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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TD INSURANCE COMPANY

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY
and **TRAFALGAR INSURANCE COMPANY**

Respondents

AWARD – PRELIMINARY ISSUE:

COUNSEL:

Pamela A. Brownlee for the Applicant

Daniel Strigberger for the Respondent, Dominion

Antonietta Alfano for the Respondent, Trafalgar

PRELIMINARY ISSUE:

1. Was Ms. Singh a deemed named insured under the Dominion policy insuring McCluskey Transportation, because a school bus was made available for her regular use by that company at the time of the accident, in accordance with section 3(7)(f) of the *Schedule* ?

RESULT:

1. No, Ms. Singh was not a deemed named insured under the Dominion policy pursuant to section 3(7)(f) of the *Schedule*, as the bus was not made available for her regular use on Sundays.

BACKGROUND:

1. Mahadai Singh was seriously injured when she was struck by a vehicle insured by Trafalgar Insurance (hereinafter referred to as "Intact") on November 30, 2014. Ms. Singh was loading some items into the trunk of her son's car while standing in her driveway, when Carlos Gouveia, driving a vehicle insured by Trafalgar/Intact, reversed his car into the driveway and "pinned" her between the two vehicles.

2. Ms. Singh's son's vehicle was insured by TD Insurance at the time. She submitted an application for payment of accident benefits under the *Schedule* to TD, and they have paid benefits to her and on her behalf. Her claim has now been resolved on a full and final basis.

3. TD contends that Ms. Singh is not an "insured" under her son's policy, and that either Dominion of Canada ("Dominion"), as the insurer of her employer, McCluskey Transportation Services, or Intact, as the insurer of the vehicle that struck her, are in higher priority to pay her claim in accordance with section 268(2)2 of the *Insurance Act.*

4. Ms. Singh was employed by McCluskey Transportation as a school bus driver at the time of the accident. TD and Intact contend that McCluskey made a vehicle available for her regular use at the time of the accident, and that Ms. Singh would therefore be a deemed named insured under the Dominion policy. The accident occurred on a Sunday. Dominion denies that its insured made a vehicle available to Ms. Singh at the time of the accident, as her work shifts were from Monday to Friday when school was in session.

5. The parties agreed that the question of whether the Dominion insured made a vehicle available for Ms. Singh's regular use at the time of the accident would be determined as a preliminary issue.

THE EVIDENCE:

6. Both the Claimant and John McCluskey, the director of McCluskey Transportation, were examined under oath during the course of this proceeding. Counsel relied on the transcripts from their evidence at the hearing. Various documents, including Ms. Singh's employment contract and the company's Employee Manual were also filed at the hearing, and relied on by counsel.

7. No *viva voce* evidence was called at the hearing.

8. The evidence establishes the following facts: Ms. Singh began her employment as a school bus driver in September 2014, a few months before the accident. A fleet policy issued by Dominion covered the buses used by McCluskey Transportation to transport children to and from school at the time of the accident. The Claimant drove one of these buses on a daily basis to pick up children in the morning, and drive them to various schools. She then picked them up once school was over in the afternoon, and returned them to their homes. She worked from Monday to Friday, on each day that school was in session.

9. Ms. Singh was assigned to drive the same bus throughout the course of the school year. She parked it at her home, when it was not in use. She kept the keys to the bus at all

times. She testified that she did not own any other vehicles, but would drive either her son's or daughter's vehicles from time to time.

10. Mr. McCluskey testified that the bus drivers employed by the company were paid by the "run", as opposed to for the hours they worked. When asked whether the drivers were permitted to use the bus that they were assigned to drive for personal purposes, he responded "during the day, during school hours, in between their runs, they are allowed to do that". He stated that "after hours the bus is to be parked until working hours start again". He testified that a normal school day would run from 7 a.m. to 5 p.m., and that he considered these to be "business hours". He conceded, however, that this term was not defined anywhere in the drivers' contracts.

11. Mr. McCluskey acknowledged that nothing was done to enforce the restriction on drivers' personal use of the buses after business hours, at the time of Ms. Singh's accident. He testified that people would sometimes call the company to report that they saw buses running at night at the time of the accident, and that "those people would be brought in and let go". When asked how often he had disciplined drivers for using buses outside of business hours, he responded "very few".

12. Mr. McCluskey stated that drivers are told when they are first hired that they are not permitted to use the buses that they are assigned to drive after business hours, and that it is a "fireable offence" if they do so. He acknowledged, however, that he had not interviewed the Claimant, so could not state with certainty what she had been told.

13. Ms. Singh was asked at her examination whether she was allowed to use the school bus that she had been assigned to drive outside of business hours, and stated that she did so for "shopping or to run errands". She did not specify whether this occurred in between her morning and afternoon shifts during the week, or on the weekends.

14. Mr. McCluskey testified that bus drivers were never required to work on weekends, stating that "our business does not work on weekends". He was specifically

asked whether any of the school buses delivered children to or from school on November 30, 2014, the date of the accident, and answered that they had not. He also stated that neither Ms. Singh, nor any of the other bus drivers were permitted to use any of the company's vehicles on that day or on any other Sunday.

15. Mr. Strigberger filed a two-line letter dated July 4, 2017 from John McCluskey that states – "McCluskey Transportation is a school bus company that transports children in the Toronto area. We are open Monday to Friday and do not transport children on weekends". Counsel for TD objected to its filing at the hearing, submitting that counsel had agreed to rely on the EUO transcripts at the hearing, and that it would be unfair to admit the letter into evidence as Mr. McCluskey, who was not in attendance at the hearing, could not be cross-examined on the contents.

16. I ruled that I would accept the letter into evidence, but would hear counsels' submissions on what weight, if any, should be placed on it.

17. As stated above, the company's manual was filed at the hearing. It is a fairly detailed document, covering many issues ranging from reporting requirements for collisions to procedures to be followed if a child gets lost. It states that drivers must advise the office where they park the bus that they drive when it is not in use, and that a record is kept of that location. If drivers do not have access to a suitable place to park the bus, a permit may be obtained to park on school property.

18. The manual provides that drivers must take their assigned buses to a "bus wash' to be thoroughly cleaned once each week. It also states that all buses "must be fuelled up prior to your run", and that drivers are not permitted to stop at a gas station for this purpose while any passengers are on the bus, unless authorisation is received from the office to do so.

19. Counsel focused on a paragraph in the manual titled "Unauthorized Use of the Company Vehicles" in their submissions. It reads as follows:

McCluskey Transportation vehicles are fully insured while they are in operations during regular school hours or authorized charters. You are permitted to use your bus for personal use during business hours only. Any driver found using a company vehicle (bus) without prior authorization – for any reason – could result in disciplinary action for that driver. Disciplinary action could be a suspension without pay and/or termination of your employment.

RELEVANT PROVISIONS:

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

Insurance Act -

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

Statutory Accident Benefits Schedule

> ***3. (7)*** *For the purposes of this Regulation,*
>
> > *(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,*

PARTIES' ARGUMENTS:

20. The applicability of section 3(7) f (i) of the *Schedule* usually raises two questions – whether a claimant's use of a vehicle can be defined as "regular", and whether the vehicle was being made available to them for their use at the time of the accident. There was no dispute that Ms. Singh enjoyed "regular use" of the school bus that she was assigned to drive. Counsels' submissions focused accordingly on the second question - more specifically, did McCluskey Transportation make the bus available for Ms. Singh's regular use on Sundays, given that that is when the accident occurred?

TD's submissions:

21. Counsel for TD contended that the evidence supported a finding that the school bus was made available for the Claimant's regular use at the time of the accident. She pointed to the fact that Ms. Singh parked the bus outside of her house when it was not in use, and that she kept the key to it at all times. She noted Ms. Singh's EUO evidence that she understood that she was permitted to use the bus for shopping and running errands outside of business hours, and that she in fact had done so. Counsel suggested that this understanding would have extended to her using the bus on weekends, as the term "business hours" was not defined in either the drivers' contracts or the company manual.

22. Ms. Brownlee noted that while Mr. McCluskey testified that drivers were only permitted to use their buses for personal reasons between shifts during "business hours", he acknowledged that there was no method available at that time to track the drivers' use of buses after hours or on weekends. She also noted that the manual requires drivers to bring their buses in to be cleaned and fueled up regularly outside of their work shifts, and submitted that this creates the expectation of drivers completing work-related duties on the weekends.

23. Counsel noted the reference in the company manual that drivers who are found using a bus outside of business hours without prior authorisation could face disciplinary action. She contrasted this with the very clear language used both in the drivers' contracts

and in the manual setting out the requirement for drivers to check buses for articles or sleeping children after each run is completed. These provisions clearly state that any driver found to have not completed a check will face a one-day suspension, and any driver found to have a child remaining on the bus after his or her run is completed will be dismissed for cause. She suggested that the language regarding use of buses outside of business hours is much more equivocal, and that I should conclude that Ms. Singh had either explicit or at least, implicit permission to use her bus outside of her scheduled shifts.

24. Ms. Brownlee referred to Justice Belobaba's decision in the seminal case of *ACE INA Insurance v. Co-operators General Insurance* (2009) CanLii 13625 and emphasized his statement that "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 a passenger in someone else's car" (at para. 19). She contended that the bus assigned to Ms. Singh was clearly accessible to her on Sundays, given that it was parked outside of her house, and that the Dominion policy is therefore in priority to respond.

25. Counsel also noted Justice Goldstein's appeal decision upholding Arbitrator Cooper's finding in *Intact Insurance v. Old Republic Insurance* (2016) ONSC 3110 in which a truck driver who had been given permission to sleep in the truck the night before completing his assigned delivery, had the vehicle available for his regular use at the time of an accident. In that case the claimant had not actually slept in the truck the previous night, but was involved in an accident the morning that he was travelling to the yard in his mother-in-law's car to pick up the truck and load that he had been assigned to deliver.

26. Finally, Ms. Brownlee noted Arbitrator Bialkowski's decision in *CAA Insurance Co. v. Travelers Insurance Co.* (2017) CarswellOnt 3229 (currently under appeal) in which a nurse working in Nunavut was found to have "regular use" of her employer's vehicle outside of her work hours, despite an official policy that nurses were not permitted to drive the vehicles for their personal use. The arbitrator found that the

employer had "turned a blind eye" to the nurses' personal use of the vehicles, and determined that she had "contemporary accessibility" to the vehicle at the time of the accident, given the course of conduct that had developed. Counsel submitted that this reasoning should be adopted here, as Mr. McCluskey had either turned a blind eye to the practice of drivers using buses outside of business hours for personal use, or a modified policy had developed.

Intact's submissions:

27. Counsel for Intact contended that the facts in our case fit squarely within the two examples set out by Justice Belobaba in the *ACE v. Co-operators, supra,* case, as encompassing "regular use" of an employer's vehicle, and that section 3(7)f (i) of the *Schedule* should apply. She noted that Ms. Singh always drove the same bus, parked it at her home, kept the keys and was permitted to use it for personal errands outside of her work shifts.

28. Ms. Alfano supported and amplified the arguments set out above by counsel for TD. She also noted that the claimants in both *Intact v. Old Republic, supra,* and *Dominion v. Lombard, supra,* were found to have vehicles made available for their regular use at the time of the accident, despite having had more limited use of their employers' vehicles than Ms. Singh did. She submitted that the decision-makers in the above cases focused on the potential for the claimants' use of the vehicle in question, and that when that aspect is considered in this case, the "regular use" provision clearly applies. She highlighted the fact that the bus was parked outside of Ms. Singh's home and suggested that there could be many reasons for her to have to drive it on a Sunday, such as having to move it to allow for snow to be cleared, or to travel to the gas station or bus wash.

29. Finally, Ms. Alfano noted that the Dominion policy covering the McCluskey school buses was the only policy of the three in question that would have contemplated the risk in providing coverage to Ms. Singh in these circumstances.

Dominion's submissions:

30. Counsel for Dominion contended that the requirements in section 3(7)f (i) of the *Schedule* are not satisfied in this case, and that Ms. Singh is accordingly not a deemed named insured under the Dominion policy in question. He contended that it is clear that Ms. Singh was not allowed to use the school bus in question on the weekends, and that it could not be concluded that the vehicle was made available for her regular use on November 30, 2014, which was a Sunday. He urged me to focus on the evidence before me, rather than speculate on questions raised by the other parties on which there is no evidence, such as when drivers were expected to wash or fuel up the buses.

31. Counsel referred to Mr. McCluskey's evidence that drivers were allowed to use their buses for personal reasons "during school hours or between their runs" but that "after hours" the bus is to be parked until working hours start again". He suggested that Ms. Singh's evidence at her EUO was consistent with this, noting that she had responded "yes" when asked whether she was permitted to use the bus outside of business hours, when her shift was completed. He also noted the prohibition in the company manual referenced above, which clearly states that drivers are "permitted to use the bus for personal use during business hours only".

32. Mr. Strigberger submitted that I should conclude from the above evidence that drivers are not permitted to drive their buses on weekends, and that the fact that Ms. Singh had a key to the bus, or parked it outside her home is not assistive in determining whether section 3(7)f of the *Schedule* applies. He contended that it is not enough to find that a claimant was physically able to access the vehicle in question, and that the focus must be on whether the company was making the vehicle available. In this case, given the clear evidence that drivers were not permitted to drive their buses on Sundays, it was clear that McCluskey was not making a vehicle available for Ms. Singh's regular use at the time of the accident.

33. Counsel agreed that the Justice Belobaba's decision in *ACE v. Co-operators, supra,* was the seminal case on this issue, but submitted that the facts of this case do not

fit within either the "sprit" or the examples provided in that case that illustrate when the "company car" provisions should apply. He noted that the decisions that have followed this ruling in which claimants have been found to have regular use of vehicles, all involve cases in which explicit permission has been granted to drivers to use the vehicles at the time of the accident. He emphasized that in this case, Ms. Singh did not have such permission.

34. Finally, Mr. Strigberger noted Justice Goldstein's statement in the appeal decision in *Intact v. Old Republic, supra,* that while a claimant's "authority and control" over a vehicle could be evidence that he or she had a vehicle available at the time of the accident, that factor should not be elevated to the level of a "test". He noted that in this case, while Ms. Singh may have technically had access to and control over her assigned bus at the time of the accident, she clearly did not have permission to drive it on a Sunday, and that it could not therefore be said that it was being made available for her use at the time of the accident.

ANALYSIS & REASONS:

35. On the evidence filed, I find that section 3(7)f (i) of the *Schedule* does not apply in these circumstances, and that Ms. Singh is therefore not a deemed named insured under the Dominion policy issued to McCluskey Transportation.

36. I begin my analysis with a close review of the language in question. In order for section 3(7)f (i) to apply, the evidence must establish that at the time of the accident, the insured automobile (i.e. the school bus that Ms. Singh was assigned to drive) was "being made available" for her regular use by a corporation, in this case McCluskey Transportation. The accident occurred on Sunday, November 30, 2014. The question can then be narrowed to – was the school bus "being made available" by McCluskey for Ms. Singh's use on that (or any other) Sunday?

37. I find that it was not. To find otherwise would be to ignore the clear evidence of John McCluskey that the company was in the business of transporting children to and

from school on school days, and that its buses did not operate on Sundays. He clearly stated at his Examination Under Oath that bus drivers were not permitted to operate any of the vehicles on November 30, 2014, and specifically testified that Ms. Singh was not permitted to use any of the company's vehicles on that day.

38. Section 3(7) f (i) requires the vehicle in question to be "*made* available" for the Claimant's use by the company. It does not merely require the vehicle to be "available" to the individual for their use, nor does it provide that the individual only requires "access" to the vehicle for their use. In my view, the requirement that a vehicle is "being made available" requires an active intention, followed by some action on the part of a company to make the vehicle available. When an employer explicitly states that use of a vehicle is prohibited on the weekends, as is the case here, it is difficult to conclude that it is making that vehicle available to its employee.

39. Counsel for TD and Intact suggested that the evidence was unclear regarding the drivers' permitted use of the school buses on the weekends. My close review of the evidence leads me to a different conclusion. I also note that the company manual clearly states that drivers are permitted to use buses "for personal use during business hours only". While the term "business hours" is not defined in the manual, it is reasonable to conclude that in the context of a company employing bus drivers to transport children to and from school, business hours would not encompass Sundays.

40. I am also not persuaded that Ms. Singh's evidence was inconsistent with that expressed by Mr. McCluskey. While her only evidence on the question of her personal use of the bus outside of her work shifts was not very comprehensive or clear, she agreed with the suggestion put to her that she was permitted to, and did use, the bus that she was assigned to drive between shifts. She was not specifically asked whether she used the bus for personal (or other) reasons on Sundays. In any event, even if she had stated that she did regularly drive the bus to do personal errands on Sundays, I am not sure that her doing so, in the face of a clear directive from her employer that she not use the bus for

personal reasons on weekends, would constitute a bus "being made available" to her by McCluskey.

41. Both counsel for TD and counsel for Intact focused on the fact that Ms. Singh parked her bus outside her home when she was not delivering children, and had access to the keys at all times. I acknowledge that these facts suggest that the bus was clearly accessible to her at all times, including weekends. This is not the test, however. As noted above, I interpret section 3(7)f (i) of the Schedule to require an intention and action on the part of the company or employer to make the vehicle available to the employee on the day in question. If McCluskey had advised its employees that drivers who park their school buses at home have access to them for personal use whenever they like, I would arrive at a different conclusion.

42. The fact that the drivers were only permitted to use the buses for personal reasons during the week, between their morning and afternoon shifts, takes this case outside of the ambit of the examples cited (and referenced by counsel for Intact) by Justice Belobaba in *ACE v. Co-operators, supra,* in which a sales representative was permitted to take the "company car" home on weekends and drive it for personal use. Mere accessibility of an employer's vehicle on a weekend is not sufficient to meet the requirement that a vehicle is "being made available" for an individual's use, absent the employer's consent.

43. Counsel cited Arbitrator Bialkowski's decision in *CAA v. Travelers, supra*, in which he determined that a nurse's employer made a vehicle available for her regular use despite its official policy that nurses working in that remote northern community not use the clinic's vehicles for personal use. He found that the employer had turned "a blind eye" to the nurse's apparently regular practise of using the vehicles for personal reasons, and that the policy had therefore been modified. I note that this decision is under appeal. I also note that there is no evidence in this case before me to suggest that the school bus drivers regularly drove the buses on the weekends and that this conduct was condoned by McCluskey. This decision is therefore of little assistance in this case.

44. Counsel for TD and Intact cited references in the company manual relating to the drivers' duties to refuel the buses, and to wash them once per week, both to be done when no passengers are on the bus. The drivers are also required to do a "dry run" before the school year starts, without any passengers on the bus, to familiarise themselves with their routes. Counsel suggested that these tasks may have been completed on Sundays, and should be taken into account in the analysis. Mr. Strigberger noted that these tasks could well have been performed on weekdays, during business hours. Neither Mr. McCluskey nor Ms. Singh were asked about the timing of these tasks, and in the absence of any evidence on these points, I cannot infer that they were regularly done on Sundays.

45. Counsel for Intact referred to various cases in which individuals were found to be deemed named insureds under their employers' policies in circumstances in which their use of the vehicles were more limited than Ms. Singh's. She contended that the arbitrators in these cases considered the "potential" for the employee's use and that I should adopt that reasoning here. I cannot accept this argument, in light of the clear wording in section 3(7)f (i) of the *Schedule*. The company or entity in question must actively make a vehicle available, and inherent in that, in my view, is that it must expressly consent to the claimant having use of the vehicle at the time in question. I note that this was the case in the decisions cited in *Intact v. Old Republic, supra*, *Dominion of Canada v. Zurich Insurance* (Novick – October 8, 2013) CarswellOnt 19135, *Chieftain Insurance v. Federated Insurance* (Densem – October 31, 2012) and *Continental Casualty v. Sovereign General Insurance* (Bialkowski – June 3, 2013) CarswellOnt 11086.

46. For all of the above reasons, I find that McCluskey Transportation did not make a vehicle available to Ms. Singh for her regular use at the time of the accident, and accordingly, section 3(7)f (i) of the *Schedule* does not apply.

ORDER:

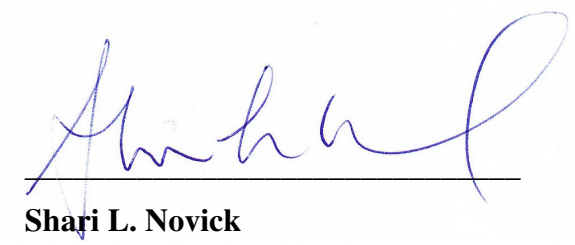
47. Ms. Singh is not a deemed named insured under the Dominion policy. The Arbitration is therefore dismissed against Dominion of Canada.

48. The Arbitration between TD and Intact will continue in order to address any issues that remain.

COSTS:

49. In view of the result, Dominion is entitled to its legal costs related to this proceeding. If the parties cannot agree on the quantum to be paid, I invite them to contact me and a process will be arranged for submissions to be filed.

DATED at TORONTO, ONTARIO this _30th _ DAY OF SEPTEMBER, 2017.



Shari L. Novick
Arbitrator