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 amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TRAVELERS INSURANCE COMPANY OF CANADA

Applicant

- and -

SCOTTISH & YORK INSURANCE CO. LTD.

Respondent

DECISION

COUNSEL:

Tim Crljenica for the Applicant

Jessica Rogers for the Respondent

ISSUE:

1. Was Hossam Saddick a deemed named insured under the Travelers policy issued to his company, H & A Automotive, because a vehicle was made available for his regular use at the time of the accident as provided in section 3(7)f (i) of the *SABS?*

RESULT:

1. Yes, a vehicle was being made available by H & A for Mr. Saddick's regular use at the time of the accident. He was accordingly a deemed named insured under the Travelers policy pursuant to section 3(7)f (i) of the *SABS.*

BACKGROUND:

1. Adam and Nisreen Saddick were injured when the vehicle in which they were occupants was involved in an accident on December 29, 2017. Their older brother Ahmad was driving the vehicle. Adam and Nisreen were both minors at the time, and were principally dependent for financial support on their father, Hossam Saddick ("Hossam"). Hossam owned a garage and used car dealership in Hamilton called H & A Automotive ("H&A"), which owned the vehicle involved in the accident. Ahmad, the driver of the vehicle, was a part-time employee of the dealership at the time of the accident.

2. The vehicle involved in the accident was part of a fleet of cars owned by H & A, for the purpose of reselling. These vehicles were insured under a garage policy with Travelers Insurance. The Claimants applied to Travelers for payment of accident benefits under the *SABS*, and Travelers has paid benefits to them and on their behalf.

3. As owner of the delaership, Hossam would drive the used vehicles from time to time to ensure that they remained in good working order. He had driven the Ford Edge involved in the accident on a few occasions prior to that day, but was not in the vehicle at

the time of the accident. He had asked his son Ahmad to drive his younger sibling's home from the movies one evening, and the accident occurred on their way home.

4. Hossam was a named insured on a personal policy issued by Scottish & York, insuring all of the personal vehicles in his household at the time of the accident. The parties agree that as dependents of Hossam, the Claimants would be insureds under the Scottish & York policy.

5. Scottish and York contends that as owner of the garage, Hossam had full access to the vehicles at all times, and would accordingly be a "deemed named insured" under the Travelers policy pursuant to the "regular use" provisions in section 3(7)f of the *SABS*. Section 268(5.2) of the *Act* directs that if an individual is a named insured under two policies, they must claim benefits from the insurer insuring the vehicle in which they (or their dependents) occupied at the time of the accident. If section 3(7)f applies, Travelers would be in higher priority to pay Adam and Nisreen's claims. If not, Scottish & York would be in priority.

6. Hossam was not an occupant of the vehicle at the time of the accident. The question I must therefore determine is whether, as owner of the garage with access to and control over the vehicles at all times, a vehicle was being made available by H & A to Hossam for his regular use at the time of the accident.

THE EVIDENCE:

7. The parties filed an Agreed Statement of Facts, the gist of which is outlined above. Hossam Saddick was also examined under oath, and a transcript of his evidence was provided to me. No *viva voce* evidence was presented at a hearing; I have based my findings on written submissions setting out the parties' positions on the issue.

8. As stated above, the Claimants were passengers in a 2010 Ford Edge at the time of the accident. That vehicle was owned by a numbered company, operating as H & A Automotive. H & A operated a garage and used car dealership in Hamilton, and Hossam

Saddick, the Claimants' father, was the sole owner and 100% shareholder of that company. The company generally kept between ten and fifteen used cars on its lot at any given time, which were owned for the exclusive purpose of reselling. The company did not own a fleet of vehicles for business use.

9. Ahmad Saddick, the driver of the vehicle at the time of the accident, was Hossam's son. He was a part-time employee of H & A. The parties agree that the Claimants were both dependants of Hossam, as defined in section 3(7)(b) of the *SABS*. It is also agreed that on the day of the accident, Hossam had asked Ahmad to use the Ford Edge to drive the Claimants and their cousins to a movie. The accident occurred on the way home from the movie, shortly after Hossam had left the dealership and arrived at home. He was not in the Ford vehicle at the time of the accident, and it is agreed that the accident occurred outside of H & A's regular business hours.

