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

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 :

OPTIMUM INSURANCE COMPANY

Applicant

- and -

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

ROBERTSON DECISION

COUNSEL

Amanda M. Lennox – Laxton, Glass LLP
Counsel for the Applicant, Optimum Insurance Company
(hereinafter referred to as "Optimum")

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Counsel for the Respondent, The Dominion of Canada General Insurance Company
(hereinafter referred to as "Dominion")

ISSUE

The following issues have been placed before me for determination:

a. Does the Dominion policy of insurance no. APP 1504759 contain coverage for statutory accident benefits pursuant to the *Statutory Accident Benefits Schedule* (hereinafter the "SABS")?

b. If the Dominion policy contains accident benefits coverage available to the claimant, does Dominion rest in priority to Optimum pursuant to Section 268(2)(1) of the *Insurance Act*?

The matter involves circumstances where a standard automobile policy was attempted to be reduced to comprehensive only without use of an OPCF-16 Suspension of Coverage Form.

AGREED FACTS

On or about May 18, 2013, the claimant, Lawrence Robertson (hereinafter "Mr. Robertson") was the driver of a 2004 Chevrolet owned by Robert Merkley (hereinafter "Mr. Merkley") on English Road near Morrisburg, Ontario.

Mr. Merkley's vehicle was stuck head on by a third party vehicle. The police and ambulance attended at the scene of the accident and Mr. Robertson was taken to Ottawa Civic Hospital via air ambulance.

At the time of the accident, Mr. Merkley's vehicle was insured under a motor vehicle liability policy of insurance with Optimum Insurance Company (hereinafter "Optimum"), bearing policy no.13498501.

The Optimum policy contained coverage for statutory accident benefits pursuant to the *Statutory Accident Benefits Schedule* (hereinafter the "*SABS"*).

At the time of the accident, and at all material times, Mr. Robertson's common-law spouse, Judy McDougall (hereinafter "Ms. McDougall") was an insured under a policy of motor vehicle insurance with The Dominion of Canada General Insurance Company (hereinafter "Dominion"), bearing policy no. APP 1504759.

At the time of the accident, Mr. Robertson was a listed driver under the policy of the Dominion Policy.

A Certificate of Automobile Insurance was issued to Ms. McDougall for a 1998 Ford Explorer for the period of May 17, 2010 to May 17, 2011. The premiums of this policy were $956.00 and the policy no. was APP 1504759. Dominion policy no. APP 1504759 contained coverage, for among other things, statutory accident benefits pursuant to the SABS.

On February 4, 2013, Ms. McDougall reduced her insurance coverage on her Dominion policy no. APP 1504759 to comprehensive coverage with a $300.00 deductible. A letter dated February 4, 2013 was sent by Dominion to Ms. McDougall regarding Dominion policy no. APP 1504759. This letter contained a Certificate of Automobile Insurance issued to Ms. McDougall for a 1998 Ford Explorer for the period of February 4, 2013 to May 17, 2013. The premiums of this policy were $75.00 annually. On page 8 of the letter next to "Comprehensive (excluding Collision or Upset)", $300.00 is listed under "Deductible" and $75.00 is listed under "Principal driver premium". On page 8 of the letter next to "Accident Benefits (Standard Benefits)" an amount is not listed.

A Suspension of Coverage Form "OPCF-16" was not used in reducing the coverage under this policy to comprehensive coverage.

A letter dated March 26, 2013 was sent by Dominion to Ms. McDougall containing the renewal for Dominion policy no. APP 1504759. This letter contained a Certificate of Automobile Insurance issued to Ms. McDougall for a 1998 Ford Explorer for the period of May 17, 2013 to May 17, 2014. The premiums of this policy were $70.00. On page 8 of the letter next to "Comprehensive (excluding Collision or Upset)", $300.00 is listed under "Deductible" and $70.00 is listed under "Principal driver premium". On page 8 of the letter next to "Accident Benefits (Standard Benefits)" an amount is not listed.

Mr. Robertson submitted an Application for Accident Benefits (OCF-1) to Optimum, dated June 14, 2013. The OCF-1 noted that Mr. Robertson was common-law and was not covered under any automobile insurance policy.

On August 20, 2012, Optimum sent Mr. Robertson and Dominion the Notice to Applicant of Dispute Between Insurers dated July 24, 2013.

