IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, as amended, Section 268 AND REGULATION 283/95

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

INTACT INSURANCE COMPANY

Applicant

- and -

AVIVA CANADA INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Jason Goodman – Laxton Glass LLP
Counsel for the Applicant, Intact Insurance Company
(hereinafter referred to as "Intact")

Jason Frost – Schultz, Frost LLP
Counsel for the Respondent, Aviva Canada Insurance Company
(hereinafter referred to as "Aviva")

ISSUE - REGULAR USE

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the Claimant, Tyler Giovannetti, with respect to personal injuries sustained in a motor vehicle accident which occurred on January 6, 2014.

[2] The determination involves the issue of "regular use".

PROCEEDINGS

[3] The arbitration proceeded in Mississauga, Ontario on March 2, 2018, on the basis of Document Briefs, Examination Under Oath transcripts and the oral evidence of the Claimant Tyler Giovannetti.

APPLICABLE LEGISLATION

[4] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

[5] Since the Claimant was occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> *(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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> *(iii) If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[6] The priority hierarchy of s. 268 also contains the following provisions:

> *3) Liability – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.*
>
> *(4) Choice of insurer – 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.*
>
> *(5) Same – 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.*
>
> *(5.1) Same – 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 own discretion, may decide the insurer from which he or she will claim the benefits.*
>
> *(5.2) Same – 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.*

[6] Section 3(7)(f) of the *Statutory Accident Benefits Schedule* (the "*Schedule*") states that an individual who is living and ordinarily present in Ontario shall be 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 made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or
ii. The insured automobile is rented by the individual for a period of more than 30 days.

[7] By combined operation of the above noted statutory provisions, if the Claimant had "regular use" of his employer's vehicle, he would be considered a deemed "named insured" under the Aviva policy and since he was an occupant of such vehicle at the time of the accident, Aviva would stand in priority by reason of s. 268(5.2) of the *Insurance Act*:

> *(5.2) Same – 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.*

[8] If the Claimant is not found to have "regular use" of the vehicle insured by Aviva at the time of the accident, then Intact would stand in priority.

EVIDENCE

[9] On January 8, 2014, Tyler Giovannetti ("the Claimant") was the operator of a 1999 Chevrolet pick-up truck vehicle, insured by Aviva Canada Insurance Company ("the

Respondent"), and owned by Swift Railroad Contractors. He was travelling on Regional Road 20, near Patterson Road in the Niagara Region, when he was involved in a single vehicle collision. At the date of the accident, the Claimant was insured under a personal automobile policy (Policy No. 7M7729913) with Intact Insurance Company ("the Applicant"). The Claimant submitted an Application for Accident Benefits (OCF-1 form) to Intact on January 17, 2014. Intact began paying benefits to the Claimant and continues to do so. Intact has taken the position that Aviva ought stand in priority. On February 12, 2014, a Notice to Applicant of Dispute Between Insurers was sent to the Claimant and the Respondent, indicating that the Claimant was entitled to claim statutory accident benefits under the Respondent's policy (Policy No. 6741130255).

Tyler Giovannetti

[10] The Claimant is currently 31 years old (date of birth: October 16, 1985). At the date of the accident, he was single with no dependants.

[11] The Claimant gave a signed statement to the Applicant, dated March 13, 2014, some three months post-accident and about a month after first applying for statutory accident benefits. By this time, he had already retained legal representation. The initial application for accident benefits indicated that he sustained a brain injury with a Glasgow Coma Scale reading of between 8–9 and may well explain the delay in applying for benefits. He confirmed that at the time of the subject accident, he was operating a Chevrolet truck owned by Swift Railroad Contractors. He reported that he had been driving the particular vehicle involved in this accident for approximately one and a half months prior to the accident, and that he had his own set of keys.

[12] The Claimant stated that he was a listed driver on his employer's insurance policy. He reported having worked at Swift Railroad Contractors for approximately 12 years. He stated that he was not laid off at the date of the accident. He reported that he was to return to work on January 6, 2014, two days prior to the subject accident, and that his return to work had been temporarily postponed. The Claimant stated that he was a physical labourer and heavy equipment operator. He stated that Swift Railroad Contractors maintained and repaired railways. The claimant further stated that the company's work schedule was dependent on the weather conditions.

[13] Pursuant to an Employer's Confirmation Form (OCF-2), undated, the Claimant was employed at Swift Railroad Contractors as an Equipment Operator and laid off on December 21, 2013, one week before the subject accident.

[14] The Claimant stated that when he was not working, he was residing at two addresses. One in Grimsby, Ontario, with his sister and a second residence in St. Ann's, Ontario, where he had roommates. He worked in two week cycles for his employer, which consisted of ten days at the job site, and four days off. During the ten days of work, the Claimant resided at a motel paid for by his employer.

[15] With regard to his use of the employer's vehicle, the Claimant stated as follows:

a. He had permission to drive the employer's vehicle at the time of the accident despite not completing any work-related duties on that date;

b. During his four days off per work cycle, he would drive the employer's vehicle from the job site to his residence (in Grimsby or St. Ann's) and park the vehicle at his residence;

c. When necessary, he would use the employer's vehicle for personal use;

d. The employer's vehicle would be in his possession the entire time he was not working;

e. When he was working, he would drive the employer's vehicle to and from the job site and the motel where he and the other employees stayed;

f. His employer paid for gas and maintenance of its vehicle, but he would pay for his own gas when using the employer's vehicle for personal use;

g. He had his own set of keys to the employer's vehicle; and

h. He had been granted verbal permission by his employer to use the vehicle for personal use.

[16] The statement indicated:

> *"I have regular use and operation of the company vehicle. I have my own set of keys. I would use if I needed to like getting groceries. There is verbal permission given for personal use."*

[17] In his oral evidence at the arbitration, he confirmed that the evidence outlined in his statement was correct. He testified that when he was given the company vehicle, he was not provided with any instruction with respect to what he could or could not do with the vehicle. There was no written policy with respect to personal use. He was never told of any policy with respect to use of the vehicle. He specifically denied that there was an unwritten policy that the company vehicle could not be used for personal tasks or that he had been directed that the vehicle was not supposed to be used outside of work duties.

[18] In cross-examination, he admitted that this was the first seasonal layoff that he was allowed to take the company pick-up truck home. He stated that he paid for the gas used when using the vehicle personally. The company paid for gas generally and had a system of marking down the mileage with each fill up. He admitted that if he wanted to take company tools home for personal use, he felt he would have to ask for permission.

Michael Firmin

[19] Michael Firmin did not testify at the hearing but has provided two signed statements. The first was provided on February 5, 2014 to Crawford & Company (Canada) Inc., as independent adjusters for the Respondent. The second signed statement was provided to the Applicant on February 11, 2014.

[20} Mr. Firmin was the Human Resources Manager at Swift Railroad Contractors at the date of the subject accident. In his initial signed statement on February 5, 2014, Mr. Firmin stated that the Claimant had been an employee of Swift Railroad Contractors on a seasonal basis for 11 years. In his subsequent statement, Mr. Firmin indicated that the Claimant had been an employee for ten years. Notwithstanding this inconsistency, it is clear that the claimant was a long term seasonal employee of Swift Railroad Contractors.

[21] In both statements, Mr. Firmin stated that the Claimant would be called back to work each new work season, with the timing dependent on the type of job and the weather. For instance, Mr. Firmin stated that the Claimant had not been laid off during the 2012 winter due to the job he was working at that time.

[22} Mr. Firmin was inconsistent in reporting the dates the Claimant was to return to work, reporting in one statement that the Claimant was to return on January 6, 2014 (two days before the subject accident), and reporting in the other that he was to return on January 7, 2014. Mr. Firmin later clarified at his Examination Under Oath that the Claimant would leave his residence on the Monday (January 6, 2014) and commence his ten day work cycle on the Tuesday (January 7, 2014).

[23] Mr. Firmin confirmed that the Claimant was scheduled to return to work on January 7, 2014, but that his return to work was postponed for one week to January 14, 2014, because of the weather. With regards to the vehicle being operated by the Claimant at the time of the accident, Mr. Firmin stated as follows:

a) The company assigned a vehicle to be used by the Claimant;

b) The Claimant's residence was in St. Ann's, and the last jobsite he had worked at prior to the accident was located in Windsor;

c) He was working at the Windsor site up to December 21, 2013, shortly before the subject accident;

d) After the winter shut down, the Claimant would have returned to the Windsor job site;

e) The jobs start on Tuesdays and the Claimant would drive from his residence in St. Ann's, using the employer's vehicle on the Monday in the afternoon, to the motel where the crew was billeted. From that point, on the Claimant would drive himself and the other employees to the job site each day using the employer's vehicle;

f) The Claimant was paid once to drive to a site, and once back in the course of an entire job;

g) Only the people listed on the employer's insurance policy were permitted to drive the employer's vehicle, and typically the Claimant was the driver;

h) Maintenance and gas was paid for by the company;

i) There was a corporate office but no parking lot, and the Claimant was known to park the vehicle at his residence when he was not in Windsor;

j) Although Mr. Firmin indicated that the Claimant was not to use the employer's vehicles for personal use, he also confirmed that there was no written agreement with regards to personal use of the company vehicle; and

k) The Claimant had his own set of keys for the vehicle.

[24] In addition to the above-noted signed statement, Mr. Firmin also testified at an Examination Under Oath on November 23, 2016, that all employees of the company were seasonally laid off for the Christmas and New Year's holidays, and would return to work again in January of 2014. Mr. Firmin further testified that there was a postponement of work that year due to a significant snow fall.

[25] Mr. Firmin testified that at the date of the accident, longer term employees were given more responsibilities, like being added as a driver on the company's insurance policy. Mr. Firmin testified that anyone assigned a company vehicle was permitted to store the vehicle at his home while he was not at work due to the location of the employer's office and the geography of storing equipment. With regards to the Claimant, Mr. Firmin testified that he had been driving the employer's vehicles since the spring of 2013. He testified that the Claimant was a listed driver on the insurance policy at the time of the accident.

[26] Mr. Firmin testified that there was no written policy in place at the date of the subject accident with regards to employees' personal use of company vehicles. Specifically, Mr. Firmin further testified as follows:

> Q. Do you recall if there was any written policy disseminated to your employees in terms of what they can use the vehicle for and what they couldn't use it for?
>
> A. We – we have a policy now that states that company vehicles are to be used for company business, and that you have to have special permission to use it for personal use, like depending on ---
>
> Q. So you say you have a policy now.
>
> A. Well, we had a policy on company vehicles that you have to – you know, not distracted driving, wear your seatbelts. All that kind of stuff. Like, it more pertained to working on the job, you know, keeping the

> vehicle clean, keep the service, do the daily check, that sort of thing. **There was nothing specific in a – a procedure that specifically said you can't use the vehicle on your days off to go use it for personal use.**
>
> Q. So before the accident, was there anything in terms of, like, a written policy that was disseminated to Tyler or any of the employees?
>
> A. No. It was kind of an understood thing between the previous owners and the people they assigned trucks to. I didn't assign trucks. I just monitored the policies and procedures.
>
> Q. Did you ever have any discussions with Tyler before the accident about the use of the Swift truck?
>
> A. Me personally, no.
>
> Q. Do you know of anybody that did?
>
> A. Probably the previous owners. I can't say, but…
>
> [Emphasis Added]

[27] Mr. Firmin later clarified as follows:

> A. I'd like to clarify that. If the person who was in control of the truck made a personal phone call to one of the owners and got permission, I am not aware of that and that's completely above my pay grade, so I don't know what the circumstances are.

[28] Mr. Firmin testified on his Examination Under Oath that he was not aware of any records or a policy in place (written or otherwise) with regards to personal use of the company vehicles. He further testified that in discussions with Swift Railroad Contractors owner, he was unable to determine whether or not the Claimant had been provided with permission to drive the employer's vehicle at the time of the accident:

> Q. To provide your prior statements, did you discuss those issues with the owners of Swift at the time?
>
> A. The one owner who works, who worked in our office, kind of, just waved his hand and said, you give the interviews, you know.
>
> Q. And which one was that?
>
> A. Jeff Swift.
>
> Q. So Jeff said --
>
> A. Mike, you take care of this. You're the HR guy.

> Q. Did you have a conversation at any time with Jeff about whether Tyler had been given permission?
>
> A. Yes. And he did not clarify that with me. So I --
>
> Q. And when was --
>
> A. He was kind of – well he was, kind of,
>
> Well, no, he shouldn't have been. But I can never get a direct answer to answer that question. So the answer to your question is no, I did not have a conversation with Jeff about whether he was given permission.
>
> …
>
> Q. So you don't have any information from Jeff or any understanding about that sort of dynamic or discussion about why the business would have a policy that laid off employees shouldn't be driving? You don't know anything about that.
>
> A. No. I know we do now.

[29] Mr. Firmin testified that the Claimant was a trustworthy and good employee, and that he was not dismissed or disciplined as a result of the subject accident. While Swift Railroad Contractors did keep track of mileage on its vehicles, there was never any audit process to determine whether the employees were putting on more miles than their work duties required. Mr. Firmin testified that mileage was recorded to budget fuel for jobs, but that there was "no record of personal or company use" otherwise.

Jeff Swift

[30] Jeff Swift did not testify at the arbitration hearing, but did swear an Affidavit dated June 5, 2017, more than three years post-accident. He indicated that he was co-owner of Swift Railroad Contractors Corporation.

[31] In such statement, Jeff Swift indicated that the Claimant was a seasonal employee, typically employed between March and December, depending on weather. He would typically be laid off each winter with the expectation that he would be re-hired each spring depending on weather conditions and work load. He was scheduled to return to work January 7, 2014 (the day before the subject accident), but this was delayed until January 14. 2014, due to the weather. In the spring of 2013, he began using company vehicles and was given additional responsibilities. The Claimant's work cycle was usually on a ten day interval. Between cycles, and while on layoff, Swift Railroads' unwritten policy was that the vehicles were not to be used for personal use, but employees were allowed to park the vehicle at their residence. Essentially, the statement confirmed that the vehicle was not available for personal use and the company did not turn a "blind eye" to personal use of company vehicles.

[32] Mr. Swift now alleges, years after the accident, that there was an unwritten policy that company vehicles were not to be used for any personal use during layoff, and that he did not turn a "blind eye" to personal use of the company vehicles. Mr. Swift does not provide any further documentation or evidence to support this alleged policy. He does not describe any conversations he or any other staff had with the Claimant or any other employees, or evidence of how he, his co-owner, Mr. Firmin, or any other managers or staff enforced the alleged policy that the vehicles were not to be used for personal use.

[33] Mr. Swift's Affidavit was accepted into evidence over the Applicant's objection and subject to the weight which would be given such statement.

JURISPRUDENCE

[33] It is clear from the evidence that the Claimant had regular use of the company vehicle, but did he have regular use when on allegedly on seasonal lay off and had not returned to regular duties. In other words "was the vehicle available to him at the time of the accident?"

[34] With respect to the law regarding "available at the time of the accident", both counsel referred me to *ACE INA Insurance v. Co-operators General Insurance Co.* [2009] CanLII 13625, O.J. No. 1276. I accept this to be the applicable caselaw for analysis.

[35] In the case of *ACE INA,* Justice Belobaba interpreted the principle of a work vehicle "being made available" at the time of the accident. The Claimant was an employee of a rental car service and had access and permission to use the rental vehicles for his employment-related needs. The Claimant was involved in a car accident when he was heading downtown on a Sunday morning, when he was not in the course of his employment and when he was off work for nine days. Justice Belobaba noted that the main question was whether the vehicle was made available to the Claimant at the time of the accident, "when he was off work and on his way downtown…"

[36] Justice Belobaba noted at paragraph 22 of his decision, that regular use of a vehicle is not a "portable status that remains with the insured – the status is only conferred at and for, a moment in time, namely the time of the accident. The employer's insurer is liable to pay accident benefits, if and only if, *at the time of the accident* a company-insured car was being made available to the employee."

[37} Justice Belobaba, after analyzing the plain language of the statute, concluded that "by adding the phrase "at the time of the accident" and the word "being" next to the phrase "made available", the legislature intended to extend coverage to an individual only where the insured vehicle is contemporaneously being made available for his regular use." [emphasis added]

[38} Justice Belobaba concluded that the Claimant did not have regular use of the company vehicle at the time of the accident.

