IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE AND FARMERS MUTUAL INSURANCE COMPANY (LINDSAY)

Respondents

AWARD

Heard: October 8, 2013, June 10 & 13, 2014

Counsel:

John Friendly for the Applicant, Her Majesty the Queen in Right of Ontario

Michael Nicolis for the Respondent, Farmers' Mutual Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This arbitration involves a priority dispute pursuant to Regulation 283/95 of the *Insurance Act*[2] between Dominion of Canada General Insurance Company ("Dominion"), Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance ("HMQ") and Farmers' Mutual Insurance Company (Lindsay) (now the Commonwell Mutual Insurance Group). For ease of reference and clarity I will refer to this respondent as "Farmers'" throughout my Award).

Chase Nicholson ("the claimant") was seriously injured in an accident occurring August 14, 2009. The claimant was operating a, 2006 Suzuki Eiger four wheel off road vehicle ("the ATV") when he was injured. A claim for SABS was advanced to Dominion, the automobile insurer of the claimant's grandparents, Sandra and Norman Chaput ("the grandparents"). Dominion paid SABS, and continues to pay SABS to the claimant. Dominion commenced a priority dispute with HMQ, asserting that Dominion was not obliged to pay SABS because the claimant was not principally dependent for financial support or care upon the grandparents.

HMQ served a priority dispute notice on Farmers' asserting that the claimant was entitled to the payment of SABS pursuant to one or more of the following policies of insurance Farmers' had in place at the time of the accident: A standard policy of motor vehicle liability insurance number 0015023A01 ("the OAP policy"), commercial general liability policy number 0015023C01 ("the CGL policy"), and commercial

[1] The facts in this introduction derive from the Exhibits hereinafter itemized, and from non-contentious submissions in the parties' *facta*.
[2] R.S.O. 1990, C. I.8, as amended.

umbrella liability policy number 0015023C02 (“the commercial umbrella liability policy”).

Subsequent to the commencement of arbitration the parties agreed that Dominion is not the priority insurer because it could not be established that the claimant was principally dependent for financial support or care upon the grandparents. Accordingly, the arbitration has been dismissed against Dominion, and the matter proceeded to a hearing involving only HMQ and Farmers’. This Award determines whether HMQ, or Farmers’ is the priority insurer ultimately responsible for the payment of SABS to the claimant, and to reimburse Dominion for SABS paid.

The Issue

Pursuant to an Arbitration Agreement executed June 13, 2014, the parties submitted the following questions to me as Arbitrator for resolution:

1. a. Is the applicant or one of the respondents, the priority insurer responsible for payment of statutory accident benefits to Chase Nicholson arising from a motor vehicle accident that occurred on August 14, 2009?

i. Whether the ATV was insured for the purposes of SABS at the time of the accident, under any Farmers’ Mutual policy.

As I indicated in the Introduction, subsequent to the commencement of arbitration Dominion’s involvement in the arbitration was terminated, so the determination of priority relates to only HMQ and Farmers’.

Resolving these questions requires an analysis of several sub-issues which I will identify and discuss in the Analysis portion of this Award.

The Evidence

The evidence for this arbitration consisted of six documentary exhibits:

Exhibit 1: Joint Document Brief prepared by HMQ, Tabs 1 to 9.

Exhibit 2: General Occurrence Report of the Kawartha Lakes Police Service, dated June 20, 2009 (one page).

Exhibit 3: *Off Road Vehicles Act* Application for Transfer (one page).

Exhibit 4: Insurance Bureau of Canada Internet page and accompanying blank Notice of the Vehicle Brand form (three pages).

Exhibit 5: Supplemental Joint Document Brief prepared by HMQ, Tabs 1 to 14.

Exhibit 6: Economical Insurance letter dated June 13, 2014 regarding automobile insurance covering a 1995 Dodge Ram Laramie from July 13, 2009 to September 1, 2010.

Analysis

I will now outlinecertain additional facts important to the determination of the issue which have been agreed upon by the parties. The facts I am setting out here

can bereferenced in either the Agreed Statement of Facts, or the Further Agreed Statement of Facts, with relevant documents to be found in Exhibits 1 and 5.[3]

The ATV being driven by the claimant at the time of the August 14, 2009 accident had been originally owned by Samuel Windrem. Mr. Windrem had registered his ownership of the ATV, and it was plated (plate number 27KP4) under the *Off-Road Vehicles Act.*[4]

On June 20, 2009 Mr. Windrem reported to the police that the ATV had been stolen. At the time of the theft the ATV was in operating condition, as confirmed by the Automobile Proof of Loss which designated the vehicle "*driveable*".

Mr. Windrem provided to Farmers' a sworn Automobile Proof of Loss dated August 7, 2009. The effect of the Automobile Proof of Loss was to transfer any "*right, title and interest*" in the ATV to Farmers', in exchange for a payment by Farmers' to Mr. Windrem of $5,915.00.

On August 11, 2009, Farmers' completed an IBC Branding Form filed with the Ministry of Transportation ("MTO") designating the vehicle as "*Stolen, Not Recovered*". The form also indicated that the ATV had been insured by Farmers' pursuant to a motor vehicle liability policy issued to Mr. Windrem as number 65684A01.

[3] Exhibit 1, Tab 1, Exhibit 5, Tab 1.
[4] Subsection 3 (1).

There was much debate at the hearing as to whether Farmers' had used the correct form to notify the MTO (or was even entitled to notify the MTO at all), and had used a valid designation for the ATV in the form by indicating the vehicle was stolen.

In summary, HMQ took the position that only the police could file a form with the MOT designating a vehicle as stolen, and that it was not open to an insurer such as Farmers' to do so. The only brand an insurer such as Farmers' could validly apply to a vehicle when filing such a form was one of "*Irreparable*", "*Salvage*", "*Rebuilt*", or "*None*".

Farmers' submitted that there was a customary course of dealing between insurers and the MTO whereby the MTO permitted insurers to file forms like the one filed in this case to designate vehicles as having been stolen since the purpose for filing such a form was to ensure that there could not be subsequent transactions involving the vehicle once it had been designated stolen. The purpose of the system was achieved, whether the police or an insurer, or both, advised the MTO.

In my opinion for the purposes of the issue which I must decide, nothing turns on determining whether Farmers' was technically entitled to inform the MTO about the stolen ATV, to use the form it used, or whether "stolen" was a brand an insurer was or was not permitted to have attached to a vehicle.

If the filing of the IBC Vehicle Branding Form has any significance, I am of the view that it simply further confirms that the ATV was considered to be in operating condition when it was stolen, otherwiseFarmers'would have designated it as "Irreparable", or possibly "Salvage".

Farmers' registered its ownership of the ATV with the MTO on August 12, 2009. The Vehicle Transfer portion of the ownership indicates that the vehicle was registered under the *Off Road Vehicles Act*, and that it was "FIT". It shows the brand as being "NONE" and that the vehicle was "UNPLATED".

The parties have agreed that Farmers' ownership became effective on August 12, 2009, and at that point Mr. Windrem's insurable interest in the ATV ceased. They have also agreed that Farmers' took the steps I have described in the preceding paragraphs "*primarily for the purpose of recovery of the stolen ATV for potential salvage*".

The accident involving the claimant occurred two days later, on August 14, 2009. Farmers' was advised on August 17, 2009 that the ATV had been found and of its location. Farmers' recovered the ATV and sold it to Peterboro Auto Recyclers on September 22, 2009. The sale price for the ATV was $850.00. Peterboro Auto Recyclers registered its ownership of the ATV on September 23, 2009, describing the ATV as "fit".

Farmers' had taken no steps to add the ATV to the OAP policy it had in place insuring two, 2008 Jeep/Compass Sport vehicles. It was not Farmers' practice to add to the OAP policy, or to any policy of motor vehicle liability insurance, vehicles which had beenreported stolen by Farmers' insureds, and for which Farmers' had transferred ownership to itself.

To be entitled to the payment of SABS the claimant must be found to have suffered animpairment as a result of an accident. The SABS regulation defines

"*accident*" as an incident in which the use or operation of an automobile directly causes an impairment.[5]In this case there is no dispute that the claimant suffered an impairment directly caused by the use or operation of the ATV.

One of the issues to be resolved however, is whether the ATV is an "automobile". If the ATV is not an automobile, it could not be insured for the purposes of SABS, and neither Farmers' nor HMQ would have an obligation to pay SABS to the claimant.

Subsection 224 (1) of the *Insurance Act* defines "*insured*" as including every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person. It also defines "*occupant*" as including the driver of an automobile.

Pursuant to subsection 268 (2) of the *Insurance Act*, if Farmers' can be considered the insurer of the ATV involved in the accident, then the claimant, an occupant of the ATV at the time of the accident, is entitled to the payment of SABS from Farmers'.[6]The obligation to pay SABS can only default to HMQ if Farmers'was not the insurer of the ATV at the time of the accident. HMQ is clearly the payor of last resort.[7]

I will now consider the first underlying issue – whether the ATV was an "automobile", as the answer to that question determines whether the ATV could be

[5] Ontario Regulation 403/96 – Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996, as amended, subsection 2 (1).
[6] Subsection 268 (2) 1. i and ii.
[7] Subsection 268 (2) 1. iv.

insured for SABS, and thus whether either of Farmers' and HMQ have an obligation to pay SABS.

In *Adams v. Pineland Amusements Ltd. and Roland Potvin, Kingsway General Insurance Company, Third Party*[8] the Ontario Court of Appeal accepted as appropriate a three-part test to determine whether a particular vehicle is an "automobile" for the purposes of an owner's policy of motor vehicle liability insurance.[9] The test is as follows:

> (i) Is the vehicle an "automobile" in ordinary parlance?
>
> If not, then,
>
> (ii) Is the vehicle defined as an "automobile" in the wording of the insurance policy?
>
> If not, then,
>
> (iii) Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?[10]

Whether the ATV could be described as an "automobile" in ordinary parlance could be argued either way. I will defer my analysis of the second branch of this test to when I deal with whether the ATV was covered under any of the three Farmers' insurance policies. For present purposes, I conclude that the general question of whether the ATV was an "automobile" in the conceptual sense is clearly answered by considering the third branch of the test.

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[8] 2007 ONCA 844 (CanLII) ("*Adams v. Pineland*").
[9] The test was enunciated in *Grummet v. Federation Insurance Co. of Canada*, (1999), 46 O.R. (3d) 340, at para. 14.
[10] *Adams v. Pineland*, paragraph 7.

The relevant portion of the definition of "motor vehicle" *in the Highway Traffic Act*[11] states as follows: "*motor vehicle" includes an automobile…and any other vehicle propelled or driven otherwise than by muscular power…*".

Subsection 224 (1) of the *Insurance Act* defines "*automobile*" as including "*(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy…*".

The Court Of Appeal in *Adams v. Pineland*deemed the section 224 definition to be the "governing (statutory) definition" for the purposes of determining whether a vehicle was an "automobile".

The Court of Appeal has also stated that the subsection 224 (1) definition of "automobile" should be given a broad interpretation:

> The use of the word "includes" signals an intention to expand the scope of the ordinary meaning of the word "automobile" to capture motor vehicles which are not automobiles in the ordinary sense, but which are statutorily required to be insured under a motor vehicle liability policy.[12]

The model of ATV under consideration in this case was a four wheeled vehicle, powered by an engine. Therelevant part of the definition in the *Off Road Vehicles Act* defines an "off-road vehicle" as, "*…a vehicle propelled or driven otherwise than by muscular power or wind and designed to travel…(b) on more than three wheels and being of a prescribed class of vehicle.*"[13]

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[11] R.S.O. 1990, C. H.8, as amended, subsection 1. (1) Definitions.
[12] Per Doherty J.A., in *Copley et al. v. Kerr Farms Limited*, 2002 CanLII 44900 (ONCA), para. 12. ("*Copley v. Kerr Farms*").
[13]*Off-Road Vehicles Act*, Section 1. Definitions.

The version of Ontario Regulation 863 enacted pursuant to the *Off-Road Vehicles Act* in force at the time of this accident states that for the purposes of the definition of "*off-road vehicle*" in the Act, the following vehicles are prescribed: "*…1.2 Vehicles designed for utility applications or uses on all terrains that have four or more wheels and a seat that is not designed to be straddled by the driver.*"

Based on the facts in this case, and the applicable law, I find that the ATV was a motor vehicle which comes within the prescribed class of vehicles as set out in Ontario Regulation 863 to which the *Off-Road Vehicles Act* applies.

To find that the ATV was an "automobile" as defined in the *Insurance Act*, it is necessary to determine that at the time the accident occurred the ATV was required by any Act to be insured under a motor vehicle liability policy. Specifically, at the time of the accident was the ATV required to be insured under the *Off-Road Vehicles Act*?

The relevant sectionsof the *Off-Road Vehicles Act* respecting insurance read as follows:

> 15 (1) Insurance – No person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy in accordance with the *Insurance Act*.
>
> (2) Idem – No owner of an off-road vehicle shall permit it to be driven unless it is insured under a motor vehicle liability policy in accordance with the *Insurance Act*.
>
> …(9) Exemption – subsections (1), (2)…do not apply where the vehicle is driven on land occupied by the owner of the vehicle.

The case law makes it clear that the determination of whether a vehicle was required to be insured is both time sensitive and context sensitive insofar as the analysis of the applicable legislative provisions is concerned. One must look at what the legal requirement for insurance was for the vehicle at the time of a particular event – *e.g.* an accident. The authoritative case on this point is*Copley v. Kerr Farms*.In that case the Court of Appeal held that although a tomato wagon could be a motor vehicle, it was not an automobile. It was not an automobile in common parlance, and it did not satisfy the subsection 224 (1) *Insurance Act* definition because at the time of the accident it was not being operated on a highway so it was not required to be insured under the *Compulsory Automobile Insurance Act*.[14]

The Court of Appeal followed its own reasoning from *Copley v. Kerr Farms* in *Adams v. Pineland*. This case decided that although a go kart met the definition of motor vehicle, it did not satisfy the definition of automobile. It was not an automobile in ordinary parlance. It alsodid not satisfy the subsection 224 (1) *Insurance Act* definition because at the time of the accident it was being operated on a private track, not on a public highway. Therefore, it was not required to be insured under the *Compulsory Automobile Insurance Act*.

Bouchard v. Motors Insurance Corporation and Financial Services Commission of Ontario[15]is especially relevant to the facts of this case. The Divisional Court held that a “pocket bike” (an off-road, motorized bike to which the *Off Road Vehicles Act* was found to apply) was a motor vehicle, but it was not an automobilefor

[14] R.S.O. 1990, C. 25.
[15] 2013, ONSC 2205 (CanLII) (“*Bouchard v. Motors Insurance*”).

subsection 224 (1) *Insurance Act* purposes because at the time of the accident it came within the exemption provided in subsection 15 (9) of the *Off-Road Vehicles Act.* Therefore,it was not required to be insured under the Act. Subsection 15 (9) of the *Off-Road Vehicles Act* providesan exemption from the subsection 15 (1) and (2) requirements to insure off-road vehicles under a policy of motor vehicle liability insurance if the off-road vehicle is being operated on land occupied by the owner of the off-road vehicle.

In my opinion, when the law as I have stated it above is applied to the agreed facts of this case, the only reasonable conclusion to reach is that the ATV being driven by the claimant was, at the time of the accident, an automobile within the meaning of the subsection 224 (1) definition in the *Insurance Act*.

Giving the words of subsection 15 (1) of the *Off-Road Vehicles Act* their plain and ordinary meaning yields the result that an off road vehicle – and I have found that the ATV was an off road vehicle, which is being driven by any person must be insured under a policy of motor vehicle liability insurance, unless excepted from this requirement by another statutory provision. The only statutory provision which could except the ATV from this requirement would be subsection 15 (9). For subsection 15 (9) to apply, the claimant would have had to have been operating the ATV on land owned by Farmers', the owner of the ATV. The claimant was not operating the ATV on land owned by Farmers', so the subsection 15 (9) exception does not apply, and the ATV was required to be insured under a policy of motor vehicle liability insurance at the time of the accident. This makes the ATV an "automobile" within the subsection 224 (1) definition in the *Insurance Act.*

My conclusion that the ATV was an "automobile" within the meaning of the subsection 224 (1) *Insurance Act* definition means that the claimant is entitled to the payment of SABS by either Farmers' or HMQ. I will now address the remaining sub issues to determine which of Farmers' or HMQ has that obligation.

It is an agreed fact that Farmers' took no active steps to insure the ATV under a policy of motor vehicle liability insurance. Indeed, Farmer's practice was not to add stolen vehicles such as the ATV in this case to any policy of motor vehicle liability insurance.

HMQ argued in its written and oral submissions that the question of whether there was SABS coverage available to the claimant under any of Farmer's insurance policies should be approached from the perspective that the purpose of the compulsory insurance scheme for automobiles, and the SABS system, is to ensure that the public is protected from losses caused as the result of the use and operation of automobiles. Further, the context for interpreting coverage available under the Farmer's policies is that the cost of providing this protection through the *Insurance Act* and related statutes is the responsibility of owners and operators of automobiles who benefit from the use and operation of those automobiles, and the private insurers who benefit from providing automobile insurance to those automobile owners and operators. The cost should not be visited upon the public at large.

In support of this submission, HMQ cites comments in the case law, such as those made by the Court of Appeal in *Jubenville v. Jubenville.*[16]In supporting the

[16] [2013] O.J. No. 2094.

motion judge's expansive definition of "insured" in an uninsured motor vehicle case, speaking for the Court, Rouleau J.A. said:

> …the language of the *Insurance Act* should be interpreted harmoniously with the scheme and object of the Act and the intention of Parliament. As the motion judge noted, the purpose of the *Insurance Act* is to internalize the costs of driving so that they do not fall on the public purse.[17]

In light of this statement of public policy in respect of the purpose of automobile insurance, HMQ submitted that Farmers' was no ordinary vehicle owner. It was an owner with the specialized knowledge of an automobile insurer. A vehicle owner, especially an owner who is also an automobile insurer knows, or ought to know, that there is a risk that the use or operation of any vehicle – stolen or otherwise, can cause injury, and that risk should be insured against. Therefore, Farmers' should have taken positive steps to insure the ATV, and it ought not to be allowed to rely upon its own failure to do so to avoid paying SABS.

The legislature has not deemed it appropriate to require that a motor vehicle liability policy provide liability coverage if the owner has not consented to the possession of his vehicle by a person who is negligent in the use or operation of the vehicle,[18]HMQ emphasizes that subsection 239 (2) of the *Insurance Act*dealing with owner's policies of motor vehicle liability insurance stipulates that such a lack of consent does not invalidate a claim for SABS except as provided in the exclusions set out in the SABS.

[17] Jubenville v. Jubenville, para. 23.
[18] See Highway Traffic Act, Section 192.

In effect, section 30 of the SABS preserves a claimant's entitlement to the payment of all SABS except for income replacement benefits, non-earner benefits, educational expenses, visitors expenses, and housekeeping and home maintenance expenses, even if the driver knew or ought reasonably to have known that he was operating the automobile while it was not insured under a motor vehicle liability policy, or without the owner's consent.For a pre-September 2010 motor vehicle liability policy such as is the case here, a claimant to whom one or more of these exclusionary parts of section 30 of the SABS applies would still be able to advance a claim for up to $100,000 medical and rehabilitation benefits, and $72,000 for attendant care. These limits rise to one million dollars for each of these benefits in the case of catastrophic impairment.

One might suggest that in this case it would be difficult to see how the claimant, who was one day short of his 11th birthday at the time of the accident, could be found to have known or reasonably ought to have known that he was operating the ATV while it was not insured under a motor vehicle liability policy, or without the consent of Farmers', the owner of the ATV. In the absence of such knowledge, or presumed knowledge, his claim for SABS would not be limited in any way by a lack of consent. There is anexclusion for the SABS benefits previously mentioned in subsection 30 (1) (b) where the driver of the automobile was driving without a valid driver's license. The claimant did not have a valid driver's license. Query however, whether this exclusion would apply. The requirement to have a driver's license while operating an automobile is found in the *Highway Traffic Act*[19] which requires the

[19] See subsection 32 (1).

driver of an automobile to have a valid driver's license when operating an automobile on a highway.The claimant was not operating the ATV on a highway when the accident occurred.

In any event, I do not have to resolve these questions concerning which SABS the claimant is eligible to claim for the purposes of the issues in this arbitration.

Based on the foregoing arguments, HMQ submits that for public policy purposes, the situation in this case is effectively no different than had the claimant been involved in an accident after the ATV had been stolen from Farmers' insured, Samuel Windrem, but before Farmers' acquired Mr. Windrem's right, title and interest in the ATV, and had registered the ATV in its name. The motor vehicle liability policy Farmer's had issued to Mr. Windrem as owner of the ATV would have had to respond to pay either full, or at a minimum, reduced SABS to the claimant regardless of the fact that Mr. Windrem would not have consented to the claimant's use and operation of the ATV.HMQ argues that the situation should be no different here simply because Farmers', the new owner of the ATV, improperly failed to take positive steps to insure the ATV.

For its part, Farmers' argued that any obligation to insure the ATV it may have had must be looked at in the context of Farmers' as a vehicle owner, and not Farmers' as an automobile insurer. Its obligation to insure ought not to be any greater or lesser than any other vehicle owner.

Farmers' submits that its obligation as owner to insure the ATV, if any, must derive in this case from the *Off-Road Vehicles Act,* not from any special knowledge it

might have as an insurer concerning the risks of operating motor vehicles. Pursuant to subsections 15 (2) and (9) of the Act, an owner is only required to have an ATV insured under a motor vehicle liability policy if the owner permits it to be driven on land not occupied by the owner. Farmers' submits that it did not permit the claimant to drive the ATV. In fact, it was never Farmers' intention that anyone should drive the ATV. The ATV was, at least as far as Farmers' was concerned, an item for which it had acquired ownership rights from its insured by paying out a loss under its policy, and for which it hoped to recover some salvage value if the ATV was recovered from its "stolen" state.

Therefore, Farmers' submits that there was no statutory obligation on Farmers' as owner to have the ATV insured at the time of the accident because it did not permit the claimant to drive the ATV either at that time or at any time. The case law makes it clear that there is no general obligation on an owner to insure a vehicle under a policy of motor vehicle liability insurance merely because the vehicle is capable of automobile-like operation, or has in the past been operated under conditions requiring a policy of motor vehicle liability insurance to be in place. Nor do the cases say that a vehicle must be insured on the general grounds that the vehicle's use and operation carries with it the risk of injury to persons. The analysis of whether motor vehicle liability insuranceis required for any particular vehicle is both time sensitive and context sensitive.

Farmers' argued that in the event there was any obligation to insure the ATV in the circumstances of this case, it was the obligation of the claimant's father, Wayne Nicholson, to have made sure that a policy of motor vehicle liability insurance

was in place on the ATV at the time his son was driving it. There was no specific authority cited byFarmers' to support this proposition, other than the theory that the claimant was a minor and under the care of his father at the time the accident took place.

There is no evidence before me as to how the claimant came into possession of the ATV. The Agreed Statement of Facts stipulates this, and also the fact that there is no direct evidence as to the type of supervision or involvement in the incident of the claimant's father.

Obviously speculation on these circumstances would be inappropriate, and in any case, I do not believe it matters. On the evidence before me, Wayne Nicholson was not the owner of the ATV, so he could not have any statutory obligation under the *Off-Road Vehicles Act* to insure the ATV.

Even though I accept HMQ's submission regarding the purpose of Ontario's insurance legislation, I agree withFarmers' argument that Farmers' did not have a general obligation effective at all times to see that the ATV was insured pursuant to a policy of motor vehicle liability insurance. The statutory obligation under the *Off-Road Vehicles Act* to have the ATV insured under a policy of motor vehicle liability insurance could only exist for Farmers' as owner of the ATV if the claimant had Farmers' permission to drive the ATV at the time of the accident. The evidence is clear that the claimant did not have such permission.

I agree with Farmers' that just because it is an automobile insurer, it does not have a special, overarchingobligation to insure a vehicle under a motor vehicle

liability policy at all times. Farmers' obligation to insure the ATV was no greater than any other owner's obligation would have been in the circumstances.

Farmers' submitted that even if there was a failure to put in place a policy of motor vehicle liability insurance when one should have been in place, this does not create a policy of motor vehicle liability insurance (which is deemed to include SABS) which responds to the claimant's SABS claim. I also agree with this submission.

Determining that compliance with the *Off-Road Vehicles Act* in the circumstances of this case means that a policy of motor vehicle liability insurance should have been in place for the ATV to comply with the Act, is only useful insofar as it informs the definition of "automobile". The fact that a policy of motor vehicle liability insurance should have been in place according to the *Off-Road Vehicles Act* does not create a motor vehicle liability policy however, or coverage under another existing policy, unless the policy terms are such that coverage is provided.

In summary, either there was a policy of motor vehicle liability insurance covering the ATV at the time of the accident, which the *Insurance Act* deems to include SABS, or there was not. Since Farmer's did not take positive steps to issue a new policy of motor vehicle liability insurance covering the ATV, or to add it to an existing policy, SABS coverage, if any, must be found in the proper interpretation of any of the OAP policy, the CGL policy, or the commercial umbrella liability policy. The stated public policy purpose of Ontario's insurance legislation must be kept in mind, and could have some constructive application in the case of any ambiguity found in the wording of the policies under consideration, but in and of itself it cannot be used

to create coverage where there is no policy of motor vehicle liability insurance in existence.

Having dealt with HMQ's public policy argument, I have similar comments to make concerningFarmers' argument about the relevance of Farmers' "intentions" with respect to not wanting to create any coverage for the ATV under its existing policies. I agree with HMQ's submission that Farmer's intentions as to whether it wanted to have coverage on the ATV under any of its policies are irrelevant to the determination of whether any such coverage exists.

Farmer's submits that for the purposes of determining whether there was any obligation to insure the ATV, it should be treated as an automobile owner, not an automobile insurer. I agree. This approach must be applied however, throughout the analysis of all the issues. The irony in this case is that because Farmer's is both automobile owner/insured and insurer, it does not necessarily have the same interests as an ordinary automobile owner/insured.

The situation involving an ordinary automobile owner and an arms length insurer is different. The automobile owner wants his policy interpreted for coverage purposes as broadly as possible. The insurer, so as to limit its exposure, would prefer restrictive interpretations of the policy.

In my view, for the purposes of determining coverage, I must apply the principle that the courts have long applied in interpreting insurance contracts. As stated by the Court of Appeal in *Jubenville v. Jubenville*:

> …a principle of interpretation specific to insurance contracts and legislation is that any ambiguities in provisions governing the extent of coverage should be resolved in favour of the insured.[20]

Or as Laskin J.A. put it in *Heuvelman v. White,* specifically with reference to contracts of automobile insurance:[21]

> …This court's jurisprudence has long recognized that ambiguities in Ontario's automobile insurance coverage must be resolved against the insurer.

Therefore, in considering whether SABS coverage exists under any of Farmers' policies, the case must be treated as if Farmers' was an arms-length insurer, with an automobile owner/insured who would be seeking the broadest possible interpretation of policy coverage. As indicated, that is the principle which the courts have consistently applied to the interpretation of insurance contracts generally, and automobile insurance contracts in particular. It is also in accord with the courts' stated public policy purpose of preventing the costs of the use and operation of automobiles from devolving to the public purse.

Farmer's made several written and oral submissions focusing on the intentions of Farmer's as an insurer. The essence of these submissions is that there should not be coverage for the ATV akin to that provided under a policy of motor vehicle liability insurance under any of the three Farmer's policies under consideration because Farmer's as an insurer, in its dealings with the ATV, never intended take on the exposure that such coverage would create.

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[20] *Jubenville v. Jubenville,* paragraph 24.
[21] 2004 CanLII 34619 (ONCA), at paragraph 15.

For example, in arguing for the conclusion that that the ATV should not be considered a “Newly Acquired Vehicle” and thereby covered under the OAP policy, Farmers’ submitted the following:

> The Newly Acquired coverage provided under the OAP 1 was principally designed to help individuals that suffer a coverage gap after the purchase of a new vehicle. They have the intention of insuring and operating their vehicle. By using the OAP 1 against an insurer who had simply attempted to protect its economic interests is a manipulative abuse of the purpose of that form. If an insurer has no intention of obtaining insurance, applying the exception of “newly acquired” puts them at unnecessary risk for which they cannot take steps to avoid…

With due respect to Farmers’, if there is a finding that coverage exists, that does not mean that the OAP 1 form is being used “against” Farmers’. Either the wording of the OAP policy, and for that matter the other two policies as well, supports the conclusion that motor vehicle liability coverage exists for the ATV, or it does not. It is not a question of whether Farmers’as an insurer would prefer that it did not exist. This would be deciding the matter viewed entirely from the perspective of Farmers’ as an insurer, not Farmers’as an arms-length owner. It ignores completely the purpose of our insurance system as confirmed by the case law – the protection of the public from losses caused by the use and operation of automobiles – including stolen automobiles, and the avoidance of having the cost of such protection fall to the public purse.

Obviously Farmers’ as an insurer has a business interest in not being found to have coverage for vehicles like the ATV in this case because a finding of coverage in such cases could result in costly claims accruing to Farmers’. Farmers’

businessinterest as an insurer in not having to pay a costly claim cannot however, trump the public policy interest previously stated, and alter the aforementioned principle upon which insurance contracts are interpreted.

From a policy perspective, I agree with HMQ's submission that the situation here is not any different than the situation where the insurer has a policy of motor vehicle liability insurance on a described vehicle owned by its insured, which vehicle is stolen and involved in an accident giving rise to a SABS claim. Neither the insured nor the insurer have any moral responsibility or control over the actions of the thief, but the legislature has seen fit to visit upon the insurer the cost of SABS benefits to be paid – even to the thief, arising out of such circumstances, and not upon the general public – HMQ.

Arguably the insurer cannot do anything in the circumstances of an individual case to protect itself from the risk of having to pay such a claim. The legislature has effectively mandated however, that paying such claims is a cost of doing business for private insurers. Presumably,to address that cost of doing business those insurers will factor it into their premiums charged for all motor vehicle liability policies issued.

This may well be avalid response to the argument that an insurer, like Farmers' in this case, who acquires its insured's title to a stolen vehicle and formally registers that title, could have SABS exposure for a loss in connection with that vehicle under an existing policy of motor vehicle liability insurance without a means in the specific instanceto protect itself against such exposure.

To return to my analysis of the three policies, I reiterate that my conclusion with respect to whether there is SABS coverage for the claimant under any of the three policies is based on whether, considering the wording of the policies in the context of relevant case law and principles of interpretation, any of the policies provides for such coverage. It is not based, nor in my opinion should it be based, on what Farmers' as an insurer did or did not intend with respect to the existence of insurance coverage for the ATV.

I will first examine the question of whether there is motor vehicle liability coverage (and hence SABS coverage) for the ATV under the OAP policy.

The question of whether coverage exists under the OAP policy comes down to whether the ATV comes within the definition of "Newly Acquired Automobiles" in Section 2.2.1 of the OAP policy. The parties argued the issue on the basis that if the ATV does not come within this definition, then there is no motor vehicle liability coverage for the ATV available in the OAP policy (and hence no SABS coverage).

The Newly Acquired Automobiles coverage set out in the OAP policy states as follows (I have omitted the special condition as it is irrelevant to this case):

> 2.2.1 Newly Acquired Automobiles
>
> A newly acquired automobile is an automobile or trailer that you acquire as owner and that is not covered under any other policy. It can be either a replacement or an additional automobile. The replacement automobile will have the same coverage as the described automobile it replaces. We will cover an additional automobile as long as:

- we insure all automobiles you own, and

- any claim you make for the additional automobile is made against the coverage we provide for all your other automobiles.

  Your newly acquired automobile(s) will be insured as long as you inform us within 14 days from the time of delivery and pay any additional premium required.

  We may inspect the newly acquired vehicle and its equipment at any reasonable time.

The issues with respect to the applicability of the section 2.2.1 Newly Acquired Automobiles coverage argued by the parties include:

1) Did Farmers', as an insurer, insure all of the automobiles it owned at the time of the accident, so as to qualify the ATV for "additional automobile" coverage?

2) Was there "delivery" of the ATV to Farmers'?

3) Did Farmers' have an insurable interest in the ATV such that it was capable of being insured under the OAP policy? (This issue is also relevant to, and was argued in connection with the CGL policy, and the commercial umbrella liability policy. I will deal with the issue here in my analysis of the OAP policy. My conclusions are applicable to, but are not restated in my coverage analysis for the CGL policy, and the commercial umbrella liability policy).

The first issue itemized above was the subject of a significant amount of further investigation and documentary evidence after the first day of hearing for the arbitration. I will attempt to summarize as succinctly as possible this evidence and the parties positions with respect thereto.

I commend the parties for their efforts in submitting much of the evidence in the form of a Further Agreed Statement of Facts and the other documents in Exhibit 5, otherwise the hearing would likely have taken several more days to complete.

Before summarizing the evidence, it is probably helpful to state the purpose for this evidence so it will make sense toreaders other than the parties. Farmers' embarked on an investigative exercise to identify a vehicle which it owned at the time of the accident involving the ATV, which was in operable condition, and which it did not insure under a policy of motor vehicle liability insurance. The reason this is important is that to the extent Farmers' insured the vehicles it owned as designated automobiles under a policy of motor vehicle liability insurance, they were insured under policies issued by Farmers' in its capacity as insurer, and not by any other motor vehicle liability insurer.

If Farmers' was able to identify a vehicle that it owned at the time of the claimant's accident, but that it did not insure, (*i.e.* the vehicle was either insured by another motor vehicle liability carrier, or it was uninsured) then this would support an argument that the ATV could not qualify under the OAP policy "Newly Acquired Automobiles" coverage because Farmers', as the insurer issuing the OAP policy, did not insure all of the vehicles it owned.

The Further Agreed Statement of Facts stipulates that on August 14, 2009, the day of the claimant's accident involving the ATV, Farmers' was the registered owner of a 2001 silver Dodge RAM truck ("the 2001 RAM") bearing vehicle identification number 1B7KF23661J239812 ("the 2001 RAM VIN"). The 2001 RAM was stolen in

Ontario on May 23, 2006. The 2001 RAM was recovered in Nova Scotia in September, 2010. At the time it was recovered it was associated with an inaccurate vehicle identification number 1B7KF26Z7SS121351 (“the 1995 Dodge VIN”) which had been previously associated with a 1995 red Dodge truck (‘the 1995 Dodge”).

