IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8; s 275
and R.R.O. 1990, Reg 664, s 9
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

DECISION

Counsel:

Coseco Insurance Company (Applicant) (hereinafter referred to as Coseco): Daniel Strigberger

Liberty Mutual General Insurance Company (Respondent) (hereinafter referred to as Liberty): Catherine A. Korte

GMAC Insurance Company/National General Insurance (Respondent) (hereinafter referred to as National): Barry G. Marta

Background to these proceedings:

On July 4, 2015, the Claimant was a passenger in a vehicle insured by Coseco. The Claimant was involved in a motor vehicle accident in Ontario.

At the time of the accident, the Claimant resided in New York State. He applied to Coseco for Statutory Accident Benefits pursuant to the Statutory Accident Benefit Schedule under the Ontario *Insurance Act,* R.S.O. 1990, c. I.8. Coseco accepted the Claimant's OCF-1 but took the position that either Liberty or National were the priority insurers of the Claimant pursuant to Section 268 of the *Insurance Act*.

Liberty insures the Claimant's spouse. The Liberty motor vehicle policy was issued in New York State. Liberty does not and has not disputed the applicability of Section 268 in terms of a priority dispute as against Liberty.

National insures SHG Inc. This is a New York commercial vehicle policy provided through an underwriting company, New South Insurance. The policy period is from August 19, 2014 to August 19, 2015.

The Claimant was listed in the policy as "owner driver" for a 2006 van for business use only and a 2010 Toyota Corolla for business and personal use. All parties to this litigation agree that National's policy is not an Ontario policy. Neither Liberty nor Coseco have ever argued that the National policy is an Ontario policy. Nor, as I understand it, have Liberty or Coseco argued that National is "an Ontario insurer". Rather, Coseco and Liberty have taken the position throughout that as this accident occurred in Ontario, National signed a Power of Attorney and Undertaking (PAU) filed on December 31, 1996, and as the Claimant applied for Ontario Statutory Accident Benefits that Section 268 of the *Insurance Act* applies to National both with respect to the right of insurers to bring priority dispute claims under that section and as well if found to be in priority to require National to pay the Claimant Ontario Statutory Accident Benefits.

National has maintained throughout that Section 268 does not apply to it, that it is not an Ontario insurer, and that as the Claimant did not apply to National for Ontario Statutory Accident Benefits that it is therefore not an Ontario insurer bound by Section 268 and therefore no order can be made as against it requiring it to stand in priority to Liberty or Coseco and to pay benefits to the Claimant or to reimburse Coseco for the benefits it has.

This is the third hearing brought forward in this matter.

The first preliminary issue hearing took place in December of 2016. At that time, National argued that I did not have jurisdiction under Ontario Regulation 283/95 and the *Arbitration Act*, 1991 to rule on whether or not I had jurisdiction to conduct this Arbitration. In my decision of December 22, 2016, I found I did have jurisdiction to rule on and I found that I had jurisdiction to conduct the Arbitration.

The second preliminary issue hearing took place in December of 2018. In that case the preliminary issue for determination was:

> "Do the priority provisions in Section 268 of the *Insurance Act* apply to the circumstances of this case".

That issue included whether or not the Ontario *Insurance Act* applied to an American insurer that does not undertake or agree to offer to undertake a contract of insurance in Ontario but that has filed a PAU. Extensive arguments were made in that case by all parties. National argued that

based on *Unifund Assurance Company v. The Insurance Corporation of British Columbia* [2003] SCJ39 that the *Insurance Act* was to be confined to its own constitutional sphere and could not be given extraterritorial application and could not therefore be extended to an out-of-province insurer. Although that case involved loss transfer and an accident that occurred in British Columbia and not in Ontario, National argued that the conclusion of the court with respect to the extraterritorial application of the *Insurance Act* would also apply in the circumstances of this case.

Liberty and Coseco argued that the decision of the Court of Appeal in *Healy v. Interboro Mutual Indemnity Insurance Company et al,* [1999] CarswellOnt 1451, a decision of the Ontario Court of Appeal, was applicable to the factual circumstances of this case. Coseco and Liberty took the position that the fact that this accident occurred in Ontario, that the Claimant had applied for Ontario Accident Benefits, and that National had filed a PAU were determinative of whether or not the *Insurance Act* applied to National.

In my decision dated December 21, 2018, I agreed with Coseco and Liberty. In my decision I specifically concluded that I was bound by the decision of the Court of Appeal in *Healy v. Interboro*. I noted that while National was not an Ontario insurer, Section 221 (1) of the *Insurance Act* defined a contract as including:

> "A contract of automobile insurance that 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 of the *Insurance Act* sets out the provisions relating to the filing of the PAU.

I found that in this case, National clearly had a contract that met the definition of a contract of automobile insurance under the Ontario *Insurance Act*.

I noted that Section 268 of the *Insurance Act* makes specific reference to "every contract evidenced by a motor vehicle liability policy". Again, National's policy would qualify as a "contract" under the *Insurance Act* by virtue of the filing of the PAU.

I then concluded that if Section 268(1) of the *Insurance Act* applied to National, then Section 268(2) relating to the priority provisions and its companion Regulation of 283/95 must also apply to National.

I found that key features of *Healy v. Interboro* which resulted in my conclusion that are applicable to National included:

1. Justice Goudge's statement that for the PAU to be triggered that the insured vehicle from the out-of-province insurer need not be in Ontario.

