IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, 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 :

CAA INSURANCE COMPANY

Applicant

- and -

TRAVELERS INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Jamie Pollack and Stacey Morrow – Laxton Glass LLP
Counsel for the Applicant, CAA Insurance Company
(hereinafter referred to as "CAA")

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Counsel for the Respondent, Travelers Insurance Company
(hereinafter referred to as "Travelers")

ISSUE

In the context of a priority dispute pursuant to s.268 of the *Insurance Act,* R.S.O.1990, c.I.8 and O. Reg 283/95 the issues before me are:

1. Do the priority provisions of the Ontario *Insurance Act* apply to an accident occurring in Nunavut involving a vehicle owned by, plated in and licensed to the Government of Nunavut?

2. Whether the claimant Patricia Soloway had “regular use” of her employer’s vehicle so as to make the insurer of that vehicle, Travelers, the priority insurer rather than the insurer of the claimant’s personal automobile insured with CAA.

PROCEEDINGS

The arbitration proceeded on the basis of an Agreed Statement of Facts, Examination Under Oath transcripts and Written Submissions.

AGREED FACTS

The parties have agreed on the following facts:

1. The claimant, Patricia Soloway (DOB: September 22, 1954), was involved in a motor vehicle accident on or about July 20, 2014 in Nunavut. The accident occurred at approximately 11:00 a.m..

2. At the time of the accident, the claimant was driving a Ford Explorer motor vehicle that was owned by her employer, the Government of Nunavut. The Ford Explorer was insured under a Nunavut policy of automobile insurance issued by the Respondent to the Government of Nunavut and it was in full force and effect at the time of the accident.

3. Following the accident, the claimant made a claim for accident benefits to the Applicant, being the insurer of the claimant’s personal motor vehicle in Niagara Falls, Ontario. At the time of the accident, the Applicant’s Ontario policy of insurance issued to the claimant was also in full force and effect.

4. At the time of the accident, the claimant was a registered nurse. She was employed with the Government of Nunavut commencing March 31, 2014 and employed as Supervisor Health Programs. The claimant’s employment was described as full-time, day but on-call or overtime requirements during evenings and overnight.

5. One of the government vehicles would be parked in the garage of the Whale Cove Health Centre and one of the government vehicles would be parked outside in front of the healthcare centre. The keys to the vehicles were located on a hook in the reception office.

The receptionist was a government employee. The keys were not kept under lock and key. There was no sign-out system at that time for using the vehicles.

6. As the nurse in charge of the Health Centre, it was part of the claimant's job description to ensure that the service of equipment and vehicles was kept up-to-date. When the claimant started working at the Health Centre, she reviewed the dates of the last services done and found that the vehicles required services. The vehicles were taken to the service garage but service was refused as the prior year's account was not settled.

7. On the day of the accident the claimant was on call for work.

ADDITIONAL FACTS

In addition to the Agreed Statement of Facts, Ms. Soloway also submitted to a written Examination Under Oath and provided CAA with a statement dated September 12, 2014 which provided the following additional information:

Ms. Soloway stated that her contract of employment commenced on April 1, 2014 and was scheduled to end on July 31, 2014. It was essentially a four month employment contract. Her home and the motor vehicle which she owned were in Niagara Falls, Ontario.

Ms. Soloway stated that employees would use the "Travelers vehicle" for personal use (for example, to get groceries).

Ms. Soloway stated that Whale Cove, Nunavut, is a fly-in community where taxi services were not available. The weather ranged from -40 degrees to -20 degrees with wind chills much colder. Polar bears, wolves and stray dogs walked in packs that attacked humans in Whale Cove. Nursing staff would therefore always use the "Travelers vehicles" for safety reasons.

Ms. Soloway stated that her employer would turn a blind eye to the nursing staff use of the "Travelers vehicles".

Ms. Soloway stated that she would use the "Travelers vehicle" on average 3-4 times per week.

Ms. Soloway stated she would use the “Travelers vehicle” involved in the accident twice per week for work purposes.

Ms. Soloway stated that she lived in an apartment above the Health Centre.

Ms. Soloway stated that the “Travelers vehicles” were parked in a garage attached to the Health Centre. The keys to the vehicles were located on a hook in the reception office. The keys were not locked up and there was no sign out system for using the vehicles.

Ms. Soloway stated that she used the “Travelers vehicle” for personal use.

Ms. Soloway stated that she was the nurse in charge of the Health Centre. She stated that it was part of her job to ensure that the servicing of equipment and vehicles was kept up to date. When Ms. Soloway started working in Whale Cove, she determined that the “Travelers vehicles” required servicing.

Ms. Soloway stated that she was operating the “Travelers vehicle” on the date of loss.

Ms. Soloway stated that she was on call for the Whale Cove Health Centre on the date of loss. Ms. Soloway advised that being on call meant that she would carry with her a radio telephone and would try to assist persons or meet them at the Health Centre to look after their needs.

ANALYSIS AND FINDINGS

Before dealing with the issue of whether the claimant had “regular use” of the Travelers vehicle at the time of the accident, it must first be determined if Ontario’s priority scheme as set out in s.268 of the *Insurance Act* applies to the facts of this case. Do the provisions of “Part VI – Automobile Insurance” of the *Insurance Act* apply to Travelers?

The Respondent Travelers takes the position that Part VI of the Ontario *Insurance Act* does not apply to this dispute. Part VI of the *Act* contains sections 268(2) and (5.2) of the *Act*, which set out the priority provisions for payment of statutory accident benefits. Travelers claims that Section 226 (2) of the Ontario *Insurance Act* states that Part VI of the *Act* does not apply in respect of an automobile not required to be registered under the Ontario Highway Traffic Act.

According to Travelers, the auto insurance provisions of the Ontario *Insurance Act* do not apply here for the following reasons:

1. The vehicle that Ms. Soloway was operating at the time of the accident was not registered, plated or insured in Ontario;
2. That vehicle was not being operated in Ontario;
3. The motor vehicle accident did not occur in Ontario;
4. The motor vehicle involved in the accident was not required to be registered under the Ontario *Highway Traffic Act*;
5. Therefore, the priority provisions contained in section 268(2) and (5.2) do not apply, but Ms. Soloway could still claim accident benefits from her own auto insurer, CAA as the named insured involved in an accident in another Province or Territory; and,
6. Section 1 of Ontario Regulation 283/95 states that it addresses disputes as to which insurer is required to pay benefits under section 268 of the Ontario *Insurance Ac*t, which is found in Part VI of the *Act*. Accordingly, this Disputes Between Insurers Regulation would not operate to allow CAA to dispute its priority to pay accident benefits under the circumstances.

Travelers maintains that Ms. Soloway is perfectly entitled to claim statutory accident benefits from her Ontario insurer CAA in accordance with the contract she had with CAA, which was in full force at all material times. However, because the Travelers' policy is not an Ontario automobile policy, but rather was Nunavut Territories Standard Automobile Policy (S.P.F. No. 1), the Part VI automobile insurance provisions of the Ontario *Insurance Act,* including Ontario Regulation 283/95 do not to apply to this dispute.

Travellers relies on the case of *Young* v. *Ontario* (*Minister of Finance*) (2003) 68 O.R. (3d) 321, from the Ontario Court of Appeal in which the claimant, Bridgette Young, tried to apply for accident benefits from the Ontario Motor Vehicle Fund. Ms. Young grew up in Toronto, attended University in Peterborough and worked in Toronto for some time before she ended up working in New Mexico. In New Mexico, Ms. Young obtained a New Mexico driver's license and bought a pick-up truck which she insured in New Mexico. Her New Mexico insurance policy provided third party liability coverage, but did not contain any accident benefits coverage. Accident benefits coverage was optional in New Mexico.

While driving her vehicle in New Mexico, Ms. Young was involved in a single vehicle accident and sustained catastrophic injuries.

Ms. Young was brought back to her family home in Toronto where she was hospitalized. Because it was a single vehicle collision, the claimant had no recourse against any tortfeasor. She did not have any accident benefits coverage under her New Mexico auto policy and she would have no recovery from any insurance source unless she could claim accident benefits coverage from the Fund in Ontario.

The Fund denied her accident benefits claim on the grounds that it did not cover accidents which occurred outside Ontario.

The trial judge in *Young* found that the Fund did cover claims for accidents outside Ontario and accordingly would cover Ms. Young because she was ordinarily resident in Ontario at the time of the accident.

The Minister of Finance appealed and the appeal was allowed.

The Court of Appeal in *Young* held that the trial judge had erred in determining that the accident in New Mexico was covered by the Ontario Compulsory Insurance Scheme. The claimant's vehicle in New Mexico was not required to be registered under the *Highway Traffic Act* of Ontario.

The Court of Appeal noted that Part VI of the Ontario *Insurance Act*, which provides that all motor vehicle liability policies are deemed to provide for statutory accident benefits, did not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* of Ontario. Extra provincial or foreign vehicles are exempted from the requirement of Ontario registration, and are only required to have mandatory insurance coverage prescribed by the *Compulsory Automobile Insurance Act* if driven in Ontario.

In that case, Ms. Young's vehicle did not need to be registered in Ontario under the *Highway Traffic Act*, nor did Ms. Young's insurance policy need to comply with the mandatory coverage provisions of the *Compulsory Automobile Insurance Act* of Ontario as the vehicle was not being operated in Ontario.

These findings, together with the fact that the motor vehicle accident did not occur in Ontario, led the Court of Appeal to hold that Part VI of Ontario *Insurance Act* had no application to the claimant or her vehicle.

Travelers maintained that in our case, the Government of Nunavut vehicle did not need to be registered in Ontario in accordance with the Ontario *Highway Traffic Act,* and that vehicle was not being operated in Ontario. The accident did not occur in Ontario and therefore, according to Travelers, Part VI of the Ontario *Insurance Act* should not apply to the facts of this case.

Accordingly, Travelers maintains the priority dispute provisions contained in section 268 of the *Insurance Act* and the Regulation made pursuant to section 268 under Part VI of the *Insurance Act* (Ontario Regulation 283/95) ought not to apply here. Travelers, on the strength of the *Young* decision, maintains that CAA is precluded from successfully shifting priority to Travelers for payment of Patricia Soloway's statutory accident benefits.

Simply stated, Ms. Soloway could and did properly claim accident benefits pursuant to her contract of motor vehicle liability insurance with CAA based on the wording of that contract, but CAA has no recourse to dispute its priority to pay here if Part VI of the *Insurance Act* does not apply.

The Applicant CAA disagrees with the position advanced by Travelers. They take the position that the Ontario Court of Appeal decision in *Young* is distinguishable and that the position advanced by Travelers fails to take into consideration the impact of Travelers being a signatory to the Power of Attorney and Undertaking (hereinafter referred to as the "PAU") and the fact that Travelers is licenced to write automobile insurance in Ontario. Furthermore, it claims that there is jurisprudence to support its position.

It was CAA's position that the priority provisions of the *Insurance Act* and related legislation are applicable to the subject motor vehicle accident as the Respondent is licensed to undertake automobile insurance in Ontario as outlined in Section 224(1) of the *Insurance Act* and is a signatory to the PAU.

It was CAA's position that the Respondent is attempting to circumvent its responsibilities under the Power of Attorney and Undertaking ("PAU") by taking the position that it is not governed by the provisions of the Ontario *Insurance Act* as the Travelers policy in question was issued in Nunavut, the accident in question occurred in Nunavut and the vehicle operated by the claimant at the time of the accident was registered in Nunavut.

The Applicant submits that Travelers is licensed to undertake automobile insurance in Ontario as outlined in Section 224(1) of the *Insurance Act*. This section states the following:

> 224. (1) In this Part,
>
> "automobile" includes,
>
> (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
>
> (b) a vehicle prescribed by regulation to be an automobile; ("automobile")
>
> "contract" means a contract of automobile insurance that,
>
> (a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or
>
> (b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule by an insurer that has filed an undertaking under section 226.1
>
> [underlining emphasis mine]

The pink slip provided by Travelers lists St. Paul Fire and Marine Insurance Company as the named insurer of the vehicle operated by the claimant on the date of loss. The effective date for this policy was April 1, 2014 to April 1, 2015. The policy was in effect on the date of loss.

The Applicant submitted that St. Paul Fire and Marine Insurance Company began operating in Canada in 1928 and was merged with Travelers Guarantee Company of Canada under the name "Travelers Canada" in 2009. Travelers Canada then acquired The Dominion of Canada Insurance Company in 2013. CAA further submitted that St. Paul Fire and Marine Insurance Company, Travelers Insurance Company of Canada and The Dominion of Canada Insurance Company are all insurers licensed to undertake automobile insurance in Ontario, as required by Section 224(1) of the *Insurance Act*. Each company lists a Chief Agent

located at 165 University Avenue in Toronto. The Applicant has submitted that the Canadian Head Office for Travelers is located at 165 University Avenue, Toronto, Ontario, M5H 3B9. The Applicant has submitted that Travelers has two Central Region Offices located at 165 University Avenue in Toronto and 20 Queen Street West in Toronto. CAA submitted that Travelers does not have an office located in Nunavut according to its company website. Most importantly, CAA submitted that St. Paul Fire and Marine Insurance Company filed a PAU with the Canadian Council of Insurance Regulators on July 1, 1964. I have received no information with respect to this insurer contrary to that submitted in this paragraph and must assume that it was licenced to write insurance in Ontario and a signatory to the PAU as claimed.

By way of background, the PAU was established in 1964. Therefore, for 53 years St. Paul Fire and Marine Insurance Company has been a signatory.

The PAU provides:

CANADA NON-RESIDENT INTER-PROVINCE
MOTOR VEHICLE LIABILITY INSURANCE CARD

POWER OF ATTORNEY AND UNDERTAKING

(denoting compliance with minimum coverage requirements
and facilitating acceptance of service)

(Name of Company)

the head office of which is in the City of _____, in the State/Province of _____ in the Country of _____, hereby with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor vehicle accident in any of the respective Provinces or Territories, appoints severally the Superintendents of Insurance* of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, and Yukon Territory, the Northwest Territories and Territory of Nunavut, to do and execute all or any of the following acts, deeds, and things, that is to say: To accept service of notice or process on its behalf.

* 'Superintendent of Insurance' means the Superintendent of Insurance or any other provincial or territorial official or Public Body authorized by law or designated by his or her government to accept such service of notice or process.

_____ aforesaid hereby undertakes:
(Name of Company)

A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:

B. That upon receipt from any of the officials aforesaid of such notice or process in respect of its insured, or in respect of its insured and another or others, it will forthwith cause the notice or process to be personally served upon the insured:

C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgement rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of: [underlining emphasis mine]

   (a) the amounts and limits for that kind or class of coverage or coverages provided in the contract or plan, or

   (b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory.

The Applicant CAA concedes that the Travelers policy in question was issued in Nunavut. However, the Applicant took the position that the origin of the automobile policy does not exclude said policy from being subject to the provisions of the Ontario *Insurance Act*, and regulations made thereunder, being statutory accident benefits.

In support of its position, the Applicant CAA relied upon the case of *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003], 2 S.C.R. 40. In that case, Ontario residents were injured in a motor vehicle accident in British Columbia. They sued for damages in British Columbia and were awarded a large sum. They also claimed statutory accident benefits from their Ontario insurer Unifund. ICBC, the insurer for the defendant in the tort action, is normally the sole provider of motor vehicle insurance in British Columbia and is generally the payor of both the no-fault benefits and any tort award. For that reason, the

British Columbia legislation does not contain a loss transfer provision similar to Section 275 of the *Insurance Act* of Ontario.

Unifund made a loss transfer claim under Section 275 of the Act against ICBC. ICBC took the position that it was not bound by the *Insurance Act* as it did not carry on business as an insurer in Ontario. Unifund brought an action in Ontario under Section 275 of the Act and the issue was whether the Act could have extraterritorial jurisdiction over ICBC. In the Supreme Court of Canada, it was held by the majority that the Act could have no extraterritorial jurisdiction over ICBC. However it is important to note that the PAU signed by ICBC excluded claims arising out of motor vehicle accidents occurring In British Columbia (where the subject accident occurred) and there was no evidence that ICBC was licenced to write automobile insurance in Ontario. Binnie J. for the majority, however, recognized the distinction between an underlying tort action between the parties to the accident and the statutory claim between the two insurers. He made clear that **if ICBC were an Ontario insurer, the loss transfer provisions of section 275 of the Act would apply** (emphasis added).

Justice Binnie made the following statements which the Applicant submitted are applicable to this dispute:

> [9] Unifund's problem is to find a cause of action. In this appeal, we are dealing only with Unifund's quite separate and distinct claim under section 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of the "SABs" under the Ontario Act.
>
> [10] It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.
>
> [12] The Ontario insurance scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated "without regard to" SABs (s. 267.1(8) para. 2(i)). However, the payor of the SABs (usually the victim's insurer) is entitled by statute to indemnification from the insurer of any "heavy commercial vehicle" (Automobile Insurance Regulations, R.R.O. 1990, Reg. 664, s. 9) involved in the motor vehicle accident in question, "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules" (s. 275(2)), i.e., allocated not by general principles of tort but by the rules set out in Ontario regulations. Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to

> the Ontario Arbitration Act, 1991, S.O. 1991, c. 17. **There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund's claim.**

CAA submitted that the statements of Justice Binnie in *Unifund v. ICBC* stand for the principle that where both insurers are "Ontario insurers" as per the *Insurance Act*, the *Insurance Act* and the loss transfer provisions apply **regardless of the location of the accident**.

CAA submitted that the principles advanced by Justice Binnie in *Unifund v. ICBC* are also applicable to a dispute between insurers over priority of payment in accordance with the priority dispute provisions of Section 268 of the *Insurance Act* of Ontario as both the loss transfer provisions and priority provisions are contained in Part VI of the *Insurance Act*. This dispute is a dispute involving the *Insurance Act* and its Regulations, just like the *Unifund v. ICBC* decision.

CAA submitted that Travelers is bound by the Ontario *Statutory Accident Benefits Schedule*, the *Insurance Act* and its Regulations as it is an insurer licensed to undertake automobile insurance in Ontario and that the injuries sustained by the claimant arose from an incident which gave rise to payment of statutory accident benefits under the Ontario regime (and by CAA).

The Applicant CAA conceded that the claimant *does* qualify for Ontario statutory accident benefits in respect of a policy of automobile insurance issued in Ontario. She is a named insured under a policy of automobile insurance with CAA and therefore is entitled to receive Ontario statutory accident benefits from the Respondent as a result of the motor vehicle accident which occurred in Nunavut. She meets that condition. Now, it is to be determined which insurer is responsible to pay her benefits.

The Applicant CAA relies upon the Ontario Superior Court of Justice decision in *Primmum Insurance Company v. Allstate Insurance Company ("Primmum")*. This decision involved an inter-company priority dispute between insurers and was decided six years after the *Young* decision relied upon by Travelers.

In the Primmum decision, the claimant Mutch was operating a motorcycle in North Carolina when he was struck and injured by a pick-up truck driven by a North Carolina resident. Mutch

was insured with Primmum, an Ontario registered insurer doing business in Ontario. The third party driver was insured by Allstate under a policy issued in North Carolina. Allstate filed a PAU in Ontario in 1964. Allstate was also an Ontario Licensed Insurer. Allstate took the position that it was not an Ontario insurer and that the accident did not occur in Ontario. Allstate took the position that Ontario's loss transfer scheme did not apply just as Travelers maintains that Ontario's priority scheme does not apply.

In Paragraphs 19 and 20 of the *Primmum* decision, Justice Cameron relies upon the findings of the Supreme Court of Canada in the *Unifund* matter referenced above. In Paragraph 28 of the *Primmum* decision, Justice Cameron finds that Allstate is an "insurer" under Section 1 of the *Insurance Act* and it issues "contracts" because it is licensed to sell insurance in Ontario under Section 224(1)(a) of the *Insurance Act*. The premiums it charges for the insurance or the limits of coverage in North Carolina are of no concern to Ontario**.** In Paragraph 29 of the *Primmum* decision, Justice Cameron indicated that Allstate can be made subject to the statutory cause of action in Ontario even though the accident occurred in North Carolina. Justice Cameron stated that this was a case of enforced arbitration of a statutory cause of action between two Ontario insurers.

It is important to note, as I have previously indicated, that both Section 268 (priority) and Section 275 (loss transfer) of the *Insurance Act* are in Part VI of the *Insurance Act*.

The Applicant submitted that the *Primmum* decision is on point, applicable to the present dispute and binding on the learned arbitrator. Travelers is licensed to undertake and sell insurance in Ontario and a signatory to the PAU should therefore be governed by the Ontario Dispute Between Insurers regime and statutory accident benefits regime, regardless of the fact that the subject accident occurred in Nunavut and the vehicle being operated by the claimant at the time of the accident was insured under a policy of insurance issued in Nunavut.

On the evidence before me, I am satisfied that the *Young* decision relied upon by Travelers is distinguishable from the present facts. There was no evidence in *Young* that the insurer, Clarendon National Insurance Company, was licenced to write automobile insurance in Ontario or a signatory to the PAU.

I am satisfied that the execution of a PAU signifies an insurer's undertaking to not set up a defence to any claim, action or proceeding under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in and in accordance with the law relating to motor vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted. Accordingly, as a signatory to the PAU, it is not permitted to question the jurisdiction of the *Insurance Act*, the Statutory Accident Benefits Schedule or its Regulations and, by disputing such jurisdiction, is in breach of its undertaking as signatory to the PAU. Further, I am satisfied that as a signatory to the PAU, Travelers is considered to be an Ontario insurer for the purposes of this dispute between insurers and is therefore subject to the provisions of the *Insurance Act*, the Statutory Accident Benefits Schedule and its Regulations. Relevant decisions are those where the accident took place outside of Ontario and the insurer wrote auto insurance in Ontario such as in *Primmum*. I agree with the findings in Primmum and am bound by the decision of Justice Cameron in that decision.

There are two other Ontario Court of Appeal decisions which support my findings as to the impact of being a signatory to the PAU. *I.C.B.C. v. Royal Insurance* [1999] I.L.R. 1-3705 stands for the principle that since an extra-provincial insurer signatory to the PAU is responsible to pay benefits as if the policy was a valid Ontario motor vehicle policy, it is entitled to access the Part VI loss transfer scheme set out in s. 275 of the *Insurance Act*. In *I.C.B.C*. a British Columbia resident insured by *I.C.B.C*. was involved in an accident in Ontario with a heavy commercial vehicle. *I.C.B.C*. paid accident benefits and sought loss transfer indemnification from Royal. The Ontario Court of Appeal found that *I.C.B.C*. was entitled to such indemnification by reason of s. 275 of the *Insurance Act* which is in Part VI of the *Act* as is the s.268 priority provisions. Goudge J.A. on behalf of the court outlines the impact of being a signatory to the PAU:

> As a result of the filing of a Power of Attorney and Undertaking ("PAU") in 1988, ICBC is a participant in the reciprocal scheme that exists in Canada for the enforcement of provincial motor vehicle insurance obligations. The nature and purpose of this scheme was described by Blair J.A. in Potts v. Gluckstein (1992), 8 O.R. (3d) 556 (C.A.) as follows at pp. 557-58:
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> > "The reciprocal scheme is based upon a power of attorney and undertaking filed by each participating motor vehicle insurer with the superintendent of insurance of British Columbia. He accepts the filing on behalf of the superintendents of insurance in the other provinces

> and territories, and sends copies to them. They are authorized to accept service on behalf of the insurer with respect to an action against it or its insured arising out of a motor vehicle accident in their respective jurisdictions. The reciprocal scheme provides a uniform basis for the enforcement of motor vehicle insurance claims in Canada. This ensures that a person who has entered into a motor vehicle insurance contract in one province is recognized as insured in other provinces. In the event of an accident, the insurer agrees to be bound by the law of the province or territory where the action is brought and not the province where the policy is issued. The insurer also accepts liability to the limits prescribed in its policy or, at least, to the minimum limits established in the province or territory where the action is brought."
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> [underlining emphasis mine]

Also helpful is the decision *of Healy v. Interboro Mutual Indemnity Insurance Co. (1999) 44 O.R. (3d) 404,* where the Ontario Court of Appeal considered claims by a New York state resident, who was injured while travelling in Ontario as a passenger in a vehicle owned and operated by an Ontario resident, insured under an Ontario policy with Guardian. The Plaintiff had his own insurance policy with Interboro on his vehicle in New York State. The parties agreed that the Plaintiff was entitled to Ontario *SABS*, but they disagreed as to whether the Ontario or the New York insurer was required to pay. Interboro was a signatory to the PAU. The court held that it was the New York insurer Interboro who was responsible for paying the more generous Ontario statutory accident benefits. The court wrote:

> "The terms of the PAU which was filed by I. Co. did not limit its operation to circumstances where the vehicle insured by I. Co. was in Ontario; nor did those terms confine the PAU to the kinds of claims that were permitted under the Ontario law at the time of the filing in 1964. Rather, those terms suggested that the PAU was intended to have not just a fleeting effect, but a prospective reach to Ontario law as it might develop. It was clear that, at the time of the accident in 1996, the named insured in a motor vehicle policy issued in Ontario was entitled to receive SABS under that policy as a result of a motor vehicle accident even if the automobile insured under the Ontario policy was not involved in the accident because it was not at the time in the jurisdiction where the accident occurred. A participating insurer in the reciprocal scheme agrees to be bound by the law concerning compulsory automobile insurance coverage of the province where the action against it is brought rather than the automobile insurance coverage of the state or province where its policy is issued. In return, a participating insurer can assure those persons whom it insures that they will be recognized as being validly insured when driving in other participating jurisdictions. To limit this scheme, either by requiring that the vehicle insured by the out-of-province insurer be required to respond only to a liability claim, would frustrate the purpose of the reciprocal scheme."
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> [underlining emphasis mine]

On the basis of the principles outlined in these cases, I find that a signatory to the PAU essentially becomes an insurer in the province or Territory where the claim is brought and with that exposure to the liability limits, accident benefit limits, as well as the loss transfer and priority obligations, if any, of that jurisdiction. As such I find that the priority provisions of the Ontario *Insurance Act* apply to Travelers.

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; [underlining emphasis mine]*
>
> *(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.*

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14). [underlining emphasis mine]

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…"*

Accordingly, if it were demonstrated that the claimant had "regular use" of the vehicle she was operating at the time of the accident, she would be considered a deemed named insured. Being a named insured on her policy with CAA and a deemed named insured under the Travellers policy, the tie-breaking mechanism of s.268(5.2) would apply and the insurer of the vehicle in which she was an occupant, Travellers, would stand in priority. If "regular use" cannot be demonstrated then CAA would stand in priority by reason of s.268(2)(i).

The Applicant CAA submitted that Ms. Soloway was a deemed named insured under the Travelers policy by reason of her regular use of the Government of Nunavut vehicle.

The leading case dealing with the "regular use" issue 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.

The evidence before me is that there was a Government policy in place that the vehicle was not to be used for personal errands. Therefore, Travelers takes the position that the claimant did not have contemporaneous access to the vehicle by reason of this policy and the fact she was not working at the time of the accident. However, the evidence also discloses that the employer turned a blind eye to personal use. The claimant used the vehicle for personal use several times each week. Other employees would use the vehicle to get groceries. The modified policy may well have been the result of the weather (-40 to -20 degrees with wind chills much lower) and dangers inherent in working in this remote location. The claimant indicated that polar bears, wolves and stray dogs walked in packs that attacked humans in Whale Cove. Nursing staff would always use the vehicles for safety reasons. Clearly the official Government policy had been modified by the conduct of the parties at this location and the claimant was acting within the modified policy. In the circumstances, I find that the claimant had contemporary accessibility to the vehicle at the time of the accident given the course of conduct that had developed. Furthermore, as nurse in charge of the Health Centre it was her responsibility that servicing of the vehicles were kept up to date. She therefore had control of the subject vehicle at all times. Furthermore, on the day of the accident she was "on call" and had access to the vehicle at any time. I therefore conclude that the claimant had "regular use" at the time of the accident and was a deemed "named insured" under the Travelers policy and also a "named insured" under her policy with CAA. The provisions of Section 268(5.2) of the *Insurance Act* would then apply which reads as follows:

> If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person **shall** claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

As the claimant was an occupant of the vehicle insured by Travelers then it would stand in priority to CAA. Travelers is the priority insurer.

ORDER

It is hereby ordered that:

1. Travelers is the priority insurer.

2. Travelers is to assume responsibility for the adjusting and payment of statutory accident benefits to and on behalf of the claimant Patricia Soloway.

3. Travelers is to indemnify CAA for those benefits paid to or on behalf of the claimant Patricia Soloway together with interest calculated in accordance with the *Courts of Justice Act.*

4. Travelers pay the arbitration costs of CAA on a partial indemnity basis.

5. Travelers pay the arbitrator's costs.

DATED at TORONTO this 27th)

day of February, 2017.)

KENNETH J. BIALKOWSKI
Arbitrator