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*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

CHUBB INSURANCE COMPANY OF CANADA

Applicant

- and -

CONTINENTAL CASUALTY COMPANY

Respondent

DECISION

COUNSEL

Jason Frost – Schultz, Frost LLP
Counsel for the Applicant, Chubb Insurance Company of Canada
(hereinafter referred to as "Chubb")

Dana Spadafina – Dutton, Brock LLP
Counsel for the Respondent, Continental Casualty Company
(hereinafter referred to as "CNA")

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Counsel for the Claimant, Peter Ekstein
(hereinafter referred to as the "Claimant")

ISSUES - OPTIONAL BENEFITS, REGULAR USE, DEPENDENCY AND DEFLECTION

[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 Peter Ekstein, with respect to personal injuries sustained in a motor vehicle accident which occurred on July 12, 2015. This determination involves an analysis of the impact of available optional benefits, regular use, dependency and deflection. The determination also involves the preliminary issue as to the claimant's right to participate in the arbitration proceeding itself.

PROCEEDINGS

[2] The dispute proceeded on the basis of Examination Under Oath transcripts, Document Briefs which included policy documentation and adjuster log notes, Books of Authority and Written Submissions. Oral submissions took place on April 2, 2018.

FACTS

[3] The claimant, Mr. Peter Ekstein, was involved in a motor vehicle accident on Sunday July 12, 2015. He was 53 years of age at the time. He was chief executive officer and majority shareholder in Weston Premium Woods Inc. (hereinafter referred to as "Weston"). He was unfortunately struck by a pickup truck while jogging at his cottage in Innisville and sustained admittedly significant and possibly catastrophic spinal cord and head injuries.

[4] While Mr. Ekstein was still in hospital, both the Applicant, Chubb Insurance Company of Canada ("Chubb") and the Respondent, Continental Casualty Company ("CNA") were contacted by relatives and company employees with respect to Mr. Ekstein's injuries and the availability of accident benefits. There were several people trying to assist Mr. Ekstein in this regard while he was in hospital. Chubb was Mr. Ekstein's personal automobile carrier and CNA provided a commercial fleet policy with respect to business operations of corporations (Weston Group) where Mr. Ekstein was an officer and director, as well as being involved in company operations on a day to day basis. **The CNA policy admittedly provided optional benefits while the Chubb policy did not.** Optional benefits coverage provides for enhanced Income Replacement, Housekeeping, and Medical and Rehabilitation Benefits compared to those provided with standard accident benefits coverage. An issue exists as to whether Mr. Ekstein was "an insured" or "named insured" under the CNA policy. He was clearly the "named insured' under the Chubb policy.

[5] On July 15, 2015, some three days post-accident, Mr. Ekstein's niece, Michelle Ekstein, contacted Chubb. She spoke with Anna Collins, the adjuster from Chubb's independent adjusting company, Crawford and Company, who sent a Summary of Benefits and an Accident Benefits package to Michelle Ekstein on July 16, 2015, as required by the legislation.

[6] On or before July 17, 2015, contact was made by a representative from Weston to The Magnes Group Inc. ("Magnes"), which is the broker for the policy of insurance issued by CNA.

[7] On July 17, 2015, Jennifer Rutledge from Magnes contacted the independent adjusting company for CNA. Ms. Rutledge advised that, among other injuries, Mr. Ekstein had undergone emergency spinal surgery for fractured vertebrae and that the damage to his spinal cord was as yet unknown. According to the log notes, Ms. Rutledge stated specifically, "This is a pre-cautionary notice as details are still unclear of events and **limits on other policies**." It is stated that the contact at Weston, Jim McPhail, would like to make contact with an adjuster from CNA to confirm priority of payments and whether there would be any coverage afforded under the policy from CNA". Jim McPhail was the Risk Manager at Weston.

[8] On July 20, 2015, Latoya Smith, the Human Resources Manager from Weston, contacted Ms. Collins, the adjuster for Chubb, and advised that she would be taking over the handling of the claim to Chubb from Michelle Ekstein. Ms. Smith was the HR Manager at Weston.

[9] On July 20, 2015, Charlene Tuzi from Crawford, on behalf of CNA, contacted Jim McPhail at Weston and left a voicemail.

[10] On July 21, 2015, Mr. McPhail sent an e-mail to Ms. Tuzi (CNA) entitled "Peter Ekstein and Insurance options". This e-mail stated that the owner wants an answer as soon as possible.

[11] On July 22, 2015, Mr. McPhail advised Ms. Tuzi (CNA) that Ms. Smith (HR Manager) would be handling Mr. Ekstein's claim going forward and that she would require assistance from Mr. Tuzi and Ms. Rutledge (Magnes) "**in reviewing policies and options available**".

[12] On July 22, 2015, Mr. McPhail spoke to Ms. Tuzi (CNA) via telephone. Mr. McPhail informed Ms. Tuzi that Mr. Ekstein is the President of Weston Premium Woods, the Owner of West Wood Solutions, and the co-owner of West Forest Umbrella. The notes state, in the context of the CNA policy: "WSIB replacement policy for executives – in the event he wishes to not sue the other party – they feel he has benefits available".

[13] On July 22, 2015, Ms. Tuzi (CNA) spoke to Ms. Smith, who advised that Weston was looking at all the policies that Mr. Ekstein would be entitled to.

[14] On July 22, 2015 at 10:59 a.m., Ms. Tuzi (CNA) wrote an e-mail to Ms. Smith and enclosed an Accident Benefits package. Ms. Tuzi's e-mail enclosed a "Summary of Basic Accident Benefits Coverage". Ms. Tuzi's e-mail stated: "**We confirm no optional coverages have been purchased under the CNA Continental policy.**"

[15] At this point in time, Mr. Ekstein had accident benefits packages from both insurers and had yet to decide against which insurer a claim was going to be made.

[16] On July 22, 2015 at 4:30 p.m., Ms. Smith wrote to both Ms. Collins (Chubb) and Ms. Tuzi (CNA) and advised that the forms previously forwarded by Ms. Collins to Michelle Ekstein were 90% completed, and would be received by Ms. Collins early the next week. Ms. Smith asked whether Ms. Tuzi required an original copy of the forms or a photocopy.

[17] On July 23, 2015, Ms. Tuzi (CNA) spoke with Ms. Smith, who confirmed that she had received the Accident Benefits package from CNA and would present the Accident Benefits forms to both Chubb and CNA. Ms. Tuzi, on behalf of CNA, advised that she could not advise Ms. Smith which policy to present to, but based on CNA's investigation, Mr. Ekstein did not operate a company vehicle or have access to a company vehicle, he was not in the course of his employment at the time of the accident, and he was not operating a vehicle insured by CNA at the time of the accident. Ms. Tuzi advised Ms. Smith that the family would have to decide which insurer to present to. Both Ms. Collins and Ms. Tuzi advised that they would confirm to

the other if they received an OCF-1. **Ms. Collins' notes for this phone call confirmed that Ms. Tuzi advised her that there were no optional benefits on the CNA policy**.

[18] On July 27, 2015, Ms. Smith of Weston contacted Ms. Collins (Chubb) to advise that Mr. Ekstein's OCF-1 was completed, but had not yet been sent in.

[19] On July 28, 2015, Mr. Ekstein's Application for Accident Benefits dated July 22, 2015 and OCF-2 Employer's Confirmation Form signed by Mr. Ekstein on July 21, 2015 and by David Hillier, CEO on July 22, 2015, were submitted to Chubb via e-mail. However, the Document Brief included the OCF-1 date stamped as having been received by Crawford (Chubb) on July 30, 2015. Nothing turns on this discrepancy.

[20] Chubb was therefore the first insurer to receive a completed OCF-1.

[21] On August 17, 2015, Chubb completed a Notice of Dispute Between Insurers and mailed it to the Claimant, as well as Ms. Smith and Michelle Ekstein. This Notice of Dispute was received by CNA on August 19, 2015. Chubb's covering letter requested that CNA confirm whether there were any optional benefits under the policy and requested the declaration page.

[22] On August 24, 2015, **CNA wrote** to Chubb and confirmed that "Mr. Ekstein is not a named insured under the Weston Forest Corp. policy, **he is a listed driver"** and that CNA was not accepting priority of the accident benefits claim as Mr. Ekstein is a named insured under the Chubb policy. **CNA** enclosed a copy of the Certificate of Automobile Insurance and stated that it confirmed **"Standard Accident Benefits are applicable with no optional benefits being purchased."**

[23] The numerous statements aforesaid by CNA or its adjusters that optional benefits had not been purchased appears factual incorrect on a review of the policy documentation provided to me.

[24] The Certificate of Automobile Insurance with CNA effective April 4, 2015 to April 4, 2016 shows as the "named insured":

> Weston Forest Corp. (see named insured schedule)

[25] The Certificate includes a page where the "Named Insured Schedule" includes:

1. WESTFOR TRANSPORT CORP
2. WESTON PREMIUM WOODS INC.
3. WESTON FOREST PRODUCTS INC.

[26} I am satisfied that these four companies were the "named insureds" under the CNA policy.

[27] The Certificate indicates that the policy included Optional Income Replacement Benefits up to $600.00/week, Caregiver Benefits, Housekeeping and Home Maintenance Benefits, Non-Catastrophic Medical and Rehabilitation Benefits of $100,000, Catastrophic

Medical and Rehabilitation Benefits of $1,100,000, Non-Catastrophic Attendant Care Benefits of $72,000, and Catastrophic Attendant Care Benefits of $1,072,000. However, there is no reference to an OPCF-47 in the policy documentation despite the reference to available optional benefits.

[28] The Coverage Form and Certificate of Insurance includes a Schedule of Drivers where the claimant Peter Ekstein's name appears along with several others.

[29] The CNA "Summary of Coverages – Automobile" in effect at the time of the accident confirms optional accident benefits coverage for caregiver, housekeeping & home maintenance, medical & rehabilitation and attendant care, as well as on OPCF 44R - Family Protection Endorsement showing as "insured":

> "Weston Forest Corp. a/o Westfor Transport Corp. a/o Weston Premium Woods Inc. a/o Bois Neos Inc. a/o Weston Forest Products Inc. a/o **Peter Ekstein**, a/o Rick Ekstein"

[30] The Summary of Coverages makes reference to several Endorsements including the OPCF 44R – Family Protection Endorsement, but makes no reference to any OPCF-47 Optional Benefits Endorsement.

[31] The Summary of Coverages was not part of the Coverage Form or Certificate of Insurance. It was not a document produced by CNA. It was a document produced by the claimant. There was no evidence introduced explaining who authored the document or how it came into the possession of the claimant. There was no evidence introduced on behalf of CNA by the broker denying that such a document was ever provided to the insureds under the CNA policy. There has been no suggestion that the Summary of Coverages document was fabricated.

[32] During the Examination Under Oath of Mr. Ekstein which took place on March 21, 2017, Mr. Ekstein confirmed that he had authority and control over the vehicles insured by CNA, including 24 hour access to the vehicles and to the keys for the vehicles. However, in practice he never used the company vehicles. This raises the issue of "regular use" and the possibility that he was a "deemed named insured**"** pursuant to s. 3(7)(f) of the Statutory Accident Benefits Schedule (hereinafter referred to as the "SABS").

ANALYSIS

[33] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[34] As Mr. Ekstein was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the *Insurance Act*, which is set out as follows:

> *Section 268 (2) – Liability to pay – 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 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.*
>
> *(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. [emphasis mine}*

[35] On the basis of this hierarchy of priority, if the claimant is found to be only an "insured" under the CNA policy then s. 268(5) would place the insurer where the claimant is found to be a "named insured, spouse of a named insured or dependent of a named insured", in this case the Chubb policy, in priority. If a "named insured" or "deemed named insured" under both

policies, the claimant has absolute discretion, as per s. 268(5.1), as against which insurer to claim. In the case before me, Mr. Ekstein made his claim to Chubb. The issue before me is whether circumstances surrounding such election invalidate the election and entitle the claimant to re-elect to make the claim against CNA where enhanced optional accident benefits are available. Such determination involves an analysis as to whether Mr. Ekstein was an insured, named insured or deemed named insured under the CNA policy, whether there was deflection on the part of CNA, whether CNA provided misinformation affecting the claimant's decision, the impact of the failure of CNA to provide an OPCF-47 and whether the claimant is entitled to relief from forfeiture on equitable grounds or other equitable relief. Clearly there are many issues which must be addressed.

[36] At risk of oversimplification, Chubb and the claimant have taken the position that:

- the claimant has standing to participate in the priority dispute arbitration

- the claimant was both an "insured" and a "named insured" under the CNA policy

- the claimant was also a deemed "named insured" by reason of the "regular use" provisions set out in s. 3(7)(f) of the SABS

- CNA "deflected" the claim by reason of the misinformation provided and its failure to issue an OPCF-47 Endorsement

- the claimant is entitled in any event to relief from forfeiture and equitable relief

- the claimant is entitled to a special award given the conduct of CNA

[37] At risk of oversimplification, CNA has taken the position that :

- the claimant has no standing to participate in this proceeding

- the claimant is not a "named insured" under the CNA policy

- the claimant is not an "insured" under the CNA policy

- the claimant is not a deemed "named insured" by reason of "regular use"

- the claimant cannot be considered "dependent" on the named insureds under the CNA policy

- the claimant has not met the requirements to trigger the OPCF-47

- there has been no "deflection" of the claim

- the claimant can only claim against one insurer and cannot re-elect

- relief from forfeiture or other equitable relief is not applicable

- the claimant is not entitled to any special award

STANDING OF THE CLAIMANT TO PARTICIPATE

[38] The Respondent CNA has taken the position in its submissions that the claimant has no standing to participate in this priority dispute arbitration on the basis that the claimant made no objection when served with the Notice of Dispute as they claim is required by the legislation. Ontario Regulation 283/95 provides:

> 5. (1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (1).
>
> (2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (2).
>
> (3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991. O. Reg. 283/95, s. 5 (3); O. Reg. 38/10, s. 7.

[39] CNA takes the position that Mr. Eckstein's failure to respond to the Notice precludes his participation in this proceeding.

[40] I am satisfied for a number of reasons that the claimant ought to have status to participate in the priority dispute proceeding herein. It should be noted that the claimant, through his counsel, participated in the pre-arbitration conferences leading up to this hearing. The objection to the claimant's participation was only formally raised in the Respondent's Factum.

[41] I am of the view that Section 5 of *Ontario Regulation 283/95* does not explicitly prohibit Mr. Ekstein's participation in this arbitration. The Notice Letter referred to only requires a response if there is an objection to the transfer of the accident benefits claim and is silent as to a situation like the one here where the insured supports the application to transfer priority.

[42] The Notice letter, which was mailed to Mr. Ekstein's home address while he was an in-patient at Toronto Rehabilitation Institute, states as follows:

> "You also have the right to object to your claim being transferred to another insurer. **If you wish to object please** complete Part 5 of this form and sent (sic) it within 14 days to the insurer that is currently

> paying you accident benefits. If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you. If you do not object, you will not be permitted to dispute the transfer of your claim to another insurer." (emphasis added).

[43] The Notice requires him to complete Part 5 only if he wishes to object to the transfer of the claim. Mr. Ekstein does not object to the transfer and never did; he supports it. Thus, given the wording on the form and his position regarding the priority dispute, there would have been no reason for him to fill it out.

[44] Additionally, the Notice outlines a consequence of not objecting: "you will not be permitted to dispute the transfer of your claim to another insurer". The Notice does not say that if Mr. Ekstein failed to object, he would not be able to support a transfer of the claim. Nor does it state that Mr. Ekstein would be barred from participating in an arbitration to determine priority.

[45] The Notice form and the Regulation do not state that an insured who supports the transfer of priority is prohibited from participating as a party or as an intervenor in a proceeding to determine priority.

[46] In any event, I am of the view that it is within the discretion of the Arbitrator to grant standing in appropriate circumstances. In the case before me, it is clear that the claimant has a significant interest in the priority decision as it affects the amount of benefits that would be available to him and there is no evidence before me of any prejudice to the Respondent in allowing the claimant to participate. On the other hand, an adverse finding in the priority dispute could potentially significantly prejudice the claimant by limiting his access to provable accident benefits. The authority provided by s. 31 of the *Arbitration Act* allows me to order equitable remedies and regardless of my interpretation of s. 5 above, I would allow such equitable relief and allow the claimant to participate in this proceeding.

[47] Section 31 of the Arbitration Act provides:

> "An arbitral tribunal **shall** decide a dispute in accordance with law, **including equity**, and may order specific performance, injunctions and **other equitable remedies**" (emphasis added).

"INSURED" OR "NAMED INSURED" UNDER CNA POLICY ?

[48] Mr. Ekstein was clearly the "named insured" under his personal automobile policy with Chubb. The issue as to whether Mr. Ekstein was a "named insured" under both policies, so as to provide him with the right to choose the insurer to pay benefits as per the tie-breaking mechanism set out in s. 268(2)(5.1), requires a detailed analysis of the policy documentation generated by CNA. Simply looking at the CNA Certificate of Insurance, one would conclude that the "named Insured" under that policy consisted of but four corporate entities. Attached to the policy documents produced by CNA is a "Schedule of Drivers" in which Mr. Ekstein's name appears among several others. However, the "Summary of Coverages" document names as "insureds" both the claimant and his brother and makes reference to the optional accident

benefits available. This “Summary of Coverages” was not part of CNA’s productions and was produced by the claimant. There is no explanation before me as to who generated such document and how it got into the possession of the claimant. There was no evidence before me to suggest that such document was not prepared by CNA, its broker or anyone else on its behalf. There is no suggestion that it was a document fabricated by the claimant.

[49] Chubb and the claimant have taken the position that it forms part of the policy. Chubb has referred me to *Security National v. Markel*, 2012 ONCA 683 (CanLII), where the Court of Appeal confirmed that a named insured means someone who is identified as an insured in an insurance policy:

> [39] Section 2 of the SABS defines an "insured person" very broadly. Among other things, an insured person is the named insured or a person who is involved in an accident involving the insured automobile and, in respect of accidents outside Ontario, the person who is an occupant of the insured automobile and who was a resident of Ontario at some point during the 60 days before the accident. The term "named insured" is not defined but is understood to refer to someone who is identified or named as an insured in an insurance policy.

[50] Accordingly, as someone identified in the CNA policy “Summary of Coverages” as an “insured”, Chubb claims that Peter Ekstein is a “named insured” under the CNA policy.

[51] However, the O.A.P. 1 – Ontario Automobile Policy, affixed to and forming part of every automobile policy, defines “named insured” as “the person or organization to whom the Certificate of Insurance was issued”. There is no reference to Peter Ekstein in the Certificate of Insurance. The evidence before me does not support a finding that the “Summary of Coverages” formed part of the Certificate of Insurance.

[52] CNA has referred me to the decision in *The Co-operators General Insurance Company v. Unifund Assurance Co.* (Arbitrator Samis - October 26, 2017) where at page 13 states:

> “Hence, “policy” does not entail all the information that may be found in the working records of the insurer. It is a specific subset of information that is in the “instrument” that the company and policyholder have as evidence of their insurance agreement. In this case it is the certificate” of insurance. Section 231 of the *Insurance Act* approves the use of Certificates of Insurance as evidence of a contract of automobile insurance.”

[53] On the basis that the claimant’s name is not found on the Certificate of Insurance but only on some document called a “Summary of Coverages”, I find that he cannot be considered a “named insured”. In all likelihood, the Summary of Coverages was probably a document issued by the broker to reflect the fact that Mr. Ekstein was a listed driver and therefore an “insured” for the purposes of optional benefits and family endorsement protection, rather than a “named insured”.

[54] CNA further takes the position that not only was he not a “named insured”; he was not even an “insured”.

[55] The Respondent stated that as the CNA policy in question at the time was a 21B fleet policy. The listing of drivers was compiled for purposes of assessing risk and calculating premiums to be charged under the policy rather than to make those named "listed drivers" for coverage purposes.

[56] In support of the above, the Respondent relied on the cases of *Allianz* v. *Lombard Insurance*, a decision of Arbitrator Guy Jones dated June 23, 2009, as affirmed on appeal by Justice Pattilo in the decision dated April 15, 2010, as well as the case of *Certas* v *Lombard*, a decision of Arbitrator Shari Novick dated May 11, 2012, as affirmed on appeal by Justice Spence on March 2, 2013 at the Superior Court of Justice and dismissed on appeal to the Ontario Court of Appeal on September 11, 2013.

[57] Arbitrator Jones at page 8 of his decision in *Allianz* stated:

> *"I am satisfied, based on the documentary evidence and the evidence of Mr. Kellawan, whose evidence I accept, that the lists covering the group fleet were essentially documents prepared to determine a premium and not intended to be considered "listed drivers" under the policy…One must remember that we are dealing with a commercial agreement where the list was simply prepared for premium purposes without addresses even being listed. In light of the above, I find that Mr. Klue was not a listed driver under the policy."*

[58] The Respondent also submitted that the following passage taken from Arbitrator Novick's decision in *Certas* v *Lombard* is applicable to the within fact situation:

> *"It is clear from the evidence that the list of drivers was supplied for the purpose of enabling the underwriters to assess the risk and set the premium for the policy, in the same way as was done in the Allianz case. While the document does state that the drivers listed are covered under the policy, I find that as there was no requirement to provide this type of list once the 21B endorsement was agreed to, it would be improper to interpret the document as creating a class of "listed drivers" as Certas suggests. To do so would be to ignore the overarching fact that Lombard had issued a "fleet policy" to Classic Towing, which by definition does not include a class of listed drivers.*
>
> *Mr. Donaldson made the point that the 21B endorsement does not replace the OAP 1, and must be read along with its provisions. While I agree with that statement, it is clear that the 21B endorsement changes the parties' practices and obligations to each other in a fundamental way. In an individual policy, a premium is established based on the actual drivers covered by the policy, and the addition or deletion of a driver will often trigger a change in the premium charged. That is not the case with respect to "fleet policies."*

[59] The Respondent submitted that Peter Ekstein can merely be classified as someone appearing on a "driver listing" used for purposes of assessing premiums under the policy, as opposed to a "listed driver" on the CNA policy. Further support of this according to CNA, is found in the Autoplus search results where the CNA policy is not shown when the search is conducted using Peter Ekstein's name and driver license number. If he were a true listed driver on the policy, the CNA commercial policy would have appeared on the Autoplus report. The fact is, as supported by Mr. Ekstein himself, that he never drove any of the company vehicles. The only reason he showed up on a "driver listing" is simply because he is the CEO of one of

the named insureds and is someone who potentially could drive the passenger vehicles listed on the CNA company policy and accordingly, should be considered when assessing risk and establishing premiums. Accordingly, the Respondent submits the mere fact that Peter Ekstein's name appears on a driver listing does not automatically impute insured status on him.

[60] The difficulty I have is that unlike in *Allianz* and *Certas*, no evidence was introduced from any underwriter or broker to provide the evidentiary basis to support the position advanced by CNA. In addition, the CNA policy provided for optional benefits. Section 28(2) of the SABS states:

> (2) The optional benefits referred to in subsection (1) are applicable only to,
>
> (a) the named insured;
>
> (b) the spouse of the named insured;
>
> c) the dependants of the named insured and of the named insured's spouse; and
>
> (d) the person specified in the policy as drivers of the insured automobile.

[61] It is most unusual to see optional benefits in a fleet policy. Unless the various drivers were listed in the policy, they would not have such coverage and there would be a benefit to no one to have purchased the optional benefits. This would not make any sense. Although in most situations the schedule of drivers is only to assess premiums for fleet policies, it had, in my view, the additional purpose here of identifying those individuals that would be entitled to the coverage of the enhanced optional accident benefits and therefore "insureds" under the policy. It is probably for that reason that the broker produced a "Schedule of Drivers" which included the name of the claimant, even though it was his practice not to make use of the company vehicles. This leads to a conclusion that although not a "named insured", Mr. Ekstein was a person "specified in the policy" and therefore an "insured" for the purposes of the optional benefits. It might also explain why the "Summary of Coverages" included the name of Mr. Ekstein as an "insured". It is also consistent with CNA's letter to Chubb of August 24, 2015, where it was indicated that Mr. Ekstein was not a "named insured" but a "listed driver". In the final analysis, I find that Mr. Ekstein was not a "named Insured" under the CNA policy, but was an "insured" under such policy by reason of being "a person specified as a driver" and the definition of "insured" as contained in s. 3(1) of the SABS, which includes "any person specified in the policy as a driver of the insured automobile".

REGULAR USE - DEEMED "NAMED INSURED"

[62] I will now deal with the issue of whether Mr. Ekstein was a deemed "named insured" by reason of s. 3(7)(f) of the SABS which states:

> (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, unincorporated association, partnership, sole proprietorship or other entity, …

[63] CNA took the position the claimant did not have regular use of the vehicles listed in the policy and the vehicles were not available to him while at the cottage when this accident took place. The evidence confirms he had never used any of the listed vehicles. Mr. Ekstein stated under oath that he was not responsible for delegation or assignment of vehicles to particular drivers, nor was he involved in any decision related to the fleet of vehicles. He was not consulted with respect to any tasks specific to the company vehicles and admitted that the operations manager, Lannie Pereira, in conjunction with Christina G., had this responsibility.

[64] Chubb took the position that as President and CEO of the named insured corporation, he obviously had ultimate control and access to all of the corporate vehicles on a 24/7 basis. He testified on his Examination Under Oath that if he wanted to use one of the lighter vehicles, he had the power or control to take the truck out for as he said, "I call the shots". He further testified that he had access to the keys of the vehicles kept in the business office at all times.

[65] There exists a large body of jurisprudence with respect to what has been referred to as the "regular use" issue. There are two decisions in particular dealing with the situation where the control that executives and owners have over the vehicles used in the course of their business are dealt with, and the impact that would have on a finding of "regular use". They are *Dominion v. Federated* (Arbitrator Densem - October 32, 2012) and *Dominion v. Lombard* (Arbitrator Bialkowski – September 11, 2013).

[66] In *Dominion v. Federated*, the Claimant, Mr. Mangat, was a 50% owner of the company. His company had an inventory of about 60-70 vehicles. The keys of the vehicles were kept at the dealership and Mr. Mangat had access to the dealership and keys at any time. Arbitrator Densem concluded:

> *"In my opinion, the ratio of ACE-INA v. The Cooperators, is that determining whether vehicles are being made available "at the time of the accident", requires that they 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 nature of the individual's activities, or the actual use to which the vehicle is being put are relevant only in so far as they may be within the scope of, or outside the scope of the individuals control or authority over the vehicles.*
>
> *Applying the law as stated in ACE-INA v. The Cooperators, to the facts of the case before me, I find that Inderjit Mangat was, at the time of the accident, a deemed named insured under the Federated policy insuring the Punjab Auto Sales Inc. vehicles.*

> *As a co-owner of Punjab Auto Sales Inc., Mr. Mangat had control over the use of the Punjab Auto Sales Inc. vehicles both during working hours and after regular working hours. He had the authority to use the vehicles himself or to allow others to use them. This authority did not cease after the dealership closed."*

[67] On this basis, Arbitrator Densem found that Mr. Manjat had "regular use" of the vehicles at the dealership, in which dealership he had an ownership interest and as a result, was a deemed "named insured" under the Federated policy. Accordingly, his son, who was financially dependent upon him, was found to be entitled to accident benefits from Federated as priority insurer as although an insured under both policies, the claimant was an occupant of a vehicle insured by Federated at the time of the accident, bringing into play the tie-breaking mechanism of s. 268(5.2).

[68] In the *Dominion v. Lombard* decision, the Claimant, Ms. McLean, was injured while riding a bicycle in Oregon when struck by a vehicle insured with Hartford (which was not a PAU signatory). She was not insured under any personal policies in Ontario. The evidence indicated that she did have her Blackberry and control over her employer's fleet of vehicles, even though on vacation. At the time, she was employed by Community Living in Mississauga. She was team leader and highest ranking person at the location where she worked. She was responsible for the maintenance and repair of the company vehicles and responsible for all the record keeping with respect to those vehicles. She would have been the person called upon if an issue arose with respect to use, maintenance and repair of those vehicles The Arbitrator stated:

> *"It is clear from the appeal decision in ACE, the claimant who is an employee (as opposed to manager, executive director, or owner of the company that owned the company vehicles) is required to have contemporaneous accessibility to the vehicle for the section to apply.*
>
> *Counsel for Dominion and the claimant submit that given the claimant's position as team leader, she remained in control of the vehicle even though she was thousands of miles away. She had access to company e-mail through her personal Blackberry. If there was a conflict as to which worker ought to have the use of the vehicle on any particular day, she was available through her Blackberry to deal with the issue as team leader. It was urged upon me that she could return back to Toronto at any time and have access to the vehicle."*

[69] It was held that she had sufficient authority and control over the vehicles insured by Lombard to be found to be a deemed "named insured" by reason of s. 3(7)(f) of the SABS.

[70] I make a similar finding in the case before me, in that Mr. Ekstein had sufficient control over the vehicles insured by CNA to be found a deemed "named insured" by reason of s. 3(7)(f) of the SABS. As President and CEO, he had control and access to them whenever he wanted, as he stated, "I call the shots".

[71] In making the finding that Mr. Ekstein was a deemed named insured under the CNA policy, I have considered the body of caselaw indicating that the accident benefits legislation is remedial in nature, with the provisions to be interpreted broadly in favour of the insured and specifically the comments of the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia,* (1995) 3 S.C.R. 405, at paragraph 16:

> *No-fault means that the respondent's liability to pay benefits occurs when injury arises out of the ownership, use or operation of a vehicle, regardless of the presence or absence of fault. The injury must still arise out of the ownership, use or operation. However, this does not mean that a narrow, technical interpretation is dictated. Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer.*

[72] This principle is ever so important. In the case of the claimant Ms. McLean in *Dominion* (supra) accident benefits would not have been available from any other source were it not for a finding that she had sufficient control as team leader over the vehicles insured by Lombard to qualify as a deemed named insured. As the accident happened in Oregon, she would not have had access to the benefits from the Fund, as the accident did not occur in Ontario and the U.S. policy of the striking vehicle did not provide accident benefits coverage.

[73] I am satisfied that the accident benefits legislation and in particular s. 3(7)(f) of the Statutory Accident Benefit Schedule must be interpreted broadly in favour of the insured so as to expand coverage where the facts dictate, as is the case here. Therefore, in keeping with the law as set out in the Dominion cases aforesaid, 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.

DEPENDENCY

[74] Section 3 of the Statutory Accident Benefits Schedule provides:

> "insured person" means, in respect of a particular motor vehicle liability policy,
>
> (a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,
>
> (i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or
>
> (ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

[75] Section 3 (7) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010, Ontario Regulation 34/10, as amended, reads as follows:

> "a person is dependent of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse"

[76] The Applicant Chubb has advanced the argument that Mr. Ekstein was principally financially dependent on the corporate named insureds (since he derived all of his income from such businesses) and therefore "an insured" under the policy issued by CNA. Chubb took the position that a corporation is a "person" under the law and the fact that all of the claimant's financial needs were provided by the corporations shown as "named insureds" in the Certificate of Insurance.

[77] I do not accept the position advanced by Chubb with respect to dependency. I am satisfied the statutory provisions relate to claimants who are dependent on "individuals and their spouses" and not corporate entities. To find otherwise would lead to a situation where any employee might look to their employer's policy covering corporate automobiles for payment of accident benefits where no other insurance is available. This would make no sense and certainly not contemplated by underwriters.

[78] Accordingly, I find that Mr. Ekstein was not an "insured" under the CNA policy by reason of financial dependency on the corporate named insureds.

MISINFORMATION, EQUITABLE REMEDIES AND FAILURE TO ISSUE AN OPCF-47

[79] On the basis of my findings with respect to the "regular use" issue, Mr. Ekstein was a "named insured" under both policies. In this situation, he would have a choice as to which policy he wished to receive benefits. Mr. Ekstein advanced his claim against Chubb and Chubb has been paying benefits on an ongoing basis pending resolution of this priority dispute. I must consider whether such election is affected by any misinformation provided by CNA, possible "deflection" on their part, a failure to issue an OPCF-47 and equitable remedies available to Mr. Ekstein.

[80] The CNA Certificate of Insurance clearly indicates that optional increased accident benefits were purchased. Also, the Summary of Coverages clearly indicates that optional benefits were purchased. The claimant Peter Ekstein is shown as an "insured" on the Summary of Coverages. Both documents fail to make reference to an OPCF-47. The OPCF-47 Endorsement enables an insured to claim the enhanced optional benefits, even though another insurer may stand in priority by reason of the priority hierarchy set out in s. 268(2) of the *Insurance Act*.

[81] The OPCF-47 states as follows:

> **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 been 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.
>
> [emphasis mine]

[82] FSCO Bulletin A-10/97 (Understanding the operation of OPCF 47 – Optional Accident Benefits) states:

> **The Endorsement**
>
> …
>
> The endorsement has been mandated in order to ensure optional accident benefits are "portable", and an insured person is able to access optional benefits 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. The insurance industry was of the view that the endorsement was required to achieve this objective because certain interpretations of the priority of payment rules would frustrate the objective to make the benefits “portable”.
>
> **Effect of the Endorsement**
>
> 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.
>
> **When optional benefits are "applicable"**
>
> One provision of the endorsement that requires clarification is the phrase:
>
> "[I]f optional statutory accident benefits are purchased and are applicable to a person under this policy...."
>
> 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.

[83] CNA has taken the position that the claimant has not met the requirements of the OPCF-47 as he made a claim for accident benefits against another company, namely Chubb.

[84] S. 28(4) of the *SABS* states:

> (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. O. Reg. 34/10, s. 28 (4). (*Emphasis added*)

[85] It is difficult to reconcile the peculiarities of the underwriting and policy documents before me. The available documentation would indicate that the CNA policy was a fleet policy issued to four corporate entities with a premium paid for optional increased accident benefits. Presumably, the optional benefits would be available to the listed operator of the insured corporate vehicles if involved in an accident. The question which arises is why a Summary of Coverages was provided by the broker showing the claimant and his brother as “insureds” if it were not meant to make the optional benefits purchased by the named insureds available to the claimant and his brother as owners of the companies.

[86] CNA failed to include an OPCF-47 with the policy documentation provided to its named insureds contrary to the *SABS*. In fact, the OPCF-47 Endorsement is not even referred to in the Certificate of Insurance or Summary of Coverages. I am satisfied that if such Endorsement had been attached to the policy or Summary of Coverages, those individuals reviewing possible insurance on behalf of the claimant while he was in hospital would have been aware of the additional benefits provided by the CNA policy, as compared to the standard benefits provided by the Chubb policy. Accordingly, the claimant or his representatives were not in

position to make an informed election in part by reason of CNA's failure to meet its statutory requirement under s. 28(4) of the SABS.

[87] Furthermore, I find that CNA, once approached by the claimant's representatives, breached its information obligations under s. 32(2) of the SABS. Section 32(2) of the *SABS* states:

> (2) The insurer shall promptly provide the person with,
>
> (a) the appropriate application forms;
>
> (b) **a written explanation of the benefits available;**
>
> (c) information to assist the person in applying for benefits; and
>
> (d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable. O. Reg. 34/10, s. 32 (2).

[88] Mr. Ekstein's authorized representative contacted CNA on July 15, 2015. Documentation regarding the communication with CNA clearly indicates that the intention of that contact was to find out what insurance was available to Mr. Ekstein. CNA wrote to Mr. Ekstein's authorized representative, Latoya Smith, on July 22, 2015 and according to the log notes stated: "**We confirm no optional coverages have been purchased under the CNA Continental policy.**"

[89] The above statement was factually incorrect. The Certificate of Automobile Insurance and the Summary of Coverages issued by CNA clearly indicated that optional benefits were available under the CNA policy. I am satisfied that this misinformation and the breaches of s.28(4) ands. 32(2) of the SABS played a significant role in the election made thereby making the election invalid.

[90] In *Prosser v. Progressive Casualty Insurance Company* (Arbitrator Sampliner – May 28, 1997), the arbitrator allowed an insured to re-elect for a benefit where he was satisfied that the insurer had failed in its information obligations pursuant to s. 59(2) of the SABS, which obligations are similar to the current s. 32(2) of the SABS.

[91] Arbitrator Sampliner found that the insurer's misinformation and incorrect advice directly led the insured to apply for the incorrect benefit and she relied to her detriment on the insurer's representations. He found that the insurer had a responsibility to correct the

misrepresentations. The insurer's negligent misrepresentations, failure to correct them, and failure to meet its statutory obligation to provide accurate written information, were the basis for his allowing the claimant to re-elect an income replacement benefit rather than a caregiver benefit. It was found that the adjuster failed to provide a written explanation of benefits, failed to explain available benefits and advised the claimant that the income from a job she recently left was not relevant to the calculation of income replacement benefits. In fact, the income she earned from a job she recently left was relevant and would make the income replacement benefits to which she was entitled greater than the caregiver benefit she chose. Arbitrator Sampliner wrote at page 5 of his decision:

> *"Without basic information about potential accident benefits, the insured person is unable to make the reasonably informed decision contemplated by the legislators. Insurers who fail to comply with the statutory standard do so at their peril."*

[92] Also, in the FSCO Appeal decision, *Antony v. RBC General* (Appeal P03-00023, July 22, 2004, Director's Delegate Makepeace) concurred with the rationale in *Prosser* and ruled that the Claimant's election of Caregiver Benefits in that case was not a valid election because RBC General Insurance Company ("RBC") did not comply with its information obligations under s. 32(2).

[93] In the case before me, I find that the claimant had available to him the enhanced and optional accident benefits set out in both the Certificate of Insurance and the Summary of coverages, yet he was advised that the policy did not provide for optional benefits. Mr. Ekstein was clearly not in a position to make an informed decision by reason of CNA's breach of s. 28(4) and s. 32(2) of the SABS. In my view, the actions of CNA in themselves were tantamount to a deflection. The deflection issue will be dealt with in greater detail in the paragraphs to follow.

[94] For the reasons above, I find that Mr. Ekstein was an "insured" under the CNA policy and entitled to the optional benefits. At the very least, he was a "listed driver" given the reference to his name on the Summary of Coverages and Schedule of Drivers. Given the conduct of CNA, he was never in a position to make an informed election as to the insurer he wished to pay benefits. On the basis of *Prosser* and *Anthony* above, he is in my view, entitled to re-elect and would obviously choose the enhanced benefits provided by CNA. I find he would

have made such election at the time he forwarded his OCF-1 to Chubb on July 28, 2015, were he aware that the CNA policy provided optional benefits available to him.

DEFLECTION

[95] Chubb and the claimant take the position that the conduct of CNA amounts to a "deflection" of the claim.

[96] S. 2.1(5) of O. Reg. 283/95 states:

> (5) An insurer that provides an application under subsection (2) to an applicant **shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer**. (*Emphasis added*)

[97] A breach of s. 2.1(5) has been referred to as a "deflection' in the jurisprudence which has emerged.

[98] It is clear from the evidence that CNA spoke to Mr. Ekstein's representative on July 23, 2015 and advised that Mr. Ekstein could only submit his Application for Accident Benefits to one insurer, either Chubb or CNA. The call log note for this conversation between CNA and Ms. Smith states that during this telephone call, CNA advised:

> "Confirmed how AB benefits work – only one insurer can be involved – the primary insurer
>
> I can not tell her [Ms. Smith] what policy to present to – but base don our investigation – he did not operate a company vehicle, he did not have access to a company vehicle and he was not in the course of his employment at the time of the accident and was not operating our insureds vehicle at the time of the accident
>
> They will have to review and they will have to decide what insurer to present to
>
> She udneratnds, she will contact the famlyl and discuss ASAP"

[99] The above statements, when taken in conjunction with the misinformation provided about Peter Ekstein's status as an insured or listed driver under the CNA policy and the absence of optional benefits under the CNA policy, in my view, constitutes a deflection by CNA of Mr. Ekstein's claim. I cannot help but conclude that the information regarding CNA's

"investigation" was given to Ms. Smith (HR Manager at Weston) for the clear purpose of inducing her (and by extension Mr. Ekstein, who was hospitalized at the time with a head injury and spinal cord injury) to submit the application to Chubb. Regardless of whether CNA advised Ms. Smith that they could not instruct her to make Mr. Ekstein's application to Chubb, providing her with the results of their "investigation" was, practically, the same thing as suggesting her to do so. From the perspective of a layperson, it was essentially saying that CNA was the wrong insurer from which to claim benefits. It is clear that if Mr. Ekstein had been advised as to the availability of optional benefits, he would have selected CNA as the insurer to submit his accident benefits claim.

[100] S. 2.1(7) of the Regulation makes reference to the penalty for a breach of this section. It states:

> (7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.

[101] In *State Farm v. TD Insurance and MVACF* (Arbitrator Bialkowski - May 18, 2016) where an insurer was found to have deflected a claim, it was held that the appropriate remedy was responsibility for the full legal costs of successful parties and responsibility of the arbitrators costs. The Arbitrator wrote:

> [47] … It is clear though that there was a deflection and TD ought to have forwarded an accident benefits package. I am further satisfied that if sent, it would have been executed and returned to TD. Then having received the first completed application, TD would have been responsible to adjust and pay the claim and then dispute priority.
>
> …
>
> [58] The conduct of TD herein should not be condoned and a sanction is warranted. Clearly at a time in need, the claimant's family ought to have been provided with information as to accident benefits and ought to have been provided with an accident benefits application package.
>
> [59] I am of the view that the sanction to be applied at this time on the facts of this case is to hold, in keeping with s.2.1(7) of O. Reg. 283/95, that TD is responsible for the full indemnity costs of both the MVACF and State Farm as well as the arbitrator's costs with respect to the proceeding to date …

[102] In the case before me both counsel for the claimant and Chubb take the position that the claimant is also entitled to a special award given the circumstances herein.

[103] S. 282(10) of the *Insurance Act* reads:

> **Special award**
>
> (10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

[104] I find that s. 282(10) is not applicable to priority dispute arbitrations commenced pursuant to O. Reg. 283/95. The special award provisions of s. 282(10) are only applicable to disputes with respect to entitlement and quantum of accident benefits claims as set out in the dispute resolution provisions of the *Insurance Act*, commencing at s. 279.

[105] I am of the view that the penalty for the deflection herein is an award of costs in favour of the successful parties on a full indemnity basis.

EQUITABLE RELIEF AND RELIEF FROM FORFEITURE

[106] Regardless of the correctness of these findings that I have made, the facts herein cry out for the application of equitable relief.

[107] Section 129 of the *Insurance Act* states:

> **Relief from forfeiture**
>
> 129 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S.O. 1990, c. I.8, s. 129

[108] Section 31 of the *Arbitration Act, 1991*, states:

> 31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

[109] On the basis of the evidence herein, the equitable result for Mr. Ekstein is for him to have access to the optional benefits for which the company, he in part owned, paid the premium. Mr. Ekstein was admittedly significantly injured. He made his application to Chubb as a result of factually false and misleading information provided by CNA and its adjusters to his representatives. If he had known that enhanced optional benefits were available under the CNA policy, he certainly would have applied to CNA.

[110] In *Kozel v. The Personal Insurance Company*, (CanlII, 2014 ONCA 130), the Court of Appeal maintained:

> [29] The remedy of relief against forfeiture is equitable in nature and purely discretionary.
>
> …
>
> [30] In insurance cases, the purpose of the remedy "is to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer": *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co*., 1989 CanLII 38 (SCC), [1989] 2 S.C.R. 778, at p.783.
>
> [31] In exercising its discretion to grant relief from forfeiture, a court must consider three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the property forfeited and the damage caused by the breach: *Saskatchewan River Bungalows*, at p. 504.

[111] The authority to invoke equitable remedies as set out in s. 31 of the *Arbitration Act* and the legal principles set out in *Kozel*, merely support the findings I have made as to the status of the claimant to participate in this proceeding and to re-elect as to the insurer he wishes to pay benefits.

SUMMARY OF FINDINGS

[112] I find that Mr. Ekstein has standing to participate in this proceeding.

[113] I find that Mr. Ekstein was an "insured" but not a "named insured" under the CNA policy.

[114] I find that Mr. Ekstein was a "deemed named insured" under the CNA policy by reason of the regular use provisions of s. 3(7)(f) of the SABS.

[115] I find that he was not "dependent" on the named insureds under the CNA policy so as to qualify as an "insured" by reason of dependency.

[116] I find that at the time of his election to pursue accident benefits from Chubb, Mr. Ekstein had been advised that the CNA policy did not provide for optional benefits when, in fact, it did. In addition, no OPCF-47 Endorsement accompanied the policy documentation. I find that the claimant was not in a position to make an informed decision as to the insurer from which he wished to pursue benefits and is entitled, in the circumstances, to re-elect based on the legal principles set out in *Prosser* and *Antony* (supra) and the authority to grant equitable relief as set out in s. 31 of the *Arbitration Act*.

[117] I find that CNA deflected the claim at first instance by providing misinformation as to the availability of optional benefits under the policy and details of its investigation as to regular use, the effect of which was to essentially suggest that the claim ought be submitted to Chubb.

[118] As a "named insured" under both policies (named insured under the Chubb policy and deemed named insured under the CNA policy), the claimant is entitled by reason of s. 268(5.1) of O. Reg 283/95 to decide the insurer from which he will claim benefits. On the basis of the submissions made, it is clear that he has re-elected to pursue benefits from CNA.

[119] In any event, as an "insured" under the CNA policy by reason of being a listed driver and the provisions of the OPCF-47 Endorsement that ought to have accompanied the policy documentation, I find that Mr. Ekstein was entitled to pursue the optional benefits from CNA regardless of the priority provisions of s. 268 of O. Reg 283/95.

ORDER

[120] On the basis of the findings aforesaid, it is hereby ordered that:

1. CNA is the priority insurer;

2. CNA indemnify Chubb for those benefits paid to or on behalf of the claimant that are properly subject to indemnity;

3. CNA pay to Chubb and the claimant the legal fees incurred by them with respect to this arbitration on a full indemnity basis;

4. CNA pay the Arbitrator's costs.

DATED at TORONTO this 4th)

day of April, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator