IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 283/95

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTACT INSURANCE

Applicant

- and -

GORE MUTUAL INSURANCE COMPANY OF CANADA,
~~HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS RESPRESENTED~~
~~BY THE MOTOR VEHICLE ACCIDENT CLAIMS FUND AND~~
~~HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED~~
~~BY THE MOTOR VEHICLE ACCIDENT CLAIMS FUND~~

Respondents

AWARD

Counsel Appearing

Douglas Wallace for the Applicant

Pino Cianfarani for the Respondent, Gore Mutual

Introduction

This matter comes before me as a dispute between two insurers with respect to “priority” in the context of a claim for benefits made arising out of an accident in Alberta. Intact received an application for benefits and paid benefits for the claimant who is injured. This proceeding is to determine priority and responsibility for payments as between Intact and Gore.

This case raises novel challenges. Seeking the correct outcome here requires consideration of interjurisdictional insurance issues and particularly how no-fault benefits are linked to motor vehicle liability insurance, and how provinces have approached problems of diverse coverage and interjurisdictional mobility.

The Submission to Arbitration

In the arbitration agreement the parties have provided:

1. This arbitration is in respect of a dispute between the parties regarding which insurer or entity is liable to pay statutory accident benefits to Jeremy F.[1] arising out of injuries he sustained in a motor vehicle accident on September 14, 2013.

2. It is the intention and desire of the parties that there be a resolution and determination of the dispute by arbitration pursuant to section 268 of the *Insurance Act*, R.S.O. 1990, C. I.8, as amended, O. Reg. 283/95 thereto, and the *Arbitration Act*, 1991 S.O. 1991, c.17.

Resolution and determination requires me to find (1) which insurer is the highest priority insurer and (2) what amount, if any, is payable for reimbursement.

The Background Facts

This dispute arises out of a claim for benefits by Jeremy F. who sustained injuries in in a motor vehicle accident on September 14, 2013 in Grand Prairie Alberta. The parties have filed an Agreed Statement of Facts that discloses that at the time of the accident he was an occupant of a motor vehicle not owned by him but which was insured under an "O.A.P. 1" issued by the respondent, Gore Mutual Insurance Company of Canada.

At the time of the accident, Jeremy's mother, owned a vehicle in Ontario which was also insured under an O.A.P. 1, but this vehicle was insured by the applicant, Intact.

The Agreed Statement of Facts recites many facts relevant to understanding Jeremy's province of residence, and the possibility that he might have been principally dependent for financial support on his mother at the time of the accident. I can see that both residency and dependency might have been quite unclear at the time of the accident. The parties did conduct comprehensive investigations about these issues.

Ultimately, at the hearing, the parties agreed that neither residency nor dependency were at issue any longer. From my perusal of the material, I concur that the evidence does not ultimately support a conclusion that Jeremy was principally dependent for financial support upon his mother within the meaning of the Ontario Statutory Accident Benefits. I also agree that the evidence does not support a conclusion other than that Jeremy was a resident of Alberta at the time of the accident and for more than 60 days prior to the accident.

These conclusions are very important to understanding what recourse Jeremy might have had to claim Ontario Statutory Accident Benefits as a result of the injuries he sustained in this Alberta incident.

From the record before me, it is quite clear these two insurers were involved in extensive, detailed, consideration of these issues prior to the hearing before me. The Agreed Statement of Facts, the facta filed, and the agreed document brief contain a great deal of information shedding light on these issues. Suffice it to say that I am satisfied that Jeremy was not a

[1] In consideration of the privacy interests of non-parties who were required to provide information about their personal affairs, I have deleted reference to surnames.

resident of Ontario at the time of the accident or within 60 days prior thereto and I am satisfied that he was not principally dependent for financial support on his mother at the time of the accident.

It seems that very soon after the accident someone gave notice of an intention to submit a claim for benefits to Intact. At Tab 13B of the Joint Document Brief, Exhibit 2, there is a letter dated September 24, 2013 from Intact to the claimant, care of his mother in Ontario. The letter alerts the claimant to the possibility of coverage available "through the jurisdiction of Alberta". Then the following position is taken:

> **"As we have been notified of this claim, we are providing a copy of the Ontario Accident Benefits forms as we are an insurance company operating in the province of Ontario. Please note that while the paperwork is being provided we are unable to comment on whether there will be Ontario coverage available."**

From reviewing other documents it appears to me that the mentioned OCF 1 claim form was returned to Intact in mid-September and other documentation including the disability certificate were sent in early December. The latter would have addressed the necessary submission of supporting documentation for a benefits claim.

By way of a letter December 17, 2013, Intact acknowledged various claims for expenses and indicated that they had reviewed those "in accordance with the Alberta accident benefits coverage available to you". I did note that in a different letter of the same date Intact took the position that the claimant was eligible to receive coverage available to him through the province of Alberta but took the position that he was not eligible to elect and or receive accident benefits through the jurisdiction of Ontario.

By that point Intact had already given formal notice to Gore of this dispute about priority of coverage for this claim. At Tab 2 of Exhibit 2 is a letter dated October 15, 2013 formally putting Gore on notice of the dispute. In the "reasons" section of that notification it is clear that Intact had indications that the claimant was not a dependent of their insured. Investigations in that direction continued with the formal statement taken from the mother, the presence of the claimant, in November 2013 and detailed testimony under oath wherein the mother and the claimant were questioned closely by counsel, in April 2015.

The Hearing Testimony

Much of the evidence in this matter is not controversial. The parties entered into an Agreed Statement of Facts which was marked as an exhibit these proceedings. Concurrently they filed a Joint Document Brief which was marked as Exhibit 2. This contains many of the background documents, correspondence between the insurers and the claimant's representative, statements and transcripts, employment income information, as well as insurance information.

At the hearing before me, I did have evidence directly from a representative of Intact as well as from the claimant's mother and the claimant. The evidence from Intact confirmed the documentary record. It is clear that Intact only responded to this claim at all because of the rules with respect to the obligation of the first insurer that receives an application for Ontario Statutory Accident Benefits. That obligation, which I will discuss in some detail, requires insurers with "nexus" to the claimant to deal with the claim regardless of priority or other matters. Based on the evidence before me I conclude that Intact was concerned that it had no alternative but to process a claim in this case because an application had been made to them.

During the testimony, there was some discussion about whether or not Alberta forms had been submitted to the claimant for completion. I do not think much turns on this question. It was very clear that the claimant was advised about access to Alberta benefits and it is equally clear that no application specifically directed at Alberta benefits was submitted to either insurer. Documents in Exhibit 2 show that, as time progressed, the claimant was represented by Ontario lawyers who persisted in advancing claims which could only be characterized as claims for Ontario level benefits.

The claimant himself testified before me briefly but it was my impression that he had little to offer about the initial transactions following the accident. He was aware, generally, that Ontario benefits are more generous than Alberta benefits and this certainly is consistent with the fact that forms were filed in relation to Ontario benefits.

Part 6 of the *Insurance Act*

This matter must be analyzed in reference to the provisions of Part 6 of the Ontario *Insurance Act*. This is where we find the legislative provisions creating the framework for Statutory Accident Benefits and the rules for determining priority when there is one more than one insurer possibly involved in a claim.

In the factum of Intact there it is an argument being made that is premised on the Gore policy having been issued in Alberta, a contradiction to the Agreed Statement of Facts. In paragraph 2 of the Agreed Statement of Facts it is stipulated that the vehicle involved in the accident was insured by Gore under an "OAP 1". That is the designation of the Ontario Auto Policy. I find that to be a contradiction since the Ontario policy would not be issued in Alberta. In the Respondent's factum, at paragraph 8, it is admitted that the vehicle involved in the accident was insured by Gore under an Ontario policy of insurance. I conclude that both insurers are in this dispute because of Ontario policies that they have issued.

Jeremy F. had only moved to Alberta in the months prior to the accident. His mother continued to reside in Ontario and had a policy of insurance with the applicant. The Certificate of Insurance evidencing this contract is found at tab 10 of Exhibit 2. This shows a contract of insurance in force from September 6, 2013 to January 22, 2014. The named insured is Jeremy's mother and the address is in Ontario. The document is entitled "Certificate of Automobile Insurance (Ontario)". As stated in that document, the certificate evidences the existence of the Ontario automobile policy "OAP 1". The vehicle insured under this policy was not involved in the accident.

The respondent, Gore, insured the vehicle involved in the accident. Gore admits that it insured the vehicle under an "OAP 1" which is the Ontario standard automobile policy.

Accordingly, the involvement of these two parties, Intact and Gore, arises out of their Ontario insurance policies.

Section 226 of the Ontario *Insurance Act* addresses the scope of Part 6 and provides:

> **Application of Part**
> **226 (1) This Part does not apply to contracts insuring only against,**
> **(a) loss of or damage to an automobile while in or on described premises;**
> **(b) loss of or damage to property carried in or upon an automobile; or**
> **(c) liability for loss of or damage to property carried in or upon an automobile.**

> **Idem**
> **(2) This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* unless it is insured under a contract evidenced by a form of policy approved under this Part.**

Based on the material before me Gore's policy was in the form of an OPF 1 so Part 6 applies whether or not the vehicle was in Ontario. In any event both insurers entered into Ontario contracts when they issued their respective policies. In my view both insurers are subject to Part 6 of the Ontario *Insurance Act* even though the events giving rise to this claim occurred outside of Ontario.

That means that both policies are obliged to include Statutory Accident Benefits per 268(1). It also means that 268(2) applies for me to determine which insurer is liable to pay benefits in priority.

Ultimately it has become clear that Jeremy is not an insured person under Intact's policy. But it seems that that was a contentious issue for many months, perhaps years, following this accident.

Features of Ontario Statutory Accident Benefits

The Ontario statutory benefits scheme is a comprehensive array of benefits for a wide range of individuals who might have some connection with the insured person or the insured automobile. As will be apparent, Ontario's approach to who is an insured person for no-fault benefits differs from the approach in Alberta. Essentially the Alberta coverage "follows the vehicle" whereas the Ontario coverage "follows the person". In Ontario, the goal is to have benefits paid to a person by the insurer that entered into a contract with the person. So the contractual nexus is emphasized and the proximity to the insured vehicle is secondary. When a person is injured they are entitled to claim benefits from any insurer where they are a named insured, spouse of the named insured, a dependent of either etc. It is only when they do not have recourse on that basis that a person would then turn to claim coverage from the insurer of the vehicle that they were an occupant in at the time of the accident. These rules are set out in section 268(2) of the Ontario *Insurance Act*.

Alberta, on the other hand, takes the approach that an injured person should claim first from the insurer of the vehicle involved in the accident. This has the advantage of making priority disputes rare. Intact has relied upon provisions of the Alberta statute:

> **591(1) When a person entitled to benefits provided by insurance under a contract referred to in section 587 or 588 (a) is an occupant of an automobile involved in an accident, the insurer is, in the first instance, liable for payment of the benefits provided by the insurance.**

The benefit levels are different between Ontario and Alberta. Generally the Ontario benefits are more extensive.

In the present case it is important to note that the Ontario Statutory Accident Benefits schedule does specifically contemplate circumstances where the Ontario insurer would be obliged to pay benefits in accordance with the system in another jurisdiction. In some circumstances described in the SABS an Ontario insurer might be obliged to pay Alberta benefits for an insured

person. In a very narrow range of circumstances Alberta style benefits are payable under the Ontario Statutory Accident Benefits.[2]

The potential for payment of Alberta benefits arises from section 59 of the SABS. Section 59 addresses claims arising out of accidents outside of Ontario. It carefully defines the concept of a "person insured in the jurisdiction" and allows a claim by such person to be made for either Ontario level benefits, or the local benefits. The "person insured in the jurisdiction" has an election but in either case benefits are to be paid by the Ontario insurer. So there is a scenario by which someone such as Jeremy might turn to an Ontario insurer and asked to be paid either Ontario benefits or Alberta benefits. That insurer could raise the question of whether or not Jeremy is a "person insured in the jurisdiction" within the meaning of section 59 of the SABS.

In order to be a "person insured in the jurisdiction" Jeremy would have to meet a number of preconditions, the first of which is that he is an Ontario resident.

The evidence about his residency points in the opposite direction. For about three months prior to the accident he had been living in Alberta. He had accommodation. He was paying rent. He found employment in Alberta. He was working steadily in Alberta.

The evidence from the Agreed Statement of Facts suggests that he had a settled intention to remain in Alberta for the foreseeable future.

In the end it has become clear that Jeremy was not an Ontario resident as required. Thus it does not appear that section 59 of the SABS is available to Jeremy. Intact would have a defence to such claims based on the fact that he was not a person insured in the jurisdiction. However Intact's position is that they are paying benefits because of their "nexus" to the claimant not because he is entitled to payments.

The Interim Response Rule of O. Reg. 283/95

As Ontario has chosen not to have accident benefits no-fault coverage "follow the automobile" there are many possible issues that may need to be addressed before one can come to a conclusion about which insurer is the insurer who should actually pay the benefits in respect of a given claimant. Various subsections of section 268 of the *Insurance Act* endeavor to clarify where a person should claim benefits. But these concepts are not known to the consumers, and to some degree may even be counterintuitive.

Government has taken a position of not placing the burden of determining priority on the injured victim. Instead government has contemplated that the injured victim could apply to an insurer and that insurer would be obliged to respond, pending some process to sort out ultimate priority. In this way government has put the burden of determining priority on the insurance community and taken the burden away from accident victims.

The provisions of O. Reg. 283/95 create an extraordinary obligation on the insurers to whom 283/95 applies. They have obligations notwithstanding no contractual commitments. Their obligations are not defined except to the extent that payment should be "in accordance with the provisions of the schedule".

[2] An Ontario insurer might be obliged to pay Alberta benefits for reasons other than provisions of the SABS. This arises from licence conditions, PAU filings and other matters discussed infra.

121(1) of the *Insurance Act* authorizes O. Reg. 283/95 with the words:

> **10.4 governing the procedure for determining who is liable to pay statutory accident benefits under section 268, including requiring insurers to resolve disputes about liability through an arbitration process established by the regulations and requiring the interim payment of benefits pending the determination of liability;**

O. Reg. 283/95 requires the approached insurer to commence paying the benefits in accordance with the provisions of the Schedule.

> **2.1 (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.**
> **(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.**
> **(3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.**
> **(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.**
> **(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.**
> **(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. O. Reg. 38/10, s. 3.**
> **(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.**
> **(8) In subsection (7),**
> **"insurer" does not include the Fund. O. Reg. 38/10, s. 3.**

The key provision found in Ontario regulation 283/95, s. 2.1 (6) is:

> **(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.**

This is an unusual provision. An insurer that is not the highest ranking insurer is nonetheless obliged to commence paying the benefits. Does this mean that the insurer has to pay benefits regardless of whether or not the claimant is a person described in one of the several tiers of persons insured? Or is it necessary that the person be an insured, at some level, with respect to the insurer?

I think that it is important to note that the regulation mandating interim response has been changed by the legislature in 2010. The former provision was:

> **2. (1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.**

It is notable that the regulation has been refined, as of 2010, to specify that the interim obligation is to pay benefits "in accordance with the provisions of the Schedule".

Cases have considered the previous regulation provisions that mandate interim claim response. In *Ontario v. Kingsway*[3], in the Court of Appeal, Justice Laskin made these observations in reference to the rule in place prior to 2010:

> **[19] Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies s. 2 is that the first insurer to receive an application for benefits must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay, or as in this case, by an insurer's claim that no policy of insurance existed at the time. [page513]**
>
> **[20] Insurers cannot avoid their obligation under s. 2 by claiming that another insurer should pay or that an insurance policy was cancelled shortly before the accident. If they could deny an application for accident benefits on either of these grounds, s. 2 would be rendered meaningless. Thus, arbitrators and the courts have developed a nexus test for triggering an insurer's obligation under s. 2. As long as there is some nexus -- some connection -- between the insurer receiving an application for benefits and the insured, the insurer must pay pending the determination of its obligation to do so. In addition to the arbitrator's ruling in this case, see for example Allstate Insurance Co. of Canada v. Brown (1998), 40 O.R. (3d) 610, 1998 CanLII 18877 (ON SC), [1998] O.J. No. 2318 (Div. Ct.); and Ontario (Minister of Finance) v. Royal & Sun Alliance, unreported (January 2003, Arbitrator M. Guy Jones).**
>
> **[21] The nature of the nexus or connection required to trigger the insurer's obligation under s. 2 will vary from case to case. Although I am inclined to agree with Arbitrator Jones in Royal & Sun Alliance, supra -- "[o]nly in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay" -- to address the case before us I need not be precise about the extent of the connection required.**

Many cases over the years have grappled with the “nexus” concept with respect to Ontario’s Statutory Accident Benefits. Essentially this concept has developed to support the proposition that an injured claimant can reach out to any insurer and claim benefits from that insurer, regardless of whether or not that insurer is actually ultimately liable to pay such benefits to the individual. In fact “nexus” has frequently been found in circumstances where the approached insurer no longer had an applicable policy in force.

Nexus is a concept entirely created by caselaw[4][5]. It is undefined. For an insurer facing an application for benefits this creates a precarious situation. If there is sufficient nexus and the insurer does not respond, there are consequences. If the insurer does respond the insurer might end up in the position of paying benefits without recourse.

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[3] Kingsway General Insurance Co. v. Ontario (Minister of Finance) 2007 ONCA 62 (CanLII), 84 O.R. (3d) 507

[4] Allstate Insurance Co. of Canada v. Brown, 1998 CanLII 18877 (ON SC) finding nexus where a person had formerly been insured by the insurer under a policy that had terminated by the time of the subject accident.

[5] In Zurich Insurance Company v. Chubb Insurance Company of Canada, 2014 ONCA 400 Justice Pardu offered the following examples of nexus findings: “For example, in *Ontario (Minister of Finance) v. Royal & Sun Alliance Insurance Co.* (January 2003, Arbitrator M. Guy Jones), the investigating officer was given a certificate of insurance issued by Royal which had expired four years earlier and covered a different vehicle. This was found to be a sufficient nexus to a motor vehicle liability insurer to justify an obligation to pay. In *Ontario (Minister of Finance) v. Progressive Casualty Insurance Co. of Canada*, 2009 ONCA 258 (CanLII), 95 O.R. (3d) 219, and *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.* (2008), 2007 CanLII 82792 (ON SC), 94 O.R. (3d) 62 (S.C.), motor vehicle liability policies expired two months before the accident. In these cases the claimants’ choice of recipient of the claim for SABS was not random or arbitrary and was connected to a “motor vehicle liability policy”. Similarly in *Danilov v. Unifund Assurance Co.*, [2009] O.F.S.C.D. No. 69 (FSCO Arb.), there was a fraudulent pink motor vehicle liability policy slip purporting to evidence a “motor vehicle liability insurance policy”.

O. Reg. 283/95, as amended in 2010, has not provided much certainty for insurers. By contrast the amended regulation is replete with ameliorative provisions in favour of the Motor Vehicle Accident Claims Fund.

The regulation revision in 2010 might be significant by adding "in accordance with the provisions of the schedule" as this, to some extent, narrows disputes about who has priority. In cases where the claimant was not an "insured person" under the SABS in connection with an approached insurer, it is hard to say that a benefit is payable by the insurer to the person "in accordance with the provisions of the schedule". The effect of the 2010 change may be to limit the scope of insurers subject to 283/95's interim response rule to that group of insurers that insures the person, his family, his company car, or the vehicle he occupied, was struck by, or was somehow involved in the accident. That is an approach that makes some sense. It's where almost every application is now submitted.

The case of *Zurich v. Chubb* finds the existence of obligations even where the insurer has not undertaken to provide any such coverage in connection with the subject loss. This question of responsibility to pay benefits per O. Reg. 283/95 came before the Supreme Court of Canada in 2015[6]. The case raised important questions about the reach of the obligation to pay benefits when the approached insurer did not insure the injured person for accident benefits at the time of the accident. The loss here arose before the O. Reg. 283/95 amendments in 2010.

Zurich v. Chubb highlights the difficult position of an insurer that receives an application for benefits in a circumstance where the insurer has no contractual obligation to pay any such benefits. In that case the claimant sent an application for accident benefits to Chubb, an insurer providing a policy that was not motor vehicle liability coverage. (SABS are an adjunct to motor vehicle liability insurance.) Naturally Chubb reacted negatively towards the asserted claim since it was not a coverage which it sold nor was there any premium collected in respect of Statutory Accident Benefits. The court was asked to give an expansive interpretation to the obligation of insurers to respond to SABS claims on an interim basis and then subsequently assert any priority claim that they would have against another insurer. Here, where Chubb was found to be an insurer that sold some automobile insurance in some circumstances, this was found to be pertinent to arriving at a conclusion that Chubb had to respond to the SABS claim under a policy that contained no SABS coverage whatsoever and was not an automobile insurance policy. This decision was made in Chubb's favour at the Ontario Court of Appeal[7]. On further appeal to the Supreme Court of Canada the decision was overturned with the court adopting the dissenting reasons of Justice Jurianz in the Court of Appeal.[8]

In the result it was determined that Chubb had an obligation to respond to the SABS claim, notwithstanding that there was no coverage whatsoever under Chubb's policy that created the "nexus".

It is against this background that we have to look at Intact's decision to pay Jeremy benefits in this case.

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[6] Zurich Insurance Co. v. Chubb Insurance Co. of Canada, [2015] 2 SCR 134, 2015 SCC 19 (CanLII) where the court adopted the dissent from the Ontario Court of Appeal

[7] Zurich Insurance Company v. Chubb Insurance Company of Canada, 2014 ONCA 400 (CanLII)

[8] Zurich Insurance Co. v. Chubb Insurance Co. of Canada, [2015] 2 SCR 134, 2015 SCC 19 (CanLII)

Priority as Between Intact and Gore

Priority under section 268, means a priority determination arising from the application of the rules specified in 268(2) of the Act. Those rules delineate between the obligations of insurers in accordance with specified relationships between the person, involved vehicles, and the insurers.

In most cases, translates into a dispute about whether the claimant is an insured person, and which category of insured person.

Jeremy's Status Under the Intact Coverage

In the SABS the definition of insured person is:

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

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

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; ("personne assurée")

Although it may not have been obvious throughout the course of this claim, we know now that the claimant is not an insured person under the Intact policy. He is not a dependant of Intact's insured. Unless the claimant is a named insured, dependant, etc., he cannot claim Ontario SABS for this Alberta accident (subject to section 59).

This does mean that the applicant's right to benefits might turn on his particular relationship with the targeted insurer, i.e. is he an insured person under definition (a) above. Here there is no question that he does not meet that criteria in relation to Intact. He is not a named insured, spouse, or dependant of Intact's named insured/spouse. So when Intact looks at the claim advanced "in accordance with the provisions of the schedule" Intact would be correct to say there are no Statutory Accident Benefits payable by Intact for the claimant here, unless section 59 applies.

Section 59, within the SABS, is a special extension of coverage where an insured person claims benefits as a result of an accident outside of Ontario. Section 59 of the SABS provides:

PART XI
INTERACTION WITH OTHER SYSTEMS

Accidents outside Ontario

59. (1) This section applies if,

(a) as a result of an accident in another province or territory of Canada or a jurisdiction in the United States of America, a person insured in that jurisdiction within the meaning of subsection (4) dies or sustains an impairment or incurs an expense described in section 15, 16 or 19; and
(b) no benefits are received under the law of the jurisdiction in which the accident occurred. O. Reg. 34/10, s. 59 (1).

(2) The person, or the person claiming benefits in respect of him or her, may elect to receive either of the following, but not both:

1. **The benefits described in this Regulation, other than the benefits referred to in paragraph 2.**

2. **Benefits in the same amounts and subject to the same conditions as if the person was a resident of the jurisdiction in which the accident occurred and was entitled to payments under the law of that jurisdiction. O. Reg. 34/10, s. 59 (2).**

(3) If an election is made under subsection (2), the insurer shall pay benefits in accordance with the election. O. Reg. 34/10, s. 59 (3).

(4) For the purpose of this section, a person is insured in the jurisdiction in which the accident occurred if, at the time of the accident,

(a) the person was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) the person met the criteria prescribed for recovery under the law of the jurisdiction in which the accident occurred;

(c) the person was not an owner, driver or occupant of an automobile registered in the jurisdiction in which the accident occurred; and

(d) the person,

(i) was an occupant of the insured automobile,

(ii) was the named insured, a person specified in the policy as a driver of the insured automobile, the spouse of the named insured or a dependant of the named insured or spouse and was an occupant of an automobile,

(iii) was the named insured, his or her spouse or a dependant of the named insured or spouse and was struck by an automobile while not an occupant of an automobile,

(iv) was struck by the insured automobile while not an occupant of an automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, was a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of the person or spouse and suffered an impairment while being the occupant of an automobile or suffered an impairment caused by an automobile of which he or she was not an occupant, or

(vi) was struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). O. Reg. 34/10, s. 59 (4).

This is a complicated extension of coverage that is not frequently encountered. The provisions of subsection (4) are critical. The injured individual has to be a person defined in this subsection (4) of section 59 for section 59 to have any application whatsoever. If the person is able to bring

themselves within the ambit of subsection (4), then they have the option to elect between the Ontario benefits or the local benefits. Such benefits would be paid by the Ontario insurer in either case.

It seems to me that Jeremy could not be qualified under subsection (4) (a). Nor does it appear that Jeremy could meet the qualification under (d). Both would be necessary to make section 59 applicable and to allow Jeremy the option to choose between Ontario and Alberta benefits.

Intact's Decision to Pay Benefits

One can question why Intact has accepted this claim and paid it in accordance with its perception of the Alberta obligations.

With the benefit of hindsight, and with the benefit of the extensive investigations conducted by counsel in preparation for this arbitration, there is considerable clarity about the residency of Jeremy and his dependency, or lack thereof. But those things may not have been clear at all at the time that the application for benefits was received and needed to be dealt with.

Intact's claims handling decision can be best understood by looking at the case through the lens of compliance with the interim response rule, discussed above. According to Ontario regulation 283/95, as amended, Intact's obligation was to pay benefits and to seek redress from a higher ranking insurer, allegedly Gore. So it is not difficult to understand why Intact finds itself in the position of responding to a claim from Jeremy and thereafter seeking reimbursement from Gore.

Intact points to the discussed *Zurich v Chubb* decision to bolster its decision to pay benefits here, even in the face of coverage issues that might be raised in defence. In that regard it is important to note that the original determination that Chubb had to pay the initial benefits came in a decision at the first level of appeal in 2012[9].

The striking feature of the *Zurich v. Chubb* case was that Chubb was neither the insurer of a vehicle connected with the accident, nor of a vehicle connected with the claimant. The claimant had engaged in a car rental transaction and at that point had been offered the opportunity to by some accident and health coverage (not motor vehicle liability insurance, and not Statutory Accident Benefits) from Chubb. The claimant declined. Evidently this was considered sufficient "nexus" for the claimant to approach Chubb for Statutory Accident Benefits, premised on the application of section 2 of 283/95 to Chubb in this instance. The main argument was that Chubb was not an insurer in this context because the policy involved was not a motor vehicle liability policy. However, Chubb was otherwise engaged in Ontario as a provider of motor vehicle liability policies and that was held to be sufficient to make Chubb subject to the interim response rule.

This development in the jurisprudence was referenced by Intact as part of its argument that its decision to pay benefits to Jeremy was a reasonable or correct response to the claim made to Intact. I agree that the decision probably represented an unforeseen enlargement of the interim response rule that would be unsettling for claims handlers.

The consequences of failing to provide initial response to an application for benefits are potentially quite serious for an insurer. O. Reg. 283 is mandatory in nature. A failure to comply would be a contravention. Arguably an intentional non-compliance could be an unfair or

[9] Zurich Insurance v. Chubb Insurance, 2012 ONSC 6363 (CanLII)

deceptive act or practice subject to regulatory sanctions[10]. Additionally failing to respond could have the effect of depriving Intact of the ability to seek redress from Gore under 283/95.

Perhaps even more important, a failure to comply with O. Reg. 283/95 might have the effect of causing an untoward delay in benefits for the injured person.

While I think that there might be some doubt about whether Intact was actually compelled to pay benefits in this particular fact situation, notably because the words "in accordance with the Statutory Accident Benefits Schedule" would seem to require the claimant to be an "insured person" within the meaning of the Schedule, Intact made the decision to give a positive response to the claimant, agreeing to pay Alberta level benefits.

This position was articulated in correspondence from Intact. Intact has been consistent in this approach throughout the course of the claim.

Intact has also consistently made their assertion that Gore should be paying Alberta level benefits.

The jurisprudential approach to "nexus" issues makes it clear to any Ontario insurer that sometimes sells automobile insurance (as Intact clearly does, and did in this case with respect to the policy sold to Jeremy's mother) cannot refuse to respond on the basis that there is no coverage under the policy with nexus to the person that they provided coverage for.

In my view Jeremy, as the son of Intact's named insured, as someone who formerly resided in the same premises, and who received some "care packages" from Intact's insured had sufficient nexus with the Intact policy to trigger Intact's duty to respond to the presented claim. I wish to emphasize here that these characteristics that suggest a nexus are factors that arise from the SABS, from the prescribed terms and conditions of the Statutory Accident Benefits Schedule with respect who is an insured person. More specifically, these are indicia of dependency.

Against this background, Intact's supposition that they have an obligation to respond to an application for benefits in the face of circumstances negating coverage was probably prudent. I agree that it was a reasonable and correct response.

From what I know of the chronology of events, Intact was alive to the possibility that Gore should be paying Alberta benefits from an early date.

For reasons discussed further with respect to licence conditions, PAU, and policy provisions, Intact would perceive that Gore had the obligation to provide Jeremy Alberta level benefits as a result of having issued an Ontario motor vehicle liability policy in respect of the vehicle being operated in Grand Prairie at the time of the accident.

Intact was required to respond to the application for statutory accident benefits. Their response was a reasonable one. They were, to some extent, required to treat their policy as conforming to Alberta requirements because of the Ontario licence condition 45(1)2. They assert that the benefits for which they are seeking reimbursement are the Alberta range of benefits. All of this seems to be correct to me.

[10] O. Reg. 7/00: UNFAIR OR DECEPTIVE ACTS OR PRACTICES, section 1.

Motor Vehicle Liability Insurance as the Anchor for Regulation

When we turn our attention to the respective positions of Intact and Gore in this case, we need to give heed to some underlying principles of automobile insurance.

Automobile insurance today as become a complicated undertaking with multiple lines of coverage provided in one contractual transaction. The contracts include:

> 1. Liability insurance which covers the owner and operator of the vehicle for liability imposed by law or damages sustained by an accident victim.
>
> 2. Collision and comprehensive coverage which provide protection for loss or damage to the insured vehicle. Principally this coverage is intended to cover the tangible asset owned by the insured person.
>
> 3. Direct compensation for damage sustained to the insured vehicle as a result of the fault of another motorist. This coverage supplants former tort rights that are now removed.
>
> 4. Statutory Accident Benefits which are “no-fault” benefits that provide indemnity with respect to medical and rehabilitation expenses, attendant care, and income replacement.

These different coverages have in common the goal of providing indemnity for adverse consequences associated with motor vehicle accidents. But beyond that the coverages diverge considerably. Not only is there variation in the subject matter of the insurance (the vehicle versus the person, impairment versus liability, etc.) the different coverages do not actually insure the same people. Liability coverage insures the owner of the vehicle and the driver of the vehicle. Collision, comprehensive, and direct compensation are essentially an indemnity for the owner of the vehicle. Statutory accident benefits is a program that casts a wide net potentially providing coverage to the contracting party, the owner of the vehicle, the driver of the vehicle, other occupants of the vehicle, occupants of other vehicles to become involved in an incident with the insured automobile, pedestrians who become involved in an incident with the insured automobile. Notably, with respect to Ontario accident benefits, it is not even necessary that the insured automobile, the presumptive subject of the automobile insurance, be involved in the incident.

It is also noteworthy that there are different public policy interests with respect to these various aspects of automobile insurance. Liability insurance is very important to protect drivers and owners from the calamity of financial ruin that could result from an accident. Concurrently, the victim of an accident has a direct interest in being able to access the proceeds of liability insurance coverage. Obviously going towards this latter interest governments have required motorists to purchase liability insurance, have set the minimum limits of coverage that must be purchased and other ancillary terms, and have granted to those “third parties” statutory rights of action directly against the insurer in order to gain recompense[11]. In fact, the victim’s rights against the insurer may well be greater in the rights of the insured person who paid for the contract of insurance[12]. The statutory regulation of motor vehicle liability insurance has a long history, going back to the early part of the 20th century.

[11] Insurance Act, s. 258(1)
[12] Insurance Act, s. 258(4)

Comparatively there is minimal public interest evident in regulating insurance coverage which applies to vehicle damage. After all, this is primarily a matter of interest to the vehicle owner, and sometimes lienholders, and doesn't have any direct external implications.

With respect to Statutory Accident Benefits there is a significant overlay of statutory provisions, regulations, guidelines, forms and bulletins which signify an intense public interest in these particular benefits.

The starting point is the statutory requirement that these no fault benefits be provided in conjunction with motor vehicle liability policies. The Ontario scheme provides:

> **Statutory accident benefits**
>
> **268 (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26 (1).**

Motor vehicle liability policies are required to be purchased[13] for every vehicle on the road in Ontario. By this combination government has effectively required motorists to purchase Statutory Accident Benefits. As a result, we arrive at a situation where Statutory Accident Benefits are provided as an adjunct to motor vehicle liability policies, notwithstanding the different nature of the benefits, the different subject matter of the insurance, and that the persons insured are a different group.

It is not just the nature and extent of Statutory Accident Benefits that has been addressed by government. Ontario has also legislated access to benefits without privity[14], constructed a scheme whereby an injured person would be an insured person under more than one insurance contract, and then put in place priority rules to sort through conflicting obligations. Those priority rules are supported by procedural provisions mandating how insurers are to respond and deal with these priority conflicts.

This arbitration is founded upon those latter provisions.

Interprovincial Arrangements

As this case considers questions of benefits arising out of an Alberta accident we need to understand how Ontario and other Canadian provinces approach interjurisdictional insurance issues.

In the mid-1960s there was an effort made to have automobile insurance laws across the country uniform. A review of the statutes will still show some vestiges of that effort in the form of statutory provisions that are repeated in multiple provinces. But in the early 1970s, as some provinces dabbled in providing "no-fault" benefits, and other provinces moved dramatically towards single-payer systems, much of the interprovincial consistency diminished. That trend has continued apace.

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[13] Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, s. 2
[14] Insurance Act, s. 244 and s. 268 (3)

Regardless of how various provinces might choose to approach automobile insurance issues, there is a stark reality that vehicles will cross interprovincial borders and accidents will happen in jurisdictions other than the province where a contract has been entered into. At a very basic level of design, automobile insurance systems need to take into account the problems that may arise when a vehicle insured in one jurisdiction becomes involved in an accident in another jurisdiction. Of course this is most important when there are significant differences between the systems in operation.

The obvious goal of the provisions about interjurisdictional issues is to address the commonly expected scenario where an automobile insured in one jurisdiction becomes involved in an accident in another jurisdiction. With respect to Ontario Statutory Accident Benefits things are complicated as those benefits can be available in circumstances where the accident does not even involve the presence of the insured automobile.

There are several approaches that have been used to address interprovincial issues. No doubt there are challenges for the draftsperson who, in one jurisdiction, is endeavouring to regulate behaviour in another jurisdiction.

License Provisions

To enter into automobile insurance contracts, an insurer needs to be licensed. The relevant licensing authority will be the one established in the place where the contract is entered into.

By legislation some provinces have inserted “conditions” into those licenses. Those conditions endeavour to dictate how an insurer must respond to certain interprovincial problems. Interestingly, the legislation does not seem to say that the insurer’s obligations are to be interpreted in a way that complies with the license conditions, but that certainly has been the effect of case law over the years[15].

The parties here are both licensed in Ontario[16] and Alberta[17].

The Ontario provision is as follows:

> **Conditions of automobile insurance licence**
>
> **45. (1) A licence to carry on automobile insurance in Ontario is subject to the following conditions:**
>
> **1. In any action in Ontario against the licensed insurer or its insured arising out of an automobile accident in Ontario, the insurer shall appear and shall not set up any defence to a claim under a contract made outside Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in Ontario and such contract made outside Ontario shall be deemed to include the statutory accident benefits referred to in subsection 268 (1).**
>
> **2. In any action in another province or territory of Canada, a jurisdiction in the United States of America or a jurisdiction designated in the *Statutory Accident Benefits Schedule* against the licensed insurer, or its insured, arising out of an**

[15] See for example Potts v. Gluckstein, 1992 CanLII 7623 (ON CA)
[16] http://licensingcomplaintofficers.fsco.gov.on.ca/LicClass/eng/lic_companies_class.aspx
[17] https://finance.alberta.ca/publications/insurance/consumers/Insurers-Recip-Ins-Exchanges-Fraternal-Societies-Licensed-in-Alberta.pdf

> **automobile accident in that jurisdiction, the insurer shall appear and shall not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in that jurisdiction. R.S.O. 1990, c. I.8, s. 45 (1); 1993, c. 10, s. 6; 1996, c. 21, s. 12.**
>
> **Penalty for breach**
>
> **(2) A licence may be cancelled when the holder commits a breach of condition as set out in subsection (1). R.S.O. 1990, c. I.8, s. 45 (2).**

In my view section 45 of the *Insurance Act* is material to understanding the legal position that these two insurers find themselves in an accident occurs in another jurisdiction. Section 45 (or its predecessor s. 25) is frequently referenced when disputes arise about the obligation of insurers for out of jurisdiction accidents. Those provisions essentially require insurers to respond to certain accident circumstances as if the policies were issued elsewhere and in compliance with the rules in the accident jurisdiction. The effect of this provision is to say that both Gore and Intact are required, in an Alberta context, to comply with whatever is mandatory in Alberta as an adjunct to motor vehicle liability insurance.

Note that the operation of section 45 (1) 2 does not depend upon Intact's insured vehicle being involved in the Alberta Accident. By virtue of this statutory provision Intact would be obliged to respond to Jeremy's claim as if the policy were issued in Alberta, and thus inclusive of Alberta's prescribed benefits although Alberta's priority rule is different[18].

Note that the Ontario license condition, in clause 2, does not specifically expand to import local no-fault benefits. The Alberta provision is generally similar but not identical as it does expressly expand out of province obligations to include out of province no-fault insurance:

> **Automobile insurance**
>
> **33 An insurer's licence to undertake automobile insurance in Alberta is subject to the following conditions:**
>
> **(a) in any action in Alberta against the licensed insurer or its insured arising out of an automobile accident in Alberta, the insurer must appear and must not set up any defence to a claim under a contract made outside Alberta, including any defence as to the limit or limits of liability and prescribed accident benefits under the contract, that could not be set up if the contract were evidenced by a motor vehicle liability policy issued in Alberta;**
>
> **(b) in any action in another province or territory against the licensed insurer or its insured arising out of an automobile accident in that province or territory, the insurer must appear and must not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Alberta, including any defence as to the limit or limits of liability and prescribed accident benefits under the contract, that could not be set up**
>
> **(i) if the contract were evidenced by a motor vehicle liability policy issued in the other province or territory, or**
>
> **(ii) under a scheme of no fault insurance that has been established by statute in the other province or territory.**

[18] Section 591(1) of the Alberta Insurance Act provides that the insurer of the vehicle is liable, in the first instance.

The Alberta provision has been interpreted to require the insurer to imply the local no fault benefits[19].

Alberta's provision explicitly mentions accident benefits. The fact that the Ontario statute does not refer to "prescribed accident benefits" makes no difference. Accident benefits are a mandatory adjunct to motor vehicle liability coverage and thus denial of such benefits is a defence that cannot be set up.

Power of Attorney and Undertaking

One tool that has been widely used for dealing with inter-jurisdictional automobile insurance issues is the "Power of Attorney and Undertaking", sometimes referred to as the PAU. By filing this form, insurers are undertaking to commit to a certain course of behaviour in the event a vehicle insured by them is involved in an accident or proceeding in a jurisdiction other than the place where the contract of insurance was entered into. This is another approach to the problem of dealing with the conflict issues that can arise because of the mobility of motor vehicles.

The use of the Power of Attorney and Undertaking is linked to the requirement for motorists to be insured in various jurisdictions and their concurrent obligation to produce satisfactory evidence of such insurance in the jurisdiction where the vehicle is being operated.

It seems that the trade-off here is that an insurer will file the required form setting out the Power of Attorney and Undertaking with a regulator and in exchange for that the insurer will be able to provide its policyholders with documents evidencing insurance that will be acceptable in the jurisdiction for which the undertaking has been filed. Thus, in exchange for the PAU commitment, insurers are able to offer an extended range of coverage to their customers, with the acquiescence of the regulators in other jurisdictions. This shows the extent to which insurers and regulators find it appropriate to treat interprovincial issues in a manner that minimizes issues between jurisdictions, making coverage portable for the customer and making the business of insurance more wide ranging.

It seems that in some jurisdictions this is done on a case-by-case basis. But in Canada it seems that there is a broader approach. Regulators have created a central repository for these documents to be filed, and have centralized a list of the compliant insurers. In the materials submitted to me is a list of participating insurers and a copy of the wording of the applicable Power of Attorney and Undertaking.

I have perused that list and have concluded that both of these insurers have filed the Power of Attorney and Undertaking with the regulatory authorities in Canada[20].

Based on what has been submitted to me, it appears that the filed undertaking includes the following commitment:

> **Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which**

[19] Wawanesa Mutual Insurance Co. v. Lindblom, 2001 ABCA 102 (CanLII)

[20] On the submitted list of participating insurers I saw ING insurance named and I understand that to be the previous name used by Intact and therefore have concluded that both Gore, which is also named, and Intact are subject to the PAU

> **such action or proceeding may be instituted, and to satisfy any final judgement rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of (a) the amounts and limits for that kind or class of coverage or coverages provided in the contract or plan, or (b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory.**

There is no explicit reference to provision of no fault benefits. However, noting that provision of no fault benefits is a mandatory consequence of providing motor vehicle liability insurance, it seems that a denial of the existence of such coverage would amount to setting up a defence that would not be permissible if the contract had been entered into in the jurisdiction that required that coverage. Accordingly the undertaking amounts to a commitment to provide local no fault benefits that are required to be provided under local policies.

The Ontario Court of Appeal case of *Healy v. Interboro*[21] raises this issue. In that case, Interboro had filed an undertaking with respect to accidents that occur, inter alia, in Ontario. The Interboro contract was made in New York State. Their insured was injured in an Ontario accident. The undertaking wording was the substantially the same, but not identical to, the wording noted above. Of particular importance to the Court was the insurer's commitment:

> **C. Not to set up any defence to any claim, action or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in and in accordance with the law relating to motor-vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceedings, up to**
>
> **1) the limit or limits of liability provided in the contract; but**
>
> **2) in any event an amount not less than the limit or limits fixed as a minimum for which a contract of motor-vehicle liability insurance may be entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.**

Even though the vehicle insured by Interboro was not involved in the Ontario accident, the court concluded that 268(1) and 268(2) of the Ontario act applied to require Interboro to pay Ontario level no fault benefits. By doing so, the court held the out of province insurer to be obliged to conform both to Ontario's benefits schedule, and to Ontario's "follow the person" priority rules.

Cases have noted that the licence conditions imposed by insurance statutes are very similar to the PAU in design. I agree.

The effect of a PAU with respect to vehicles coming into Ontario is to make Ontario law applicable and would include entitlement to SABS if it is requiring compliance with Ontario laws respecting motor vehicle liability coverage[22].

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[21] Healy v. Interboro Mutual Indemnity Insurance Company, 1999 CanLII 1485 (ON CA)
[22] See also Berg v. Farm Bureau Mutual Insurance Company, 2000 CanLII 2301 (ON CA)

Policy Provisions

In this case both insurers have entered into automobile insurance contracts utilizing the Ontario standard form of coverage. The prescribed form that sets out the detailed terms and conditions of coverage is known as “OAP 1”. Within that document one can find reference to the various types of coverage committed to by the insurer.

Within the section of the OAP 1 addressing liability coverage there is a reference to the obligation of the insurer with respect to accidents in another jurisdiction. That provision is as follows:

> **3.3.3 Outside Ontario**
>
> **If the incident happens in a jurisdiction covered by this policy in which the minimum liability coverage required is higher than the limit shown on the Certificate of Automobile Insurance, we will honour the higher amount. We also agree not to use any legal defence that would not be available if the policy had been issued in that jurisdiction.**

This provision does not directly address the obligation to pay no-fault benefits in out of province accidents. The presence of the clause within the liability section of the policy indicates that the dominant intention of this obligation is to provide liability coverage that complies with local laws. Nonetheless, the agreement to “not use any legal defence that would not be available if the policy had been issued in that jurisdiction” would seem to preclude an insurer from saying “we do not provide the local no-fault benefits” if such benefits are required as a consequence of having issued a motor vehicle liability policy in the jurisdiction.

Given the litany of case law giving this effect to similar language in licence conditions and PAU documents, I conclude that this provision is broad enough to apply to no fault benefits that are a mandatory adjunct to motor vehicle liability insurance in the jurisdiction of the accident.

Discussion

What Intact has done here is to step in and pay Alberta benefits as some kind of positive response to the claimant’s request for Ontario benefits. It is not really clear that the claimant or his mother understood the nuances of available benefits as between Alberta and Ontario. But it is clear that the submitted application for benefits is a prescribed form directed towards Ontario benefits. I heard evidence that they intended to claim Ontario benefits.

This puts Intact in a difficult position since it seems clear on the policy wording that the claimant is not entitled to Ontario accident benefits since the applicable definition of “insured person” only allows that status to a person in limited circumstances for accidents outside of Ontario. Those limited circumstances do not apply here. However, the facts that make this clear were not at all clear at the outset of this claim. The parties conducted extensive investigations, obtained detailed statements, conducted formal examinations under oath, obtained documents from non parties, all with a view to determining residency and dependency questions. Up to the point of delivering facta in this proceeding, these continued to be live issues.

Furthermore, section 59 of the Ontario scheme does provide a circumstance that would make Alberta benefits payable. Importantly, if that were applicable, those benefits would be payable under the prescribed terms (section 59) of Ontario’s statutory accident benefits. Although the benefits would have the characteristics of Alberta benefits, they are payable as a result of the obligations set out in the Ontario statutory accident benefits. Hence, if the benefits were paid in

this scenario then priority could be pursued in accordance with subsection (2) of section 268 of the Ontario *Insurance Act*.

I question whether section 59 should have any application here. Now, in the fulsome passage of time, after detailed examinations under oath and other investigations, the parties have come to the conclusion that the claimant was not a resident of Ontario and was not a dependent upon his mother. This development was communicated to me at the hearing and apparently this consensus was reached after the preparation of the detailed facta which thoroughly canvas dependency and residency issues. All of which goes to show the uncertainty of whether or not the claimant was Ontario resident (at the time or shortly before the event) and the concurrent uncertainty about dependency.

If the evidence had gone in a different direction and we were to conclude that the claimant was still an Ontario resident and was principally dependent for financial support upon his mother, then one could conclude that the claimant was entitled to elect to receive Alberta benefits under the Ontario SABS coverage, section 59. Also, if those were the facts the claimant apparently would have been entitled to claim Ontario level benefits.

But the effect of the restricted definition of "insured person" for accidents out of Ontario, (subject to the provisions of section 59 of the SABS), is that Ontario does not extend SABS coverage in "out of province" accidents except to the limited class of people in section (a) of the definition of insured person. This is the subset of individuals who are in close connection with the contracting party, the named insured, the spouse, the dependent, etc. The extra provincial availability of SABS is restricted in this respect. The Ontario scheme does not require extension of the Ontario level benefits to the broader array of individuals that would be entitled to the benefits if the accident were in Ontario.

If Intact were brilliantly clairvoyant at the outset of this claim they might have recognized four possible outcomes with respect to claim advanced towards them:

> (1) the claimant qualifies as an insured person under Ontario SABS "insured person" definition (a) and gets Ontario level of statutory accident benefits. This would mean finding that he was a dependent, but residency does not matter.
>
> (2) the claimant qualifies as a person insured in the jurisdiction as defined in 59 (4) and elects to have benefits per the Ontario SABS. This means finding that he was both an Ontario resident and a dependent of Intact's named insured.
>
> (3) the claimant qualifies as a person insured in the jurisdiction as defined in 59 (4) and elects to have Alberta style benefits. Again this means finding that he was both an Ontario resident and a dependent of Intact's named insured.
>
> (4) that, pursuant to the conditions of Intact's license in Alberta, Intact would have to respond and pay Alberta benefits in accordance with the Alberta scheme. Concurrently, Intact might well have recognized that Gore would be subject to the same Alberta licence condition and would be the primary insurer with respect to Alberta benefits in accordance with section 591 of the Alberta Legislation. This scenario is unlike the other scenarios as it is rooted in compliance with licence conditions requirements. Compliance with licence conditions,as with provision of Ontario Statutory Accident Benefits, is a consequence of having a motor vehicle liability policy in place. These are two consequences of having issued a motor vehicle liability policy.

Faced with this understanding of possible outcomes, Intact's claims handling decisions are then further complicated by

(1) Unclear status of the claimant both as to residency and dependency. He had moved, changed jobs previously. He had some form of assistance from family as he was making his way into the work force. His track record of employment and out of province residency was not longstanding. These issues have considerable nuance.

(2) The obligations under O. Reg. 283/95 to respond to a claim even in the absence of coverage. Highlighted by the Zurich v Chubb case Intact would have been right to be wary of turning away the claim instead of processing it with a view to making recovery from a higher ranking insurer if the facts supported that approach.

Processing the SABS claim is not always something that can be done without taking into account the relationship with the insurer, and hence it is occasionally going to be problematic for an insurer dealing with uncertain priority to respond to a SABS claim in those few instances where the SABS entitlement will differ, depending on the insurer.

The initial response rule makes some sense if one assumes that the claimant has the exact same entitlement to benefits regardless of which insurer is actually the highest in priority. But that will not always be the case. Occasionally, perhaps only rarely, there will be extenuating circumstances that mean that the entitlement to SABS can only be determined by taking into account factors that apply in relation to the higher priority insurer. For example, optional benefits, excluded driver provisions.

Parts of the Schedule are the provisions defining who is considered to be an "insured person" in respect of a particular contract. The answer to that question may depend on circumstances unique to each insurer's contract, such as: who is the named insured, who are the listed drivers and regular users, what is the insured automobile under the policy. For those Schedule provisions one cannot know if the person has access to benefits as an "insured person" unless one knows something about the insurer and its particular contract. How then is an insurer to determine benefits payable "in accordance with the provisions of the Schedule" if the person is not an "insured person". That is what has happened here. Ultimately, after all of the investigations, it has been determined that the claimant is not an insured person under the Intact policy. If that had been clear from the outset Intact might have said "in accordance with the provisions of the Schedule no benefits are payable to you".

If that approach had been taken by Intact, the claimant would have been deprived of any benefits, and Intact might have been criticized for a strict reliance on policy technicalities. But in a legal environment where obligations are determined by undefined notions of "nexus" rather than explicit contractual or regulation provisions, Intact had no difficulty in taking the course of providing a positive response to the claimant, pending priority determination.

Intact may have been encouraged by the belief that, regardless of residency or dependency status, the claimant would have recourse to Alberta no fault benefits against the insurer of the vehicle in which he was an occupant, Gore.

Against this background Intact's decision to pay the claimant benefits equivalent to the Alberta no fault benefits is understandable. In the context of this case it was a very reasonable decision. Intact focused on meeting the needs of an injured person, putting themselves at risk of being at

a disadvantage in recouping from Gore. It was a claims handling decision that is commendable. Intact clearly put the interests of the claimant first.

Which Insurer has Priority in Accordance with Section 268 of the *Insurance Act*?

Section 268 of the *Insurance Act* is found in Part 6 of the Ontario *Insurance Act*. Part 6 applies to both of these insurers. They are licensed automobile insurers in the Province of Ontario. They have issued Ontario policies and wordings in this case. They have asked me to determine this dispute in accordance with section 268.

Section 268 (2) sets out the ranking of priorities as follows:

Liability to Pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

According to this ranking system, Intact would have the highest ranking coverage if the claimant were principally dependent for financial support upon Intact's named insured or spouse. That would make him an insured. Based on the facts before me the claimant is not principally dependent for financial support and is not an insured under the Intact policy. Thus, the claimant does not have recourse against Intact "under subparagraph i". Absent that recourse the legislation says that "**the occupant has recourse against the insurer of the automobile in which he or she was an occupant".** That is Gore.

Gore does not acknowledge that this claimant was an "insured person" under its policy at least insofar as applying Ontario terms and conditions is concerned. Gore points out that under the Ontario wordings coverage would be restricted and would only cover occupants such as this claimant if the accident were in Ontario. It might be the case that Gore has issues that need to be addressed if the claimant approaches Gore for Ontario's Statutory Accident Benefits. But for my purposes, I only need to determine whether or not the claimant has recourse against Intact under subparagraph i. Having made that determination, the legislation is mandatory.

Based on the facts of this case I can reach no other conclusion but that, in accordance with subsection 2 of section 268 of the Ontario *Insurance Act*, Gore is the higher ranking insurer with respect to Statutory Accident Benefits.

Which Insurer Has Priority in the Alberta Scheme

Based on the submissions to me, it is clear that section 591(1) of the Alberta *Insurance Act* the priority insurer for the Alberta benefits is the insurer of the vehicle, Gore.

It is convenient that application of the Ontario and Alberta rules results in the same outcome. It could be otherwise quite easily on different facts.

Noting the disposition made by the Ontario Court of Appeal in the *Healy v. Interboro* case, I would generally start with the proposition that compliance with the local benefits includes compliance with the local priority regime.

Reimbursement

A consequence of being found the higher ranking insurer is that reimbursement must be made to the insurer that paid benefits on an interim basis.

This is been the practice for nearly 3 decades and has been universally adopted and accepted by Ontario's automobile insurers. Interestingly, it is not a consequence which is specifically mandated by the legislation or the regulations. But it is certainly pragmatic and necessary to support the needs of accident victims while insurers sort out priority issues. Hence it is a critical component of a scheme to advance the legislative intent.

Only rarely has there been consideration given to the scope of reimbursement. Some cases have turned attention to administrative expenses and items such as expert and legal costs. But I am not aware of any case which has looked at the issue that arises here, where the insurer approached for benefits on an interim basis has paid benefits which it perceives to be in accordance with the Alberta system, where it believes that the higher ranking insurer as an obligation to provide Alberta level benefits. Where the higher ranking insurer has issued an Ontario policy subject to the license conditions, the Power of Attorney and Undertaking, and the policy provisions.

Truly, one could argue that an arbitrator in a priority dispute should not, under Ontario authorizing legislation, be ordering reimbursement of monies paid in accordance with an understanding of the Alberta benefits system. This issue causes me considerable concern. I must determine whether or not I have jurisdiction to apply the reimbursement principles to benefits which were paid by Intact as if they were Alberta benefits.

As noted, there is no regulation provision or legislation that describes the extent of the arbitrator's authority with respect to reimbursement.

But I am aware that in some cases insurers have disputed whether amounts paid by an insurer should be reimbursed if, in hindsight, the insurer might have withheld benefits from the claimant. The arbitral decisions that touch on this issue have recognized the peril of second-guessing the insurer who is administering the benefits. Accordingly, the decisions have allowed reimbursement for amounts that were reasonably paid. No such case is based on facts similar to those before me now.

An arbitrator might be urged to take a strict approach and to rule in Gore's favour because of Intact's decisions. But such an approach, standing as it does on form rather than substance, is out of step with the modern approach to payment of "no fault" benefits. These benefits are to be

provided to meet needs in a timely manner. Insurance laws have changed dramatically to adapt. The "usage in the trade" amongst insurers with respect to taking obstructive positions is to the contrary. And so it should be as the modern approach suits the interests of the customers, the insurance community, and policy makers in government. It is now very common for insurers to find ways to resolve controversies by less confrontational means, and by not inconveniencing customers unnecessarily.

In the Ontario Superior Court decision in *R. v. Lombard*[23], Justice Perrell, on appeal from a priority dispute under s. 268 had an opportunity to consider the nature and extent of the reimbursement that might be awarded in a priority dispute arbitration.

> **There is a divergence in the arbitration case law and no judicial pronouncement about whether an arbitrator on a priority dispute has the jurisdiction to award a reimbursement beyond the repayment of the statutory benefits.**
>
> **[71] This issue is discussed in the arbitration decision Ontario (Minister of Finance) v. Lombard General Insurance Co. of Canada and Kent & Essex Mutual Insurance Co. (August 14, 2009, Arbitrator B.R. Robinson). In that case, Arbitrator Robinson reviewed several arbitration decisions, and he concluded that the jurisdiction existed, and he tied it to the principle of unjust enrichment and to the arbitrator's equitable and statutory jurisdiction to order restitution.**
>
> **[72] I agree with Arbitrator Robinson that in the circumstances of resolving a priority dispute between insurers under O. Reg. 283/95 that an arbitrator has the jurisdiction to order reimbursement beyond repayment of the statutory benefits. In my opinion, this jurisdiction is provided by ss. 1 and 7 of O. Reg. 283/95. Section 1 provides that "all disputes as to which insurer is required to pay benefits under s. 268 of the Act shall be settled in accordance with this Regulation". Section 7 provides that "If the insurers cannot agree as to who is required to pay benefits . . . the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 [S.O. 1991, c. 17]."**
>
> **[73] In the case at bar, the arbitration agreement between the parties included, as an issue in dispute, the following:**
>
> > **If so, is the Fund entitled to recover the costs it has incurred beyond the benefits it has paid out is liable to pay Mr. Berhe under the Statutory Accident Benefits Schedule? Specifically, can the fund recover the costs incurred in its investigation of this matter, and if so, what is the proper amount owed by Lombard?**
>
> **[74] I also agree that this jurisdiction is tied to the idea of unjust enrichment, which entails that the costs for which [page66]reimbursement is being sought are costs that were incurred for the ultimate benefit of the insurer that will assume responsibility for the statutory benefits. Put differently, the first insurer cannot recover for costs that do not benefit the insurer assuming responsibility for the statutory benefits. In the case at bar, the connection to unjust enrichment entails that the Fund would not necessarily be held harmless for all expenses and costs it paid to date. Rather, it would be entitled to recover only those costs that unjustly enriched Lombard because Lombard is saved having to incur those expenses.**

Other decisions at the same level have supported the notion that inter-company disputes re Statutory Accident Benefits should order reimbursement based of equitable principles of restitution. This has been the case in loss transfer disputes[24] and in priority disputes[25] under

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[23] *R. v. Lombard Ins. Co. of Canada*, 2010 ONSC 1770 (CanLII)
[24] *GAN v. State Farm Mutual Automobile Insurance Co* [1999] O.J. No. 4467, [1999] O.T.C. 165, 19 C.C.L.I. (3d) 266, 96A.C.W.S. (3d) 667
[25] *Ontario (Minister of Finance) v. Echelon General Insurance Company*, 2018 ONSC 4550 (CanLII), Lederer, J.

section 268 (2). I observe that the authority of a priority dispute arbitrator includes jurisdiction to apply equitable remedies[26].

The overarching principle of reimbursement for sums reasonably paid in response to a claim for statutory accident benefits is sound. First and foremost it meets the legislative intention of facilitating early payment of benefits for the benefit of the injured person. Secondly, it does not serve the interests of the insurance community as a whole to be engaged in disputes between themselves about matters of judgement when all insurers constantly administer claims by making judgements that sometimes could be challenged in hindsight. Additionally, one presumes that the ultimately paying insurer would also have acted reasonably when facing a claim and so applying the "reasonableness" measurement puts the insurer in the same position that it would have been if it had been first approached for benefits.

We should not lose sight of the fact that many priority disputes arise because, in the initial stages, there was may be uncertainty about a person's status in relation to an insurer or a vehicle. The very nature of the statutory dispute resolution scheme is built on the idea that the first insurer will have paid benefits that it otherwise could have declined. From that starting point it is highly appropriate to judge the insurer's conduct by reasonableness, not clairvoyance.

In this particular case, I also note that Intact paid what they thought were Alberta level of benefits not because those benefits had been applied for, or because Intact was obliged to provide such benefits. Intact paid Alberta level benefits in response to a claim for Ontario Statutory Accident Benefits.

In the milieu of complex obligations -- pay without coverage, pay extra provincial benefits, etc. -- and knowing of each insurer's obligation to comply with Alberta's system with respect to Alberta accidents it's not an unreasonable approach. Most importantly it was an approach that got benefits to the injured person while other issues between insurers were pending. I find these circumstances compelling reasons for me to give an interpretation to the statutes, regulations and wordings that accords with the legislative policy of getting benefits paid quickly, regardless of looming inter-insurer disputes.

It is also significant that under the Ontario Statutory Accident Benefits scheme, section 59, it is conceivable that Alberta benefits would be payable as a requirement of the Ontario Benefits scheme.

Both insurers have issued involved policies in accordance with Ontario's prescribed forms. Both insurers are licenced in Ontario. Both insurers have filed the PAU. Both insurers have submitted this dispute to arbitration saying:

> **It is the intention and desire of the parties that there be a resolution and determination of the dispute by arbitration pursuant to section 268 of the *Insurance Act,* R.S.O. 1990, C. 1.8, as amended. 0. Reg. 283/95 thereto, and the *Arbitration Act,* 1991 S.C. 1991, c. 17.**

I have considered the position of Gore in this matter and whether or not there is some unfairness if Gore is required to reimburse Intact with respect to Intact's payment of Alberta style benefits. Based on the record before me, Gore would be obliged to provide Alberta style

[26] **31** An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies. *Arbitration Act* 1991, c. 17, s. 31.

benefits to this claimant if the claimant had applied to Gore. Asking Gore to now reimburse Intact is not unfair, it is an equitable disposition. Intact has paid what Gore was liable for.

Intact should be reimbursed by Gore.

Conclusion

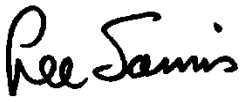
Intact received an application for Ontario Statutory Accident Benefits. Pursuant to Ontario *Insurance Act* section 268(2), Gore has the priority for Ontario Statutory Accident Benefits. As a response to an application for Ontario Statutory Accident Benefits, Intact reasonably paid Alberta level benefits.

As submitted to me, Gore has obligations to treat the claimant as a person entitled to Alberta level of no fault benefits. This is the consequence of the licencing conditions, the PAU, and the OAP 1 wording. The Alberta scheme makes Gore the insurer responsible as the insurer of the vehicle in which the claimant was an occupant. So whether one looks at the Alberta plan, or the Ontario rules in 268(2), Gore is the insurer to respond once it is determined that Jeremy is not a dependent of Intact's insured, and not a resident of Ontario.

Thus, I find that it is appropriate to order that Gore reimburse Intact for sums reasonably paid as benefits in accordance with the Alberta scheme which otherwise would have been payable by Gore if appropriate applications had been submitted to Gore.

If there are any other submissions to be made, please let me know within the next 30 days.

Dated at Toronto this 11th day of September, 2018.



LEE SAMIS
Arbitrator