IN THE MATTER OF THE *Insurance Act,* R.S.O. 1990, c I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Daniel Strigberger: Counsel for Co-operators General Insurance Company (hereinafter called Co-op)

Leanne A. Zwadzki: Counsel for Intact Insurance Company (hereinafter called Intact)

Introduction:

This matter comes before me pursuant to the *Arbitration Act* 1991 to arbitrate a dispute between two insurers with respect to a priority issue that has arisen pursuant to the *Insurance Act*, R.S.O. 1990 c I.8, as amended and specifically Section 268 of the *Insurance Act* and Regulation 283/95, as amended.

By way of background this case arises out of a motor vehicle accident that occurred on November 22, 2018. On that day TP (hereinafter called the claimant) was driving his mother's it was insured by co-op but DP had reduced coverage prior to the date of loss to fire and theft only. Co-op acknowledges that no OPF-16 was provided. Co-op's position is however that the coverage on the policy was properly reduced and that there was no Accident Benefit coverage on the date of loss that would extend to provide benefits to the claimant.

Intact insures DM pursuant to policy number 730512230. DM was the driver of the other vehicle involved in the accident with the claimant. Co-op takes the positon that as there was no Accident Benefit coverage available on the date of loss that Intact is the priority insurer.

This case therefore revolves around whether or not the Co-op's motor vehicle liability policy for DP was properly reduced to a comprehensive policy prior to the accident involving the claimant so that Accident Benefit coverage was not available.

The matter proceeded before me in a combination of oral and written hearing on November 20, 2020. Counsel submitted a Joint Book of Documents including a voice recording of a statement taken from DP after the accident, Factums and Books of Authority. In addition counsel had the opportunity to make oral submissions.

The only exhibit at the hearing marked as Exhibit 1 was the Joint Document Brief for Arbitration which also included the Arbitration Agreement dated March, 2020.

Issue in Dispute:

The Arbitration Agreement sets out a very broad issue in dispute asking which insurer is responsible to pay the claimant's Statutory Accident Benefits under Section 268 of the *Insurance Act*. However the parties' Factums and oral submissions narrowed the issue in dispute to the following:

> Was the Co-op's motor vehicle liability policy for DP properly reduced to a comprehensive policy prior to the accident in question, such that it no longer provided for Accident Benefit coverage.

Facts

Generally the facts in this case are not in dispute. However the parties disagree in one or two key areas as to what implications one would draw from the fact.

DP had been insured with Co-op since May of 1979. Her policy renewed annually in May each year. In the few years prior to the accident of November 22, 2018 the only vehicle insured under the policy was a 2002 Intrepid.

According to the Agreed Statement of Facts on May 16, 2017 DP's policy renewed with road coverages. Her premium for the year was $1,061.00.

Based on Co-op's system notes DP called Co-op on August 15, 2017 to make changes to her policy. No recording was made of that call. According to the Co-op's policy center notes on August 15, 2017 at 2:39 p.m. DP's policy was reduced to comprehensive only.

There is no dispute between the parties that during that call on August 15th that DP was not offered an OPCF-16. There is also no dispute between the parties that no OPCF-16 was ever placed on the policy.

Once the policy change was effective the prorated annual premium was reduced from $1,061.00 per year to $44.00 for comprehensive coverage and $20.00 for transportation replacement. DP was subsequently sent a letter by Co-op on August 15, 2017 reflecting these changes which were to be effective as of August 16, 2017. However a new policy was not issued to DP by Co-op to reflect the changes.

The letter of August 15th was part of the Joint Book of Documents. It states on the front page as follows:

> "The changes you recently requested are listed on the summary of policy changes paid. If the changes effect your liability slips (pink cards) we have enclosed new ones. Keep one your vehicle.".

On the second page of the document there is a heading **Summary of Policy Changes**. This document indicates that the following coverage has been deleted: accident benefits, collision, direct compensation, 44R-family protection, liability and uninsured automobile.

