab Auto Sales Inc. were available for the regular use of Mr. Mangat at any time.

Dominion's position is founded on the control Mr. Mangat could exercise over the use of the Punjab Auto Sales Inc. vehicles to support the conclusion that those vehicles were therefore "being made available" to him.

Dominion's counsel stresses that there is nothing in section 66 (1) (a) that requires the availability for regular use be connected to the business operation of the corporation making the vehicle available. In fact, the cases make it clear that the "regular use" of the vehicle can be business, personal, or both.

Federated's counsel submits that Federated is not asserting that there has to be some kind of business use for the Federated coverage to apply. He argues however, that this is a priority dispute where a choice has to be made as to which of two insurers who have an obligation to pay SABS has the highest priority to do so. As such, section 66 (1) (a) should be interpreted in accordance with the reasonable expectation of the parties that it would be the Mangat's personal insurer who should be responsible to pay the claim in these circumstances, not the insurer of Punjab Auto Sales Inc.. He argues that this would be an appropriate allocation of risk considering that Mangat's personal insurer would be receiving a premium for the risk while Punjab Auto Sales Inc. insurer would not.

Federated's counsel submits that if section 66 (1) (a) is interpreted in this light that it would make sense to conclude that the Punjab Auto Sales Inc. vehicles ceased to be available to Mr. Mangat for his regular use when there was no longer any business connection that could be reasonably inferred from the circumstances of their use. Otherwise, it would be impossible to draw any line with respect to when the Punjab Auto Sales Inc. vehicles were being made available to Mr. Mangat. To conclude that the vehicles were available to Mr. Mangat at all times would, in effect, grant him the perpetual "floating charge" as a deemed named insured that Justice Belobaba has said is an improper interpretation of section 66 (1) (a). The status is only conferred by section 66 (1) (a) if the vehicle is being made available "at the time of the accident".

I will begin my analysis by stating what is a trite but an important concept. An adjudicator must be cautious in deciding the case on the facts and evidence of the case

before the adjudicator, and not on the facts and evidence of a different or hypothetical case.

I will examine first whether the vehicles of Punjab Auto Sales Inc. were being made available to Inderjit Mangat by a corporation for his regular use. On the evidence set out in the Agreed Statement of Facts, I have no difficulty in concluding that Punjab Auto Sales Inc. vehicles were being made available to Mr. Mangat for his regular use. The Agreed Statement of Facts establishes that as part of the normal operation of a business of which he was a principal, Mr. Mangat personally drove and/or operated the corporation's vehicles both during business hours and after business hours. As the case law indicates, actual use is evidence of availability and in my opinion there is no doubt that the Punjab Auto Sales Inc. vehicles were being made available to Mr. Mangat for his regular use.

In my view it is also important for my conclusion to note that as one of the principals of Punjab Auto Sales Inc. Mr. Mangat was not only able to drive or operate the vehicles at his discretion, but he also had the power to authorize the use of the vehicles by others. In this case, it is further evidence that Punjab Auto Sales Inc. vehicles were being made available for Mr. Mangat's regular use in that he permitted Komal Lamba to use one of the vehicles to drive his son and Ms. Lamba's brother home.

The more complex question to be answered is whether on the facts of the case, were Punjab Auto Sales Inc. vehicles being made available to Mr. Mangat **at the time of the accident**?

The analysis of the law that I believe is most relevant to determining this issue is found in the decision of Justice Belobaba in *ACE-INA v. The Cooperators General Insurance Company.*[11] Out of all of the cases dealing with the issue of regular use, the facts of *ACE-INA v Cooperators* are the most similar to the facts of this case, and yet there are important differences. In *ACE-INA* v.*The Cooperators*, the claimant was injured while a passenger in a vehicle insured by The Cooperators. At the time of the

[11] *Supra*, note 6.

accident, the claimant was employed with Enterprise Rent a Car. Enterprise was insured by ACE-INA. The claimant was a customer service representative who had access to rental vehicles while working. Once his work day was over he could no longer drive the cars. He was not permitted to take vehicles home. Justice Belobaba summarized the situation of the availability of the vehicles by saying that Enterprise cars were made available to the claimant but only when he was at work. The accident occurred when the claimant was off work and riding in a friend's car.

On these facts the arbitrator found that the claimant was a deemed named insured on the ACE-INA policy. He concluded as follows, *"I find that once an individual has been deemed to be a named insured by virtue of the factual situation in the application of s. 66, the status of being a "named insurer"* (sic) *under the policy remains even if at the time of the accident the employer is not making a specific vehicle available to the employee."*

On appeal Justice Belobaba reversed the arbitrator's decision. He said that the important question to ask is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car?

It was in this factual context that Justice Belobaba made his comments about "floating charge". The point of his comments is that the deemed named insured status conferred by section 66 (1) (a) is only conferred on an individual at times when a vehicle is being made available to him and an accident occurs at that time. If an accident occurs at a time when for whatever reason a vehicle has ceased to be available to the individual then he is not a deemed named insured. Justice Belobaba held that the Enterprise vehicles ceased to be available to the employee when his working hours ended. Therefore his status as a deemed named insured also ceased when his working hours ended. Since the accident occurred outside the employee's working hours the Enterprise vehicles were not being made available to the employee at that time.

To illustrate the operation of section 66 (1) (a), Justice Belobaba gives three examples, two based on the nature of the employee's relationship with the employer

from the facts of his case, and one with an important difference. Justice Belobaba's examples also demonstrate that the claimant does not have to be driving or operating the vehicle being made available to him, nor does he have to be assigned a specific vehicle in the fleet for him to acquire deemed named insured status under section 66 (1) (a).

In the first example the employee drives a company vehicle during working hours, and stops to buy a coffee at a restaurant. While crossing the street as a pedestrian he is struck by another vehicle. Justice Belobaba concludes that section 66 (1) (a) would apply and the insurer of the employer's vehicle would pay SABS. The reasoning here is that since the accident occurred during the employee's working hours, the employer's vehicle is still being made available to the employee notwithstanding that at the time of the accident he was engaged in an activity that was not work related.[12]

In the second example, the employee is at work and on duty. He is ready to drive one of several of his employer's cars but no specific car has yet been selected. He walks across the street to buy a coffee and is hit by another car. Section 66 (1) (a) applies even if no specific vehicle had yet been made available to him. It was sufficient that he was at work and one or more of the employer's insured vehicles were being made available to him.[13]

What determines the result in the above examples is the fact that the employer's vehicles were made available to the employee during working hours, and the employee's accident occurred during working hours. As long as the accident occurred during the employee's working hours, the same time that the employer's vehicles were being made available to him, it did not matter whether the activity he was engaged in at the moment the accident occurred was personal or work related, he was nevertheless a deemed named insured pursuant to section 66 (1) (a). It is the terms of the employee's relationship with his employer in respect of his access to vehicles that determines whether vehicles are being made available at a particular time.

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[12] *Supra,* note 6, at para 18.
[13] *Supra,* note 6, at para 23.

The third example is in my opinion the most important for the facts of the case before me. In this example the employee drives the company car as a sales rep but is allowed to take the car home and use it for personal transportation. On a Saturday evening, he leaves the car in his driveway and is a passenger in his friend's car when they are involved in an accident. Justice Belobaba concludes that on these facts section 66 (1) (a) would apply and the company's insurer would pay the SABS.

The important difference here is that not only is the employer's vehicle being made available to the employee during working hours, but it is also being made available to him for personal use outside of working hours. The nature of his activity, and the fact that he was not actually using this vehicle at the time of the accident, do not matter. The vehicle was still being made available to him at the time of the accident.

In my opinion, the *ratio* of *ACE-INA* v. *The Cooperators,* is that determining whether vehicles are being made available "at the time of the accident", requires that the focus be on the nature of the individual's control over the vehicle(s) being made available, or his authority to use the vehicle(s) at the time of the accident. The nature of the individual's activities, or the actual use to which the vehicle is being put are relevant only in so far as they may be within the scope of, or outside the scope of the individual's control or authority over the vehicles.

Applying the law as stated in *ACE-INA v. The Cooperators*, to the facts of the case before me, I find that Inderjit Mangat was, at the time of the accident, a deemed named insured under the Federated policy insuring the Punjab Auto Sales Inc. vehicles.

As a co-owner of Punjab Auto Sales Inc., Mr. Mangat had control over the use of the Punjab Auto Sales Inc. vehicles both during working hours and after regular working hours. He had the authority to use the vehicles himself or to allow others to use them. This authority did not cease after the dealership closed. There is nothing in the Agreed Statement of Facts that would suggest any restriction on Mr. Mangat's control or authority over the use of Punjab Auto Sales Inc. vehicles when the dealership was closed. In fact, to the contrary, there is evidence in the Agreed Statement of Facts that

Punjab Auto Sales Inc. vehicles were available to Mr. Mangat on a personal basis after regular working hours.

It must be remembered that is not necessary that Mr. Mangat had been driving, operating, or had been a passenger in the Punjab Auto Sales Inc. vehicle when the accident occurred. The question is, was a Punjab Auto Sales Inc. vehicle being made available to him when the accident occurred?

Counsel for Federated argued that finding Mr. Mangat had Punjab Auto Sales Inc. vehicles available to him at all times would in effect create a "floating charge" in his favour, and this would run afoul of Justice Belobaba's reasoning in *ACE-INA v. The Cooperators*. I disagree. As I have explained, Justice Belobaba's "floating charge" comments were made in the context of describing when the deemed named insured status would attach to an individual and when it would cease. The key to the status attaching, according to Justice Belobaba's reasoning, depends on whether the individual has control over or permission to use the use a vehicle at the time an accident occurs. If an individual has control over or permission to use a vehicle, then deemed named insured status exists. If the individual does not have control over, or permission to use a vehicle, then the deemed named insured status does not exist, or if it did exist, it ceases.

This is an appropriate point to reiterate the comments I made at the beginning of my analysis. It is important for the adjudicator to decide the case on the facts before the adjudicator. There are important differences in the facts of this case that bring about a different result than the result in *ACE INA v. The Cooperators*. Had the facts of Justice Belobaba's case been those in his example that I have described on page 13 herein, he would have found that the Enterprise fleet policy would have had to pay SABS.

The facts of this case are even more compelling than those in Justice Belobaba's third example. Mr. Mangat was not merely an employee of Punjab Auto Sales Inc., he was a co-owner of the company. Mr. Mangat did have Punjab Auto Sales Inc. vehicles available to him both during working hours and after working hours. He had both business and personal use of the vehicles. Most importantly, he had unrestricted control

and authority over the use of the vehicles. When the accident occurred involving the Punjab Auto Sales Inc. vehicle, Punjab Auto Sales Inc. vehicles were being made available to Mr. Mangat.

Counsel for Federated submits that where priority is in issue, to have the risk of loss allocated to the appropriate insurer as intended by the drafters of section 66 (1) (a), on the facts of this case the section should be interpreted so that the deemed named insured status requires some type of business connection to the use of the Punjab Auto Sales Inc. vehicles. Otherwise, it is suggested, the interpretation could become so open ended as to support the kind of argument that was advanced in *Gore Mutual Insurance Company v. Guarantee Company of North America*.[14]

In that case Gore argued that because the claimant regularly used the municipal transit system to travel to and from work that this meant she was a deemed named insured under the policy of insurance covering the municipal transit vehicles. It was argued that these municipal vehicles were being made available to her at a time when an accident occurred involving a stolen (non-municipal) vehicle. There was no evidence (nor was it suggested) that apart from riding in public transit vehicles, the claimant had any control or authority over the use of municipal transit vehicles.

I think the facts of the *Gore* case are quite distinguishable from this case, and in fact they are distinguishable on the very point that is the foundation of the *ACE INA v. The Cooperators* decision. In upholding arbitrator Samis' decision that the claimant was not a deemed named insured on the policy covering the municipal vehicles, Justice Echlin cited a number of section 66 cases and the basis for the adjudicators' conclusion as to why the status of "deemed named insured" existed. He stated *"...all involved cases in which the accident benefits claimant had some indicia of control over the automobile, unrestricted access to the vehicle, or some form of personal connection, often arising out of the employment relationship."*[15]

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[14][2010], O.J. No. 2925 (ONSC)
[15] *Supra*, para 34.

I am not persuaded that a finding that Inderjit Mangat is a deemed named insured opens the "floodgates". I do not think it does any more or any less than apply the law I have discussed, particularly *ACE INA v. The Cooperators*, to the specific facts of this case.

Counsel for Federated argued that an appropriate interpretation of section 66 (1) (a) requires that Dominion, as the insurer of Mr. Mangat's personal vehicles, should be responsible to pay SABS as it would have received a premium in contemplation that such a loss might have to be paid, whereas Federated would not have received such a premium. It was submitted that Federated would be expecting to insure losses that had some connection to the operation of the Punjab Auto Sales Inc. business, while Dominion would be expecting to insure losses that have a personal connection to Mr. Mangat. In this case, since Mr. Mangat's son, who had no connection with the business, was injured at a time when the Punjab Auto Sales Inc. vehicle was being used for a personal rather than business purpose, it is appropriate that Dominion, rather than Federated should pay SABS.

Even if I accepted, which I do not, that this is a relevant consideration for me to take into account in interpreting section 66 (1) (a), there is no evidence before me as to the basis upon which Federated and Dominion chose to underwrite their policies. I am not prepared to find that one or the other of these insurers did or did not receive a premium for the kind of loss that occurred in the circumstances. It is not so clear to me that I could take judicial notice of the proposition that it would have been Dominion rather than Federated who would have charged a premium for and expected pay the loss in the circumstances.

Again, even if I thought this was a relevant factor to consider, and I thought some judicial notice would be permissible, I would be inclined to conclude that both these very astute insurers factored in the possibility of having to pay such a loss when setting their premiums. It should be remembered that both the Federated and Dominion policies did provide for the payment of SABS in exactly the circumstances that occurred in this case.

I think it is also worth noting that the standard Garage Automobile Policy that Federated issued to Punjab Auto Sales Inc. provides for the payment of SABS to any insured person (and that includes Jasmandeep Mangat) in the case of an accident involving an "owned automobile". An "owned automobile" is defined in the policy as including an automobile owned by Punjab Auto Sales Inc. and **used for pleasure** or in connection with the business...".

In my view my decision on the interpretation of section 66 (1) (a) must consider only the plain wording of the section, the evidence in the Agreed Statement of Facts, and properly apply the law set out in the cases that I have discussed. Principles of statutory interpretation require me to interpret section 66 (1) (a) so as to give effect to its legislative intent. It is not open to me however, to import wording that is not there into the section or to give effect to a purported insurance industry intent of which I have no evidence. That is what I would have to do to accept Federated's argument, and find that the vehicles of Punjab Auto Sales Inc. ceased to be available to Mr. Mangat once there was no longer any business connection to their use.

The section makes no reference to such a requirement. In fact, the case law makes it clear that reference to regular use is not restricted to a specific kind of use such as business or personal. The case law further indicates that the section refers to an "individual" to whom a vehicle is being made available. There is no statutory requirement mandating a business relationship such as, for example, employer-employee.

To conclude my analysis I will make reference to the very recent decision of the Ontario Court of Appeal in *Security National Insurance Company v. Markel Insurance Company, and Kingsway General Insurance Company v. Gore Mutual Insurance Company.*[16] This decision was an appeal from arbitral and Superior Court decisions in two section 66 cases. The issue in these cases was not the same as the issue in the case before me. The narrow issue there was whether an individual who operates as a sole proprietor could become a deemed named insured where the sole proprietorship

[16] [2012] O.J. 683 (ONCA)

makes a vehicle available to the individual. I refer to this case to note the approach taken by the Court of Appeal in interpreting section 66 (1) (a).

Justice Pepall, writing for a unanimous Court, approached the issue by looking at the "plain language" of the section. She states, *"I start by observing that s. 66 (1) (a) is not preclusive. There is nothing in subsection (a) that precludes a sole proprietorship from making a vehicle available to the sole proprietor.*[17] Later, she says, *"the subsection contemplates that an individual operating a sole proprietorship can make a vehicle available to him or herself. Put differently, there is no requirement that the two parties be divorced from one another. In my view, on a plain reading of s. 66 (1) (a), this is clear."*

Taking the same approach to the interpretation of section 66 (1) (a) on the facts of this case, if Inderjit Mangat's circumstances come within the plain language of the section, as I have found that they do, then there is no basis to preclude a finding that he is a deemed named insured under the Federated policy.

Justice Pepall also discusses the legislative intent of section 66 (1) (a). She states, in part, *"...the intent of the section is that the commercial insurer should be responsible for the accident benefits arising from the operation of the commercial vehicle... If a vehicle is made available for regular use by any of the listed entities, the risk is to be borne by the insurer of that vehicle. This, in my view, makes sense and should be so in spite of any past practice in the insurance industry."*[18]

Examining the facts of this case in the above context, simply put, the obligation to pay SABS arose out of the operation of the commercial vehicle owned by Punjab Auto Sales Inc., and insured by Federated, not from a vehicle owned by Inderjit Magat, and insured by Dominion.

I draw support for my decision from the approach taken by the Court of Appeal to the interpretation of section 66 (1) (a).

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[17] *Supra*, at para 59.
[18] *Supra*, paras 63, 64.

Conclusion

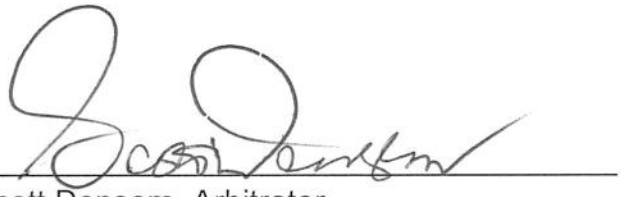
For the foregoing reasons I conclude as follows:

1. Jasmandeep Mangat **was not**, at the time of the accident, a deemed named insured under the policy issued by Federated Insurance to Punjab Auto Sales Inc.
2. Inderjit Mangat **was**, at the time of the accident, a deemed named insured under the policy issued by Federated Insurance to Punjab Auto Sales Inc.
3. Federated Insurance has the highest obligation to pay SABS, pursuant to section 268 (5.2) of the *Insurance Act.*

The consequence of my conclusions is that Dominion Insurance has been successful in seeking to transfer to Federated Insurance responsibility for the payment of SABS to Jasmandeep Mangat. Dominion Insurance is entitled to its costs of arbitration including the arbitrator's fees and disbursements

If counsel are unable to resolve the issue of costs, I invite them to contact my Coordinator to arrange a post-arbitration conference to discuss the issue, and if necessary, make arrangements to have me determine the costs issue.

Dated at Toronto, this 31st day of October, 2012



Scott Densem, Arbitrator