2. The rationale behind the PAU and Section 268(1) of the *Insurance Act* is to provide a level playing field for this reciprocal scheme.
3. As a result of the PAU an insurer cannot raise a defence to a claim that it could not raise if the out-of-province insurer's contract had been validly entered into in Ontario.

The key paragraph in my decision that is relevant to a decision in this "new" preliminary issue is set out below:

> "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 then 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".

Of significance to this hearing is the fact that when I made my initial decision, the Court of Appeal had not rendered its decision in *Travelers Insurance Company of Canada v. CAA Insurance Company,* 2018 ONCA 382. In rendering my decision, I did comment on Arbitrator Bialkowski's decision in that case and the fact that it was upheld by Justice Pollak. However, I specifically found that irrespective of those decisions, I would still reach the same conclusion on the facts of this case based on the Court of Appeal's direction in *Healy v. Interboro*.

My December 2018 decision was appealed by National and was heard before Justice Nakatsuru on August 21, 2019. He released his decision the next day (*Coseco v. Liberty* 2019 ONSC 4918). Justice Nakatsuru upheld my decision. He found it was reasonable and correct. He noted:

> "Dispositive of the appeal is that this case is on all fours with the binding decision of *Healy v.* Interboro *Mutual Indemnity Insurance Company* (1999) 44 O.R. (3D) 404. The Arbitrator found this to be so. I find that she was right on this".

Justice Nakatsuru in his decision agreed with me that a key factor in determining National's responsibility under Section 268 of the *Insurance Act* was the fact that the motor vehicle accident happened in Ontario. He states:

> "The subject motor vehicle accident happened here in Ontario. It took place in the legislative jurisdiction of Ontario… Here GMAC has agreed to the terms of the PAU applying it in Canada. As in *Healy* this made the priority provisions in the *Insurance Act* applicable to it".

Justice Nakatsuru then quoted my analysis outlined above and concluded that the analysis was correct and he dismissed the appeal.

National filed a Notice of Motion for Leave to Appeal dated September 5, 2019. The grounds for the Leave to Appeal included, inter alia:

1. The judge erred in failing to follow the 2003 Supreme Court of Canada decision in *Unifund* that the Ontario *Insurance Act* cannot be applied extraterritorial: "the decision of the Ontario legislator to impose no fault benefits on Unifund could not be bootstrapped into legislative jurisdiction to impose a corresponding debt on the Appellant, which (leaving aside the PAU argument) was beyond the territorial jurisdiction of the province".
2. Concluding that GMAC agreed to the terms of the PAU "it made the primary provisions of the *Insurance Act* applicable to it" when the court in *Unifund* held "if as I concluded earlier the Appellant is not otherwise within the legislative jurisdiction of Ontario, the PAU does not put it there by agreement".
3. Distinguishing the Supreme Court of Canada *Unifund* decision on the basis of the location of the accident.

On December 13, 2019 the Ontario Court of Appeal adjourned National's motion for Leave to Appeal until it had an opportunity to decide the appeal in the *Travelers Insurance Company v. CAA Insurance Company* case (supra). The *Travelers v. CAA* case was released by the Court of Appeal on June 15, 2020. The Court of Appeal overturned the decisions of Arbitrator Bialkowski and Justice Pollak.

In the interim, National had filed its Factum on October 10, 2018 and Coseco and Liberty filed responding motion materials on November 1, 2019 and November 4, 2019. The *Travelers* appeal was actually argued on November 26, 2019 and involved the same counsel for Travelers as appears before me on this case on behalf of Coseco.

The Endorsement by the Court of Appeal pending its decision in the *Travelers* case made on December 13, 2019 indicated the following:

> "This Leave application is adjourned to await this courts decision in the appeal from *Travelers Insurance Company v. CAA Insurance Company,* 2018 ONSC 3911".

On release of this decision, National took the position that the Court of Appeal's decision in the *Travelers* case effectively overturned my decision as upheld by Justice Nakatsuru. Liberty and Coseco did not agree.

As a result, National sent an email to the Court of Appeal attaching their decision in the *Travelers* case and requesting that the Court of Appeal now proceed with the motion for Leave to Appeal in this matter. As nothing was heard form the Court of Appeal on April 23, 2021, National's lawyer

sent a further email to the court with respect to the scheduling of the motion for Leave which was to be heard in writing.

On April 26, 2021, the Court of Appeal office advised that the motion would be on the list for May 3, 2021.

The Court of Appeal issued an Endorsement on May 26, 2021 noting:

> "this motion for Leave to Appeal is dismissed. Costs are fixed in the amount of $3,500.00 inclusive of disbursements and applicable taxes".

The parties to this Arbitration do not agree as to the effect of the dismissal of the Leave to Appeal.

As a result of the disagreement as to the implications of the court's Endorsement, counsel had requested a further pre-hearing in the context of the Arbitration in this matter. It is to be noted that by this time the Claimant's Statutory Accident Benefit claim had settled. No reimbursement has been made to Coseco despite both National and Liberty acknowledging that Coseco is not the priority insurer under Section 268 of the *Insurance Act*.

At the pre-hearing, counsel for National indicated that it was raising a "new" preliminary issue. The new issue was based on National's position that my decision cannot stand in light of clear direction from the Court of Appeal in *Travelers* and/or that the issues being raised by National were not actually decided by me in my initial decision but are new matters arising out of the Court of Appeal's analysis in the *Travelers* case.

Coseco and Liberty take the position that there are no new issues and the matters raised by National should be found to be "res judicata".

Coseco also, at the pre-hearing, was most concerned that the Claimant's Accident Benefits file had now been settled and there had been no determination with respect to reimbursement. Of concern was the fact that counsel had agreed that Liberty and National (if the *Insurance Act* was applicable to National) ranked equally under Section 268 of the priority provisions. This was on the basis that Liberty insured the Claimant's spouse and National insured the Claimant's employer and he would be a deemed named insured under that policy based on regular use. Accordingly, the parties had agreed that if I concluded that National fell within the Ontario *Insurance Act*, in terms of priority, then the Claimant should be put to an election as required under Section 268. With the Claimant's case now settled, counsel raise a question as to whether an election would have any merit. Therefore, Counsel for Coseco requested that in addition to whatever new preliminary issues or alleged new preliminary issues National was raising that this case needed to move forward on issues with respect to quantum, the quantum of reimbursement, interest, or the election also needed to be dealt with in this new hearing. Liberty and National agreed that it was time to make best efforts to wrap up everything.

This then is the lengthy history in this case, which is more than 6 years post-accident and hopefully moving into its final stages.

Issues:

National

National seeks a determination on the following issues as set out in their Factum:

1. Is National General Insurance Company an "Ontario insurer" for the purposes of the priority provisions in Section 268 of the Ontario *Insurance Act*.
2. Is the National General Insurance policy an "Ontario policy" for the purposes of the priority provisions in Section 268 of the Ontario *Insurance Act*.

National seeks a Declaration that it is not liable under Section 268 of the *Insurance Act* and therefore is not liable under 268 of the *Insurance Act* to reimburse Coseco for any Statutory Accident Benefits Coseco has paid to The Claimant.

Liberty

Liberty in their Factum styles the issues as follows:

1. Has the Applicant, National General Insurance Company, failed to properly appeal the Ontario Court of Appeal's decision dated May 26, 2021 dismissing GMAC's motion for Leave to Appeal.
2. Are the issues as to whether GMAC is an "Ontario insurer" for the purposes of the priority provisions of Section 268 of the Ontario *Insurance Act* and whether GMAC's policy is a "Ontario policy" for the purposes of the priority provisions of Section 268 of the Ontario *Insurance Act,* res judicata.
3. Is *Travelers Insurance Company of Canada v. CAA Insurance Company* (supra) distinguishable to the case at bar.
4. If both GMAC and Liberty Mutual are liable under Section 268 of the *Insurance Act* to indemnify Coseco, who bears ultimate responsibility to indemnify Coseco.

Coseco

Coseco adopts Liberty's issues as outlined above, but also seeks determination on the following issue:

1. Which of GMAC and Liberty is responsible for paying $144,169.90 by way of reimbursement to Coseco.
2. What interest is payable.

Quantum

The issue of quantum was narrowed down during the course of both written and oral submissions. Liberty did not raise any issue with the quantum of indemnity being claimed by Coseco. National claimed that the legal fees with respect to a dispute at the Licensing Appeal Tribunal between the Claimant and Coseco in the amount of $3,477.02 was not covered by way of reimbursement in a priority dispute.

Interest

With respect to the interest, neither Liberty nor National made any submission on that issue.

The key issue here for determination is whether the matters raised by National are the subject matter of res judicata and if not, whether National is liable under Section 268 of the *Insurance Act* to reimburse Coseco.

Decision:

I find that the issues raised by National were already addressed at the Arbitration level and all appeal options have been exhausted. I find that res judicata is applicable to this dispute.

Even if I found that res judicata was not applicable to this dispute, I would conclude that the decision of the Court of Appeal in *Travelers v. CAA* does not overturn *Healy v. Interboro* and I am still bound by the result in *Healy v Interboro*.

I find that the legal costs in the amount $3,477.02 with respect to the LAT dispute are not recoverable in the context of this priority dispute.

I direct that the parties within 60 days of this decision agree on a letter to be sent out by Coseco to the Claimant putting him to an election as between Liberty and National. If the Claimant. does not respond within 90 days of the date of that letter, then reimbursement to Coseco will be on the basis of a 50/50 split as between Liberty and National. Reimbursement to Coseco is to be made within 90 days thereafter.

With respect to interest, I find that interest is payable in accordance with the *Courts of Justice Act* from the date of Justice Nakatsuru's decision of August 22, 2019 to the date of this decision. Post-judgment interest would be applicable thereafter, again in accordance with the *Courts of Justice Act*.

Submissions and Analysis:

1. **Res Judicata**

National submits that the Court of Appeal decision in *Travelers v. CAA* is determinative and that the Court of Appeal did not need to give reasons in dismissing the Leave to Appeal as clearly *Travelers* stood for the proposition that the original conclusion was wrong and was therefore overturned by the *Travelers* case.

National submits that where the accident occurred is irrelevant and that the key issue for determination is whether or not National is an "Ontario insurer". If not an Ontario Insurer then National submits that the *Travelers* decision would require me to find that Section 268 of the *Insurance Act* is not applicable to National.

National submits that in my prior decision, I decided whether or not the priority provisions of Section 268 of the *Insurance Act* applied to National. In this case, National is asking me to determine whether it is an "Ontario insurer" or if its policy is an "Ontario policy" for the purpose of the priority provisions in Section 268. National submits that this is a completely different issue than the one I decided earlier and that it is not re-litigating my December 2018 Award.

National submits that issue estoppel is a branch of res judicata and for it to be successfully invoked there are a number of pre-conditions to have been met. One of those is that "the issue must be the same as the one decided in the prior decision". As that pre-condition has not been met, issue estoppel is not applicable, and, therefore, I should not find that this is a case of res judicata.

Liberty and Coseco submit that the two issues that National ask me to address in this hearing are no different in substance than the issue I decided previously. Coseco and Liberty submit that the refusal of the Court of Appeal to grant Leave in this matter was on the basis that the decisions of myself and Justice Nakatsuru were correct and not overturned as a result of the decision in *Travelers v. CAA*.

Liberty and Coseco point out that at no time have they ever argued, or has it even been an issue, as to whether National's policy was an "Ontario policy" or whether it is an "Ontario insurer". Coseco points out that the executed Arbitration Agreement, in this matter, dated October 1, 2018, confirms that National is an American insurer with an American policy and that this was clearly set out in my original Award.

Liberty and Coseco submit that the issue of whether National was liable under Section 268 of the *Insurance Act* is the same issue as whether National is an Ontario insurer and/or has an Ontario policy for the purposes of Section 268 of the *Insurance Act*. The fact that National was not an Ontario insurer and was not an Ontario policy was not an issue in dispute in the previous decision and was in fact conceded by all parties. Therefore, argues Coseco and Liberty, the determination by Justice Nakatsuru that I was correct in finding that Section 268(1) and 268(2) of the *Insurance Act* of Ontario applied to National despite the fact that it is not an Ontario insurer and not an Ontario policy is therefore determinative of the preliminary issue raised here. It is in essence no difference, they argue, and it is simply an attempt to re-litigate.

Both Liberty and Coseco point to the fact that Justice Nakatsuru did find that the key distinguishing factor in this matter was the fact that the accident occurred in Ontario and was not an extraterritorial accident. The accident in *Travelers v. CAA* took place in Nunavut. Justice Nakatsuru concluded that *Healy v. Interboro was* applicable to the facts of this case. Justice Nakatsuru found that my analysis that National as an out-of-province insurer was bound not only to provide Statutory Accident Benefits to their insured but that they were also subject to the priority dispute provisions under Section 268(2) of the *Insurance Act*. Therefore, as the same issue has been dealt with, and rejected in the Leave to Appeal application, this falls within the criteria for the applicability of res judicata as the issue before me today is the same as that decided previously.

I agree with the submissions of Coseco and Liberty.

In the decision of the Court of Appeal in *Freedman v. Reemark Sterling I LTD* (2003) 62 O.R. (3D) 743 (CA) the Court of Appeal set out the 4 elements that are required with respect to issue estoppel a subset of res judicata. These 4 elements are set out below:

1. Has the same question been decided in a previous judicial hearing.
2. Is the judicial decision that reportedly creates the estoppel final.
3. Are the parties to that prior proceeding the same as the parties in the proceeding in which the issue of estoppel is being put forward.
4. Was the determination of the issue giving rise to the estoppel fundamental to the decision arrived at in the prior proceeding.

I note that the Supreme Court of Canada in the decision *Danyluk v. Aimsworth Technologies,* 2001 SCC24 confirmed that these are the 4 relevant factors with respect to issue estoppel.

I have reviewed those 4 criteria and confirm that each and every one has been met in this case.

With respect to the first issue, I conclude that the same question that is being raised before me today by National is the same question that was determined in the previous judicial hearing. My decision in December 2018 confirmed that National was bound by the provisions of Section 268 of the Ontario *Insurance Act* despite the fact that it was an out-of-province insurer with an out-

of-province policy. I do not see the wording of the issue as set out by National to be any different then whether or not National was bound by the provisions of Section 268 of the *Insurance Act*. It is simply a different way of expressing the same issue and I see no merit in National's argument that my previous decision did not deal with the issue as they have now raised it.

With respect to the second part of the test, the Court of Appeal rejected the Leave to Appeal brought by National even after having rendered its decision in *Travelers v. CAA*. Costs were awarded to the Respondents in that appeal. I therefore conclude that there are no further routes of appeal for my initial decision, and, therefore, it can be said to be final.

As to the third criteria, the parties to the prior proceeding are identical to the parties here.

Lastly, I conclude that the determination of the issue that is giving rise to the issue estoppel argument was absolutely fundamental to my initial decision. Whichever way you put it, the issue in this case is whether or not National is bound by Section 268 of the *Insurance Act* and whether it is therefore responsible for reimbursing Coseco for payments made to National's insured based on Ontario Statutory Accident Benefits.

Therefore, on those grounds, I find that National's "new" preliminary issue fails as that matter has been previously decided and all avenues of appeal are exhausted. If I am wrong with respect to my analysis and the applicability of res judicata/issue estoppel I now turn to the question as to whether or not the *Travelers v. CAA* decision can be interpreted to suggest that National is not bound by Section 268 of the *Insurance Act* on the grounds that it is not an Ontario insurer.