A Certificate of Insurance is attached which indicates an effective date of August 16, 2017 at 12:01 .m. with an expiry date of May 16, 2018: 12:01 .a.m. On page 4 of the document (page 2 of the Certificate) is a list of insurance coverage. The total premium for comprehensive only is $44.00. The total premium including the transportation replacement is shown to be $64.00".

The previous Certificate Automobile Insurance prior to the change on August 2017 was also included in the materials before me. This clearly showed a premium of $1,061.00. The premium for Standard Accident Benefits was $239.00. Similarly there were provisions for premium for bodily injury at $473.00 and property damage for $10 for a total of $1061.00.

On April 1, 2018 Co-op sent a Policy Renewal and Certificate to DP. This policy period ran May 16, 2018 to May 16, 2019 and would therefore reflect the Certificate of Insurance for the policy that was in place on the date of loss on November 22, 2018. Under the summary of the insured automobile it shows that the 2002 Intrepid is insured and the premium noted to be $47.00. On the Insurance Coverage page there is no premium listed beside bodily injury, property damage or accident benefits. $27.00 is allocated to comprehensive and $20.00 to the transportation replacement for a total of $47.00. No OPCF-16 was issued with this document either.

According to correspondence from Co-op dated February 7, 2020 had an OPCF-16 been offered to DP and added to her policy in August, 2017 the premium would have been an additional $741.00 more for the remainder of the policy term.

DP was interviewed by a representative of Co-op with respect to her insurance interactions. The Interview took place on January 28, 2020. I reviewed both the typed written statement and also listened carefully to the audio recording of the statement.

DP was asked why she wanted to reduce her insurance coverage on August 15, 2017 to comprehensive only. Her answer was:

> "I would have had to put a considerable amount of money into the car to make it safe to drive. So I thought okay, there is no sense in me paying a big policy on a car that is going to sit in the driveway and your representative said, well, you should keep something on it in case its stolen or catches on fire so I went by her advice".

DP said a number of times that she was aware that the reduction in the insurance coverage meant she was only covered for fire or theft. She was also quite clear that it did not makes sense to her to pay $70.00 per month for car insurance for a car that was not going to be driven. Her evidence in this statement was that her car was going to be put in the driveway and she was considering purchasing another car. Her evidence was also that she had no expectation that anyone would drive the car. She was the only driver and she had no intention of driving it. DP also stated that she never would have guessed that her son would have taken the car and get involved in an accident. It is part of the Agreed Statement of Facts that the claimant in this case was charged under Section 2(d) of the *Highway Traffic Act* "use of a number plate upon a vehicle other than an number plate authorized for the use of that vehicle". DP was also asked in this interview that if back in August, 2017 she'd been offered an endorsement that would have provided some additional coverages and that it would cost an additional $740.00 per year whether she would have accepted that or not. Her answer was she would not because she had intentions of buying a new car and "why would I pay $700.00 per month for something I wasn't going to drive anymore."… "I could put it towards a new vehicle". Also in this statement DP indicated that she was satisfied with the coverage that was in place and that she knew the car wasn't supposed to be driven.

Position of the parties:

Co-op submitted a detailed Factum and Reply setting out a comprehensive position with respect to the law relating to OPCF-16s and why in their view an OPCF-16 should not be compulsory and be the only way in which an insured person can reduce coverage to comprehensive coverage on their policy. I do not propose to go over Co-op's submissions in that regard because to some extent they became superfluous due to some admissions made by Intact. Intact's position was that there are three ways in which an individual can remove Accident Benefits from their policy. The first is through the OPCF-16. That is not in dispute in this case as no OPCF-16 was ever provided or purchased by DP.

Intact says the second way in which one can reduce or eliminate Accident Benefit coverage is to issue a new policy. On this scenario Co-op would have had to have cancelled the policy that was in place in August 2017 and issued a new policy for a new policy period with the reduced coverage and reduced premium. Intact submits that Co-op did not issue a new policy but rather issued a

policy change to DP's original policy. Therefore it remained a motor vehicle liability policy with a change in premium and change in coverage.

The key concession made by Intact is that they agree that there is a third way to reduce or change coverage on the motor vehicle liability policy. This would be by way of an agreement between the insured and the insurer to effect change to the terms of the policy. However in those circumstances there must be evidence to support that the insured knew or understood the effects of those changes. Intact takes the position that DP did not know or understand the effect of their changes as evidenced by her statement and particularly by the long pauses and vague responses to some of the questions asked during her statement. In these circumstances it is helpful to review Intact's position first.

Intact submits that no OPCF-16 was ever placed on DP's policy after the August 15, 2017 call. Rather a letter was sent to DP reflecting these changes showing them effective as of August 16, 2017 with the prorated annual premium being reduced to $44.00 for comprehensive coverage and $20.00 for the transportation replacement. Intact submits that a new policy was never issued to DP by Co-op to reflect those changes and that the policy renewal issued on May 16, 2018 was a policy renewal of her policy as of August 16, 2017. The only change was to increase the annual premium to $47.00.

Intact submits that for Co-op's policy to remain "in play" it must have been a motor vehicle liability policy at the time of the accident. Intact concedes that if the policy had been properly reduced to comprehensive that it would then no longer be considered a motor vehicle liability policy and priority would rest with Intact. However Intact's position is that the policy was not properly reduced to comprehensive coverage. The policy was neither terminated and a new one written nor was a proper Endorsement provided in accordance with section 227(1) of the *Insurance Act*.

Intact submits that Co-op has not provided any documentation signed by DP that showed she was advised of or agreed with the changes to her coverage nor any statement or audio recording that was done contemporaneously with a reduction in coverage from full liability to comprehensive only to show that she understood the changes being made and the implications.

Intact accepts that a mere departure from an approved form (either the failure to use the OPCF-16 or to use a different Endorsement form) does not necessarily negate the validity of an otherwise clear agreement. Intact agrees with Co-op's submissions of the effect of the Court of Appeal's decision in *Royal & Sun Alliance Insurance Company of Canada v. Intact Insurance Company 2017 ONCA 381*. However Intact differs from Co-op as to whether on the facts of this case DP was clear as to what was being agreed to. It is important to outline the relevant facts that Intact relies upon with respect to those submissions.

First of all Intact indicates that DP was 74 years of age when she sought the changes to her policy in 2017. Although Intact confirms that there was an amended Certificate of Insurance that

reflected changes to the policy sent to DP in August 2017 that there is no evidence whether she understood the substance of those changes. Intact points to the ECM client review notes that formed part of the Joint Document Brief. These notes indicated that Co-op spoke to DP on October 12, 2017 after the policy changes had been made to review her auto policy with her. The notes indicate that they confirmed her address, that she was the only person operating the vehicle that she had a retiree discount and that her kilometres were accurate. There was some discussion about them providing her a quote on her home and she agreed. There is nothing in the notes to suggest there was any discussion about her auto policy being comprehensive only. Intact notes why would Co-op ask DP if she was the only person operating the vehicle if the only coverage was comprehensive. The person who conducted this conversation was the same individual who had changed the policy from full liability to comprehensive earlier in August of that year.

To confuse matters further there are policy center notes which indicate the following:

- April 18, 2017 Co-op's notes indicate they have "remove collision" on the policy
- May 15, 2017 the agent is noted as "removing comp"
- August 15, 2017 there is a policy change to "comp only"

Intact points out there is no explanation with respect to these notations.

Finally Intact points to the statement of DP. Intact notes that the actual audio recording highlights what is clear confusion on the part of DP regarding the changes in her policy. When she was asked whether she understood whether there was any coverage for Accident Benefits or for injuries sustained if the car was driven DP after an extremely long pause says:

> "well I don't know I was in the hospital sick so I didn't know what was going on in the house.".

Intact submits that appears to be nonresponsive to the question or that she did not understand about the coverage.

Further Intact points to a second attempt by the Co-op representative to have DP confirm that she understood what the effect of the changes on her policy had been She is asked whether she was aware there was no liability insurance on the car and she responds:

> "no I don't know what was on it at the time.".

Based on this Intact submits that DP did not understand the changes to her policy, did not understand that Accident Benefit coverage would be removed, was not properly advised about the reductions in coverage and repercussions and therefore in the absence of an OPCF-16 or a newly issued policy there is insufficient evidence to confirm that the policy was properly reduced to comprehensive coverage only.

Co-op's position is that there is no need and that the case law does support that an OPCF-16 is compulsory and nor is there any need to provide a cancellation and policy renewal to effect a reduction in coverage. I will not deal with Co-op's submissions in this regard as they are accepted by Intact.

Co-op relies upon the decision in Royal & Sun Alliance (supra) to support their position that two parties to a contract (in this case Co-op and DP) can have a meeting of the minds and change the terms of the contract and effectively reduce or change a motor vehicle liability policy to a non-motor vehicle liability policy through that processes. Co-op submits that the Royal & Sun Alliance case is support for the proposition that it is not up to the courts or Arbitrators to determine what the consequences are of the failure to use an approved form or Endorsement. Co-op submits that just because that the Court of Appeal in Royal confirmed that where an insurer fails to comply with a provision of the *Insurance Act* (such as using a wrong or non approved Endorsement form) that it is not up to the courts to determine the consequences of that failure to comply. The courts job or the Arbitrators job is to determine whether the contract was valid as a matter of contract law and if it was then the consequences of failing to comply with the specific provision of the act is to be determined by the provisions of the act and regulation. Co-op points to the following statement of Justice Juriansz:

> "I draw from reading section 227(1) in this context that the legislature did not intend for the courts, while engaged in adjudicating a contractual dispute, to consider a contractual provision void merely because its form fails to comply strictly with section 227(1) of the *Insurance Act*".

Co-op submits that DP and Co-op entered into a new agreement in May 2017 to reduce the coverage on DP's policy with Co-op (liability, Accident Benefits, etc.) and that the result was that it was no longer a motor vehicle liability policy and it no longer carried Accident Benefits coverage. The fact that a specific form was not used is not relevant as long as there was a meeting of the minds and the validity of the contract complied with the general contract law

Co-op submits that there is an abundance of evidence available to show that DP understood what she was asking for and what the consequences of that were. They point to the same statement that Intact relies upon where on at least two or three occasions DP confirms that she understood that her policy of insurance with Co-op would only provide coverage for theft and fire. She confirmed on two or more occasions that she understood her car was not to be driven. The reason given was due to the fact she did not want to have repairs done. Co-op submits that DP was quite clear that she did not want and would not have agreed to spend and additional $700.00 per year to receive an OPCF-16 which would have been the only way that coverage could have remained on the policy once it was reduced to comprehensive.

Co-op submits that Intact has the onus of establishing that DP would have purchased the OPCF-16 if it had been offered and explained to her. Co-op submits that Intact cannot do so and that DP's statement is clear that she would not have purchased it had it been offered to her.

Co-op submits that its failure to offer the OPCF-16 to DP is irrelevant if the evidence is clear that DP would not have purchased it. Co-op relies on a line of cases dealing with the claims made where an individual did not purchase optional benefits in support of their position (see *Zefferino v Meloche Monnex Insurance 202ONSC 154*).