Similar to its dealings with the ATV, Farmers’ had insured the 2001 RAM under a policy of motor vehicle liability insurance issued to its Ontario insured, Traves. Farmers’ obtained all rights, title, and interest in the 2001 RAM with a payment to Traves and/or the lessor of $24,700.00. On July 6, 2006 Farmers’ registered its ownership of the 2001 RAM.

Meanwhile, in Nova Scotia, the 1995 Dodge changed ownership a few times over the years. I will not go into the extensive detail that is contained in the documents found in Exhibit 5. The issue to be determined for the purposes of whether the ATV has coverage under the OAP policy, is whether the 2001 RAM and the 1995 Dodge are the same vehicle – in other words, whether the vehicle changing hands in Nova Scotia identified as the 1995 Dodge was one and the same vehicle as the 2001 RAM which had been stolen in Ontario and was at that point owned by Farmers’. If it was the same vehicle, then it must be established that the vehicle was in operable condition at the time of the August 14, 2009 accident involving the claimant.

The Department Of Justice, Canada, through the RCMP, conducted an investigation into the 2001 RAM having been stolen in Ontario, and then turning up as the 1995 Dodge in Nova Scotia, with the 2001 RAM VIN hidden, and only being

discovered in September, 2010. The RCMP'swritten investigation was entered into evidence as Exhibit 5, Tab 14. I am prepared to rely on the information contained in that Exhibit to form the basis for my conclusions on this issue. Although much of the information contained in the RCMP investigation is hearsay, the *Arbitration Act* permits an arbitrator to rely upon such evidence, in the arbitrator's discretion, even though the evidence, or portions of it, may not be admissible in court in the absence of a witness.[22]

I also believe that the evidence meets the test of reliability required so that it may be given weight, and credence by me in reaching a decision. It should be noted that thisinformation was gathered by an independent, law enforcement official employed by the federal government, with no interest in the outcome of this case, and who was acting under a statutory duty to properly investigate the matter when this information was obtained.

The information in the RCMP investigation, and in other portions of Exhibit 5, confirms that in and around the time relevant to theissue under consideration, the 1995 Dodge was registered to one Parker, a person who was employed in the business of constructing and servicing pools. According to the RCMP investigation, RCMP officer Sutherland interviewed Parker, andone Drysdale. On December 3, 2010. The report in the RCMP file prepared following these interviews reads as follows:

[22] See *Arbitration Act, 1991*, S.O. 1991, C.17, section 21, *Statutory Powers Procedure Act*, R.S.O. 1990, C. S. 22, section 15.

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> Updating file. I interviewed PARKER regarding the truck and he had bought it from John Drysdale in Ellershouse. Parker had did (*sic)* a pool for Drysdale and in exchange, Drysdale gave Parker the truck. Parker did not have any idea it was stolen. I believe Parker, that he did not know truck was stolen.
>
> I then contacted Drysdale who came to office to speak with me regarding the truck. He said he gave truck to Parker as they had an arrangement for part of payment of the pool Parker did for him. Drysdale said he used the truck for a work truck and it was full of his tools etc.[23]
>
> … Based on the what has been learned (*sic)*, the file will be concluded as unknown who stole the truck and pieced it together with the old VIN.

A couple of months earlier, on September 28, 2010, RCMP officer Sutherland entered the following report into the RCMP file which actually deals with events subsequent to those referred to in the Constable's December 3, 2010 entry:

> … Car deal(er), Noel Fredericks spoke to Ross Parker who is a certified pool installer and pool maintenance person. Parker has done this job for many years and has been quite successful. Parker advised Fredericks that the 1995 grey Dodge truck he was selling (*in September, 2010*) had a 2001 cab. It also had a bad oil leak that Parker did not want to bother fixing, another reason for selling the truck. Fredericks test drove the truck[24] and decided to purchase same. $3,000. was paid for the truck. Parker cleaned the truck out as he had pool supplies, tools ect (*sic)* inside. The vehicle was driven home by Fredericks[25] at which time the magnitude of the leak was notice(d). Fredericks over the next 2 weeks proceeded to repair the truck to make it fit to sell. The mechanic discovered when attempting to buy parts for the truck that the 1995 parts were not fitting. A carpenters pencil wedged over the vin tag inside the

[23] Arbitrator's emphasis.
[24] Arbitrator's emphasis.
[25] Arbitrator's emphasis.

> cab was fished out by the mechanic. The vin number on the window was different than the vin on the registration. Fredericks supplied Cst. MacAlpine with both vin numbers to check on the vehicle. The vin number inside the truck shows the truck was stolen out of Ontario in 2006. OPP Collingwood Det have the file...for this truck.[26]

As I understand it statements were obtained by an investigator acting on behalf of Farmers', from at least Ross Parker, and perhaps other persons referred to in the chain of events connected with the stolen vehicle investigation in Nova Scotia. The parties agreed not to enter the statements into evidence because they had not been tested by way of cross-examination.

The only evidence which could be considered "direct" evidence from Mr. Parker is contained in paragraph 11 of the Further Agreed Statement of Facts. That paragraph says: "*It is Mr. Parker's untested evidence that he used the Drysdale vehicle (the 1995 Dodge) for about a year, although exact dates were not provided or known*."

In addition to the RCMP investigation referred to, there is additional evidence which in my view corroborates Parker's "untested" evidence regarding Parker's use of the 1995 Dodge for his pool business during the period of time overlapping the August 14, 2009 accident. This evidence is found in excerpts from the file of a Nova Scotia insurance broker. Exhibit 5 Tab 13 contains documents from Brooklyn Insurance Commercial, an insurance broker in Newport Hants, Nova Scotia, which confirms that the 1995 Dodge was insured through Mr. Parker's business, Parker Pools & Spas, effective July 13, 2009 through until September, 2010, when Mr.

[26] Arbitrator's emphasis.

Parker sold the vehicle to the car dealer, Fredericks. According to these documents the 1995 Dodge had coverage underwritten by The Economical Insurance Group for third-party liability, accident benefits, family protection coverage, and uninsured/unidentified coverage.[27] Mr. Parker had also registered his title to the 1995 Dodge on July 10, 2009.

HMQ submits that the evidence is insufficient for Farmers' to discharge its burden of proof that the 2001 RAM owned, but not insured by it was operable on August 14, 2009.

HMQ further submits that when Mr. Parker acquired the 2001 RAM, and registered it to his pool business, the documentary evidence in Exhibit 5 indicates that he already owned, through the pool business a 2001 Chev Silverado, and a 2002 Dodge Caravan. This evidence also indicates that on November 13, 2009 Mr. Parker transferred the 2002 Dodge from his pool business to himself, and then to his daughter. He kept the Silverado registered in the name of his pool business. HMQ submits that this suggests it is more likely that Mr. Parker did not begin using the 1995 Dodge in his pool business until he transferred the Dodge Caravan to his daughter in November 2009. The inference I am asked to draw from this is thatthe 1995 Dodge was not being used by Parker in his pool business during a period of time overlapping the accident date of August 14, 2009.

Farmers' submits that the evidence is sufficient for me to conclude that the 1995 Dodge was one and the same vehicle as the stolen 2001 RAM owned by

[27] Exhibit 6 is Economical's letter confirming this coverage.

Farmers', and that it was in an operable condition during a period of time that coincided with the August 14, 2009 accident. Specifically, with respect to the transfer of the Dodge Caravan by Mr. Parker to his daughter, Farmers' argues that it is highly unlikely Mr. Parker would have been using a Dodge Caravan – a well-known passenger vehicle, in his pool business. In the pool business he would require a vehicle which could easily carry supplies and equipment. It is much more likely that he would have used the 1995 Dodge for this purpose, just as Mr. Drysdale, the person who gave the 1995 Dodge to Mr. Parker, apparently used the truck for work purposes.

Considering all of the evidence on this issue as a whole, I am satisfied that the 2001 RAM was one and the same vehicle as the 1995 Dodge, and therefore it was a vehicle owned by Farmers' which Farmers' had not, at the time of the August 14, 2009 accident, designated as a described vehicle on any motor vehicle liability policy it had issued.

I am also satisfied on the evidence that the 2001 RAM was operable during a period concurrent with the date of the accident in this case – August 14, 2009. I find that the evidence that Mr. Parker had pool supplies and equipment in the 1995 Dodge when he sold it to Fredericks who test drove it in September, 2010, combined with the evidence that Mr. Parker insured the 1995 Dodge with Economical Mutual Insurance in the name of his pool business effective July 13, 2009,and that Mr. Drysdale used the 1995 Dodge for work before giving it to Mr. Parker, of sufficient weight to support the conclusion that the vehicle was operable at a time less than a

month before the accident in this case, and continued to be operable at the very least until the August 14, 2009 accident, and likely through to September, 2010.

If the vehicle had not been operable, and Mr. Parker did not use it for his pool business, he likely would not have insured it as a business vehicle, and in any event, if he was not going to operate it, it is even less likely that he would have insured it for any type of coverage except perhaps comprehensive coverage. There would have been no reason to insure the vehicle for third-party liability coverage if it was not operable.

The RCMP investigation is sufficient, in my opinion, to establish that the 1995 Dodge was in operable condition approximately one year after the accident in this case even though it may not have been in the best of shape by that time. There is evidence suggesting that it required work to restore it to good enough condition that a used car dealer could sell it. The evidence does indicate however, that the vehicle was operable in September, 2010.

I do not think Farmers'is required to prove that the 2001 RAM was operable each and every dayfrom the time it arrived in Nova Scotia as a stolen vehicle in 2006, becoming the 1995 Dodge, until it was identified as the 2001 RAM, and recovered in September, 2010. Farmer's need only prove that the 2001 RAM was operable on August 14, 2009.

There is sufficient evidence that the 2001 RAM was operable within weeks before the accident, and sufficient evidence it was operable over a year later. In my

opinion, this makes it reasonable to infer, in the absence of evidence to the contrary, that it was operable on August 14, 2009.

I would note as well that the test is not whether the 1995 Dodge was actually being operated on the specific date we are concerned with, or even over the period of time discussed. The test is whether the vehicle was in a condition that made it capable of operation should someone choose to operate it. Therefore, even if HMQ is correct, and Mr. Parker was not using the 1995 Dodge in his pool business, but instead leaving it parked while he used the Dodge Caravan and/or the Chev Silverado, as long as the 1995 Dodge was capable of being operated, the test is satisfied.

For the foregoing reasons I find that the 2001 RAM was an automobile owned by Farmers', but not insured by Farmers', at the time of the August 14, 2009 accident.[28]For this reason, the OAP policy Newly Acquired Automobiles coverage cannot apply to the ATV in the circumstances. Consequently the ATV was not covered under the OAP policy at the time of the August 14, 2009 accident.

In my view, given my conclusion in the preceding paragraph, it is technically unnecessary for me to address Farmers' further argument that there could not be coverage for the ATV under the "Newly Acquired Automobiles" definition because the ATV was not "delivered" to Farmers' before the August 14, 2009 accident.

[28] I will deal with HMQ's argument that the 2001 RAM was an automobile insured by Farmers' because, HMQ submits, it was covered under the commercial umbrella liability policy, in my analysis of whether the ATV is covered under the commercial umbrella liability policy.

In the event that a court determines my conclusion with respect to whether Farmers' insured all of the automobiles it owned is incorrect, the delivery issue may be relevant, so I will address it for that reason.

Farmers' takes the position that since the ATV was not physically delivered to it before the August 14, 2009 accident, the Newly Acquired Automobiles coverage under section 2.2.1 cannot apply to the ATV. I disagree, for two reasons.

First, on the facts of this case, in my view the argument is rendered moot by the decision of the Court of Appeal in*Hunter Estate v. Thompson*.[29] That case involved the purchase of a pickup truck by a Ms. Kozowy who was insured under a motor vehicle liability policy issued by Kingsway Insurance for another automobile. Ms. Kozowy purchased the truck as an additional automobile, not as a replacement automobile. Ms. Kozowy did not notifiy Kingsway within 14 days of delivery of the truck to her. An accident occurred involving the truck approximately 10 days after Ms. Kozowy had purchased the truck.

On a motion to determine coverage, Kingsway argued that the purchased truck could not be covered under the existing motor vehicle liability policy as a newly acquired automobile because Ms. Kozowy did not notify Kingsway within 14 days of the delivery of the automobile to her – or at all, and she did not pay an additional premium.

Ms. Kozowy argued that the conditions of notice to the insurer within 14 days of delivery of the automobile to the insured, and payment of any additional

[29] [2003] O.J. No. 2395 (ONCA).

premiumrequired were irrelevant to coverage within 14 days of the purchase of the additional automobile because coverage for the initial 14 day period is “automatic”, and the conditions must be met only if insurance is to continue after day 14.

The motions judge reviewed the authorities and concluded that Ms. Kozowy’s position was correct in law. Notice to the insurer within 14 days of the time of delivery of the additional automobile to the insured was irrelevant to coverage within those first 14 days.The motions judge reasoned that by inserting the 14 day wording in connection with an “additional automobile” into the OAP policy it must have been intended that the premium on the existing automobile must include an amount reflecting the risk of additional coverage. “*Otherwise, the insurer would not have included an “additional automobile” under the definition provided in s. 2.2.1 if it did not intend that such automobile be “automatically covered” during those 14 days*.”[30]

The motions judge also concluded that any additional premium to be paid would only apply to coverage from day 15 onward, so the payment of any additional premium required was irrelevant to coverage for the first 14 days from the date of delivery of the automobile to the insured.

Therefore, the trial judge found that the truck purchased by Ms. Kozowy was a “newly acquired automobile” under the existing policy issued by Kingsway. Notably on the issue of whether Kingsway insured all vehicles owned by Ms. Kozowy – the coverage precondition discussed previously in this Award, it was found that although Ms. Kozowy owned a third vehicle which was not insured by Kingsway, or any other

[30]*Hunter Estate v. Thompson*, [2002] O.J. No 5314, per Del Frate J., at paragraph 22.

insurer, it was described as “parked”. The motion judge’s reasons indicate that he concluded “parked” meant “inoperable”, so the vehicle did not qualify as an “automobile” which had to be insured.

On appeal, the parties had agreed to a new fact which changed the result in the case. The new fact was that the third vehicle owned by Ms. Kozowy was in operable condition. It was not insured by Kingsway, or any insurance company at the time of the accident. Therefore, it was an “automobile” owned by the insured, but not insured by Kingsway.

This Court of Appeal’s decision confirms, in my opinion, the conclusion I have arrived at in this case with respect to the ATV not being a “newly acquired automobile”. The court stated:

> On the facts we have now, the plain words of s. 2.2.1 require that the owner insure with the insurer all of the automobiles he owns. If the insured owns automobiles that he insurers with another insurer or that he leaves uninsured, the precondition is not met…Because the 1991 Ford is operable it is an “automobile” owned by the insured.[31]

For the purposes of the “delivery”issue under discussion, the Court of Appeal clearly approved of the motion judge’s approach with respect to “automatic” coverage for additional automobiles up to 14 days after purchase, irrespective of notice to the insurer after delivery of the automobile, and irrespective of the payment of an additional premium.

On this point in the court stated as follows:

[31] *Hunter Estate v. Thompson*, [2003] O.J. 2395 (ONCA), per the Court at paragraphs 8, and 9.

> The motions judge…held that since the accident had occurred within the 14-day notice period required in the policy the additional vehicle was automatically insured. The original insurance premium would necessarily include the risk of any additional coverage for the 14-day notice period.
>
> …We would not give effect to the argument that, if the precondition (*that the insurer insure all automobiles owned by the insured*) is met, the automobile is not automatically insured for fourteen days under the policy. Again, on the plain wording of s. 2.2.1 it is automatically insured for fourteen days.[32]

One might attempt an argument that this case is distinguishable on the basis that unlike the facts here, the owner in *Hunter Estate v. Thompson*had dominion and control over the automobile because it was being operated with her consent when the accident occurred. In my opinion such a distinction is irrelevant to the reasoning of the court that coverage for an additional automobile as a "newly acquired automobile" is automatic for the first 14 days provided the insurer insures all of the automobiles owned by the insured. The Court's reasoning is not premised in any way on the owner/insured having physical possession of, or dominion and control over the automobile within the first 14 days from acquiring ownership. In addition, I have already pointed out that for the purposes of SABS coverage, the consent of the owner to the use or operation of the automobile is not necessary for significant aspects of SABS coverage to apply.

The second reason I conclude that physical possession of the ATV was not required to constitute "delivery" for the purposes of subsection 2.2.1 of the OAP 1 is

[32]*Hunter v. Thompson Estate* [2003] O.J. No. 2395, per the Court at paragraphs 5, and 10.

only relevant in the event that my interpretation of the application of the *Hunter Estate v. Thompson* is found to be incorrect.

Farmers' states (at paragraph 6) in its Supplementary Factum, "*Delivery" is a commonly used term with essentially two legally acceptable forms – actual and symbolic or notional*." Farmers'refers to various cases to support its interpretation of "delivery" as requiring obtaining physical possession for the purposes of this kind of case. In my view the case law cited has limited application as much of it is dated, it is from other jurisdictions, and it considers different legislation. It does not deal with the same provisions in the OAP policy – especially after the revision to the OAP policy to add the "additional automobile" coverage in section 2.2.1. To the extent that it conflicts with the decision of the Court of Appeal in *Hunter Estate v. Thompson*, it cannot be followed.

In any event, even if some sort of dominion and control over an automobile is necessary to constitute "delivery", I am of the view that the case law generally is equally supportive of the argument that delivery can be accomplished with the insured having acquired title to the automobile so as to create an interest in the automobile, and legal responsibility for the automobile, without having physical possession of the automobile.

For example, one of the cases cited by Farmers' in support of its position is *Cyr v. Phoenix Insurance Company,*[33] a case decided by the New Brunswick Court of Appeal. Farmers' submits that this case has been referred to in other authorities,

[33] 1972 CarswellNB 86, 5 NBR (2d) 95.

including *Hunter Estate v. Thompson*. As an aside, I would point out that it was referred to by the motions judge as one of the authorities cited by Kingsway in support of Kingsway's position on the 14 day notice and additional premium payment conditions, a position which was ultimately rejected by the motions judge and the Court of Appeal.

Farmers' relies upon the following passage from that case in support of its argument that physical possession is required for "delivery":

> The word "delivery" used in the definition of a "A Newly Acquired Automobile" signifies the handing over of the physical possession and control of the automobile to the insured or the assumption of dominion over it by him, so as to subject the insured to liability for its ownership use and operation…[34]

Farmer's of course stressed in its argument the first part of this passage. The wording I have highlighted indicates however, that as an alternative to physical possession, "delivery" can also be accomplished if the insured assumes dominion over the automobile.

In my view, once a party owns an automobile, he assumes dominion over it, and has responsibility for its use and operation. In certain circumstances, if he has not consented to the possession of the automobile by a third party, then his legal liability in tort may be negated. He nevertheless still has an ownership interest in the automobile, and the insurer of that automobile may have to pay SABS even in the case of the theft of the automobile, or when it is in another's possession without the owner's consent.

[34] *Ibid.*, paragraph 11. Arbitrator's emphasis.

The fact that a party can be found to have responsibilities in respect of an automobile without having actual possession of that automobile is readily evident from the development of the case law on third-party liability and consent to possession. Since the Supreme Court of Canada laid down the principle in*Hayduk v. Pidoborozny*[35] and*Honan v. Dohman Estate*[36], it has been the law that the registered owner of an automobile can be held responsible for the negligent use and operation of that automobile even though that registered owner did not have physical possession of, or control over the use of the automobile. Given Ontario's current automobile legislation regarding owner's policies, an owners physical possession of or control over the automobile is clearly unnecessary for the insurer of that automobile to have an obligation to pay SABS.

In my opinion the analysis makes good sense for another reason. A careful reading of the wording in subsection 2.2.1 indicates that it is not the delivery of the automobile to the insured that is the focus of the condition for coverage. The focus of the condition for coverage is notice to the insurer that the insured has taken on responsibility for an additional automobile. The purpose of notice is to enable the insurer to properly evaluate the risk and factor it into the terms of the insurance being provided to the insured. Physical possession of the automobile by the insured is not necessary for this risk evaluation by the insurer.

[35] [1972] S.C.R. 879.
[36] [1974] S.C.J. No. 131. (SCC).

For these reasons I do not view Farmers' not having obtained physical possession of the ATV as amounting to non-delivery of the ATV for the purposes of section 2.2.1 of the OAP 1.

If am incorrect in my application of *Hunter Estate v. Thompson*, and with respect to the physical possession issue, I would find that Farmers', as an insurer, has suffered no prejudice in the circumstances from any lack of notice of the delivery of the ATV.

For the purposes of this conclusion, in my view it is appropriate to treat the knowledge of Farmers' as an owner/insured as being identical to the knowledge of Farmers' as an insurer. In this respect I agree with the submissions of HMQ that Farmers', in its capacity as insurer, understood from the outset that it would not be obtaining physical possession of the ATV from its insured (Windrem) because it had been stolen. Farmers' was nevertheless still able to sufficiently identify the year, make, model, and condition (operable) of the ATV. It was able to settle Windrem's claim, to acquire his title in the ATV, and to register its ownership of the ATV with the MTO describing it a "FIT".In my view, Farmers' had sufficient information about the ATV properly assess it as a risk for the purposes of a motor vehicle liability policy without having physical possession of the ATV. That is the purpose of the 2.2.1 notice requirement.

I will now address Farmers' submission that it did not have an insurable interest in the ATV because it was in a "stolen" state at the time Farmers' acquired

ownership of it. Farmers' argues that because it did not have an insurable interest in the ATV, the ATV could not be insured under any of its policies

In its written and oral submissions Farmers' argued that an insurable interest arises where insurance can be obtained for the object or person sought to be insured. Farmers' submits that no insurer would underwrite a policy for property which has already been stolen. Farmers' further submits that its "potential insurable interest" in the ATV would not arise until the ATV was recovered. Before that, Farmers' did not have dominion or control over the vehicle, or know it is location and condition. Therefore, Farmers' argues, it had no tangible risk of loss until the ATV had been recovered. For the reasons which follow, I do not agree with Farmers' position on this issue.

The doctrine of insurable interest was revised and expanded almost thirty years ago by the Supreme Court of Canada in *Kosmopoulos v. Constitution Insurance Company*.[37] The facts of that case involved a claim advanced on a policy of fire insurance which insured Kosmopoulos as a sole proprietor, and owner of certain property and premises. Subsequently Kosmopoulos incorporated his business and was the sole shareholder and director of the company which owned the property and premises. Some of the property and premises were damaged by fire and Kosmopoulos sought indemnity under the policy. The insurer denied the claim taking the position that Kosmopoulos personally had no insurable interest in the property and premises claimed for since it was owned by a corporation.

[37] [1987] 1 S.C.R. 1.

The Supreme Court of Canada upheld the Ontario Court of Appeal's ruling that Kosmopoulos had an insurable interest in the property and premises, even though he did not have a legal or equitable interest in the property and premises. Until this decision the law in Canada regarding insurable interest was based on a much more restrictive definition from English jurisprudence. Essentially, insurable interest required enforceable legal or equitable rights in the property.[38]

It is useful for the purposes of addressing Farmers' submissions on this issue to consider the Courts analysis as to why it expanded the nature of insurable interest.

Wilson J. Stated that three policies have been cited as underlying the requirement of an insurable interest. They are:

(1) the policy against wagering under the guise of insurance;

(2) the policy favoring limitation of indemnity;

(3) the policy to prevent temptation to destroy the insured property.

The Court considered each of these policies in turn and rejected them as having validity for the concept of insurable interest in modern day insurance law. It is noteworthy that in dealing with the policy against wagering, the Court stated that a narrow definition of insurable interest is not an "ideal mechanism" to combat the perceived ill of wagering in respect of insurance contracts. The Court made the following comments which would seem to have general importance for maintaining a broad definition of insurable interest:

[38] See *Macaura v. Northern Assurance Co.* [1925] A.C. 619.

> …The insurer alone can raise the defense of lack of insurable interest; no public watchdog can raise it. The insurer is free not to invoke the defense any particular case or it can invoke it for reasons completely extraneous to and perhaps inconsistent with those underlying the definition.[39]

The Court applied the following definition of insurable interest to the facts of the case before it:

> …to be so circumstanced with respect to [the subject matter of the insurance] as to have benefitfrom its existence, prejudice from its destruction is to have an insurable interest in it.[40]

The Court concluded that Mr. Kosmopoulos, although he had neither legal nor equitable interest in the property and premises which were the subject matter of the insurance policy, had an insurable interest in them capable of supporting the insurance policy because he *"…was so placed with respect to the assets of the business as to have benefit from their existence and prejudice from their destruction*."[41]

This definition of insurable interest has continued to inform insurance law throughout Canada to the present day.

The circumstances of the case before me appear to be unique. Neither party was able to find a case with facts on all fours with those here. Certainly no case was referred to me which definitively answers the question of whether Farmers' could have an insurable interest in the ATV in the circumstances.

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[39] At page 22.
[40] At page 30.
[41] At page 30.

In my opinion, applying the expansive definition of insurable interest established by the Supreme Court of Canada to the facts of this case leads to the conclusion that Farmers' did have an insurable interest in the ATV.

All of the facts in respect of Farmers' dealings with the ATV indicate to me that Farmers' was so placed with respect to the ATV as to have benefit from its existence, and prejudice from its destruction.

Farmers' had a clear connection to the ATV as a piece of property that had value to Farmers'.Farmers' had previously insured the ATV under a policy of motor vehicle liability insurance by which fact alone suggests that the ATV was capable of supporting an "insurable interest". After the ATV was stolen, Farmers' settled the claim with its insured under its insurance contract. In the course of doing so Farmers' obtained all right, title and interest in the ATV by having its insured execute a proof of loss. Further, Farmers' registered its title as owner of the ATV with the MTO. It is beyond doubt that Farmers' benefited from the existence of the ATV. When the ATV was recovered, Farmers' was able to sell its interest in the ATV for valuable consideration. Had the ATV turned up destroyed, it still would have had some salvage value. If the ATV was destroyed to the point of having no monetary value, then Farmers' would have suffered prejudice by this result.

The foregoing facts are not disputed. Farmers' itself acknowledges it had an economic interest in the recovery of the ATV for salvage purposes. Therefore, it seems to me that any merit in Farmers'"no insurable interest" argument must depend entirely on the fact that the ATV was in a "stolen" state when Farmers'acquired

ownership of the ATV.In my opinion, the fact that the ATV was in a stolen state at the time Farmers' acquired ownership of it does not in any way detract from Farmers'having an insurable interest in the ATV.

One of the reasons Farmers' submits that the "stolen" state of the ATV is significant is that it did not have dominion or control over the ATV, or know of the ATV's location at the time it acquired ownership of the ATV. There is nothing in the Supreme Court's definition of insurable interest requiring the insured to have dominion and control over an object at the time ownership is acquired, or to know the location of the object, in order to benefit by its existence, or be prejudiced by its destruction.

If an object ceases to exist, then one might legitimately argue that it is no longer capable of benefiting or prejudicing anyone. That is not the situation in this case. The ATV did not cease to exist when it was stolen. In fact we know it continued to exist because the claimant was injured while driving it, and Farmers' received proceeds from the sale of the ATV after it was recovered. Farmers' clearly benefited from the continued existence of the ATV even thoughFarmers' did not have possession of or control over the ATV when it acquired ownership of the ATV.

In my opinion, an insurable interest in something does not start and stop as the object comes into or goes out of the possession of or the control of the insured. In fact, it is for the very reason that the object may not be in the possession of or under the control of the insured that the object could be damaged (or cause damage) and the insured be prejudiced as a result.

I will refer here to some case law the reasoning from which, in my opinion, supports the conclusion I have come to on the insurable interest issue.

Minister of Transport for Ontario v. Economical Mutual Insurance Company[42]dealt with a situation where Economical insured one McNaughton under the standard owner's automobile insurance policy in respect of a 1949 Fargo pickup truck. During the currency of the policy McNaughton sold the pickup. McNaughton did not notify Economical that he no longer owned the pickup truck. Later, also during the currency of the policy, McNaughton purchased a 1955 Oldsmobile. McNaughton did not notify Economical that he owned the Oldsmobile. McNaughton borrowed a 1952 Pontiac from a friend. The Pontiac was uninsured. McNaughton negligently caused an accident while driving the Pontiac. The Minister of Transport paid a judgment against McNaughton, and sought to recover what was paid from Economical on the basis that Economical's policy provided third-party liability coverage to McNaughton at the time of the accident.

Economical denied liability arguing that if McNaughton had still owned the pickup truck at the time of the accident he would have had coverage while driving the Pontiac under what is now section 2.2.3 – "Other Automobiles" in the policy. Since he had sold the pickup truck however, he no longer had an insurable interest in the automobile insured by the policy, so the policy automatically lapsed when his ownership in the pickup truck ended.

[42] 1973 CanLII 806 (ONSC).

Learner J. held that although coverage for loss or damage to the insured automobile would lapse because insurable interest is necessary for such coverage, an insurable interest in the automobile is not necessary for the continued existence of insurance under the third-party liability section of the policy:

> The policy in the case at bar is divided into three parts: Sections A, B, and C, dealing with third-party liability, medical payments and loss of or damage to insured automobile respectively…
>
> …The fact that one of these insurances may lapse does not mean that the entire policy would lapse. Insurable interest is clearly necessary for the continued existence of the insurance under s. C (loss of or damage to insured automobile), but is not necessary for the continued existence of insurance under s. A (third-party liability)…The subject matter of the insurance under s. A is…legal liability for loss or damage, and not loss or damage to the described automobile. Clearly, no insurable interest in the described automobile must be retained for the continued existence of insurance under s. A, assuming…s. A is a different insurance from s. C it is not dependent for its existence on the continued existence of the s. C insurance.

Lerner J. held that Economical did have a valid argument that McNaughton had breached the statutory conditions of the policy relating to material change in risk. Although this would have been a good defense to the claim for indemnity under the policy, Lerner J. held that the absolute liability provisions in the *Insurance Act* required Economical to pay the claim.[43]

It could be argued that Lerner J.'s comments with respect to insurable interest are *obiter dicta* in light of the fact that the case was decided on another ground. Nonetheless, I have not found a subsequent case which disagrees with Lerner's J.'s

[43] See what is now section 258 of the *Insurance Act*.

comments on the insurable interest issue. If an insured does not require an insurable interest in an automobile for motor vehicle liability coverage to apply, then I think it would follow that SABS coverage would also apply.

The facts before Reilly J. in *B. McCurdy Trucking v. Southwestern Equipment Inc*.[44] involved a claim by a trucking company under the "all perils" coverage in a fleet policy issued by Zürich Insurance in respect of two trailers the trucking company had purchased from Southwestern Equipment Inc. It turned out, unbeknownst to the trucking company, that the trailers had been stolen. The trailers were seized by the police and returned to their original owners.

Zürich denied the claim arguing that because the trailers were in a "stolen" state when acquired by the trucking company, no insurable interest in them could be created.

Reilly J. relied upon the law as stated in *Kosmopoulos v. Constitution Insurance* finding that the trucking company benefited from the existence of the trailers because they were used in the trucking company's business, and it was prejudiced by the loss of the trailers which loss was caused by the police seizing them. Based on the broad meaning of "insurable interest", the fact that the trucking company acquired the trailers when they were in a "stolen" state did not prevent an insurable interest in them from being created in favour of the trucking company.Reilly J. ruled that Zürich was required to indemnify the trucking company for the loss of the trailers as a result of the police seizure.

[44] 2005 CanLII 34596 (ONSC).

As I have indicated, the facts of these cases are not identical to the facts of the case before me so they could not be characterized as “binding” authorities. Nevertheless, they certainly support an expansive interpretation of the concept of insurable interest. The *McCurdy Trucking* case is, in my view, authority for the proposition that an object acquired when it is in a “stolen” state is still capable of supporting an insurable interest.

On the issue of insurable interest, I conclude that Farmers’ did have an insurable interest in the ATV so that it was capable of being insured under any of Farmer’s policies, as long as it otherwise satisfies the requirements for coverage under those policies.

I will turn now to examine whether there is SABS coverage for the claimant under Farmers’ CGL policy and/or the commercial umbrella liability policy.

One of the sub-issues to be considered here is whether either or both of the CGL policy and commercial umbrella liability policy is a “motor vehicle liability policy” and thus deemed to provide SABS by operation of subsection 268 (1) of the *Insurance Act*.[45]

Subsection 268 (1) of the *Insurance Act* stipulates that every contract evidenced by a motor vehicle liability policy shall be deemed to provide SABS, subject to the exclusions and limits set out in the SABS.[46]

[45] There is no issue in this case that the OAP policy is a motor vehicle liability policy and thereby provides SABS.
[46] I am paraphrasing the essential part of the subsection.

The definition of “motor vehicle liability policy”in the *Insurance Act* is as follows:

> 1. Definitions…
>
> “motor vehicle liability policy”means a policy or part of a policy evidencing a contract insuring,
>
> (a) the owner or driver of an automobile…
>
> …against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof;

An owner’s policy is a type of motor vehicle liability policy. It is defined in section 1 of the *Insurance Act* as follows:

> 1. Definitions…
>
> “owner’s policy” means a motor vehicle liability policy insuring a person in respect of the ownership, use or operation of an automobile owned by that person and within the description or definition thereof in the policy and, if the contract so provides, in respect of the use or operation of any other automobile;

Under the heading, “*Motor Vehicle Liability Policies*”, subsections 239 (1), and (2) of the *Insurance Act*read as follows (I have omitted the reference to “excluded driver” as it is not relevant for the issue before me):

> 239. (1) Coverage of owners policy, specific automobile – …every contract evidenced by an owner’s policy insures…every…person named therein and every other person who with the named person’s consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract against

liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and

(b) resulting from bodily injury to or the death of any person and damage to property.

(2) Saving, statutory accident benefits – A lack of consent does not invalidate such statutory accident benefits as are set out in the *Statutory Accident Benefits Schedule*.

In this case, the OAP policy is an owner's policy of motor vehicle liability insurance, and by operation of section 277 (1) of the *Insurance Act* it takes priority over other motor vehicle liability policies with respect to the requirement to respond to liability and SABS claims. Since I have concluded that there is no coverage for the ATV under the OAP policy in this case, it is appropriate to consider whether there is any coverage for the ATV under either or both of the CGL, and umbrella liability policies.

The documentation in evidence before me confirms that at the time of the accident Farmers' insured itself under the CGL policy. The CGL policy contained an endorsement known as the SPF#6 - Standard Non-Owned Automobile endorsement.[47] This is an endorsement which is regulated by Ontario's automobile legislation and is a standard policy form (hence the SPF reference).

The coverage provided under such a form in a CGL policy indemnifies the insured against liability imposed by law upon the insured for loss or damage arising

[47] Exhibit 1, Tab 3.

from the use or operation of any automobile not owned in whole or in part or licensed in the name of the insured.[48]

In my opinion, this wording is sufficient to constitute this part of the CGL policy a motor vehicle liability policy within the meaning of the *Insurance Act* definition. The insured, in this case Farmers', is insured for liability arising from injury caused by the use or operation of an automobile. Therefore, this part of the CGL policy would also provide for SABS coverage, by operation of subsection 268 (1) of the *Insurance Act*.

As with the OAP policy however, it remains to be determined whether the motor vehicle liability coverage under the CGL policy applies to the ATV in the circumstances. In my opinion, the answer to this question is straightforward and can be answered unequivocally by examining the coverage grant in the SPF #6.

In my opinion, the CGL policy does not provide coverage for the ATV in the circumstances. The coverage grant is clear that the coverage applies to an automobile <u>not</u> owned or licensed in the name of the insured. The evidence in this case confirms that Farmers' owned the ATV at the time of the accident. Farmers' had not plated the ATV, but it had registered its ownership of the ATV with the MTO. There could be debate on the question ofwhether the ATV was "licenced". It is not necessary to resolve that question in this case however, because the fact that Farmers' owned the ATV on the day of the accident is sufficient to take it out of the non-owned automobile coverage in the CGL policy.

[48] See SPF #6.

Whether coverage for the ATV existed on the date of the accident under the commercial umbrella liability policy is the remaining matter to be considered.

The first issue to be considered is whether the commercial umbrella liability policy was a "motor vehicle liability policy", and hence would include SABS coverage.

As with the CGL policy, the question is whether the coverage grant in the commercial umbrella liability policy would bring it within the definition of "motor vehicle liability policy" in the *Insurance Act*.

The coverage grant in the commercial umbrella liability policy is found in the combination of Insuring Agreements2.a. Automobile Coverage, and Endorsement No. 1 Excess Automobile Liability Endorsement.[49]

Insuring Agreement 2.a provides as follows:

> 2.a Automobile Coverage: If the Declaration Page shows coverage for the Excess Automobile Liability Endorsement, then the provision by this policy of insurance against liability arising out of the ownership, use or operation by or on behalf of the Insured of an "automobile" shall be subject to all the terms and conditions listed under the Excess Automobile Liability Endorsement.[50]

Endorsement No. 1 Excess Automobile Liability Endorsement provides in part as follows:

> …subject, insofar as applicable, to the terms, conditions, general provisions, definitions and exclusions set forth in the first loss policy described in Item 2 (Schedule of Underlying Insurance) on the Declaration Page…the Excess Insurer agrees to indemnify the insured under the first loss motor

[49] Exhibit 1, Tab 5, pages 3 and 9.
[50] Arbitrator's emphasis.

> vehicle liability insurance against liability imposed by law upon the Insured for an amount or amounts in excess of the limit(s) of the first loss insurance and the underlying excess insurance for loss or damage arising from the ownership, use or operation of the automobile(s)covered under such first loss insurance and the underlying excess insurance resulting from Bodily Injury to or Death of any Person or Damage to Property.[51]

There are cases where the wording of umbrella liability policies has been found not to satisfy the requirements necessary for motor vehicle liability insurance. Two of the three such cases of which I am aware deal with personal, rather than commercial umbrella liability policies.

In *Keelty v. Bernique*; *General Accident Assurance Company et al Third Parties*[52] the Court of Appeal dealt with a priority of response issue involving the family protection coverage in an O.E.F 44 policy issued by one insurer to a passenger in a vehicle driven by a negligent driver to whom the second insurer had issued a personal umbrella liability policy. The personal umbrella liability policy provided underinsured coverage for amounts passengers were legally entitled to recover as damages from the owner or driver of an underinsured automobile (in this caseit was the owner and driver of the underinsured automobile who also the insured under the personal umbrella policy).

On these facts the Court of Appeal decided that the O.E.F. 44 coverage was primary and was required to respond before the coverage in the personal umbrella liability policy. The essence of the decision was that the nature of the coverage set out in the personal umbrella liability policy was not motor vehicle liability coverage

[51] Arbitrator's emphasis.
[52] 2002 CanLII 22040 (ONCA) ("*Keelty v. Bernique*").

within the meaning of Ontario's automobile legislation. It did not contain the necessary details to bring it within the regulated scheme of Ontario's automobile legislation.

In *Heuvelman v. White* the Court of Appeal again had to decide whether coverage under a personal umbrella liability policy provided motor vehicle liability insurance coverage. The claimant was entitled to payment under an OAP owner's policy of motor vehicle liability insurance. There was no debate that such coverage was primary. The claimant was also insured under an OPCF 44 Family Protection Endorsement. The issue in the case was whether money available under the personal umbrella liability policy was money available under "other motor vehicle liability insurance", and therefore deductible from the amount payable under the terms of the OPCF 44 coverage.

The Court of Appeal decided that the money available under the personal umbrella liability policy was not deductible from the OPCF 44 coverage because it was not motor vehicle liability insurance. The decision seems to have turned at least in part on the lack of a Certificate of Automobile Insurance for the personal umbrella liability policy as indicating that the personal umbrella liability policy was not governed by the Ontario automobile legislative scheme. The court followed its conclusions in *Keelty v. Bernique*that the personal umbrella liability policy – to the extent that it provided for underinsured motorist coverage, was really a policy that provided protection against excess judgments of third parties, rather than providing individuals with automobile insurance.

The other line of cases which concludes that commercial umbrella liability policies like the commercial umbrella liability policy in this case are owner's policies, begins with*Guardian Insurance Co. of Canada v. York Fire & Casualty Insurance Co.*[53]

Guardian v. *York Fire* also involved a priority issue between a CGL policy issued by Guardian providing non-owned automobile coverage, and a commercial umbrella liability policy issued by Kanasa General Insurance providing excess automobile coverage. The driver of a leased vehicle negligently caused an accident. The lessee of the leased vehicle insured it with Employer's Insurance of Wausau under an OAP owner's policy. It was agreed that this owner's policy was first loss insurance.

The driver's employer, who was vicariously liable for the drivers negligence, was insured under a CGL policy providing motor vehicle liability insurance for non-owned automobiles.

The owner, and lessor of the automobile involved in the accident was insured under a Standard Garage Policy (S.P.F. 4), an owner's policy of motor vehicle liability insurance issued by York Fire. The owner/lessor was also insured under a commercial umbrella liability policy. Although the wording was not specifically set out in the judgment, Montgomery J. described the coverage under the commercial umbrella liability policy as follows:

[53] [1989] O.J. No. 2233 ("*Guardian* v. *York Fire")*.

> Kansa General Insurance provides indemnity…under a commercial umbrella liability policy which included the standard excess automobile policy form (S.P.F. 7) with a policy limit of $1,000,000.00 excess to other coverage as defined in the said policy and endorsements.[54]

An S.P.F.7, is a standard endorsement form in Ontario's automobile legislative scheme providing excess automobile coverage. The relevant coverage wording in this standard endorsement form reads as follows:

> …the Excess Insurer agrees to indemnify the insured under the first loss motor vehicle liability insurance against liability imposed by law upon the Insured for an amount or amounts in excess of the limit(s) of the first loss insurance and the underlying excess insurance for loss or damage arising from the ownership, use or operation of the automobile(s) covered under such first loss insurance and the underlying excess insurance resulting from Bodily Injury to or Death of any Person or Damage to Property.[55]

After rejecting an argument by the commercial umbrella liability insurer which is important for this case, and with which I will deal later, Montgomery J. held: "*I conclude that the Kansa policy is primary as an owner's policy…and must respond in priority to Guardian's non-owned auto policy.*"[56]

A comparison of the S.P.F. 7 wording forming the basis for Montgomery J.'s conclusion in *Guardian* v. *York Fire* makes it readily apparent that it is exactly the same as the wording in the Endorsement No. 1, Excess Automobile Liability Endorsement in the commercial umbrella liability policy under consideration in this case.

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[54] *Guardian* v. *York Fire*, page 3.
[55] See S.P.F. 7.
[56] *Guardian* v. *York Fire,* page 4.

In *Avis Rent A Car System Inc. et v. Certas Direct Insurance Company*[57] once again the issue was priority between the commercial umbrella liability insurer of Avis, Illinois National Insurance Company, and Certas, the personal automobile insurer of a driver who had rented a van from Avis, and negligently operated the Avis van.

The court went through the definitions of "contract", "motor vehicle liability policy", and "owners policy" in the *Insurance Act*, comparing them to the coverage grant in the commercial umbrella liability policy. The court concluded that the policy issued by the commercial umbrella liability insurer satisfied the requirements to be an owner's policy, and hence a motor vehicle liability policy. Essentially, the court relied on the fact that the commercial umbrella liability policy insured Avis in respect of the ownership, use, or operation of owned automobiles – the key wording in the *Insurance Act* definitions, as grounds for this conclusion. Consequently, by operation of section 277 (1) of the *Insurance Act* the commercial umbrella liability policy, as an owner's policy, responded in priority to the Certas policy.

In *Avis v. Certas,* Goudge J.A. refers to the automobile coverage in the commercial umbrella liability policy under consideration in that case as being found in Endorsement No. 1. He says, *"…As evidenced by Endorsement No. 1, part of the policy insures against loss caused by automobiles owned by Avis*.[58] In another part of the judgment, it is stated:

[57] 2005 CanLII 16075 (ONCA) ("*Avis v. Certas*").
[58] *Avis v. Certas*, paragraph 22.

> ...the (*commercial umbrella liability policy*) insures Avis in respect of the ownership, use, or operation of an automobile (*i.e.* the van) that is within the definition of automobile in the policy.[59]

The commercial umbrella liability insurer relied upon the *Keelty* and *Heuvelman* decisions for its argument that its policy was not a policy of motor vehicle liability insurance. The court distinguished these decisions stating that in this case, the commercial umbrella liability insurer had filed an undertaking pursuant to section 226.1 of the *Insurance Act* which confirmed the commercial umbrella liability insurer's agreement to be part of Ontario's regulated automobile insurance scheme. The court thereby deemed the commercial umbrella liability insurance policy to be in compliance with Part VI of the *Insurance Act*dealing withmotor vehicle liability insurance.

I would point out here that such an undertaking is unnecessary in the case of an insurer who is licensed to undertake contracts of automobile insurance in the province of Ontario.Farmers' is such an insurer, and is thereby subject to Ontario's regulated automobile insurance scheme.

ING Insurance Company of Canada v. Lombard General Insurance Company of Canada[60] is a third example of a case where a commercial umbrella liability policy was found to be an owner's policy of motor vehicle liability insurance.

The lessee of a vehicle involved in an accident insured the vehicle with Cooperators under an OAP owner's policy which was acknowledged to be first loss insurance by operation of section 277 of the *Insurance Act*.

[59] *Avis v. Certas*, paragraph 28.
[60] 2009 CanLII 1667 (ONSC), 2009 CanLII 570 (ONCA) ("*ING v. Lombard").*

ING insured the negligent driver under an OAP owner's policy on another vehicle, by operation of that policy's "other automobiles" coverage.

Lombard insured the lessor/owner of the vehicle involved in the accident under several policies. These included the Cooperators OAP owner's policy, an OAP 4 Standard Garage Auto Policy, and a CGL policy with non-owned auto coverage. These policies were listed in the Schedule of Underlying Insurance contained in a commercial umbrella liability policy issued by Lombard covering the lessor/owner.

The automobile coverage in Lombard's commercial umbrella liability policy contained the same, S.P.F 7 wording which was in the commercial umbrella liability policy in the *Guardian* v. *York Fire* case, and which is in the commercial umbrella liability policy in this case.

Jennings J. followed Montgomery J.s decision in *Guardian* v *York Fire*, and the Court of Appeal's decision in *Avis* v. *Certas*, in finding that the commercial umbrella liability policy was an owner's policy of motor vehicle liability insurance. He stated:

> The Lombard policy is clearly a "motor vehicle liability policy" as defined by s. 1 of the *Insurance Act*. It provided…the owner of the vehicle with coverage "against liability arising out of bodily injury to…a person…caused by an automobile…". It is not disputed that the umbrella policy is a contract. I have found it to be an owner's policy as defined by the *Insurance Act* (see *Avis Rent a Car, supra*).

Justice Jennings' decision was upheld by the Court of Appeal. The court stated: "*…this case is governed by this court's decision in Avis Rent A Car System v. Certas Direct Insurance Co…"*.

I am satisfied that the wording in Insuring Agreement 2.a, andEndorsement No. 1 Excess Automobile Liability Endorsement in Farmers' commercial umbrella liability policy is, based on the authorities cited, sufficient to make the commercial umbrella liability policy an owner's policy of motor vehicle liability insurance.

If the commercial umbrella liability policy covered the ATV on the date of the accident, then the claimant is entitled to the payment of SABS under the commercial umbrella liability policy.

The final issue to be determined is whether the commercial umbrella liability policy covered the ATV on the date of the accident.

HMQ's position on this issue is, simply put, that the commercial umbrella liability policy is a policy of motor vehicle liability insurance which provide SABS, and the ATV meets the definition of an automobile which would be covered under that policy.

Farmers' takes the position that the ATV is not covered under the commercial umbrella liability policy for two reasons.

Farmers' first argument is that the ATV does not satisfy the definition of "Automobile" set out in the Commercial Umbrella Liability Definitions section of the policy. That definition reads as follows:

> 4. Automobile
>
> "Automobile" means any self-propelled land motor vehicle, trailer or semitrailer (including machinery, apparatus, or equipment attached thereto) which is

> principally designed and is being used for transportation of persons or property on public roads.

Farmers' submits that the ATV was not principally designed for transporting persons or property on public roads. Even if the ATV could satisfy the first part of the test, Farmers' further submits, asserting the temporal and contextual connection required by the case law earlier discussed, that the ATV cannot satisfy the conjunctive, second part of the definition because it was not being used for the transportation of persons or property on public roads at the time of the accident.

I am of the view that the ATV comes within the commercial umbrella liability policy definition of "automobile".

As far as the definition wording is concerned, in my opinion, a grammatically correct reading of the definition would have the modifier "principally" apply to the entire phrase which follows. Read this way, the meaning of the phrase is that to be an "automobile", the vehicle must be principally designed for, and principally used for transporting persons or property on public roads.Principally does not mean exclusively. The Court of Appeal interpreted the word "includes" expansively in the *Copley* case when considering the definition of "automobile" in section 224 (1) of the *Insurance Act.*Applying a similar approach, I would interpret the word "principally" as making the definition broad enough to include a vehicle like an ATV. An ATV may not be principally designed for or principally used on public roads, but an ATV's design certainly makes it capable of being used on public roads, and ATVs are commonly used on public roads.

In my opinion it would be far too restrictive an interpretation of the definition to make a vehicle an automobile for the purposes of the motor vehicle liability coverage in the policy only when the vehicle was operated on public roads. Such an interpretation would not conform to the manner in which “automobile” is defined for the purposes of Ontario insurance legislation. This case is a perfect example of a situation where the ATV is an “automobile” within the meaning of the case law and Ontario’s insurance legislation even though it was not being operated on a public road at the time of the accident.

I further conclude that because the wording of the definition of “automobile” in the commercial umbrella liability policy may beopen to competing interpretations it is therefore ambiguous. Applying the interpretation principles earlier discussed the definition should be interpreted in a manner that results in coverage for the ATV, rather than in a manner that would exclude coverage for the ATV. Interpreting the definition to include the ATV also promotes the public policy objectives of Ontario’s automobile insurance legislation discussed earlier in this Award.

The second reason Farmers’ submits that the commercial umbrella liability policy does not cover the ATV is that since the commercial umbrella liability policy is an excess policy, if there is no coverage for the ATV in the underlying policies (the OAP policy and the CGL policy), then the commercial umbrella liability policy cannot apply because there is nothing to which it can be “excess”.

In my opinion neither the commercial umbrella liability policy wording nor the case law supports Farmers’ in this submission.

The policy wording in Endorsement No. 4 is on its own, I believe, the answer to Farmers' submission. The wording of the Endorsement is as follows:

> Endorsement No. 4
>
> Automobile Liability Coverage Endorsement
>
> It is agreed that, in respect to all automobiles owned or leased by the Insured, the Insured will maintain the following minimum underlying insurance in force during the currency of this policy covering the Insured's liability arising out of ownership, use of (*sic)*[61] operation of such automobiles. In the event of failure by the Insured to so maintain such policies in force…the insurance afforded by this policy shall apply in the same manner it would have applied had such policies been so maintained in force.[62]

The section of this endorsement which follows the forgoing passage stipulates that the underlying coverage to be maintained in force should be standard automobile liability coverage with limits of at least $2,000,000.00.

There are two policies of insurance in the Schedule of Underlying Insurance which is item number 2 in the Commercial Umbrella Declarations. Those policies are the OAP policy, and the CGL policy. There is no doubt that Farmers' maintained these policies in force in the sense that it paid the premiums for these policies, and the stipulated limits of $2,000,000.00 were maintained for automobile liability in both of those policies.

Does it matter that Farmers' did not take positive steps to insure the ATV? Could this inaction be construed as a failure to maintain the underlying insurance?

[61] I believe this is a typographical error and the word should be "or".
[62] Arbitrators emphasis.

I am of the view that it does not matter. Even if Farmers' is found to have failed to maintain the underlying insurance because it did not take positive steps to insure the ATV, the latter part of the wording which I have underlined in Endorsement No. 4 has the effect of relieving against what could otherwise be a breach of a condition of the commercial umbrella liability policy.In practical terms what the wording means is that the insurance in the commercial umbrella liability policy will still apply even if the insured has not maintained the underlying insuranceas required by the endorsement.

I would point out as well that since the commercial umbrella liability policy is an owner's policy of motor vehicle liability insurance, a breach of this condition in the policy by Farmers' would not vitiate SABS claims under the policy. The only limitations on such claims are found in section 30 of the SABS and have been previously discussed. Although it does not directly bear on the issue before me, I would note as well that the absolute liability provisions section 258 of the *Insurance Act* would preserve a tort claimant's entitlement to payment under the policy up to Ontario's minimum third-party liability limits in spite of any breach of condition of the policy.

The authorities also suggest that an absence of underlying coverage, and/or the failure to reference underlying coverage in the commercial umbrella liability policy, does not vitiate the automobile coverage in the commercial umbrella liability policy.

This is clearly the result reached by Montgomery J. in *Guardian* v. *York Fire.*On the facts of the case, it was found that York Fire's Standard Garage Policy –

the scheduled underlying insurance to the commercial umbrella liability policy, did not respond because it did not cover the vehicle involved in theaccident. The Employers of Wausau OAP policy which did respond was not scheduled in the commercial umbrella liability policy.

The argument was advanced by the commercial umbrella liability insurer that because the scheduled Standard Garage Policy did not apply there was no underlying insurance. Therefore, the commercial umbrella liability policy did not have to respond because there was no underlying insurance to which it was excess.

Montgomery J. rejected that argument, and held that even though there was no coverage for the vehicle involved in the accident in the scheduled underlying insurance in the Standard Garage Policy, the insured had nevertheless maintained the policy in full effect as required by the terms of the commercial umbrella liability policy. The insured had thus complied with the minimum underlying insurance requirements.

Jennings J. came to the same conclusion in *ING v. Lombard*. The parties agreed that none of the scheduled, underlying insurance policies provided coverage in respect of the automobile involved in the accident to the insured named in the commercial umbrella liability policy.

Like Montgomery J., Jennings J. concluded that even though there was no coverage in the underlying policies for the automobile owned by the insured named in the commercial umbrella liability policy, the minimum underlying insurance was nevertheless maintained. Jennings J. stated:

> …This would seem to me to be precisely the situation that was before Justice Montgomery in (*Guardian v. York Fire*). In that case, the owner of a leased vehicle involved in a motor vehicle accident had a Standard Garage Policy which did not respond in the circumstances of the case as well as a commercial umbrella liability policy which included a Standard Excess Automobile Policy SPF No. 7…Justice Montgomery held that the underlying insurance with respect to the umbrella policy was the Standard Garage Policy…
>
> …I am unable to accept that Montgomery J erred…I am obliged to give deference to the decision of Montgomery J. and to follow it unless I find the decision to be clearly wrong. I cannot make this finding and any review of it is a matter to be addressed by the Court Of Appeal.[63]

The Court of Appeal subsequently upheld Justice Jennings relying upon its decision in *Avis* v. *Certas*.[64]

In the recent case of *Xu v. Mitsui Sumitomo Insurance Company*[65], McEwen J. (who was upheld on appeal) commented on *Guardian v. York Fire*, *Avis* v. *Certas*, and *ING* v. *Lombard* as follows:

> …I am also aware that in *Guardian*, although the underlying Standard Garage Policy did not respond (like the underlying policies in this case did not respond), the Court of Appeal upheld the trial judge's ruling that the owner/lessors follow-form coverage (*the commercial umbrella liability policy*) responded nevertheless…If (*the owner/lessor*) was a named insured under the Commercial Excess Policy, I would be bound by the precedent in the *Guardian*, *Certas*, and *Lombard* cases.[66]

[63] *ING* v. *Lombard*, paragraphs 10 and 11.
[64] 2009 CanLII 570 (ONCA).
[65] 2014 CanLII 167 (ONSC).
[66] *Ibid*. Paragraphs 54 and 55.

Even if the *Guardian* v. *York Fire*, *Avis* v. *Certas,* and *ING* v. *Lombard* cases are somehow distinguishable on their facts, in my view the wording of Endorsement No. 4 excuses any failure to maintain underlying insurance and makes the insurance in the commercial umbrella liability policy applicable as if the underlying insurance had been maintained.

To summarize, I find that the wording of the commercial umbrella liability policy, and the authorities, support the conclusion that the commercial umbrella liability policy is an owner's policy of motor vehicle liability insurance which is deemed to provide SABS.

I further find that the ATV comes within the definition of "automobile" in the commercial umbrella liability policy, and that the automobile coverage available under the commercial umbrella liability policy is not affected by the fact that there is no coverage for the ATV in the underlying insurance – the OAP policy, and the CGL policy.

Conclusion

1) The ATV is covered for SABS under Farmers' commercial umbrella liability policy. Consequently, Farmers' is the priority insurer.

2) Subject to the determination of the appropriate quantum, Farmers' is responsible to reimburse Dominion for SABS paid to the claimant, and Farmers' is responsible for the payment of future SABS, if any are payable.

3) HMQ, as the successful party, is entitled to recover from Farmers' its arbitration costs, including its share of the arbitrator's fees and disbursements. Should the parties be unable to agree on the quantum of costs, or if there are other matters in connection with the quantum of costs about which the parties wish to make submissions, I invite them to contact my Coordinator to schedule a telephone conference to discuss arrangements to deal with the costs issue.

Dated at Toronto, February 24, 2016

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Scott W. Densem, Arbitrator