IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT,* R.S.O. 1990, AND *ONTARIO REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

PROTECTIVE INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Andrew Smith and Patrick Sinclair for the Applicant

Mark K. Donaldson for the Respondent

ISSUE:

1. Which insurer is in highest priority to pay accident benefits to Stephen Taylor as a result of injuries he sustained in an accident on September 28, 2017 – that of the lessor (Aviva) or the lessee (Protective)?

RESULT:

1. Aviva is in higher priority to pay Mr. Taylor's claim.

BACKGROUND:

1. Stephen Taylor was struck by a van while he was driving his bicycle on the shoulder of a road on September 28, 2017. He sustained a left elbow fracture, some fractured ribs, and other injuries. The van was owned by New Horizons Car & Truck Rentals Ltd. ("New Horizons") and was leased from them by Federal Express Canada ("FedEx") for a two-week period that spanned the date of the accident.

2. Aviva Insurance Company of Canada ("Aviva") had issued a fleet policy to New Horizons, covering the vehicle in question. Mr. Taylor submitted an Application for payment of accident benefits under the *SABS* to Aviva. They accepted the application and have paid benefits to him and on his behalf. Aviva contends that Protective Insurance Company ("Protective") is in higher priority to pay the claim because it had issued an auto policy to FedEx that also covered the vehicle in question, and that the parties had intended that that policy would respond to claims of this type.

3. The parties agree that both Aviva and Protective are insurers "of the automobile that struck the non-occupant" under subsection 268(2)2(ii) of the *Insurance Act* and are therefore on the same "priority rung". The question to be determined is whether Aviva, the insurer of the owner and lessor of the vehicle, can pursue Protective, the insurer of the lessee of the vehicle in these circumstances.

RELEVANT EVIDENCE:

4. The parties filed an Agreed Statement of Facts, setting out the facts outlined above and some details about the two policies in question. They also filed various documents, including both insurance policies and a corporate lease agreement between the parties. No *viva voce* evidence was called at the hearing.

5. The Aviva policy issued to New Horizons is a standard OAP 1 policy. It is subject to various change forms or Endorsements, including an OPCF 21B providing Blanket Fleet Coverage for Ontario Licensed Automobiles. That endorsement specifies that coverage is provided for all licensed automobiles that are owned by and licensed in the name of the insured. The parties agree that the GMC van that struck Mr. Taylor was one such vehicle, and is therefore covered under the policy.

6. The Aviva policy is also subject to an OPCF 5 – Permission to Rent or Lease Form. It permits the insured to rent or lease automobiles that are covered under the policy, as long as the rental period does not exceed thirty consecutive days.

7. As noted above, FedEx's policy was underwritten by Protective. It is also a standard OAP 1 policy with the same two endorsements (and others). The Certificate of Insurance for the policy specifies the "Described Automobiles" as being "all vehicles owned, registered, leased to and/or operated on behalf of the Named Insured". The parties agree that the GMC van that struck Mr. Taylor is also covered under this policy.

8. The parties executed an agreement, the terms of which are set out in a document drafted by Discount Car & Truck Rentals (an entity related to New Horizons) titled Select Corporate Program. The agreement sets out the different rates to be charged for different classes of vehicles, and various other terms. The only reference to insurance coverage appears in the page set out below –

COVERAGE OPTIONS- Self-insured

Insurance covered by FedEx:

FedEx is covered by their commercial insurance policy.

Kindly indicate information regarding your insurance provider and your CVOR number:

Insurance company name: _____

Insurance policy number: _____

Policy expiration date: _____

CVOR Number (Commercial vehicles only) _____

COVERAGE OPTIONS- Discount Car and Truck Rentals supplied

Collision Damage Waiver (CDW) PROTECTION:

Minimum age accepted for renting a vehicle with Discount Car and Truck Rentals CDW coverage in case of an accident is 21 years old.

Collision Damage Waiver (CDW) "Physical Damage Coverage"

CDW covers:	CDW does not cover:
1. Bumper-to-bumper coverage 2. Theft of the vehicle* 3. Vandalism and fire to the vehicle 4. Down-time and administration fees 5. All authorized drivers on the rental agreement	1. Personal effects 2. Damage to or theft of interior components 3. Damage caused by willful acts or undue care 4. If any terms or conditions of the rental agreement is violated 5. Damage above the windshield, or to the undercarriage (underside) of the vehicle 6. Wrong type of fuel 7. Towing and storage fees 8. FH and ND class vehicles 9. If vehicle is driven outside of the permitted area

RELEVANT PROVISIONS:

The parties referred to the following parts of section 268(2) of the *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,*
> > >
> > > *iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,*
> > >
> > > *iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

9. The parties agree that as the Claimant was not a named insured, or a spouse or dependent of an insured, subsection 268(2)2(i) does not apply and that subsection is 268(2)2(ii) is the applicable provision.

Section 268(4) as well as (5), and (5.2) are also relevant to the analysis. They state –

> ***268(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.*
>
> ***(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.

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

Section 277 of the *Act* was also referred to by the parties. It states –

277. (1) *Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.*

(1.1) *Despite subsection (1), if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies shall respond in respect of liability arising from or occurring in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force:*

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.

2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph 1.

3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2.

PARTIES' ARGUMENTS:

10. Counsel agree that both Aviva and Protective are "insurers of the automobile that struck the non-occupant" under section 268(2)2(ii). The question then becomes – can the insurer who received the first application pursue another insurer on that same 'priority rung', and if so, which insurer is in higher priority to pay the claim, that of the lessor (Aviva) or the lessee (Protective)?

Aviva's submissions:

11. Counsel for Aviva noted that while section 268(4) of the *Act* provides a claimant who has recourse to more than one insurer under subsections (i) or (iii) of 268(2)2 with the discretion to chose which insurer from whom to claim benefits, no such discretion is provided with regard to subsection (ii). He contended that this statutory "gap" must be filled, and that when the expectations of the parties, the commercial context in which the policies were underwritten and the legislators' intent are considered, Protective should be determined to be in higher priority.

12. Mr. Smith noted that the above three factors were considered in other cases in which no "tie-breaking" mechanism exists to determine priority under section 268(2) of the *Act*. Subsection 268(2)1(ii) of the *Act* provides an occupant of a vehicle with recourse against the insurer of the automobile "in which he or she was an occupant". Counsel noted that in *Certas Direct Insurance v Zurich Insurance* (September 10, 2013) and *Certas Direct v. Sovereign General Insurance* (June 17, 2015) I considered which of the two insurers would have anticipated the risk and had calculated policy premiums to reflect that risk in order to determine which insurer was in priority. He submitted that when these factors are considered in this case, Protective should be found to be the priority insurer, as its insured (FedEx) chose both the drivers for the vehicles and the routes that they drove, and would therefore have been more apprised of the risks involved than Aviva.

13. Counsel also submitted that the contract between the parties reflects their intention that New Horizons/ Discount Car Rentals would supply CDW coverage on the vehicles it leased, but that FedEx's policy would otherwise provide coverage for the vehicles. He suggested that it was reasonable to assume that Aviva agreed to bear the risks associated with covering the fleet of vehicles insured while they were in the possession of New Horizons, but that when they were being leased out to a third party, the lessee's insurance would be primary.

14. Mr. Smith also referred to Arbitrator Cooper's decision in *Northbridge Insurance v. Intact Insurance* (May 5, 2018). In that case, Northbridge had issued a policy to a driver who – unbeknownst to them – was operating his vehicle through the Uber rideshare program. Intact had issued a policy with specific endorsements to the rideshare company, that covered the vehicle while it was being operated under the Uber app. A passenger in the vehicle applied to Northbridge for payment of accident benefits following an accident. Northbridge pursued Intact for priority, and Arbitrator Cooper determined that Intact, the insurer that issued the policy with the rideshare endorsements, was in higher priority, based on the fact that Northbridge had no knowledge that its insured was operating his vehicle for ridesharing purposes, while endorsements on the Intact policy specifically contemplated that that policy would respond first to claims for payment of accident benefits. Counsel contended that a finding that the insurer who underwrites the risk should pay the claim makes practical sense, given that lessees have care and control over the vehicles they insure, while the lessors do not.

15. Finally, Mr. Smith referred to both section 277 of the *Act* and the OPCF 5 Endorsement attached to both policies, each of which address the order in which policies should respond in the case of overlapping coverage for third party liability in a tort claim. He noted that section 277 provides that a lessee's policy must respond first, before that of a lessor, and suggested that by analogy, FedEx's policy should be in priority to pay accident benefits to Mr. Taylor in these circumstances. He also noted that the OPCF 5 Form attached to Aviva's policy provides that the coverage provided is "excess

insurance" for the purposes of third party liability, and contended that this expresses the parties' general intentions with regard to the order in which the policies should respond.

Protective's submissions

16. Counsel for Protective acknowledged that both policies covered the "striking vehicle", but contended that as the applicable section of the Act does not contain a tie-breaking mechanism, Aviva – as the first insurer who received the application – must adjust the claim and pay the benefits that Mr. Taylor is entitled to. He submits that there is no statutory provision on which Aviva can rely to pursue this dispute, and that Aviva is simply left with no remedy, as Protective would have been if it had been the first insurer to receive the application.

17. Counsel noted that the Certificate of Insurance attached to Aviva's policy issued to New Horizons denotes "described automobiles" as "automobiles owned or leased by and licensed in the name of the insured". He submitted that this clearly covers the van that struck Mr. Taylor. He noted that in the two decisions cited above involving Certas Insurance, I determined that the policy that had been issued to the owner of the vehicle was in priority to pay the claims. While he acknowledged that section 2.2.3 of the OAP 1 policy has no relevance here (as it did in the other cases), he argued that if the same approach was followed in this case, the result would be that Aviva's policy insuring the van was in higher priority.

18. Mr. Donaldson submitted that the lease agreement entered into by the parties is vague with regard to insurance details, and that it does not even specify that FedEx must maintain a valid motor vehicle liability policy. He stated that New Horizons could easily have provided that FedEx's policy was to respond to any accident benefits claims arising from their drivers' operation of the leased vehicles first, but did not do so. He contended that the phrase "FedEx is covered by their commercial insurance policy" appearing on the page excerpted above does not support Aviva's argument that the parties intended FedEx's policy to be in priority in these circumstances.

19. Finally, Mr. Donaldson contended that section 277 of the *Act* has no application to a priority dispute between insurers for the payment of accident benefits. He noted that the OPCF 5 endorsements attached to the policies similarly only apply in the context of third party liability claims, and therefore should not be seen as indicating the parties' intentions regarding priority for the payment of accident benefits claims. He noted that the amendments to section 277 that provide that a lessee's policy is to respond before that of the lessor for third party liability claims was described by Justice Nakatsuru in *Aviva v Wawanesa* (2018) ONSC 5778 as having been passed in order "to reduce the lessor's cost of doing business, as such costs were normally passed on to the consumer", and contended that no parallel change was required to the priority ranking in section 268(2) because the same level of Accident Benefits coverage is mandated to be provided in every motor vehicle liability policy, whereas lessors typically carry higher "exposure limits" for potential third party liability claims on their policies than do lessees.

Reply submissions

20. Counsel for Aviva advised that the *Aviva v Wawanesa, supra,* decision cited above is currently under appeal. He noted that the reason for the amendments that changed the order in which lessee and lessor policies should respond for third party liability claims is evidence of a consideration of the commercial reality of plaintiffs choosing to pursue policies with higher exposure limits.

21. Finally, counsel disputed the suggestion that no remedy is available to Aviva in these circumstances and that section 268(2) sets out a complete code for how and when insurers can pursue priority disputes, noting that Arbitrator Cooper considered the terms of the policies in issue in his decision in *Northbridge v Intact, supra.*

ANALYSIS & FINDINGS:

22. This case raises a vexing question – what approach should be taken when two insurers occupy the same 'priority rung' under section 268(2) of the *Act,* but there is no statutory mechanism to break the tie? Protective contends that this leaves Aviva (as the first insurer who received the application) without a remedy, and submits that I do not

have the jurisdiction to fill in this legislative gap. Aviva disagrees and argues that I should consider the legislators' intentions and the expectations of the parties to reach a conclusion.

23. I was faced with a similar question in *Certas v Zurich Insurance, supra,* and *Certas v Sovereign Insurance, supra,* cited above. In considering section 268(2)1(ii) addressing the recourse that an occupant of a vehicle would have (as opposed to a non-occupant, as the Claimant is in this case) in a situation where there were two insurers of the automobile, I found that the drafters had not likely contemplated that there could be more than one "insurer of an automobile in which the claimant was an occupant", and that this notion had evolved through case law following a court ruling that engaged section 2.2.3 of the OAP1 in a situation in which a claimant was an occupant of an uninsured vehicle. I found that section 268(5.2) of the *Act* made it clear that the insurer of a vehicle in which the claimant was an occupant should respond first, and that this clearly expressed legislative intention should guide my analysis in the absence of a "tiebreak mechanism". I also suggested that this approach was consistent with the parties' expectations and the commercial reality of auto insurance and the risk assessments involved.

24. The circumstances in this case are different. Unlike the situation presented in the decisions above, the instant case involves two corporate insureds, each of which are covered by fleet policies, and both of which provide coverage to the van that struck Mr. Taylor and by extension, provide access to accident benefits under the *Schedule*. As the Claimant was not an occupant of the van that struck him, the 'occupancy breaks the tie' rule is clearly not applicable here.

25. Section 268(4) of the Act provides that a person "in his or her absolute discretion" may decide the insurer from whom to claim benefits in the event that they have recourse to more than one insurer under either subparagraph (i) or (iii) of paragraph 1 (involving occupants of vehicles) or under subparagraph (i) or (iii) of paragraph 2 (involving non-occupants). Why did the drafters of the legislation choose to omit any reference to

subsection (ii) in either paragraph ? As expressed in *Certas v. Zurich, supra,* I assume that that omission relating to paragraph 1 stems from the assumption that there could only be one insurer of an automobile in which a claimant was an occupant. The case law and the expansion of the definition of an "insurer of an automobile" through the application of section 2.2.3 of the OAP 1 that led to the conundrum of having two or more insurers on this priority rung is relatively recent and was likely not contemplated at the time.

26. It seems unlikely, however, that the omission of subsection (ii) relating to paragraph 2 can be explained in the same manner. Subsection (ii) of that paragraph directs a non-occupant to seek recourse against the insurer of the automobile that struck him or her. In my view, the possibility that both a lessor and lessee of a vehicle could have overlapping policies covering the same vehicle is not that remote such that it would not have been contemplated by the drafters of the Act. The idea that a leased vehicle may be covered by two policies is clearly acknowledged in section 277(1.1) of the *Act*, which specifies the order in which the potential policies should be accessed for third-party liability purposes. While I do not find section 277(1.1) to be relevant to this analysis, it clearly shows that the drafters of the legislation were live to the issue of a leased vehicle having potentially overlapping coverage.

27. I am left to conclude that the exclusion of subsection 268(2)2(ii) from the list of sections in 268(4) under which a claimant has absolute discretion to choose which insurer to approach was deliberate. The logical extension of that finding is that the first insurer on that second 'priority rung' who receives an application for benefits must pay benefits to the Claimant.

28. Counsel for Aviva urged me to consider the parties' expectations and the risk assessments likely conducted by Protective and Aviva in calculating the premiums charged to their insureds. While he contended that the parties intended that FedEx's policy would respond first to any accident benefits claims arising from its drivers' operation of the vehicles leased from New Horizons, I find that the contract between the parties is far from clear on that point.

29. As noted by Mr. Donaldson, the contract contains no explicit reference to FedEx being required to maintain a valid motor vehicle liability policy. The only references to insurance in the entire document appear on page 6, reproduced above, on which the phrase "Coverage Options" appears twice. The first reference is followed by a line simply stating "Insurance covered by FedEx" and provides that FedEx is covered "by their commercial insurance policy". None of the requested details regarding the insurance provider or policy details are filled in. The title "Coverage Options" appears again lower down on the same page, followed by "Discount Car and Truck Rentals supplied" which is then followed on the next line by "Collision Damage Waiver (CDW) Protection". Various details regarding the minimum age of drivers and the breadth of the CDW coverage is then set out. Notably, there is no mention of coverage for accident benefits or third party liability on that page, or anywhere else in the document.

30. This is quite different than the situation in *Northbridge v Intact, supra*, in which an Endorsement to the Intact policy clearly stated that primary coverage would be provided by that policy during the relevant periods of ridesharing activity. The Endorsement specifies that it would respond prior to any other policy for both accident benefits claims and third party claims made arising from the use or operation of the vehicle. These are explicit and clear references to the priority of payment between insurers for accident benefits claims, an important feature that is entirely lacking in the documents in this case.

31. For all of the reasons set out above, I find that Aviva is the insurer in higher priority to adjust and pay Mr. Taylor's claims.

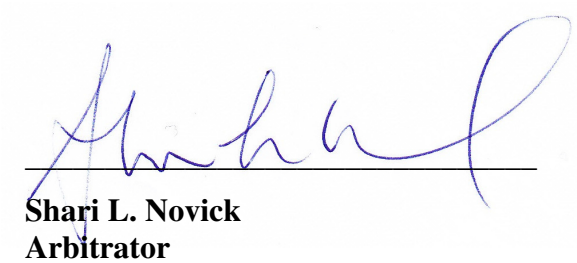
ORDER:

The Application for Arbitration is hereby dismissed.

COSTS:

Given the result, Aviva shall pay Protective's legal costs on a partial indemnity basis, as well as the Arbitration fees incurred. If counsel cannot agree on the quantum of costs to be paid, I invite them to contact me so that a procedure for resolving that issue can be discussed.

DATED at TORONTO, ONTARIO this ___22nd __DAY OF AUGUST, 2019



Shari L. Novick
Arbitrator