**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:

**LIBERTY INTERNATIONAL UNDERWRITERS**

Applicant

and

**UNIFUND ASSURANCE COMPANY**

Respondent

# AWARD

Heard:June 12, 2014

Counsel:

Jonathan A. Schwartzman for the Applicant,Liberty International Underwriters

Peter A. B. Durant for the Respondent, Unifund Assurance Company

SCOTT W. DENSEM: ARBITRATOR

**Introduction**:[1]

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute concerning which of the insurers have priority under Section 268 of the Insurance Act for the payment of *Statutory Accident Benefits*(SABS) to Tom McRae ("the claimant").

This priority dispute arises out of a January 3, 2011 accident occurring in El Paso, Texas. The claimant, a resident of Kingston, Ontario, was driving a rental car while on vacation. He was accompanied by his wife. At the time of the accident they were on a personal errand.

The claimant was employed by the Technical Standards & Safety Authority ("TSSA"). The claimant had regular use of a vehicle owned by TSSA. This vehicle was insured by the Applicant ("Liberty") under a policy of motor vehicle liability insurance.

The claimant was an insured person under a policy of motor vehicle liability insurance issued by the Respondent ("Unifund") to his spouse.

As a result of the accident the claimant sought SABS from the Applicant ("Liberty"). Liberty served a section 283/95 priority dispute notice on Unifund. Liberty took the position in its priority dispute notice thatthe claimant was not a "deemed named insured" under its policy because the TSSA vehicle it insured was not "in use" at the time of the accident. More than 90 days after receiving the claimant's completed SABS application, and after retaining counsel, Liberty provided the alternative reasons for

[1] The facts set out in this introduction are taken from the Agreed Statement of Facts, or from the written and oral submissions of the parties on matters where the facts are not disputed.

disputing priority (discussed in detail, *infra*) that are the basis of Liberty's position in this arbitration.

Unifund disputes Liberty's priority arguments, submitting that the claimant was a "deemed named insured" under the Liberty policy at the time of the accident. Unifund takes the position that Liberty's policy remains primary for the purposes of paying SABS to the claimant.

The parties elected to proceed on the basis of an oral arbitration agreement. I will set out one of the important terms of that agreement here. The parties agree that my Award may be appealed on a question of law, or a question of mixed fact and law.

**Evidence**

The arbitration proceeded on the basis of an Agreed Statement of Facts, written submissions from the parties, and oral submissions from the parties. The Agreed Statement of Facts was the only exhibit introduced into evidence. I have attached the Agreed Statement of Facts to this Award.

**Issues**

To decide priority between Liberty and Unifund, the following issues must be resolved:

1. Was the claimant a "deemed named insured" under the Liberty policy at the time of the accident?

2. If the claimant was a "deemed named insured" under the Liberty policy, is SABS coverage excluded for the claimant by operation of subsection 2.2.3 of the Ontario Automobile Policy ("OAP 1")?

3. Does the OPCF 5 Permission to Rent or Lease Automobiles and Extending Coverage to the Specified Lessee(s) endorsement ("OPCF 5") that was part of the Liberty policy override the exclusionary wording in subsection 2.2.3 of the OAP 1, and provide SABS coverage for the claimant as a "lessee" of the rental vehicle?

4. Is Liberty precluded from advancing the priority arguments it presented at the arbitration hearing on the grounds that it failed to set out these arguments in its priority dispute notice to Unifund, or in any event within 90 days of receiving the claimant's SABS application?

**Analysis**

The Content of Liberty's Priority Dispute Notice

I will deal with the last issue in the list first. In my opinion Liberty is not precluded from advancing the priority arguments it relied upon in its written and oral submissions on this arbitration even though those arguments were not set out in Liberty's priority notice to Unifund, or within 90 days of having received the claimant's completed SABS application.

In addressing this argument, I think it is important to consider the legislative purpose behind Regulation 283/95.

Regulation 283/95 is a procedural regulation made pursuant to the *Insurance Act* which has two purposes. The first purpose is to start the payment of SABS to the claimant upon delivery by the SABS claimant of a completed SABS application to an insurer. The objective is to make sure that benefits are paid as quickly as possible to accommodate the needs of the claimant.

The second purpose of the regulation is to provide a mechanism to resolve any disputes which may arise between insurers with section 268[2] liability to pay SABS, as to which insurer has the highest priority obligation to pay. This part of the regulation takes into account the fact that the insurer who initially pays SABS to the claimant[3] may not be the highest priority insurer under the priority scheme set out in section 268 (2).

Section 3 (1) of Regulation 283/95 requires the first insurer to receive a completed SABS application who wishes to dispute priority with another insurer or insurers, to serve a written notice of dispute within 90 days of having received the completed SABS application. It has been established that this insurer does not have to serve a priority dispute notice on every insurer who might stand in higher priority. To satisfy the requirements of section 3 (1), the insurer simply needs to serve a priority dispute notice on one insurer who it claims stands in higher priority. In selecting this insurer the first insurer's priority opinion does not have to be correct to validly commence a priority dispute under the regulation.[4]

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[2] *Insurance Act*, R.S.O. 1990, c. I. 8, as amended.
[3] A section 268 insurer who receives a completed SABS application is responsible to pay SABS to the claimant, and then dispute priority with another insurer or insurers – see Regulation 283/95, Section 2 (1).
[4] See *Co-operators General Insurance Company v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance (aka Motor Vehicle Accident Claims Fund)* January 9, 2013,Arbitrator Shari Novick; affirmed, 2014 ONSC 515 (Ont. Sup. Ct.); leave to appeal refused, June 13, 2014, Hoy, ACJO, Cronk, and Pepall, JJ.A., (Ont. C.A.).

In my view the interpretation given to Regulation 283/95 in the case law by arbitrators and judges indicates that the first insurer to receive a completed SABS application should act expeditiously to start handling the claimant's SABS claim, and in commencing a priority dispute (to be done within 90 days); however, a standard of perfection is not expected from that insurer in terms of what is required to get the priority dispute started.

I am not aware of any arbitral or court decisions which have found that an insurer who fails to provide accurate (or even any) reasons in its priority dispute notice served upon another insurer is thereafter precluded from advancing different or new arguments in support of its position. Certainly I am not aware of any cases that hold the insurer issuing the priority dispute notice to the section 3 (1) 90 day time period to get its arguments in order.

An insurer is not, in my view, precluded by operation of the 90 day time limit in section 3, or any other section of Regulation 283/95, from making different or additional arguments at a priority dispute arbitration hearing than are contained in the priority dispute notice.

In my opinion, whether an insurer should be permitted to advance arguments (including any evidence in support of those arguments) in a priority dispute arbitration is a matter of process to be governed by the arbitrator, in accordance with the *Arbitration Act*[5], and the parties' arbitration agreement.

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[5]S.O. 1991, c. 17, as amended.

In general, whether a party should be permitted to advance new or different positions in a proceeding from those which were originally taken is a matter of fairness.It depends on when these new positions or arguments are advanced, and whether the other party will suffer prejudice by allowing them to be advanced. Sometimes such prejudice can be addressed by granting an adjournment of the proceedings to enable the aggrieved party an opportunity to properly respond to the new position and arguments. If the prejudice cannot be addressed this way, or by some other satisfactory means, then the arbitrator has the discretion to disallow the new positions and arguments.

Fortunately, in the case before me I am not confronted with such a situation. Neither party submitted that it had suffered irreparable prejudice in advancing the arguments it wished to make because of the lack of opportunity to consider the position taken by the opposing party. In fact, both parties were able to deliver comprehensive materials setting out their arguments, and they supplemented those arguments with an oral presentation including full rights of rebuttal regarding their opponent's arguments.

Therefore, on this issue I conclude that Liberty is not precluded from advancing different or new arguments for the purposes of the arbitration hearing, from those advanced in its priority dispute notice served on Unifund. Liberty's section 3 (1) priority dispute notice was valid, and the arbitration is otherwise properly constituted.

Is the Claimant a Deemed Named Insured under the Liberty Policy?

This issue should be dealt with next, since if the claimant is not a deemed named insured under the Liberty policy then Unifund's policy must take priority. In that case the issues involving the wording of the OAP 1, and the OPCF 5 are moot.

If the claimant is a deemed named insured under the Liberty policy, the parties agree that, subject to the OAP 1 wording, and the effect of the OPCF 5, the Liberty and Unifund policies have equal priority status. By operation of section 268 (4), (5), and (5.1), the claimant has the discretion to decide whether to apply to Liberty, or Unifund for SABS. In this case, the point was made by counsel for Unifund that the claimant exercised his discretion in favour of applying to Liberty, and that discretion is not reviewable.

To be a "deemed named insured" under the Liberty policy, the claimant must satisfy the requirements of section 3 (7) (f) (i) of the SABS[6]. That section reads as follows:

> 3. (7) (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
>
> (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated Association, partnership, sole proprietorship, or other entity…

The parties have agreed that the claimant had regular use of a vehicle owned by his employer, TSSA, a corporation. Therefore, the determination of this issue turns upon

[6] This was formerly section 66 (1) of the SABS prior to the September, 2010 amendments.

whether this vehicle was being made available to the claimant at the time of the accident.

With respect to the “being made available” requirement, based on the Agreed Statement of Facts, I conclude that the TSSA vehicle was being made available to the claimant. He had regular use of the vehicle, and he kept the vehicle at his home. The Agreed Statement of Facts does not outline any restrictions or limitations on the claimant’s control over the TSSA vehicle. The fact that he kept the vehicle at his home supports the inference that he was authorized to make use of the vehicle for both personal, and business purposes. I conclude therefore, that the claimant had the same control over the use and operation of the TSSA vehicle as if it was his personal vehicle owned by him.

The final question on this issue is:Did the claimant have the control I have described in the preceding paragraph over the TSSA vehicle “at the time of the accident”?

Liberty submits that the TSSA vehicle was not being made available for the claimant’s regular use at the time of the accident. Liberty argues that this connection had been broken by geographical distance and circumstances. The claimant was in El Paso, Texas, on vacation, and operating a rental car when the accident occurred. Liberty submits that when the accident occurred the claimant was “far away from use or any potential use” of the TSSA vehicle. Liberty argues that it is also relevant to consider that the claimant was on vacation and operating a rental car at the time of the

accident.No “use” was being made of the Liberty insured TSSA vehicle at the time of the accident.

Liberty submits that to find the claimant was a deemed named insured under the Liberty policy in these circumstances would effectively mean that the Liberty policy would always be answerable to a SABS claim 24 hours a day, seven days a week, without limitation. Liberty submits that this is not what was intended by section 3 (7) (f) (i) of the SABS.

Unifund submits that the key to determining whether the requirements of section 3 (7) (f) (i) are satisfied is whether the claimant has the necessary control over the use and operation of the vehicle. This is not determined by geographic proximity to the vehicle, or the circumstances of the claimant’s activities at the time of the accident. It is determined by the extent of the claimant’s authority over the use and operation of the vehicle. As long as the claimant has authority to use, or determine the use and operation of the vehicle at the time of the accident, the requirements of the section are satisfied. It does not matter how far away the claimant might be from the vehicle when the accident occurs, or the nature of the claimant’s activities at the time of the accident.

Both parties have cited and relied upon the reasoning of Justice Belobaba in *ACE-INA v. The Cooperators General Insurance Company*[7] in support of their positions. It remains the leading case on what is meant by a vehicle being made available at the time of an accident. The case dealt with what was then section 66 (1) of the SABS. As I have indicated, that section has become what is now section 3 (7) of the SABS.

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[7] (2009), CanLII 13625, (ONSC) (“*ACE-INA v. The Cooperators*”)

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

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

On appeal Justice Belobaba reversed the arbitrator's decision. He characterized the arbitrator's decision as having created what amounted to a "floating charge" in favour of the claimant by finding that once the status of "deemed named insured" was created during the employee's working hours, it did not cease even during the employee's off work hours, since he would be returning to work the next day.

Liberty relies on this reasoning as support for its position that if it were found that the Liberty policy on the TSSA vehicle covered the claimant in the circumstances of this case,it would amount to a “floating charge”, per Justice Belobaba’s analysis.

I do not agree with this conclusion. A careful examination of Justice Belobaba’s reasoning demonstrates that whether a vehicle is being made available to a claimant at the time of an accident is dependent upon whether the claimant’s status is such that hehas the authority to exercise control over the use and operation of that vehicle (either by himself, or by permitting others to do so), not whether he has the physical ability or proximity to do so himself.

In *ACE-INA v.The Cooperators*, the claimant’s entitlement to exercise control over the use and operation of the Enterprise vehicles ceased at the conclusion of his working hours. He did not have control over the use and operation of his employer’s vehicles during his non-working hours. It is the terms of the employee’s relationship with his employer in respect of his control over the employer’s vehicles that determines whether vehicles are being made available at any particular time.

To illustrate the operation of section 66 (1) (a), Justice Belobaba gives three examples, two based on the nature of the employee’s relationship with the employer from the facts of his case, and one with an important difference. Justice Belobaba’s examples also demonstrate that neither the claimant, nor anyone else has to be driving or operating the vehicle being made available to him at the time of the accident to acquire deemed named insured status under section 66 (1) (a).

In the first example the employee drives a company vehicle during working hours, and stops to buy a coffee at a restaurant. While crossing the street as a pedestrian he is struck by another vehicle. Justice Belobaba concludes that section 66 (1) (a) would apply and the insurer of the employer's vehicle would pay SABS. The reasoning here is that since the accident occurred during the employee's working hours, the employer's vehicle is still being made available to the employee notwithstanding that at the time of the accident he was engaged in an activity that was not work related.[8]

In the second example, the employee is at work and on duty. He is ready to drive one of several of his employer's cars but no specific car has yet been selected. He walks across the street to buy a coffee and is hit by another car. Section 66 (1) (a) applies even if no specific vehicle had yet been assigned to him. One or more of the employer's insured vehicles were being made available to him because during his working hours he was authorized to operate his employer's vehicles.[9]

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

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[8] *Supra,* note 7, at para 18.
[9] *Supra,* note 7, at para 23.

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

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

In my opinion, the *ratio* of *ACE-INA* v. *The Cooperators,* is that whether a vehicle is being made available "at the time of an accident", requires a determination of the claimant's statusat the time of an accident with respect to his entitlement to exercise control over the vehicle being made available. Put another way, when the accident occurred, did the claimant possess the authority to control the use and operation of the vehicle? If so, then he is a "deemed named insured" in respect of that vehicle.

For "deemed named insured" status to apply, it is not necessary that the vehicle being made available for the claimant's regular use actually be in use at the time of the accident. The claimant need only have entitlement or authority to control the use and operation of the vehicle at a time when an accident occurs.

The nature of the individual's activities, the time those activities take place, and his geographic location in relation to the vehicle, are relevant only if they impact upon the scope of the individual's control or authority over the vehicles.

In the case before me, the facts demonstrate that the claimant possessed the authority to control the use and operation of the TSSA vehicle at all times, whether he was engaged in work related activities or personal activities. The fact that he could not have physically used or operated the vehicle himself at the time of the accident is irrelevant. As I have indicated, *ACE-INA v. The Cooperators* confirms that "deemed named insured" status is not dependent upon actual use or operation of the provided vehicle at the time of the accident.

Liberty argued that interpreting the application of the Liberty policy this way is so broad an application of the policy wording as to render it unnecessary for anyone in the position of the claimant to require a personal automobile policy.

As was pointed out by Unifund,thisis exactly the benefit accruing to a person in the position of the claimant who is fortunate enough to have a company owned car provided to him for his personal, as well as business use. In such circumstances he may well not require a personally owned automobile, since through the benevolence of his employer he has a vehicle available to him which for all intents and purposes is akin to a personal automobile. Perhaps the only difference would be that the claimant could not sell or otherwise dispose of the vehicle, but his control over the use and operation of the vehicle is in all other respects the same as if he owned the vehicle.

I believe there is another valid reason to interpret section 3 (7) (f) (i) in this way. There is much jurisprudence in respect of the interpretation of the SABS indicating that the provisions of the SABS should be interpreted broadly to expand the availability of SABS coverage where the wording of the particular provision makes it feasible to do so, rather than narrowly, to restrict the coverage.

I would point out that if we were not dealing here with a priority contest between two potentially available policies, and the Unifund policy did not exist, then the interpretation of section 3 (7) (f) (i) urged by Liberty could result in the claimant having no Ontario style SABS coverage available through private automobile insurance.

Although he would have recourse to benefits through the government-funded Motor Vehicle Accident Claims Fund ("MVACF"), there is also much jurisprudence to the effect that MVACF should be considered a payor of "last resort" to be accessed in circumstances where there is clearly no basis to find coverage under a private automobile policy.

In my opinion, interpreting section 3 (7) (f) (i) to find that the claimant is a "deemed named insured" under the Liberty policy in the circumstances is justified based on the jurisprudence on the issue, and for the SABS interpretation policy reasons cited.

Having concluded that the claimant is a deemed named insured under the Liberty policy, I will now consider the parties arguments in respect of the interpretation of the OAP 1, and the OPCF 5.

Is coverage under Liberty's policy excluded by operation of subsection 2.2.3 of the OAP 1?

Liberty makes an alternative argument in the event of a finding (as I have made) that the claimant is a deemed named insured under the Liberty policy. Liberty submits that subsection 2.2.3 of the OAP 1 operates to exclude coverage as an "other automobile" under the Liberty policy for the car rented by the claimant and his wife in Texas, except for subsection 2.2.4 liability coverage limited to the renter of the vehicle arising from the negligence of the driver.

I have reproduced below the pertinent wording of subsection 2.2.3 of the OAP 1 that is relied upon by Liberty for this submission:

> **2.2.3 Other Automobiles**
>
> Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.
>
> The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile.
>
> - Liability,
> - Accident Benefits,
> - Uninsured Automobile, and
> - Direct Compensation – Property Damage.
>
> **Special Conditions: For other automobiles to be covered, the following conditions apply:**
>
> …6. **If you are a corporation**,...the employee...for whose regular use a described automobile is supplied, and their spouse who lives with that person,

> will be covered when they drive the other automobile, under the following conditions:
>
> …Except as provided under subsection 2.2.4, this policy doesn't cover the employee…or their spouse if they own, lease, or rent any automobile and it is insured as the law requires…

Liberty cites the definition of "We and You" in section 1.3 of the OAP 1 which reads as follows:

> We and You
>
> Throughout this policy the words you and your refer to the person or organization shown on the Certificate of Automobile Insurance as the named insured.

Liberty submits that the Certificate of Automobile Insurance for the Liberty policy specifies the TSSA as the named insured. Therefore, Special Condition 6 in subsection 2.2.3 can apply to the Liberty policy because the "you" in the Special Condition by definition must refer to TSSA which is a Corporation.

Liberty submits that the requirements of Special Condition 6 are satisfied. The claimant, and/or his spouse, rented the vehicle that they were operating in El Paso, Texas when the accident occurred, and that this vehicle was "insured as the law requires", because it was covered under Unifund's policy.

Liberty submits that the rented vehicle is covered under Unifund's policy because special condition 6 of subsection 2.2.3 does not apply to the Unifund policy. The Certificate of Insurance for the Unifund policy names Gail Delaney, the claimant's wife, as the named insured. She is an individual, not a corporation. As a result, the exclusionary language of special condition 6 cannot apply to the Unifund policy.

In summary, Liberty submits that the terms of Special Condition 6 apply to the Liberty policy to exclude coverage as an "other automobile" for the car rented by the claimant and his wife in Texas, but Unifund's policy provides coverage for the rental car as an "other automobile".

Unifund's response to the subsection 2.2.3 argument advanced by Liberty, is that the OPCF 5 makes coverage applicable under the Liberty policy to the vehicle rented by the claimant. I will address this argument in more detail later in my Award. I will say at this point however, that I agree with Liberty's position that the OPCF 5 does not apply in the manner suggested by Unifund. Therefore, I do not believe the OPCF 5 providesSABS coverage under the Liberty policy for the car rented by the claimant.

In conjunction with its subsection 2.2.3 argument, Liberty addresses the operation of subsection 2.2.4 of the OAP 1. I have reproduced below the wording of subsection 2.2.4:

> **2.2.4Other Automobiles that are Rented or Leased**
>
> …In addition to the coverages referred to in subsection 2.2.3, the following coverage applies to rented automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:
>
> - Liability
>
> Automobiles, other than a described automobile, are covered as described in this subsection when rented by you, or by your spouse who lives with you, for periods of not more than 30 days, but only with respect to the liability of the person renting the automobile arising from the negligence of the driver of that automobile, and only if the driver is not an excluded driver under this policy.

> **Special Conditions: For rented automobiles to be covered, the following conditions apply:**
>
> ...6. **If you are a corporation**…the employee…for whose regular use a described automobile is supplied, and their spouse who lives with that person, will be covered when they rent an automobile…

Liberty argues that subsection 2.2.4 provides only limited liability coverageunder the Liberty policy for Other Automobilesthat are rented or leased. It does not provide any other coverage. The liability coverage is restricted to the liability of the person renting the automobile arising from the negligence of the driver of the automobile. In other words, the policy provides liability coverage only to the person renting the automobile, and not to the driver (unless they are one and the same).

For the reasons which follow, I agree with Liberty's position that coverage for the claimant rental car is excluded under the Liberty policy by operation of subsection 2.3.3 of the OAP 1. I arrive at this conclusion in a different manner however, than the way in which Liberty argued its position.

I think it is helpful to start by looking at section 2.2 of the OAP 1, which is the section dealing with the extension of coverage under the OAP 1 to automobiles other than the described automobile shown on the Certificate of Automobile Insurance.

Section 2.2 reads as follows:

> 2.2 **Extending Your Insurance to Other Automobiles**
>
> If a premium is shown on the Certificate of Automobile Insurance for a specific coverage for a described automobile, then this coverage may be available in the event of a loss for other types of automobiles under this

> policy. The following chart[10] summarizes the types of coverage that can be extended to other types of automobiles. The chart is only a guide. Details of coverages are explained later in this section.

Five subsections of section 2.2 then follow. These subsections detail the requirements to be met in respect of different classifications of automobiles for those automobiles to be covered under the OAP 1. These classifications of automobiles include: Newly Acquired Automobiles (subsection 2.2.1), Temporary Substitute Automobile (subsection 2.2.2), Other Automobiles (subsection 2.2.3), Other Automobiles that are Rented or Leased (subsection 2.2.4), and Trailers (subsection 2.2.5).

In my view, the extension of coverage to Other Automobiles beyond the automobile described in the Certificate of Insurance requires a determination of whether the automobile in question fits into the coverage set out in one of the specific subsections of section 2.2, and is not otherwise excluded from coverage.

Subsection 2.2.3 sets out general coverages for Other Automobiles. The subsection defines Other Automobile as an automobile other than a described automobile driven by the individual named in the Certificate of Insurance (or their spouse). The scope of this definition includes rented vehicles. It is obviously not limited to only rented vehicles.

If a vehicle qualifies as an Other Automobile, subsection 2.2.3 stipulates that the Other Automobile has liability, SABS, uninsured automobile, and direct compensation –

[10] I have not reproduced the chart here, but I will comment on it later in this Award.

property damage coverage when driven by the individual named in the Certificate of Insurance or their spouse.

Special Condition 6 extends the coverage to, *inter alia*, corporate employees or their spouses for whose regular use a described automobile is supplied. If Special Condition 6 of 2.2.3 applies, the coverages enumerated are engaged when the employee or the employee's spouse drives the other automobile.

There are a series of four conditions that must be satisfied for Special Condition 6 to apply. The conditions are actually worded in the negative so that as long as the automobile does not come within the terms of any of the four conditions, Other Automobile coverage applies. In this case, none of the conditions operate to exclude the itemized coverages available in subsection 2.2.3.

The paragraph at the end of the four conditions in Special Condition 6 of 2.2.3 is what is relied upon by Liberty for its argument that SABS coverage[11] is excluded in this case for the claimant's rental car. For clarity, I will repeat the wording here:

> …Except as provided under subsection 2.2.4, this policy doesn't cover the employee…or their spouse if they own, lease, or rent any automobile and it is insured as the law requires…

There is no similar wording in subsection 2.2.3 excluding coverage where the person named on the Certificate of Automobile Insurance is an individual – as in the case of the Unifund policy, where the claimant's wife, Gail Delaney, is named on the Certificate.

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[11] In fact, Liberty's argument is that all coverages are excluded if this wording applies, except for the limited liability coverage set out in section 2.2.4.

Liberty suggests that the interpretation of the exclusionary wording means that a vehicle rented by the employee (or spouse)is not covered under Liberty's Other Automobile coverage becauseit is "insured as the law requires". Liberty argues that the rented vehicle is insured as the law requires because it is covered by Unifund's policy.

As I have mentioned, I agree with Liberty that the exclusionary wording at the end of Special Condition 6 of subsection 2.2.3 applies, but not for the reasons argued by Liberty.

Liberty has placed the focus on the status of the claimant's rental car, and whether it was insured as the law requires. I do not believe that the focus of the inquiry should be restricted to the claimant's rental car. The operative wording of the exclusionary paragraph reads, "…*this policy doesn't cover the employee…or their spouse if they <u>own, lease or rent **any**automobile</u> and it is insured as the law requires*…"[12]. In this case, if it were only the claimant's rental car to be considered as to whether it was insured as the law requires, then Liberty's position would fail. I say this because there is no evidence before me of an applicable law for the purposes of the OAP 1 requiring that the claimant's rental car be insured.

Since the exclusionary wording only applies if there is both a legal requirement for the owned, leased or rented vehicle to be insured, and the vehicle is in fact insured as required, it is necessary to consider what if any legal requirement exists for any owned, leased, or rented vehicle to be insured.

[12] Underlining and highlighting added.

Upon initial examination it might appear that there is some ambiguity in the OAP 1phrase, "...*insured as the law requires*...".Does this phrase mean insured as Ontario law requires? Could the phrase be interpreted to mean insured as the law of the jurisdiction in which the vehicle is registered requires? Or could it mean insured as the law of the jurisdiction in which the vehicle is operated requires (which is not necessarily the same jurisdiction as where the vehicle is registered – especially in the case of rental cars)?

Applying proper principles of statutory and contract interpretation resolves any apparent ambiguity. In my opinion thecorrectinterpretation must be – insured as Ontario law requires. Since we are dealing with an Ontario contract mandated by Ontario legislation, one must determine whether any vehicle the employee or their spouse (*i.e.* the claimant or his wife, Ms. Delaney in this case) owned, leased, or rented was insured as required by Ontario law.

In Ontario, the requirements to insure automobiles are specified in the *Compulsory Automobile Insurance Act*.[13] Section 2 (1) of the *CAIA* requires that the owner or lessee of a motor vehicle insure that motor vehicle under a contract of automobile insurance if they are going to operate the vehicle, or cause or permit it to be operated on a highway in Ontario.

The *CAIA* does not however, have extra-territorial effect. It cannot create an obligation to insure the claimant's rental vehicle in this case because we are dealing with a vehicle that was rented in El Paso, Texas, and which was being operated thereby

[13] R.S.O. 1990, c. 25, as amended ("*CAIA*").

the claimant when the accident giving rise to the SABS claim occurred. From the standpoint of Ontario law then, there is no legal requirement that the claimant's rental vehicle be insured.

Therefore, absent such a legal requirement for insurance under Ontario law, even though the claimant's rental car was insured under the Other Automobile coverage in theUnifund policy, the exclusionary language at the end of Special Condition 6 in subsection 2.2.3 does not apply in insofar as the claimant's rental vehicle is concerned.

To assume that "law", in the OAP 1 phrase, "*insured as the law requires…",*could refer to the law of jurisdictions other than Ontario would improperly introduce an extraterritorial element to the interpretation of a contract made in Ontario, and to Ontario's compulsory automobile insurance legislation. This would also mean that the application of coverage under the OAP 1, and the availability/amount of no-fault benefits could vary significantly depending upon the various automobile insurance statutes throughout North America where the OAP 1coverage applies.

This could lead to inconsistent, and inequitable results. Consider, for example, the situation of a person in the position of the claimant, but who has only the Liberty "company car" coverage available, and not the coverage provided by Unifund's policy.This person rents a vehicle in Texas, is involved in an accident, and seeks SABS under the Liberty policy. Assume that Texas state law required the rental vehicle to be insured, and that it was insured by the car rental company which owned the vehicle. Assume further that the Texas policy insuring the vehicle provided for significantly inferior no-fault benefits coverage to that provided in the Liberty policy (a situation which

in my experience is fairly common as far as American automobile policies are concerned).

If the exclusionary wording in Special Condition 6 of subsection 2.2.3 was interpreted in the extraterritorial manner I have described, the person in the situation would have no recourse but to seek payment of whatever no-fault benefits, if any, were available under the Texas policy. I do not believe principles of contract interpretation support this result, nor do I think this result is what the drafters of the OAP 1could have intended.

Interpreting the phrase, "…*insured as the law requires*…" to mean as Ontario law requires, ensures that SABS and other coverage under a policy like the Liberty policy will not be excluded unless there is another policy in place on a vehicle owned, leased, or rented by the employee or their spouse which is either an Ontario policy, or an out of province policy that is required to provide the same benefits as an Ontario policy.[14]

The other fail-safe mechanism built into this exclusionary wording is that not only must there be a legal requirement that any automobile owned, leased, or rented by the employee or their spouse be insured, but that vehicle must in fact be insured for the exclusionary wording to apply. If the vehicle is not insured even though there is a legal requirement for it to be insured, the exclusionary wording does not apply, and coverage would remain under the company vehicle policy.

[14] To explain this latter comment, I am referring to the situation where the policy may have been issued in a jurisdiction other than Ontario, but pursuant to section 226.1 of the *Insurance Act*, the insurer has filed an undertaking with the Superintendent of Insurance agreeing to provide Ontario style coverage for accidents occurring in Ontario.

In my opinion, the reason the exclusionary wording in Special Condition 6 of subsection 2.2.3 applies to eliminate coverage under Liberty's policy in this case is based on the fact that the claimant's spouse, Gail Delaney, owned a vehicle that was insured as the law requires. Both Ms. Delaney and the claimant are insured persons under that policy.

The vehicle owned by Gail Delaney was an Ontario registered vehicle, subject to the provisions of the *CAIA*, thereby satisfying the legal requirement for insurance portion of the test for exclusion. The second part of the test for exclusion is satisfied because Ms. Delaney's vehicle was in fact insured by Unifund under an Ontario policy of automobile insurance.

In effect then, what subsection 2.2.3 of the OAP 1 appears to do in situations where company employees or their spouses are driving Other Automobiles as described in subsection 2.2.3, is to establish a priority system whereby the employee or the employee's spouse must access any Ontario style insurance coverage available to them under any vehicle they own, lease or rent ahead of accessing coverage under the policy on the employee's company vehicle.

As a final comment on this issue, it should be noted that the coverage described in subsection 2.2.4 is only confined to the limited liability coverage specified in situations where the exclusionary wording in the Special Condition 6 of subsection 2.2.3 applies. In a company car case like the one here, the exclusionary wording would not apply if, for example, the claimant's spouse did not own a vehicle that was required by Ontario law to be insured, and that was in fact insured according to Ontario law.

If the claimant or his spouse did not own, lease, or rent any automobile required to be insured under Ontario law, and that was in fact insured, then the claimant and his spouse would have all of the coverages enumerated in subsection 2.2.3, including SABS, available to them, and they would have the additional coverage in subsection 2.2.4 available for liability arising from the negligence of the driver of a vehicle they had rented. This is apparent from the opening words of the second paragraph of subsection 2.2.4 which state: "*In addition to the coverages referred to in subsection 2.2.3, the following coverage applies*…(liability coverage for the renter of a vehicle)."

Does the OPCF 5 that was part of the Liberty policy override the exclusionary wording in subsection 2.2.3 of the OAP 1?

Unifund submits that the OPCF 5 endorsement that was part of the Liberty policy issued to TSSA precludes the exclusionary wording in subsection 2.2.3 from applying.

Unifund submits that the claimant is a deemed named insured under the Liberty policy. As a deemed named insured he stands in the same capacity as TSSA under the OPCF 5with respect to coverage for rented or leased automobiles. Having rented an automobile in El Paso, Texas, he is a "*lessee*" within the meaning of the OPCF 5, and heis thereby entitled to coverage under the Liberty policy.

Unifund submits that effect of section 2.2 of the OPCF 5 prevents the exclusionary wording in subsection 6 of subsection 2.2.3 of the OAP 1[15] from applying, and therefore the claimant is entitled to SABS coverage under the Liberty policy.

[15] *Supra*, page 17, 18.

Section 2.2 of the OPCF 5 reads as follows:

> 2.2 in the following Sections of your policy, the word "you" means the lessee:
>
> - Section 2, "What Automobiles Are Covered,"…

Unifund submits that this wording requires that the claimant's name be inserted into the wording of subsection 6 of subsection 2.2.3 because he was the "*lessee*" of the automobile rented in Texas. When that is done, since the claimant is an individual, and not any of the enumerated categories in the preamble to subsection 6, the effect is that subsection 6 cannot apply in the circumstances.

This is essentially the same argument that Liberty advanced in its submission that the Unifund policy covered the automobile rented in Texas. Since the claimant's spouse, Gail Delaney, is an individual, the enumerated categories in subsection 6 did not apply to her and therefore coverage under subsection 6 in the Unifund policy could not be excluded.

This would bring us back to the concurrent coverage or "tie" situation whereby both the Liberty and Unifund policies would apply, and it would be in the claimant's discretion as to which company he could apply to for SABS. Unifund submits that the claimant exercised his unfettered discretion to apply to Liberty, and therefore Liberty's policy must respond.

As an alternative argument, Unifund submits that the meaning of "*lessee*" in the OPCF 5 is ambiguous as to whether it could apply to an individual like the claimant in the circumstances of this case. Unifund submits that there is no clear definition of

lessee, and points out that in the *Insurance Act,* definitions simply refer to a lessee as a person who leases or rents an automobile.[16]

Unifund submits that the consequence of this ambiguity means that the interpretation principle, *contra proferentum,* should be applied to resolve the interpretation against Liberty and in favour of Unifund.

Liberty submits that the OPCF 5 does not apply as interpreted by Unifund. The OPCF 5 was issued to the TSSA as the potential lessee or renter of any vehicles. It was not intended to permit corporate employees such as the claimant personal discretion to rent or lease vehicles and acquire coverage under the Liberty policy if they did so.

As I indicated earlier in this Award, I am of the opinion that the OPCF 5 does not apply as suggested by Unifund, and therefore does not negate the effect of the subsection 2.2.3 exclusionary wording.

It is useful to consider the purpose of the OPCF 5 endorsement in interpreting its application. To begin, the full title of the endorsement should be examined. The endorsement is entitled, "*Permission to Rent or Lease Automobiles and Extending Coverage to the Specified Lessee(s)*".[17]

It must be remembered that the policy applied for by TSSA, and issued by Liberty, is an owner's policy of automobile insurance, insuring the 2006 Chevrolet Impala owned by TSSA. Hence it was issued as anOAP 1 (Owners Policy Form 1) policy. Where a party with an owner's policy on an owned automobile leases or rents

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[16] See, for example, sections 277 (4) and 191.9.
[17] Underlining added.

another automobile, the party is not the owner of the other automobile, it is owned by the leasing or rental company.The reason that the OPCF 5 is added to owner's policies is to ensure that automobiles rented or leased by the party with an owner's policy on an owned automobileis provided the same coverage as if the party owned the rented or leased automobiles.

In my view the description of the purpose of the OPCF 5 endorsement in the section entitled, "*Purpose of This Change*" when carefully examined offers a full rebuttal to the position advanced by Unifund.

Under the heading "*Lessor*", the endorsement reads as follows:

- It permits the lessor to rent or lease automobile(s) to the lessee who has completed the Ontario Application for Automobile Insurance Owners Form (OAF 1).For the purposes of s. 267.12 (1) (a) of the Insurance Act (Ontario), the policy shall be deemed to have been issued only to the lessee of the automobile, and not to the lessor.[18]

Although this section is entitled "*Lessor*", it actually provides a definition of "*lessee*", for the purposes of the endorsement. When one links up the underlined wording in this section with the "*Specified Lessee(s)*" wording in the title of the endorsement, in my opinion it is clear that the endorsement is intended to identify the party who applied for the OAP 1, and to whom the OPF 5 endorsement is issued, as the "*lessee*" for the purposes of the coverage extended by the endorsement.

Applying this analysis to the facts of this case, TSSA is the party who applied to Liberty for, and was issued the OAP 1 policy. The OPCF 5 was issued by Liberty to

[18] Underlining added.

TSSA. If TSSA leases or rents automobiles, the OPCF 5 will provide coverage to TSSAunder the Liberty policy as if TSSA were the named insured on the owner's policy insuring the rented or leased automobile.

Although I agree with Unifund's submission that the claimant is a deemed named insured under the Liberty policy, in my opinion that does not confer upon the claimant the status of "*lessee*" within the meaning of the OPCF 5 endorsement.The claimant did not complete the application for the OAP 1 policy issued by Liberty. TSSA completed the application. TSSA, and not the claimant, is the "*Specified Lessee*" under the OPCF 5 endorsement to whom a lessor may rent or lease an automobile, and have the coverage under the Liberty policy apply.

The claimant's status as a deemed named insured under the Liberty policy does not confer upon him the authority to lease or rent vehicles at his discretion because he is not an OPCF 5 "*lessee*".

TSSA's authority to rent or lease automobiles and have them covered under the Liberty policy derives not from its status as the named insured on the Liberty policy, but from its status as a "lessee" under the OPCF 5 endorsement.

The wording of the section in the OPCF 5 endorsement entitled "*Lessee*", also under the general heading: "*Purpose of this Change*", reads as follows:

- It provides coverage to the lessee as if the lesseewere the named insured, and to every other person who uses or operates the automobile with the lessee's consent…

In my view, what this section means is that The OPCF 5 endorsement provides coverage under the Liberty policy to TSSA as the lessee or renter of an automobile as if it were the named insured on the owner's policy issued to the owner of the rented or leased automobile.

I will briefly address Unifund's alternative argument on the *contra proferentum* principle. Since I have found no ambiguity in the wording of the OPCF 5 endorsement as it applies to the circumstances of this case, it is unnecessary for me to consider whether the *contra proferentum* principle should be applied.

I would comment however, that even if I had found ambiguity in the wording of the OPCF 5 endorsement, I am doubtful that this would be an appropriate case to apply *contra proferentum*.

The insurance contract under consideration is a standardized policy form that is legislated by the Ontario government. The same is true of all of the endorsements, such as the OPCF 5, which forms a part of the Liberty policy in this case.

Liberty was not the author of the OAP 1, nor did it create the wording for the OPCF 5 endorsement. Therefore, the principle that the party who creates the wording for a contract and wishes to rely upon it to reduce or eliminate a contractual obligation such as coverage under an insurance contract should have any ambiguity in the wording resolved against them, does not, in my opinion, apply to the circumstances of this case.

**Conclusion**

1) The claimant **was** a deemed named insured under the Liberty policy at the time of the accident.

2) SABS coverage for the claimant under the Liberty policy in respect of the automobile rented in El Paso, Texas **is excluded** by operation of subsection 2.2.3 of the OAP 1.

3)The OPCF 5 endorsement that was part of the Liberty policy **does not** override the exclusionary wording in subsection 2.2.3 of the OAP 1, and provide SABS coverage for the claimant as a "lessee" of the rented automobile.

4)Liberty **is not** precluded from advancing the arguments it presented in its written and oral submissions fort the arbitration hearing on the grounds that it failed to set out these arguments in its priority dispute notice to Unifund, or in any event within 90 days of receiving the claimant's SABS application.

5) The claimant **was** an insured person under Unifund's policy at the time of the accident. Unifund's policy provided Other Automobile coverage for the automobile rented by the claimant in El Paso, Texas. Therefore, the claimant is entitled to SABS from Unifund.

7) Subject to the determination of proper quantum, if necessary, Liberty is entitled to reimbursement from Unifund for SABS paid to the claimant, and Unifund is responsible for the payment of future SABS to the claimant, if required.

8) Liberty, as the successful party, is entitled to recover from Unifund 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 this 15th day of June, 2015

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Scott Densem, Arbitrator