10. H & A held an OAP 4 Garage Policy issued by Travelers, and the Ford Edge was insured under this policy at the time of the accident. The parties agree that as owner of H & A, Hossam had full authority over the vehicles owned by the company at all times. He was entitled to drive them whenever he wanted to, and could permit other employees to do so as well. The keys to all of the used cars on the lot were kept in a locked place in the main office at H & A, to which Hossam had access at all times.

11. The Agreed Statement of Facts provides that Hossam or one of his employees would drive each of the used vehicles from time to time, to ensure that they remained in good mechanical working order. He explained at his EUO that cars sitting outside on a lot should be driven every few weeks, so that the rotors and brake pads don't seize up. Hossam estimated that he had personally driven the Ford Edge that was involved in the accident for this purpose six or seven times before the accident. He stated that Ahmad had also driven that particular vehicle on a few occasions prior to the accident, and that he had asked him to drive it on the day of the accident because it was due for an emissions test, and the act of driving it would reset the computer.

12. When asked whether he ever used the vehicles owned by H & A for personal purposes, Hossam initially stated that the only time that this had occurred was on the date of the accident. He later responded that he would occasionally drive one of the cars from the dealership home if his personal vehicle was not available, or if a car had to be delivered to a buyer.

13. As noted above, Hossam was a named insured under an OAP1 auto policy issued by Scottish & York at the time of the accident, which insured all of the vehicles in his household.

RELEVANT PROVISIONS:

Insurance Act

> ***268(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > *1. In respect of an occupant of an automobile,*
> >
> > > *i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,*
> > >
> > > *ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,*
>
> ***(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.*

Statutory Accident Benefits Schedule

> *3(7) For the purposes of this Regulation,*
>
> > *(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;*

> *(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:

Travelers' submissions

14. Travelers submits that as Hossam was a named insured under the Scottish & York policy, and the Claimants were dependents of his, they would also be insured persons under that policy. Counsel contended that section 268(2)1(i) of the *Act* accordingly dictates that the Scottish & York policy would be in priority.

15. Counsel submitted that Hossam would not be a deemed named insured under the Travelers' policy, as he did not have" regular use" of the vehicle in question at the time of the accident. He noted that Hossam was neither the driver of the Ford Edge nor a passenger in the car at that time. He contended that as the Ford was being driven by Ahmad when the accident occurred, it was clearly not available for Hossam's use and submitted that section 3(7)f(i) of the *SABS* would therefore not apply.

16. Mr. Crljenica cited the Superior Court's decision in *ACE INA Insurance v. Co-operators General Insurance* [2009] O.J. No. 1276, in which Justice Belobaba emphasized that the analysis in "regular use" cases should focus on whether a vehicle was being made available to an individual *at the time of the accident*. He noted that it was clear in this case that the Ford Edge was being driven by Ahmad at the time of the accident, and that the vehicle was therefore only made available to Ahmad, rather than Hossam, at that time.

Scottish & York submissions

17. Scottish & York contends that H & A had made a vehicle available to Hossam for his regular use at the time of the accident, and that he, and by extension the Claimants, were deemed named insureds under the Travelers policy. Counsel noted that the case law draws an important distinction between "regular use" of vehicles by employees, and the use of company vehicles by managers and owners who by virtue of their positions of authority have unfettered access to the vehicles. Counsel submitted that in the case of owners, the question of whether a vehicle is being "made available" for their regular use at a certain time does not depend on whether they are physically in the vehicle at the moment of the collision, but rather on whether they had access to that vehicle at that time.

