IN THE MATTER OF SECTION 268 OF THE ***INSURANCE ACT,*** R.S.O. 1990 S. I.8

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

RBC GENERAL INSURANCE COMPANY

Applicant

- and –

GEICO INDEMNITY COMPANY

Respondent

AWARD

Introduction:

This matter came before me as an Arbitrator pursuant to the Arbitrations Act, 1991, Section 266 of the Insurance Act, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95. The parties selected me as their Arbitrator on consent and the matter proceeded to a half day hearing in Toronto on February 3, 2010.

The Applicant and the Respondent are automobile insurers and a dispute has arisen as to which of the two insurers, should pay no fault accident benefits to Millicent Abu as a result of a motor vehicle accident that occurred on July 9, 2006.

Counsel:

RBC General Insurance Company: Applicant – Daniel Strigberger

Geico Indemnity Company: Respondent – Kevin S. Adams

Record:

The record in this matter consisted of three exhibits:

Exhibit 1 – Arbitration Agreement dated November 24, 2009
Exhibit 2 – Agreed Statement of Facts dated December 2, 2009 (this exhibit included 2 documents)
Exhibit 3 – Affidavit of Sarah Hutnyan dated February 3, 2010

No oral evidence was called.

The Issue:

The Arbitration Agreement did not identify the issue for determination however the parties agreed at the opening of Arbitration that the following was the issue for determination:

> *Does the Geico policy provide SABS coverage to the claimant, who at the time of the accident was an occupant of an uninsured vehicle driven by Shantese Dunlap/Patience Arhia and if so, is the Geico policy in priority to the RBC policy pursuant to Section 268 of the Insurance Act.*

While the issue seems rather simple when stated above, it is in fact a far more complex issue as it involves consideration of an insurer that is a US based insurer and how its filing of the Power of Attorney and Undertaking in Canada affects its obligation to pay accident benefits and/or to stand in priority to RBC in the circumstances of this case.

Background Information:

The accident that gives rise to this dispute occurred in Toronto near the intersection of Albion Road and Kipling. There were four occupants of a Nissan vehicle which was being driven by an individual that for the purposes of this decision will be described as "Dunlap". It is acknowledged that the Nissan vehicle was uninsured at the time of the accident. The Nissan collided with a vehicle driven by Deepa-Devi Persaud who was insured with RBC. The claimant Millicent Abu was a passenger in the Dunlap vehicle.

RBC is an insurer licensed to carry on automobile insurance in the Province of Ontario and is paying statutory accident benefits to Ms. Abu. RBC claims that Geico is the priority insurer.

Geico is a US based insurer that has filed a Power of Attorney and Undertaking (PAU) with the appropriate Canadian Authority. The PAU was produced at the Arbitration. There is no issue that the PAU was in full force and effect at the time of this accident.

Geico issued an insurance policy bearing number 4069688481 to "Dunlap" insuring two vehicles: a 2003 Lincoln Navigator and a 2002 Mercedes. This policy was cancelled after the accident that gives rise to this dispute.

While there are some issues with respect to possible identity theft and who was the actual driver of the uninsured Nissan vehicle at the date of loss, for the purposes of the preliminary hearing only the parties have agreed that that is not an issue and that the Geico policy was in fact issued to the driver of the Nissan vehicle and was valid and in force at the time of the accident.

The Affidavit of Sarah Hutnyan was completed by a Claims Examiner employed by Geico who suggests that at the time the Geico policy was issued that it was not reasonably within the contemplation of Geico that it's policy would extend to provide accident benefits to all occupants of a vehicle not listed in the Geico policy when the vehicle was being driven by the Geico insured.

For the purposes of this decision, it is important to remember that the Geico policy did not insure the vehicle that the Applicant was in but insured the driver of that vehicle under a US policy for US cars. The Nissan involved in this accident was not a described vehicle under that policy and was uninsured. For the purpose of this decision I am assuming that the Nissan was registered in Ontario.

The priority issue really revolves around the question as to whether the Power of Attorney and Undertaking which requires Geico not to "set up any defences 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 plans of automobile insurance of the Province or Territory of Canada..." can result in extending accident benefit coverage to an occupant of an uninsured vehicle that is being driven by the Geico insured.

Relevant Statutes:

Section 261.1 of the *Insurance Act* R.S.O. 1991, c.I.8 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 Benefits Schedule, may file an undertaking with the Commission, in the form provided by the Commission, providing that the insurer's motor vehicle liability policy will provide at least the coverage described in Sections 251, 256 and 268 when the insured automobiles are operated in Ontario.*

While the plain wording of this statute would appear to be clear there have been numerous cases interpreting it. One must look closely at the PAU itself before reaching any conclusions based on this provision only.

Position of the Parties:

RBC takes the position that under the PAU Geico cannot raise any defence to RBC's claim for priority that would not be available had the Geico contract been entered into in Ontario.

RBC submits that under the Standard Ontario Automobile Policy the uninsured Nissan would be covered both for the driver and the occupant of that vehicle as an "other automobile" under the Standard Ontario Policy. RBC argues that as the OAP1 (Ontario Automobile Policy in force at the time) was the only approved policy of automobile insurance in Ontario that Geico by virtue of the PAU is deemed to have issued that policy and its wording to Dunlap in Ontario thus providing the "other automobile coverage". If I accept that argument then Geico is the priority insurer as Ms. Abu would be in priority to RBC as pursuant to Section 268(2)(1)(ii) of the *Insurance Act* provides that if the occupant is not herself insured then her next recourse is against the insurer of the automobile in which she is an occupant.

There does not appear to be any dispute from Geico that if I agree with RBC's argument that they would be in priority based on the "other automobile" argument.

However, Geico does not agree with RBC's submissions. Geico argues that it was not within the reasonable contemplation of Geico that their policy would extend to provide coverage for accidents to all occupants of vehicles not listed on the Geico policy when driven by the Geico insured. Geico argues that it is not an insurer which issues an OAP1 Standard Ontario Policy. Geico argues that one cannot interpret Section 226.1 of the Insurance Act and the PAU to "clone" all the wording, conditions, and provisions of the OAP1 on to the Geico policy when its insured is driving an automobile in Ontario.

Geico accepts that it cannot raise any defence that would not be available to it, if its contract had been entered into in Ontario but suggests that the question of coverage is not a "defence". Geico suggests that that conclusion would lead it to insure all occupants of all vehicles in Ontario for all statutory accident benefits when any vehicle is driven by its insured.

Geico will acknowledge that its policy issued in the State of Georgia is modified by its filing of the PAU but that modification is limited to extending higher bodily injury limits, higher SABS benefits and being estopped from raising any defences in Ontario which could not otherwise have been raised. Geico however submits that the PAU cannot be interpreted to require that policy wording be read into its policy that was not originally there where the result would be to extend coverage.

In support of their argument, Geico points out some of its policy provisions.

The definition of non-owned auto is limited. The Geico policy provides at paragraph 5 of the definition provision Section 1 the following:

> *"Non-owned auto" means an automobile or trailer not owned by or furnished for the regular use of either you or a relative, other than a temporary substitute auto. An auto rented or leased for more than 30 days will be considered as furnished for regular use."*

Geico points out there is no provision other than this one for "other automobiles".

Under paragraph 14 of the definitions, Section 1, "you" is defined as "the policy holder named in the declaration and his/her spouse if a resident of the same household".

Geico also refers to the provisions under its policy entitled **persons insured**.

With respect to the non-owned auto, the person who insured is as follows:

1 (a) **You**;
(b) Your relatives when using a private passenger farm or utility auto or trailer;

Geico points out that Ms. Abu neither qualifies under the definition of **you** nor as a relative.

Lastly with respect to its policy, Geico points to page 5 of 15: **Out of State Insurance** which provides as follows:

> *"When the policy applies to the operation of a motor vehicle outside of your state, we agree to increase your coverage to the extent required of out of state motorists of local law. This additional coverage will be reduced to the extent that you are protected by another insurance policy. No person can be paid more than once for any item of loss."*

Geico submits that this contemplates the filing of a PAU and the acknowledged increase in **your coverage** to the extent required by the out of state local law. It argues that **your** does not include Ms. Abu.

RBC did not really challenge Geico's interpretation of its own policy but maintained its position that one could not use the wording of the Georgia policy. Rather RBC says one must look at the OAP1 to determine coverage as to do otherwise would be raising a defence not otherwise available in Ontario. RBC submits it does matter what the Geico policy says, it does not matter whether it would have provided coverage to the occupant, all that matters is that a PAU was filed and thus the OAP1 is the operative wording which, the parties agree, would result in Ms. Abu being covered as an occupant and Geico being priority. RBC, also submits that their approach is consistent with the SABS and in particular the definition of insured person which includes in paragraph (b):

> *"In Ontario an insured person includes in respect to accidents in Ontario a person who is involved in an accident involving the insured automobile".*

RBC relies on both the OAP and the Geico policy in these circumstances to point out that Dunlap would have been insured while driving the uninsured Nissan as a "non-owned automobile" and therefore as Ms. Abu was a person involved in the accident involving the insured vehicle she would be covered under the SABS as well as under the OAP1.

Case Law:

The parties referred me to a number of cases, none of which were on point but which were helpful in the analysis of this issue. A summary of some of those cases and the relevant points I draw from them are as follows:

***Potts v. Gluckstein*, [1992] I.L.R. 1-2849 (Court of Appeal)**

The Plaintiff in this case was injured in Ontario when an automobile driven by an uninsured 15 year old driver without the owner's consent collided with her motorcycle which was licensed in British Columbia and insured by ICBC. At the initial trial ICBC was held liable to pay the Plaintiff's damages under the reciprocal scheme (PAU). The Court of Appeal upheld the decision confirming that ICBC was precluded by its PAU from setting up any defences which could not be set up by an Ontario insurer. That included the defence that uninsured coverage was not available in the circumstances under the law of British Columbia. In that case it was argued that the filing of the Power of Attorney and Undertaking in Ontario did not render the ICBC policy as if it was a "made-in-Ontario policy". It was argued that previous cases suggested that the PAU only required out of province insurers to observe Ontario rules "to a certain extent". The court in this case concluded that the PAU did oblige the ICBC to provide uninsured coverage as that was specifically provided for under the Insurance Act and that the denial of liability with respect to an uninsured automobile on the grounds that that coverage was not available to ICBC is a "defence" within the meaning of the undertaking.

Of relevance is the quote referred to in "Potts" from the decision of the Supreme Court in Canada in *MacDonald v. Proctor* (1997) 1979 S2 S.C.R. 153 (SCC).

> *The undertaking does not presume, in this case, to create an agreement to incorporate into this Alberta policy all of the items required by the British Columbia legislation. Indeed the legislation of both British Columbia and Alberta does not require it to do that. It is correct to say that the legislature of the Province of British Columbia cannot dictate the terms of a policy issued in the Province of Alberta. As I understand the purpose of the reciprocal restrictions placed on insurers in terms of defences which they can or cannot raise, it is simply to ensure that they will not evade contractual liability by having recourse to legislative provisions unique to their own province.*

Similarly at page 535 of that decision is the following:

> *The undertaking means that the defences which a defendant insurer company may raise in terms of denying liability are dictated by the laws of the province in which the motor vehicle accident occurred.*

These comments suggest that one must distinguish when looking at issues relating to the PAU between what is mandated by law (in this case the *Insurance Act* of Ontario) as opposed to the policy itself. In response to this case, RBC takes the position that under the *Insurance Act* an Ontario insurer is required to issue a motor vehicle liability policy in the approved form: the OAP1. This is provided for under Section 227 and 226 of the *Insurance Act.*

***Healy v. Interboro Mutual Indemnity Company*, [1999] I.L.R. I-3704 (Court of Appeal)**

In this case the insured Healy was a resident of New York State and while a passenger in a motor vehicle was involved in an accident in Thunder Bay. The vehicle that he was an occupant of was insured by Guardian who was licensed to provide automobile insurance in Ontario. Healy was himself a named insured under a policy of automobile insurance issued by Interboro Mutual Indemnity Insurance Company and licensed to provide coverage in New York State. Interboro had filed a PAU. The question for determination was whether the reciprocal scheme of enforcement of motor vehicle liability policies in Canada required a participating American insurer to pay no fault benefits to its insured as it would if it were a licensed Ontario insurer.

As with this case, some of the argument revolved around what is a defence. The Court of Appeal in reaching its conclusion took its lead from the *Potts* decision supra. The Court held that the *Potts* decision provides a complete answer to the argument. The Court concludes that the PAU precludes Interboro from asserting the defence that its policy does not include SABS coverage given that this coverage is mandated by Section 268(1) of the *Insurance Act* to be part of the Standard Automobile Policy. The Court notes that this result serves the "level playing field" objective of the reciprocal scheme.

This case would appear to provide a full answer to Geico's position. However Geico makes reference to the following cases.

***Unifund Assurance Company of Canada v. Insurance Corporation of British Columbia* [2003] 2 S.C.R. 63.**
It is of note that this decision post dates the Healy decision.

In the Unifund case, some Ontario residents were involved in a motor vehicle accident in British Columbia. The Ontario residents received no fault benefits from the Ontario insurer. The Plaintiffs were also awarded tort damages in a British Columbia action payable by the BC insurer and no fault benefits were ordered deducted from that judgment. The Ontario insurer then brought an application in Ontario with respect to loss transfer pursuant to Section 275 of the Insurance Act. ICBC opposed this application claiming that Ontario did not have jurisdiction to impose a debt on the ICBC insurer through the imposition of no fault benefits imposed on an Ontario insurer. Unifund argued that the PAU prevented the ICBC from contesting its entitlement. The Court of Appeal in Ontario had confirmed the right of Unifund to proceed and suggested the approach was that an Arbitrator be appointed to determine the appropriate forum and whether the *Insurance Act* applied. The Supreme Court of Canada held that the ICBC was correct. The following are some of the relevant comments from the decision.

The Court notes that the PAU is about the enforcement of insurance policies not about helping insurance companies which have been paid a premium for no fault coverage and to seek to recover in their home jurisdiction losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction and where claims arising out of the accident were litigated there.

These comments would not appear to help Geico with respect to the RBC claim here. However the Court does go on to quote with approval from *MacDonald v. Proctor* (supra) that if an insurer wanted to incorporate the Ontario Statutory provisions into the PAU that they would have to do so expressly. The Court commented with approval that the undertaking itself cannot be read as an agreement to incorporate into extra provincial policies all of those items that the Ontario Insurance Act obliges an Ontario policy to include.

The Court also comments with approval Justice Goudge's decision in *Healy* (supra) noting that the PAU does have some limited effect and that its purpose is to ensure the same statutory guarantees to someone injured in an automobile accident in Ontario whether the relevant automobile insurance contract was made in Ontario or another participating jurisdiction.

I note that in the Unifund case, the accident occurred in British Columbia and that the case involved an effort by an Ontario insurer to bring proceedings against a British Columbia insurer in Ontario. These are not the circumstances in the case before me.

***MacDonald v. Proctor* (1977) 86 D.L.R. (3d) 455, Ontario Court of Appeal**
In this case the Plaintiff Ms. MacDonald claimed damages as a result of injuries she had sustained in an accident in Parry Sound. Ms. MacDonald was a Manitoba resident and was insured under the MPIC (Manitoba Public Insurance Corporation). At the trial the Plaintiff confirmed that she had received or was entitled to receive disability benefits. At the trial, held in Ontario against the at fault drivers (Ontario drivers) the trial judge deducted from the damages, the monies the Plaintiff had received from the MPIC. The Plaintiff appealed that deduction from the assessment arguing that

the payments made by MPIC did not fit within the Insurance Act and therefore were not deductible. The Defendant's position was that they became deductible by virtue of their filing a PAU.

The Court of Appeal found that these monies were not deductible.

I quote the following from page 3, paragraph 12:

> *The undertaking filed simply precludes an insurer from setting up defences which cannot be set up by an Ontario insurer by virtue of the Insurance Act. I am able to read the undertaking as an agreement to incorporate into extra provincial policies all those items that the Ontario Insurance Act obliges an Ontario policy to include. It is important to observe that where policy limits are involved, the undertaking goes on to expressly subscribe to the minimum limits in the Province of Ontario....In my opinion an undertaking by the Manitoba Public Insurance Corporation to in effect observe Ontario rules to a certain extent, where its insured is involved in Ontario proceedings, does not render the Manitoba policy one that is "made in Ontario".*

While I accept both the conclusions and comments of the Supreme Court of Canada and Court of Appeal in the cases noted above, I also note that the facts are quite different in the case before me and therefore I find that I am bound by the decision of the Court of Appeal in "Healy" (supra).

Conclusion:

I find that the PAU obliges Geico "not to set up any defences to any claim, action or proceeding... 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...in the Province of Ontario".

I find that the position taken by Geico that their policy does not provide coverage for "other automobiles" in the circumstances of this case is in effect setting up a defence that would not be available to an Ontario insurer. Healy provides that the PAU precludes an insurer from asserting a defence that its policy does not include "SABS coverage" given that this coverage is mandated by Section 268(1) of the *Insurance Act* to be part of the standard automobile policy. Similarly in this case the wording of the OAP1 is mandated under the *Insurance Act* and therefore I find that Geico cannot set up a defence that its policy does not provide the same coverage in the circumstances of this case with respect to other automobiles.

The question posed in the Arbitration was:

> *Does the Geico policy provides SABS coverage to the claimant, who at the time of the accident was an occupant of an uninsured vehicle driven by Shantese Dunlap/Patience Arbia and if so, is the Geico policy in priority to the RBC policy pursuant to Section 268 of the Insurance Act.*

The answer to this question is yes. I therefore find that the Geico is the priority insurer

Costs:

The parties, pursuant to their Arbitration agreement, have confirmed the costs of the Arbitration including the Arbitrator's fees expenses and disbursements shall be in the sole discretion of the Arbitrator. While this was an unusual point of law, I see no reason not to follow the usual rule with

respect to costs and I award costs of the Arbitration including payment of the Arbitrator's fees, expenses and disbursements to RBC General Insurance Company. If the parties cannot agree on the amount of costs within 60 days of the date of this decision a further Hearing date will be scheduled to argue costs.

Order:

It is ordered that Geico Indemnity Company is responsible for the payment of accident benefits to Millicient Abu arising out of the motor vehicle accident of July 9, 2006.

DATED THIS 29th day of March, 2010 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP