

**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:

**STATE FARM INSURANCE COMPANIES**

Applicant

and

**THE WAWANESA MUTUAL INSURANCE COMPANY**

Respondent

**AWARD**

Heard: February 6, 2015

Counsel:

Mark Donaldson for the Applicant, State Farm Insurance Companies

Kevin D.H. Mitchell for the Respondent, TheWawanesa Mutual Insurance Company

SCOTT W. DENSEM: ARBITRATOR

## Introduction<sup>1</sup>

This Award is in connection with a priority dispute arbitration pursuant to Ontario Regulation 283/95 – Disputes Between Insurers, made under the *Insurance Act*.<sup>2</sup> The dispute to be resolved is priority responsibility for the payment of statutory accident benefits under Ontario Regulation 403/96 – Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996 (“SABS”).

The dispute arises as a result of an accident occurring September 26, 2009. One PhuCuongDang (“the claimant”) was a passenger in an automobile involved in the accident which automobile was insured by the applicant (“State Farm”). The claimant applied for SABS to State Farm following the accident. State Farm began handling the claimant’s SABS claim. As a result of its investigation, State Farm obtained information which in its opinion indicated that the claimant was an “insured person” as defined in the SABS under a policy of motor vehicle liability insurance issued by the respondent (“Wawanesa”).

State Farm served a Notice of Dispute between Insurers on Wawanesa seeking to be indemnified for SABS payments made to the claimant, and to have Wawanesa take over handling of the claim. There is no issue as to the sufficiency or timeliness of this Notice.

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<sup>1</sup> The information in this Introduction is based on agreed or non-contentious facts contained in the parties’ *facta*, and from information contained in Exhibit 2 referred to *infra*.

<sup>2</sup>R.S.O. 1990, c. I.8, as amended.

Wawanesa declined to indemnify State Farm and to take over the SABS claim, taking the position that the claimant was not an insured person under its policy, and therefore was not entitled to the payment of SABS.

State Farm commenced arbitration proceedings, and the parties agreed to appoint me as arbitrator to determine the priority issue. There is no issue as to the timeliness of the commencement of the arbitration proceedings.

### **The Issues**

The parties entered into a written Arbitration Agreement executed in counterpart on January 27, 2015, and January 28, 2015. Under the terms of the Arbitration Agreement the following questions were submitted to me for determination:

- (a) Whether the injured claimant, CuongPhu Dang, would be considered as an insured person under Wawanesa's policy by virtue of him having been shown thereon as an "excluded driver"?
- (b) If the answer to (a) is in the affirmative, what is the appropriate indemnity amount to be paid by the Respondent to the Applicant?
- (c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing?
- (d) The determination of the costs of the arbitration and the burden of payment of same.

## **The Evidence**

The evidence in the arbitration took the form of documentary exhibits as itemized below. The parties made written and oral submissions, and submitted briefs of authorities.

Exhibit 1: Arbitration Agreement, executed January 27, 2015 (State Farm), and January 28, 2015 (Wawanesa).

Exhibit 2: Applicant's (State Farm) Document Brief, Tabs 1 to 9.

## **Analysis**

If the claimant is determined to be an insured under Wawanesa's policy, then Wawanesa is the priority insurer by operation of subsection 268 (2) of the *Insurance Act*. Subsection 268 (2) 1. i. makes the insurer of an automobile in respect of which an occupant is an insured the highest priority insurer for the purposes of SABS.

In this case, if the claimant is an insured under the Wawanesa policy, State Farm comes second in the priority structure to Wawanesa by operation of subsection 268 (2) 1. ii. of the *Insurance Act*. The claimant's only connection with State Farm is that he was an occupant (passenger) of the vehicle involved in the accident that was insured by State Farm.

If the claimant is not an insured under Wawanesa's policy then State Farm maintains the obligation to deal with the claimant's SABS claim.

To be an insured for the purposes of SABS under Wawanesa's policy the claimant must satisfy the definition of "insured person" in subsection 2 (1) of the SABS. The Court of Appeal made it clear in *Warwick et. al. v. Gore Mutual Insurance Company* that the SABS definition of "insured person" is the governing definition used to determine whether a claimant is an insured for the purposes of SABS under a particular contract of motor vehicle liability insurance.<sup>3</sup>

I will reproduce here the portions of the definition of "insured person" in subsection 2 (1) of the SABS which are important for this case:

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

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

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile...<sup>4</sup>

The parties agree that to qualify as an "insured person" under Wawanesa's policy on the facts of this case the claimant must be "*any person specified in the policy as a driver of the insured automobile*". There is no basis on the facts for the claimant to otherwise qualify as an insured person. The claimant is the brother of Hoang Nga Dang. She is one of the named insureds on Wawanesa's policy. Hoang Nga Dang is the wife of the other named insured – Xuan Hung Nguyen. The claimant was not a named

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<sup>3</sup>32 O.R. (3d) 76, per Laskin J.A.

<sup>4</sup> SABS subsection 2 (1), arbitrator's underlining.

insured on Wawanesa's policy, he was not a spouse of a named insured, and he was not a dependant of either of the named insureds.

Wawanesa issued a Certificate of Automobile Insurance ("the Certificate") to its named insureds.<sup>5</sup> The Certificate confirmed that Wawanesa had issued a standard policy or contract of motor vehicle liability insurance which, by operation of subsection 268 (1) of the Insurance Act, is deemed to include SABS.<sup>6</sup>The policy period confirmed in the Certificate was August 24, 2009 to August 24, 2010. There is no issue that this contract was in force at the time of the September 26, 2009 accident. The identity and address of the named insureds, the particulars of the described automobiles, and the insurance coverages were set out on page 1 of the Certificate. A 1993 Lexus was described as vehicle 01. A 1997 Acura was described as vehicle 02.

The following information was set out on page 2 of the Certificate:

Driver Name	Principal Driver of Vehicle(s)	Occasional Driver of Vehicle(s)
Dang, Hoang Nga	01	
Nguyen, Xuan Hung	02	
Dang, PhuCuong	Excluded	Excluded

During a previous term of Wawanesa's policy, an endorsement in the standard form approved by the Superintendent of Insurance was issued to Wawanesa's named

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<sup>5</sup>Exhibit 2, Tab 9.

<sup>6</sup> See subsections 232 (5) and 227 (1) of the *Insurance Act* with respect to the Certificate evidencing a contract of motor vehicle liability insurance in a standard form approved by the Superintendent of Insurance.

insureds and became part of the policy. The endorsement was an OPCF 28A Excluded Driver Endorsement.<sup>7</sup>

The effect of the OPCF 28A Excluded Driver endorsement was to designate the claimant as an excluded driver in respect of the Wawanesa policy. On the facts of this case the parties agree that the OPCF 28A Excluded Driver endorsement was properly issued, and was in force in respect of Wawanesa's policy at the time of the September 26, 2009 accident.

State Farm submits that the claimant was an insured person under Wawanesa's policy because he was a person specified in the policy as a driver of the insured automobiles. He was specified because his name appears in the list under the heading "Driver Name" on page 2 of the Certificate. State Farm argues that the claimant remains a specified driver even though he has been designated as an excluded driver. The OPCF 28A Excluded Driver endorsement designating the claimant as an excluded driver does not affect his identification as a specified driver, it merely limits the extent of coverage the policy provides if the claimant drives one of the described automobiles, a temporary substitute automobile, or a newly acquired automobile. These are the only circumstances in which the coverage is limited by the OPCF 28A Excluded Driver endorsement. In this case, the claimant was a passenger in an automobile completely unconnected with Wawanesa's policy, so there is no limitation on the SABS coverage to which he would be entitled as a specified driver on Wawanesa's policy.

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<sup>7</sup>Exhibit 2, Tab 5.

Wawanesa submits that specified driver status, and excluded driver status are mutually exclusive. It is logically inconsistent that a person who has made a written promise not to drive certain automobiles can be considered a “specified driver” of those same automobiles. Wawanesa argues that giving the words, “...*a person specified in the policy as a driver the insured automobile...*” common sense meaning requires that the driver be described in the Certificate as having some form of “active” status with respect to driving the insured automobiles. For example, a person who is identified in the list of drivers in column 1 of the Certificate and is described in columns 2 and/or 3 of the Certificate as a “principal operator”, or an “occasional operator” of one of the insured automobiles would have the necessary active status to be considered a “specified driver”. A person who is only described as an excluded driver in respect of the insured automobiles does not have such activestatus.

Wawanesa submits that the legislature never intended an excluded driver to have the status of “insured person” as defined in subsection 2 (1) of the SABS. To the contrary, the legislature intended that excluded drivers have very limited rights, and that insurers who issue excluded driver endorsements should have reduced exposure to claims.

Therefore, Wawanesa submits, for the purposes of the insured person definition excluded driver status is overarching. It prevents the excluded driver from attaining specified driver status, and thereby becoming an insured person under the policy where he is designated as an excluded driver.

The resolution of the issue in this case involves an exercise in statutory interpretation. The Supreme Court of Canada has endorsed Elmer Driedger's statement in his work entitled, *Construction of Statutes* (2<sup>nd</sup> ed. 1983) as the proper method for statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>8</sup>

To apply the approved approach to interpreting the meaning of the words, "... *any person specified in the policy as a driver of the insured automobile...*" in the definition of "insured person" in subsection 2 (1) of the SABS I must consider their context, their grammatical and ordinary meaning, the scheme and object of the SABS, and the intention of the legislature with respect to the definition.

I believe however, that I must also apply the principles of interpretation that the courts have held to be appropriate in interpreting insurance law and contracts. In *Schneider v. Maahs Estate*<sup>9</sup> the Ontario Court of Appeal had to interpret the meaning of "insured person" for the purposes of determining whether a plaintiff was covered under an OPCF 44 endorsement in an automobile insurance policy. It is important to note that the resolution of the issue determined which of two insurers had to respond first to the plaintiff's claims. In other words, this was not a case where the court's interpretation of "insured person" could have been influenced because the plaintiff's recovery hinged on how the issue was decided; it did not. The case involved an issue between two insurers

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<sup>8</sup>*Rizzo & Rizzo Shoes Ltd. (Re)*, CanLII 837 (SCC), per Iacobucci J. at paragraph 21.

<sup>9</sup>2001 CanLII 3018 (ONCA).

as to which of them would be responsible to pay the plaintiff who would recover from one of them in any event.

It was in this context that Laskin J.A. made the following comments with respect to interpreting Ontario automobile insurance contracts:

An insurance policy is a contract and the ordinary rules of contract interpretation apply to determine the meaning of an insured person. The court must give effect to the intention of the parties by looking at the words they used (citations omitted). Admittedly, searching for the intention of the parties to an Ontario car insurance policy is somewhat fictional. The mandatory provisions of the policy and the optional endorsements incorporate standard terms and forms. These terms and forms are written by the insurance industry. The driving public can either accept or reject the coverage that is available but they cannot modify the words of the policy. Still, the court should interpret the policy, including optional endorsements, like the OPCF 44, by first looking at the words actually used...

...At best...the definition...is ambiguous...any ambiguity must be resolved against the insurer...Although the OPCF 44 endorsement was approved by the Commissioner of Insurance, its terms, as I have said, were drafted by the insurance industry. Any ambiguity in the terms of a contract must be interpreted against the drafter of those terms on the principle that the drafter could have avoided the ambiguous language.

...As a general rule, clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured; conversely, clauses excluding coverage are interpreted strictly against the insurer.<sup>10</sup>

I will begin my analysis with a consideration of the scheme and object of the SABS – the “Act” in which the words, “...*any person specified in the policy as a driver of the insured automobile...*” are found. In my view, it is important to consider that the

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<sup>10</sup>*Schneider v. Maahs Estate*, per Laskin J.A. at paragraphs 13, 15, and 22.

words are found in the definition section of the SABS which establishes the scope for the group of persons who are entitled to claim SABS under a particular motor vehicle liability policy. This is the enabling section of the Regulation which grants entitlement to SABS coverage under motor vehicle liability policies.

There is much case law to the effect that the entire SABS scheme is to be given a generous, expansive interpretation. It is remedial in nature in that its benefit structure is designed to replace at least in part the value of claims that have been restricted or eliminated by statutory modifications to automobile tort law.

Applying the interpretation rules discussed, since the words are found in the provision granting coverage they should be expansively interpreted. If the words are open to competing interpretations, then the interpretation which provides coverage should be preferred over the interpretation which excludes coverage.

In my opinion this kind of interpretation reflects the intention of the legislature with respect to the object of the SABS, and with respect to the manner in which the scheme should operate.

On this point, It should also be noted that the words under consideration represent an addition by way of amendment from the original definition of “insured person” in subsection 2 (1) of the SABS. At least one of the cases which I will refer to later in this Award was decided under a version of the SABS which did not include specified drivers as part of the definition of “insured person”. In my opinion, the fact that these words were added by itself indicates that the drafters of the Regulation were seeking to expand the definition of “insured person” to include a larger number of

persons who would be eligible to advance SABS claims under particular automobile policies.

Let us consider the words, “...*any person specified in the policy as a driver of the insured automobile...*” in their grammatical and ordinary sense. Common synonyms for “specified” include “listed”, and “identified”. To determine whether a person is specified (listed or identified) in the policy as a driver of the insured automobile one must look to the Certificate. The chart on page 2 of the Certificate specifies the drivers of the insured automobiles in Wawanesa’s policy. An examination of the first column of the chart entitled “Driver Name” indicates that Wawanesa has specified three drivers. The three drivers specified are the two named insured’s, and the claimant. The claimant’s name clearly appears in this column entitled “Driver Name”. In my opinion, by including the claimant in the column headed “Driver Name” Wawanesa has specified – listed or identified if you will, the claimant as a driver of the insured automobile(s).

Therefore, in my view, giving the words, “...*any person specified in the policy as a driver of the insured automobile...*” their grammatical and ordinary meaning leads to the conclusion that the claimant is a specified driver in the Wawanesa policy.

This conclusion is supported by a careful study of the chart on page 2 of the Certificate. Column 1 of the chart specifies in the policy the three drivers under the heading, “Driver Name”. Columns 2 and 3 of the chart describe the status of the specified drivers. Their status is described as “Principal Driver”, “Occasional Driver”, or “Excluded”.

The column under the second heading, “Principal Driver”, indicates whether a specified driver holds the status Principal Driver in respect of the insured automobiles. In this case, Hoang Nga Dang holds the driver status of Principal Driver in connection with automobile 01, the 1993 Lexus. Xuan Hung Nguyen holds the driver status of Principal Driver in connection with automobile 02, the 1997 Acura.

The third column on page 2 of the Certificate entitled “Occasional Driver” indicates whether a particular specified driver holds the status Occasional Driver in connection with the insured automobiles. In this case, neither of the named insured’s is indicated as holding the status “Occasional Driver” in connection with the insured automobiles.

In the case of the claimant, who is a specified driver in column 1, he is indicated in columns 2 and 3 as holding the status “Excluded” in connection with the insured automobiles.

As is discussed later in this Award, the status of “excluded driver” is a special legal status which can only be created by adding the OPCF 28A Excluded Driver Endorsement to the policy, under the authority of section 249 of the *Insurance Act*. This status is not conferred by naming a driver in the “Driver Name” column of the Certificate, and indicating beside that name in columns 2 and/or 3 that the driver’s status is “Excluded”. The effect of doing so is merely descriptive in that it indicates a specified driver in the policy holds the status of excluded driver because there is an OPCF 28A Excluded Driver Endorsement forming part of the policy.

Wawanesa argues that the claimant's status as an "excluded driver" precludes him from being a "specified driver" because an excluded driver does not have "active" status to drive the insured automobile.

I disagree. Whether a person's name appears in column 1 on page 2 of the Certificate is the factor which determines if that person is a "specified driver". The status of excluded driver held by the claimant is a legal status completely independent of what is stated in the Certificate. It is created through the separate OPCF 28A Excluded Driver Endorsement. The OPCF 28A Excluded Driver Endorsement makes no mention of whether the Certificate describes a specified driver as having a certain type of driving status in respect of the insured automobiles. It only sets out the reduced coverage consequences in the event that the excluded driver drives the insured automobile.

In a closely connected argument in support of its position that an excluded driver cannot be a specified driver, Wawanesa submitted that OPCF 28A Excluded Driver Endorsement "specifically prohibits" the claimant from driving the insured automobiles. It is this prohibition which prevents the claimant from being "elevated" to the status of an insured person under the policy as a specified driver.

The OPCF 28A Excluded Driver Endorsement does not prohibit, in a statutory or contractual sense, the excluded driver from driving the insured automobiles. In fact, the entire focus of the Endorsement is what happens when the excluded driver drives the insured automobiles, even though he has promised not to do so. The effect of the endorsement is that it eliminates some, and reduces other coverage under the policy if the excluded driver breaks his promise.

Therefore, in my opinion, an excluded driver who is identified in the list of drivers in the Certificate is simply a type of specified driver, or a specified driver who has excluded driver status because an OPCF 28A Excluded Driver Endorsement has been added to the policy.

To put it another way, the description “excluded driver” is essentially a sub-category of the broader, specified driver category. Considered this way, I do not view it as logically inconsistent for the claimant to be a specified driver under the policy while having “excluded” status. The grammatical and ordinary meaning of listing a driver in column 1 of the Certificate headed “Driver Name” indicates that the person has been specified as a driver in respect of the insured automobiles. Columns 2 and 3 on page 2 of the Certificate describe the status of that specified driver. In the case of the claimant, he has been described in columns 2 and 3 of the Certificate as having the status “Excluded” because he is named in an OPCF 28A Excluded Driver Endorsement which forms part of the policy. This status carries certain consequences in the form of reduced coverage in the event he drives the insured automobiles.

I will turn now to a consideration of what the legislature intended with respect to the words, “*any person specified in the policy as a driver of the insured automobile*” in the context of the SABS definition of “insured person”.

The question to be asked in this case is: Did the legislature intend that the grammatical and ordinary meaning of these words should be circumscribed by the operation of the OPCF 28A Excluded Driver Endorsement?

The short answer to this question, in my opinion, is “No”. In fact I am of the view that there is no evidence, at least none before me, to indicate that the legislature intended the OPCF 28A Excluded Driver Endorsement should have any impact on the interpretation of the SABS section 2 (1) “insured person” definition.

Wawanesa argued that it was the intention of the legislature that an excluded driver not be considered an insured person for the purposes of SABS under the policy in which he is designated as an excluded driver. I do not agree. This assertion is not supported by an analysis of the development of the OPCF 28A Excluded Driver Endorsement, or a consideration of the entire definition of “insured person” in the SABS.

The reason that the legislature, in cooperation with the insurance industry, created the OPCF 28A Excluded Driver Endorsement was explained by Spiegel J. in *Jevco Insurance Co. v. Wawanesa Insurance Company; Jevco Insurance Company v. Pilot Insurance Company*.<sup>11</sup>

I must also consider the purpose of the excluded driver concept...

...Prior to 1990, if an insurer was asked to provide automobile coverage to a person in circumstances where it appeared that the automobile would be available to another person whom the insurer regarded as a substandard driver, the insurer had only two options, it could charge a premium which reflected the perceived risk involved in the other person driving, or it could decline the request for insurance. Even if the person seeking coverage undertook that the other person would not drive the automobile, there was nothing in the *Act* which would relieve the insurer from liability to third parties if this undertaking was breached. The result was that the person would have to pay the higher premium or go without coverage which was not an acceptable option in view of the compulsory automobile insurance legislation. The

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<sup>11</sup>(1998) 42 O.R. (3d) 276 (Ont. Ct. Gen. Div.) (“*Jevcov. Wawanesa and Pilot*”).

excluded driver scheme was designed to remedy this unsatisfactory situation. The scheme was implemented by Bill 68, S.O. 1990 c2. which permitting (*sic*) the naming of persons as excluded drivers in contracts of automobile insurance and which amended a number of Acts to grant protection from liability to the insurers issuing such contracts if the automobile was driven by the excluded driver.

Spiegel J. describes the legislature's intention in creating the OPCF 28A Excluded Driver Endorsement. The mischief to be remedied through the creation of the Endorsement is increased liability exposure for insurers to third parties when their insured vehicles are driven by high risk or substandard drivers to whom the insured vehicles are available because of circumstances such as family relationships, or living arrangements, to cite but two examples.

In my opinion, this rationale gives no indication that in creating the excluded driver concept the legislature intended to prevent a person who is specified in the policy (*ie.* listed in the Certificate) as a driver of the insured vehicles from having the status of "insured person" in so far as SABS are concerned because he is an excluded driver under the policy.

Such intent seems even less likely with respect to a fact situation like the one before me. The objective of the excluded driver legislation was to reduce an insurer's liability exposure caused by the bad driving of the insured vehicle by a substandard driver. In this case, the accident occurred while the claimant was a passenger in a vehicle. He was not driving one of Wawanesa's insured vehicles. There is no basis to conclude that the legislature must have intended that an excluded driver should not be considered an insured person for SABS purposes under the policy where he is specified

as a driver when he was not driving the insured vehicle at the time of the accident. The insurer's exposure in this case has absolutely nothing to do with any bad driving of the insured vehicle by the claimant.

An examination of the provisions in the *Insurance Act* dealing with excluded drivers, and the OPCF 28A Excluded Driver Endorsement supports this interpretation.

Section 249 of the *Insurance Act* is the enabling section permitting the addition of the OPCF 28A Excluded Driver Endorsement to a policy of motor vehicle liability insurance. It reads as follows:

**249. Excluded driver endorsement** – A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract.<sup>12</sup>

It is important to note that the enabling section 249 does not state that the person who the named insured seeks to designate as an excluded driver acquires that status by being named in the list of drivers in the Certificate, and then described as "Excluded". Under the law, the status of excluded driver is accorded to the person designated by the named insured by operation of the OPCF 28A Excluded Driver Endorsement, a standard form approved by the Superintendent of Insurance. The OPCF 28A Excluded Driver Endorsement becomes a part of the policy once it has been properly executed by the excluded driver, and the named insured, and a copy of the endorsement has been provided to the insured.<sup>13</sup>

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<sup>12</sup> Arbitrator's underlining.

<sup>13</sup> Technically, the execution of the OPCF 28A Excluded Driver Endorsement is not required to make it a binding part of the policy, provided there is evidence that both the excluded driver and the named insured

Subsection 224 (1) of the *Insurance Act* defines excluded driver as follows:

“**excluded driver**” means a person named as an excluded driver in an endorsement under section 249;<sup>14</sup>

Once again I would note that a person acquires the status “excluded driver” by being named in the OPCF 28A Excluded Driver Endorsement, not because he is named as a driver in the Certificate, and described therein as “Excluded”.

Sections 225 and 240 of the *Insurance Act* deal with the consequences of the excluded driver driving the insured vehicle.

Section 225 provides as follows:

**225. Exception re: insured** – Except as provided in the *Statutory Accident Benefits Schedule*, the insured under a contract shall be deemed not to include any person who sustains loss or damage while any automobile insured under the contract is being used or operated by an excluded driver.<sup>15</sup>

I have already discussed the fact that the courts have held that the SABS definition of “insured person” is the paramount definition to determine who is an insured under a policy of motor vehicle liability insurance for the purposes of SABS. The preliminary wording in section 225 takes the SABS out of consideration from the impact of the remainder of the section.

Section 240 of the *Insurance Act* reads as follows:

**240. Insurer not liable re: excluded driver** – If a contract evidenced by a motor vehicle liability policy names an excluded driver, the insurer is not

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know of the Endorsement, and understand its effect. See *GMAC Leaseco Corp. v. Lombard Insurance*, 2007 ONCA 665 (CanLII).

<sup>14</sup> Arbitrator’s underlining.

<sup>15</sup> Arbitrator’s underlining.

liable to any person under the contract or under this Act or the regulations for any loss or damage that occurs while the excluded driver is driving an automobile insured under the contract, except as provided in the *Statutory Accident Benefits Schedule*.<sup>16</sup>

The exception wording appears at the end of section 240, as opposed to the beginning of the section as it does in section 225, but the result is the same. The impact of section 240 does not apply to SABS.

The effect of section 240 would appear to be that it removes any liability an insurer would otherwise have under the policy for third-party damage claims in tort, or property damage claims which occur when an excluded driver under the policy is driving the insured vehicle. It is also been held that section 240 removes the liability a second party insurer would otherwise have to pay loss transfer indemnity pursuant to section 275 of the *Insurance Act* when an excluded driver is driving the second party insurer's insured vehicle.<sup>17</sup>

In my view, for the purposes of the issue which I must decide, the important points to take from the sections of the *Insurance Act* which I have cited are as follows: First, the Certificate and the OPCF 28A Excluded Driver Endorsement serve distinct purposes. The Certificate is the evidence that a motor vehicle liability policy exists. It is also the part of the policy where the drivers of the insured vehicles are named, and their status is described. Naming persons as drivers in the Certificate makes them "specified drivers", and therefore "insured persons" for the purposes of SABS.

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<sup>16</sup> Arbitrator's underlining.

<sup>17</sup> See *Jevco v. Wawanesa and Pilot*.

The sections of the *Insurance Act* which I have discussed make it clear that naming a driver in the list of drivers in the Certificate, and describing that driver's status as "Excluded", does not make that driver an excluded driver. A person is legally designated an excluded driver for the purposes of the *Insurance Act* and the policy only if that person is named in an OPCF 28A endorsement properly made part of the policy. Therefore, it is not necessary to name a driver in the driver list contained in the Certificate to designate that driver as an excluded driver within the meaning of the *Insurance Act*.

A person can be an insured person by being any of the listed entities in the SABS subsection 2 (1) definition, and also be an excluded driver. The definition of "insured person" and "excluded driver" are not mutually exclusive.

Second, the SABS is a complete code governing the conditions for the payment of benefits to any person injured in an automobile accident. It operates separate and apart from the sections of the *Insurance Act* which I have cited which deal with the insurance coverage consequences when an excluded driver drives an insured vehicle.

To illustrate this point let us examine the impact of the OPCF 28A Excluded Driver Endorsement in a situation where the excluded driver is driving the insured vehicle. The sections of the *Insurance Act* I have referred to remove coverage under the policy naming an excluded driver for liability to third parties for damages sustained when the excluded driver is driving the insured vehicle. In such circumstances third-party claimants must access other motor vehicle liability coverage available to them, if any, as they cannot recover at all under the policy naming the excluded driver.

By contrast, for the purposes of SABS, all coverage is not excluded under the subject policy even in the case where the excluded driver drives the insured vehicle in breach of the OPCF 28A Excluded Driver Endorsement. The only limitations on SABS payable in respect of situations involving excluded drivers are found in Part IX – General Exclusions in the SABS.

The relevant parts of Subsection 30 in the General Exclusions read as follows:

30. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20 (Lost Educational Expenses), 21 (Expenses of Visitors) or 22 (Housekeeping and Home Maintenance) in respect of a person who was the driver of an automobile at the time of the accident,

...(c) if the driver is an excluded driver under the contract of automobile insurance;

(2) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22,

...(b) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent.

(3) Clause (2) (b) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured.<sup>18</sup>

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<sup>18</sup> Arbitrator's underlining.

With the very narrow exception described in subsection 30 (2) (b), and (3), it will be observed that the limitations upon SABS payable imposed by section 30 apply only to situations where the excluded driver is driving the insured vehicle. The narrow exception is that subsection 30 (2) makes reduced SABS payable also in the case of an occupant (passenger) in a vehicle who knows or should know that the driver does not have the owner's consent to operate the vehicle.

It is also noteworthy however, that subsection 30 (3) provides that an occupant who knows or should know of the driver's lack of consent, or the excluded driver who knows he does not have the owner's consent, are still entitled to the payment of full SABS if they are named insureds under the policy.

An excluded driver who drives the insured vehicle is entitled to recover under the policy insuring the vehicle the significant benefits available under Part V – Medical, Rehabilitation and Attendant Care Benefits.

An excluded driver who is a passenger in the vehicle in respect of which he is an excluded driver, or the driver of or a passenger in any other vehicle if he is an insured person under the policy in respect of which he is an excluded driver, is entitled to recover SABS without limitation under the policy designating him as an excluded driver.

In my view one of the strongest arguments against the suggestion that the legislature did not intend excluded drivers to have SABS insured person status is the fact that the named insured, the named insured's spouse, and any dependant of either the named insured or of the named insured's spouse are clearly "insured persons", but they can also be excluded drivers.

If any of the named insured, the named insured's spouse, or a dependant of the named insured or of the named insured's spouse is an excluded driver under insurer A's policy, and is involved in an accident while either the driver of or a passenger in a vehicle insured by insurer B, the priority insurer in each case would be insurer A because they are insured persons under insurer A's policy, despite being excluded drivers. On these facts there would be no limitation on the scope of SABS claimable by any of the parties itemized. Their SABS would only be limited if they had been driving insurer A's insured vehicle when the accident happened.

In my opinion the legislature authorized the creation of the OPCF 28A Excluded Driver Endorsement for the main purpose of relieving the insurer naming the excluded driver from the consequences of the increased risk of third party claims for tort damages caused by the excluded driver driving the insured vehicle. The legislature felt it appropriate to entirely absolve the insurer naming the excluded driver from any liability to third parties for loss caused by the excluded driver driving the insured vehicle.

With respect to the excluded driver concept and the SABS, the legislature did little more than merely reducing the SABS benefits available to the excluded driver if he drives the insured vehicle. If it had wanted to go further, it could have easily employed language in section 30 of the SABS similar to that used in section 240 of the *Insurance Act* eliminating the insurer's responsibility to third parties.

If by creating the OPCF 28A Excluded Driver Endorsement the legislature had intended to significantly restrict or even eliminate the entitlement of an excluded driver to recover SABS under the policy naming him as an excluded driver even if he was

not driving the insured vehicle, it could have done so simply by inserting an explicit provision in the SABS definition of insured person to the effect that an excluded driver is deemed not to be an insured person.

In response to these points it might be argued by Wawanesa in the alternative that it was not the intention of the legislature to go as far as precluding all of the entities named in the definition of “insured person” from being insured persons even though they are excluded drivers. The intention was to preclude from being an insured person only a driver named in the list of drivers who is also an excluded driver, but who is not any of the other listed entities.

The proponent of this argument would submit that the general intent of the legislature was to limit, not eliminate, the situations where an excluded driver could recover SABS from the policy in which he is named as an excluded driver. The purpose was, in some circumstances, to relieve the insurer who has designated the person as an excluded driver from the obligation to pay SABS, and have that obligation devolve to a different insurer. Therefore, the intent of the excluded driver legislation with respect to SABS was to make the insurer designating the excluded driver the priority insurer in fewer instances involving claims by the excluded driver than would be the case if the claimant was not an excluded driver.

To illustrate the point, consider the different priority result brought about by this argument in a hypothetical fact scenario, and the current fact scenario. In both scenarios the claimant is an excluded driver under Wawanesa’s policy, and a passenger in the State Farm insured vehicle.

If while a passenger in the State Farm vehicle the claimant had been the named insured, a spouse of the named insured, or a dependant of the named insured or of the named insured's spouse, then he would have been an insured person under Wawanesa's policy even though he was an excluded driver, and Wawanesa would have had priority for SABS.

On the other hand, if while a passenger in the State Farm vehicle the claimant is not the named insured, the named insured's spouse, or a dependant of the named insured or of the named insured's spouse, since he cannot be a "specified driver" because he is an excluded driver, it is vehicle occupancy, and not "insured person" which determines that State Farm has priority for SABS.

Had the claimant been an occupant of a Wawanesa insured vehicle, Wawanesa would have had to have paid SABS – not because the claimant was an insured person under its policy, but because he was an occupant of a Wawanesa vehicle, and subsection 268 (2) 1. ii. would have made Wawanesa the priority insurer.

One problem with this argument is that it is circular, or begs the question if you will. In this argument, the intention of the legislature is to be proven by determining whether a particular entity satisfies the SABS insured person definition. The premise is that the named insured, the named insured's spouse, and any dependent of either the named insured or his spouse can be "insured persons" in motor vehicle liability policies in which they were designated as excluded drivers. The reason for this is what is sought to be proven – because that is what the legislature intended.

Conversely, persons who are listed in the Certificate under the column heading “Driver Name” cannot be considered specified drivers and hence insured persons if they are also excluded drivers because that is not what the legislature intended.

Stipulating by definition and presumed legislative intention that an excluded driver (who is not also one of the other entities set forth in the insured person definition) cannot be a specified driver of course leads to the result that a specified driver who is an excluded driver cannot satisfy the insured person definition.

The second problem with the argument is that it requires a divination of legislative intention that is extremely narrow in scope, and would apply only in very limited circumstances.

In my view it is often difficult enough to discern what the overall or general intention of the legislature is with respect to a particular piece of legislation, let alone to determine it with such precision. Also, as Justice Laskin points out in *Schneider v. Maahs Estate*, searching for the intention of the parties in the context of Ontario’s automobile insurance legislation “...is somewhat fictional.”

I am unable to determine on the evidence and authorities before me that the legislature’s intention for interaction between the excluded driver legislation and the SABS is as precise as Wawanesa’s position would require. I have difficulty accepting that as far as interaction between the excluded driver legislation and the SABS is concerned, the legislature intended anything other than to limit the SABS available to an excluded driver who is involved in an accident while driving the insured vehicle.

I have already outlined my views that the legislature's development of the OPCF 28A Excluded Driver Endorsement was almost exclusively meant to deal with a perceived problem of insurer exposure for third-party liability or tort claims arising out of the bad driving of insured vehicles by persons who had access to those vehicles. It had little to do with SABS, except for creating the additional penalty to the excluded driver who could not recover full SABS from the policy under which he was named as an excluded driver if he was driving the insured vehicle.

Therefore, I am unable to find that the legislature must have intended an interaction between the OPCF 28A Excluded Driver Endorsement and the SABS definition of insured person which would allow the named insured, the named insured's spouse, and a dependant of either the named insured or of the named insured's spouse to recover full SABS under the policy if they were the driver of or passenger in another vehicle, when they were excluded drivers under the policy, but not allow the SABS claim of a person named in the list of drivers who was a passenger in another vehicle (or a driver) because he is an excluded driver, and therefore should not be considered an insured person.

This analysis presumes, without supporting evidence, that for the purposes of the section 268 *Insurance Act* priority rules the legislature wished to create a distinction between the status and entitlement of one group of insured persons – the named insured, the spouse of the named insured, a dependant of the named insured or of the named insured's spouse, and an insured person in the form of a specified driver, when those entities are also designated as excluded drivers under the policy.

If the concern was to give relief from payment of SABS to insurers designating an excluded driver under the policy similar to the relief given in respect of third party liability claims, why would the focus be limited to restricting the interpretation of “specified driver” in the SABS definition of insured person? Would such an intention not have been expressed in a more expansive way, such as deeming an excluded driver not to be an insured person in the SABS definition? This would certainly have been a clearer and more effective way of evincing a legislative intention that the excluded driver legislation was meant to have a significant impact on SABS claims, in the same manner as third party tort claims.

I can see no grounds for either a broad or narrow statement of legislative intention in the evolution of the OPCF 28A Excluded Driver Endorsement, and in the insurance legislation under consideration in this case which would support the conclusion that a driver listed in the Certificate under the heading “Driver Name” should not be considered a specified driver if that person was also an excluded driver, because the legislature did not intend that such an excluded driver should be an insured person for SABS purposes.

I will now discuss the authorities bearing on the issue to which the parties have referred me.

I will consider first a case I alluded to earlier in my Award. As I have mentioned, this case was decided under a version of the SABS which did not include a “specified driver” in the definition of “insured person”.

*Laforme v. Wabisa Mutual Fire Insurance Company*<sup>19</sup> was a decision of Justice Cavarzan. The case dealt with an accident occurring April 16, 1992. The relevant version of the SABS in force at the time of the accident, and therefore applicable to the SABS claim at issue, was Ontario Regulation 672 – Statutory Accident Benefits Schedule – Accidents before January 1, 1994. The relevant section of the definition of “insured person” in section 2 of the Regulation 672 version of the SABS regulation read as follows:

2. “**insured person**”, in respect of a particular motor vehicle liability policy, means,

...(c) the named insured, his or her spouse and any dependant of either of them while the occupant of any other automobile...

Neither this subsection of the insured person definition<sup>19</sup> nor any other part of the definition in the Regulation 672 SABS included the words, “...*any person specified in the policy as a driver of the insured automobile...*”, or, “*specified driver*” as an entity designated as an insured person.

The relevant facts of the case for the issue at hand were that Daniel Laforme, an 18-year-old driver of an automobile owned by his then girlfriend, and found to be uninsured, was injured in a single vehicle accident.

As Cavarzan J. describes it, prior to August, 1991 Daniel Laforme had been an “insured person” under an automobile policy issued by Wabisa to Daniel

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<sup>19</sup>2004 CanLII 26330 (ONSC) (“*Laforme v. Wabisa Mutual*”).

Laforme's father, Leo Laforme.<sup>20</sup> Whether Cavarzan J. intended this comment as a reference to third-party liability coverage, SABS coverage, or both is unclear.

The judgment indicates that Daniel Laforme had been an occasional driver of any motor vehicle owned by his father and insured by Wabisa. Even though Cavarzan J. uses the words, "insured person" in describing Daniel Laforme's pre-1991 status under the policy, given the SABS definition of "insured person" in effect at the time, this would not have qualified Daniel Laforme as an insured person for the purposes of SABS under the Wabisa policy.

In August, 1991, Leo Laforme wrote to Wabisa requesting that his son be removed from coverage under his policy because he was concerned about his son's driving having generated too many "traffic tickets" and the effect that this could have on his insurance premium. An O.E.F. 28A Excluded Driver Endorsement was signed by both Daniel Laforme and Leo Laforme, and became part of Wabisa's policy. Wabisa refunded a portion of Leo Laforme's insurance premium.

A SABS claim for Daniel Laforme eventually made its way to Wabisa. The only way that Daniel Laforme could qualify as an "insured person" under the Wabisa policy was to establish that he was a dependant of his father. On the facts, Cavarzan J. concluded that Daniel Laforme was not a dependant of his father so he was not an insured person under Wabisa's policy. His SABS claim had to be paid by the Motor Vehicle Accident Claims Fund.

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<sup>20</sup>At paragraph 3.

That is the end of the precedential value of this case. Based on the SABS definition of “insured person” in effect at that time, Daniel Laforme was found not to be entitled to SABS under Wabisa’s policy because he was not an insured person. He was not an insured person because he was not a dependant of his father.

An issue put before Cavarzan J. in the case involved the question of whether the O.E.F. 28A Excluded Driver Endorsement “effectively deleted” Daniel Laforme as an occasional driver under the Wabisa policy. I must confess that I have difficulty understanding the relevance of this issue given the SABS definition in effect at the time. As I have indicated, even if Daniel Laformeremained identified as an occasional driver in the Wabisa policy after the addition of the O.E.F. 28A Excluded Driver Endorsement, that would not bring him within the SABS definition of “insured person” in effect at the time.

Although it is not referred to in the judgment, presumably the parties and Cavarzan J. were aware of the 1997 decision of the Court of Appeal in *Warwick v. Gore Mutual* holding that the SABS definition of insured person was the governing definition to determine entitlement to SABS. Whether the status of occasional driver under the Wabisa policy may have made Daniel Laforme an “insured” under another section of the *Insurance Act* would not seem to have made any difference with respect to whether he satisfied the SABS “insured person” definition.

In any event, although in my opinion it is *obiter dicta* in the judgment, and has no precedential value given the subsequent change in the SABS “insured person”

definition, Justice Cavarzan commented with respect to the effect of the O.E.F. 28A Excluded Driver Endorsement becoming part of the Wabisa policy as follows:

...the O.E.F. 28A Excluded Driver Endorsement signed by Daniel Laforme and Leo Laforme effectively deleted Daniel Laforme as an occasional driver under the policy issued for his father's motor vehicle...

Assuming Daniel Laforme's name appeared in the Wabisa Certificate in the list of drivers of Leo Laforme's vehicle with a described status of "occasional driver", it is not clear from the above passage whether Daniel Laforme's name was actually removed from the Certificate, or whether it remained in the Certificate when the O.E.F. 28A Excluded Driver Endorsement became part of the policy. It would be inappropriate to speculate either way. There is no doubt however, that Cavarzan J. treated the addition of the O.E.F. 28 Excluded Driver Endorsement to the Wabisa policy as removing both liability and SABS coverage for Daniel Laforme.

Perhaps the lack of detail on this point is understandable since without the reference to "specified driver" in the insured person definition there was no need for Justice Cavarzan to consider the significance of whether Daniel Laforme was still named in the list of drivers in the Certificate after the O.E.F 28A Excluded Driver Endorsement became part of the policy.

Justice Cavarzan had already reached his conclusion on the SABS "insured person" definition issue in determining that Daniel Laforme did not qualify as an "insured person" because he was not a dependant. His consideration of the significance of the "occasional driver" issue appears to have been undertaken for a completely different

reason, the purpose of which inquiry, as I have stated, is not apparent from the judgment.

Wawanesa, quite properly, does not assert that *Laforme v. Wabisa Mutual* is a binding authority for the position it advocates in this arbitration. It does submit however, that Cavarzan J.'s opinion with respect to the consequences of adding an OPCF 28A Excluded Driver Endorsement to a motor vehicle liability policy is indicative of how the issue should be approached.

I am not persuaded. With due respect to Cavarzan J., his reasoning and ultimate conclusion in *Laforme v. Wabisa Mutual* were the product of a completely different SABS definition of "insured person". Whether his analysis and conclusion would have been the same had he been required to consider the significance of the addition to the SABS definition of the words, "...any person specified in the policy as a driver of the insured automobile...", and, "specified driver", is a question which can never be answered. In my opinion however, the difference in the legislation that was being considered is so significant as to make the case of limited value for the present arbitration issue.

I would repeat here that in the 1994 overhaul of our insurance legislation which is referred to in the industry as "Bill 164", the definition of "insured person" in the SABS Regulation<sup>21</sup> was amended to include the current "specified driver" wording. I do not think it is speculative to suggest that this amendment could have been made to address

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<sup>21</sup> Ontario Regulation 776/93 – Statutory Accident Benefits Schedule – Accidents after December 31, 1993 and before November 1, 1996.

the kind of gap which existed in the SABS “insured person” definition being considered by Cavarzan J. in *Laforme v. Wabisa*.

Wawanesa relies upon the decision of private Arbitrator Jones in *R.B.C. General Insurance Company v. Lombard Insurance Company*<sup>22</sup> in support of its position.

*R.B.C. v. Lombard* is a case which considers the same SABS definition of “insured person” I am dealing with in this case even though it was under a previous version of the SABS Regulation.

The facts were that the SABS claimant was a passenger in a motor vehicle owned by his girlfriend which was insured by RBC. He presented a claim for SABS to RBC and RBC dealt with his claim. RBC commenced a priority dispute with Lombard. Lombard insured the claimant’s father. RBC took the position that the claimant was an insured person under Lombard’s policy on two grounds: first, because the claimant was principally dependent for financial support upon his father; and second, because the claimant was designated in an OPCF 28A Excluded Driver Endorsement as an excluded driver under the Lombard policy.

Most of Arbitrator Jones’ decision focused on the principal dependency issue. He concluded, based on the evidence, that the claimant was not principally dependent upon his father for financial support so he could not be an insured person on those grounds.

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<sup>22</sup> Award July, 2002 (“*R.B.C. v. Lombard*”).

With respect to the excluded driver – insured person issue Arbitrator Jones describes RBC’s position as follows:

...(RBC) points out that (the claimant) was listed in his father’s policy on the O.P.C.F. No.28 A form and therefore meets the definition of an “insured person”.<sup>23</sup>

It is not clear from this description whether the claimant was named in the Certificate as a driver of the insured vehicle(s) with the status “excluded”, as well as being designated in the OPCF 28A Excluded Driver Endorsement as an excluded driver, or whether he was only designated in the OPCF 28A Excluded Driver Endorsement as an excluded driver. In my view, this would be relevant for the result.

In any event, on the issue Arbitrator Jones concluded as follows:

It is RBC’s position...that as long as the person is listed in the policy, it does not matter in what capacity they are listed...I do not agree. To specifically list a person as an “excluded” (*sic*) under the policy and to allow that then to give them status and benefits under the policy would result in a situation not likely intended by the Legislature or the parties.<sup>24</sup>

Unfortunately, Arbitrator Jones does not elaborate on the reasons why he considers this a result not intended by the legislature or the parties. As I have discussed earlier in this Award, an excluded driver can have “insured person” status, and an excluded driver can be entitled to full SABS under the policy in which he is designated as an excluded driver. In fact, the entitlement to some significant SABS under the policy

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<sup>23</sup>At page 13.

<sup>24</sup>At page 13 and 14.

exists even if the excluded driver does the very thing he has promised not to do – drive the insured vehicle.

In the absence of a more compelling explanation for the presumed intention of the legislature and parties, with the greatest of respect to Arbitrator Jones I am unable to agree with his conclusion.

The last case cited to me by the parties about which I will comment is *Pafco Insurance Company v. Cumis General Insurance Company*<sup>25</sup>, a decision of private Arbitrator Bialkowski.

The facts were that the claimant was a passenger in a 1992 Toyota owned by the claimant's mother and insured by Cumis when it was involved in an accident giving rise to his SABS claim. The claimant was listed on the Cumis Certificate as a "driver 2" in respect of 3 vehicles (one of which was the 1992 Toyota) insured by Cumis. The claimant was also designated in an OPCF 28A Excluded Driver Endorsement as an excluded driver under the Cumis policy in respect of the 3 vehicles.

Pafco had issued a policy naming the claimant's brother as the named insured in respect of a 2002 Honda. The claimant was listed on the Pafco Certificate as a driver of the 2002 Honda.

The claimant presented his claim for SABS to Pafco. Pafco dealt with the claim and commenced a priority dispute with Cumis asserting, like State Farm in this

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<sup>25</sup> Award March 31, 2014 ("*Pafco v. Cumis*").

case, that the claimant was an “insured person” under the Cumis policy because he was “...specified in the policy as a driver of the insured automobile(s)”.

Cumis argued, like Wawanesa in this case, that the claimant could not be an insured person under its policy because he was designated as an excluded driver.

Arbitrator Bialkowski held as follows:

...I am satisfied that although excluded from driving all 3 vehicles listed on the Certificate of Insurance (the claimant) was nevertheless “specified in the policy as a driver” on the face of the Certificate so as to entitle him to certain coverages while not operating the listed vehicles. This exposure could have been avoided if Cumis had simply not shown (the claimant) as a listed driver on the face of the Certificate of Insurance in a situation where he was excluded from driving all the vehicles listed on the Certificate. I find that being “specified in the policy as a driver” provides him with certain coverages and in particular statutory accident benefits coverage provided he was not driving a vehicle that he was excluded from driving. In the subject accident he was a passenger.

I am moved by the body of jurisprudence which holds that the accident benefit legislation is remedial in nature and as such should be accorded a broad and liberal interpretation.

It appears to me that the reason why Cumis required the OPCF 28A was to address the risk of (the claimant) driving the insured automobiles. That risk was addressed by the execution of the Endorsement by (the named insured and the claimant). No other rights or entitlements were taken away by the OPCF 28A.

...There is no bar to (the claimant's) right to claim SABS if he is a passenger in the Toyota. Equally, there would be no bar if he were a passenger in someone else's vehicle or simply a pedestrian on the street. He

is only barred if he is *driving* the automobile identified in the Endorsement, and then, he is only barred from receiving *most* accident benefits.

...the Excluded Driver Endorsement only bars a claim for *some* SABS if the excluded driver is driving the insured automobile.<sup>26</sup>

For the reasons I have outlined earlier in this Award, I agree with the approach taken by Arbitrator Bialkowski. If a person is listed in the Certificate under the heading “Driver Name”, then he is a “specified driver” of the insured automobiles, and therefore an “insured person” for SABS purposes. He is not precluded from being an “insured person” because he has been designated in an OPCF 28A Excluded Driver Endorsement as an excluded driver.

To return to an argument advanced by Wawanesa which I have discussed previously, it could be argued that *Pafco v. Cumis* is distinguishable on the basis that the reference to the claimant in the Certificate in that case listed him as a driver and described his status as “driver 2”. This gave the claimant an “active” status with respect to driving the insured vehicles which proponents of this argument would say is necessary to support a specified driver satisfying the requirements of what is meant by “specified driver”. In the case before me the claimant’s status was described as “Excluded”. Arguably this is an “inactive” status, inconsistent with the aforementioned concept of what is required to be a “specified driver”.

In response, I reiterate my views expressed earlier that it is the listing of the person’s name in the Certificate under the column 1 heading “Driver Name” which is the essential fact necessary to find that he is a “specified driver”, and therefore an “insured

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<sup>26</sup>At pages 8 to 10.

person". The description of the driver in columns 2 and/or 3 of the Certificate as a "principal operator", "occasional operator", or "excluded" simply denotes the type of driver, or the status held by the driver at a particular time.

A description of the listed, or specified driver's status denotes that the driver is in what is effectively a sub-category of "specified driver". The sub-category the driver is in may have various ramifications such as, for example, with respect to the amount of premium the insurer will charge for a driver in the "Principal Operator", or "Occasional Operator" sub-category.

If a driver has been placed in the "excluded" sub-category by operation of an OPCF 28A Excluded Driver endorsement, this has ramifications with respect to the level of SABS benefits payable to that driver as an insured person. It must be remembered that the only situation where the SABS recoverable by a specified driver who is also an excluded driver are less than full is the situation where the excluded driver drives the insured vehicle. Otherwise he is entitled to full SABS benefits just like any other insured person.

In my view, it resolves any debate about the significance of "active" or "inactive" status to the determination of whether a driver named in the list of drivers in the Certificate can be a "specified driver" to recall that it is not necessary to list the name of an excluded driver in the Certificate in any manner to designate that person as an excluded driver. This is accomplished by the OPCF 28A Excluded Driver Endorsement alone.

As stated by Arbitrator Bialkowski in *Pafco v. Cumis*, an insurer who designates a person as an excluded driver by operation of an OPCF 28A Excluded Driver Endorsement can avoid the exposure of having that person become an “insured person” for SABS purposes simply by not identifying the person in the list of drivers in the Certificate.<sup>27</sup>

In conclusion, I would say that although I prefer State Farm’s position in this matter to Wawanesa’s position, I would not say that Wawanesa’s position is implausible based on the wording of the SABS “insured person” definition in subsection 2 (1).

I believe however, that this is where the principles discussed previously regarding the interpretation of insurance contracts come into play. Even if it were found that the definition of “insured person” in SABS subsection 2 (1) was open to either the interpretation advocated by State Farm, or the interpretation advocated by Wawanesa, the matter should be resolved in favour of finding coverage under the Wawanesa policy for the claimant as an “insured person”.

I find the following factors significant in concluding that the claimant should be found to be an “insured person” under Wawanesa’s policy in this case: The fact that all legislation is to be considered remedial, especially the SABS; that the SABS subsection 2 (1) insured person definition has been expanded to increase the number of persons who could qualify for the payment of SABS under a particular policy; and the principle that clauses in insurance policies providing coverage are to be interpreted liberally or broadly in favour of the insured (in this case, the claimant).

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<sup>27</sup> This assumes that the person could not qualify as an insured person in any category of the SABS subsection 2 (1) definition other than as a “specified driver”.

## **Conclusion**

- 1) The claimant is an insured person under Wawanesa's policy.
- 2) Wawanesa is the priority insurer, and is responsible to indemnify State Farm for SABS paid, including interest thereon, in amounts to be agreed upon or determined by further arbitration proceedings. If necessary, Wawanesa should assume from State Farm handling of the claimant's SABS claim.
- 3) State Farm, as the successful party, is entitled to recover from Wawanesa 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, March 10, 2016

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Scott W. Densem, Arbitrator