[39] In *Cheiftain Insurance v. Federated Insurance Company of Canada* (Arbitrator Densem – October 31, 2012) the arbitrator also touches on the decision of Justice Belobaba in *ACE INA*:

> "In my opinion, the ratio of ACE-INA v. Co-operators, is that determining whether vehicles are being made available "at the time of the accident", requires that the focus be on the nature of the individual's control over the vehicle(s) being made available, or his authority to use the vehicle(s) at the time of the accident.
>
> …
>
> The key to the status attaching, according to Justice Belobaba's reasoning, depends on whether the individual has control over or permission to use the use [sic] a vehicle at the time an accident occurs. If an individual has control over or permission to use a vehicle, then deemed named insured status exists. If the individual does not have control over, or permission to use a vehicle, then the deemed named insured status does not exist, or if it did exist, ceases."

ANALYSIS AND FINDINGS

[40] Intact has taken the position that the evidence outlined herein supports a finding that the claimant had "regular use" of the vehicle insured by Aviva at the time of the accident. Aviva has taken the position that any use of the vehicle was firstly not "regular" and secondly that the vehicle was not "available" for personal use, as was the case at the time of the accident.

[41] I will first deal with the issue of whether the use of the company vehicle was "regular". The evidence clearly indicates that he used the vehicle regularly throughout 2013. The vehicle was used to get to and from jobsites. On the jobsite it was used in numerous ways. The vehicle would be used to transport workers from the jobsite to the motel where the crew would be staying. It would be used to haul fuel and equipment. The Claimant had possession of the keys at all times. He was allowed to take the vehicle home between work cycles. He was allowed to take the vehicle home during seasonal layoff. All evidence suggests that the situation would likely have been the same in 2014 if not for the accident. It is abundantly clear to me that the Claimant's use of the vehicle was "regular". His use of the vehicle was not "irregular" or "out of the ordinary". There exists an abundant number of decided cases that support such finding including:

> The fact that the use of a vehicle is limited to work purposes does not change the categorization of the use as "regular".
>
> ***Dominion of Canada v. The Co-operators*** **(February 9, 1999), Arbitrator Malach**

> The language employed by the *Schedule* does not require the use of the employer's motor vehicle to be frequent, exclusive or personal. The mere fact that there is some use that can be said to be regular was sufficient to give the individual status under the policy.
>
> ***The Personal v. ING*** **(January 4, 2007), Arbitrator Glass**
>
> Using a company vehicle 3-4 times per month constitutes "regular use" within the meaning of section 66 of the *Schedule*.
>
> ***The Personal v. ING*****,**
>
> Regular use does not mean frequent use. A "reasonable" and "common sense" definition for "available" and "regular use" was applied concluding that one need not have exclusive or personal use in order to be deemed to have regular use of a vehicle.
>
> ***The Personal v. ING*****, Endorsement of Justice Morissette of the Superior Court of Justice – Ontario, Court File No. 53141**
>
> The Plaintiff was an OPP officer injured in a car crash on duty when the cruiser she was driving was rear-ended. The officer was assigned one of 15 police cruisers in the fleet. Her use was habitual, normal, and recurred uniformly according to a predictable time and manner. She used the police cruiser during the shift and returned it to the detachment at the end of the shift. However, she never drove it for her personal use. A personal component was not required to satisfy the concept of "regular use".
>
> ***Schneider v. Maahs Estate*** **[2001] 56 O.R. (3d) 321**
>
> "Regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular or out of the ordinary". "Regular use" does not apply where the characterization is "irregular at best and out of the ordinary".
>
> **Dominion of Canada General Insurance Company v. Certas Direct Insurance Company (Arbitrator Samworth - December 7, 2015)**

[42] I will now move to the issue of whether the vehicle was "available" to him at the time of the accident, by reason of the alleged prohibition for personal use as alleged by the employer. The determination of this issue largely depends on an evaluation of the "he said, she said" evidence regarding personal use. Essentially, the Claimant maintains that he had permission for personal use and the employer says he did not.

[43] I am satisfied that the law to be applied is that set out in the appeal decision of Justice Belobaba in *ACE INA* (supra) and as summarized by Arbitrator Densem in *Cheiftain* (supra) namely:

> "The key to the status attaching, according to Justice Belobaba's reasoning, depends on whether the individual has control over or permission to use the use [sic] a vehicle at the time an accident occurs. If an individual has control over or permission to use a vehicle, then deemed named insured status exists. If the individual does not have control over, or permission to use a vehicle, then the deemed named insured status does not exist, or if it did exist, ceases."

[44] The issue is whether the Claimant Tyler Giovannetti had permission to use the vehicle for personal use while on temporary layoff and before returning to regular duties.

[45] The Applicant Intact maintains that the evidence of the Claimant is clear that he had permission for personal use as indicated in his statement of March 13, 2014, just three months post-accident and that evidence provided at an early stage is the most reliable. The evidence of the company is simply not supported by any written policy with respect to personal use or evidence of any specific discussion with the Claimant by corporate staff with respect to personal use.

[46] The Respondent Aviva maintained that the Claimant did not have permission to use the company vehicles for personal use based on the evidence of both Mr. Firmin (HR manager) and Mr. Swift (co-owner).

[47] On the evidence overall, I find that on the balance of probabilities that the claimant Tyler Giovannetti had permission, or at least implied permission, to use the company vehicle during temporary layoffs and between periods of time on the worksites. I find the most probative and reliable evidence to be that of the Claimant himself. I found his evidence to be straightforward and persuasive. When compared to the equivocal transcript evidence of Mr. Firmin, I have no hesitation to prefer the oral evidence of the Claimant. In Mr. Firmin's statement of February 5, 2014, he merely states that it is understood that no personal use was authorized. No specifics whatsoever where provided as to the basis for it being "understood". No reference was made to any written policy or specific conversation with the claimant by Mr. Firmin or any corporate personnel. On Mr. Firmin's subsequent Examination Under Oath dated November 23, 2016, I find his evidence equally equivocal. At page 23 of his transcript he confirmed that no written policy as to personal use and disseminated to employees was in existence at the time of the accident. There was a written policy at the time as to use of the vehicles "not distracted driving, wear your seatbelts. all that kind of stuff - but nothing specific as to personal use". In the words of Mr. Firmin, the prohibition was "kind of an understood thing" with absolutely no specifics as to how the Claimant would have so understood. There was no reference to any specific conversation between Mr. Firmin (HR manager) or any other corporate personnel. In fact, Mr. Firmin admitted never having any discussion with the Claimant with respect to personal use of the company vehicle. The claimant testified, and I accept, that he had no discussion with the owner, Mr. Swift, other than to say "hi". In my view, the evidence of Mr. Firmin and Mr. Swift is insufficient to overcome the clear evidence of the Claimant that he had permission for personal use.

[48] The evidence discloses several other indicia of permission for personal use. He was given the keys and permission to take the vehicle home. He was not asked to return the

vehicle to the company between work assignments or during seasonal layoff. The company admittedly took no steps to monitor personal use. There was no evidence adduced of any disciplinary action ever having been taken against the Claimant for personal use, or for that matter, any other employee. I am satisfied that the Claimant was never specifically told he could not use the vehicle for personal tasks. The impression left is that this was a small company where the employer turned a blind eye to occasional personal use by its trusted and long-term employees such as Mr. Giovannetti, and that they would not step in unless there was serious abuse of the privilege. On this basis, I find that the Claimant had permission, or at the very least implied permission, to have personal use of the vehicle.

[49] I find that the Claimant had "regular use" of a company vehicle insured by Aviva at the time of the accident and therefore qualified as a deemed named insured by reason of s. 3(7)(f) of the SABS. The Claimant was therefore a named insured under both the Intact and Aviva policies. Applying the tie-breaking mechanism of s. 268(5.2), the insurer of the vehicle in which the Claimant was an occupant would stand in priority. In this case, it would be Aviva. I find that Aviva is the priority insurer on the basis of the evidence before me.

ORDER

[50] In light of my findings above, I hereby order that Aviva is the priority insurer and obligated to pay statutory accident benefits to the Claimant Tyler Giovannetti. I order that Aviva indemnify Intact for those benefits properly the subject matter of indemnification, plus interest calculated according to the *Courts of Justice Act* and costs of this arbitration on a partial indemnity basis. I further order that Aviva pay the costs of the Arbitrator.

DATED at TORONTO this 8th)

day of March, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator