IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, s. 268 and Ontario Regulation 283/95 thereunder;
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17;
AND IN THE MATTER of an Arbitration

BETWEEN:

COSECO INSURANCE COMPANY

Applicant

- and -

LIBERTY MUTUAL GENERAL INSURANCE COMPANY and GMAC INSURANCE COMPANY

Respondents

AWARD

Counsel:

Coseco Insurance Company (Applicant): Daniel Strigberger

Liberty Mutual General Insurance Company (Respondent): Catherine A. Korte

GMAC Insurance Company (Respondent): Barry G. Marta

Issue:

According to the Arbitration Agreement dated October 1, 2018 the issue for my determination is set out as follows:

> "Do the priority provisions in Section 268 of the *Insurance Act* apply to the circumstances of this case as noted above?"

Essentially the issue before me is whether the *Ontario Insurance Act* applies to an American insurer that does not undertake or agree or offer to undertake a contract in Ontario but that has filed a PAU.

Result:

I conclude that the provisions of the *Insurance Act* and specifically 268 of the *Insurance Act*, Ontario Regulation 283/95 do apply to GMAC Insurance Company in the circumstances of this case.

Background:

On July 4, 2015 Heerah Singh was a passenger in a vehicle insured by Coseco Insurance Company (hereinafter referred to as "Coseco"). Mr. Singh was involved in a motor vehicle accident in Ontario.

At the time of the accident Mr. Singh was a resident of New York State. The vehicle in which he was a passenger was insured by Coseco. Mr. Singh applied to Coseco for statutory accident benefits pursuant to the Statutory Accidents Benefits Schedule for accidents on or after September 1, 2010 pursuant to the *Insurance Act* R.S.O. 1990 c.I.8, s.268 (hereinafter referred to as the "Insurance Act").

In accordance with Regulation 283/95 (as amended by Regulation 38/10) Coseco accepted Mr. Singh's OCF-1 and continues to pay statutory accident benefits to Mr. Singh.

The Respondent, Liberty Mutual General Insurance Company (hereinafter referred to as "Liberty") insures Golabie Singh, the spouse of Mr. Heerah Singh. Liberty has a motor vehicle policy of insurance bearing number A0S228731940. This policy was issued in New York State.

GMAC Insurance Company (hereinafter referred to as "GMAC") insured Singh Hickley Glass Inc. This is a company owned by Heerah Singh. It is a motor vehicle liability policy bearing number 2235372. It is agreed that GMAC's policy is <u>not</u> an Ontario policy.

Pursuant to Section 268 of the *Insurance Act* and Regulation 283/95 Coseco commenced an arbitration claiming that priority for Mr. Singh's accident benefit claim rested with either Liberty as the insurer of Mr. Singh's spouse or with GMAC who insured Mr. Singh through Singh Hickley Glass Inc. Coseco alleges that Mr. Singh in regard to GMAC is either a named insured or a deemed named insured under the GMAC policy. Coseco claims that either the Liberty policy or the GMAC policy would rank in priority to the Coseco policy as Mr. Singh would be a named insured and/or deemed named insured under either of those policies. Coseco would only provide coverage to Mr. Singh as an occupant of their vehicle. There seems to be no argument amongst counsel that Liberty's policy and GMAC's policy would rank in priority to Coseco. However, GMAC takes the position that the *Insurance Act* and Regulation 283/95 do not apply to them as an out-of-province insurer who has not undertaken nor offers to undertake a contract of motor vehicle liability insurance in Ontario.

Before this preliminary issue hearing an earlier preliminary issue hearing took place in December of 2016. In that first preliminary issue hearing GMAC argued that I did not have jurisdiction under Ontario Regulation 283/95 and the *Arbitration Act*, 1991, to rule on my own jurisdiction to conduct this arbitration. I concluded (Decision dated December 22, 2016) that I did have jurisdiction to rule on whether I had jurisdiction to conduct this arbitration and concluded that I did. Much of the reasoning outlined in that first preliminary issue hearing is germane to the present argument being raised by GMAC. In that initial decision I concluded that the key decision relied upon by GMAC both in that preliminary issue hearing case and in this new matter before me (*Unifund Assurance Co. v. Insurance Corporation of British Columbia, [2003], S.C.J. 39*) was distinguishable from the facts of this case on three key grounds. I make a similar finding in this case and as will be outlined under my analysis I conclude that that decision does not apply to the circumstances of this case and accordingly GMAC is subject to the priority provisions of Section 268 of the *Insurance Act* and its Regulation 283/95.

It is also germane to this decision that GMAC acknowledges that while it is an American insurer that does not operate in Ontario, it did sign a "Power of Attorney and Undertaking" ("PAU") which was filed on December 31, 1996. The pertinent wording from the PAU for the purposes of this arbitration is as follows:

> "GMAC Insurance Company undertakes:
>
> A. To appear in any action or proceeding against it or its insured in any Province of Territory in which such action has been instituted and of which it has knowledge;
>
> ...
>
> C. Not to set up any defence to any claim, action or proceeding under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into, and in accordance with the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted and to satisfy any final judgment rendered against it or it's insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of:
>
> a. The amounts and limits for that kind of class or coverage or coverages provided in the contract or plan; or,

b. The minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory."

Parties' Positions:

GMAC is essentially the applicant with respect to this preliminary issue hearing. GMAC takes the position that the Ontario Priority Arbitration Scheme does not apply to GMAC as GMAC is an American insurer. GMAC further submits that the PAU, while it may be interpreted as requiring its appearance to defend a claim in Ontario, it does not result in the *Insurance Act* applying to it and does not prevent it from contesting the application of the *Insurance Act* to impose a civil obligation on an out-of-province insurer with respect to a motor vehicle accident. In other words, while GMAC acknowledges that it would defend it's insured with respect to a claim brought in Ontario and would not raise any defences that would not otherwise be available to an Ontario insurer, GMAC draws the line at accepting that the PAU would apply to allow Coseco to pursue a claim against GMAC for a reallocation of the cost of payments required under the *Insurance Act* amongst insurance companies subject to the Ontario act.

GMAC submits that the Supreme Court of Canada decision in *Unifund Assurance Co. v. Insurance Corporation of British Columbia*, (supra) applies to the circumstances of this case. GMAC submits that the Supreme Court of Canada in that case concluded that the *Insurance Act* is to be confined to its own constitutional sphere and cannot be extended to an out-of-province insurer.

GMAC submits that the proper interpretation of the *Unifund & I.C.B.C.* case is to conclude that the *Insurance Act* does not apply to a non-resident insurer who does not undertake or offer to undertake a contract in Ontario and that the question of where the motor vehicle accident occurred is not relevant to that determination.

GMAC submits that the intent of the PAU is to ensure that out-of-province insurer's cannot defend a claim in Ontario on the basis that it does not have the Ontario minimum liability limits of $200,000.00 or that it does not have the same accident benefit schedule or unidentified/ uninsured coverages. GMAC submits the purpose of the PAU is to guarantee that a person injured in Ontario will have the same liability and accident benefit coverage that would have been available under the Ontario policy.

Liberty and Coseco (the respondents) take the same position with respect to GMAC's claim. Both the respondents point out that the facts in this case are not in dispute. The key fact from their perspective is that this accident occurred in Ontario. They also accept that there is no

dispute that GMAC is an American insurer that does not write policies in Ontario but GMAC did sign the PAU.

The respondents take the position that the *Unifund & I.C.B.C.* case is not applicable to the circumstances of this case. Primarily their argument is that in the *Unifund & I.C.B.C.* case the accident did not occur in Ontario. Further, that case dealt with Section 275 of the *Insurance Act*. Finally, they point out that while the I.C.B.C. had signed the PAU in similar if not identical wording to GMACs that the PAU was not applicable because the one the I.C.B.C. had signed did not apply to the Province of British Columbia.

The respondents rely upon the decision from the Court of Appeal in *Healy v. Interboro Mutual Indemnity Insurance Company, (1999) Carswell ONT. 1451, [1999] O.J. No. 1667,* decision of the Ontario Court of Appeal. The respondents submit that the decision in *Healy* is on all fours with the circumstances of this case.

The respondents submit that *Healy* stands for the proposition that Section 268 of the *Insurance Act* applies to an American insurer who was involved in an accident in Ontario and who has filed a PAU even if that insurer is not licenced to provide automobile insurance in Ontario.

The respondents submit that the decision in *Healy* not only stands for the proposition that that out-of-province insurer is obliged to pay Ontario Statutory Accident Benefits but that it also stands for the proposition that the out-of-province insurer is to be considered an Ontario insurer for the purposes of a dispute between insurers and is therefore not only subject to the provisions of the *Insurance Act* and its statutory accident benefits schedule but it is also subject to its regulations: Specifically Regulation 283/95 which provides for the orderly handling of priority disputes between insurers.

The respondents submit that GMAC is bound to respond to the priority dispute that has been brought by Coseco and cannot opt out of the scheme based on its constitutional argument.

For reasons that I will now outline I agree with the position of the respondents.

Analysis:

The relevant statutory provisions that have a bearing on this decision are set out below.

> "Section 221(1) of the *Insurance Act* provides as follows:
>
> > Section 221(1) In This Part
> >
> > "Contract" means a contract of automobile insurance that

(a) Is undertaken by an insurer that is licenced to undertake automobile insurance in Ontario or;

(b) Is evidenced by a policy issued in another Province or Territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefit Schedule by an insurer that has filed an undertaking under Section 226.1."

Section 226.1 provides as follows:

> "An insurer that issues motor vehicle liability policies in another Province or Territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefit Schedule may file an undertaking with the Superintendent, in the form provided by the Superintendent, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in Sections 251, 265 and 268 when the insured automobiles are operated in Ontario."

Section 268 of the *Insurance Act* has two relevant provisions for the purposes of this decision. The first is Section 268(1) set out below:

> "Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefit Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that schedule."

Section 268(2) to 268(5.2) provides a series of rules for determining who is liable to pay statutory accident benefits. The list of rules is not relevant for the purposes of this decision but the fact that those rules fall under Section 268 of the *Insurance Act* is.

Finally, I note that all the provisions set out above fall under Part VI of the *Insurance Act* which is entitled - Automobile Insurance.

According to GMAC the auto insurance provisions set out above do not apply here and specifically the priority provisions set out in 268(2) and Regulation 283/95 do not apply. I will not set out the provisions of Section 283/95 but it provides the regulatory scheme by which priority disputes that arise under Section 268(2) of the *Insurance Act* are to be dealt with. It sets out the rules and regulations with respect to priority disputes through a private arbitration process.

It is also relevant to point out that Section 275 of the *Insurance Act* which deals with the loss transfer provisions which was the focus of the decision in the Supreme Court of Canada in *Unifund & I.C.B.C.* also falls under Part VI of the *Insurance Act*.

This then brings us to the case law and in particular the two key decisions of *Unifund & I.C.B.C.* and *Healy & Interboro*.

It is my conclusion that the decision of the Supreme Court of Canada in *Unifund & I.C.B.C.* does not apply to the facts of this case. That case was an issue between two insurance companies that flowed from a motor vehicle accident that occurred in **British Columbia**. The claimant had been injured in British Columbia. The claimant then returned to Ontario and applied and collected statutory no-fault accident benefits from Unifund Assurance Company who was an Ontario insurer. Unifund was licenced to carry on business in Ontario but was not licenced to carry on business in British Columbia.

Unifund applied to the Ontario Superior Court of Justice to have an arbitrator appointed pursuant to Section 275(4) of the *Insurance Act*. It was Unifund's position that they could pursue a loss transfer claim under Section 275 against the Insurance Corporation of British Columbia. The Insurance Corporation of British Columbia insured a heavy commercial vehicle which (subject to jurisdictional and constitutional arguments) would make it potentially liable for a loss transfer claim. Loss transfer is a process between two insurers whereby the insurer of the heavy commercial vehicle, if at fault, can be obliged to make loss transfer payments to the insurer of an automobile who is paying the accident benefits to the claimant.

Throughout the proceedings the I.C.B.C. took the position that the loss transfer process was not applicable to it. They claimed that Unifund had no cause of action against an out-of-province insurer on the facts of the case.

The case proceeded through the motion to appoint the arbitrator, an appeal to the Court of Appeal and then ultimately up to the Supreme Court of Canada. The Supreme Court of Canada found that on the facts that Unifund did not have a cause of action in loss transfer as against I.C.B.C. The Supreme Court of Canada held that the loss transfer provisions of the Ontario scheme did not apply to the I.C.B.C.

In the decision the Court noted that there was no real and substantial connection with Ontario as the motor vehicle accident had occurred in British Columbia. Therefore the Court held that Ontario insurance law could not impose a civil obligation arising out of an accident that occurred within the territorial limits of British Columbia. To do so would give the Ontario Statute impermissible extra territorial effect.

In that decision it was also acknowledged that there was an argument with respect to the applicability of the PAU. While the I.C.B.C. had signed a PAU, the Court noted that the PAU did

not extend to all Provinces and Territories. In fact, British Columbia's name had been crossed off the standard form signed by the I.C.B.C. Therefore, the PAU was not applicable.

In reading the decision it seems to be abundantly clear that one of the key facts for the Supreme Court of Canada in its determination with respect to the claim for loss transfer was the fact that this involved an Ontario Insurer bringing a proceeding against an out-of-province insurer where the accident had <u>not</u> occurred in Ontario.

Justice Binney states at paragraph 55 (page 14) as follows:

> "In this case however we are asked to apply the 'real and substantial connection test' in the different context of the applicability of a Provincial regulatory scheme to an out-of-province defendant. The issue is not just the competence of the Ontario Court to entertain the appointment of the arbitrator (as in choice of forum cases) but, as the constitutional question asks whether the 'connection' between Ontario and the respondent is sufficient to support the application to the appellant of Ontario's regulatory scheme."

GMAC frames their constitutional question in this preliminary issue in the same manner.

In looking at the real and substantial connection the Court looked at the following:

1. It noted that the I.C.B.C. was not authorized to sell insurance in Ontario;
2. It noted the insured vehicles in this case did not venture into Ontario;
3. The Court noted that the accident did not take place in Ontario.

The Court noted that at best the terms of the real and substantial connection from Unifund was the fact that when the accident happened in British Columbia it triggered certain payments under Ontario law. However, the fact that the Ontario legislature chose to attach legal consequences in Ontario to an event that occurred outside Ontario did not result in an extension of its legislative reach to residents out of Ontario (see page 19, paragraph 83).

Also of significance in terms of distinguishing the Unifund decision from the circumstances of this case is Justice Binney's comments at paragraph 90:

> "It is true that the appellant has participated in litigation in Ontario from time to time, and on some occasions has 'benefited' from the Ontario Act. However, the appellant's sporadic entries into Ontario were the result of motor vehicle accidents in Ontario involving motor vehicle policies in British Columbia and were case specific. Nothing in the appellant's activities in those cases give rise to the obligation sought to be imposed in this case."

It is my view that Justice Binney is clearly indicating that this is a fact specific decision that flows from the accident occurring outside of Ontario in British Columbia. I find that is a key basis for my conclusion that the *Unifund & I.C.B.C.* decision is not applicable here as the accident occurred in Ontario. Further I find that the fact that the PAU was not applicable to I.C.B.C. in the circumstances of the Unifund case is also a distinguishing feature. GMAC has acknowledged that they are signatories to a PAU.

This then brings me to the decision which I feel I am bound by and that I feel directs me to conclude that Section 268 of the *Insurance Act* in its entirety applies to GMAC. That is the decision of the Court of Appeal in *Healy & Interboro Mutual Indemnity Insurance Company* (supra). In that case Mr. Healy was a resident of New York State. He was a passenger in a motor vehicle that was involved in an accident in Thunder Bay, Ontario. The vehicle he was a passenger in was insured by Guardian Insurance Company who was licenced to provide automobile insurance in Ontario. Mr. Healy was also a named insured under the Interboro Mutual Indemnity policy. Interboro was licenced to issue automobile insurance in New York State but not in Ontario. Interboro was a signatory to the PAU. The case suggests that the PAU signed by Interboro is identical in terms to that signed by GMAC.

Interboro took the position that its policy did not provide for the payment of statutory accident benefits as set out under Section 268(1) of the *Insurance Act* and therefore they were not obliged to pay Mr. Healy Ontario benefits. The Court of Appeal concluded that Interboro was obliged to pay Ontario Statutory Accident Benefits. The Court noted that the PAU precluded Interboro from asserting a defence that its policy did not include SABS coverage given that that coverage was mandated pursuant to the *Insurance Act* under Section 268.

Some of the key aspects of the Court of Appeal's decision relevant to my award in this case are set out below.

At page 3, paragraph 16 Justice Goudge states that the vehicle that was covered by the Interboro policy in that case need not be in Ontario for the PAU to be triggered. In this particular case the GMAC vehicle was not in Ontario. I do not find that to be a relevant fact based on the Court of Appeal's determination that the PAU is triggered whether or not the vehicle that it insures is within the province.

Justice Goudge on behalf of the Court concludes at paragraph 19 that Interboro is precluded from asserting that its policy does not include SABS coverage based on the PAU. He concluded the PAU prevents Interboro from making that argument given that that coverage is mandated by Section 268(1) of the *Insurance Act* and it deemed to be part of the standard automobile policy. He states that this result provides a level playing field objective of this reciprocal scheme that has been set up by the PAU.

Finally, and most critically, at paragraph 25 Justice Goudge states the following on behalf of the Court:

"In summary, I conclude that the 1964 PAU was in force on November 8, 1996 and applies to the circumstances of this accident. Because of its undertaking, the appellant is obliged by Section 268(2), paragraph 1, to pay SABS to its insured Mr. Healy. It cannot raise a defence to this claim that it could not raise if its contract with Mr. Healy was validly entered into in Ontario.

It is my view that the decision of the Court of Appeal in *Healy* directs me to conclude that where a motor vehicle accident occurs in Ontario, there is an out-of-province insurer whose policy covers the claimant, and that insurer has signed the PAU that that insurer is bound by Section 268 of the *Insurance Act* in its entirety. I find that is the only logical conclusion. In other words to limit the out-of-province insurer to only being bound by Section 268(1) of the *Insurance Act* would not make any legislative or practical sense. If the out-of-province insurer is bound to provide statutory accident benefits to an individual then that same insurer is going to have any priority disputes determined under Section 268(2) of the *Insurance Act*. It would make little sense that an insurer could be obliged to provide those statutory accident benefits and yet not be obliged to participate in the scheme to determine which of a variety of insurers is obliged to pay those benefits. I suggest that if the first application for accident benefits in this case had been made to GMAC and that GMAC believed that an Ontario insurer was responsible in terms of priority for those payments, that GMAC would have considered that it had the right to pursue a priority dispute under Section 268(2) of the *Insurance Act* and Regulation 283/95.

The PAU was intended to provide a reciprocal scheme on a uniform basis for the enforcement of motor vehicle insurance claims in Canada. This was to ensure that a person who entered into a motor vehicle contract in one Province (or State) is recognized as an insured in other Provinces. In the event of an accident that insurer agrees to be bound by the law of the Province or Territory where the action is brought and not the place where the policy is issued. (See *Potts v. Gluckstein [1992] O.J. No. 1173 (Court of Appeal)*). It would not again make sense if the reciprocal scheme that is designed by the Interconnecting provisions of the *Insurance Act* and the PAU did not also include the procedural provisions to allow for the interpretation and enforcement of those contractual obligations. I have difficulty understanding that if in accordance with *Healy v. Interboro* GMAC would have had the obligation to pay statutory accident benefits to Mr. Singh had he applied to them for benefits but at the same time GMAC based on their argument would be excluded from any priority dispute in Ontario.

I have also reviewed the recent decision of Arbitrator Bialkowski in the decision *CAA Insurance Company & Travelers Insurance Company (2007) Carswell ONT 3229*, which decision was recently upheld on appeal by Justice Pollak (2018) ON S.C. 3911 (CanLii). In that case Arbitrator Bialkowski decided that Travelers was the priority insurer for benefits as a result of an accident that occurred in Nunavut. In that case Travelers was an Ontario insurer who had filed a PAU. It

was the insurer of the car that was involved in an accident in Nunavut under a Nunavut auto policy. The claimant in that case however applied to her own insurer, CAA, for Ontario statutory accident benefits. CAA paid the claimant but brought a priority dispute in Ontario claiming that Travelers had priority. Travelers took the position that Section 268 of the *Insurance Act* was not applicable. They argued that the arbitrator should not have applied Ontario law to find Ontario benefits coverage. Travelers claimed that its policy was entered into in Nunavut and the accident occurred in Nunavut. Accordingly Ontario law did not apply to Travelers in the circumstances of this case. Travelers also took the position that while it had signed a PAU that the arbitrator was wrong in concluding that the signing of the PAU resulted in the Travelers Nunavut policy being a "made in Ontario policy".

As noted, the arbitrator concluded that Section 268 and the priority dispute provisions set out in Regulation 283/95 applied to Travelers. Justice Pollak upheld that decision.

Justice Pollak accepted the submissions of CAA as set out at paragraph 22 of his decision (page 5) which I quote below:

> "CAA submits that when the PAU is read with Section 224(1) of the *Insurance Act* the only correct decision for the arbitrator to make is that Travelers is an Ontario insurer for the purposes of the priority dispute and it is therefore liable for the accident benefit limits."

I feel I am bound by the decisions of the Court of Appeal in *Healy & Interboro* and the decision of Justice Pollak in *Travelers & CAA (supra)*. However, even if I were not bound by those decisions I would conclude in this case that GMAC having filed a PAU and the accident having occurred in Ontario that they are bound by the provisions of the *Insurance Act* relating to automobile insurance and specifically Section 268 of the *Insurance Act* together with the supporting Regulation 283/95.

<u>Award</u>:

The priority provisions in Section 268 of the *Insurance Act* apply to GMAC in the circumstances of this case.

<u>Costs</u>:

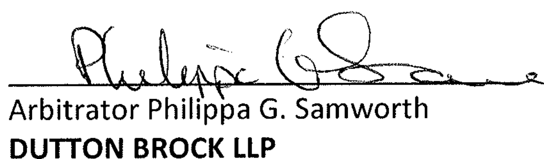
As Liberty and Coseco have been entirely successful in this preliminary issue hearing I find that GMAC is responsible for paying costs of Liberty and Coseco. I also find that GMAC is responsible for the costs of the arbitrator.

However, I understand that an appeal is likely to be launched from this decision. Accordingly pursuant to the Arbitration Agreement the costs of the arbitrator pending the appeal are to be

borne equally by the parties and then subject to distribution in accordance with the result of the appeal. Further, no legal costs are payable until the appeal process has been completed.

If at some point there is a dispute with respect to the quantum of costs the parties can address this through a costs hearing once the appeals have been heard and/or a further pre-hearing is scheduled.

DATED THIS 21st day of December, 2018 at Toronto.



Arbitrator Philippa G. Samworth
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