In the Matter of an Arbitration under the *Arbitration Act*, 1991
and pursuant to the provisions of s.275 of the *Insurance Act*
and Ontario Regulations 664 and 668 thereunder

AND IN THE MATTER of an Arbitration between:

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Mark Donaldson – Dutton, Brock LLP
Counsel for the Applicant, The Co-operators General Insurance Company
(hereinafter referred to as "Co-op")

Douglas MacCon – Miller Thomson LLP
Counsel for the Respondent, The Dominion of Canada General Insurance Company
(hereinafter referred to as "Dominion")

ISSUE

The issue before me involves the legal doctrine of "abuse of process" and its applicability in a loss transfer dispute.

Can Dominion introduce evidence in this loss transfer dispute contrary to that agreed upon as the underlying facts by its insured driver as part of a guilty plea with respect to a charge of improper loading under s.111(2.1) of the Highway Traffic Act?

PROCEEDINGS

The arbitration of this preliminary issue was completed on the basis of Document Brief, Books of Authority, Written Submissions and oral argument which took place on October 14, 2015.

OVERVIEW

The Co-operators General Insurance Company ("Co-op") insured a 2003 Ford Focus operated by the claimant, Samantha Kelly-Giroux ("Samantha"), and occupied by her three year-old son, Lucas Cundle ("Lucas").

Samantha and Lucas were injured when a rock fell out of a dump truck combination allegedly insured by The Dominion of Canada General Insurance Company ("Dominion") and at all material times operated by Joseph Wilson ("Wilson").

Co-op is funding the claims for statutory accident benefits of both Samantha and Lucas and seeks recovery of all benefits paid, plus accrued interest and incurred costs by way of loss transfer.

Following the accident, Wilson was charged under the *Highway Traffic Act*. Represented by counsel and in open Court, Wilson pled guilty to the charge laid of improper loading and agreed to pay a fine, make restitution to Samantha and had already made a significant donation to the Children's Hospital of Eastern Ontario. Samantha was not charged as a result of this accident.

Co-op takes the position that Wilson was 100% at fault for the subject loss and thus by operation of the loss transfer legislation and as a result, Dominion is responsible to make complete reimbursement to Co-op for all accident benefits paid to and on behalf of Samantha and Lucas.

Dominion denies responsibility for Co-op's loss transfer claim and now seeks to introduce evidence to show that it was not the vehicle operated by Wilson involved in the incident with the claimant's vehicle by means of a full hearing. Co-op seeks a finding by way of this preliminary issue hearing that any effort to re-litigate Wilson's conviction is barred by the doctrine of abuse of process.

APPLICABLE LEGISLATION

Evidence Act, R.S.O. 1990, c. E.23 at s. 22.1

Proof of conviction or discharge

> 22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Highway Traffic Act s. 111

Loading vehicles

Same, commercial motor vehicle

(2.1) No person shall operate or permit to be operated upon a highway a commercial motor vehicle that carries a load or draws a vehicle that carries a load unless the load is loaded, bound, secured, contained or covered in accordance with the regulations. 2002, c. 18, Sched. P, s. 26.

Same – commercial motor vehicle

(5) Despite subsection (4), every person who contravenes this section or a regulation made under subsection (3) is guilty of an offence and, if the offence was committed by means of a commercial motor vehicle within the meaning of subsection 16 (1), on conviction is liable to a fine of not less than $200 and not more than $20,000 and, in addition, his or her driver's licence issued under section 32 and permit issued under section 7 may be suspended for a period of not more than 60 days. 1996, c.20, s.26.

FACTS

The document brief filed with respect to this preliminary issue hearing consisted of:

1. Motor Vehicle Accident Report;
2. Statement of Samantha Kelly Giroux dated January 29, 2013; and
3. Transcript of the Sentencing Hearing in Her Majesty the Queen v. Joseph Wilson

The Motor Vehicle Accident Report dated July 13, 2012 indicates that on July 13, 2012 Dominion's insured vehicle, a 1997 International dump truck/trailer combination operated by Joseph Wilson was proceeding southbound on Doran Road in Renfrew County. At the same time, Co-op's insured vehicle, a 2003 Ford Focus operated by Samantha Kelly-Giroux, with her son Lucas Cundle as a rear seat passenger, was proceeding northbound on Doran Road. Debris, specifically a rock, fell out of Wilson's vehicle, struck the road and went through the windshield of the Co-op vehicle, significantly injuring Samantha and Lucas.

