COURT OF APPEAL FOR ONTARIO

CITATION: Continental Casualty Company v. Chubb Insurance Company of Canada, 2022 ONCA 188
DATE: 20220307
DOCKET: C69057

MacPherson, Simmons and Nordheimer JJ.A.

In the Matter of the *Insurance Act,* R.S.O. 1990, c. I.8, as amended, and *Ontario Regulation 283/95* made under the *Insurance Act*

And in the Matter of the *Arbitration Act, 1991,* S.O. 1991, c. 17, as amended

And in the Matter of an Arbitration

BETWEEN

Continental Casualty Company

Appellant (Respondent)

and

Chubb Insurance Company of Canada

Respondent (Appellant)

and

Peter Ekstein

Insured Person

Jason R. Frost and Joseph Filice, for the appellant

Mark Donaldson and Shelby Chung, for the respondent

Heard: November 4, 2021 by video conference

On appeal from the order of Justice David G. Stinson of the Superior Court of Justice, dated September 26, 2019, with reasons reported at 2019 ONSC 3773, allowing an appeal from a decision of Arbitrator Kenneth Bialkowski, dated April 4, 2018.

Simmons J.A.:

A. INTRODUCTION

[1] The issues on this appeal arise out of a priority dispute between insurers concerning liability for statutory accident benefits ("SABS") where the SABS claimant had basic mandatory SABS coverage under one policy and both basic mandatory and optional enhanced SABS coverage under another policy.

[2] In July 2015, Peter Ekstein, the owner, President and CEO of a forestry products company, suffered catastrophic injuries when he was hit by a pickup truck while jogging near his cottage.

[3] Mr. Ekstein had basic mandatory SABS coverage under his personal automobile insurance policy issued by Chubb Insurance Company of Canada. In addition, his company had purchased optional enhanced SABS coverage under a fleet policy issued by Continental Casualty Company for his company's vehicles.

[4] Following Mr. Ekstein's accident, Continental denied both that its policy provided optional enhanced SABS coverage and that Mr. Ekstein had coverage under its policy.

[5] Mr. Ekstein accordingly claimed basic mandatory SABS from Chubb. Chubb subsequently initiated a priority dispute, claiming that Continental was the insurer liable to pay SABS to Mr. Ekstein.

[6] Section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8. (the "Act") sets out priority of payment rules specifying the insurer against which a SABS claimant may

have recourse for SABS in particular circumstances. Under ss. 268(5) and (5.2) of the Act, if a SABS claimant is a “named insured” under more than one policy, the SABS claimant may decide from which insurer to claim SABS.

[7] Unless altered by the legislative scheme, within the insurance industry “named insured” generally refers to the person actually named in a contract of insurance, while an “insured” is a person who, whether by statute or by contract, has some or all of the rights of the named insured[1]. In the case of the Continental policy, Mr. Eckstein’s company was the “named insured”. However, s. 3(7)(f) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the “SABS Schedule”) expands the scope of the named insured for a “company car”. A person will be deemed to be the named insured under an automobile insurance policy at the time of an accident where the insured automobile “is being made available for the individual’s regular use by a corporation.”

[8] In April 2018 an arbitrator found that Mr. Ekstein was the named insured under the Chubb policy and a “deemed named insured” under the Continental policy[2] because he met the “regular use” requirements in s. 3(7)(f).

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[1] *Axa Boreal Assurances v. Co-operators Insurance Co.* (2000), 50 0.R. (3d) 395 (C.A.), at paras. 18 and 19.

[2] The arbitrator also found that Mr. Ekstein was a listed driver and an insured under the Continental policy.

[9] The arbitrator held that absent misinformation provided by Continental, Mr. Ekstein would have elected to receive SABS from Continental, the optional enhanced SABS insurer, and that Mr. Ekstein was entitled to re-elect in the circumstances. Continental was therefore the priority insurer under the s. 268 priority of payment rules and obliged to pay Mr. Ekstein both basic mandatory and optional enhanced SABS.

[10] Further, because the Continental policy included optional enhanced SABS benefits, the arbitrator found Continental should have issued to its insured an Ontario Policy Change Form 47 endorsement ("OPCF 47") as required under s. 28 of the SABS Schedule.

[11] Subject to a requirement that a person, to whom an optional enhanced SABS benefit is applicable, does not claim SABS under another policy, OPCF 47 allows that person to claim both basic mandatory and optional enhanced SABS under the optional enhanced SABS policy, even though the s. 268 priority of payment rules may require the person to claim SABS under another policy.

[12] The arbitrator concluded that regardless of the s. 268 priority of payment rules[3], Mr. Ekstein was "entitled to pursue the optional benefits from [Continental]".

[13] Continental appealed the arbitrator's finding that Mr. Ekstein was a deemed named insured under its policy to the Superior Court.

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[3] At para. 119 of his reasons, the arbitrator referred to the priority provisions of s. 268 of O. Reg. 283/95. However, it is obvious from the context that the arbitrator was referring to s. 268 of the Act.

[14] The Superior Court Appeal judge (the "SCAJ") found the arbitrator's finding that Mr. Ekstein met the regular use requirements in s. 3(7)(f) of the SABS Schedule unreasonable. Although as a company executive Mr. Ekstein had access to and control over company vehicles, he had never used any of such vehicles. The SCAJ accordingly concluded Mr. Ekstein was not a deemed named insured under the Continental policy. Therefore he could not elect under the s. 268 priority of payment rules to claim SABS from Continental and Chubb was the priority insurer under those rules.

[15] Nonetheless, the SCAJ found that Continental was obliged to pay both basic mandatory SABS and optional enhanced SABS to Mr. Ekstein under the terms of OPCF 47.

[16] Over Chubb's objections, the SCAJ went on to consider whether Chubb, as the priority insurer under the s. 268 priority of payment rules, was obliged to indemnify Continental for basic mandatory SABS payments Continental was required to make, an issue not raised in Continental's notice of appeal.

[17] Relying on an arbitrator's decision, the SCAJ found that an OPCF 47 endorsement does not displace the s. 268 priority of payment rules. The SCAJ accordingly set aside the arbitrator's order and declared that:

- Continental must pay both basic mandatory SABS and optional enhanced SABS to the SABS claimant;
- Continental is responsible for the cost of all optional benefits provided;

- Continental is entitled to reimbursement from Chubb for the cost of basic mandatory SABS benefits paid to the SABS claimant by Continental and all expenses associated with administering those benefits.

[18] Chubb was granted leave to appeal to this court on February 28, 2020.

[19] Chubb raises a variety of procedural and substantive issues concerning the SCAJ's decision. In my view, this appeal can properly be disposed of by answering the following questions:

1. Did the SCAJ err in overturning the arbitrator's decision that Mr. Ekstein met the regular use requirement in s. 3(7)(f) of the SABS Schedule and was therefore a deemed named insured under the Continental policy?
2. Did the SCAJ err in holding that as the priority insurer under the s. 268 priority rules, Chubb was obliged to indemnify Continental for basic mandatory SABS payments Continental was obliged to pay to Mr. Ekstein under OPCF 47?

[20] For the reasons, that follow, I would answer no to the first question and yes to the second.

B. THE SABS REGIME

[21] To provide context for the issues on appeal, I will briefly review the SABS coverage regime and the s. 268 priority rules and related regulations. I will set out other relevant regulatory and contractual provisions when addressing the specific issues to which they relate.

(i) SABS Coverage

[22] Subsection 268(1) of the Act states that all motor vehicle liability insurance policies are deemed to provide for the SABS set out in the SABS Schedule:

> 268(1) Every contract evidenced by a motor vehicle liability policy … shall be deemed to provide for the statutory accident benefits set out in the [*Statutory Accident Benefits*] *Schedule*….[4]

[23] Under the SABS Schedule, all insurance policies must provide stipulated basic mandatory SABS coverage and all insurers must offer stipulated optional enhanced SABS coverage: s. 2(1) and s. 28(1) of the SABS Schedule.

[24] Sections 4-27 of the SABS Schedule set out the specified basic mandatory benefits that must be provided, including, for example, a maximum income replacement benefit of $400 per week: s. 7(1) of the SABS Schedule.

[25] Section 28(1) of the SABS Schedule requires that every insurer offer specified optional enhanced SABS benefits. For example, s. 28(1)(1.) requires that the following optional enhanced benefit be offered:

> 1. An optional income replacement benefit that increases the maximum weekly amount of $400 referred to in the definition of “B” in subsection 7 (1) to $600, $800 or $1,000, as selected by the named insured under the policy.

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[4] Section 268(1.1) provides an exception concerning occupants of public transit vehicles.

[26] Under s. 28(2) of the SABS Schedule, the optional benefits referred to in s. 28(1) are “applicable” only to: the named insured, the spouse of the named insured, their dependants and persons specified in the policy as drivers of the insured automobile.

[27] Put another way, even if the s. 268 priority rules afford recourse against an insurer to a SABS claimant with no connection to the policy (for example, a pedestrian struck by the insured automobile where the pedestrian has no automobile insurance), any optional enhanced SABS coverage available under the policy would not be “applicable” to that claimant.

(ii) The Section 268 Priority Rules and Related Regulations

[28] Subsections 268(2)-(5.2)[5] of the Act set out the rules for determining the insurer against which a person has recourse for SABS and for determining the insurer liable to pay SABS.

[29] Whether an occupant or non-occupant of an automobile at the time of an accident, a SABS claimant’s first avenue of recourse is against the insurer of an automobile in respect of which the person is an insured: s. 268(2)(1.)(i) and (2)(2.)(i) of the Act. As Mr. Ekstein was a pedestrian (“non-occupant”) when he was injured, s. 268(2)(2.) therefore applies:

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[5] The full text of these sections is set out in Appendix ‘A’.

> 268(2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> …
>
> 2. In respect of non-occupants,
>
> i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. [Emphasis added.]

[30] Where a person has recourse against more than one insurer under subparagraphs (i) or (iii) under paragraphs (1.) or (2.) of s. 268(2), the person may decide the insurer from which the person will claim benefits: s. 268(4) of the Act.

[31] Despite s. 268(4), if a person is a named insured under a policy, the person must seek recourse for SABS under that policy: s. 268(5) of the Act.

[32] However, subject to s. 268(5.2), if a person is a named insured under more than one policy providing SABS coverage, the person may choose the insurer against which the person will seek recourse: s. 268(5.1) of the Act.[6]

[33] As noted, s. 3(7)(f) of the SABS Schedule expands the notion of a named insured if a SABS claimant can establish regular use of a company vehicle. It provides:

> 3(7)(f) 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 an 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…. [Emphasis added.]

[34] Section 268(3) of the Act stipulates that the insurer against whom a person has recourse for SABS is liable to pay SABS:

> 268(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. [Emphasis added.]

[35] Further, s. 2(4) of the SABS Schedule states:

> 2(4) Benefits payable under this Regulation in respect of an insured person shall be paid by the insurer that is liable to pay under s. 268(2) of the Act.

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[6] Section 268(5.2) does not apply to the facts of this case. It stipulates that if a person is a named insured under more than one policy and was, at the time of the incident, an occupant of an automobile in respect of which the person is a named insured (or the spouse or a dependant of the named insured), the person must claim SABS against the insurer of the automobile in which the person was an occupant. As noted, Mr. Ekstein was a pedestrian, or “non-occupant”, when struck by the pick-up truck.

[36] Section 2.1(6) of O. Reg. 283/95 (*Disputes Between Insurers*) requires the first insurer that receives an application for SABS to pay SABS pending the resolution of any dispute as to which insurer is required to pay the benefits. This provision ensures SABS payments are not delayed by priority disputes between insurers. If the insurers cannot agree as to which insurer is required to pay benefits, the dispute must be resolved through an arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17: s. 7(1), O. Reg. 283/95.

C. ANALYSIS

(1) Did the SCAJ err in overturning the arbitrator's finding that Mr. Ekstein meets the regular use requirement in s. 3(7)(f) of the SABS Schedule and is therefore a deemed named insured under Continental's policy?

(a) The Arbitrator's Decision

[37] The arbitrator's decision that Mr. Ekstein was a deemed named insured under the Continental policy was premised on a finding that Mr. Ekstein met the "regular use" requirement set out in s. 3(7)(f) of the SABS Schedule.

[38] The evidence before the arbitrator was that Mr. Ekstein's name appeared on a schedule of drivers attached to the Continental fleet policy. However, it was undisputed that he had never driven any of the corporate vehicles, most of which were tractor-trailers used in the forestry products business. Although Mr. Ekstein

was involved in the day-to-day operations of the business, others were responsible for day-to-day decision-making concerning the fleet of vehicles and the assignment of vehicles to particular drivers. Nonetheless, Mr. Ekstein testified that he had access to the keys for the vehicle fleet, which were kept in the corporate business office, and had the power to take one of the lighter trucks out 24/7 if he chose to do so. He “called the shots”.

[39] The arbitrator noted that there are two arbitration decisions that deal in particular with the control executives and owners have over vehicles used in their businesses and the impact of that control on the regular use issue: *The Dominion of Canada General Insurance Company v. Federated Insurance Company of Canada* (Arbitrator Densem – October 31, 2012) and *The Dominion of Canada General Insurance Company v. Lombard Insurance Company (McLean)*, 2013 CarswellOnt 19270, (Arbitrator Bialkowski – September 11, 2013).

[40] Taking account of those decisions the arbitrator concluded that Mr. Ekstein had sufficient authority and control over the vehicles to meet the requisite standard. The arbitrator said:

> Mr. Ekstein had sufficient control over the vehicles insured by [Continental] to be found a deemed “named insured” by reason of s. 3(7)(f) of the SABS [Schedule]. As President and CEO, he had control and access to them whenever he wanted, as he stated, “I call the shots”.
>
> …

> I find that Mr. Ekstein was a deemed named insured pursuant to s. 3(7)(f) of the SABS and his control of the corporate vehicles by reason of his ownership interest, ultimate control of the vehicles and accessibility to the keys. [Emphasis added.]

(b) The SCAJ's decision

[41] Before the SCAJ, the parties agreed that the standard of review was reasonableness. The SCAJ distinguished the two cases on which the arbitrator relied by noting that, in each case, the SABS claimant made actual use of the vehicle that was the subject of the policy.

[42] In *Dominion v. Federated*, the claimant was a dependant of a co-owner of a used car lot.[7] The used cars on the lot were insured under a garage policy issued by Federated. At the time of the accident, the claimant was a passenger in one of the used vehicles which was being driven by a third party with the father/co-owner's permission. There was no issue that the father/co-owner made regular use of the vehicles on the lot. The real issue was whether a company vehicle was being made available to the father at the time of the accident as the used car lot was closed when the accident occurred and there was no business purpose associated with the claimant's travel. The issue turned on the father's

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[7] Access to the Federated policy depended on s. 268(5.2) of the Act which reads:

> If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

access to and control over vehicles on the lot such that they were being made available at the time of the accident.

[43] In *Dominion v. Lombard*, the claimant was struck by a vehicle while riding a bicycle in Oregon. She was a team leader and highest-ranking person at an Ontario group home. She used the group home's vehicle while working and was also responsible for assignment of, record keeping in relation to, and responsibility for the maintenance and repair of the vehicle. She claimed SABS under the group home fleet policy. The insurer conceded regular use. The issue as framed by the arbitrator was whether the vehicle was "available to the claimant at the time of the accident". The arbitrator concluded that the claimant had sufficient residual control over the vehicle to be considered a deemed named insured.

[44] In considering the application of those decisions to this case, the SCAJ stated, "while there was an element of so-called 'residual control' over the vehicles … what is missing … is any evidence of those vehicles 'being made available for [Mr. Ekstein's] regular use.'" Further, it was "unreasonable for the Arbitrator to impute regular usage to Mr. Ekstein when none existed."

[45] The SCAJ found that the arbitrator failed to consider Mr. Ekstein's evidence that he never used a company vehicle prior to or at the time of the accident, or that a company vehicle was not being made available to him at the time of the accident. The SCAJ concluded:

> I conclude that the Arbitrator's decision is unreasonable because he failed to carry out the proper analysis, it is inconsistent with underlying legal principles, and the outcome ignores or cannot be supported by the evidence. To the contrary, the evidence supports the finding that no automobiles that were subject to the [Continental] policy were made available for Mr. Ekstein's regular use by the company. Since the outcome ignores that uncontroverted fact, I find it is unreasonable. [Emphasis added.]

(c) Discussion

[46] Chubb contends that, post-*Vavilov*[8], the standard of review to be applied in this case is the appellate standard. I agree.

[47] At para. 37 of the majority reasons in *Vavilov*, the court stated that it should be recognized that "where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision."

[48] The arbitration in this matter was conducted pursuant to the *Arbitration Act, 1991*. Subsections 45(2) and (3) of that Act provide for an appeal on questions of law and mixed fact and law if permitted by the arbitration agreement. Paragraph 6 of the parties' arbitration agreement provides for an appeal without leave to a Superior Court judge on questions of law or mixed fact and law.

[49] Chubb submits that the SCAJ made a palpable and overring error in reversing the arbitrator's finding that Mr. Ekstein met the regular use requirement.

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[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1.

In particular, there was evidence before the arbitrator that Mr. Ekstein had control over and access to the company vehicles whenever he wanted. As noted by the arbitrator, Mr. Ekstein stated, “I call the shots”. Mr. Ekstein could have used, or directed the use of, any of the corporate vehicles at any time had he chosen to do so. Chubb submits that the SCAJ erred by effectively removing the phrase “available for” from the regular use definition. He further erred by failing to defer to the factual findings of the arbitrator when he concluded that no automobiles were being made available by the company for Mr. Ekstein’s regular use.

[50] I would not accept these submissions.

[51] As a starting point, I consider that the issue presented may be a question of law requiring a correctness standard of review. It is undisputed that although Mr. Ekstein could have driven at least some of the company vehicles at any time he wished, he never did so. Accordingly, the question arises, can the regular use requirement set out in s. 3(7)(f) of the SABS Schedule be met based on access to and control of a vehicle, standing alone, without any use? For reasons that I will explain, I would answer no.

[52] However, even assuming that the standard of review is palpable and overriding error, I agree with the SCAJ that the arbitrator erred by focusing on the evidence concerning Mr. Ekstein’s potential access to and control over his company’s vehicles. In doing so, the arbitrator effectively ignored, or failed to give

effect to, the evidence that, as of the date of the accident, Mr. Ekstein had never used any of the company vehicles insured under Continental's policy.

[53] I reach these conclusions for several reasons. I will begin by repeating the regular use requirement set out in s. 3(7)(f) of the SABS Schedule for ease of reference:

> 3(7)(f) 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 an 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….

[54] Read as a whole and in the context of the legislative history of the section, the language of s. 3(7)(f) makes the actual situation at the time of the accident the focus of the section rather than theoretical possibilities.

[55] Belobaba J. made this point in *ACE INA Insurance v. Co-operators General Insurance Company* (2009), 79 M.V.R. (5th) 312 (Ont. S.C.), at paras. 25-26, when he compared the language of the current section (at the time, s. 66(1) of the SABS Schedule under the heading "Company Automobiles and Rental Automobiles") to the language of the comparable section under the same heading in the immediately preceding insurance regime:

> Section 66(1) [now s. 3(7)(f)]: if, at the time of the accident, the insured automobile is being made available for the individual's regular use by a corporation….

> Former section (s. 91(4) under O. Reg. 776/93): if an insured automobile is made available for the regular use of an individual… [Emphasis added.].

[56] By focusing on the time of the accident and adding the phrase "is being", the current requirement speaks to reality, not hypotheticals.

[57] Thus, in *ACE INA Insurance v. Co-operators*, even though an employee of rental car company made regular use of rental car vehicles during working hours, he did not meet the regular use requirement because the accident did not happen during working hours. At para. 17, Belobaba J. said:

> The question is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car.

[58] In *ACE INA Insurance v. Co-operators*, there was no issue about regular use. The sole issue was whether a company vehicle was "being made available" at the time of the accident. The answer turned on whether the employee had access and control at the time of the accident – he did not.

[59] In this case, the primary issue is regular use. Mr. Ekstein had never made any use of company vehicles. Accordingly, the primary issue was not whether a company vehicle was available to him at the time of the accident. Rather, it was whether a company vehicle was being made available for his regular use at the time of the accident.

[60] Although Mr. Ekstein's control over the fleet of corporate vehicles may mean that at least some of them were theoretically available for him to use[9] at the time of the accident, to hold that a company vehicle was being made available for his regular use at the time of the accident would amount to speculation.

[61] Like the SCAJ, I fail to see how availability for regular use can be imputed in the absence of any use up to the point of the accident.

[62] Second, in the decisions relied on by the arbitrator, regular use was not in issue. Rather, the main issue in each case was again whether a corporate vehicle was being made available to the SABS claimant (or to a person on whom the SABS claimant was dependent) at the time of the accident. Again, the issue turned on access and control. The term "available" obviated any requirement that the SABS claimant actually be using an insured vehicle at the time of the accident. The decisions held that access to and control over a vehicle can support a finding that a vehicle was "available" to a claimant at the time of an accident. However, in both decisions, the claimant (or the insured upon whom the claimant was dependent), had regular use of an insured company vehicle. Accordingly, these decisions do not address the question whether, absent any use, access to and control over a company vehicle, standing alone, is sufficient to meet the requirement that a

[9] Continental disputes this factual point because the accident occurred on a weekend when Mr. Ekstein was at his cottage and the corporate office was closed.

company vehicle "is being made available for [an] individual's regular use" at the time of the accident.

[63] Third, in *Dominion v. Federated*, at p. 4, Arbitrator Densem canvassed the meaning ascribed to "regular use" in the caselaw and noted the propositions set out below (footnotes omitted). Not all of the cases from which these propositions are derived were dealing with the regular use provision of the SABS Schedule. However, it is noteworthy that none of these cases contemplated that no use could amount to regular use:

- "regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular, or out of the ordinary, or special";
- the language of s. 66(1)(a) (the predecessor to s. 3(7)(f)) does not require that the use be frequent, exclusive (in the case of fleets), or personal, to be regular;
- "regular use" has been defined in several arbitration decisions as being use that is "habitual, normal and recurred uniformly according to a predictable time and manner." However, the cases where the individuals have been found not to be regular users of the subject vehicles were only those cases where the characterization of the use was "irregular at best and out of the ordinary";
- "regular use" does not require that the person for whom the vehicle is being made available be driving or operating the vehicle being made available.

The person could be a pedestrian or even a passenger in someone else's car.

[64] Fourth, with the introduction of the no-fault benefits regime, the legislature chose to make an individual's own insurer in most cases the first avenue of recourse for SABS: see s. 268(2) of the Act. According to Arbitrator Samis, as quoted in *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, 2012 ONCA 683, 112 O.R. (3d) 1, at para. 44, with the introduction of what was originally referred to as the "company car" provision, the legislature made a policy choice that the first avenue of recourse for a regular user of a company car would be the corporate insurer:

> The traditional "company car" scenario involves situations where a business purchases a vehicle, and insurance for the vehicle, and then makes that vehicle available for the regular, personal, and frequent use of its employees or officers.
>
> …
>
> Given the known frequency of these types of transactions, the legislature attempted to address how the new priority rules would apply to these situations.
>
> …
>
> The apparent purpose of the regulation provision is to deem the person, for whom a vehicle is made available for regular use, to be a "named insured". This is clearly a recognition that in these types of transactions the regular user is in such a relationship with the vehicle and the vehicle insurer that that person should claim their benefits first from the insurer of the vehicle, rather than claim benefits from some other insurance company.

[65] Given the apparent purpose of the company car or regular use provision, I find it difficult to conceive that the legislature intended to make the corporate insurer the customary first avenue of recourse for SABS for a corporate owner/executive who has never used a corporate vehicle.

[66] I conclude that the arbitrator made at least a palpable and overriding error in failing to give effect to the evidence that Mr. Ekstein had never used any of the corporate vehicles and in finding that Mr. Ekstein met the regular use requirement in s. 3(7)(f) of the SABS Schedule and was therefore a named insured under Continental's policy.

(2) Did the SCAJ err in finding that, as the priority insurer under the s. 268 priority rules, Chubb is obliged to indemnify Continental for basic mandatory SABS payments made to Mr. Ekstein under OPCF 47?

[67] To answer this question, it is necessary to review OPCF 47, s. 227 of the Act, Financial Services Commission of Ontario ("FSCO") Bulletins A-17/96 and A-10/97, and the SCAJ's reasons.

(a) OPCF 47

[68] Continental has acknowledged that, in addition to basic mandatory SABS coverage, Mr. Ekstein's company purchased optional enhanced SABS coverage under Continental's fleet policy.

[69] Section 28(4) of the SABS Schedule provides that where an insured purchases optional enhanced SABS coverage the insurer shall issue an OPCF 47 endorsement as approved by the Commissioner of Insurance under s. 227 of the Act:

> 28(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in Ontario Policy Change Form 47 (OPCF 47), as approved by the Commissioner of Insurance on December 3, 1996 under section 227 of the Act.

[70] Subject to the requirement that the person not claim SABS under another policy, OPCF 47 allows a person with optional enhanced SABS coverage under a motor vehicle insurance liability policy to claim SABS under that policy even though the s. 268 priority of payment rules may require the person to claim SABS under another policy. The endorsement reads as follows:

> OPCF 47 Agreement Not to Rely on SABS Priority of Payment Rules
>
> 1. Purpose of This Endorsement
>
> This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident benefits under this policy may, by the priority of payment rules in Section 268 of the *Insurance Act*, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have purchased under this policy. This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy, including the optional statutory accident benefits provided by this

> policy, provided they do not make a claim for SABS under another policy.
>
> 2. What We Agree To
>
> If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.
>
> All other terms and conditions of the policy remain the same. [Emphasis added.]

(b) Section 227 of the Act

[71] Section 227(2) of the Act permits the Chief Executive Officer to approve an endorsement where any provision of Part VI of the Act is inappropriate to the requirements of a contract with the result that the approved endorsement is effective in accordance with its terms even if its terms are inconsistent with or vary a provision of Part VI:

> 227(2) Where, in the opinion of the Chief Executive Officer, any provision of this Part, including any statutory condition, is wholly or partly inappropriate to the requirements of a contract or is inapplicable by reason of the requirements of any Act, he or she may approve a form of policy, or part thereof, or endorsement evidencing a contract sufficient or appropriate to insure the risks required or proposed to be insured, and the contract evidenced by the policy or endorsement in the form so approved is effective and binding according to its terms even if those terms are inconsistent with, vary, omit or

> add to any provision or condition of this Part. [Emphasis added.]

[72] As noted above, OPCF 47 was approved in December 1996.

(c) FSCO Bulletins A-17/96 and A-10/97

[73] FSCO Bulletin A-17/96 was issued soon after OPCF 47 was approved "to assist insurers in interpreting s. 268 of the [Act]". The Bulletin notes that the insurance industry had expressed concern that certain interpretations of the Act could frustrate the objectives of optional statutory accident benefits.

[74] Bulletin A-17/96 states, in part, that "a key objective of the *Automobile Insurance Rate Stability Act, 1996 (Bill 59)* [was] to lower the cost of compulsory automobile insurance by establishing" basic mandatory SABS coverage suitable for most consumers but allowing for the purchase of optional enhanced benefits for consumers who required such coverage. The optional enhanced coverage was intended to be portable, meaning it would apply to the consumer, their spouse and dependent(s) and any listed driver on the policy, whether the accident took place in the vehicle covered by the policy or any other vehicle. Further, the "rate filings of insurers for the optional statutory accident benefits reflects this portable aspect of the coverage."

[75] However, because certain interpretations of the Act may not reflect the intended portability, "endorsement form OPCF 47, Agreement Not to Rely on SABS Priority of Payment Rules" was developed to "protect purchasers of optional

statutory accident benefits from different interpretations of the Act which may result in denial of coverage." An example of this potential was explained as follows:

> An example is a consumer who has purchased his or her own policy with optional statutory accident benefits. The consumer is injured in an accident while occupying the vehicle of a spouse or dependent who is insured under a separate policy without optional statutory accident benefits. The Act can be interpreted, in this case, to require the consumer with optional statutory accident benefits, to claim under the spouse's or dependent's policy instead [under s. 268(5.2)]. As a result, the consumer who has purchased optional statutory accident benefits would not be able to claim these benefits.

[76] FSCO Bulletin A-10/97 was issued on November 19, 1997 as a supplement to Bulletin A-17/96 because of "questions about how [OPCF 47] should be interpreted in certain situations." Bulletin A-10/97 notes that OPCF 47 was mandated, in part, to ensure insured persons are able to access optional enhanced SABS regardless of how the priority of payment rules set out in subsections 268(2), (4), (5), (5.1) and (5.2) of the Act are interpreted. Under the heading "Effect of the Endorsement", Bulletin A-10/97 states , in part, the following:

> The OPCF 47 provides that if optional accident benefits are purchased and are "**applicable**" to a person under the policy, the insurer will permit the insured person to claim **both mandatory accident benefits and optional accident benefits under that policy**. The insurer will not deny benefits on the basis that the priority of payment rules set out in section 268 of the Act provide that another insurer is liable to pay the mandatory accident benefits.
>
> The endorsement also provides that where an insured person claims both mandatory accident benefits and

> optional accident benefits from an insurer, the insured person agrees not to apply for SABS under another policy. This is to prevent double compensation. [Emphasis in original.]

[77] Bulletin A-10/97 goes on to explain that an optional accident benefit would be "applicable" if the insured person was involved in an accident and met the eligibility criteria for the benefit as set out in the SABS [Schedule] and provides an example.

(d) The SCAJ's decision

[78] On the arbitrator's findings, Continental was both the s. 268 priority insurer and the OPCF 47 optional enhanced benefits insurer. However, because the SCAJ reversed the arbitrator's finding that Mr. Ekstein was a deemed named insured under the Continental policy, Chubb became the priority insurer under s. 268(5) of the Act.

[79] In the SCAJ's view, this created a dichotomy between Mr. Ekstein's right to SABS coverage, which was governed by contract, and the rights and obligations as between the two insurers for SABS, which, in his view, were governed by the Act.

[80] In concluding that, as between the insurers, the statutory priority regime in s. 268 of the Act prevails, the SCAJ adopted the arbitrator's reasoning in *Echelon General Insurance Company v. Co-operators General Insurance Company,* 2015 CarswellOnt 20908, at paras. 26-28, 43 and 45.

[81] In *Echelon*, the claimant applied to Echelon for SABS under a policy for the automobile she was driving when the accident occurred, which included basic mandatory SABS coverage. Echelon initiated a priority dispute with Co-operators, which had issued a policy to the claimant's father that included optional enhanced SABS coverage. The claimant was a listed driver under the Co-operators policy. Co-operators denied coverage on the basis that the claimant's injuries appeared to fall within minor injury guidelines such that optional enhanced benefits would not be applicable. The dispute proceeded to arbitration under the Disputes Between Insurers regulation.

[82] In his reasons, the *Echelon* arbitrator noted the evolution of the automobile insurance regime in Ontario, from a tort regime to a system with significant no-fault benefits to a more hybrid regime – and the corresponding evolution of the mandatory SABS scheme, from a broad and extensive scheme to a less extensive scheme coupled with the requirement in s. 28 of the SABS Schedule to offer optional enhanced benefits.

[83] The arbitrator also noted that it became apparent that receipt of optional enhanced SABS might be jeopardized by the s. 268 priority rules, which could require a claimant to apply for SABS to an insurer other than their optional enhanced SABS insurer. But rather than revise the Act, the government responded with OPCF 47, which the arbitrator described as "an undertaking given solely in

respect of a denial of the claim and [which] does not speak to priority dispute issues, between insurers."

[84] At paras. 26-28 and 45 of his reasons, the arbitrator considered what would have happened had the claimant applied to Co-operators for SABS. He concluded that, under OPCF 47, Co-operators would have been obliged to pay both basic mandatory and optional enhanced SABS. He was also of the view that there was nothing in OPCF 47, the Act or the SABS Schedule that would have precluded Co-operators from seeking reimbursement, at least for basic mandatory SABS and any optional enhanced SABS that might be available under Echelon's policy from Echelon, a higher ranking insurer under the s. 268 priority rules. To hold otherwise would be a windfall for the higher ranking insurer and "a dislocation of risk which would necessarily make optional benefits coverage inordinately expensive, far more expensive than the breadth of extended coverage obtained for the consumer." Nonetheless, in his view, Co-operators would not have been entitled to off-load the continuing handling of the claim.

[85] However, the claimant had applied to Echelon for SABS and the question before the arbitrator was whether Echelon could claim reimbursement for basic mandatory SABS from Co-operators. The issue whether OPCF 47 applied and made Co-operators responsible for SABS raised four questions:

- had optional enhanced SABS been purchased?;
- were the optional enhanced SABS applicable to the claimant?;

- had or could the claimant claim SABS under the Co-operators policy?; and
- had or could the claimant agree not to make a claim for SABS under another policy?

[86] The first condition was obviously satisfied. Further, the arbitrator found the policy was applicable to the claimant because she fell within the category of persons to whom optional enhanced benefits were applicable under s. 28(2) of the SABS Schedule.[10] Without foreclosing the possibility that the claimant could, at some point in the future, successfully satisfy the third and fourth conditions and advance a claim for optional enhanced SABS directly against Co-operators, the arbitrator found that Echelon could not seek reimbursement from Co-operators for the basic mandatory SABS it had paid. The arbitrator reasoned that Echelon would not have had that right if optional enhanced SABS had not been purchased. Further, he saw nothing in OPCF 47 or the Disputes Between Insurers regulation that would permit Echelon to seek reimbursement from Co-operators. In his view, this outcome was consistent with what would have happened had the claimant applied to Co-operators for SABS. Either way, the s. 268 priority insurer would ultimately be responsible for basic mandatory SABS, a result which precluded unduly loading costs onto the optional benefits insurer:

> [T]he net result is that the obligation for the mandatory benefits ultimately rests with the insurer having the

[10] This reasoning may not accord with FSCO Bulletin A10/97 concerning the meaning of “applicable”. The arbitrator said he found the Bulletin inconsistent in addressing the issue and, overall, “not helpful”.

> highest ranking under section 268 of the *Insurance Act*. This is entirely appropriate. It supports the legislative intention of making optional benefits available at reasonable cost. Any other interpretation would have the effect of unduly loading costs onto the optional benefit insurers and would discourage individuals from purchasing that coverage for their protection. [Emphasis added.]

[87] The SCAJ adopted the arbitrator's reasoning and held that while Continental must pay both standard and optional SABS to Mr. Ekstein under OPCF 47, Chubb must reimburse Continental for all basic mandatory SABS paid to Mr. Ekstein together with associated administrative expenses.

(e) Discussion

[88] Continental submits that the SCAJ reached the correct conclusion: nothing in OPCF 47, the Act or the SABS Schedule displaces the right of an insurer that provides optional enhanced SABS coverage to seek reimbursement for basic mandatory SABS from another insurer in accordance with the s. 268 priority rules. Further, optional enhanced SABS only come into play once basic mandatory SABS are exhausted. To hold otherwise could lead to the anomalous situation that persons who mistakenly apply to the "wrong" insurer (i.e., under the policy that does not provide optional enhanced SABS coverage) will be left without recourse against any insurer.

[89] I would not accept this submission for four reasons.

[90] First, OPCF 47 is clear in requiring the optional enhanced SABS insurer to pay both basic mandatory and optional enhanced SABS:

> OPCF 47
>
> 1. Purpose of This Endorsement
>
> …
>
> This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy, including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.
>
> 2. What We Agree To
>
> If optional statutory accident benefits are purchased and are applicable to a person … and the person claims SABS under this policy … and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.

[91] Second, contrary to the SCAJ's conclusion and the *Echelon* arbitrator's reasons, I conclude that OPCF 47 displaces the s. 268 priority rules. That is because OPCF 47 is inconsistent with those rules and because s. 227(2) of the Act makes OPCF 47 effective in accordance with its terms even though it may be inconsistent with the s. 268 priority rules.

[92] Section 268(2) of the Act specifies the insurer against which a person may have recourse for SABS in particular circumstances. Section 268(3) requires that insurer to pay SABS:

> 268(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

[93] Where applicable, on its face, OPCF 47 contradicts those provisions. If a claimant applies for SABS to an insurer providing optional enhanced SABS coverage, the coverage is applicable and the claimant agrees not to apply for SABS to another insurer, OPCF 47 requires the optional enhanced SABS coverage insurer, and not the s. 268 priority insurer, to pay both basic mandatory and optional enhanced SABS. When OPCF 47 was approved it 1996, it became effective in accordance with its terms: s. 227(2) of the Act.

[94] Section 227(2) provides an apparently rarely used power to the Chief Executive Officer to make an endorsement that is inconsistent with the Act effective in accordance with its terms despite its inconsistency with the Act. In *Prasad v. GAN Canada Insurance Co.* (1997), 33 O.R. (3d) 481 (Ont. C.A.) appl. for leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 389, this court held that a territorial limitation in an approved policy could not limit the statutorily mandated coverage specified in the SABS Schedule and rejected an argument that policy approval meant that the territorial restriction overrode the SABS

Schedule[11]. This court observed that there was no evidence that a decision had been made to approve a policy inconsistent with the Act.

[95] However, in *Prasad*, the policy did not reference the regulation and the conflict was not apparent from the face of the document. Here, the conflict is identified in OPCF 47 and it cannot realistically be suggested that the Chief Executive Officer did not turn his/her mind to the conflict or to approving an endorsement inconsistent with the Act.

[96] Fundamentally, both s. 268 of the Act and OPCF 47 address who must pay SABS in particular circumstances. They do not address reimbursement. Any right of reimbursement arises only where one insurer has paid SABS when another insurer has the obligation to pay. Where it applies, OPCF 47 obliges an insurer that provides optional enhanced coverage to pay both basic mandatory and optional enhanced SABS. An optional enhanced SABS coverage insurer cannot claim reimbursement from another insurer when the optional enhanced coverage insurer undertook the obligation to pay.

[97] The FSCO Bulletins support the interpretation that the OPCF 47 insurer undertakes the obligation to pay both basic mandatory SABS and optional enhanced SABS; that the risk of doing so is built into the premiums; and that the

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[11] In *Prasad*, this court also noted that the territorial limitation provision in the Act was amended after the date on which the events in that case occurred to encompass SABS benefits. *Prasad* has subsequently been distinguished on that basis but not in relation to the comments concerning s. 227 of the Act.

ultimate intention of the legislature was to reduce the cost of compulsory automobile insurance. The *Echelon* arbitrator noted that the Bulletins address contractual rights between insured and insurer, not rights or reimbursement between insurers. However, this is because there is no independent right of reimbursement. The right only arises where one insurer, as the first insurer to receive a SABS application, is required to assume another insurer's obligation to pay. By virtue of OPCF 47, the optional enhanced SABS insurer assumes the obligation to pay.

[98] Third, on their face, the s. 268 priority rules and s. 268(3) of the Act (and s. 2(4) of the SABS Schedule) make an insurer liable to pay SABS; they do not make an insurer liable to pay basic mandatory SABS alone. Put another way, nothing in s. 268, the SABS Schedule, or the Disputes Between Insurers regulation, makes an insurer liable for only a portion of the SABS payable to a particular person or stipulates that SABS obligations can be bifurcated.

[99] Fourth, two arbitration decisions, neither of which was brought to the SCAJ's attention, have made comments critical of the *Echelon* arbitrator's analysis and support the conclusion that OPCF 47 displaces the s. 268 priority rules: *Jevco Insurance Company v. Chieftain Insurance Company* (Arbitrator Samworth – March 11, 2016) and *Co-operators General Insurance Company v. Certas Home & Auto Insurance Company* (Arbitrator Cooper – April 2019).

[100] Like *Echelon*, the comments in *Jevco* were *obiter*. However, in *Co-operators*, the arbitrator refused an optional enhanced SABS insurer's request for reimbursement for basic mandatory SABS payments from a s. 268 priority insurer largely on the basis of the *Jevco* analysis.

[101] In *Jevco*, the claimant was injured while riding a motorcycle. He applied for SABS to his motorcycle insurer, Jevco. The Jevco policy did not include optional enhanced SABS but the claimant's car insurance policy, issued by Chieftain, did. Jevco initiated a priority dispute with Chieftain.

[102] The *Jevco* arbitrator expressed the view that the wording of OPCF 47, which speaks to an insurer not denying a claim for benefits on the basis of the s. 268 priority rules, is both "antiquated" and "meaningless". Because of O. Reg. 34/10, which amended the Disputes Between Insurers regulation (O. Reg. 283/95) and developments in the caselaw, an insurer cannot deny SABS on the basis it is not the priority insurer: "[t]hat battle is left up to an inter-company dispute." Accordingly, the only reasonable way to interpret OPCF-47 is that if the optional benefits insurer receives a SABS claim, "then they do not have the right to make a priority dispute claim under Regulation 34/10 for any of the benefits they are paying to their insured."

[103] Further, the *Jevco* arbitrator opined that claims for reimbursement for a portion of benefits paid is not permitted:

> I do not find the wording of the regulation, the OPCF-47 and Section 268 of the Insurance Act provides a basis for pursuing a portion of benefits paid. Clearly Chieftain could not pursue Jevco for the optional benefits as they did not provide for those benefits.

[104] In addition, the *Jevco* arbitrator rejected the idea that a complex scheme of reimbursement such as that contemplated in *Echelon* was intended:

> I believe that the regulation and the endorsement was intended to simplify the process for the insured's receipt of optional benefits … and to pre-empt private disputes between insurers on this issue and not set up a complex scheme for priority disputes, reimbursements between various insurers nor placing the administration of a [SABS] claim with an insurer who would not be actually making the payments.

[105] In the result, the *Jevco* arbitrator concluded that, as between Jevco and Chieftain, Jevco was responsible to pay SABS to the claimant. As noted above, the SABS claimant had applied to Jevco for SABS. In the result, the SABS claimant did not have access to the optional enhanced benefits in the Chieftain policy.

[106] The *Co-operators* arbitrator agreed with the *Jevco* arbitrator's interpretation of OPCF 47. *Co-operators* also involved a motorcycle accident, a motorcycle policy including basic mandatory SABS only and a motor vehicle policy with optional enhanced SABS. However, in that case, the claimant applied to the optional enhanced SABS insurer, Co-operators, for SABS benefits. Relying on *Echelon*, Co-operators subsequently initiated a priority dispute with the motorcycle insurer, Certas, seeking reimbursement for benefits paid. The Co-operators arbitrator said:

> The OPCF 47 endorsement changes everything and, provided that the claimant satisfies the four conditions present in the endorsement, the optional benefits insurer is required to administer both mandatory and optional benefits coverages without regard for the priority of payment rules in Section 268 of the Insurance Act. [Emphasis added.]

[107] The *Jevco* arbitrator acknowledged that the result in that case was harsh because the SABS claimant was not afforded access to the optional enhanced SABS coverage he had purchased. However, the issue before her was obligations as between insurers. While she had commented that the SABS claimant was not entitled to re-elect from which insurer he wished to claim benefits, she was not purporting to decide the claimant's options. That question was for another forum.[12]

[108] I observe that potential unfairness arising from an insured's errors when applying for SABS may, in some cases, be corrected by invoking relief from forfeiture as happened in this case.

[109] I conclude that the SCAJ erred in holding that liability for SABS can be bifurcated under s. 268(2) of the Act. I would therefore set aside his order requiring Chubb to reimburse Continental for the cost of basic mandatory SABS payments and all expenses associated with administering those benefits.

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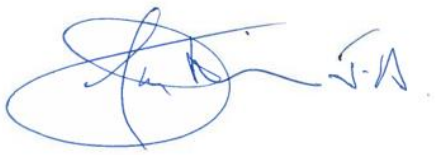
[12] Unlike in this case, in *Jevco*, the claimant did not seek status on the arbitration.

D. DISPOSITION

[110] Based on the foregoing reasons, the appeal is allowed and paras. 1(c) and (d) of the SCAJ's order requiring that Chubb reimburse Continental for the cost of basic mandatory SABS and related benefits are set aside.

[111] Costs of the appeal are to Chubb on a partial indemnity scale fixed in the amount of $20,000 inclusive of disbursements and applicable HST. The parties may file brief written submissions within 21 days if further costs orders are required (14 days for initial submissions, 7 days for a response).

Released: March 7, 2022 JCM



I agree. J.C. MacPherson J.A.

I agree. J.B. Nordheimer j.a.

Appendix ‘A’

Liability to pay
268 (2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

    i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

    ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

    iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

    iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

    i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

    ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

    iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

    iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Liability
(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

Choice of insurer
(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits

Same
(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

Same
(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

Same
(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.