

***IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, SECTION 268 and REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY and ACE INA INSURANCE COMPANY

Respondents

ARBITRATION AWARD

COUNSEL:

Shelley Khan for the Applicant

Derek Greenside for the Respondent (Unifund)

Jason Frost for the Respondent (ACE)

ISSUES:

The parties have set out the following issues to be determined in their Arbitration Agreement:

1. Was the vehicle insured by The Personal involved in the incident ?
2. If that vehicle was not involved in the incident, is the Claimant considered an "insured" under the policy issued by The Personal ?
3. If the answer to the above question is no, then who between Unifund and ACE INA is highest in priority to pay benefits ?
4. If the answer to question #2 is yes, are all three policies equal in priority?
5. If all three policies are equal, did the Claimant "choose" The Personal by virtue of submitting his Application for Accident Benefits to them, or does he still have the opportunity to make a choice ?

There are further questions posed in the agreement that I have not included, as the answers to the above questions render them moot. I have appended the Arbitration Agreement to the end of this decision.

RESULT:

1. No, the vehicle insured by The Personal was not involved in the incident from which the entitlement to statutory benefits arose.
2. No, the Claimant is not an "insured" under the policy issued by The Personal.
3. Pursuant to section 268(2)2(ii) of the *Act*, the Claimant has recourse against the insurer of the automobile that "struck" him for benefits. In accordance with the case law adopting the concept of "transmission of force", that insurer is Unifund.

BACKGROUND:

1. Enrique Andrada was struck by a vehicle while he was walking on the sidewalk near the southeast corner of Pharmacy Avenue and Steeles Avenue in Scarborough, on March 7, 2014. He sustained a left leg fracture, right wrist fracture, fractured ribs and various other injuries. The vehicle that came into contact with him was insured by ACE Ina Insurance Company ("ACE").
2. The events leading up to the Claimant being struck are somewhat complicated. The ACE insured vehicle was proceeding eastbound on Steeles Avenue, through its intersection with Pharmacy Road, when it collided with another vehicle insured by Unifund Assurance ("Unifund") that was travelling westbound on Steeles, attempting to turn left onto Pharmacy Ave. The force of that impact propelled the two vehicles in different directions. The ACE vehicle struck the Claimant on the sidewalk, while the Unifund vehicle struck a third vehicle that was stopped in the northbound lanes of Pharmacy, waiting for the traffic light to change. That vehicle was driven by Edward Chan and insured by The Personal ("TPIC").
3. The parties agree that the vehicle insured by The Personal did not make contact with Mr. Andrada, the Claimant.
4. In any event, Mr. Andrada submitted an application for payment of accident benefits to The Personal. They accepted his application and have paid benefits to him. Mr. Andrada is not a named insured under any auto policy, nor a listed driver, spouse or dependent of a named insured. The Personal claims that either ACE, as the insurer of the vehicle that came into contact with the Claimant, or Unifund, as the insurer of the vehicle that struck the vehicle that Mr. Chan was driving, are in higher priority under section 268(2)2 of the *Insurance Act* to pay his claim. An arbitration proceeding was commenced under the *Regulation 283/95 to the Act*, and I was appointed to arbitrate the matter.
5. Counsel filed written submissions addressing the questions set out above.

THE EVIDENCE:

6. The parties submitted an Agreed Statement of Facts, the gist of which is outlined above. Mr. Chan, the driver of the vehicle insured by The Personal, also provided a signed statement to The Personal on April 16, 2014, which counsel referred to in their submissions as well.

7. Mr. Chan stated that he witnessed the accident while his vehicle was stopped in the northbound lanes on Pharmacy Avenue, as he was waiting for the stoplight at the intersection of Steeles Avenue and Pharmacy to change from red to green. He noted that after the initial impact between the two other vehicles travelling on Steeles Avenue, the vehicle that was driving east on Steeles struck a fence at the southeast corner of the intersection, and that about "2 or 3 seconds later a car came and hit me on the left front corner of my car". He recalled that that car then "mounted the curb on the south east corner of the intersection". He estimated that the pedestrian that was struck (Mr. Andrada) was about 40 feet or more away from his car.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act -***224. (1) In this Part,***

"insured" means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person;

268(2) The following rules apply for determining who is liable to pay statutory accident benefits:

In respect of non-occupants,

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

- ii. *if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,*
- iii. *if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,*
- iv. *if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund*

(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.

Statutory Accident Benefits Schedule – Ontario Regulation 34/10

3. (1) In this Regulation,

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

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

CASE LAW:

8. Counsels’ submissions were thorough and addressed a few different issues. The two main points of focus were whether the vehicle insured by the Personal and driven by Mr. Chan was “involved in the incident” from which Mr. Andrada’s entitlement to benefits under the *SABS* arose (section 268(2)2(iii) of the *Act*), and whether Mr. Andrada was an “insured” (section 268(2)2(i) of the *Act*) under the TPIC policy. Counsel referred to various cases decided by courts and Arbitrators, in both Priority Dispute and Loss Transfer contexts. A summary of the relevant case law is useful in order to appreciate the submissions filed by counsel.

9. All counsel cited the Ontario Superior Court’s decision in *Seetal v. Quiroz* [2009] I.L.R. 1-4858, on the issue of whether the TPIC vehicle was “involved in” the accident.

In that case, Mr. Quiroz, an uninsured driver, drove through a red light and struck the Plaintiff as she was crossing the street. The vehicle went on to collide with a taxi, while she was still on the hood of the car. The taxi was insured by Lombard Insurance. The Plaintiff did not have her own insurance. She applied to Lombard for payment of accident benefits. She also commenced a tort action against the uninsured driver, the driver and owner of the taxi and Lombard Insurance. The Fund was eventually added as an intervenor.

10. Justice Perell was asked to determine, by way of interlocutory motion in the tort action, whether the driver of the taxi was “a person who is involved in an accident involving the insured automobile”. This phrase appears in the definition of “insured person” in the *Schedule*. If so, Ms. Seetal would qualify as an “insured” under the Lombard policy covering the taxi, despite the fact that the driver of that vehicle was not the cause of her injuries.

11. Justice Perell found that the taxi was involved in the accident. He stated that the Lombard insured vehicle was within the “temporal, spatial and participatory factors sufficient to conclude that there was involvement” in the Plaintiff’s accident, notwithstanding that the taxi driver was not a cause of or contributing factor to the accident. He also held that “a person who is involved in an accident involving the insured vehicle” includes (a) a person who caused or contributed to the accident and (b) a person who – to borrow from s.7(3) of the *Motor Vehicle Claims Act* – is a person against whom the injured person might reasonably be considered as having a cause of action. He determined that the second option applied in that case.

12. Counsel also referred to the 1998 OIC decision in *Janousek v. Halifax Insurance Company et al* (OIC #A96-000449). In that case, Ms. Janousek was struck as a pedestrian by an uninsured vehicle. The driver of the vehicle lost control of the car, and after striking Ms. Janousek, hit a fence. That impact caused debris from the fence to fall on three unoccupied vehicles parked in a parking lot on the other side of the fence. Each of those vehicles was covered by an auto policy. Arbitrator Manji was asked to determine

whether the Claimant had recourse against the insurer of any of the parked vehicles for accident benefits. In doing so, she was required to analyse whether they were “involved in the incident from which entitlement to statutory accident benefits arose” appearing in section 268(2)2(iii) of the *Act*.

13. Arbitrator Manji found that a person may be involved in an accident involving an insured automobile even though that automobile may not have caused the accident, or come into contact with the injured person. She determined, however, that the parked vehicles on the other side of the fence that happened to be struck by the uninsured vehicle played no role in the incident that caused injury to the Claimant, and that the nexus between these vehicles and the accident was remote. She concluded that Ms. Janousek did not suffer injuries as a result of an accident involving the insured automobiles, resulting in the Fund being responsible to pay her claim.

14. Counsel also referred to Arbitrator Samis’ decision in a Loss Transfer dispute between *Dominion of Canada & Kingsway Insurance* (August 23, 1999). In that case, a heavy commercial vehicle insured by Kingsway drove out of a truck stop and crossed the northbound lanes of Highway 11 before making a left turn onto the southbound lanes of the highway. The Claimant was driving northbound on Highway 11. He applied his brakes when he saw the truck cross the northbound lanes, believing that his passage was obstructed. His vehicle skidded and struck a pickup truck parked on the side of the road. There was no contact between the Claimant’s vehicle and the truck insured by Kingsway.

15. The Claimant applied for accident benefits to Dominion, his insurer. Dominion sought reimbursement for the benefits it paid out from Kingsway, the insurer of the truck, under the Loss Transfer provisions in section 275 of the *Insurance Act*. The threshold question that Arbitrator Samis was asked to determine was whether the truck that crossed the highway but did not come into contact with the Claimant’s vehicle was “involved in the incident from which responsibility to pay statutory accident benefits arose” (section 275(1) of the *Act*). If the truck was found not to be involved in the incident, section 275

would not apply, and Dominion would not be entitled to pursue a claim for Loss Transfer.

16. Arbitrator Samis noted that the term “involved” is broader than “in collision with” or other language requiring contact between vehicles. He offered the following five criteria to consider in determining whether a vehicle is involved in an incident – whether there was any contact between the vehicles, the physical proximity of the vehicles, the time interval between the actions of the two vehicles, whether there was a causal relationship between the actions of one vehicle and the subsequent actions of another, and whether it is foreseeable that the actions of one vehicle might directly cause injury to another vehicle or its occupants. Applying these criteria to the facts before him, he determined that the truck insured by Kingsway was involved in the incident. This decision was upheld on appeal to the Superior Court (January 11, 2000), with Justice Sachs stating that the analysis set out by Arbitrator Samis was correct.

17. Counsel for The Personal also cited Arbitrator Bialkowski’s decision in a priority dispute between *Economical Insurance v. Wawanesa, Certas, Unifund & MVACF* (February 8, 2011). In that case, two vehicles collided in the westbound lanes of Queen Street in Brampton and debris from that collision struck a Ford Explorer insured by Certas, travelling in the eastbound lanes. One of the issues for determination was whether the fact that the debris from the collision between the vehicles in the westbound lanes had struck the Certas insured vehicle resulted in that vehicle being “involved” in the incident.

18. Arbitrator Bialkowski cited Arbitrator Samis’ decision in *Dominion v. Kingsway, supra*, and the criteria for “involvement” set out in that case. He determined that the Certas insured vehicle was not involved in the accident, given that there was no contact between that vehicle and the others, that the Certas insured vehicle was physically separated from the other two by a cement median. He also noted that the actions of the driver of the Certas insured vehicle had no impact on the actions of the other vehicles.

PARTIES' ARGUMENTS:

The Personal – initial submissions:

19. Ms. Khan submitted that the main issue to be determined is whether the vehicle insured by The Personal was “involved in the incident” that led to the Claimant’s injuries. She contended that it was not, and noted that the TPIC insured vehicle did not come into contact with Mr. Andrada or exert any force that led to him being struck by the vehicle insured by ACE.

20. She argued that the impact that ensued between the vehicle insured by Unifund and Mr. Chan’s vehicle was a separate incident, which did not contribute in any way to the injuries sustained by the pedestrian Claimant. She also noted that the impact between the ACE insured vehicle and Mr. Andrada occurred some distance from where Mr. Chan’s vehicle was stopped, and contended that his actions did not contribute in any way to either the initial collision between the ACE and Unifund insured vehicles, or to the impact between the Unifund vehicle and the Claimant.

21. Ms. Khan cited Justice Perell’s comments in *Seetal v. Quiroz, supra*, and contended that there was no “temporal, spatial or participatory nexus” or “proximity in place, time and participation” between the vehicle insured by The Personal and Mr. Andrada, on which to base a finding that that vehicle was involved in the accident. She also submitted that Mr. Chan was not a person who “caused or contributed to the accident”, or against whom the Claimant would have a cause of action. She contended that when the facts of this case are analysed against the criteria applied by the court in *Seetal*, it is clear that the vehicle insured by The Personal was not involved in the incident that caused the Claimant’s injuries.

22. Counsel also referred to Arbitrator Samis’ decision in *Kingsway v Dominion, supra*, and the five criteria set out for interpreting the phrase “involved in the incident”. She noted that Arbitrator Bialkowski adopted this analysis in *Economical v Wawanesa, supra*, to find that the vehicle struck by debris from another collision was not involved in

the accident. She contended that the facts of this case resemble those in the Bialkowski case, but that the connection between the vehicle insured by The Personal and the collision between the ACE vehicle and the Claimant here is even more remote. She submitted that when the “Samis criteria” are applied in this case a similar finding should result, as the actions of Mr. Chan had no impact on the other two vehicles or the Claimant, nor was it foreseeable that his actions might cause harm or injury to Mr. Andrada.

Unifund's submissions:

23. Counsel for Unifund disagreed with the position outlined above and contended that the vehicle insured by The Personal was involved in the accident. He noted Justice Perell's finding in *Seetal v. Quiroz, supra*, that the Lombard insured taxi was involved in the accident, despite the fact that its driver did not cause the Plaintiff's injuries or contribute to the accident, and submitted that the same reasoning should apply in this case.

24. Mr. Greenside submitted, however, that Mr. Andrada was not an “insured” under the policy issued by The Personal, and that section 268(2)2(i) of the *Act* would therefore not apply. He set out that when the analysis shifts to the second “rung” of the priority ladder, it is clear that ACE would be in highest priority to pay benefits to Mr. Andrada by virtue of section 268(2)2(ii) of the *Act*, as it insured the vehicle that struck Mr. Andrada.

25. Counsel cited some older case law that led to the evolution of the concept of “transmission of force”. He noted that the Ontario Court of Appeal adopted the idea in 1979 that a person can be considered to have been “struck by” a motor vehicle when that vehicle provides the transmitting force for the collision that causes injury, even if the actual contact with the victim is with another vehicle (see *Ezard v. Warwick* (1979) 25 O.R. (2d) 577, *Traham v. Royal Insurance Co of Canada* (1981) 32 O.R. (2d) 143).

26. Mr. Greenside then cited Arbitrator Samis' decision in *Co-operators v. Royal Insurance* (issued August 29, 1996), in which this concept was considered. The claimant in that case was standing in between two vehicles, one of which was insured by Co-operators. That vehicle was struck by a vehicle insured by Royal, and as a result of that impact, the Co-operators insured vehicle came into contact with the claimant and caused injury. In considering which insurer insured the automobile that "struck" the claimant under section 268(2)2(ii), Arbitrator Samis reviewed the older case law and determined that the law in Ontario was clear as of 1979 "that a person is struck by a motor vehicle when that vehicle provides the transmitting force for an injury to occur, even when the actual contact is with another vehicle." He determined that the claimant was accordingly "struck" by the vehicle insured by Royal and that they were therefore responsible to pay benefits to him, despite the fact that the Co-operators vehicle was the one that made actual contact with him.

ACE's submissions:

27. Counsel for ACE framed the central issue to be decided in a different way. He stated that I should determine whether Mr. Andrada was involved in an accident involving The Personal insured vehicle, as opposed to whether the vehicle insured by The Personal was involved in the incident. While this distinction may seem trivial or semantic, it is important to note that the latter question derives from the words in section 268(2)2(iii) of the *Act* and is therefore part of the priority scheme, while the former arises from the definition of "insured person" in section 3(b) of the *Schedule*.

28. Mr. Frost contended that all three vehicles were involved in a chain reaction collision. He submitted that the initial impact between the vehicles insured by ACE and Unifund was the direct cause of the subsequent two impacts, involving the Claimant and the ACE insured vehicle on the one hand, and the vehicle insured by Unifund and Mr. Chan's vehicle (insured by The Personal) on the other hand. He noted that all of these events happened in the same area, and that the various impacts occurred within seconds of each other.

29. Counsel cited Justice Perell's finding in *Seetal v. Quiroz, supra*, that the Lombard insured taxi was found to have been involved in the accident, despite the fact that it had not caused the collision injuring the Plaintiff, and suggested that the same result should be reached in this case. He submitted that it was possible that Mr. Chan's actions affected the actions of the driver of the ACE insured vehicle, and that there was no evidence before me that the TPIC insured vehicle did not cause or contribute to the actions of the other drivers or the Claimant. Counsel similarly contended that the application of the criteria outlined by Arbitrator Samis in *Dominion v. Kingsway, supra*, should lead to a determination that Mr. Andrada was involved in an accident with the vehicle insured by The Personal.

30. There are three 'branches' to the definition of "insured person" in section 3(b) of the *Schedule*, one of which is "a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario". Counsel for ACE submits that all three vehicles listed in the Police MVA Report (insured by Unifund, Ace and The Personal) were involved in the accident, and that Mr. Andrada therefore fits within this definition, and would be an "insured" under all three policies. He argued that subsection 268(2)2(i) of the *Act* would therefore govern, and that as Mr. Andrada submitted his claim for benefits to The Personal, section 268(4) dictates that they would be the priority insurer.

Reply submissions – The Personal:

31. Ms. Khan disputed Mr. Frost's claim that the central issue to determine is whether or not Mr. Andrada was involved in an accident involving the vehicle insured by The Personal. She noted that his submissions presume that the definition of "insured person" in the *Schedule* should be applied to section 268(2)2(i) of the *Act*, and contended that this should not be the case.

32. She stated that if the definition found in the *Schedule* is imported into the priority scheme outlined in 268(2)2 of the *Act*, the remaining sections in the scheme would be rendered meaningless. She noted that section 268(2)2(iii) specifically references

automobiles “involved in the incident”, and suggested that if the question of a vehicle’s involvement was incorporated into the analysis of whether a claimant was an “insured” under the first rung (section 268(2)2(i)), part (iii) of that section would be superfluous. She further noted that sections 268(4), 268(5) and 268(5.2) that address ‘tiebreaking’ in the event that a claimant has recourse to more than one insurer, would also be unnecessary.

33. Counsel further submitted that the purpose of the priority scheme in section 268(2) of the *Act* is to put the obligation to pay accident benefits to a claimant on an the insurer with the strongest connection to the claimant. She stated that if Mr. Frost’s contention that Mr. Andrada was an “insured” under all three policies was accepted, the purpose of the priority scheme would be undermined, in that the insurer of a vehicle with no connection to a claimant could potentially be found to be in higher priority than a vehicle that struck a claimant and caused his or her injuries.

34. Counsel also made submissions on the question of whether the fact that the OCF 1 Form was sent to The Personal should result in Mr. Andrada being found to have exercised his discretion to choose between insurers determined to be on the same rung. As this point has no bearing on the ultimate outcome of the matter, I will not set out these arguments.

ANALYSIS & FINDINGS:

35. The parties have put various issues before me, set out in the Arbitration Agreement appended to this decision. Usually, the sequential steps in a priority analysis will follow the order of the “rungs” on the priority ladder set out in section 268(2) of the *Act*. Given the agreement filed in this case, however, I will deviate from that order and approach the issues in the manner suggested by the parties.

Was the vehicle insured by The Personal involved in the incident?

36. This is the first question posed in the Arbitration Agreement. While counsel for ACE suggested that the question should be framed in a different manner – namely,

whether Mr. Andrada was involved in an accident involving the TPIC insured vehicle, the phrase found in the definition of "insured person" in the *Schedule* - that does not appear in the parties' Arbitration Agreement. I am bound to follow this document, from which I derive my jurisdiction, and which has been executed by all parties. I will therefore focus on the question posed in the agreement, and provide my comments on the question raised by counsel for ACE later in the decision.

37. Having considered the facts agreed to by all parties and the arguments submitted, I find that the vehicle insured by The Personal and driven by Mr. Chan was not involved in the incident resulting in the Claimant's injuries. The fact that this vehicle is listed in the Police MVA Report is of no import. This priority dispute arises from Mr. Andrada's claim for benefits under the *Schedule*, caused by him being struck by a vehicle insured by ACE and suffering injuries. Any question raised about the involvement of other vehicles for the purpose of determining the priority dispute must be considered in this context.

38. Mr. Chan's vehicle was stopped on Pharmacy Avenue, waiting for the light to change, when these events took place. His vehicle was ultimately struck by the Unifund vehicle, after that vehicle's initial impact with the ACE vehicle in the intersection caused it to veer southward. Mr. Chan's statement suggests that he was struck by the vehicle insured by Unifund two or three seconds after he noticed some debris from the initial collision coming in his direction, His vehicle did not make contact with Mr. Andrada, and he estimated that Mr. Andrada was approximately forty feet away from his car.

39. While the sequence of events described above stemmed from the initial collision between the ACE and Unifund vehicles, I find that the 'secondary impacts' were two separate events. Mr. Andrada was struck by the ACE insured vehicle, while Mr. Chan's vehicle was struck by the Unifund insured vehicle. While these secondary impacts occurred close in time to each other, they were separate consequences of the initial accident.

40. I have reviewed the decision in *Seetal v. Quiroz, supra*, closely. While Justice Perell grappled with the question of whether a vehicle that was not at fault for someone's injuries can nevertheless be "involved in an accident", the discussion of that issue arises from completely different circumstances than those in the instant case. Ms. Seetal was struck by an uninsured driver. She commenced a tort claim against him, and was forced to add the Lombard insured (and Lombard itself) by the Fund. The determination of the motion before the judge turned on whether Lombard was obliged to provide Uninsured Motorist Coverage to her under its policy, pursuant to section 265(2) of the *Act*. Nothing in the analysis undertaken involves a discussion of the phrase at issue here from section 268(2)2(iii) of the *Act* – namely, whether the Claimant has recourse against "the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose".

41. As a result, applying the reasoning in the *Seetal* case to the facts at hand is an awkward exercise. If the Quiroz vehicle had been insured, I suspect that the analysis and framing of the issue would have been different (presuming there would even have been a tort claim). Accordingly, I do not find Justice Perell's comments in that case to be instructive here, with the exception of his statement (in para. 41) that "involvement depends upon some proximity in place and time and participation between a person and an event or activity".

42. That statement serves as a good general guideline, and I do find it helpful to the analysis that I am called on to make in this case. While the requirements of proximity in place and time are met here, I find that the requirement for "participation" is lacking. While the vehicle insured by The Personal was struck by one of the vehicles involved in the initial collision, I would describe that as "collateral damage" rather than "involvement" in the incident that led to the Claimant's injuries.

43. Counsel also cited the decision in *Janousek v. Halifax Insurance et al., supra*. In that case, the Fund urged Arbitrator Manji to find that the parked cars that were damaged by debris from a fence that fell onto them when an uninsured driver lost control of the

vehicle he was driving and struck the claimant and then the fence, were involved in the accident. She referred to the dictionary definition of the word “involve” and determined that the fact that debris fell onto the cars in the manner it did was not enough to implicate them in the accident that led to the claimant’s injuries. She found that “the nexus or link between the insured automobiles and the accident” was remote and concluded that the vehicles in question were not involved in the accident. In my view, the nexus or link to the Claimant’s accident and the vehicle insured by The Personal in this case is equally remote, if not more so. Mr. Chan’s vehicle played no role in the incident in which the use or operation of a vehicle caused injury to Mr. Andrada.

44. Counsel focused on the criteria set out by Arbitrator Samis to determine whether a vehicle is involved in an incident in his decision in *Dominion v. Kingsway, supra*. This was a Loss Transfer dispute brought by Dominion under section 275 of the *Act*. The five criteria noted are – whether there was contact between the vehicles, the physical proximity of the vehicles, the time interval between the relevant actions of the vehicles, the possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another, and whether it is foreseeable that one vehicle’s actions might directly cause injury to another vehicle and its occupants.

45. While I find these points to be helpful in a general way, I question whether the analysis undertaken in that case should be wholly imported into a priority dispute. Section 275(1) of the *Act* specifies that the Loss Transfer provisions are only to be used if the target insurer insured the vehicle that was “involved in the incident from which the responsibility to pay accident benefits arose”. It is a “threshold requirement”, and if not met, the provisions do not apply.

46. In contrast, the ‘priority ladder’ set out in section 268(2)2 of the *Act* requires a claimant to first seek recourse against the insurer of an automobile in respect of which he or she is an “insured”. Often this will result in a finding that an insurer who does not insure a vehicle involved in the accident is the insurer with highest priority. Given this significant difference, it is not clear in my view that the criteria set out above to

determine a vehicle's involvement in the context of a Loss Transfer claim should be used to determine that question in a Priority Dispute.

47. In any event, Arbitrator Bialkowski applied these criteria in his decision in *Economical v. Wawanesa, supra*, (a priority dispute), and determined that the fact that debris from a collision between two vehicles struck a third vehicle travelling in the opposite direction did not result in that third vehicle being "involved" in the accident. If I applied these criteria to the facts of the instant case, I would reach the same determination. There was no contact between the "target vehicle" (driven by Mr. Chan) and the Claimant, and while the vehicles may have been physically proximate and the events may have occurred within a short time of each other, there is no evidence before me to suggest a causal relationship between the actions of Mr. Chan and the impact that caused the Claimant's injuries.

48. Further, while it is foreseeable that a truck pulling out onto a highway and crossing the path of an oncoming vehicle would cause that vehicle to take evasive action (as happened in *Dominion v. Kingsway, supra*.) it is not foreseeable that a secondary impact between two vehicles, neither of which struck or affected Mr. Andrada, would directly cause harm or injury to him. Accordingly, for the reasons set out above, I find that the vehicle insured by The Personal was not involved in the incident from which the Claimant's entitlement to statutory benefits arose.

Is Mr. Andrada an "insured" under the TPIC policy?

49. The next question in the sequence set out in the Arbitration Agreement that flows from the above finding is whether the Claimant is an "insured" under the policy issued by The Personal covering Mr. Chan's vehicle. Counsel for ACE contended that pursuant to section 3(b) of the *Schedule* and section 268(2) of the *Act*, the Claimant is an "insured" under this policy as he was involved in an accident involving that vehicle. He submitted that this reasoning supports a finding that Mr. Andrada would be an "insured" under the ACE and Unifund policies as well, and thus had the option of claiming benefits from any of the three insurers. Mr. Frost contended that by submitting his OCF 1 form to The

Personal, he effectively chose them, noting that he had the assistance of counsel in completing that form.

50. Counsel for Unifund did not support this position.

51. I find that Mr. Andrada was not an “insured” under the policy issued by The Personal, for a few reasons. Firstly, I have already determined that the TPIC insured vehicle was not involved in the incident that led to the Claimant’s injuries, but rather, that Mr. Chan’s vehicle was involved in a separate accident with the vehicle insured by Unifund. As a result, even if I agreed with counsel for ACE that the question should be framed as whether Mr. Andrada was involved in an accident involving the TPIC vehicle, I would find, for the reasons explained in the above section, that he was not.

52. Further, I do not believe that the definition of “insured person” in section 3 of the *Schedule* should be imported into the section 268(2) analysis. As I stated in *Certas v. Zurich* (decision issued September 10, 2013) my task as an arbitrator appointed to determine a priority dispute is to interpret the provisions in section 268(2) of the *Act* and apply them to the circumstances of the case before me. While the underlying issue is which insurer is obliged to pay accident benefits, a priority dispute does not address or impact upon a claimant’s entitlement to benefits under the *Schedule*. In my view, the definition of “insured person” in the *Schedule* has no place in an analysis of priority.

53. Section 224(1) of the *Act* defines “insured” as “ a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person”. The last part of this definition would seem to support my view that the definition in the *Schedule* of “insured person” has no bearing in the priority context. While this definition is admittedly broad in scope, the general rules of modern statutory interpretation must be heeded when analysing a provision such as section 268(2) of the *Act*.

54. The rules of statutory interpretation dictate that a statutory or regulatory provision must be considered in its entire context and if its meaning is unclear, it should not be interpreted in a manner that renders other parts of the provision to be redundant. As noted by counsel for The Personal, if Mr. Andrada (or any other claimant in the same circumstances) is found to be an "insured" under the TPIC policy by virtue of his involvement in an accident with that vehicle under the first "rung" of the priority ladder, 268(2)2(iii) of the Act would be redundant and meaningless. In my view, this could not have been the intention of the drafters of this section.

55. While different interpretations of the language in question can be argued, the overall premise of the priority scheme must be kept in mind when doing so. As I see it, the scheme calls for an initial determination of whether a claimant has a direct connection to a policy either through his or her own insurance or by virtue of a spousal or dependent relationship with someone who does (or by virtue of the 'deemed insured' provisions). If no such connection is found, in the case of a non-occupant, the inquiry shifts to whether there is an insurer of a vehicle that struck him or her. If no insurer fits that definition, the net is then cast more broadly in order to determine whether there is an insurer of a vehicle that was involved in the incident giving rise to the claim for benefits.

56. I find support for this 'staged approach' in Arbitrator Samis' decision in *Co-operators v. Royal, supra*. On page 2 of that decision, he states as follows:

It is to be noted that Mr. Mann is firstly obligated to claim benefits from a policy where he is an "insured". Under the definitions imposed on all automobile insurers, the Statutory Accident Benefits Schedule defines "insured person" to include all individuals involved in accidents with the described automobile. Thus Mr. Mann is an "insured person" both under the Co-Operators policy and under the Royal policy. Does this then mean he must claim from those policies in accordance with clause 2.i. as an insured? In my view the ranking rules which are set out in the Insurance Act would make no sense if the term "insured" in clause i. was held to have the same meaning as the term "insured person" as set out in the definitions of the Statutory Accident Benefits Schedule. The legislation clearly contemplates in clauses ii. and iii. categories of persons who are not "insured" but who are within the broader definition of "insured person" under the Statutory

Accident Benefits Schedule. Thus, I conclude that Mr. Mann is not a person described in section 268 (2) 2. i.

(emphasis added)

57. I note that Arbitrator Bialkowski's decision in *The Personal Insurance Company v Kingsway General* (June 16, 2009, at p.4) in which he relies on reasoning by Arbitrator Jones in *Axa v. State Farm and CGU Insurance* (July 14, 2005) also supports this view.

Who between Unifund and ACE is in highest priority? ("striking vehicle")

58. The Arbitration Agreement provides that if I find that the vehicle insured by the Personal was not involved in the incident resulting in Mr. Andrada's injuries, and if I find that he is not an insured under that policy, I must then determine question (d) – which of the Respondents is in highest priority? This final step calls for a determination of which automobile "struck" the Claimant, pursuant to section 268(2)2(ii) of the *Act*.

59. The Statement of Agreed Facts filed sets out that the ACE insured vehicle was proceeding eastbound on Steeles Avenue when it collided with the Unifund vehicle. That vehicle had been travelling westbound on Steeles, attempting to turn left onto Pharmacy Avenue. The two vehicles proceeded in different directions following their impact, and the ACE insured then struck the Claimant.

60. While the question raised by section 268(2)2(ii) may seem straightforward – i.e. which automobile struck the Claimant - the case law cited adds a "twist" to this analysis. Arbitrator Samis' decision in *Co-operators' v. Royal Insurance, supra*, outlines the evolution of the "transmission of force" concept through various cases in the 1970's, and finds that "as of 1979, the law in Ontario was clear that a person is "struck by" a motor vehicle when that vehicle provides the transmitting force for an injury to occur, even when the actual 'contact' is with another vehicle". He acknowledges that this earlier case law emanates from an earlier provision in the *Act* (s.236), but states that there is no reason why the changes in the compensation system that followed would lead to a conclusion that the existing case law is no longer applicable. He notes that "significant as the changes are, the issues about interpreting the word "struck" continue to be the same".

61. I agree with these comments. In Arbitrator Samis' case, the claimant was standing near a vehicle insured by Co-operators, when that vehicle was hit by a vehicle insured by Royal Insurance. That impact caused the Co-operators insured vehicle to come into contact with the claimant. Arbitrator Samis determined that due to the force it transmitted, the vehicle insured by Royal was the "striking vehicle" and thus, Royal was required to pay the benefits in question.

62. When that principle is applied here, I find that Unifund insured the "striking vehicle". While the ACE vehicle was the one that came into contact with Mr. Andrada, it was propelled in his direction by virtue of its collision with the Unifund insured vehicle. If the driver of the Unifund vehicle had not attempted to make a left turn into the intersection, the ACE vehicle would not have come into contact with Mr. Andrada. Following the case law cited, and applying the "transmission of force" concept, I conclude that the Claimant has recourse against the insurer of the automobile that "struck" him pursuant to section 268(2)2(ii) of the *Act*, and that that insurer is Unifund.

63. Accordingly, for the reasons set out above, Unifund is in highest priority to pay Mr. Andrada's claim.

ORDER:

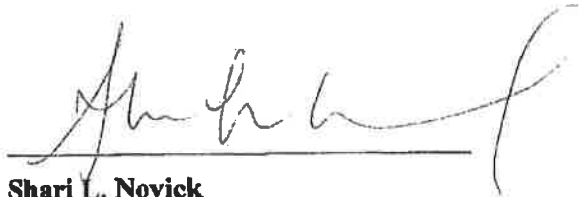
The Application for Arbitration brought by The Personal is hereby dismissed against ACE, but succeeds against Unifund. Unifund shall reimburse The Personal for the benefits it has paid out to date, and shall assume responsibility for Mr. Andrada's claim going forward.

COSTS:

Given the result, The Personal and ACE are entitled to recover their costs of this proceeding from Unifund, subject to counsel advising me of any relevant Offers to Settle having been exchanged. If the parties cannot agree on the quantum of costs payable, I

invite them to contact me so that a teleconference can be convened in order to discuss the issue.

DATED at TORONTO, ONTARIO this 3rd DAY OF JUNE, 2016.

A handwritten signature in cursive script, appearing to read 'Shari L. Novick', written over a horizontal line.

Shari L. Novick

Arbitrator

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NO. 9994 P. 2/502/003

IN THE MATTER OF Section 266 of the Insurance Act, R.S.O. 1990 c. I.8 and Regulation 283/95

AND IN THE MATTER OF THE Arbitration Act, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY

Applicant

AND

UNIFUND ASSURANCE COMPANY AND ACE INA INSURANCE COMPANY

Respondents

ARBITRATION AGREEMENT

The Applicant and Respondents, by their respective lawyers, hereby agree as follows:

ARBITRATION ISSUES

1. The Applicant and Respondents agree to submit to arbitration pursuant to Ontario Regulation 283/95 and the Arbitration Act, 1991 on the following issues:
 - a. Was the vehicle insured by The Personal Insurance Company ("TPIC") involved in the incident?
 - b. If the vehicle insured by TPIC was involved in the incident, who between Unifund, ACE INA and TPIC is highest in priority?
 - c. If the vehicle insured by TPIC was not involved in the incident, is Enrique Andrada (hereinafter referred to as the "Claimant") still considered an "insured" under the TPIC policy?
 - d. If the answer to "c" is no then who between Unifund and ACE INA is highest in priority?
 - e. If the answer to "c" is yes, are all three policies equal?

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- f. If the answer to "e" is yes, then did the Claimant "choose" TPIC by virtue of submitting his Application for Accident Benefits (OCF 1) to TPIC, or does the Applicant still have the opportunity to make a choice?
 - g. If the answer to "e" is no then which policy is highest in priority or which two policies are considered equal?; and
 - h. If the answer to "g" is that two policies are considered equal and TPIC is one of those two policies, did the Claimant choose TPIC by virtue of submitting his Application for Benefits (OCF 1) to TPIC, or does the Claimant still have the opportunity to make a choice?
2. The amount payable for costs, disbursements and interest by the unsuccessful party to the remaining parties?

LEGAL COSTS

3. Payment of legal costs shall be as determined by the arbitrator, taking into account the success of the parties, any Offers to Settle, the conduct of the proceedings, and the principles generally applied in litigation before the courts of Ontario.

COST OF ARBITRATION

4. The parties agree that the arbitrator's Interim accounts, if any, up to the arbitration hearing and/or any preliminary issue hearings will be borne equally by the parties and then will be subject to reassessment in accordance with the result of any hearings, pursuant to the criteria set out in paragraph 4 of this agreement.
5. The expenses of the arbitrator and the expenses of the arbitration, including any expenses that were the subject of any Interim accounts from the arbitrator, shall be apportioned as determined by the arbitrator, taking into account the success of the parties, any Offers to Settle, the conduct of the proceedings, and the principles generally applied in litigation before the courts of Ontario.

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DOCUMENTARY DISCLOSURE

6. The parties agree that they are each obligated to give full documentary production relevant to the issues in this matter and that any issues with respect to solicitor and client privilege or litigation privilege will be dealt with by means of preliminary motion before the arbitrator.
7. All matters of discovery, disclosure, production, and procedures shall be as directed by the arbitrator in the absence of an agreement between the parties.

EVIDENCE AND CONDUCT OF ARBITRATION PROCEEDING

8. The parties will endeavor to shorten the arbitration proceedings to the extent possible by submitting an Agreed Statement of Facts.
9. If *viva voce* evidence is necessary, witnesses will be called, examined in chief, cross-examined and examined in reply as if the arbitration were a court proceeding.
10. A party who intends to call an expert witness at the arbitration hearing shall, not less than 90 days before the commencement of the arbitration, serve on every other party to the arbitration a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
11. A party who intends to call an expert witness at the arbitration hearing to respond to the expert witness of another party shall, not less than 60 days before the commencement of the arbitration hearing, serve on every other party to the arbitration a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

APPEAL

12. The parties expressly reserve the right of appeal of any interim or final Awards of the arbitrator in this proceeding without leave to a single Judge of the Ontario Superior Court of Justice on issues of law or mixed fact and law. An appeal of an award or an application to

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set aside an award shall be commenced within 30 days after the appellant or applicant receives the award, correction, explanation, change, or statement of reasons on which the appeal or application is based.

13. In the event of an appeal by any of the parties, the costs referred to under the heading Legal Costs shall not be payable, but shall become payable once this matter has been appealed and in accordance with the result of the appeal. Provided, however, that pending the appeal process, the costs referred to under the heading "Cost of Arbitration", will be borne equally by the parties and then subject to distribution in accordance with the result of the appeal.


14. In the event of an appeal, the arbitrator's decision that is the subject of the appeal will be stayed pending the outcome of the appeal.

IDENTITY OF ARBITRATOR AND HEARING DATE


15. The parties hereby agree to the appointment of Sheri Novick as arbitrator pursuant to the Arbitration Act, 1981, S.O. 1981, c. 17.

16. The location and time of the arbitration and any other hearings are to be agreed upon by the parties, but in the absence of any such agreement then as directed by the arbitrator.

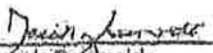
Date: Jan 19 / 2016


Shelley C. Khan
Lawyers for the Applicant, The Personal Insurance

Date: January 31 / 2016


Jason Frost
Schulz Frost LLP
Lawyers for the Respondent, ACE INA Insurance

Date: January 18, 2016


Derek Greenside
Kostynluk & Greenside
Lawyers for the Respondent, Unifund Assurance Company