

N 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

SECURITY NATIONAL INSURANCE COMPANY

Applicant

and

NORTHBRIDGE INSURANCE COMPANY

Respondent

AWARD

COUNSEL APPEARING

Esinam Ayesu-Attah, counsel for Security National Insurance Company (hereinafter referred to as "Security").

Elizabeth Branopolski, counsel for Northbridge General Insurance Corporation (hereinafter referred to as "Northbridge").

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act*, 1991 and s. 268 of the *Insurance Act*, specifically Regulation 283/95 with respect to a claim as between two insurers as to which has priority to pay statutory accident benefits to the claimant arising out of an accident that occurred on December 15, 2020.

On December 15, 2020 the claimant was driving a rental car insured by Northbridge. Security insured the claimant's mother. The claimant applied to Security for statutory accident benefits and Security takes the position that the claimant is a deemed named insured under the Northbridge policy as the vehicle was rented for more than 30 days and accordingly Northbridge stands in priority. Northbridge claims Security is the priority insurer as it also insured the rental car as a temporary substitute vehicle.

The parties selected me as their arbitrator on consent and provided me with a signed Arbitration Agreement dated December 3, 2024.

We had a number of pre-hearings and then this matter was set down for a written hearing. No witnesses were called.

An issue did arise with respect to the written materials. Counsel made submissions with respect to the fact that the timelines I had set down for providing written materials were not strictly met. There was some suggestion that in the circumstances the submissions of the Respondent should not be accepted. I advised counsel that the timelines were not strictly enforced as they may have experienced at the Licence Appeal Tribunal and I would allow the late submission of the Respondent's material.

The second issue arose when Security submitted their reply to Northbridge's submissions. Security submitted documents that had not formed part of the Joint Document Brief. Northbridge submitted they had not seen these documents before. Further, Northbridge submitted that the record provided by Security, particularly with respect to some e-mail exchanges, was not complete. Northbridge sought the right to file a sur-reply and Security resisted that.

A further pre-hearing took place at which time I ordered that Northbridge could file its sur-reply, thus being given an opportunity to respond to any new documents or matters raised in the reply of Security.

In the sur-reply filed by Northbridge they argue that these additional documents that were submitted with the reply of Security should not be permitted to form part of the record and noted their concern that the documents did not reflect the complete documentary disclosure relating to various e-mails.

Both counsel also argue that there should be some cost consequences.

I am concerned that there was not a full documentary disclosure during the course of the pre-hearing process. However, as will be noted in this decision, initially it appeared that the arguments to be made in this case revolved around dependency. Once the materials were filed, it became clear that dependency was not in fact an issue but rather the main issue before me was going to be whether or not the claimant was insured as a named insured under the Security policy through the rental agreement that was entered into. Therefore, while these documents submitted by Security had no relevance to dependency, they did have some minor relevance to the main issue. Northbridge has had an opportunity of reviewing them and responding by way of sur-reply. They did not request a further pre-hearing or seek an order for production of any additional materials.

Priority disputes are meant to be a quick and flexible process to deal with disputes between insurers. Arbitrators have jurisdiction under the *Arbitration Act* to control their own process. I see no benefit in this case to adhering to strict timelines nor excluding documents when the parties have had an opportunity to review them and indeed make submissions on them.

Therefore the new documents that were submitted with the Security reply form part of the hearing record to the extent that they have any relevance.

As to the issue of costs, I will comment on that under my costs award at the conclusion of my analysis and decision.

ISSUES IN DISPUTE

The Arbitration Agreement sets out very general questions indicating that I am to determine all matters in dispute between the parties arising out of the accident benefit claim of the claimant from the motor vehicle accident of December 15, 2020.

The Arbitration Agreement did not identify specific questions or issues for me to determine.

As noted during the course of the pre-hearing and indeed in the submissions of the Applicant, the issue of whether or not the claimant was principally dependent for financial support on his mother, who was insured by Security, was raised. Security took the position that the claimant was not principally dependent on his mother and therefore would not be a deemed named insured under their policy through any dependency argument.

The responding materials of Northbridge accepted that the claimant is not dependent on his mother. Accordingly, I do not see any issue for me to determine in that regard.

Further, both parties seem to agree that the claimant was a deemed named insured under the Northbridge policy by virtue of the fact that he rented the Northbridge vehicle from Certified Car Rental (the owner) for more than 30 days. There did not appear to be any argument between counsel on the 30-day issue nor on the coverage issue with respect to Northbridge.

Therefore, the issue that appears to be before me is whether or not the claimant was also a deemed named insured under the Security policy on the date of loss on the basis that Security covered the rental vehicle as a temporary substitute vehicle. If the claimant does qualify on the Security policy then Security and Northbridge rank equally and the issue of an election would arise.

FACTS

The parties filed a Joint Book of Documents and in addition there were further documents provided by Security in their reply materials. The facts do not appear to be in dispute.

The claimant's mother is the named insured under the Security policy. The policy was in full force and effect on the relevant date of loss of December 15, 2020.

The claimant, who was Security's named insured's son, was not a listed driver on his mother's policy on December 15, 2020. He was not the named insured. Nor was he a dependant.

There had been a prior accident involving the Security vehicle on October 26, 2020. The claimant was driving his mother's vehicle at that time. The mother's policy with Security bears number

00100584304 and the relevant term was from August 21, 2020 to August 21, 2021. A copy of the policy was produced and clearly indicates that the claimant was not a listed driver on that policy.

After the accident of October 26, 2020 the claimant called Security on November 3, 2020 to ask whether he was a listed driver at the time of the October accident. He was advised that he was not a listed driver.

On or about October 26, 2020 the claimant attended at Certified Car Rental in Barrie and rented a Mazda 3TR 2020.

According to the car rental document, the claimant was the renter. It provides his cell phone number and his address. The time that he picked up the car is October 26 at 8:30 a.m. While according to the rental document it is due back on November 28, 2020, it was in fact not returned and the claimant was driving this rental vehicle on December 15, 2020 when he was involved in the second accident.

There is evidence to suggest that the claimant's mother may have been with him at the rental agency. However, her name appears nowhere on the rental document. The document simply indicates that the claimant is the renter of the vehicle and he signs the document.

The rental agreement also indicates that the cost of the rental is to be covered by TD Direct Agency referencing Security policy number 00100584304 that covers a 2017 Chevy Cruze. This is the policy number of the mother and the Cruze is in reference to the vehicle that was damaged in the October 2020 accident.

There is no dispute that Security paid for the cost of the rental from October 26, 2020 when the claimant rented the vehicle and was continuing to pay for it on the date of loss some 50 or so days later.

There is no evidence to suggest that this vehicle was rented for anyone other than the claimant. Specifically, his mother does not appear to have been involved in the rental and there is no evidence that she drove it.

The claimant applied to Security for accident benefits. A copy of his OCF-1 was produced dated April 23, 2021. It indicated that the claimant was choosing to submit his OCF-1 to Security on the grounds (see part 4) that it was "a policy of a person on whom he was a dependant." Again under part 4, the details of auto insurance noted the claimant's mother referenced TD Insurance but noted the Mazda which was the rented car. The owner of the car was identified as Certified Car Rental and incorrectly identified their insurer also as TD.

On June 10, 2021 Security submitted a Notice to Applicant of Dispute Between Insurers to Northbridge advising that the claimant was driving a rental vehicle that had been rented for more than 30 days and accordingly Northbridge should be the priority insurer.

The claimant gave a statement to Security on April 7, 2022. In this statement he advises that he had rented the Mazda from Certified Car Rental and that his mother had been present when the Mazda was rented. He advises that a copy of her insurance was provided to Certified Rental at the time the car was rented. This same statement suggests that the claimant was under the impression that at the time of the accident he was listed as an occasional driver on his mother's policy and that was not the case.

The log notes of Security were produced which do have some relevant entries. On January 24, 2022 the adjuster conducts what she describes as a priority review. She notes that the claimant was driving a rental vehicle at the time. He had been in a prior accident under their policy and the rental he was driving was the replacement vehicle in relationship to that claim. The note then states,

"Clmt was not a listed driver on this policy at time of MVA, PD coverage for damage to rental vehicle initially declined as clmt not a listed driver however appears PD has agreed to pay based on an exception."

The same log note goes on to indicate that the adjuster reviewed an Autoplus report which indicated the claimant was an unlisted driver on the Security policy, having been removed on June 28, 2019. She goes on to say,

"Does not appear that clmt is a listed driver on any of mother's TD policies at time of loss ... Clmt was occupant of rental vehicle at time of accident, appears insurance extended by TD in error as clmt not listed on policy."

Of interest there is an earlier log note that pre-dates the December 15, 2020 accident but post-dates the October 26 accident. The claimant calls on July 9, 2020 and speaks to an adjuster. The note indicates,

"Christine's son called enquiring about renting a car through TD Insurance, advised Christine that her son is not listed on the policy therefore he doesn't get coverage through GTS on renting a car."

Despite having been told that, the claimant appeared to be under the impression that when he went in to get the rental vehicle in October, that he would be covered by his mother's policy. At his EUO that took place on November 21, 2023, the claimant advised (see questions 91 through to 95) that he had been told that his insurance would cover the rental vehicle until their actual vehicle had been repaired. He stated,

" So, I had ... well, my mom's insurance policy has if your vehicle gets damaged, they ... they give you a rental until yours is fixed, or you buy another one, or whatever."

POSITION OF THE PARTIES

Security

Security submits that Northbridge is the priority insurer pursuant to s. 268 of the *Insurance Act*. Northbridge insured the rental vehicle. As the claimant had rented the vehicle in excess of 30 days, he becomes a deemed named insured under the Northbridge policy pursuant to s. 3(7)(f) of the Statutory Accident Benefit Schedule.

Section 3(7)(f) of Ontario Regulation 34/10 is set out below:

"An individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident, the insured automobile is being rented by the individual for a period of more than 30 days."

As noted earlier, Northbridge does not dispute that the claimant is a deemed named insured under their policy.

With respect to their own policy, Security's position is that the claimant was not their named insured, not a spouse, not a dependant and not a listed driver. Therefore, irrespective of the circumstances, the claimant cannot access the Security policy when he rents a vehicle, even though it may have been a replacement vehicle for the car that was insured by Security and had been damaged in October of 2020.

Security submits that the substitute vehicle provisions set out in the OAP and the *Insurance Act* only operate to extend coverage for a rental vehicle when it is a temporary substitute vehicle to the named insured and the named insured spouse. As the claimant was not the named insured, not a spouse, not a dependant and not even a listed driver on the Security policy, he therefore was not covered and not an insured under the Security policy at the time of the loss of December 15, 2020.

Security submits that the rental vehicle being driven by the claimant was not rented as a temporary substitute vehicle for the named insured and therefore s. 2.2.2 of the OAP-1 is not applicable.

Northbridge

Northbridge admits that the claimant is a deemed insured under their policy by virtue of the rental vehicle being rented in excess of 30 days. However, Northbridge submits that the vehicle was rented by Security and paid for by Security under the claimant's mother's policy. Northbridge submits that even though the renter on the rental agreement is identified as the claimant, that in fact the vehicle was rented by Security for the mother in excess of 30 days and therefore the claimant is covered.

Northbridge submits that the rental agreement incorporates the Security policy by reference in the rental agreement and that the log notes of Security clearly identify that the claimant was driving a replacement vehicle under their policy as a result of the damage to the described vehicle from the accident of October 26, 2020.

Specifically, the argument put forward by Northbridge is set out below (see paragraph 29 of the Factum):

"Northbridge submits that the evidence in this matter illustrates that, although the claimant was listed on the rental agreement as the renter, the vehicle was not rented directly by the claimant. Rather, the vehicle was rented by Security National for their named insured as an insurance replacement (temporary substitute) for the Security National vehicle."

Northbridge submits that this results in the claimant being a named insured under both the Security policy and the Northbridge policy on the grounds that the rental vehicle was being made available for the claimant's regular use for a period in excess of 30 days and that therefore he became a deemed named insured under both the Northbridge and Security policies.

In essence, Northbridge argues that s. 3(7)(f) of the SABS operates not only with respect to Northbridge but also with respect to Security. Northbridge takes the position that Security made the rental car available to the claimant and therefore he becomes a deemed named insured under their policy.

In these circumstances, as the claimant would therefore be an occupant of the vehicle, under both policies he is a deemed named insured under s. 3(7)(f). He therefore is put to an election. Northbridge argues he elected Security.

Security/Reply

Security's simple response to this is that it did not rent the vehicle the claimant did. The fact that they paid for the vehicle through the mother's policy does not make them the renter of the vehicle nor was Security renting the vehicle and then making it available for the claimant's regular use.

ANALYSIS AND DECISION

Section 268 of the *Insurance Act*, R.S.O. 1990 c. I.8 provides a cascading hierarchy of insurance coverage for the purposes of priority.

An insured person's first claim is generally against the vehicle in respect of which he or she is a named insured. If one is a named insured under a number of policies, then occupancy becomes relevant and the priority insurer may be the one under which the insured person is the named

insured and the occupant of the described vehicle.

Section 268 recognizes that in some cases there can be more than one insurer that rank equally. In such a case, the claimant has the right to choose which insurer he or she wishes to apply to for statutory accident benefits.

In this case, the claimant is an occupant of a vehicle in which he is potentially the named insured under two policies: The Security policy by virtue of the extension of coverage to a temporary substitute vehicle or Northbridge as the insurer of the rental vehicle itself.

Relevant to this dispute is s. 3(7)(f) of Ontario Regulation 34/10 which sets out the "deemed named insured provisions". The full text of that section is set out below:

- "(f) An individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy of insurance insuring an automobile at the time of the accident if, at the time of the accident,
- (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole partnership or other entity, or
 - (ii) the insured automobile is being rented by the individual for a period of more than 30 days."

Also relevant to this case is the definition of an insured person set out in the Statutory Accident Benefit Schedule. In order for priority to fall under s. 268 of the *Insurance Act*, the claimant must qualify as an insured person under the insurance policies of the insurers who are participating in the priority dispute for s. 268 to apply to that insurer.

The definition of insured person is set out below:

- "'Insured person' means, in respect of a particular motor vehicle liability policy
- (a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured, and a dependant of the named insured or his or her spouse,
 - (i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile;
 - (b) a person who was involved in an accident involving the insured automobile, if the accident occurs in Ontario."

In this case, both Security and Northbridge have conceded that the claimant was a deemed named insured under the Northbridge policy as the vehicle had been rented for more than 30 days. They also agree the claimant is not the named insured or a dependant of the named insured under the Security policy.

Northbridge however takes the position that the temporary substitute provisions under the OAP-1 operate to also have the claimant a deemed named insured under the Security policy.

Pursuant to the Ontario Automobile Policy, a temporary substitute vehicle is defined under s. 2.2.2 as follows:

"A temporary substitute automobile is an automobile that is temporarily used while a described automobile is out of service. The described automobile must not be used by anyone insured by this policy, because of its breakdown, repair, service, theft, sale or destruction.

Coverage for a temporary substitute automobile is provided under the automobile policy of the owner of the temporary substitute automobile."

Also relevant is the definition of "other automobiles" defined under s. 2.2.3 of the OAP set out below:

"Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you."

There does not appear to be any dispute that the vehicle that the claimant was in on December 15, 2020 was a temporary substitute vehicle that replaced Security's named insured (the mother of the claimant) described vehicle that had been damaged in the accident of October 26, 2020. Had the claimant's mother rented the vehicle and been driving the vehicle on the date of loss, there would be no doubt that she would be the named insured under the Security policy and the deemed named insured under the Northbridge policy and would have to be put to an election.

The question is whether that is also true of the claimant. I conclude that it is not.

I find as a fact that the claimant rented the vehicle from Certified Car Rental. The fact that that vehicle was (in what seems an error in retrospect) paid for by Security under the mistaken impression that the mother was renting the vehicle, does not in my view result in a finding that Security rented the vehicle or that it rented the vehicle on behalf of the claimant. Security was simply paying for the cost of the rental as required under their policy with their named insured. The reference to the policy of the claimant's mother and the number on the rental agreement is consistent with the coverage available to the claimant's mother for insurance to be extended including property damage or accident benefits to the substitute automobile pending the repairs of her own car. However, that does not, in my view, extend coverage to the claimant himself.

The claimant has no connection with the Security policy. While he is the son of the named insured, he does not otherwise qualify as an insured person under the Security policy. He is not the named insured, he is not the spouse, the parties agree he is not a dependant and the policy itself clearly shows he was not a listed driver on the date of loss. Coverage for the temporary substitute vehicle cannot be extended to a non-insured individual under Security's policy. The purpose of the substitute vehicle provisions is to provide coverage for the actual insured under the Security policy when their car is damaged, not for non-insured individuals even if they are family members.

This is consistent with s. 2.2.4 of the OAP-1 which is set out below:

"Automobiles, other than a described automobile, are covered as described in this subsection when rented by you, or by your spouse who lives with you, for periods of not more than 30 days, but only with respect to the liability of the person renting the automobile arising from the negligence of the driver of that automobile."

While this deals with liability coverage, it is consistent with the wording of the temporary substitute vehicle relating to accident benefits and the operation of other automobiles that the substitute rental provisions of the policy do not extend beyond an individual who is insured under the described vehicle policy.

I therefore conclude that on December 15, 2020 the claimant was not a named insured or deemed named insured under the Security policy but was a deemed named insured under the Northbridge policy and accordingly Northbridge stands in priority to Security.

COSTS

In light of the parties' positions with respect to various procedural matters, including the submission of late documents and some new documents and the apparent confusion at the pre-hearing process that dependency was in dispute, I am reserving my decision on costs.

If the parties cannot resolve the issue of costs within the next 30 days, I would ask them to notify me and we will set up a time for costs submissions.

DATED THIS 28th day of January, 2025 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors
1700 – 438 University Avenue
TORONTO ON M5G 2L9