IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.I.18, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act*,
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTACT INSURANCE COMPANY

Applicant

- and –

OLD REPUBLIC INSURANCE COMPANY

Respondent

AWARD

Counsel:

Joseph Lin and Connor O'Neil
Counsel for the Applicant, Intact Insurance Company

Catherine A. Korte and Anthony H. Gatensby
Counsel for the Respondent, Old Republic Insurance Company of Canada

ISSUES:

This Arbitration involves a priority dispute between insurers. The issues, as set out in the arbitration agreement and as paraphrased by me, are as follow:

(a) As between Intact Insurance Company ["Intact"] and Old Republic Insurance Company ["Old Republic"], which insurer is responsible to pay statutory accident benefits to Allan B. [Allan"][1] arising out of a motor vehicle accident occurring on January 7, 2012? This issue requires me to make a determination as to whether Allan was a deemed named insured under the Conray Dymond / Conray Truck Line fleet policy of automobile insurance issued by Old Republic at the time of the accident. If Allan was a deemed named insured, then Old Republic has the higher priority. If Allan was not a deemed named insured, then Intact has the higher priority.

(b) If I determine that Old Republic has the higher priority, what is the amount to be paid by Old Republic to Intact?

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[1] By reason of privacy concerns, Allan B. is not further described in this Award.

(c) What is the amount of interest owing upon the amount determined in respect of issue (b), if any?

(d) What is the quantum of costs and which party has the burden of payment?

The legal backdrop to the arbitration arises from section 268 (2) of the *Insurance Act* which creates a priority scheme to the extent that two or more insurers may be potentially liable to pay statutory accident benefits.

As Allan was an occupant of a vehicle, his first recourse should be against the insurer of an automobile in respect of which he was an insured. His secondary recourse would be against the insurer of the automobile in which he was an occupant.

Allan was not the named insured under any policy of automobile insurance. However, Intact takes the position that he was the deemed named insured pursuant to section 3(7)(f) of the *Statutory Accident Benefits Schedule* [the so-called "company car" provision]. This requires a consideration of the phrases "regular use" and "at the time of the accident". This section is reproduced for convenience and with emphasis added:

(f) 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*

EVIDENCE:

The following documents were entered into evidence at the hearing which proceeded on a written record only:

1. An Agreed Statement of Facts and Documents Brief consisting of a brief statement of facts, the arbitration agreement, a statement taken from Alan by an insurance adjuster on October 17, 2012 and the transcript of Allan's examination under oath held on March 3, 2015

2. Written submissions from each of Intact and Old Republic and Reply submissions of Intact

3. A Book of Authorities from Intact [Old Republic's authorities being appended to its written submissions]

The facts, as I find them, are as follows.

From the agreed statement of facts, I find that a motor vehicle accident occurred at approximately 7:30 AM on Saturday, January 7, 2012. Allan was involved in a two-party motor vehicle accident. He was driving a vehicle owned by his mother-in-law, Wendy A., who maintained a policy of automobile insurance with Intact. Allan sustained injuries in the accident and applied to Intact for statutory accident benefits which were paid by Intact.

At the time of the accident, Allan did not own any vehicle of his own and was not a named insured under any motor vehicle policy of insurance. At the time of the accident, Allan was working full time as a short haul truck driver for Conray Truck Line. At the time of the accident, Conray had a fleet policy of automobile insurance issued by Old Republic.

From the statement of Allan dated October 17, 2012, I find that Allan was employed with Conray Dymond / Conray Truck Line since September 2011 as a full-time truck driver. Allan was listed as a driver on his employer's policy of automobile insurance. As part of his employment, he drove transport trucks. He typically drove the same transport truck which was a Mack transport. He was not provided with a company vehicle for personal purposes and did not have access to other company vehicles apart from vehicles which he would use for purposes of his work as a truck driver.

Allan was required to find his own transportation to travel from his home in Cobalt to his place of employment in New Liskeard / Temiskaming Shores. This would require him to travel approximately 20 km. He seemed to have a practice of borrowing vehicles owned by family members. If he did not have access to these vehicles, he could take the bus or attend at his place of employment on the day before his workday and sleep in a truck in the yard. This sleeping arrangement had occurred on 4 or 5 times before the time of the accident.

Allan typically worked Monday through Friday and on some Saturdays or Sundays if there was work required of him. He did not have a set schedule. Allan's boss, who was apparently the owner of the company, would advise Allan the day before whether he was expected to work the next day and what he was to do. On Friday, January 6, 2012, Allan was informed by his boss that he was expected to work on Saturday, January 7, 2012. Allan was using his mother-in-law's vehicle to get to work. The accident occurred at approximately 7:30 AM. But for the accident, Allan would have started work at approximately 8 AM.

From the transcript of Allan's examination under oath, I find that Allan's only employment was with Conray Dymond / Conray Truck Line. In addition to driving transport trucks, he was involved in the loading of trucks. The owner of the company would inform Allan the day before as to what he would be doing and, insofar as Saturday or Sunday work was concerned, whether he was required to work. Allan's remuneration was variable in that he might be paid by the hour, by the mile or by the delivery.

Allan drove a number of trucks which were all owned by Conray Dymond / Conray Truck Line. The owner of the business would assign a truck and trailer when assigning work for the next day. Allan was not authorized to take a truck home or to use it for personal purposes. When he arrived at the yard, he would look at a clipboard to verify that there had been no change to his driving assignment. He would pick up keys in the warehouse/shop. The warehouse/shop was generally unlocked and access to the keys did not require Allan to interact with anyone on behalf of Conray Dymond / Conray Truck Line. He was allowed to sleep in the truck the night before his driving assignment.

Allan had discretion as to how he would complete the delivery. If it made common sense, he could start the delivery on the day or night before [being the day when the assignment was given to him by the owner of the company], sleep overnight in the truck and complete the delivery on the next day and return to the yard.

Allan was instructed on Friday, January 6, 2012 to load a trailer in Englehart on Saturday, January 7, 2012. There was no specific time set for his arrival in Englehart.

ANALYSIS:

As I have noted, above, the issue to be determined by me is whether Allan was a deemed named insured under the policy of insurance issued by Old Republic at the time of the accident. This issue turns on an interpretation and application of section 3(7)(f) of the *Statutory Accident Benefits Schedule* [the so-called "company car" provision]. This requires a consideration of the phrases "regular use" and "at the time of the accident". This section is reproduced for convenience and with emphasis added:

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, ***at the time of the accident,***

(i) the insured automobile is being made available for the individual's ***regular use*** *by a corporation, unincorporated association, partnership, sole proprietorship or other entity*

The parties appear to be in agreement that Allan had "regular use" of one or more insured automobiles under the policy issued by Old Republic to Conray Dymond / Conray Truck Line. In the event that I have misunderstood or misapprehended agreement in this regard, I would have no difficulty finding that Allan had regular use of an insured automobile made available to him by Conray Dymond / Conray Truck Line, having regard for the facts, as set out above, and the law as reviewed, below.

The courts have defined "regular" as intended to describe "periodic, routine, ordinary or general" as opposed to "irregular, or out of the ordinary, or special".[2]

The section under consideration and its predecessor does not require that the use be frequent, exclusive [in the case of a fleet of automobiles] or personal to be regular.[3]

"Regular use" has been defined in several arbitration decisions as use that is habitual, normal and recurred uniformly according to a predictable time and manner. Cases where the individuals have been found not to be regular users of a subject vehicle arose where the characterization of the use was "irregular at best and out of the ordinary ..."[4]

"Regular use" does not require that the person for whom the vehicle is being made available be driving or operating the vehicle which was being made available at the time of the accident. The person could be a pedestrian or a passenger in another's automobile. [5]

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[2] Canadian General Insurance Company v. State Farm Mutual Insurance, [1957] O.R. 257 (CA)

[3] State Farm Mutual Insurance Company v Kingsway General Insurance Company (Arbitrator Lee Samis, October 20, 1999)
Schneider v Maahs Estate, 2001 Can LII 3018 (On C.A.)

[4] Zurich Insurance Company v. Personal Insurance Company, 2009 Can LII 2632 (On S.C.)

[5] Wawanesa Mutual Insurance Company v Royal & SunAlliance Insurance Company (Arbitrator M. Guy Jones, May 13, 2009)

The issue requires an examination of whether a vehicle is available for regular use and not whether there was actual regular use of the vehicle. While actual use is evidence of the availability of the vehicle, the fact that the vehicle was not being used at the time of the accident does not necessarily mean that it was not available to an individual.[6]

The essence of the issue before me is **whether a Conray Dymond / Conray Truck Line vehicle was available to Allan at the time of the accident** [my emphasis].

The leading and governing decision is that of Justice Belobaba in *ACE INA Insurance v. Cooperators General Insurance Co.*[7] In this case, the claimant was a passenger in a friend's vehicle late on a Saturday night. The claimant was an employee of Enterprise Rent a Car and regularly drove company vehicles while at work. His work was confined to Monday through Friday. He had not worked for some 9 days. The court held that the claimant did not have a company vehicle "available to him at the time of the accident" and, as a result, he was not a deemed named insured under the policy issued to his employer. Justice Belobaba writes:

[14] I begin by noting that this is not a case about the meaning of "regular use" but about the meaning of the phrase "being made available at the time of the accident."

[15] As already noted, one can paraphrase the relevant portion of s. 66(1) as follows: if, at the time of the accident, an insured company automobile is being made available for the individual's regular use, then that individual shall be deemed to be a named insured under the company's policy insuring the automobile at the time of the accident.

[16] 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.

[17] 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.

[18] 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.*

ACE INA v. The Cooperators General Insurance Company, 2009 Can LII 13625 (On S.C.)

[6] Unifund Assurance Company v. St. Paul Fire & Marine Insurance Company (Arbitrator Philippa Samworth, August 9, 2000)
State Farm Mutual Insurance Company v. Kingsway General Insurance Company (Arbitrator Lee Samis, October 20, 1999).

[7] ACE INA v The Cooperators General Insurance Company, [2009] O.J. No. 1276 (S.C.J.).

- *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.*

[19] 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, i.e. is accessible to him - even if he is a pedestrian or an passenger in someone else's car.

Later in the decision, Justice Belobaba explains why he disagreed with the analysis of the arbitrator and granted the appeal. He explains that the arbitrator's error was to find that once the claimant was found to be a regular user, he acquired the status of a deemed named insured. Justice Belobaba writes as follows:

[21] In my opinion, the error made by the arbitrator is found at page 12 of his reasons where he states the following: "I find that once an individual has been deemed to be a named insurer by virtue of the factual situation in the application of s. 66, the status of being a "named insurer" under the policy remains even if at the time of the accident the employer is not making a specific vehicle available to the employee."

[22] With respect, this analysis is mistaken in two ways. One, s. 66 is not like a floating charge. It does not confer a portable status that "remains" with the insured – the status is only conferred at, and for, a moment in time, namely the time of the accident. The employer's insurer is liable to pay accident benefits if and only if at the time of the accident a company-insured car was being made available to the employee. Two, s. 66 does not ask whether "a specific vehicle" was being made available to the employee but whether any vehicle was being made available.

[23] For example, an employee is at work and on duty, ready to drive one of several Enterprise cars but no specific car has yet been selected. He decides to walk across the street to buy a coffee and is hit by a car. Section 66 would apply even if no specific vehicle had yet been made available. It is enough that at the time of the accident, one or more insured vehicles were being made available to that employee.

[24] If further support is needed for what in my view is a straight-forward reading of the plain language in s.66, one only has to compare how the language in the "company car" regulation was changed from s. 91(4) in Bill 164 to s. 66(1) in Bill 59.

[25] Before the Bill 59 SABS came into effect on November 1, 1996, accident benefits coverage in Ontario was found in the Statutory Accident Benefits Schedule — Accidents After December 31, 1993 and before November 1, 1996, O. Reg. 776/93 ("Bill 164 SABS"). Notice how the regulation was changed:

Former provision	*Current provision*
• *Bill 164 SABS, Section 91(4)*	• *Bill 59 SABS, Section 66(1)*
• *91(4)...if an insured automobile is made available for the regular use of an individual...by a corporation...the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits...*	• *66. (1) An individual...shall be 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* • *(a) the insured automobile is being made available for the individual's regular use by a corporation...*

- • ***Former regulation (Bill 164)*** *- If an insured company automobile is made available for the regular use of an individual, the individual shall be deemed to be a named insured under the policy*

- • ***Current regulation (Bill 59) -*** *If an insured company automobile is being made available at the time of the accident for the individual's regular use, the individual shall be deemed to be a named insurer under the policy...*

[26] I agree with Mr. Samis, counsel for ACE, that by adding 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. In other words, in reworking the "regular use" provision from the Bill 164 SABS predecessor regime, the legislature has seen fit to focus the inquiry on vehicle availability "at the time of the accident". Otherwise, the phrase "at the time of the accident" in the Bill 59 SABS would be meaningless and adding it to the "regular use" provision would have served no purpose.

I should point out that there is no difference between section 3(7)(f) and section 66(1) [under an earlier iteration of the SABS].

Counsel for Old Republic submits that the test is whether, at the moment of the accident, the claimant **could have** been operating the company automobile. This emphasis was provided to me by counsel for Old Republic.

In her very thorough and capable submissions, she emphasized that I should focus upon who had care and control of the vehicle at the time of the accident. She urged me to find that on the facts before me, this would be the employer rather than the employee, Allan. Counsel emphasized that Allan was not allowed to use a company vehicle other than for company delivery purposes and was required to provide his own transportation to and from the company yard. Counsel submitted that at the moment of the accident, Allan

was using a vehicle for personal purposes and had no authority over or control of a company vehicle. As a result, a company vehicle was not available to him and Intact's priority claim must fail.

My review of the case law leads me to an opposite conclusion.

Arbitrator Philippa Samworth, in *Unifund Assurance v. St. Paul Fire and Marine Insurance* (August 9, 2000), observed that:

> "the use of the words "make available" to my mind suggest that whether an individual actually uses the vehicle may not necessarily be a key part in determining regular use. In looking at the wording of section 66, it does not appear to require that the individual actually uses a vehicle regularly but rather that it is made available should he wish to use it regularly. However, I accept that actual use of the vehicle would be evidence as to the extent that it would be made available."

This observation accords with that of Arbitrator Lee Samis in *State Farm Mutual Automobile Insurance v. Kingsway General Insurance* (October 20, 1999) who found that the section in question does not require the claimant to actually have used the vehicle regularly but to examine its availability. Actual use is evidence of the availability of the vehicle.

Arbitrator Scott Densem, in *Dominion of Canada General Insurance v. Federated Insurance* (October 31, 2012), made the following observations or findings:

- Actual use is evidence of availability.
- In determining whether vehicles are being made available "at the time of the accident", the focus should be on the nature of the individual's control over the vehicle being made available or his authority to use the vehicle at the time of the accident. The nature of the individual's activities or the actual use to which the vehicle is being put are relevant only in so far as they may be within the scope of or outside the scope of the individual's control or authority over the vehicle.
- Considering and following the reasoning of Justice Belobaba in *ACE INA*, one must focus on whether the claimant has control over or permission to use a vehicle at the time an accident occurs. If an individual has control over or permission to use a vehicle at the time of the accident, then the deemed named insured status exists. If an individual does not have control over or permission to use a vehicle, then the deemed named insured status does not exist or, if it did exist, it ceases.

I would paraphrase one of Arbitrator Densem's findings and put it this way: while actual use may be evidence of availability at the time of the accident, availability does not necessarily require actual use at the time of the accident.

If I apply all of the law which I have considered, above, to the facts of this case, at the time of the accident, Allan had a vehicle owned by Conray Dymond / Conray Truck Line and insured by Old Republic available to him in that he was authorized to use the vehicle at the time of the accident. The law does not require that he be actually using the vehicle at the time of the accident; rather, it is sufficient that he had authority to use the vehicle at the time of the accident. If he had left home 5 minutes earlier or 5 minutes later, he

would have presumably reached his employer's yard and used the vehicle as expected. Indeed, it was the happening of the accident which interrupted or frustrated his ability to exercise his authority to use the vehicle as was his intention and that of his employer.

It should be noted that on some occasions, Allan had actually slept in the vehicle on the night before the next day's delivery. There was evidence that if Allan wished to do so, he could start his trip on one day, stop along the way or at his destination, sleep in the truck and complete his work the next day [rather than doing the entire job from start to finish on the next day]. On the specific facts of this case, once the employer instructed Allan on Friday, January 6, 2012 to perform a delivery on Saturday, January 7, 2012, a vehicle was made available to him and Allan certainly had authority to use the vehicle. He may not have had control of a specific vehicle, in that his employer could substitute the use of one vehicle from the fleet for another, but Allan had authority to use a vehicle from the fleet once the assignment was provided to him until such time as the assignment was completed and his work was done on Saturday, January 7, 2012.

The decision of Arbitrator Bialkowski, in *Dominion of Canada v. Lombard*,[8] while distinguishable on certain of its facts, is most apt to support the findings and conclusions which I have made, above. In this case, a motor vehicle accident occurred in the state of Oregon. The claimant was riding a bicycle when struck by another automobile. The claimant was employed in Mississauga and had use of her employer's van at work. She worked as a team leader in a group home. The company van was kept at the group home. It was to be used for work purposes only. Keys for the vehicle were kept at the group home. Other employees had access to the vehicle for work purposes. It was submitted that the claimant, as team leader, remained in control of the vehicle even though she was thousands of miles away. She had access to company email through her personal Blackberry. If there was a conflict as to which worker ought to use the vehicle on any particular day, she was available through her blackberry to deal with the issue as team leader. She could return back to Toronto at any time and have access to the vehicle.

Arbitrator Bialkowski reviewed the decision of Arbitrator Densem in *Dominion of Canada General Insurance v. Federated Insurance* and concluded, on the facts before him, that the claimant did not have contemporaneous physical accessibility to the company vehicle at the time of the accident. However, the issue remained as to whether the claimant, as the only team leader at this particular group home and the highest ranking person in charge of the home, continued to have sufficient authority over or control of the vehicle so as to meet Arbitrator Densem's control and authority considerations. Arbitrator Bialkowski reviewed circumstances whereby the claimant could well have been contacted respecting the vehicle [though there was no evidence that this actually occurred] and concluded that the claimant, despite being thousands of miles away, retained sufficient residual control, given her position of authority with the employer, so as to be a deemed named insured under the employer's policy.

If the claimant in *Dominion of Canada General Insurance v. Federated Insurance* can be thousands of miles from the company vehicle at the time of the accident and still be found to have control over or authority to use the company vehicle, then I have no

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[8] The Dominion of Canada General Insurance Company v. Lombard Insurance Company et al. (Arbitrator Kenneth Bialkowski, September 11, 2013).

difficulty finding that Allan, who was only minutes from his employer's yard, had authority to use the company vehicle at the time of the accident.

Finally, I repeat the finding of Justice Belobaba in *ACE INA Insurance v. Cooperators General Insurance Co.*:

[19] 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, i.e. is accessible to him - even if he is a pedestrian or an passenger in someone else's car.

Allan had access to a company vehicle from the moment work was assigned to him on Friday, January 6, 2012 until completed the work on Saturday, January 7, 2012. The vehicle was accessible to him. He was authorized to use it. The fact that he was not using the vehicle or had not yet begun to use the vehicle at the time of the accident matters not.

CONCLUSION:

I find that Allan was a deemed named insured under the Conray Dymond / Conray Truck Line fleet policy of automobile insurance issued by Old Republic at the time of the accident. As a result, Old Republic has the higher priority to respond to the statutory accident benefit claims of Allan arising from the motor vehicle accident of January 7, 2012.

I remain seized of this matter to address the following issues:

(a) What is the amount to be paid by Old Republic to Intact?

(b) What is the amount of interest owing upon the amount determined in respect of issue (a)?

(c) What is the quantum of costs and which party has the burden of payment?

I am obliged to counsel for their thoughtful and comprehensive written and oral submissions.

I will hold this matter in abeyance for 45 days to allow counsel to try to work through the foregoing issues. Thereafter, I will render my account in accordance with the terms of the arbitration agreements which govern this matter and convene an arbitration teleconference to work through procedure and logistics so that I can make determinations on the issue or issues that remain outstanding and unresolved.

Dated at Toronto this 5th day of January, 2016.

Vance H. Cooper, Arbitrator