In the Motor Vehicle Accident Report dated July 13, 2012, Wilson's vehicle is described as a dump truck towing a large, full trailer. At the time of the accident it was a sunny day and visibility was pretty good.

On the basis of the Motor Vehicle Accident Report dated July 13, 2012 and a statement from Samantha, it is indicated that In the vicinity of the accident Doran Road is fairly straight. Samantha was coming down a hill and the approaching truck was coming up the hill. There was not much traffic. There was another car farther behind the dump truck.

Samantha indicates in her statement that on approaching the dump truck Samantha noted that it had brush and rubble in it. She saw a rock fall out of the dump truck, hit the ground and then smash through her windshield. The dump truck's load was not covered. It appeared to Samantha that the dump truck was overloaded. The rock from the dump truck bounced off of the roadway and through her windshield, striking her on the face and then striking her son, who was seated in the rear seat, on the head. Following the incident Samantha immediately stopped her car, got out and tried to get the dump truck to stop, but it did not. Samantha did not get the dump truck's plate number but she remembered the colour and provided a description to the police. She recalled the dump truck as being a "bluish grey kind of colour". The police were on the scene before the ambulance. The police subsequently identified the dump truck. Samantha did not personally identify the commercial vehicle following the accident. She was distraught and "all over the place". The police advised Samantha or her father that the truck driver drove the same route every day and it was the only dump truck on the road carrying brush.

The transcript of the Sentencing Hearing indicates that following the accident Wilson was charged with improper loading pursuant to the provisions of s.111(2.1) of the *Highway Traffic Act*. At the sentencing hearing Wilson was present in Court and was represented by counsel. The charge laid against Wilson was read into the record and Wilson entered a plea of guilty. The Crown read in the facts of the underlying offence and Wilson's counsel agreed that the facts were substantially correct. The transcript indicates the following:

"Mr. Wilson:	**Guilty.**
The Court:	Thank you.
Ms. Ives-Ruyter:	Your Worship, on the 13th day of July 2012 at 10:20 hours, police were dispatched to a motor vehicle collision personal injury. There was a small child unconscious and mother in shock. At 10:22 hours, Officer Hebner arrived on the scene and observed a red Ford Focus facing northbound on the shoulder of Doran Road. Samantha Kelly Giroux was sitting on the side of the road holding her head in her hands. Kimberly Dickson had stopped and was helping Samantha with her injuries until an ambulance arrived. In the back seat of the car, buckled into a child restraint, was three year-old Lucas Cundle, in and out of consciousness with a serious head injury. Officer Hebner and other bystanders administered first aid to both parties until the ambulance arrived. Lucas was in serious condition, bleeding from his ear and in and out of consciousness. Upon arrival of the paramedics, Samantha and Lucas were transported to the original – sorry, to the Pembroke Regional Hospital. Once at the hospital, Samantha was treated locally for her injuries, but due to the seriousness and the extent of Lucas' critical head injury, he was immediately transported by air ambulance and taken to CHEO and treated there. He spent two weeks there. <u>After speaking with Samantha and other witnesses, it was identified as Joseph Wilson being the person driving the commercial vehicle. While southbound – while he was travelling southbound on Doran Road, Mr. Wilson was hauling a load of tree stumps and dirt. Samantha was travelling northbound. Upon approaching the truck, she could see a lot of dirt and debris flying out of the truck. As she met the truck, a large boulder flew out of the untarped load. It bounced on the pavement and</u>

	then flew through the centre of Samantha's windshield. The boulder struck her in the head and smashed her sunglasses. It continued on and struck Lucas in the head as well. Samantha pulled to the side of the road. She tried to flag down the truck, but she was unsuccessful and then she focused on tending to Lucas, her injured son, until bystandards, sorry bystanders, police and paramedics arrived on scene. MTO Officer Quinton Recoskie conducted an inspection of the dump truck. The truck was found not to have a tarp to cover the load, or any other means of securing a load, so that portions of the load could become dislodged or fall from the vehicle. Those are the facts, Your Worship.
THE COURT:	Mr. Gervais (counsel for Wilson), are those facts substantially correct?
MR. GERVAIS:	Yes, Your Worship. The facts are substantially correct that certainly Mr. Wilson was operating the vehicle on the date in question. What My Friend has indicated are substantially correct. My understanding of what he was hauling was what I would call stumpage, but in any event, substantially correct for the purpose of today's proceeding."

The facts, as substantially agreed upon by Wilson, confirm that it was a rock from his truck that struck the claimant's vehicle. The primary issue in the loss transfer dispute is whether it was a rock from Wilson's truck that struck the claimant's vehicle.

The claimant Samantha was present in Court at the sentencing hearing and read into the record a Victim Impact Statement. The Crown and defence counsel made a joint submission as to penalty. Wilson had already made a $2,000 donation to the Children's Hospital of Eastern Ontario. The joint submission was accepted and Wilson was convicted of the offence. Wilson was fined $200 and paid a restitution in favour of Kelly Giroux of $300.

It is an agreed fact that Mr. Wilson was represented by a lawyer at his HTA sentencing.

It is an agreed fact that Mr. Wilson has not appealed the guilty plea nor did he take any steps to claim his counsel was incompetent.

It is also an agreed fact the parties have not received the oral or affidavit evidence of Mr. Wilson, Ms. Kelly-Giroux, OPP Constable Hebner, OPP Constable Kretchman or any other parties with information relating to the accident.

ANALYSIS AND FINDINGS

It should be noted at the outset that although there was some mention in the Factums provided to me of the legal doctrine of "issue estoppel", both parties have agreed that such legal doctrine does not apply so that the preliminary issue hearing herein dealt only the doctrine of "abuse of process".

Co-op relied on Section 22.1 of the *Evidence Act* which provides that proof that a person who has been convicted anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person if no appeal was taken and the time for an appeal has expired, or an appeal was taken but was dismissed or abandoned and no further appeal is available. Dominion took no issue with the use of Section 22.1 of the *Evidence Act* in this regard. Co-op further submitted that the issue of whether the vehicle driven by Dominion's insured was the vehicle involved in the incident with the claimant's has been decided by agreeing to facts as outlined by the Crown as part of Wilson's plea of guilty to the *Highway Traffic Act* charge and it would be inappropriate to re-litigate this issue.

In my view, the law with respect to the application of the legal doctrine of "abuse of process" is well established. My task is to determine whether the doctrine is applicable in the present fact situation, and if it does apply, can Dominion establish that these facts fit into one of the three exceptions identified by the Supreme Court of Canada in *Toronto (City) v C.U.P.E., Local 79*, [2003] S.C.R. 77 (hereinafter referred to as the *CUPE* decision) where the Supreme Court of Canada held that the doctrine of abuse of process must be considered to ascertain whether re-litigation of an issue would be detrimental to the adjudicative process when asked to decide whether a criminal conviction ought to be rebutted or taken as conclusive.

The rationale of the doctrine of "abuse of process" is set out at paragraph 51 of the decision. The Supreme Court stated that the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Re-litigation is undesirable to the integrity of the adjudicate process as re-litigation may not yield a more accurate result than the original proceeding. Re-litigation may prove to be a waste of judicial resources, an unnecessary expense for the parties and additional hardship for some witnesses. Re-litigation may undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

Further, at paragraphs 52 and 53 the Supreme Court stated that there are certain instances where re-litigation of an issue may enhance the integrity of the judicial system such as:

> 1). When the first proceeding is tainted by fraud or dishonesty;
>
> 2). When fresh, new evidence, previously unavailable, conclusively impeaches the original results; or
>
> 3). When fairness dictates that the original result should not be binding in the new context.

In addition to the *CUPE* decision*,* Co-op also relied on the decision *in Andreadis v. Pinto*, [2009] 98 O.R. (3d) 701, where Justice Brown found that a conviction under section 2(1)(b) of the *Compulsory Automobile Insurance Act* was subject to the abuse of process doctrine. It was concluded that proof standards set out in s.22.1 of the Evidence Act were applicable to provincial offences as well as *Criminal Code* offences. Furthermore a conviction under this section would prevent a re-litigation of the facts surrounding the conviction. He found that the guilty plea was voluntary and not made under undue pressure. Factually, the owner of a motor vehicle had pled guilty to "permitting a motor vehicle to be operated without insurance". The vehicle was being operated by his wife at the time of the collision. Justice Brown found that the guilty plea was tantamount to an admission that his wife was operating the vehicle with his permission. The owner of the vehicle was not allowed to re-litigate the

facts contrary to his conviction on the basis of the abuse of process doctrine as set out in *CUPE*. It was specifically found that it was not unfair to prevent the owner from challenging the evidence of conviction.

In Caci v. McArthur, [2008] 93 O.R. (3d), the Ontario Court of Appeal found that allowing either the convicted driver or the insurer of the convicted driver to re-litigate the facts essential to a conviction of dangerous driving would be an abuse of process. The Defendant driver and the corporate owner of the vehicle sought to introduce evidence that the driving was not dangerous. The Plaintiff objected to the introduction of such evidence in light of the earlier conviction and such objection was sustained. The corporate owner of the Defendant vehicle appealed and the appeal was dismissed by reason of the application of the abuse of process doctrine. The court held that both the Defendant driver and corporate owner had the same interest and were equally bound by the doctrine as being parties of similar interests.

On the basis of jurisprudence aforesaid, Co-op submitted that it would be an abuse of process to allow the Respondent Dominion to re-litigate the facts that its insured agreed to as part of the guilty plea process. Dominion on the other hand, maintains that the present fact situation falls into the second or third exception to the application of the doctrine as set out by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79 (supra)* or other expanded exceptions resulting from more recent jurisprudence which will be discussed in the paragraphs to follow.

Firstly, Dominion takes the position that the basis for the “abuse of process” doctrine is the integrity of the adjudicative process. A specific concern raised by the Court was the waste of judicial resources in re-litigating matters. A further concern was whether inconsistencies in the judicial decisions would undermine the “credibility of the entire judicial process”. Dominion submitted that a loss transfer arbitration process is a *private* arbitration process. Here, Dominion submitted that there is no waste of judicial resources in this regard. Second, as this is a *private* arbitration, where a loss is being transferred between two insurance companies, it cannot be said that the “credibility of the entire judicial process” is in anyway in peril. The decision of this process is binding on the parties.

I am of the view that it matters not whether the second proceeding is part of the judicial process or arbitration process; it is the integrity of the “adjudicative” process that must be protected. The Supreme Court of Canada referred to the “adjudicative process” as opposed to the “judicial process” in its decision. By allowing the re-litigating of facts already admitted to would lead to a waste of adjudicative resources, an unnecessary expense, additional hardship for some witnesses to the parties and possible inconsistent findings. In my view, this would not be in keeping with the general approach to loss transfer claims as set out in *Jevco Insurance Co. v. York Fire & Casualty Co.* [1996] O.J. No. 646 (C.A.) and *Jevco Insurance Co. v. Canadian General Insurance Co.* [1993] O.J. No. 1774 which confirm:

> The purpose of the legislative scheme under Section 275 of the *Insurance Act* and Regulation 668 is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no fault benefits from the second party insurer whose insured was fully or partially at fault for an accident. The fault of the insured is to be determined strictly in accordance with the Fault Determination Rules, prescribed by Regulation 668.

The Supreme Court in *CUPE* (supra) expressly confirmed that the bar on re-litigation either through issue estoppel or the doctrine of abuse of process, is not an absolute bar. There were instances where re-litigation would *enhance*, rather than impeach, the integrity of the legal system. As I have indicated earlier, these include :

> (a) when the first proceeding is tainted by fraud or dishonesty;
> (b) when fresh, new evidence conclusively impeaches the original evidence;
> (c) when fairness dictates that the original result should not be binding in the new context.

The Supreme Court in *CUPE* added that discretionary factors need to be applied to prevent the doctrine of abuse of process from achieving undesirable results in the legal system. Discretionary factors to consider are: that the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable; an inadequate incentive to defend; the discovery of new evidence; or a tainted original process.

I fully accept these exceptions and must determine if the present facts fall into one of these exceptions or are subject to other discretionary factors used in other cases since *CUPE*.

Dominion has submitted that the leading case on the treatment of a HTA offence and abuse of process is the Ontario Court of Appeal decision in *Shah v. Becamon* 2009 ONCA 113. In this case, Becamon pled guilty to the HTA offence of "not driving while accompanied with a fully licensed driver". She was fined $105. Her insurer, Wawanesa Mutual Insurance Company ("Wawanesa"), took an off coverage position in the subsequent civil action, claiming Becamon violated a policy condition – driving while not "authorized by law". Becamon brought a third party action against Wawanesa seeking a declaration to defend. In the decision Justice MacPhreson asked: "if a person pleads guilty to offences under the HTA, do the factual admissions that ground the pleas bind a court, in a subsequent civil trial, on the basis of issue estoppel or *res judicata*?". The trial judge granted Becamon's declaration and was allowed to re-litigate.

Justice MacPherson held that:

> "Evidence of a prior conviction affords only a prima facie proof of guilt in a subsequent civil proceeding. The presumption is rebuttable in the civil proceeding where re-litigation of the issue that gave rise to the guilty plea in the criminal proceeding does not constitute an abuse of process." [emphasis added]

In *Becamon*, re-litigation of the prior underlying facts was granted, applying the fairness branch of the *CUPE* test. Discretionary factors were considered. The Court noted that Becamon was unrepresented and had difficulty with English. Neither of those issues apply to Mr. Wilson in the case at bar. However, the Court of Appeal in *Becamon* held that a finding of negligence in a civil action had significantly different consequences than in a HTA proceeding. The original proceeding in *Becamon* was short and "relatively small fines" were imposed. In contrast, the stakes in the civil action were high and compensation could have been in the hundreds of thousands of dollars.

Dominion draws a parallel with the *Becamon* case. In *Becamon*, the Court of Appeal affirmed that different consequences, or stakes, must be considered in determining whether the factual admissions of a HTA guilty plea should be accepted. In the case at bar, the stakes of the loss transfer could conceivably be high. The loss transfer to Dominion could potentially be in excess of $1,000,000. Similarly to *Becamon*, Mr. Wilson was given a relatively small fine in contrast. Dominion submits that it would be an injustice for a HTA guilty plea to be binding upon Dominion when the stakes are so grossly disparate.

I am not satisfied that the discretionary factors referred to in *Becamon* are sufficient to overcome the strong words of the Supreme Court of Canada in *CUPE* or the Ontario Court of Appeal in *Caci*. The discretion was allowed in *Becamon* where there were several factors to consider. Unlike *Becamon*, Wilson was represented by counsel. Unlike *Becamon*, Wilson admittedly did not have problems with the English language. As for the disparate stakes, I do not find they were sufficiently disparate to be a significant factor. It is clear that the accident benefit exposure for at least one of the claimants was significant but the exposure potential penalty to Wilson was also significant given his occupation as a commercial driver. He faced a fine of not less than $200 and not more than $20,000, plus a license suspension of not more than 60 days. A license suspension would have taken him away from his employment for a while. Such a license suspension and such a conviction could well impact on future employability as a trucker. In my view the stakes were significant for both. Furthermore, it is unclear whether he was aware of a potential personal injury claim but the guilty plea was entered in October 2013, some 15 months post-accident and more than a year after Co-op had served its Notice of Dispute between Insurers which set into motion this loss transfer dispute.

Further, in *Becamon*, the Court of Appeal stated it was appropriate for the trial judge to review the “circumstances surrounding Becamon’s testimony”. In the case at bar, Dominion submits that should the factual admissions of the underlying HTA infraction be accepted without oral evidence having been adduced, an Arbitrator would not be able to review or comment on the circumstances surrounding Mr. Wilson’s guilty plea as the Arbitrator was never afforded the opportunity to receive Mr. Wilson’s oral evidence.

Dominion also indicates that the benefit of a full discovery prior to determining if facts of an underlying HTA guilty plea should be held as binding on a subsequent proceeding was discussed in *Bhattacherjee v. Marianayagam et. al*. 2013 ONSC 40. This case involved the attempted re-litigation of a disobey traffic signal offence. The Defendants sought summary judgment. Justice O’Connor noted that Examinations for Discovery were completed in addition to cross-examinations of affidavits. Justice O’Connor wrote:

> [T]his court had a full appreciation of the key witnesses evidence through the discovery process, the documentary evidence and the police evidence. Additionally, I have a full appreciation of the material facts and issues from which to weigh evidence, assesses credibility and draw inferences necessary to determine the key disputed issues.

Dominion submitted that without a full hearing, it cannot be said that evidence on liability has been fully adduced or that a full appreciation of the facts is available for the Arbitrator to consider. The acceptance of the HTA guilty plea as proof of the factual admission in

Bhattacherjee was accepted by the Court *only after* discoveries were completed. No examination has been completed in the case at bar.

Bhattacherjee involved a summary judgment motion where there would be discoveries or affidavits. That is not the case here. A statement or affidavit was never provided by Wilson in the loss transfer dispute to explain why he may have pleaded guilty for reasons other than admitted guilt. In *Caci*, where the Defendant was not allowed to re-litigate a guilty plea in a subsequent personal injury civil action, the Ontario Court of Appeal had no difficulty finding that a conviction of dangerous driving was conclusive of negligence and refused to allow any evidence that would suggest that the individual who was convicted was not negligent. I am of the view that the fact situation in *Caci* so closely resembles the facts before me and that the abuse of process doctrine ought be applied as was done in that case.

Dominion also referred me to the *State Farm Insurance Co. v. Kingsway General Insurance Co. et. al*. (Arbitrator Kenneth J. Bialkowski - January 12, 2009) decision which also spoke to the opportunity of a party to provide oral evidence at a loss transfer arbitration proceeding. In *State Farm*, Guy Laplante had pled guilty to careless driving. Mr. Laplante attended and provided oral evidence at the hearing as to how the collision occurred. Opposing counsel never objected to such evidence being introduced nor was the issue of "abuse of process" raised. On that basis, Laplante was allowed to testify but never overcame the onus explanation upon him created by his careless driving guilty plea. It was simply not a case where the abuse of process doctrine was considered.

Dominion has also referred me to the decision of *Singh v. Tattrie* (2013) O.J. No. 4241. This involved a denial of a summary judgment motion. Tattrie had made a left turn across the path of the through vehicle operated by Innes. Tattrie was charged and pled guilty to making an unsafe turn. No affidavit evidence was introduced by the driver of the through vehicle Innes. The Judge denied the summary judgment motion and allowed the liability issue to proceed but on careful analysis, it was only in respect of whether there was contributory negligence on the part of the driver of the through vehicle. Justice Leitch writes:

> "I find there is a genuine issue for trial - that is, whether Ms. Innes contributed in any way to the accident. Putting it another way, I cannot conclude that there is no chance that a trier of fact will find that Ms. Innes bears some responsibility for the accident."

It appears that Justice Leitch had concluded that Tattrie's guilty plea was prima facie proof of negligence and that the liability issue proceed on the basis of possible negligence on the operator of the through vehicle. It should be noted that this is exactly what occurred in *Caci* (supra) where the party convicted of dangerous driving was not allowed to re-litigate his own negligence on the basis of the abuse of process doctrine but allowed to introduce liability evidence with respect to possible contributory negligence of the driver of the other vehicle involved. I am of the view that on careful analysis the *Tattrie* decision is more supportive of Co-op's position than Dominion's and supports my finding that the abuse of process doctrine is applicable to the facts before me.

Dominion has also referred me to the decision of *Duncan v. Morton* (2012) ONSC 3105, which dealt with the doctrine of abuse of process in relation to a driving infraction. The moving party sought summary judgment on the basis that Morton's guilty plea of driving without consent proved the underlying facts. Justice Quigley considered that the guilty plea

was entered at a point when Morton was not under any jeopardy relative to a civil lawsuit having been commenced against him. It was noted that "there was no robust examination or cross-examination conducted relative to the facts of the matter at the time Mr. Morton's plea was taken." As there had been no Examination for Discovery nor affidavit evidence, the moving party had not "put its best foot forward."

In *Duncan,* a Respondent argued that the second branch of the *CUPE* test, the prospect of fresh evidence, may also be applicable. As examinations had not taken place, it was too early to know what would be uncovered.

Justice Quigley held that a moving party seeking summary judgment must put its best case forward so the Court has a full appreciation of the evidence. Justice Quigley wrote:

> There is an absence of rigorous examination and cross-examination in the circumstances of taking a guilty plea in this case on a relatively innocuous criminal charge, with the accused having faced little jeopardy, either in terms of the sentience that was imposed, or as a result of economic claims realistically being made against him. To my mind, those circumstances weigh in favour of forcing this matter to go to trial or at least to the discovery stage where counsel can get to the bottom of these open questions through vigorous examination or cross-examination on affidavits, not of the lawyers involved, but of the personalities themselves. [emphasis added]

Dominion draws a parallel with the *Duncan* case. Dominion submitted that as no oral evidence has been heard, there is prospect for fresh evidence. They claim that it is too early to know what will be uncovered and that fairness requires the Arbitrator to hear from Mr. Wilson in that regard. Dominion asserts that in the absence of *viva voce* evidence of the circumstance surrounding the guilty plea, where Mr. Wilson was not in any palpable jeopardy, case law weighs in favour to proceeding to a full hearing in this matter, as held in *Duncan*.

On careful analysis, I am of the view that the circumstances in *Duncan* are far different than the case before me. Those differences are such that the application of the "fairness" test, being the third exception in *CUPE*, was appropriate in that case. *Duncan* involved a personal injury civil suit brought by the Duncans against the driver of the other vehicle Morton and its owner. Morton had pled guilty to operating a motor vehicle without consent. Allstate was also named as a Defendant pursuant to uninsured and underinsured coverages. It was not in a position technically to crossclaim against Morton yet wished to establish that Morton had consent or at least implied consent to operate the vehicle. If found that Morton did not have consent, Allstate would be exposed to the personal injury claims of the Duncans. If found that there was actual or implied consent then the insurer of the owner of the vehicle would face such exposure. The summary judgment motion was brought by the owner of the vehicle operated by Morton. It was denied on the basis of fundamental fairness as Allstate had never been given the opportunity to explore the consent issue. Justice Quigley writes:

> "However, Allstate can only play its role in the debate or drama if it has status to speak in this matter. It needs to have that voice out of fundamental fairness because no one else will advance the concerns that it raises, but need to be brought forward to

> the extent that hey go to the heart of the search for truth and the ultimate allocation of damages to the party properly responsible to pay them."

In essence. Justice Quigley allowed the evidence to proceed as it was the only way Allstate, a party with a different interest to Morton and the owner of the vehicle he was operating, could challenge the plea against the jurisprudence with respect to consent and implied consent. The case before me involves the very party admitting involvement in the incident now wanting to introduce evidence that his vehicle was not involved - a far different fact situation, and in my view, the very type of case requiring application of the abuse of process doctrine as enunciated by the Supreme Court of Canada in *CUPE*.

The application of the "fairness" exception as outlined in *CUPE* is appropriate in certain circumstances. In fact, contemporaneous with the release of this decision, I have also released a decision in *Intact v. Federated* (arbitrator Kenneth J. Bialkowski – October, 2015) which also deals with the abuse of process doctrine in a priority dispute context where it was held that "fairness" required a full exploration of the guilty plea on the basis that the party seeking to explore the issue was not the party having pled guilty or having been convicted much like in *Duncan* where Justice Quigley found that it would be unfair to Allstate not to have an opportunity to explore the consent issue.

In the final analysis, I find that the facts before me are exactly the type that require application of the abuse of process doctrine. I am bound by the Supreme Court of Canada decision in *CUPE* and the Ontario Court of Appeal decision in *Caci* where the facts are very similar to those before me. I do not find that Dominion has introduced evidence to support any of the exceptions set out in the jurisprudence aforesaid. Wilson decided to voluntarily plead guilty. He was represented by counsel. He had no difficulties with the English language. The stakes were not so disparate. I believe that in the circumstances there is nothing unfair about having an individual admitting that his vehicle was involved in this incident now being precluded from introducing evidence that his vehicle was not involved. As I have indicated, I believe that this is the very scenario that the Supreme Court of Canada meant to capture with the abuse of process doctrine.

ORDER

I hereby order that Dominion is precluded from introducing evidence contrary to the facts agreed to in Wilson's plea of guilty to the charge under s.111(2.1) of the *Highway Traffic Act*. Co-operators has sought an order preventing Dominion from disputing liability in its entirety. As in many of the cases that referred to the party having pled guilty or convicted should still have the opportunity of establishing negligence or contributory negligence on the other motorists involved.

I hereby order that Dominion pay the costs of Co-op of this preliminary issue arbitration on a partial indemnity basis.

I hereby order that Dominion pay the costs of the Arbitrator with respect to this preliminary issue arbitration.

DATED at TORONTO this 23rd)

day of October, 2015.)

KENNETH J. BIALKOWSKI
Arbitrator