Finally Co-op points to what its counsel described as a ludicrous situation that would occur if DP's clear intention to reduce the coverage under her policy to comprehensive only was not enforced. If the OPCF-16 had been purchased it leaves in place limited Accident Benefits only in certain circumstances. It would be when the insured is a pedestrian or a passenger in someone else's car. Co-op points out that the OPCF-16 even if purchased would not have provided Accident Benefit coverage to the claimant because it was the described vehicle that was involved in the accident. Co-op points out the OPCF-16 specifically provides in Section 2.2 that the coverages are cancelled for Accident Benefits "for the use or operation of the described automobile a newly required automobile and a temporary substitute automobile." Co-op points out that all all the cases that have been described by other Arbitrators involving the OPCF-16 are cases where the described vehicle was not being used and it was an other vehicle or the individual was a pedestrian. As a result even if the OPCF-16 had been purchased there would have been no accident benefit coverage to the claimant and Co-op submits that it would make no sense to find Co-op the priority insurer in the circumstance where it did not issue an OPCF-16 when if it had it would not be a priority insurer.

Decision and Analysis:

As both Intact and Co-op agree that there was no OPCF-16 and that there was no cancellation and new policy issued that would have provided for Accident Benefit coverage to the claimant I will only deal with the question as to whether or not DP and Co-op entered into an agreement that changed the form of her contract of insurance so that it was no longer a motor vehicle liability policy and only a policy that provided theft and fire coverage to her vehicle. I will also address whether or not there is evidence that DP was able to effect this contractual change by virtue of understanding what was being asked, what was being offered and what was being accepted. Turning first of all to the key decision of the Court of Appeal in Royal & Sun Alliance. This was a priority dispute case but it did not involve an OPCF-16 but rather it involved an OPCF-28A (Excluded Driver Endorsement). In that case the insured and her husband had met with her insurance broker. The insured's drivers license had been suspended for unpaid fines and her insurance was being cancelled. However she wanted to maintain coverage on the car so that her husband could drive it. Insurance was therefore arranged on the basis that the insured would be an excluded driver. An Excluded Driver Endorsement was executed and while the proper Endorsement was used it had not been filled in correctly.

The insured/wife then had her drivers license reinstated. She drove the vehicle and was involved in an accident. At the trial evidence was introduced that when the insured completed the form with her broker it was explained to her and she understood that even if her drivers license was reinstated she would still not be insured and the excluded endorsement would continue to apply.

The Court of Appeal held with respect to the use of the form and it not being filled in properly that this was imperfect compliance rather than noncompliance. As noted earlier the court was quite clear that they did not feel that their role was to make a decision as to what the consequences were of the use of an imperfect form or imperfect compliance with Section 227 of the *Insurance Act*. The court noted that Section 227 is in fact quite silent on what the consequences are if the proper form is not being used or if its not properly filled out. The court also looked at Section 439 of the *Insurance Act* which sets out by regulation what are unfair and deceptive practices. An unfair and deceptive practice includes when someone uses a form other than one approved by the Superintendent unless the deviations from the document do not effect the substance of it or are not calculated to mislead. The Court of Appeal drew from this that while the form may not strictly comply with Section 227 as long as the deviation does not effect the substance it would still be a valid contract.

Co-op relied on this case to support their position that the OPCF-16 is not compulsory and that all the previous cases dealing with the need to use an OPCF-16 to cancel or reduce coverage on a policy (to comprehensive) must be revisited. Intact agreed with Co-op's positon. The question therefore for me is irrespective of the failure to use the OPCF-16 whether there was a valid contract made between Co-op and DP to reduce the coverage on her policy to comprehensive only. I am satisfied on the evidence that has been presented by way of the Agreed Statement of Facts, Policy of Insurance and the insured's statement that there was a contract entered into to reduce policy to comprehensive coverage and that DP understood what she was asking for, what she was offered and what the result of that was.

The evidence seems to me to be quite clear that DP did not want to pay a premium of some $1,000.00 a year for her 2002 Intrepid when it was sitting in her driveway and she had no intention of getting it repaired. Indeed she mentioned a couple of times that she was looking to get a new car. The documents from the Co-op are also quite clear that there was a conversation that took place on August 15, 2017 between DP and Co-op that resulted in changes being made to her policy. The fact the change was made was reflected in the Co-op policy notes. More importantly that change is clearly reflected in the Certificate of Insurance and accompanying documents sent to DP both on August 15, 2017 and then again when the policy renewed on April 1, 2018. In particular the document dated August 15, 2017 on its summary of policy changes indicates that **Accident Benefits are deleted**. While there may have been other phone calls between DP and Co-op that the fact that her policy coverage had been reduced to comprehensive was never mentioned suggests to me that there was no need to have that discussion that DP understood and was happy with her policy coverage and clearly was happy with her premium.

While I do agree with Intact that for some question her responses were slow with long silences and she certainly appeared to be unclear about liability coverage there is no doubt in my mind that DP understood the only insurance she had on her Intrepid as of August of 2017 was fire and theft. I am further satisfied on the evidence that if the OPCF-16 had been offered to DP clearly she was not going to accept it. Her car was going to be sitting in the driveway. She had no intention of driving it. As DP says why would she pay $700.00 for more insurance on a car that was not being driven.

I therefore conclude that DP and Co-op on August 15, 2017 renegotiated the contract of automobile insurance and reduced the coverage so that her motor vehicle lability policy ceased to be a motor vehicle liability policy and only provided comprehensive coverage for fire and theft. There was no accident benefit coverage on her policy on the date of loss of November 22, 2018. I agree with Co-op that a review of the case law prior to the Royal & Sun Alliance decision would not be helpful. As to the line of cases that been issued subsequent to the Royal decision I did find Arbitrator Jones' decision in *Allstate v State Farm* (February 22, 2018) to be helpful. Arbitrator Jones in that case reviewed the Court of Appeal's decision in Royal and Intact and made the following statement:

> "I take from the above summary of the case law that one should, pursuant to Section 227(1) of the *Insurance Act*, use the approved OPCF-16 when changing policies from full mortar vehicle liability coverage to comprehensive coverage. The failure to follow that form in its entirety is not necessarily fatal to the contract however. When determining when a deviation is fatal one should look as to whether there was unfairness or deception. In doing so one should examine among other things, what the circumstances were when the parties made the changes.".

Arbitrator Jones and I seem to agree on the approach. However in Arbitrator Jones case he felt that there was not sufficient evidence to satisfy him that the claimant had been properly advised about the reduction in coverage and concluded the policy was not properly reduced to comprehensive coverage. In this case I have found that there was sufficient evidence to feel comfortable that the insured had been advised of and agreed with the changes in coverage.

As a result I conclude that the Co-op policy did not provide for Statutory Accident Benefits on the date of loss on November 22, 2018 and the priority insurer in this case is Intact Insurance Company.

Award:

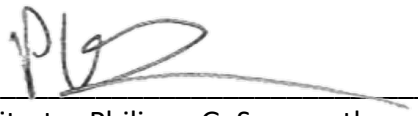
In response to the question that is raised in the Arbitration Agreement I find that as between Co-operators General Insurance Company and Intact Insurance Company that Intact is responsible for paying Statutory Accident Benefits to the claimant arising out of the motor vehicle accident of November 22, 2018.

Costs:

According to the Arbitration Agreement legal costs are to be determined by the Arbitrator taking into account the success of the party, any offers to settle, the conduct of the proceeding and the principles generally applied for litigation both the court of Ontario. I am not aware of any offers to settle. Co-operators has been entirely successful in the Arbitration and accordingly I find that the costs of the Arbitrator and the legal costs are to be payable by Intact.

If the parties are unable to agree on costs a further pre-hearing can be arranged to schedule costs hearing.

DATED THIS 22nd day of December, 2020 at Toronto.



Arbitrator Philippa G. Samworth
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