On this issue, National submits that the Court of Appeal concluded that the Ontario *Insurance Act* can only apply to an "Ontario insurer". National submits that the location of the accident is irrelevant to this determination.

The facts of the *Travelers* case are clearly relevant. In the *Travelers* case, an accident occurred in Nunavut. The Claimant was a resident of Ontario but was at the time employed and working in Nunavut. She was driving a vehicle owned by her Nunavut employer. That vehicle was insured in Nunavut pursuant to a Nunavut policy of automobile insurance. The insurer was Travelers.

The Claimant applied to CAA for Statutory Accident Benefits. CAA insured the Claimant's personal car which was plated in Ontario.

CAA brought a priority dispute as against Travelers claiming that as Travelers insured the vehicle in which the Claimant was an occupant and she would be a deemed named insured under the Travelers policy that they were the priority insurer. The Arbitrator in the first instance found that Travelers' policy was in priority and that the Ontario *Insurance Act* was applicable. This was upheld on Appeal. The Court of Appeal overturned the decision on the grounds that the Travelers' policy was not an Ontario policy and that the mere fact that Travelers was a signatory

to the PAU did not essentially result in operating to extend loss transfer and priority obligations in the circumstances of this case.

National points to the Court of Appeal's analysis which started with whether or not Travelers could be considered an Ontario insurer under Section 268 of the *Insurance Act*. It is factually relevant that Travelers is licenced to write car insurance in Ontario. The Court of Appeal pointed out that the mere licensing of an insurer in Ontario does not necessarily mean they become an Ontario insurer where the accident takes place out of Ontario. The court stated:

> "treating mere Ontario licensing as the sole reason to constitute an insurer as an "Ontario insurer" would give Ontario insurance legislation extraterritorial effect which would be contrary to the essential holding in Unifund".

National argues that if Travelers, as a company who writes auto insurance policies in Ontario, is not considered to be an Ontario insurer and therefore not bound by Section 268 of the *Insurance Act* then clearly National would be in a similar position.

National also relied on the following extract from the Court of Appeal in Travelers:

> These provisions properly interpreted include policies that are issued in Ontario and polices that are issued in another province when vehicles from those jurisdictions are operated in Ontario. They make it plain that part VI of the Ontario *Insurance Act* did not apply to the Nunavut vehicle operated by the Claimant in Nunavut at the time of the accident because the vehicle was not then required to be insured in Ontario".

Therefore, National argues if the Nunavut policy is not an Ontario policy and therefore not bound by Section 268 of the *Insurance Act* then similarly the National policy which is also not an Ontario policy nor an Ontario insurer similarly should not be bound by Section 268 of the *Insurance Act*.

I do not agree with National's characterization of how the Court of Appeal in *Travelers v. CAA* should be applied to the circumstances of this case. National consistently takes the position that the location of the accident has no relevance. I disagree, and, in my view, the Court of Appeal made it quite clear that the location of the accident is clearly relevant. In reviewing the extracts from the decision of the Court of Appeal above relied upon by National, there is consistent reference to the fact that the accident occurred in Nunavut. The courts specifically find that if the Claimant in that case had driven the Nunavut vehicle into Ontario and had the accident there that Travelers would have had to respond to the Claimant's request for Statutory Accident Benefits at the Ontario level under the Nunavut policy.

The court also referenced, in terms of key facts, that Travelers had issued a Nunavut policy, insuring a Nunavut plated vehicle, owned by the government of Nunavut that the accident had occurred Nunavut and that policy was governed by Nunavut insurance law and therefore the

Claimant was entitled to Nunavut Statutory Accident benefits and not Ontario Statutory Accident Benefits. The PAU was not operative in that case.

The Court of Appeal states that when reviewing the provisions of Section 224 and 226 of the Ontario *Insurance Act* in conjunction with Section 268, that those provisions properly interpreted make it clear that part VI of the Ontario *Insurance Act* does not apply to a Nunavut vehicle being operated by the Claimant in Nunavut at the time of the accident because that vehicle was not required to be insured in Ontario. Again, I stress that the accident in this case occurred in Ontario and it seemed to be a key factor of the Court of Appeal decision that the accident occurred in Nunavut.

The court stated at paragraph 35, and I quote:

> "but the priority rules stipulated by s. 268 only apply if both insurers are subject to those rules. Section 268(1) provides that it applies to "every contract evidenced by a motor vehicle liability policy" to understand what this means, one must turn to the definition of "contract" in Section 224(1) that section refers to Ontario polices and to polices issued extra provincially by insurers who file an undertaking in Ontario (Section 224(1)(b)) the extent to which extra provincial policies are caught by Section 224(1)(b) is generally limited by Section 226.1 to situations where the vehicle that is registered and insured extra provincially is actually operating in Ontario".

Clearly, the Court of Appeal is again stating the significance of the location where the accident occurs. Also of note is that a footnote is provided in reference to the above noted quote to deal with the question as to whether *Healy v. Interboro* is still good law. In the footnote the Court of Appeal states as follows:

> **I note that part VI of the Ontario *Insurance Act* also applies to a foreign insured when they are injured in any vehicle driven in Ontario through the operation of the PAU: *Healy v Interboro Mutual Indemnity Insurance Company* (1999) 44 O.R. (3D) 404 [1999] O.J. 1667(C.A.).**

I take this footnote as a clear direction from the Court of Appeal to indicate that *Healy v. Interboro* is still good law and that when the accident occurs in Ontario with a foreign insurer who has filed a PAU that Section 268 of the *Insurance Act* (Sections 1 and 2) are applicable to that insurer. I also conclude that this footnote is a good indication as to why the Court of Appeal may have declined to hear the Leave to Appeal application from my initial decision.

I therefore conclude that *Travelers v. CAA* does not overturn the decision of the Court of Appeal in *Healy v. Interboro* and as Justice Nakatsuru found that *Healy v. Interboro* was on all fours with this case factually and legally that there is no reason to change my initial approach with respect

to finding National bound to respond to this priority dispute both in terms of priority and reimbursement.

National also relied on a recent decision in *The Personal Insurance Company v. Zurich Insurance Company* a decision of Arbitrator Novick 2018 CarswellOnt 10656.

In that case the accident occurred in Chicago. A car insured by The Personal Insurance was hit by a tractor trailer. The Claimant was in The Personal vehicle and sustained injuries. She was a resident of Hamilton, Ontario. The tractor trailer was insured by Zurich USA. This was a loss transfer claim. The evidence was that Zurich America was not licenced to sell insurance in Ontario. The truck was not required to be insured under Ontario law. However, Zurich did file the PAU.

Arbitrator Novick found that Zurich America was not subject to the loss transfer provisions under Section 275 of the *Insurance Act* as the accident occurred in the state of Illinois. Zurich America was not an Ontario insurer. The question of who or what was an Ontario insurer was certainly discussed by Arbitrator Novick. At the end of the day her decision was premised on where the accident occurred. I do not find this decision to be helpful or instructive with respect to National's argument in this case.

National also relied on the decision in *Economical v. Intact,* 2021 ONC 3249. This decision was rendered by Justice Chalmers after the decision of the Court of Appeal was released in *Travelers*. In that case RL was killed in a motor vehicle accident in Thunder Bay, Ontario. She had been insured under an Ontario automobile policy issued by Economical. Ms. L had a daughter who lived in Alberta. The daughter owned a vehicle in Alberta which was insured by Intact under an Alberta policy. The daughter claimed she sustained psychological injuries as a result of her mother's death and submitted an Accident Benefit claim to Economical. Her claim was denied and no benefits were paid. She did not challenge the denial of benefits. However, Economical commenced a proceeding against Intact seeking a Declaration that it was the priority insurer.

Arbitrator Bialkowski at first instance concluded that as the daughter was not "an insured person" under the Economical policy she was not entitled to Accident Benefits. He did find that she was insured by Intact for the purposes of Accident Benefit coverage and that therefore Intact was in priority to Economical.

Intact Appealed the Arbitrator's decision and Justice Chalmers allowed the appeal. Justice Chalmers relied on the decision of the Court of Appeal in *Travelers* and concluded that Intact was not an Ontario policy for the purposes of the daughter's claim. As it was not an Ontario policy, the *Insurance Act* did not apply despite the fact that the original accident occurred in Ontario.

Justice Chalmers carefully reviewed the decision in *Travelers* and concluded that the Court of Appeal had found that the PAU is only for the purpose of assisting insureds and is not intended to assist insurers in seeking reimbursement from other insurers. National interprets this to mean

that the PAU cannot be relied upon to establish priority but can only be relied upon to give the foreign insurer's policy holder the right to pursue Ontario Statutory Accident Benefits when an accident occurs in Ontario. It does not extend to provide the right to pursue a priority dispute or a priority claim if the insured elects to seek its Ontario Accident Benefits elsewhere.

Economical in that case argued, as indeed do Liberty and Coseco, that as the accident occurred in Ontario that the case was on all fours with *Healy* and that Justice Chalmers should follow *Healy*. Justice Chalmers chose to follow *Travelers* noting that the mere fact that an insurer such as Intact is licensed to provide automobile insurance in Ontario does not necessarily result in a finding that the insurer is bound by the priority rules under Section 268 of the *Insurance Act*.

Justice Chalmers also commented on the decision of Justice Nakatsuru in this case. He noted that:

> "Coseco was decided before the Court of Appeal released its decision in Travelers. In that case the Court of Appeal stated that the PAU cannot be relied on to find an extraterritorial insurer bound by the Ontario priority dispute process".

He also went on to say that this case was distinguishable on its facts from the matter before him as the Claimant advancing a request for Statutory Accident Benefits was not in Ontario at the time of the accident.

I have carefully reviewed the Submissions of National, Liberty, and Coseco and the decision of Justice Chalmers and I find that it is distinguishable. In as much as he found that my decision was distinguishable due to the fact that the Claimant was in Ontario, I find that his decision is equally distinguishable due to the fact that the daughter in the case before him lived in Alberta, was in Alberta when the accident occurred, and was a derivative Claimant. I find that this decision does not assist National in its argument.