18. Counsel noted that as owner of the garage and dealership, Hossam clearly had control over all of the vehicles owned by H & A. She contended that when this is coupled with the evidence that he actually drove the Ford Edge that was involved in the accident on various occasions before the date of loss, it is clear that Hossam satisfies the criteria to be deemed a named insured under the Travelers policy pursuant to section 3(7)f (i)of the *SABS.*

19. Ms. Rogers cited two decisions in support of her position. She noted that Arbitrator Densem determined in *Dominion of Canada o/a Chieftain Insurance v. Federated Insurance Company of Canada* (October 31, 2012) that the principal or owner of a company who has authority to drive vehicles covered under the company's policy, and in fact does so, can be said to have a vehicle made available for his or her regular use if that individual has permission to drive the vehicle at the time the accident. She noted that the facts in that case are very similar to those here, and urged me to follow that ruling.

20. Counsel also noted that Arbitrator Bialkowski cited and relied on the above decision in his award in *Dominion of Canada v Lombard General Insurance and Northbridge Insurance Company* (September 11, 2013). In that case, he determined that a claimant who was involved in a cycling accident in Oregon maintained the status of a

"deemed named insured" under her employer's policy with Lombard, given that she retained a level of control over the van that she drove at the group home at which she worked, despite the fact that she was on vacation out of the country at the time of the accident.

21. Ms. Rogers acknowledged the Superior Court's decision in *Continental Casualty Company v. Chubb Insurance Company of Canada* (2019) ONSC 3773, in which Arbitrator Bialkowski's determination that the owner of a forest products company who theoretically had access to all of its vehicles was a deemed named insured under the company's policy was overturned. She pointed out, however, that the claimant in that case had never used any of the large tractor trailers that were covered by the Continental policy, and that the court found that it was "unreasonable for the Arbitrator to impute regular use to..[the claimant] …when none existed". She argued that the facts in that decision are clearly distinguishable to those here, as the evidence clearly shows that in contrast, Hossam Saddick regularly drove the vehicles owned by H & A before the accident.

Reply submissions

22. Counsel for Travelers submitted in reply that Justice Belobaba's analysis in *ACE v. Co-operators* remains the controlling appellate authority on the application of section 3(7)f(i) of the *SABS*, and that the "control and authority" test relied on by the Respondent should not be applied when it leads to a result that is contrary to the clear text of that section.

23. Counsel also noted that the "control and authority" test has never been approved by the courts. He pointed out that Justice Goldstein stated in *Intact v Old Republic* (2016) ONSC 3110 that while an individual's authority and control over vehicles could be evidence that a vehicle was made available for them at the time of the accident, "to elevate it to the level of a test goes too far". Mr. Crljenica noted that Arbitrator Densem did not have the benefit of these comments, or of the court's findings in *Continental v. Chubb, supra*, when he decided the *Dominion v. Federated* case in 2012.

CASE LAW – "REGULAR USE" BY OWNERS OR MANAGERS:

24. Given the evolving case law on this issue, I have closely reviewed the decisions cited above. I will provide a brief summary of these cases in order to clearly understand what the courts have said about applying the "regular use" provisions to owners of companies with garage policies covering vehicles sold by their businesses.

ACE INA v. Co-operators General Insurance (Superior Court – 2009)

25. The claimant in this case was injured while he was a passenger in a vehicle insured by Co-operators, late on a Saturday night while he was heading downtown with a friend. He was employed by Enterprise Rent A Car at the time, and had access to their vehicles while he was at work (only). Enterprise's vehicles were insured by ACE. The arbitrator determined that the claimant was a deemed named insured under the ACE policy, as he enjoyed "regular use" of the Enterprise vehicles as an employee. The claimant was not working at the time of the accident.

26. On appeal, Justice Belobaba overturned the arbitrator's decision. In what has become a much cited quote, he found that (then) section 66 of the SABS did not confer a "floating charge", and that the status of deemed named insured does not attach to someone with regular use of his employer's vehicles at all times, but rather only at the moment of the accident. He stated that the issue to focus on is whether an employer's vehicle was being made available to an individual *at the time of the accident*, and that the real question is whether any of the employer's vehicles were being made available at that specific time, rather than any particular vehicle.

***Dominion/ Chieftain v Federated Insurance (*Densem – 2012)**

27. As noted above, the facts of this case are quite similar to those of the instant case. The father of an injured claimant was a 50% owner of a car dealership that sold used cars. His child was injured in an accident while being driven home by someone else in a van owned by the dealership. It was agreed that the claimant was financially dependent on his father. An application was submitted to Dominion, the insurer of the father's personal vehicles, and Dominion pursued Federated Insurance, who had issued a garage policy to

the car dealership, for priority. It was agreed that if a vehicle was being made available to the father by the company for his regular use at the time of the accident, section 286(5.2) of the *Act* would dictate that Federated was in priority.

28. As in the instant case, the father had access to the keys for the vehicles owned by the dealership at all times. He drove the vehicles during business hours, and also regularly drove them home. He was not at the dealership at the time of the accident. Arbitrator Densem found that the father was a deemed named insured under the Federated garage policy, as he had regular use of the dealership's vehicles at the time of the accident. He grounded his analysis in Justice Belobaba's comments in the *ACE v Co-operators* case, finding that the father's control over and access to the company's vehicles both during and after working hours meant that he theoretically had the right to use all of the vehicles at the time of the accident.

Dominion v Lombard & Northbridge **(Bialkowski – 2013)**

29. The claimant in this case was involved in a cycling accident while on vacation in Oregon. She lived in Ontario and worked as a Team Leader at a group home run by Community Living in Mississauga. In that role, she made use of a van insured by Lombard. She used the van for work-related travel, and was permitted to use it beyond her regular working hours if she was called in to work extra shifts. She was also responsible for organising any repairs that the vehicle required, and for maintaining all of the vehicle's records.

30. Arbitrator Bialkowski reviewed and cited the *Dominion v. Federated* decision above. He noted that Arbitrator Densem had looked beyond the insured's physical access to the dealership's vehicle and focused on his control or authority over the vehicles at the time of the accident. Arbitrator Bialkowski determined that despite being in Oregon, the claimant retained sufficient residual control over her employer's vehicle at the time of her accident, given her position of authority in the organisation, and the fact that she remained responsible for maintenance and record keeping relating to the vehicle while she was on vacation. He concluded that she was a deemed named insured under the

Lombard policy, as the vehicle technically remained available for her use at the time of the accident.

Intact Insurance v. Old Republic Insurance Company **(Superior Court – 2016)**

31. The claimant in this case was involved in an accident while driving his mother-in-law's car to work. He was employed as a short-haul truck driver, and was on his way to the yard to load up the truck that he had been assigned to drive that day. The claimant was a listed driver on a fleet policy issued to his employer by Old Republic. His regular work hours were from Monday to Friday, and he was occasionally asked to work on the weekends. The accident occurred as he was making his way to the yard on a Saturday, after being assigned to make a delivery on that day.

32. The claimant's mother-in-law's car was insured with Intact, and he applied to them for payment of accident benefits. Intact claimed that Old Republic was in higher priority to pay the claim as the employer's vehicle was being made available to him at the time of the accident, and that he was therefore a deemed named insured under that policy. Arbitrator Cooper noted that while the claimant was not allowed to drive the employer's trucks for his personal use, he was permitted to arrive at the yard the night before and sleep in the truck that he was assigned to drive the following day. Relying on that fact, he found that the claimant had a vehicle made available for his regular use at the time of the accident, and concluded that he was a deemed named insured under the Old Republic policy by virtue of section 3(7)f(i) of the *SABS.*

33. Justice Goldstein upheld the decision on appeal, on a standard of correctness. He noted that Arbitrator Densem had cited the *ACE v. Co-operators* decision in his analysis in *Dominion v Federated, supra,* to reach the conclusion that a consideration of whether a vehicle was made available at the time of the accident required an analysis of the nature of the individual's control over the vehicle, or his or her authority to use that vehicle. Counsel for Old Republic argued that the Densem decision had "unreasonably stretched the scope of section 3(7)(f)", and that Arbitrator Cooper had erred in following that approach.

In response to that, Justice Goldstein stated –

> *there is merit in the argument that the interpretation of the scope of s. 3(7)f has gone too far…I have little difficulty finding that authority and control could well be evidence that a claimant had a vehicle available at the time of the accident, but I do agree that to elevate it to the level of a test goes too far.*

He found, however, that Arbitrator Cooper had not employed "authority and control" as a test, but rather as evidence to be considered. He also upheld his finding that "while actual use may be evidence of availability at the time of the accident, ***availability does not necessarily require actual use".*** (emphasis added)

Chubb Insurance v Continental Casualty *(Bialkowski – 2018)*

34. This case is best known for the analysis of the interplay between optional benefits and the priority rules. It also raised the question of whether the owner and CEO of a forest products company had regular use of vehicles owned by his company at the time that he was struck by a vehicle as he was jogging near his cottage. He applied to Chubb Insurance, the insurer of his personal vehicles, for payment of benefits under the *SABS*. Chubb contended that as the claimant had access to keys for all vehicles owned by the company at all times, those vehicles were essentially made available for his regular use at the time of his accident, and that he would therefore be a deemed named insured under the Continental policy insuring those vehicles. In practise, the claimant never actually drove the company's vehicles, most of which were large tractor trailers.

35. Arbitrator Bialkowski determined that as owner and CEO of the company, the claimant had sufficient control over the vehicles insured by Continental, and would accordingly be a deemed named insured under the fleet policy issued to the company by virtue of section 3(7)f(i) of the *SABS.* He also noted that the decision in *Amos v ICBC* (1995) 3 S.C.R. 405 provides that accident benefits legislation should be interpreted broadly, and concluded that the above provision should be interpreted to expand coverage where the facts dictate.

36. On appeal, Justice Stinson overturned the above award. He noted that while the owner of the company may have theoretically had access to the company's vehicles, the evidence was clear that he never actually drove them. He found that the arbitrator's failure to consider this evidence was unreasonable, and that he had imputed regular usage to the claimant where none existed. He noted that Arbitrator Bialkowski had not followed the analytical approach set out by Justice Belobaba in *ACE v. Co-operators, supra,* and that his decision was accordingly inconsistent with the accepted legal principles governing the issue.

37. I understand that Chubb has sought leave to appeal this decision to the Court of Appeal, but that the court has not yet provided its ruling.

ANALYSIS & FINDINGS:

38. The following principles regarding the application of the "regular use" provisions in section 3(7)f (i) of the *SABS* emerge from the cases outlined above –

- While use of a vehicle is important, it is the individual's access to the vehicles covered by the policy in question at the time of the accident that is the key factor (*ACE v Co-operators – paras 19 and 22*);

- An employee who has access to vehicles only while at work, and is involved in an accident outside of work hours, is not a deemed named insured under the employer's policy covering those work vehicles; (*ACE v Co-operators – para 20*)

- The analysis should not focus on whether a specific vehicle was being made available for the employee's use, but rather whether *any* vehicle was being made available to him or her at the time of the accident (*ACE v. Co-operators - para 22*);

- An individual who has access to a company vehicle outside of their defined work hours, and who is involved in an accident outside of those hours would be a deemed named insured under the company's policy (*ACE v Co-operators, Intact v Old Republic*);

- An owner of a car dealership who regularly drives vehicles owned by the dealership home is a deemed named insured under the dealership's policy if he (or his dependent) is involved in an accident, even if the accident occurs after work hours (*Dominion v. Federated);*

- An individual's authority and control over vehicles owned by a company could be evidence that the individual had a vehicle made available to them at the time of the accident, but those factors should not be elevated to the level of a test (*Intact v. Old Republic);*

- An owner or manager who has theoretical access to a company's vehicles but does not actually drive them cannot be said to have those vehicles made available for his regular use at the time of the accident – i.e. regular use of vehicles should not be imputed if none exists (*Chubb v Continental, appeal decision*).

39. Applying the above principles to the facts of this case, I find that a vehicle was being made available by H & A for Hossam Saddick's regular use at the time of the accident in question. Consequently, the Claimants, by virtue of their dependence on him, are deemed named insureds under the Travelers policy in accordance with section 3(7)f(i) of the *SABS.*

40. I acknowledge counsel for Travelers' comment that the court decisions cited above do not support the application of a "control and authority test" to the question of whether an individual had regular use of a vehicle made available to him or her. I also acknowledge the Superior Court's finding in *Chubb v. Continental, supra,* that regular

use of vehicles "should not be imputed if none exists". However, the facts agreed to by the parties in this case differ in significant ways from the evidence in the *Chubb* case, and in my view, a different result is merited.

41. As noted in the Statement of Agreed Facts, Hossam did drive the vehicles owned by the dealership on various occasions in order to ensure that they remained in good working order. He sometimes used a vehicle from the dealership to drive himself home at the end of the day, if his personal vehicle was not available, or if the vehicle needed to be delivered to a customer. He had in fact driven the Ford Edge that was involved in the accident six or seven times before the date of the accident, and estimated that Ahmad had also done so.

42. It is clear from the above that Hossam did not merely have theoretical access to the vehicles owned by H & A, but that he actually drove them, including the Ford Edge that was involved in the accident. I also note that Hossam's use of the dealership's vehicles was not merely for his personal convenience, but was an activity that was integral to the business itself, as it helped maintain the mechanical viability of the vehicles that the dealership was trying to sell.

43. Finally, if Hossam, rather than Ahmad, had been driving his children home from the movies when the accident occurred, Travelers would undoubtedly not be disputing its priority position. Counsel for Travelers contends that the fact that Ahmad was driving the vehicle and that Hossam was not an occupant of the vehicle at the time of the accident leads to the conclusion that that vehicle could not have been made available to Hossam for his regular use at the time. While I appreciate the initial appeal of this logic, I am not persuaded that the fact that Ahmad was the one driving, at Hossam's request, changes the analysis or outcome.

44. As stated by Justice Belobaba in *ACE v Co-operators, supra,* decision makers should not focus on whether a specific vehicle was being made available to the employee at the time of the accident, but rather on whether *any* vehicle was being made available to

him at that time. This statement, along with the examples he provides earlier in the decision, essentially creates a theoretical test – did the accident happen at a point in time that the individual in question had access to the company's vehicles ? If so, the test for "regular use" is met.

45. While the court in *Chubb v Continental* seems to have narrowed this somewhat, and ruled out situations in which an owner or manager's use is purely based on their theoretical access to the vehicles, Justice Stinson clearly stated that Justice Belobaba's analysis in *ACE v Co-operators* remains good law. The focus must accordingly be on whether an individual had access to a company vehicle at the relevant time, rather than whether he or she was physically an occupant of the particular vehicle involved in the accident.

46. For all of the reasons cited above, I find that Mr. Saddick was a deemed named insured under the Travelers policy at the relevant time, and that the Claimants, as dependents of his, also had this status. Section 268(5.2) of the *Act* therefore provides that Travelers is in higher priority to pay the claims of Adam and Nisreen Saddick than is Scottish & York.

ORDER:

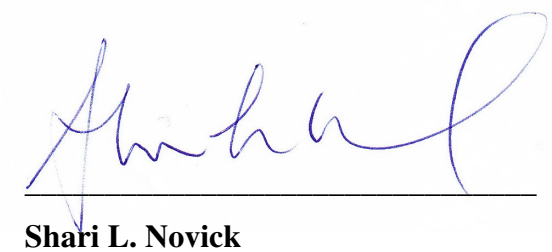
The application for Arbitration is hereby dismissed.

COSTS & ARBITRATION FEES:

Given the result, Scottish & York is entitled to payment of its legal costs from Travelers, on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, I invite them to contact me and a further teleconference will be arranged in which this issue will be addressed.

Travelers is also responsible to pay all arbitration fees incurred in regard to this matter.

DATED at TORONTO, ONTARIO this ___4th ___DAY OF DECEMBER, 2019



Shari L. Novick
Arbitrator