IN THE MATTER of a dispute between CGU Group (Canada) Ltd. and Lombard Canada Insurance Company pursuant to Regulation 283/95 under the *Insurance Act,* R.S.O. 1990, I.8 as amended.

AND IN THE MATTER OF an Arbitration pursuant to the *Arbitration Act*, S.O. 1991

BETWEEN:

CGU GROUP (CANADA) LTD.

Applicant

and

LOMBARD CANADA INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Kenneth Coulson, for the Applicant

Albert Conforzi, for the Respondent

ISSUES:

1. Is CGU Group (Canada) Ltd. (the "Applicant") or Lombard Canada Insurance Company (the "Respondent") responsible to pay statutory accident benefits to Mr. Peter Beaulieu as a result of the injuries suffered in a motor vehicle accident which occurred on May 7, 1999, pursuant to section 268(2) of the *Insurance Act* and section 66 of the

Statutory Accident Benefit Schedule-Accidents on or after November 1, 1996 [Ontario Regulation 462/96]?

As the insurers were unable to agree as to which insurer is required to pay the benefits, the dispute must be resolved through an arbitration, pursuant to the *Arbitration Act,* 1991, as required by Ontario Regulation 283/93.

ORDER:

1. It is ordered that CGU Group (Canada) Ltd. pay statutory accident benefits to Mr. Peter Beaulieu arising out of a motor vehicle accident which occurred on May 7, 1999.

1. I may be spoken to with regard to the issue of costs.

HEARING:

The arbitration hearing was held in the City of Toronto, in the Province of Ontario, on November 17, 1999, before me, M. Guy Jones, pursuant to the provisions of the *Arbitration Act ,* 1991.

EVIDENCE:

The Parties submitted an “Agreed Statement of Facts” and no witnesses were called to give evidence.

THE FACTS:

The agreed facts of this case may be summarised as follows:

1. On May 7, 1999, Mr. Peter Beaulieu, an individual ordinarily resident in Ontario, was involved in a motor vehicle accident while driving a 1998 Ford Explorer (the "Explorer"). The Explorer was leased from Ford Credit Canada by Associated Management Group Inc., and was insured with the respondent, Lombard, pursuant to policy no. 9827M7618. The "named insured" was First Team Transport Group Ltd.. Mr. Beaulieu was a "named driver" on the respondent's policy. Associated Management Group Inc. paid all expenses associated with the Explorer.

2. At the time of the motor vehicle accident, Mr. Beaulieu was the owner of a 1992 Ford Mustang, licence no. ZEK 988 (the "Mustang"), which was insured with Traders General Insurance (now CGU Group (Canada) Ltd.) pursuant to policy no. A20171669.

3. Following the accident, Mr. Beaulieu gave notice to Traders General of his claim for statutory accident benefits, and Traders General paid him benefits. On or about June 16, 1999 the applicant notified the respondent of the dispute between insurers, which gives rise to this arbitration.

THE LAW AND ANALYSIS:

What is fundamentally in issue in this case is whether Mr. Peter Beaulieu is deemed, pursuant to Section 66 of Ontario Regulation 403/96, to be a "named insured" under the Lombard policy of insurance for the purposes of Section 268 of the *Insurance Act.*

Section 268 governs the priority of payment of statutory accident benefits in Ontario. The relevant portions of this section provide as follows:

> (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,
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to no-fault benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund…

> (4) If under subparagraph i or iii of paragraph 1 or subparagraph 1 or iii. of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of no fault benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

The above is subject, however, to section 268(5) which states:

> Despite subsection (4) if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is a spouse or a dependent, 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.

It is, therefore, important to determine if Mr. Beaulieu was a “named insured” at the time of the accident and therefore whether or not section 268(5) applies. If so, Lombard must pay the statutory accident benefits, and if not, CGU Group (Canada) Ltd. must pay.

Section 224 of the *Insurance Act* defines “Insured” as:

> “A person insured by a contract whether named or not and includes every person who is entitled to no fault benefits under the contract whether or not described therein as an insured person”.

Section 2 of the Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996 (hereinafter referred to as "the Bill 59 Schedule") defines "insured person" as follows:

> (1) The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
>
> > (a) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile,
> >
> > …
>
> (2) In respect of an accident in Ontario, a person who is involved in an accident involving the insured automobile…

Although the term "named insured" is not defied in the *Insurance Act,* or in the Schedule, in the Insurance Industry the term is generally meant to refer to the person or entity in whose name the policy is issued. [1]

The key reference to "named insured" for the purposes of this case is found in section 66 of the Statutory Accident Benefits schedule (Bill 59), which, in effect, deems a person to be a "named insured". It states:

[1] Royal Insurance Company of Canada and Market Insurance Company of Canada vs. Brian Portch (December 17, 1996, Director's Delegate Naylor) -OIC File P-008360 and P-007701 at page 15.

(1) An individual who is living and ordinarily present in Ontario shall be deemed for the purposes of this Regulation 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, unincorporated association, partnership, sole proprietorship or other entity; or

(b) the insured automobile is being rented by the individual for a period of more than 30 days.

In order to determine if section 66 applies to the question of priority as between insurers, it is necessary to briefly review the statutory accident benefit regime in the province of Ontario as it relates to the providing of benefits and priority disputes between insurers.

Accident benefits are, pursuant to section 268 of the *Insurance Act,* part of every automobile liability contract in the province of Ontario, subject to the terms, conditions, provisions, exclusions and limits contained in the Statutory Accident Benefits Schedule.

The original version of section 66 of the present Schedule is found in section 3(1) of the Statutory Accident Benefit Schedule-Accidents on or before January 1, 1994 (Bill 68) which states:

> (1) If the insured automobile is made available for the regular use of an individual, whether or not resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Regulation applies to the individual and his or her spouse and their dependants as if the individual were a named insured."

Section 3(1) has been interpreted in many arbitration and court decisions. Its applicability has been restricted to determining the identification of persons covered by or entitled to statutory accident benefits and not to the question of priority as between insurers. Essentially, the reason for this is that section 3(1) deems the "named insured" provision to apply only to the Regulation (Schedule), whereas the priority provisions are set out in section 268 of the *Insurance Act.*

As Justice Roberts stated in Axa Home Insurance Company vs. Western Assurance Company (1994) 21 C.C.I (2d) 125:

> "I've considered the provision of section 3(1) of the Regulation as that provision is written and in light of the scheme of the *Insurance Act* as a whole. I find that section 3(1) deals solely with the identification of persons covered by the no-fault provisions. It does not extend the definition of "named insured" for any other purpose and, in particular, does not extend the definition of "named insured" under section 268(5) to include those persons eligible for no fault benefits as defined in section 3(1)".

Section 3(1) was replaced by section 91(1) of the Statutory Accident Benefits Schedule-for Accidents on or after January 1, 1994. That section stated:

> (1) If an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity or an insured automobile is rented to an individual who is living an ordinarily resident in Ontario, the individual shall be deemed for the purposes of this regulation to be a named insured.

While the wording is slightly different than the earlier section 3(1), the phrase "for the purpose of this regulation" remained in the section. Arbitrator Blackman, in Crosby vs. Pilot Insurance Company and Co-Operator's General Insurance Company, (October 16, 1995) OIC files A/009908 and A/012239, held that the change did not affect the priority rules as set out in section 268 of the *Insurance Act*, but rather applied only to the question of entitlement of benefits, as set out in the Schedule.

As Arbitrator Blackman stated:

> In accordance with the maxim "expressio unius est exclusio alterius" (the expression of one thing is to the exclusion of another), I find that the Schedule, by specifying that the expansive meaning of "named insured" is "for the purpose of this Regulation," excludes broadening the meaning of

> "named insured" for the purpose of the priority rules, which are set out in the Act, not in the Regulation. [2]

Section 91(1) was repealed and replaced effective January 1, 1995 by section 91(4), which reads as follows:

> If an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more that 30 days to an individual who is living and ordinarily present in Ontario, 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 set out in this Regulation.

As can be seen, the key wording was changed from "for the purposes of this Regulation" to "under the policy". This change in the wording of the Regulation was interpreted by Madame Justice Lax in Re: Axa Insurance (Canada) and Old Republic Insurance Company (1998) 38 O.R. (3rd) 630, who found that the change in the wording was of fundamental importance and that the deemed "named insured" provision would now apply to the question of priority as well as entitlement.

Madame Justice Lax stated:

> "Section 91(4) now provides that the individual "shall be deemed to be the named insured under the policy insuring the automobile for the purpose of

[2] Crosby vs. Pilot Insurance Company and Co-Operator's General Insurance (October 16, 1995) OIC File A-009908 and A-012239 at page 10.

> payment of the statutory action benefits set out in this Regulation" (emphasis added). I do not think that this language is susceptible to any interpretation other than the legislature intended that regular users of company cars would be treated as if they were owners… and that priorities as between insurers would be determined accordingly".

The decision of Justice Lax and the reasoning set out in her decision has been followed in a number of arbitration decisions dealing with section 91(4) and it is not necessary to review them at this time.

Section 91(4) was altered yet again and replaced by section 66 of the Statutory Accident Benefits-Accidents on or after November 1, 1996. That section states:

> (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purposes of this Regulation to be the named insured under the policy insuring an automobile at the time of the 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, unincorporated association, partnership, sole proprioriship or other entity; …

As can be seen, the legislature has re-introduced the phrase "for the purposes of this Regulation," which formed part of the earlier sections 3 and 91(1). It has also, of course, made reference to the phrase "under the policy", which was first seen in section 91(4) of

the Schedule. The question which must now be addressed is what effect, if any, the change of the wording has on the applicability of section 66 to the priority rules.

Arbitrator Bruce Robinson, in Unifund Assurance Company and Commercial Union Assurance Company of Canada (unreported decision, dated September 26, 1998) had an opportunity to consider the applicability of section 66 to the priority rules. He stated:

> "the interpretation of section 3(1) and section 91(1) in the above cases are consistent in that the wording of each is restrictive. A more expansive treatment has been given by the arbitrators and judges to section 91(4), particularly by Madame Justice Lax and arbitrators Samis and Malach. I find this a more reasonable approach in dealing with the present section 66 and feel that the purpose of section 91(4) and section 66 are similar. The operative wording of section 66 is the phrase "under the policy". This is the same wording as found in section 91(4) which has previously been given an expansive interpretation with regard to the "deemed insured" interpretation. These words are clear and specific, and should be given their full and proper interpretation. I do not find the subsequent words "for the purposes of this regulation" restrictive when read in context with the prior phrase "under the policy".

While I am in agreement with Justice Lax as well as arbitrators Samis and Malach in their expansive treatment of section 91(4), I am not in agreement with Arbitrator Robinson in his analysis of section 66. Justice Lax made it very clear that it was the change in the wording of section 91(4) that resulted in the deemed "named insured" provisions applying to the priority rules. It is, in my view, equally important to look at the

changes in the wording from section 91(4) to section 66. In doing so, I'm drawn to the conclusion that section 66 is now much closer to the earlier sections 3(1) and 91(1) than it is to section 91(4). In arriving at this conclusion, I first note that the key restrictive phrase "for the purpose of this Regulation" reappears in the new section. It is precisely this wording that led the earlier judges and arbitrators to restrict the use of the section to the question of entitlement rather than the question of priority.

Arbitrator Robinson found that "the operative wording of section 66 is the phrase "under the policy". I agree that these words are important, but they must be read in conjunction with the words in the remainder of the section. In interpreting the section it is important to note that the words "for the purpose of this Regulation" precede the words "under the policy". Arbitrator Robinson seems to have been under the mistaken impression that the phrase "for the purposes of this Regulation" followed the phrase "under the policy." In this regard, he is mistaken, and I think that the difference is crucial. By having the words "for the purposes of this Regulation" preceding the later words, the legislature intended to restrict the use of section 66, in much the same way as it did with section 3(1) and 91(1), as interpreted by Justice Lax in Axa Home Inurance Company vs. Western Assurance Company.

In arriving at this conclusion, I'm reinforced in my thinking by the fact that the legislature did change the wording, and in doing so made it very similar to that used in sections 3(1) and 91(1). It is trite law that the change in the language of a statutory provision must be presumed to have some significance.

I note that Arbitrator Robinson's decision in Unifund vs. Commercial Union Assurance Company was upheld by Mr. Justice Ferrier (unreported decision, released June 30,

1999). In reviewing Justice Ferrier's brief decision, I note that he has simply agreed with Arbitrator Robinson's analysis. This is, of couse, based on the mistaken assumption that the words "for the purpose of this Regulation" follow the words "under the policy." For this reason, as well as my reasons stated above, I have come to the opposite conclusion.

It has been suggested in earlier arbitration decisions that section 66 would serve no additional purpose if it did not apply to the priority rules. I disagree. By extending the definition of "named Insured" under section 66, coverage is given to individuals who may otherwise not have any entitlement to accident benefits. In the absence of section 66, the spouse and dependants would not have access to accident benefits through that policy unless they were occupants of that vehicle at the time of the accident.

I am further reinforced in my view of the purpose of section 66 in light of the fact that this interpretation is consistent with the underlying principle behind the statutory accident benefits scheme, being that the coverage follows the insured person, who looks first to his or her own insurance company, whether or not his or her vehicle is the one involved in the accident. [3]

I also note that by having the coverage follow the person, rather than the vehicle, this allows the individual to receive accident benefits consistent with the options that he or she would have chosen and paid for when purchasing their policy. If the injured party were forced to receive accident benefits from the company insurer, they might well

[3] Royal Insurance Company of Canada and Market Insurance Company of Canada vs. Brian Portch (December 17, 1996, Director's Delegate Naylor)–OIC File P-008360 and P-007701
Crosby vs. Pilot Insurance Company and Co-Operator's General Insurance (October 16, 1995) OIC File A-009908 and A-012239

receive lesser benefits than those which they choose and paid for when purchasing their own motor vehicle insurance.

I am aware of Arbitrator Malach's decision in Dominion of Canada General Insurance vs. The Co-Operator General Insurance Company (unreported decision released February 9, 1999). In that case, Arbitrator Malach analyzed the Court of Appeal decision in the Warwick et al vs. Gore Mutual Insurance Company (1997) 32 O.R.(3d)76, and came to the conclusion that section 66 did apply to classify the injured party as a "named Insured" for priority purposes.

With respect, I do not read Warwick to stand for the proposition that section 66 applies to the priority rules. In Warwick the Court of Appeal held that the plaintiff was not an insured under the State Farm policy. The Court held that the definition of insured under the Statutory Accident Benefit Schedule determined entitlement to statutory accident benefits. The Court did not deal with the issue of priority, as priority does not become an issue unless coverage exists under two separate policies.

For the above reasons, I order that CGU Group (Canada) Ltd. is responsible to pay Mr. Peter Beaulieu statutory accident benefits as a result of injuries suffered by him in a motor vehicle accident that occurred on May 7, 1999.

COSTS:

I may be spoken to with regard to the issue of the costs to be awarded, as well as the cost of the arbitration itself.

Dated at Toronto this 7th day of January, 2000.

M.Guy Jones
Arbitrator