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:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

and

CERTAS HOME & AUTO INSURANCE COMPANY

Respondent

AWARD

Heard: April 18, 2019

Counsel:

Mark Donaldson for the Applicant

Ahmad Khan for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Overview and Issue

This Award is in respect of a Statutory Accident Benefits ("SABS") priority dispute arbitration. It is being issued concurrently with an Award in an arbitration bearing the title of proceedings: *Co-operators General Insurance Company v. Liberty International ("Co-operators v. Liberty")*. For the purposes of the issue to be decided the parties in both matters agreed, and I concur, that the arbitrations could be heard together and that any differences in the facts were immaterial to the legal analysis for both cases. Therefore, the two Awards are the same insofar as the legal analysis and conclusions are concerned. They differ only in the recitation of the background facts specific to each case.

In this matter, at issue is the ultimate responsibility for the payment of SABS to one Denise Lima ("the claimant").

The claimant was involved in a motor vehicle accident April 8, 2017 while a passenger in her husband's vehicle insured by the Respondent ("Certas"). The claimant held named insured status on the Certas policy. The Certas policy offered only standard or mandatory SABS. The claimant was also named insured on a policy issued by the Applicant ("Co-operators") for her own vehicle. The Co-operators policy offered both mandatory and optional SABS. The claimant applied to the Co-operators for SABS. Co-operators served a Notice of Dispute Between Insurers ("NDBI") on Certas.

Since the claimant was an occupant of the Certas insured vehicle at the time of the incident, the SABS priority rules in the *Insurance Act* (s. 268 (5.2)) stipulate that the claimant "*shall*" apply for SABS to the insurer of the vehicle of which she was an occupant.

In other words, according to the SABS priority rules in s. 268 of the *Insurance Act*, Certas would be the highest priority insurer in these circumstances.

If the SABS available under both the Co-operators and Certas policies were the same, the result in the case would be straightforward. Certas would have the ultimate responsibility to pay SABS to the claimant and Co-operators would succeed in the priority dispute with Certas.

In this case however, Co-operators' policy insures the claimant for not only the mandatory SABS which all Ontario motor vehicle liability policies are obligated by statute to provide, it carries significantly enhanced levels of SABS coverage through what are known as "optional benefits".

In contrast, the Certas policy carries only the mandatory level of SABS coverage.

Every Ontario insurer must offer for purchase optional benefits which enhance the mandatory SABS coverage of a motor vehicle liability policy (s. 28 (1), *Ontario Regulation 34/10, Part VI*). If the insured elects to purchase optional benefits, the insurer must issue an endorsement to the policy known as the OPCF 47 Endorsement (s. 28 (4) *Ibid.*)

The central question which will determine the result in this arbitration is how to properly interpret the OPCF 47 Endorsement. Does it supersede *Insurance Act* s. 268 (5.2) and make Co-operators ultimately responsible for the payment of both mandatory and optional SABS to the claimant, or is Co-operators entitled to advance a priority claim against Certas to be reimbursed for the value of mandatory SABS paid to the claimant while remaining responsible for the payment of optional SABS?

The Evidence

The arbitration proceeded by way of the submission of documentary evidence, and a hearing at which counsel presented legal arguments.

The following documents were introduced into evidence:

Exhibit 1: Applicant's Document Brief, Tabs 1 – 6.

Exhibit 2: Respondent's Document Brief, Tabs 1 – 8.

It is also appropriate here to note that there is an arbitration agreement between the parties which, *inter alia*, provides that either party may appeal my Award based on a question of law, or a question of mixed fact and law.

Analysis

The OPCF 47 Endorsement, and the Purpose of the SABS Delivery Legislation

The Endorsement reads as follows:

AGREEMENT NOT TO RELY ON SABS PRIORITY OF PAYMENT RULES

OPCF 47

Issued to   Policy Number   Effective Date

1. Purpose of This Endorsement

This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident benefits under this policy may, by the priority of payment rules in Section 268 of the *Insurance Act*, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have been purchased under this policy.

This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.

2. What We Agree To

If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claims SABS under another insurance policy.

All other terms and conditions of the policy remain the same.

The OPCF 47 Endorsement is a part of what I will call the SABS delivery legislation. To properly interpret the OPCF 47 Endorsement, it is necessary to examine the historical context of its evolution, and to review the purpose of the SABS delivery legislation from the perspective of the insured claimants, and the insurers.

The endorsement was introduced in 1997 following the proclamation of the *Automobile Insurance Rate Stability Act, 1996*. Commonly known in the industry as Bill 59, this legislation was one of a series of statutes designed to provide adequate insurance protection for consumers while at the same time trying to keep insurance affordable.

The Financial Services Commission of Ontario ("FSCO") issued Bulletin A -17/96 to address concerns expressed by the insurance industry that *"…certain interpretations of the (Insurance) Act could frustrate the objectives of optional statutory accident benefits…*". The bulletin references the exact situation in this case (remedied by the OPCF 47 Endorsement). Section 268 (5.2) requires a SABS claimant who is a named

insured in respect of a vehicle to apply for SABS to the insurer of that vehicle if the claimant was an occupant of that vehicle at the time of the incident. That SABS claimant may have more lucrative, optional SABS benefits available through another insurance policy but, would be unable to access those benefits if required to follow the requirements of s. 268 (5.2).

The Bulletin explains that one of the key objectives of Bill 59 was to offer automobile insurance consumers some level of choice with respect SABS coverage. There was a basic, mandatory level of coverage to be provided in every policy, with the consumer having the choice to supplement that coverage by purchasing enhanced levels of coverage through optional benefits.

It was the intention of the legislation that when a consumer purchased optional SABS coverage, that coverage would be "portable". This means that an eligible claimant would be able to access that coverage no matter what vehicle the eligible claimant occupied when the incident occurred.

The government and the insurance industry collaborated in the development and implementation of the OPCF 47 Endorsement "*…to protect purchasers of optional statutory accident benefits from different interpretations of the (Insurance) Act which may result in denial of coverage*" (FSCO Bulletin A – 17/96).

After the OPCF 47 Endorsement was implemented there were still concerns in the industry as to how it should be applied. This prompted FSCO to issue a second Bulletin, A – 10/97 "*…to supplement the earlier Bulletin (A – 17/96) in clarifying how the endorsement is intended to operate.*" This Bulletin states in part as follows:

> The Endorsement
>
> …The endorsement has been mandated in order to ensure optional accident benefits are "portable", and an insured person is able to access optional benefits regardless of how the priority of payment rules set out in subsections 268 (2), (4), (5), (5.1) and (5.2) of the (*Insurance) Act* are interpreted.
>
> Effect of the Endorsement
>
> The OPCF 47 provides that…the Insurer will permit the insured person to claim both mandatory accident benefits and optional benefits under that policy. The insurer will not deny benefits on the basis that the priority of payment rules set out in section 268 of the (*Insurance*) *Act* provides that another insurer is liable to pay the mandatory benefits…

The Bulletin goes on to give examples in a way which appears to assume that the claimant will know to apply to the highest priority policy if the level of benefits under a choice of policies available is the same, but will recognize that he/she should apply to the optional benefits policy even if it is not the highest priority policy when optional benefits are "applicable".

This somewhat naively assumes a level of sophistication on the part of a claimant which, at least in my experience, does not exist in automobile insurance matters. In practice, as will be seen from my later discussion of the case law in this area, insureds – even those represented by professionals, frequently do not apply to the "correct" policy. They apply to whatever policy they think may be appropriate in the circumstances and leave it to the insurers to sort out who has the ultimate responsibility to pay SABS.

Arbitrators have given a broader and less complicated scope to what is meant by optional benefits being "applicable" for the purposes of making the OPCF 47

Endorsement operational. They have held that once it is established a claimant is any of the named insured, spouse of the named insured, a dependant, or a specified driver in the policy, that is sufficient to make optional benefits "applicable".

The explanation in OPCF 47 Endorsement Bulletins does not address priority disputes between insurers. There is no language in the Bulletins which states that a lower priority insurer with mandatory and optional benefits is precluded by the OPCF 47 Endorsement from pursuing priority against a higher priority insurer with only mandatory benefits.

In any case, the Bulletins are only guides to assist if they can in the interpretation of the OPCF 47 Endorsement. They cannot override the meaning given to the words in the Endorsement or the *Insurance Act* as interpreted by arbitrators or courts.

An integral part of the SABS delivery legislation is Ontario Regulation 283/95 – Disputes Between Insurers. Although titled in such a way as to suggest it has the narrow focus of disagreements between insurers, it contains some very important provisions designed to achieve the objective of the no fault insurance system – to ensure that injured claimants have immediate, uncomplicated access to a full range of no fault accident benefits.

One of these provisions is commonly referred to as the "pay first – dispute later" subsection 2 (6) of the Regulation (subsection 2 (1) for pre September 1, 2010 accidents). It provides as follows:

> 2 (6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the

provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits.

There has been much jurisprudence concerning s. 2 (6) of Ontario Regulation 283/95. The law as well known to the parties, and to the insurance industry in general. I do not think a lengthy discourse of how the law has developed is required here. A brief summary of the main points is all that is necessary.

As far as can be determined by the parties' research, subsection 2 (6) of Regulation 283/95 has been in the Regulation in its current form since inception in 1995. Notably this predates both Bill 59, and the OPCF 47 Endorsement.

In the beginning, and for several years after Regulation 283/95 came into existence, in spite of s. 2 (6) insurers frequently denied responsibility to pay SABS when presented with a SABS application by a claimant. One of the arguments advanced to avoid the "pay first – dispute later" intent of s. 2 (6) was that an insurer receiving a SABS application was not, in fact an "insurer" and therefore had no obligation to pay SABS. A typical example of a situation where this argument was advanced involved the insurer asserting that its policy had been cancelled prior to the incident giving rise to the SABS claim.

Other situations involved insurers asserting that the SABS application received was incomplete for one reason or another, denying the claim presented on those grounds, and sometimes deflecting the claim to another insurer.

Over the years arbitrators and courts dealt with these cases, and the situation has evolved essentially to the point where as long as an insurer presented with a SABS claim

has virtually any type of "nexus" with the claimant, that is generally sufficient to trigger the obligation of the first insurer presented with the claim to pay SABS to the claimant, and then initiate the dispute mechanism in Regulation 283/95 against any higher priority insurer. Amendments to Regulation 283/95 (September 2010) have also added explicit prohibitions against an insurer deflecting SABS applications.

There is no doubt that the paramount objective of the SABS delivery legislation, as consistently reinforced by arbitrators and the courts, is to make sure that injured claimants receive SABS promptly, fully, and without interference from insurers disputing priority.

The government in its regulation of the insurance industry has also established a separate legislative mechanism whereby insurers can resolve their disputes respecting priority of ultimate responsibility for the payment of SABS to claimants. These provisions interact, as necessary, but the overarching purpose is always to ensure that SABS claimants receive the benefits they are entitled to without any undue delay.

Disputes as to which insurer is ultimately responsible may necessarily involve claimants, but should not interfere with their receipt of benefits to which they are entitled. To the extent the dual objectives of providing SABS to claimants and dispute resolution between insurers conflict, providing SABS to claimants is given precedence.

Having said that however, as long as the overarching purpose of the SABS delivery legislation is met – the timely delivery of proper SABS to claimants, it seems to me there is no reason that the priority dispute resolution part of the legislation cannot operate to achieve the objectives of the SABS payment priority obligations established in s. 268 of the *Insurance Act*.

The Law

Before I started writing this Award, there were four decisions dealing with this issue – all authored by arbitrators. After I was partway through my Award, the parties brought to my attention a decision by Justice Stinson of the Ontario Superior Court in *Continental Casualty Company v. Chubb Insurance Company of Canada* (ONSC 2019, 3373, "*Continental Casualty v. Chubb*") which was released in June 19, 2019, after the hearing in this case. I will comment in more detail about this decision later in my Award. I will observe at this point however, that I am of the view that Justice Stinson's decision is binding on me and requires me to find in favour of the Cooperators in this arbitration.

Since the parties have also advised me that leave is being sought to appeal Justice Stinson's decision to the Court of Appeal, to the extent it may be useful I intend to outline the reasons why I agree with Justice Stinson's reasoning and conclusions (and those of Arbitratror Samis) on the issue.

I will first review the four decisions of the arbitrators which predated Justice Stinson's decision.

The first decision I will consider is the decision of Arbitrator Samis in *Echelon General Insurance Company v. Cooperators General Insurance Company* (January 20, 2015). The facts of that case were essentially the reverse of those before me. The SABS claimant held equal status under both the Echelon and the Cooperators policies. She was a specified driver under both policies. The claimant was an occupant of the Echelon insured vehicle which had only mandatory SABS coverage. The Cooperators policy offered both mandatory and optional benefits. She applied to Echelon for SABS. Echelon

served a Notice of Dispute between Insurers on Cooperators asserting that even though section 268 (5.2) would make Echelon the higher priority insurer, Echelon argued that the OPCF 47 Endorsement required Cooperators to maintain responsibility for the payment of both mandatory and optional SABS to the claimant.

Arbitrator Samis concluded that the OPCF 47 Endorsement did not operate to displace the operation of the priority rules set out in section 268 (2) of the *Insurance Act.* He found that the OPCF 47 Endorsement is a contractual undertaking limited in its application between the insurer (in that case Cooperators) and the insured SABS claimant. It did not give Echelon any rights to advance a priority claim against Cooperators when Echelon was clearly the priority insurer on the facts based on section 268 (5.2) of the *Insurance Act*.

Arbitrator Samis opined that had the SABS claimant applied to Cooperators or should she in the future apply to Cooperators for SABS then the OPCF 47 Endorsement would trigger a contractual obligation on the part of Cooperators to respond to the insured's SABS claim both for mandatory and optional SABS.

Arbitrator Samis said however that this would not preclude Cooperators from pursuing a priority dispute against Echelon for reimbursement of at least the mandatory SABS Cooperators had to pay to the claimant.

His comments on the issue of what should happen when the claimant applies to the lower priority insurer with both mandatory and optional benefits are, strictly speaking, *obiter dicta.* In that case the claimant had applied to Echelon for SABS (the higher priority insurer with only mandatory benefits).

Arbitrator Samis' reasoning on the issue of the effect of the OPCF 47 was that it was silent on the question of priority between insurers. He did not find wording in the Endorsement which would preclude an optional benefits insurer from pursuing reimbursement from a higher priority insurer for SABS paid to a claimant at least insofar as mandatory SABS is concerned.

Arbitrator Samis goes on to consider how to deal with responsibility for administering the claim. He suggests that if an application for SABS is made to the insurer which has both mandatory and optional benefits, but which is a lower priority insurer, it would make sense for that insurer to administer the claim in its entirety, and be entitled to reimbursement for the mandatory portion of the SABS paid from the higher priority insurer later, rather than having responsibility for the administration of the mandatory portion of the claim being transferred to the higher priority insurer at the same time as the optional benefits insurer is administering the optional benefits portion of the claim.

The next arbitration decision to deal with this issue is a decision of Arbitrator Samworth in *Jevco Insurance Company v. Chieftain Insurance Company* (March 11, 2016).

Arbitrator Samworth was dealing with the same fact situation as confronted Arbitrator Samis in *Echelon v. Cooperators*. The SABS claimant had equal status under both the Jevco and Chieftain policies. He was an occupant of a motorcycle insured by Jevco which offered only mandatory SABS but which – by operation of section 268 (5.2) of the *Insurance Act*, was a higher priority insurer than Chieftain which offered both

mandatory and optional SABS. As in the *Echelon v. Cooperators* case, the claimant applied to the higher priority insurer which offered only mandatory benefits.

Arbitrator Samworth traces the history of the legislation and the development of the law which I have earlier summarized as culminating in the "pay first – dispute later" obligation of an insurer with any nexus at all to the claimant. She finds that the wording of the OPCF 47 Endorsement was crafted before the case law had developed and when insurers did not readily follow the pay first and dispute later requirements of Regulation 283/95 2. (6).

Since the interpretation of Regulation 283/95 2 (6) has evolved to effectively now preclude the first insurer which receives a SABS application from refusing to process it, in Arbitrator Samworth's view the operative words of the OPCF 47 Endorsement – *"…we will not deny the claim, for both mandatory and optional (SABS)…"* are "*antiquated*", and "*meaningless*".

Arbitrator Samworth quite properly asserts however, that in spite of the difficulty posed by trying to give meaning to words in an endorsement which she concludes have been made redundant by developments in the case law, the rules of statutory interpretation require that they be given meaning.

Arbitrator Samworth concludes that the only solution to interpreting the aforementioned operative wording of the OPCF 47 Endorsement is to say that it means the optional benefits insurer agrees to be responsible for the payment of both mandatory and optional benefits and gives up the right to pursue a priority dispute for reimbursement against a higher priority *Insurance Act* insurer.

Arbitrator Samworth's explanation for interpreting the OPCF 47 Endorsement this way appears to be based on what she states is a practical requirement of simplifying the system. She says, "*to find otherwise would result in the creation of some complicated system for reimbursement and administrative claims as found by Arbitrator Samis in the Co-operators v. Echelon case…It seems to unduly complicate the process contemplated by the endorsement."*

Once again, like Arbitrator Samis' analysis on this issue in *Echelon v. Cooperators*, Arbitrator Samworth's analysis is technically *obiter dicta* since the claimant advanced his claim to the higher priority insurer with only mandatory benefits first, rather than to the lower priority insurer with both mandatory and optional benefits.

In the recent case, *Cooperators General Insurance Company v. Certas Home & Auto Insurance Company* (April 25, 2019) Arbitrator Cooper followed Arbitrator Samworth's approach. The difference in that case was that the facts are the same as the cases before me. The SABS claimant had equal status under both the Cooperators and Certas policies. The claimant was an occupant of a motorcycle insured by Certas. By operation of 268 (5.2) Certas would be the higher priority insurer. The claimant applied to Cooperators for SABS. The Cooperators policy offered both mandatory and optional SABS. Cooperators commenced a priority dispute proceeding against Certas asserting that Certas was the higher priority insurer. Certas took the position that because of the OPCF 47 Endorsement Cooperators was responsible to pay both mandatory and optional SABS to the claimant and was precluded from disputing priority with Certas.

Arbitrator Cooper accepted Certas' position. Arbitrator Cooper agreed with Arbitrator Samworth's approach to interpreting the OPCF 47 Endorsement that systemic efficiency requires that the Endorsement be interpreted as eliminating the right of a lower priority insurer which offers both mandatory and optional benefits to pursue a Section 268 (2) *Insurance Act* priority dispute against a higher priority insurer with only mandatory benefits. Arbitrator Cooper's reasoning implies that because there is no clear direction in the SABS legislation as to how such a priority dispute should be dealt with, the OPCF 47 Endorsement must have been intended to prevent the question from ever having to be addressed.

In commenting on Arbitrator Samis' reasoning in the first of his two *Echelon v. Cooperators* Awards, Arbitrator Cooper remarks as follows:

> In obiter, Arbitrator Samis reviewed what may have happened had the claimant applied to Cooperators first. Arbitrator Samis constructed a scheme whereby Cooperators would evaluate and administer benefits (both mandatory and optional) and have the right to reimbursement or indemnification from Echelon in relation to mandatory benefits only. This appears to be a hybrid of priority and loss transfer. There is no precedent of this process being actually employed in relation to a statutory accident benefits claim of which I am aware.

Later in his Award Arbitrator Cooper comments specifically on the operative wording of the OPCF 47 Endorsement. He agrees with the historical analysis of Arbitrator Samworth in *Jevco v. Chieftain* and her conclusion that the only possible meaning to give to the OPCF 47 Endorsement is that it overrides Section 268 (5.2) of the *Insurance Act* and precludes a lower priority insurer with both mandatory and optional SABS from pursing a priority dispute with a higher priority insurer:

> …I will focus on the phrase, "we will not deny the claim…on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy."
>
> It is trite that an insurer cannot deny accident benefits to the claimant on the basis of a priority dispute. The situation was addressed in the very early years of enhanced accident benefits coverage starting with the Ontario Motorist Protection Plan (OMPP). It can only mean that the ordinary priority rules (absent optional benefit coverage) do not apply…

Arbitrator Samis had the opportunity to revisit his analysis of the issue in another case also involving the insurers Echelon General Insurance Company and Cooperators General Insurance Company. This case involved a different accident and the different claimant, but the fact scenario was the same from the standpoint of the OPCF 47 Endorsement issue.

In *Echelon General Insurance Company v. Cooperators General Insurance Company* (March 2, 2018) the SABS claimant was the operator of a motorcycle insured by Echelon. Like the earlier *Echelon v. Cooperators* case the claimant applied to Echelon for SABS. The Echelon policy offered only mandatory SABS. The claimant was also a named insured under a policy with the Cooperators which policy offered both mandatory and optional benefits. The ordinary application of the *Insurance Act* priority rules made Echelon the higher priority insurer. Echelon sought to recover payment of SABS from the Cooperators arguing that the OPCF 47 Endorsement changed the ordinary priority rules and required that Cooperators pay both mandatory and optional SABS.

Arbitrator Samis repeats and further explains his reasoning that the OPCF 47 Endorsement does not purport to change the *Insurance Act* priority rules. "*It is solely the alteration of one insurer's position and only to the extent that the insurer commits to a*

particular position vis-à-vis the claimant…There is no undertaking that the insurer forgo its rights against other insurers."

In his decision in this case, Arbitrator Samis outlines in detail the reasons why he does not accept that the OPCF 47 Endorsement should be interpreted as altering the *Insurance Act* priority rules because simplicity requires it.

I will not repeat all of his reasoning here, but a part with which I wholeheartedly agree accords with my view that insurers, with the help of arbitrators where necessary, are more than capable of properly and fairly managing the two aspects of the SABS delivery system – the administration of SABS claims, and the reimbursement of SABS paid by a lower priority insurer from a higher priority insurer in any case. There is no legal or practical reason why an optional SABS case should be any different.

Arbitrator Samis states:

> For the better part of 3 decades priority disputes have been part of the automobile insurance system. There may be many reasons for a priority dispute but ultimately these disputes take a common form, resolution by private arbitration, claims for reimbursement of benefits paid, and a transfer of ongoing responsibilities for handling of the claim to the higher priority insurer. Nowhere in the legislation or in the procedural regulation is there any provision that discusses the relief to be granted in a priority dispute. It is open to the arbitrator to grant whatever relief seems appropriate in the circumstances. It seems that the interests of all insurers are well served by the long-standing practice of reimbursement and determination of ongoing handling obligations…

I agree with these comments. The absence of a specific formula in the SABS legislation to deal with a priority dispute between a lower priority insurer with both optional and mandatory benefits and a higher priority insurer with only mandatory benefits should

not mean that the Section 268 (2) Insurance Act priority rules cannot apply. As Arbitrator Samis has pointed out, there is no formula in the SABS legislation setting out how the claims handling or reimbursement issues in any priority dispute are to be resolved. It is up the parties, and in particular, the arbitrator of the dispute, to determine the appropriate solution in any given case. The arbitrator has very broad powers under the *Arbitration Act* and the SABS legislation to do exactly that.

Priority disputes do not come before an arbitrator only in one form. Sometimes there is an active SABS claim underlying the priority dispute. In that case, the arbitrator must decide issues relating to entitlement to reimbursement of the lower priority insurer by the higher priority insurer, as well as the issue of whether and when responsibility for the ongoing handling of the SABS claim should be transferred.

Sometimes the SABS claim has already been concluded and there is no issue as to transferring responsibility for the future handling of the claim. In that situation, after priority is decided the entire focus of the dispute becomes the appropriate amount of reimbursement to which the lower priority insurer is entitled to receive from the higher priority insurer.

In the situation where there is a live SABS claim underlying the priority dispute, although this responsibility is frequently transferred to the higher priority insurer once the determination is made, that result does not have to be absolute. As Arbitrator Samis points out, Regulation 283/95 gives broad discretion to an arbitrator to make whatever order which the particular circumstances of the case dictate is just and reasonable.

The Regulation does not require the automatic transfer of the administrative handling of a SABS claim once the highest priority insurer has been determined. There may be appropriate cases where a lower priority insurer which has been handling the claim should continue to handle the claim until it has been concluded, or until a point at which it makes administrative sense to transfer the claim. These are matters which the parties are at liberty to make submissions about as part of the priority dispute arbitration proceedings and which the arbitrator must decide if transfer of claims handling responsibilities is in issue.

To ensure prompt and efficient SABS delivery to a claimant, where the lower priority insurer has both mandatory and optional benefits and the higher priority insurer has only mandatory benefits, it makes sense for the lower priority insurer to adjust the claim to resolution then seek reimbursement from the higher priority insurer for the mandatory SABS paid. In my opinion, this disposition prevents potential conflicts with two insurers adjusting the claim at the same time, and it is well within the statutory powers granted to an arbitrator determining a priority dispute.

To further illustrate my point that the SABS legislation has been crafted to permit flexible solutions for dealing with claims administration and reimbursement issues in priority cases, I will refer to some specific provisions in Regulation 283/95.

In addition to deciding priority and reimbursement issues, the legislation gives an arbitrator authority and broad discretion to do what is appropriate in the circumstances of the case with respect to whether responsibility for the ongoing handling of a SABS claim should be transferred, and the timing of that transfer.

Subsection 4 (1) provides that an insurer who has received a SABS application from a claimant and wishes to commence a priority dispute proceeding against another insurer must give notice to the claimant.

Subsection 5 (1) gives the claimant the right to notify the insurer commencing the priority dispute proceeding that the claimant objects to the transfer of the claim to another insurer. Subsection 5 (3) gives the claimant the right to participate in the arbitration of the priority dispute and further indicates that should the disputing insurers make an agreement as to which insurer should pay the claim such an agreement is not binding unless the claimant consents.

These provisions give the claimant rights to be consulted and heard with respect to issues surrounding the transfer of a SABS claim from the insurer who received his application to a different insurer. The claimant can participate in an arbitration where this issue is being considered.

These provisions would have no purpose if it was not open to an arbitrator to make whatever order is just and appropriate in the circumstances with respect to whether claims handling responsibility for a SABS claim should be transferred, and if so, the timing of the transfer.

A priority dispute between insurers to establish ultimate responsibility for the payment of SABS is specifically authorized by the *Insurance Act* and Regulations. It is a substantive, statutorily created right to reimbursement. The administration of the SABS claim is a procedural matter to be determined by what is in the best interests of the claimant.

Regulation 283/95 quite clearly contemplates an arbitrator dealing with the substantive issue of reimbursement based on priority, and the procedural issue of if and when responsibility for the handling of an ongoing SABS claim should be transferred between insurers as two completely separate matters. As I have attempted to point out it is open to an arbitrator to order reimbursement based on priority, but not order the immediate transfer of the handling of the SABS claim to the higher priority insurer, or in fact order that it remain with the lower priority insurer through to a conclusion. The solutions for claims handling issues are many and can be crafted to suit the facts of the case.

I agree with the view that it would take very clear wording in the enabling statute, the Regulations, or the Endorsement, to supersede this substantive right to reimbursement. In my opinion there is no such clear wording in the OPCF 47 Endorsement.

How then should the OPCF 47 Endorsement be interpreted? I agree with Arbitrator Samworth that the OPCF 47 Endorsement wording, "*…we will not deny the claim, for both mandatory and optional statutory accident benefits…on the basis that the priority of payment rules in section 268 of the Insurance Act may require that the person claim SABS under another insurance policy*" was created before the "pay first – dispute later" law had fully evolved. Giving non-redundant meaning to the words, "*we will not deny the claim…*" is difficult since after the Endorsement was written subsection 2 (6) of Regulation 283/95 has been interpreted to prohibit an insurer refusing to accept a SABS application whenever it has the slightest connection with the claimant.

All stakeholders and adjudicators would agree that the rules of statutory interpretation require that the OPCF 47 Endorsement words must be given meaning. In my opinion, interpreting the OPCF 47 Endorsement in a way that negates substantive rights created by the enabling legislation – the *Insurance Act,* is not the only solution. I do not believe that is what is required to do justice to the principles of statutory interpretation.

One of the most important tenets of statutory interpretation is to give meaning to the language in a manner which achieves the purposes of the legislation.

In this case, the legislation under consideration is the *Insurance Act*, and the Regulations and the Endorsements to insurance contracts are all subsidiary to it. The purpose of the particular part of the *Insurance Act* under consideration is firstly the prompt and effective delivery of SABS to accident victims, and secondly the resolution of issues between insurers as to ultimate responsibility for the payment of SABS. As far as the resolution of issues between insurers purpose is concerned, the *Insurance Act* has set out a specific structure to address priority of payment obligations.

Unless there is a clear legislative directive to do so, or the achievement of the legislation's secondary purpose conflicts with the primary purpose in a manner which cannot be resolved, in my view there is no reason to interpret an endorsement to a contract in such a way as to frustrate the statutory structure in place to resolve the payment responsibilities of insurers.

What meaning can be suggested then for the "*deny the claim…*" phraseology in the OPCF 47 which accords with the purpose of the legislation set out above, and yet

gives the words as much as possible their plain and ordinary meeting when taken in the context of the Endorsement as a whole?

It is essential to consider the historical context to properly interpret the OPCF 47 Endorsement. In my opinion, the drafters likely chose the language they did because at the time a clear directive to lower priority, optional benefits insurers was required that they must accept a SABS application and handle the claim for both mandatory and optional benefits; not take the position they would administer and pay only the optional benefits part of the claim while attempting to have to claimant seek mandatory benefits from a higher priority insurer.

This does not mean however, that they also intended to take away the statutory rights of a lower priority insurer to dispute reimbursement issues with a higher priority insurer. Not only is there no language to that effect in the OPCF 47 Endorsement, there is no hint of such an intention in two FSCO bulletins issued to help explain the operation of the Endorsement. A reasonable conclusion is that they just did not want the reimbursement issue to interfere with the claimant's efficient receipt of both mandatory and optional SABS.

The primary concern of the insurance regulators was (and is) to make sure a claimant had efficient, unimpeded access to optional benefits for which they had paid a premium. This "portability" of benefits is a procedural, claims administration issue however, not a substantive, reimbursement issue.

Taking into account these factors: the historical context of what the drafters of the Endorsement likely intended based on the insurers approach to Regulation 283/95 at the

time; the evolution of the “pay first – dispute later” case law, and above all the purpose of the SABS legislation as set out above, I would suggest that the following interpretation makes sense:

The lower priority, optional benefits insurer must accept and begin administering the SABS claim for both mandatory and optional benefits if it is the first insurer to receive a completed application, not because of the OPCF 47 Endorsement, but because that is what Regulation 283/95 requires.

The OPCF 47 Endorsement confirms that if the lower priority, optional benefits insurer which has accepted initial responsibility to adjust a SABS claim (because of 283/95 2 (6)) commences a priority dispute proceeding against the higher priority, mandatory benefits insurer seeking a declaration of entitlement to reimbursement for mandatory SABS paid, it agrees to handle the administration of the claim for both mandatory and optional benefits through to a conclusion, and will not seek to transfer responsibility for the administration of the claim for mandatory SABS to the higher priority insurer as part of the relief sought in the priority dispute.

This interpretation of the Endorsement supports the dual purposes of the SABS delivery legislation. It allows a lower priority insurer with optional benefits to seek reimbursement from a higher priority insurer with only mandatory benefits on terms such that it does not interfere with the prompt, efficient delivery of SABS to the claimant.

This brings me again to the decision of Mr. Justice Stinson in *Continental Casualty v. Chubb Insurance.* The facts of that case were that the claimant was injured when he was struck by a vehicle as a pedestrian. He had a personal automobile policy with Chubb

under which he was a named insured. He was the president and CEO of a company which had an automobile policy with Continental Casualty Company ("CNA"). The Chubb policy offered only mandatory SABS. The CNA policy offered both mandatory and optional SABS. The claimant first applied for SABS to CNA. The claimant was given erroneous information by CNA that its policy did not provide optional benefits. CNA also took the position that the claimant was not a named insured under its policy. Consequently, he applied to Chubb which administered his claim for SABS but commenced priority dispute proceedings against CNA.

The priority dispute was arbitrated by Arbitrator Ken Bialkowski. One of the issues Arbitrator Bialkowski decided was whether the claimant was a deemed named insured on the CNA policy. This was important because if the claimant was a deemed named insured he would have had equal status under that policy and under the Chubb policy. Since this was not a case where the claimant was an occupant of a vehicle under which he was a named insured at the time of the accident, subsection 268 (5.2) did not apply. Instead, subsection 268 (5.1) applied and the claimant had the absolute discretion to choose the insurer from which to claim benefits.

Arbitrator Bialkowski decided that the claimant was a deemed named insured under the CNA policy. He further held that had the claimant not received incorrect information by CNA, he would have pursued his application with CNA rather than Chubb because CNA policy offered optional benefits. On this basis the Arbitrator found that CNA was an equal priority insurer to Chubb to whom the claimant had applied first, thus exercising his discretion under 268 (5.1). Therefore he found that CNA was ultimately responsible for the payment of mandatory and optional SABS.

On appeal to Justice Stinson, CNA argued that the Arbitrator had erred in finding that the claimant was a deemed named insured under its policy and thereby entitled to choose which policy to apply to for SABS. CNA argued that the claimant was only a specified driver under its policy, but a named insured under the Chubb policy. Therefore the claimant was, by operation of subsection 268 (5), required to claim SABS under the Chubb policy.

Chubb argued that the Arbitrator's finding that the claimant was a deemed named insured under the CNA policy was correct. In the alternative, Chubb argued that even if the claimant was only a specified driver under the CNA policy and a named insured under its policy – thus making Chubb the highest priority insurer by operation of subsection 268 (5), the OPCF 47 Endorsement on the CNA policy overrode the regular priority rules and required CNA to pay both mandatory and optional SABS without the right to pursue priority against Chubb.

CNA argued that the OPCF 47 Endorsement did not change the *Insurance Act* priority rules, and that it was required to pay only optional SABS to the claimant while Chubb was responsible to pay mandatory SABS.

Justice Stinson held that Arbitrator Bialkowski's finding that the claimant was a deemed named insured under the CNA policy was incorrect, and that he was only a specified driver under the policy. Therefore, the issue as to the significance of the OPCF 47 Endorsement was of central importance to Justice Stinson's decision.

In essence, Chubb was the higher priority insurer but was seeking to have ultimate responsibility for the payment of both mandatory and optional SABS placed on the lower priority insurer, CNA, by virtue of the OPCF 47 Endorsement.

There does not appear to have been any challenge to Arbitrator Bialkowski's finding that the claimant applied to CNA first for SABS, and that CNA ought to have commenced handling his SABS claim had it not given incorrect information to the claimant about the SABS available under the CNA policy. In effect, it would appear that CNA deflected the application to Chubb, although the deflection issue was not argued. This may be because CNA acknowledged that it incorrectly advised the claimant that its policy did not offer optional benefits, and agreed that it should have adjusted the claim for both mandatory and optional benefits, seeking reimbursement from Chubb for the mandatory benefits.

I have spent some time on this point simply because it could be argued that this case is distinguishable from the cases before me on the basis that it is similar on the facts to the cases dealt with by Arbitrator Samis and Arbitrator Samworth. It will be recalled that in those cases the SABS application was first made to the higher priority insurer with only mandatory benefits, which then sought to transfer priority to the lower priority insurer with both mandatory and optional benefits.

In reality however, in *Continental Casualty v. Chubb*, the claimant did, as in the cases before me, apply to the lower priority insurer with both mandatory and optional benefits first. It was only because erroneous information was given to the claimant that he then applied to the higher priority insurer with only mandatory benefits.

In any event, a careful review of the decision discloses that Justice Stinson's interpretation of the OPCF 47 Endorsement does not depend on whether the priority dispute was commenced by the higher priority insurer or the lower priority insurer. He clearly finds that the OPCF 47 Endorsement should be interpreted to require the optional benefits insurer to administer the claim for both mandatory and optional benefits. If there is a higher priority insurer which has only mandatory benefits, the optional benefits insurer is entitled to reimbursement from the higher priority insurer for the value of the mandatory benefits paid, and the expenses associated with administering that part of the claim. The payment of optional benefits and the costs of administering the claim in connection with those remain the responsibility of the optional benefits insurer.

Even if Justice Stinson's decision in *Continental v. Chubb* is not technically binding on me, for the reasons I have outlined, I agree with his reasoning and with Arbitrator Samis whose reasoning Justice Stinson adopts.

I have reproduced below some of the important passages from Arbitrator's Samis' Award in *Echelon v. Co-operators* approved of and adopted by Justice Stinson, and Justice Stinson's conclusion:

> …The higher priority insurer, having only a partial obligation to respond, would not necessarily be the appropriate insurer to continue the file handling, regardless of its obligation to reimburse the optional benefit insurer. In effect, then, the insurer that has received the additional premium for agreeing to pay an optional benefit also gets the burden of the administration of the claim. But the insurer would be entitled to reimbursement from the higher ranking insurers. This reimbursement mechanism reduces the cost of the optional benefit for that insurer, and therefore this translates into lower cost access to optional benefits for consumers. This scheme makes sense.

…Most importantly, nothing in the Regulations, statutory provisions or in the approved form of undertaking suggests that the priority rules, as between insurance companies, are altered as a result of the issuance of an OPCF-47.

…[T]he net result is that the obligation for the mandatory benefits ultimately rests with the insurer having the highest ranking under section 268 of the *Insurance Act*. This is entirely appropriate. It supports the legislative intention of making optional benefits available at reasonable cost. Any other interpretation would have the effect of unduly loading costs onto the optional benefit insurers and would discourage individuals from purchasing that coverage for their protection.

I respectfully agree with and adopt the foregoing analysis and conclusions.

I therefore hold that, in the first instance, CNA must pay both standard and optional SABS benefits to (the claimant). CNA is entitled, however, to reimbursement from Chubb for all payments and expenses associated with paying and administering the standard benefits paid to (the claimant). CNA is obliged to pay the cost of all optional benefits provided.

Conclusion

I am grateful to counsel for their extremely able and efficient presentation of this case. Their professionalism in the matter is also to be commended.

For the foregoing reasons I order the following:

1. Co-operators must administer the payment of both mandatory and optional SABS to the claimant.

2. Co-operators is responsible for the cost of all optional SABS paid or payable to the claimant, including all claims administration expenses associated therewith.

3. Co-operators is entitled to reimbursement from Certas for the cost of all mandatory SABS paid by Co-operators to the claimant.

4. Co-operators is entitled to reimbursement from Certas for all claims administration expenses associated with payment of mandatory SABS by Co-operators to the claimant.

5. As the successful party, Co-operators is entitled to its costs of the arbitration from Certas.

6. I encourage the parties to agree on costs. If that is not possible, I direct as follows:

   i) Co-operators shall serve its Bill of Costs on Certas, accompanied by written submissions within 15 days of the release of this Award.

   ii) Certas shall serve its response on Co-operators within 15 days thereafter.

   iii) Co-operators shall serve its reply, if any, on Certas within 10 days thereafter.

   iv) The parties' main written submissions shall be limited to 3, double-spaced pages (not including the Bill of Costs or copies of case law) with any reply by Co-operators being limited to 2, double-spaced pages.

   Iv) Counsel should provide the Arbitrator with their costs submissions concurrently with their service upon opposing counsel.

Dated at Toronto, September 17, 2019

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Scott W. Densem, Arbitrator

ADDENDUM

On April 18, 2019, the Arbitration hearing jointly in these two matters – Co-operators General Insurance Company and Certas Home & Auto Insurance Company, and Co-operators General Insurance Company and Liberty International – proceeded before me, and on September 17, 2019 I issued a written Award decision in each.

In the first, Co-operators as insurer with optional accident benefits in its automobile insurance policy in respect of Denise Lima, sought to place priority to pay the mandatory accident benefits with Certas, and thus have Certas reimburse it for all past, ongoing, and future mandatory benefits. In my Award I found in favour of Co-operators.

In the second, Co-operators as insurer with optional accident benefits in its automobile insurance policy in respect of Bodo Weddig, sought to place priority to pay the mandatory accident benefits with Liberty, and thus have Liberty reimburse it for all past, ongoing, and future mandatory benefits. In my Award I found in favour of Co-operators.

In both cases I applied the Ontario Superior Court of Justice decision in *Continental Casualty v. Chubb Insurance*, an appeal decision from a priority dispute arbitration decision of Arbitrator Kenneth Bialkowski, as the basis for my Awards.

In both cases, the Respondents, Certas and Liberty, having each been unsuccessful, subsequently delivered Notices of Appeal from my Awards. Counsel for all of the involved parties have advised me that they reached an agreement to toll the appeals, which were to proceed jointly, until after and subject to the outcome in the appeal

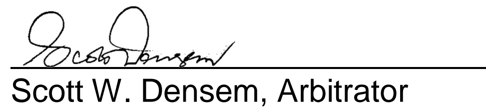
from the *Continental Casualty v. Chubb Insurance* Superior Court of Justice decision to the Ontario Court of Appeal, given its identical subject matter on the issue of the optional benefits insurer seeking to place priority to pay the mandatory benefits with the other insurer.

The Court of Appeal decision *in Continental Casualty v. Chubb Insurance* was released on March 7, 2022. In it, the Court of Appeal reversed the Superior Court of Justice decision below, and found that where the optional benefits carrier receives the first completed Application for Accident Benefits, the optional benefits insurer cannot seek to place priority to pay the mandatory accident benefits with the other insurer. Rather, the optional benefits insurer maintains priority for all accident benefits – optional and mandatory – and cannot avail itself of s. 268(2) and ensuing subsections of the *Insurance Act*, R.S.O. 1990, c. I.8.

Accordingly, in now applying the Court of Appeal decision here, as the parties to these Arbitrations have agreed to have me do via this joint Addendum decision including instead of them having to now proceed with an appeal of my Award decisions to the Superior Court of Justice, I now reverse my Award decisions and find that Co-operators maintains priority to pay all the past, present, and future accident benefits – optional and mandatory – and cannot avail itself of s. 268(2) and ensuing subsections of the *Insurance Act,* R.S.O. 1990, c. I.8 in these claims. Instead, I find that in the Lima matter Certas has been successful, and in the Weddig matter Liberty has been successful, and the Arbitrations are therefore dismissed.

The parties have also agreed that in light of the reversal of the Award decisions, Certas and Liberty as the Respondents are entitled to payment by Co-operators of their respective costs for the Arbitration, and that Co-operators shall fully pay the Arbitrator's fees for the Arbitration including for issuing this Addendum decisions. The parties will now attempt to determine and resolve the quantum of costs between themselves, but in the event they are unable to do so in either Arbitration, they may contact me further with respect to arranging for costs submissions and Decision.

Dated at Toronto, June 6, 2024



Scott W. Densem, Arbitrator