Dominion received the Notice to Applicant Between Insurers within all applicable limitation periods.

This Arbitration was commenced on April 2, 2014 by way of a Notice of Submission to Arbitration.

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268(2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii) If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

If I were to find that the Dominion policy continued to provide accident benefits coverage, despite coverage being reduced to comprehensive only, then Dominion would stand in priority to Optimum by reason of the application of the aforesaid priority hierarchy set out in s.268(2) of the *Insurance Act*.

ANALYSIS AND FINDINGS

It is the position of the Applicant Optimum, as outlined in the paragraphs to follow, that all motor vehicle liability policies must contain coverage for statutory accident benefits pursuant to the *SABS* and the *Insurance Act.* Dominion policy of insurance no. APP 1504759 is a motor vehicle liability policy. As such, Dominion policy of insurance no. APP 1504759 had coverage for statutory accident benefits available to Mr. Robertson on the date of loss.

On February 4, 2013, Judy McDougall (Dominion's Insured and Mr. Robertson's common-law spouse) attempted to reduce the coverage under Dominion policy of insurance no. APP 1504759 to comprehensive coverage. The only way to effect a change of the terms of a motor vehicle liability policy is with an endorsement approved by the Superintendent of Financial Services.

The Ontario Policy Change Form 16 (OPCF-16) is the prescribed form that must be used to reduce a motor vehicle liability policy to comprehensive coverage. Dominion failed to use an OPCF-16 to alter Ms. McDougall's policy.

Any changes Dominion attempted to effect to Dominion policy of insurance no. APP 1504759 are null and void due to Dominion's failure to use an OPCF-16 to reduce the policy to comprehensive coverage. As such, this policy continues to contain coverage for statutory accident benefits pursuant to the *SABS*, which was available to Mr. Robertson on the date of loss.

In the alternative, the terms of the OPCF-16 must be read into the policy even if the OPCF-16 was not used. As such, this policy continues to contain coverage for statutory accident benefits pursuant to the *SABS*, which was available to Mr. Robertson on the date of loss so long as the prescribed automobile, a newly acquired automobile or a temporary substitute automobile was not involved in the accident.

Coverage for statutory accident benefits pursuant to the *SABS* in Dominion policy of insurance no. APP 1504759 carried forward on each renewal of said policy and was available to Mr. Robertson on the date of loss.

The Dominion policy of insurance no. APP 1504759 contains coverage for statutory accident benefits pursuant to the *SABS* and rests in higher priority to Optimum policy no. 13498501 pursuant to Section 268(2)(1) of the *SABS.*

It is the position of the Respondent Dominion that, while the policy period ending shortly before the date of the accident may have provided for statutory accident benefits coverage, the policy was renewed thereafter and did not provide for accident benefits coverage either by operation or by statute, or in accordance with its terms.

The Dominion insured Judy McDougall (common-law spouse of the claimant Roberston) was free to enter into a contract of insurance with the Dominion that did not provide for liability coverage, and she did so prior to the accident. The renewal policy of May 17, 2013 provided for comprehensive only which is exactly that requested by McDougall. There is no authority for the proposition that coverage not requested and not desired by a policyholder, must be forced upon the insured.

Counsel for both parties have referred me to 4 previous priority dispute arbitration decisions involving the availability of accident benefits to a claimant where coverage was reduced to comprehensive only without the use of an OPCF-16 endorsement. In the first 3 decisions it was held that availability of accident benefits would continue after the policy change, whereas in the final decision it was held that no accident benefits coverage would exist. It is the decision of arbitrator Scott in *State Farm v. TD* that forms the basis for the Respondent Dominion's position in the matter before me.

The 4 decisions are as follows:

1. *Certas v. CGU/Aviva (Arbitrator Lee Samis, December 5, 2005);*

2. *Enterprise Rent A Car v. ING Insurance Company Of Canada (Arbitrator Guy Jones, November, 2006);*

3. *Jevco v. State Farm (Arbitrator Kenneth J. Bialkowski, July 23, 2013);*

4. *State Farm v. TD General Insurance Company (Arbitrator Jarvis Scott, August, 2011)*

In Certas (supra), arbitrator Samis dealt with a situation where an insured requested that his auto policy with Certas be reduced to "comprehensive only". Rather than using an OPCF-16, Certas issued a "Certificate of Automobile Insurance" reflecting "comprehensive" coverage only. The subject accident occurred about a month after the changes and before any renewal.

Like the arbitrators in all 4 cases, arbitrator Samis considered the impact of s.227(1) of the *Insurance Act*.

Section 227(1) of the *Insurance Act* states:

> " (1) An insurer **shall not** use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent:
>
> 1. An application for insurance.
>
> 2. A policy, endorsement or renewal.
>
> 3. A claims form.
>
> 4. A continuation certificate."

Also considered in all 4 cases was the wording of the OPCF-16 Endorsement as approved by the Superintendent of Insurance. The OPCF-16 reduces the coverage available on a motor vehicle liability policy pursuant to the following conditions listed on the form:

> 2.1 You agree that the following coverage will be cancelled for the use or operation of the described automobile, a newly acquired automobile, and a temporary substitute automobile:
>
> - Section 3, "Liability Coverage,"
> - Section 4, "Accident Benefits Coverage,"
> - Section 5, "Uninsured Automobile Coverage," and
> - Section 6, "Direct Compensation – Property Damage Coverage."

2.2 You also agree that the following coverage will be cancelled for the described automobile, newly acquired automobile and temporary substitute automobile:

- Section 7, "Loss or Damage Coverages (Optional)"
  - All Perils, but only for loss or damage caused by Collision or Upset, and
  - Collision or Upset.

The OPCF-16 effectively reduces almost all coverage from a desired automobile with the exception of comprehensive coverage and some residual accident benefits coverage not involving the described automobile, newly acquired automobile or temporary substitute automobile.

Arbitrator Samis in *Certas (supra)* concluded that, where an insured wished to reduce his policy to comprehensive coverage, the OPCF-16 is the proper form and must be used. Arbitrator Samis stated the following:

> *"In my view, the transaction entered into by Certas and Michnevich on August 22, 2002, is substantially, the same transaction which is intended to be governed by the OPCF-16. It is, for the most part, a suspension of liability coverage, and other coverage other than comprehensive. As such, in my view, Section 227 of the Act* ***requires*** *that the insurer use the available approved form for this purpose, the OPCF-16."*

In reaching his decision Arbitrator Samis found that by creating the OPCF-16, Regulators have seen it important for people that have coverage under suspension to continue to have residual protection for accident benefits coverage as set out in the OPCF-16 Endorsement. He found that Regulators believed that insured persons were in need of such protection. He found that s.227 of the *Insurance Act* required the insurer to use the approved form and that accident benefits coverage remained available to the insured as if the OPCF-16 had been used. He essentially found that there was a deemed continuation of residual accident benefits coverage as if the OPCF-16 had been used. Arbitrator Samis wrote:

> "In the Supreme Court of Canada's decision in *Smith vs.Co-operators*, the court discussed the effect of insurer non-compliance with prescribed procedures. In the *Smith* case, the insurer had declined a claim but had provided documentation to the insured person, which was found to be deficient in meeting the prescribed obligations to disclose Dispute Resolution Procedures. The obligation to describe the Dispute Resolution Procedures was separate and distinct from a limitation period found in the insurance arrangement. Nonetheless, the court concluded that the inadequacy of the disclosure prevented the insurer from saying that the limitation period had started to run. In this way, the court has shown that the consumer interest represented by having insurers comply with prescribed procedures, means that insurers will not be able to rely upon their own inadequate procedures, to their advantage or to the detriment of policy holder. Here, if Certas had followed the prescribed procedure and issued the OPCF16, Certas would be the insurer responsible to pay the accident benefits and would have no claim against Aviva."

In *Enterprise* (supra), arbitrator Jones dealt with a similar situation where the insured requested that policy coverage be reduced to "comprehensive only". ING, rather than using

an OPCF-16 form, merely issued a new Certificate of Automobile Insurance showing coverage for “Comprehensive” only. There were no subsequent renewals prior to the subject accident.

Relying on the decision of arbitrator Samis in *Certas* (supra,) arbitrator Jones found:

> “In short, the legislature, by way of s.227 of the Insurance Act, required that changes be made in accordance with the approved form. Because of the complexities of insurance coverage in Ontario, there are good reasons for the use of such forms. If ING had used the correct form, the statutory accident benefits coverage would have continued to be in place for limited purposes including the factual situation presented in this case. ING cannot benefit by its failure to use the required form . Accordingly the benefits that would have been in place had the form been used should be deemed to have remained in place and accordingly ING is responsible for payment of accident benefits to or on behalf of the clamant.”

In Jevco (supra), a previous decision of mine, the insured requested that insurance be reduced to comprehensive only. State Farm used an internal document called a “Withdrawal from Use Form” which purported to eliminate several coverages, including accident benefits coverage, while continuing with comprehensive coverage only, rather than using an OPCF-16. The subject collision occurred before any renewal of the policy.

I found that accident benefits coverage remained available to the insured. Firstly, by reason of the ambiguity in the wording of the “Withdrawal of Use Form” used by State Farm and secondly, because the approved form OPCF-16 ought to have been used. I wrote:

> “I accept the general proposition that approved forms must be used to modify an existing policy. I am satisfied that Section 227 of the Insurance Act requires all policy endorsements be completed in a form approved by the Superintendent. It is not that Mr. Azizi did not have options available to him. In April of 2010, Mr. Azizi had the option of terminating his policy (which cancels all coverage) as contemplated by s.11(2) if OAP 1 – Ontario Automobile Policy, or, in the alternative, execute an OPCF 16 – Suspension of Coverage which would maintain comprehensive coverage and certain residual coverages.”

It is the *State Farm* (supra) decision of arbitrator Scott that forms the basis for the submissions advanced by Dominion herein. In *State Farm* (supra) the insured on August 9, 2006 called TD and requested comprehensive coverage only. He was offered the OPCF-16 and declined as he did not want residual accident benefits coverage. An underwriting note indicates the change effective August 10, 2006. On November 4, 2006 the insured called TD requesting liability coverage be restored to his policy. On May 18, 2007 TD issued a renewal of the policy. On December 13, 2007 the insured once again called TD to once again delete liability coverage. There is no reference to an OPCF-16 being offered at this time. The underwriting note indicates that coverage was reduced to “comprehensive only” effective December 14, 2007. The policy was renewed on May 18, 2008 with TD issuing a Certificate of Insurance for the policy period May 18, 2008 to May 18, 2009 showing comprehensive coverage only. The claimant was involved in a motor vehicle accident on May 3, 2009.

The factual differences between the *State Farm* (supra) decision of arbitrator Scott and the 3 other decisions that were referred to me by counsel is that in *State Farm* an offer of an OPCF-16 was declined by the insured and that the policy was renewed between the changes and subsequent motor vehicle accident. In the other 3 decisions there is no reference to an

OPCF-16 having been offered and there had never been a renewal of the policy between the purported changes and subsequent motor vehicle accident.

Arbitrator Scott in *State Farm* (supra) concluded that the insured had at the time of the loss the coverage she had asked for, namely comprehensive coverage only without residual accident benefits coverage. When applying for accident benefits she appeared to be cognizant that she had no coverage from any other policy including her TD policy. Arbitrator Scott outlined situations where the insured would have no interest in maintaining accident benefits coverage, such as circumstances where the insured owned another vehicle with accident benefits coverage. He found that the insured ought be able to purchase the insurance he or she wants. He found that an insured seeking to reduce coverage to comprehensive is likely entitled, from a broker or insurer, to be informed about the availability of and the available benefits coverage of the OPCF-16, but ultimately the decision would be that of the insured whether the additional benefits were warranted. He writes:

> *"Despite the decisions to the effect that use of an OPCF-16 is mandatory, for policy reasons, to reduce full coverage to comprehensive coverage only, there would appear to be, at least in my mind, an inconsistency in finding that it is also perfectly fine to issue a policy with only comprehensive coverage at first instance. Why should an initial request for limited coverage and presumably a lower premium than that which would exist without an OPCF-16 be any different than a mid policy term request for the same or limited coverage? The insured should be able to purchase the coverage she wants from an insurer."*

In my view there is a flaw in basing his decision on the insured's entitlement to have a choice. Automobile insurance in Ontario is a highly regulated product and often provides the consumer with no choice. The wording of the Standard Automobile policy is mandated and cannot be modified at the choice of the consumer. Motor vehicle liability policies must contain accident benefits coverage. Section 268(1) of the *Insurance Act* states that "every contract evidenced by a motor vehicle liability policy … shall be deemed to provide Statutory Accident Benefits". A consumer cannot say that he or she wants third party liability coverage but does not want to pay for accident benefits coverage. A consumer cannot say that he or she only wants $100,000 in third party liability coverage as the *Insurance Act* requires minimum limits of $200,000. Clearly, regulators have provided consumers with no choice with respect to certain aspects of automobile coverage.

Arbitrator Scott also considered the argument advanced by TD that when the policy was renewed on May 18, 2008 it was for comprehensive coverage only and ought be looked at as "a new contract with its own offer and acceptance". He considered the following comments of the Supreme Court of Canada in *Patterson v. Gallant* (1994) 3 S.C.R. 1080:

> "Two separate meanings can be described to a 'renewal' of an insurance policy. The first meaning results from a continuous policy. Such policies provide for further extensions to the term of an existing contract, subject to the rights of either of the parties to terminate the contract. In a single continuous policy, questions of formation are answered by reference to the original offer and acceptance that initiated the coverage. By contrast, the other meaning of a 'renewal' of an insurance policy involves the situation where a separate and distinct contract comes into existence at each renewal. Automobile insurance renewals fall Into the latter category, in that each renewal represents a new contract with its own offer and acceptance."

Despite these considerations he came to the conclusion that he was unable to determine if the subject policy fell into the "continuous policy" category or "new contract" category but arbitrator Scott writes:

> "In any event, even if there was a 'new contract', if it was found that the OPCF-16 was to be read into the policy, subsequent certificates would include the reading in of the OPCF-16 endorsement".

Ultimately the basis for his decision was based on his view that an insured be entitled to purchase the insurance he or she wants and not be forced to pay for additional accident benefits coverage he or she may not require.

With the greatest of respect, I find that arbitrator Scott in *State Farm* (supra) has failed to place sufficient emphasis on the policy considerations of the regulators when introducing the OPCF-16 endorsement. Arbitrator Samis in *Certas* (supra) writes at page 3 of his decision:

> "Automobile insurance in the Province of Ontario is a highly regulated product. The price of the product is controlled by regulatory authorities, the characteristics of coverage are defined, limited and mandated by the provisions in Part VI of the Insurance Act, and the documentation issued by insurers to their policy holders is highly regulated in accordance with the statute. There is a strong public policy, evidenced by the extensive legislative activity, that the insurance product should be delivered in a way that makes it understandable to the consumer. There are many instances of limitations on the ability of an insurer, or a consumer, to enter into agreements that vary from the mandatory characteristics"

Arbitrator Samis stated at page 7 of his decision:

> "Regulators have seen that it is important for people that have coverage under suspension to continue to have residual protection for liability coverage and accident benefits coverage. hence regulators have issued the OPCF-16 to provide the residual protection."

Consumer protection reasons may not be the only policy consideration of the Regulators for the introduction of the OPCF-16. The requirement of the OPCF-16 to maintain residual accident benefits coverage also reduces exposure of claims presented to the Ontario Motor Vehicle Accident Claims Fund. An individual with "comprehensive only" coverage would be putting forth an accident benefit to the Ontario Motor Vehicle Accident Claims Fund if injured in an accident involving an unidentified or uninsured motor vehicle. With the mandatory residual coverage required by the OPCF-16 those claims as against the Fund would be avoided with the burden falling on private insurers. Regulators seem to have a subtle movement to avoid or reduce claims against the Fund as evidenced by recent changes effective September 1, 2010 to Ont. Reg. 283/95 – Disputes Between Insurers - now requiring insurers to complete a reasonable investigation and provide particulars of such investigation to the Fund before the Fund can be put on notice of a priority dispute.

I much prefer the rationale of the decisions in *Certas, Enterprise* and *Jevco* (supra) to the reasoning in of arbitrator Scott in *State Farm* (supra). I therefore find that Dominion ought to have used the OPCF-16 form to reduce coverages as required by s.227 of the *Insurance Act* and that the policy and any subsequent renewal is deemed to include the residual accident benefits coverage that would have been required by the OPCF-16.

I find that Dominion stands in priority with respect to the payment of statutory accident benefits to the claimant Lawrence Robertson.

ORDER

I hereby order that Dominion is the priority insurer. I order that Dominion reimburse Optimum with respect to those benefits properly the subject of indemnification. I order the Dominion pay Optimum the legal costs of this priority dispute on a partial indemnity basis. I order that Dominion pay the Arbitrator's costs.

DATED at TORONTO this 25th)

day of April , 2015.)

KENNETH J. BIALKOWSKI
Arbitrator