The last point that National raises is one that is more an interpretation of *Healy v. Interboro* in retrospect taking into consideration the *Travelers* appeal and indeed Justice Chalmers' comments. National argues that *Healy* was not in fact a priority dispute. The accident in *Healy* took place in 1996. The accident occurred in Thunder Bay. Mr. H was a resident of New York State. He claimed entitlement to Ontario Statutory Accident Benefits. Both his own insurer, Interboro, who provided the New York policy and Guardian Insurance who insured the vehicle that Mr. H was a passenger in under an Ontario policy declined to pay Mr. H any Accident Benefits. This case was decided before Regulation 283/95 of the Ontario *Insurance Act* was amended to require that the first insurer who received an OCF-1 (Application for Accident Benefits) was obliged to pay those benefits pending any priority dispute. As a result, Mr. H was obliged to sue both Interboro and Guardian. National argues that therefore this was a case where the New York insured was seeking Ontario Statutory Accident Benefits from its own insurer and this is a distinguishable feature from the case here. The Claimant here did not choose to seek benefits from National.

Liberty and Coseco submit that while the style of the litigation may be insured v. insurer that does not change or take away from the result in this case. I agree with Liberty and Coseco.

In the decision, Justice Goudge, specifically states that:

> "the dispute is whether the SABS to which Mr. H is entitled must be paid by Guardian or Interboro. If Interboro can assert the defence that its policy does not provide for the payment of SABS, then under the *Insurance Act* Guardian must pay".

The court clearly suggests that while Mr. H may have brought this claim, this was in essence a priority dispute. The court concluded that the vehicle covered by the Interboro policy need not be in Ontario for the PAU to be triggered. Even though the Healy policy was an out-of-province policy with an out-of-province insurer it was bound by the Ontario *Insurance Act* by virtue of the PAU. As I indicated in my initial decision, I read *Healy* as indicating that Section 268(1) and (2) of the Ontario *Insurance Act* applies to an out-of-province insurer in the circumstances of this case. I also note that the same conclusion was reached by Justice Nakatsuru and I am bound by his decision.

I therefore reject National's argument that the *Travelers v. CAA* case has changed the landscape of the applicability of Section 268 to a non-Ontario insurer with a non-Ontario policy who has filed a PAU but when the accident has occurred in Ontario and their insured advances a claim for Ontario Statutory Accident Benefits.

Reimbursement of LAT Legal Fees:

Coseco claims it is entitled to legal fees of $3,477.02. This was in the context of an application brought to the Licensing Appeal Tribunal by the Claimant for various benefits that had been denied by Coseco while they were adjusting his claim. Coseco submitted that bill showing time involving 2 law clerks, an assistant, as well as a lawyer of a 2008 year of call. The work done included reviewing the LAT application and medicals, filing a Declaration of Representative, filing a Response, drafting a Case Conference Brief, attending a Case Conference, and ultimately settling the LAT claim. The total amount of fees was $3,804.50 and the HST on the fees was $494.59. There were no actual disbursements.

Coseco submits that its legal fees should be recoverable. It argues that this is the type of case where legal fees relating to a LAT dispute should be funded despite case law that suggests that such a cost item is not always recoverable. They note that the amount being sought is not large as it settled before it reached a hearing. They also argue that National's behaviour has been unreasonable. The priority dispute commenced in April 2016. There was a jurisdictional dispute from which there was an appeal and then later the appeal was abandoned. There was a further issue raised with respect to whether Section 268 applied and that was appealed up to the Court

of Appeal and now there is this preliminary issue hearing which Coseco submits is frivolous based on the res judicata and issue estoppel argument.

Coseco points out that it has never been the priority insurer and that National's behaviour can only be interpreted as an effort to avoid handling and funding the Accident Benefit claim. If National had accepted its responsibility earlier, Coseco would never have had to incur the legal fees.

Liberty takes no position with respect to the legal fees. National however submits that legal fees at the Licensing Appeal Tribunal are not recoverable based on case law.

National relies on the decision of Arbitrator Jones in *Zurich Insurance Company & Co-operators General Insurance Company,* dated January of 2007. In that case, Zurich sought to be reimbursed from Co-operators for legal expenses that Zurich had incurred in defending a FSCO Arbitration that had been brought by the Claimant. Arbitrator Jones concluded that the legal costs of the FSCO dispute were not recoverable. Arbitrator Jones accepted that an Arbitrator has equitable jurisdiction to award such legal costs in the appropriate case. It is justified whether it is based on the doctrine of unjust enrichment or restitution. However, Arbitrator Jones found that such discretion should only be used in the most extreme of cases. He noted that the priority dispute was developed to provide a quick, efficient, and relatively inexpensive method of resolving disputes between insurers. To allow legal costs incurred in first party disputes to be recovered regularly in priority disputes would lead to an endless examination of accounts and their reasonableness. While he noted that his conclusion may seem unfair as one insurer would be burdened with costs of handling legal fees relating to a case for which another insurer is ultimately responsible for but it should be remembered that in the next case that the other insurer may very well be the beneficiary.

This decision was the subject matter of an appeal which was heard by Justice Darla Wilson on May 1, 2008. Justice Wilson upheld Arbitrator Jones' decision. She noted that she agreed with his assessment of the facts and did not find any error in law. She found Arbitrator Jones used the correct test when he declined to reimburse legal fees. She noted:

> "it is an exercise of discretion based on the particular facts of the case and he declined to do so for reasons clearly annunciated in his decision".

I draw from this decision that I have the discretion to award legal fees such as those paid in this case but it is dependent upon the facts of the case and as Justice Wilson upheld Arbitrator Jones' decision it should be a discretion only exercised in extreme cases.

Coseco referred to a previous decision of mine in the case *of Dufferin Mutual Insurance Company and Aviva Insurance Company of Canada* where I concluded that adjusting expenses were payable in the context of a reimbursement in a priority dispute. I have reviewed my decision in

that case dated August 12, 2021 and I find it is quite distinguishable. I find adjusting expenses are quite different in nature then legal expenses.

In this case, I conclude that the legal fees for the LAT are not recoverable. While certainly this case has taken a long time to move forward, National has raised valid arguments in an area of law that is difficult, complex, and has been the subject matter of some considerable examination by both the Court of Appeal and the Supreme Court of Canada. Jurisdictional, cross-border issues, extraterritorial issues are often complex.

While certainly things could have moved more quickly, I do not find the behaviour of National in this dispute to be such that it puts the claim for legal costs in the exceptional case. Accordingly, I exercise my jurisdiction to find that the legal costs for similar reasons outlined by Arbitrator Jones and upheld by Justice Wilson are not recoverable in this case.

Interest

With respect to interest, Coseco claims it is entitled to interest on the amount for which it seeks reimbursement. Pursuant to the *Arbitration Act* 1991 (Section 57) in the absence of agreement to the contrary, interest is payable in accordance with the *Courts of Justice Act* in the same way as a money judgement in court. Under the *Courts of Justice Act*, interest is payable from the date a cause of action arises at the rate prevailing at the time the proceeding was commenced. Coseco also notes that post-judgment interest also applies from the date the Order is made.

Coseco submitted that the cause of action in a priority dispute arises from the time the first insurer provides notice of the dispute to the other potential priority insurer. In this case, notice was served October 2015. Coseco notes that interest at that time was 1% per annum.

Coseco then submits that an expedient way of calculating interest is to assume that payments were made evenly between the date of the first payment on February 12, 2016 until the date of the last payment which was made December 3, 2018 (the date of settlement). Coseco proposes interest should be calculated based on 0.005 x 144,169.90 x 2.81 years which comes to $2,025.59.

In the decision of the *Dominion of Canada General Insurance Company and Certas Direct Insurance Company* (decision of Arbitrator Jones dated September 2012) he concluded that interest should run from the date of notice in accordance with the *Courts of Justice Act*. He made reference to the decision of Arbitrator Holland in *Jevco Insurance Company and Dominion Insurance Company* where Arbitrator Holland held that as the insurer had the use of money over the years that accordingly interest was payable.

I agree with Arbitrator Jones and accordingly, I award interest from the date of notice October 2015 to the date of this decision. I also find the formula proposed by Coseco to be reasonable. The only change would be that the quantum upon which interest is calculated is to be reduced by the amount of the legal costs that I have found not payable. The quantum of reimbursement

is $140,692.88. The formula would therefore be 0.005 x 140,692.88 from October 2015 to the date of this decision. If counsel cannot agree on the calculation they can contact me for further submissions. In my view, interest would run from the date of the notice up to the date of this decision as opposed to my first decision as suggested by counsel for Coseco. Post-judgement interest would run from this decision on forward.

Responsibility for Reimbursement/Priority as between Liberty and National:

I find that Liberty and National rank equally pursuant to Section 268 of the *Insurance Act*. I had understood that this was not in dispute although there were some submissions made by National that suggest the contrary. In oral submissions I understood counsel for National to concede that the National policy ranked equally with the Liberty policy on the grounds that Liberty insured the Claimant's spouse and National insured the employer. The National policy therefore would have the Claimant as deemed named insured as he had regular use of the employer's vehicle.

The fly in the ointment is that under Section 268 of the *Insurance Act* normally in circumstances where 2 insurers rank equally the Claimant is put to an election. In fact the wording of the relevant section is mandatory. The wording is that the insured "shall" be put to the election. Therefore, despite the fact that the Claimant's claim has settled, I find that the Claimant must be put to his election as between Liberty and National. Counsel for the 3 insurers should work together to come up with a letter that has wording with respect to the election that is satisfactory to everyone. I find that Coseco should send out that letter as that is insurer with whom the Claimant would have had the closest connection in relation to his claim for Statutory Accident Benefits. It is also a more neutral approach without having either Liberty or National's letterhead on the letter.

The letter should be sent to the Claimant. at his last known address. If he has not responded within 90 days electing one or other of the insurers then I find that Liberty and National must reimburse Coseco on a 50/50 basis.

Whether it is Liberty or National or both of them who are ultimately having to reimburse Coseco either due to an election or due to my ruling on the 50/50 split that reimbursement is to be done promptly. Reimbursement is to be made to Coseco either within 90 days of the Claimant having made an election or within 180 days after the election letter was sent out.

Costs:

Coseco and Liberty were wholly successful in their position that National was bound by Section 268 of the *Insurance Act* and had an obligation to respond by way of the priority dispute including reimbursement. Coseco while not successful in its claim for costs of the Licencing Appeal Tribunal was otherwise overall successful on its claim for reimbursement as well as interest.

In all the circumstances, I find that National is responsible for paying the full amount of the Arbitration fees relating to this proceeding and is responsible for the legal fees of Coseco and Liberty. If the parties cannot agree on the amount of costs I would ask that they contact me so that we can schedule a costs hearing.

DATED THIS 31st day of January, 2022 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP