IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, Section 268 AND
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT*

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

LOMBARD INSURANCE COMPANY, LOMBARD GENERAL INSURANCE COMPANY, and NORTHBRIDGE INSURANCE COMPANY

Respondent

- and –

MARTHA McLEAN

Claimant

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

D'Arcy McGoey – Thomas, Gold, Pettingill
Lawyer for the Applicant, The Dominion of Canada General Insurance Company
(hereinafter referred to as "Dominion")

Greg Heckel – Samis & Company
Lawyer for the Respondent, Lombard/Northbridge Insurance Company
(hereinafter referred to as "Lombard")

David Zarek – Zarek, Taylor, Grossman, Hanrahan
Lawyer for the Claimant Martha McLean

ISSUE

This priority dispute arises out of a motor vehicle accident that occurred on October 3, 2011 in the state of Oregon. At the time of the accident, Ms. Martha McLean ("the claimant"), while

on vacation from work, was cycling in Oregon when she was struck by a motor vehicle and sustained injuries.

The Applicant, The Dominion of Canada General Insurance Company ("Dominion") received an Application for Statutory Accident Benefits on behalf of the claimant on the basis that she was principally financially dependent on her mother who was Dominion's named insured. Dominion disputes that the claimant was principally financially dependent on its insured at the time of this accident. Dominion is paying the claimant's accident benefits, as required by law, and has initiated this priority dispute taking the position that Lombard is the priority insurer.

The sole issue in this preliminary hearing is whether the claimant, Martha McLean, was an insured person under a policy of insurance issued by Lombard at the time of the accident.

Conceivably, if the claimant is found by me not to be an "insured person" under the Lombard policy and later found or conceded not to be a dependent relative of her mother, insured with Dominion, she may well be without access to any statutory accident benefits at all as benefits are not available from The Motor Accident Claims Fund for accidents outside of Canada.

PROCEEDINGS

This Arbitration proceeded on the basis of Examination Under Oath transcripts, document briefs, oral evidence of three witnesses given on January 28, 2013 and oral submissions made on February 25, 2013.

FACTS

At the time of the accident, Dominion had issued a motor vehicle liability policy of insurance to Debra M. McLean, the claimant's mother. The claimant applied to Dominion alleging that the claimant was dependent on her mother. As indicated above, Dominion denies that the claimant is a dependent relative of her mother and therefore not an insured person under the Dominion policy.

Martha McLean did not own a vehicle and was not a named insured on any policy of insurance.

At the time of the accident, the claimant was employed with Community Living – Mississauga ("CL"). The claimant had use of a van at work. The van was insured under a motor vehicle liability policy issued by Lombard.

The vehicle that struck the claimant was operated by an Oregon resident and was insured by Property and Casualty Insurance Company of Hartford ("Hartford"). It has since been determined that this company may not have been licensed to carry on the business of automobile insurance in Ontario and may not have filed a power of attorney and undertaking in Ontario. There were no accident benefits available to the claimant through the Hartford policy.

The subject incident of October 3, 2011 involved the claimant operating a bicycle while on a lengthy bicycling vacation along the Pacific coast, when struck by the vehicle mentioned above. No Ontario insured vehicles were involved in the collision in any way.

The claimant, 30 years old on the date of the accident, started working at CL part-time in 2007. When she commenced employment she acknowledged that she had a duty to have a valid drivers licence, an available and reliable car and automobile insurance. The employer paid up to $50 for business insurance for her car and various amounts for mileage. She began working full-time sometime in 2008 on a contract basis. In December 2010, the claimant became a full-time employee at CL. At the time of the accident, the claimant had been a Team Leader for approximately 8-9 months. She was the highest ranking person at the Aviation Boulevard home. She reported to a manager who worked at head office.

At the time of the accident, the claimant was earning approximately $61,000.00 per year.

The claimant's job as Team Leader involved working with people that live in the community. The claimant would work with a team of other social workers or support workers as well as some of their doctors and nurses. She would spend 60% of her time at work travelling, with the remaining 40% working in peoples' homes or at the office. She spent very little time at the head office which was located at 6695 Millcreek Drive in Mississauga.

At the time of the accident, the claimant was assigned to a group home located at 946 Aviation Road in Mississauga. This was her primary location, and her work vehicle was kept there.

The vehicle used by the claimant was a Dodge minivan with a sliding panel door, "Mango/Tango" colour. This vehicle has now been identified as a 2011 Dodge Grand Caravan. This vehicle was purchased in 2011. In July or August of 2011 Martha Mclean sold her personal automobile and cancelled insurance on it as she no longer had use for it as a vehicle was now available for her use at work.

The claimant commenced using the Dodge at the start of her shift. She would arrive for work at the group home which was her primary location, where the Dodge was kept. The Dodge was represented to the claimant as a work vehicle that she could use. If called by her employer "off hours" she would have access to the vehicle. As part of her job description she was responsible for all of the record keeping associated with respect to the vehicle. She was, as Team Leader, also responsible for it's maintenance and repair.

On arrival at the group home, the claimant would debrief with whichever staff member she was relieving and check her notes. She would then generally be out of the office at appointments and team meetings. After the claimant checked in at the group home, she would take the minivan out with her and would be using the minivan on pretty much a daily basis as a driver. Lombard has conceded "regular use" but claims the vehicle was not "available to her at the time of the accident".

The Dodge was understood to be for work purposes only. Keys were kept at the group home. The other social workers and support workers also had access to the vehicles and records were kept with respect to its use. There were no other vehicles associated with CL utilized by the claimant.

Lombard issued a Policy of Insurance to CL with a policy renewal period of one year from April 1, 2011 to April 1, 2012. This was a fleet policy. This period covers the date of the subject accident of October 3, 2011.

CL paid a premium of $41,368 for automobile coverage on all of its vehicles at all of its homes, including the Aviation Boulevard home where the claimant was team leader. In total the policy covered approximately 20 vehicles.

Counsel for the claimant indicates that Martha McLean sustained significant and substantial injuries in the subject accident including a severe traumatic brain injury. If there is no coverage under the Lombard policy and it is ultimately found that she was not principally financially dependent on her parents at the time of the accident, it is conceivable, as I have mentioned previously, that she will have no source of accident benefits funding given the Motor Vehicle Accident Claims Fund is unavailable for accidents occurring outside of Canada.

ANALYSIS AND FINDINGS

The Applicant Dominion and the claimant submit that Martha McLean was an "insured person " under the Lombard policy for three reasons, each of which will be dealt with in the paragraphs to follow.

1. INSURED PERSON AS "SPECIFIED" IN THE POLICY

The Applicant Dominion and the claimant also take the position that the claimant was an "insured person" by reason of the fact that she was a person specified in the policy as a driver of the insured vehicle. The Statutory Accident Benefits Schedule provides:

> *"'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 dependent of the named insured or of his/her spouse.*
> >
> > > *(i) if the named insured, specified driver, spouse or dependent is involved in an accident in or outside Ontario that involves the insured automobile or another automobile…[emphasis added]"*

Counsel for Dominion urges upon me that the definition of "insured person" does not require an individual to be listed on a policy in order to qualify for SABS coverage. An individual need only be "specified" on the policy. The Oxford English dictionary defines "specified" as "that is or has been definitely or specifically mentioned, determined, fixed or settled." Counsel for Dominion submits that the term "specified" is broader than the term "listed". Counsel for Dominion submitted that the claimant was specified so much as Lombard was provided with a list of drivers in order to assess risk. They further submit that the policy contemplated coverage for individuals as opposed to vehicles, as evidenced by the OPCF-44R Family Protection Coverage as referred to in the policy. Furthermore, the claimant was advised by the employer that coverage for the claimant formed part of her employee total benefits package.

Martin Vanderhoot testified on behalf of Lombard as an executive underwriter. He had 20 years of experience as an underwriter and 18 of those years dealing with motor vehicle fleet policies. He testified that CL's policy was a fleet policy which insured vehicles and not

specific individuals. He made it clear that Lombard would not know or care as to which drivers would be operating the fleet vehicles. Premium would be based on the number of vehicles, the type of vehicle and the fleet experience. The Lombard policy covered the vehicles used by all of the group homes of CL. It covered approximately 20 vehicles. It only covered commercial vehicles. These vehicles can be private passenger vehicles, vans or trucks as long as they are used to carry some of the CL clients.

Martin Vanderhoot admitted that it was Lombard's policy to obtain a list of drivers each year in order to do a sampling of motor vehicle searches as a risk management tool. Normally a sampling of about 10 people would be used. He admitted that motor vehicle searches had not been done since 2009. The subject accident occurred in 2011. He did receive a list of 350 employees of CL for the 2010/2011 policy year but as indicated no motor vehicle searches were done. Most importantly, he testified that the subject fleet policy did not identify or list any of the drivers. Martha McLean's name is nowhere to be found in the policy issued by Lombard. Nor is the name of any other employee found in the policy. The full policy was part of the document brief before me.

Martin Vanderhoot testified that there was no OPCF-44 coverage on the subject fleet policy, as alleged by Dominion. The policy itself includes at pages 123 and 124 a Certificate of Insurance. The Insurance Coverage form at page 124 makes reference to an OPCF-44 but there is no premium shown beside such reference. On the other hand there is also reference to other OPCF endorsements and a specific premium of $3,232 noted. Of importance is the wording of the Certificate of Insurance at page 123 which states:

> *"You only have a particular coverage for a specific automobile if this Certificate shows a premium for it, or shows the coverage is provided at no cost."*

Since there was no premium set out beside the reference to the OPCF-44 there would be no such coverage. Page 124 merely lists all possible coverage, in other words a template of coverage, and only those where premiums were charged available to the insured.

For the most part, I accept the evidence of Martin Vanderhoot. He presented his evidence in a straightforward and convincing fashion with respect to all of the questions asked of him having to do with underwriting. Admittedly he appeared confused when asked questions about claims but admitted his unfamiliarity with claims.

At one point in cross examination he was given a hypothetical question about a hypothetical executive director who had a company vehicle which was available for his personal use as well. This individual was struck as a pedestrian while in Arizona or Florida while the company vehicle remained in Toronto. When asked whether the fleet policy would give him SABS coverage even though not listed on the policy, he answered "I would say yes". Having received this answer counsel for the claimant quickly moved on to a different question area. For the most part the hypothetical posed to Mr. Vanderhoot was similar to the fact situation before me with the exception that Martha McLean did not have a vehicle given to her by CL for personal use nor was she an executive director. He was never asked why the answer to the hypothetical might be different than the fact situation involving the claimant. There was no evidence that somehow coverage might be different for an executive director or someone with personal use of one of the vehicles. Mr. Vanderhoot seemed confused when giving that answer. In many ways the hypothetical question was a claims question and outside the expertise of this underwriter. Earlier when asked about accident benefit coverage available to

excluded drivers he quickly indicated that he was not familiar and would have to check with his claims department.

In the final analysis, I must determine whether the Lombard fleet policy provided accident benefits coverage to an employee while on vacation in Oregon who was not an executive director and had not been given a company vehicle for personal use. I must determine whether in a fleet policy situation those listed as potential drivers for the purposes of risk assessment as part of the underwriting process are actually "persons specified in the policy" so as to have available to them full accident benefits coverage whether operating the company vehicle or not. I have difficulty giving significant weight to the answer given by Mr. Vanderhoot to the hypothetical question given the factual differences in the hypothetical compared to the present fact situation and his admitted unfamiliarity with claims.

Martin Vanderhoot appeared equally confused when presented in cross examination with a document obtained by counsel for the claimant over the internet. It was a brochure explaining accident benefit coverage. It is clear from the evidence that it was a brochure produced by Northbridge Insurance sometime after the subject motor vehicle accident explaining accident benefit coverage without specific reference to the policy of insurance it is explaining or the type of policy. Northbridge was formed in 2012 with the subject accident occurring in 2011. Once given an opportunity to review the 14 page document during a recess Mr. Vanderhoot concluded that the description of accident benefit coverage as set out in the brochure related to a commercial policy but not necessarily to a fleet policy. I am not prepared to place much weight on a brochure produced by a successor company to Lombard after the date of the subject accident, particularly when there is no reference whatsoever to the type of policy it was meant to explain. The document may well have been in reference to a commercial policy or owner/operator policy where there may have been specified drivers.

I accept the fact that Lombard had been provided with a list of employees so that a sample of motor vehicle searches could be completed merely for risk management and was in no way the equivalent of listing those drivers as part of the policy. The 169 page policy of insurance marked as an exhibit in this proceeding did not contain the names of any of the drivers. I accept the evidence of Martin Vanderhoot that this was a fleet policy insuring vehicles and not individuals. I find that Martha Maclean was not "specified" in the fleet policy just because her name appeared on a list of employees provided to the broker for risk assessment purposes only.

Martin Vanderhoot had no knowledge of the letter from the employer CL indicating that "coverage for the claimant formed part of her employee total benefits package." On a review of the evidence and documents as a whole this may well have a reference to insurance coverage available to individuals while operating or occupants of CL vehicles. I do not feel that the letter from the employer makes Martha Maclean a person "specified" in the policy.

Overall, I am not satisfied that Martha McLean was a person "specified" in the policy.

2. DEEMED NAMED INSURED

The Applicant Dominion and the Claimant submit that Martha McLean was a deemed named insured under the Lombard policy by reason of her regular use of the CL company vehicle.

Section 3(7)(f) of the Statutory Accident Benefits Schedule reads as follows:

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

The evidence overwhelmingly supports a finding that Martha McLean had regular use of the company vehicle. The Respondent Lombard has conceded this. The issue which remains is whether the vehicle was "available to the claimant at the time of the accident". The leading case interpreting these words is that of ACE INA Insurance v. Co-operators General Insurance Co. [2009] O.J. No.1256, the 2009 appeal decision of Belobaba, J. of the Ontario Superior Court.

In the ACE INA decision, the claimant was a passenger in a friend's car going downtown late on a Saturday night. The claimant was an employee of Enterprise Rent-a-Car and regularly drove company vehicles while at work. He had not worked for nine days. Justice Belobaba held that the claimant did not have the company vehicle "available to him at the time of the accident" and therefore the claimant was not a deemed named insured in the policy issued to his employer.

Justice Belobaba was dealing with Section 66(1) of the Statutory Accident Benefits Schedule, which is the identically-worded predecessor Section to the current Section 3(7)(f) of the Insurance Act. Justice Belobaba writes:

> *"In other words, the focus in s.66(1) is whether at the time of the accident a company-insured car was being made available to the individual.*
>
> *The question is not whether the car would be available to the claimant when he went back to work the next day, but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car.*
>
> *To help answer this question, it is important to understand that section 66(1) can apply even if the injured employee was not actually driving the company vehicle at the time of the accident. Two examples:*
>
> > *The employee is driving the company vehicle during work hours, but then stops to buy a coffee at a restaurant. While crossing the street as a pedestrian, he is struck by another car. Section 66(1) would apply and his employer's auto insurer would pay the accident benefits.*
> >
> > *The employee drives the company car as a sales rep but is allowed to take the car home and use it for personal transportation. On a Saturday evening, he leaves the car in his driveway and is a passenger in his friend's car when they are involved in a car accident and he is injured. Section 66(1) would again apply and the company's insurer would pay the accident benefits.*
>
> *The point of s.66 is that accident benefits are to be paid by one's employer's auto insurer if at the time of the accident, a company car is being made*

> *available to the injured employee, ie. is accessible to him – even if he is a pedestrian or a passenger in someone else's car.*
>
> *In our case, how can it be said that at the time of the accident (in the late evening hours when the claimant was on his way downtown as a passenger in a friend's car) that an Enterprise automobile was being made available to him for his regular use, or indeed for any use?"*

It is clear that Justice Belobaba in ACE found that for the section to apply, the vehicle had to be "accessible" to the claimant "at the time of the accident". Justice Belobaba further writes:

> *"I agree with Mr. Samis, counsel for ACE, that by adding the phrase 'at the time of the accident' and the word 'being' next to the phrase 'made available', the legislature intended to extend coverage to an individual only where the insured vehicle is contemporaneously being made available for his regular use."*

It is clear from the appeal decision in ACE, the claimant who is an employee (as opposed to manager, executive director or owner of the company that owned the company vehicles) is required to have contemporaneous accessibility to the vehicle for the section to apply.

Counsel for Dominion and the claimant submit that given the claimant's position as team leader, she remained in control of the vehicle even though she was thousands of miles away. She had access to company e-mail through her personal Blackberry. If there was a conflict as to which worker ought to have the use of the vehicle on any particular day, she was available through her Blackberry to deal with the issue as team leader. It was urged upon me that she could return back to Toronto at any time and have access to the vehicle.

In light of these submissions, I have considered the case of The Dominion of Canada General Insurance Company O/A Chieftain Insurance v. Federated Insurance Company of Canada (Arbitrator Densem, October 31, 2012), hereinafter referred to as the "Chieftain" decision. It is important to note that this was a decision which post-dated the ACE decision. Arbitrator Densem discusses the findings of Justice Belobaba and distinguishes the case on its facts by looking at the employee's "authority and control" over the vehicle.

In Chieftain, an 11 year-old claimant was a passenger in a vehicle owned by Punjab Auto Sales Inc. and insured with Federated. Punjab Auto Sales Inc. was essentially a used car dealership with about 60–70 cars on the lot. The claimant's father was an officer, director and 50% owner of the company. He regularly drove the company vehicles for business purposes during the business day and would normally drive one of the company vehicles home each day. On weekends and during off hours he would drive his personal automobile insured with Dominion.

One of the issues in the priority dispute decided by Arbitrator Densem is whether the claimant's father was a deemed named insured under the Federated policy by reason of his regular use of the company vehicles. If the father was a deemed named insured, accident benefits would be available to his son who was a dependant relative through the Federated policy. Arbitrator Densem not only looked at the physical accessibility to the company vehicles, but also the father's control or authority over the vehicles at the time of the accident. This was not an issue in ACE as that case involved an employee of Enterprise who had no access to the company vehicles when not at work and did not hold a position of authority at Enterprise where he had control or authority over the vehicles when not at work.

Arbitrator Densem ultimately found that the father was a “deemed named insured” with one of the considerations being his authority or control over the vehicles. There are several paragraphs in his decision that deal with this issue of authority and control.

At page 10 of his decision Arbitrator Densem writes:

> *In my view it is also important for my conclusion to note that as one of the principals in Punjab Auto Sales Inc. Mr. Mangat was not only able to drive or operate the vehicles at his discretion, but he also had the power to authorize the use of the vehicles by others.*

At page 13 and 14 of his decision Arbitrator Densem writes:

> *In my opinion, the ratio of ACE-INA v. The Co-operators, is that determining whether vehicles are being made available “at the time of the accident”, requires that the focus be on the nature of the individual’s control over the vehicle(s) being made available, or his authority to use the vehicle(s) at the time of the accident.*
>
> *...*
>
> *The key to the status attaching, according to Justice Belobaba’s reasoning, depends on whether the individual has control over or permission to use the use [sic] a vehicle at the time an accident occurs. If an individual has control over or permission to use a vehicle, then deemed named insured status exists. If the individual does not have control over, or permission to use a vehicle, then the deemed named insured status does not exist, or if it did exist, it ceases.*

On the facts before me, I am unable to find that Martha McLean had contemporaneous physical accessibility to the company vehicle “at the time of the accident”. The issue which remains is whether she, as the only team leader of the Aviation Boulevard home and the highest ranking person in charge of the home, continues to have sufficient authority over or control of the vehicle so as to meet Arbitrator Densem’s “control and authority considerations”. Control and authority on the facts in Chieftain were, in my view, relatively clear. As co-owner of the business, he clearly had access to the vehicles and authority to dictate who could have use of the vehicles. They are not quite as clear on the facts before me. Lombard has taken the position that she was thousands of miles away. She was on vacation. There is no evidence before me that she continued to deal with work issues while on vacation. There were no records available to show any contact with the office. However, given her position as team leader and the highest person in charge was there sufficient residual control, despite her being thousands of miles away, to be considered a deemed named insured? What if a conflict arose as between two employees over who would have use of the vehicle on a particular day? Would the claimant have been contacted by phone or e-mail? What if the vehicle had been involved in a collision? Would the claimant have been contacted? Would her advice been sought out by e-mail or phone as to what to do about repairs? Her job description as Team Leader required her to be responsible for maintenance and repair of the company vehicle. The CL representative on his Examination Under Oath testified that if repairs were required, it would be the responsibility of the team leader to make

arrangements for it . As the person in charge of the home I cannot help but conclude that she might well have been contacted in these circumstances. In my view, despite being miles away, she retained sufficient residual control given her position of authority at CL so as to be a "deemed named insured" under the Lombard policy. This would not have been the case if Martha McLean was a mere employee and not a manager or team leader with ultimate responsibility for the maintenance, repair and use of the vehicle as well as the record keeping associated with it's use as was the case here.

In my view, the same result would apply on the Cheiftain facts if the father of the claimant and 50% owner of Punjab Auto Sales was on holiday in Oregon. As he would still have control over the 60–70 cars on his lot, he would be a "deemed named insured" under Arbitrator Densem's analysis and application of his "control and authority" test.

It is perhaps on this "control and authority" consideration that Martin Vanderhoot, Lombard underwriter, when asked whether accident benefits coverage would exist in the hypothetical situation posed to him involving the executive director as outlined at page 5 of this decision answered "I would say yes". In the hypothetical posed to him the individual was the executive director of the company. We will never know why he gave the answer he did as he was never pressed to give an explanation.

In reaching this difficult decision as to the applicability of s.3(7)(f) of the Statutory Accident Benefits Schedule, I have considered the body of caselaw indicating that the accident benefits legislation is remedial in nature with the provisions to be interpreted broadly in favour of the insured and specifically the comments of the Supreme Court of Canada in Amos v. Insurance Corp. of British Columbia, (1995) 3 S.C.R. 405 at paragraph 16:

> *No-fault means that the respondent's liability to pay benefits occurs when injury arises out of the ownership, use or operation of a vehicle, regardless of the presence or absence of fault. The injury must still arise out of the ownership, use or operation. However, this does not mean that a narrow, technical interpretation is dictated. Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer.*

The fact situation before me is a rare one. It is rare that an individual is involved in a motor vehicle accident and has possibly no available personal insurance, a policy of insurance on the striking vehicle which does not provide accident benefits coverage and no access to benefits through the Motor Vehicle Claims Fund. Particularly in such circumstances is it necessary to consider a broad interpretation of the legislation while yet maintaining the true legislative intent.

On the basis of the above analysis, I find that the claimant Martha Maclean was a "deemed named insured" under the Lombard policy pursuant to section3(7)(f) of the Statutory Accident Benefits Schedule.

3. SECTION 59 STATUTORY ACCIDENT BENEFITS SCHEDULE

Counsel for Dominion and the claimant submit that since the subject accident occurred outside of Canada, section 59(1) of the Statutory Accident Benefits Schedule provides for Lombard coverage because "she was a person for whose regular use the insured automobile was supplied at the time of the accident", wording far less onerous than that contained in Section 3(7)(f).

Section 59(1) of the Statutory Accident Benefits Schedule reads as follows:

> *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.*
>
> *(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.*
>
> *3. If an election is made under subsection (2), the insurer shall pay benefits in accordance with the election.*
>
> *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 dependent of the named insured or spouse and was an occupant of an automobile,*
>
> *(iii) was the named insured, his or her spouse or a dependent 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 dependent 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).”*

Counsel for Dominion and the claimant submit that the wording of Section 59 is obviously different than the previously described “deemed named insured” provisions of Section 3(7)(f) of the Statutory Accident Benefits Schedule and less onerous for the Plaintiff. They claim that there is no need that the vehicle is being made available at the time of the accident. Specifically, Section 59 describes a person who was a person for whose regular use the insurer automobile was supplied. They argue that her history clearly shows that she was a person for whose regular use the vehicle was supplied at the time of the accident. Under Section 59, there is no requirement that the insured vehicle is being made available. Simply stated, they take the position that the individual needs to just have had a history of regular use of the supplied vehicle for coverage to follow.

Counsel for Lombard submitted that coverage under the SABS, while extensive and generous, is not unlimited, undefined or open-ended. The legislative intention is to provide no fault accident benefits within Ontario. The extension beyond Ontario is limited to cases involving Ontario insured vehicles or Ontario insured claimants. This is supported by the fact that the Motor Vehicle Accident Claims Fund is not required to respond to accidents beyond Ontario borders. According to the submissions of Lombard, Section 59 of the SABS sets out the way in which the Ontario accident benefits system is to work in conjunction with foreign accident compensation systems. It operates by providing the claimant with an election between Ontario benefits and foreign benefits in specified circumstances. In contrast to the “company car” and “deemed named insured provisions” of Section 3(7)(f), Section 59 does not state that a person meeting the criteria for election, is deemed to be an insured or a named insured of the insured automobile. The “insured person” definition of the Statutory Accident Benefits Schedule continues to apply to accidents both inside and outside of Ontario. All Section 59 does is provide the claimant with an election should she meet the criteria set out in the section.

I accept the submissions made by Lombard as to the purpose of Section 59 of the Statutory Accident Benefits Schedule. On the evidence overall, I find that if Martha McLean were to satisfy the requirements of Section 59, all that would be provided is a right to claim Ontario benefits as opposed to foreign benefits which might be available to her (which in this case were none). In order to access statutory accident benefits, Martha McLean would still have to

prove she was an “insured person” through either the Dominion or Lombard policies. The application of Section 59 does not, in itself, make her an “insured person” under either policy.

ORDER

In the final analysis, I find that Martha Maclean was a “deemed named insured” of the Lombard fleet policy by reason of Section 3(7)(f) of the Statutory Accident Benefits Schedule by reason of her ongoing “control and authority” over the company vehicle despite her having been geographically removed from contemporaneous physical accessibility while on holiday in Oregon.

In light of my findings aforesaid, I order that Lombard pay the costs with respect to the determination of this preliminary issue of Dominion and the claimant on a partial indemnity basis. I order that Lombard pay the costs of the Arbitrator with respect to the arbitration of the preliminary issue.

DATED at TORONTO this 11th)

day of September, 2013.)

Arbitrator Kenneth J. Bialkowski