
Appeal P-008360 & P-007701

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ROYAL INSURANCE COMPANY OF CANADA

Appellant

and

MARKEL INSURANCE COMPANY OF CANADA

Respondent

and

BRIAN C. PORTCH

Respondent

BEFORE: Susan Naylor, Director's Delegate

COUNSEL: Wayne Edwards (for Royal Insurance)
Mark Wilson (for Markel Insurance)
David B. Hayward (for Mr. Portch)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeal is dismissed and the arbitrator's order, dated March 20, 1995, is confirmed, subject to paragraph 2 of this order.
2. The arbitrator's order is varied as follows:

Royal Insurance Company of Canada must repay Markel Insurance Company of Canada \$28,200, representing the total amount of benefits which Markel Insurance Company of Canada paid to Brian Portch.
3. Brian Portch is entitled to his appeal expenses, to be paid by Royal Insurance Company of Canada.

December 17, 1996

Susan Naylor
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Brian Portch was injured while preparing to unload goods from his transport truck at a delivery site on September 21, 1992. His truck-trailer was insured under his employer's fleet policy issued by Markel Insurance Company of Canada (Markel). In addition to his rig, Mr. Portch owned two cars for his own personal use. He insured these with Royal Insurance Company of Canada (Royal).

The issues in this appeal, which was initiated by Royal, are as follows:

1. Was the arbitrator wrong in finding that Mr. Portch's injuries were caused by the use or operation of his truck-trailer, and thus compensable under the accident benefits scheme?
2. Was the arbitrator wrong in fixing liability to pay Mr. Portch's benefits on Royal, his private car insurer, rather than Markel, the fleet insurer, even though the accident involved his transport truck?
3. If Royal is the right insurer, should Markel be allowed to recover from Royal the benefits it initially paid Mr. Portch?

II. THE ACCIDENT

Mr. Portch drove for Norris Transport Limited, a freight company. His job was to transport products to various locations on behalf of the company. His duties included loading and unloading the goods from his rig, although the scope of his actual involvement in this varied from site to site.

At the time of the accident, Mr. Portch was delivering a shipment of fire-logs to a retail warehouse. He had backed his transport truck up to a vacant loading dock. A hinged steel plate was attached to the rim of the loading dock. The hinged part could be raised and extended hydraulically to form a ramp between the dock and the rear of the delivery vehicle. On the day in question, the hydraulic mechanism was not working, so depot staff connected a chain between the plate and a fork-lift and used the fork-lift to manoeuvre the plate into place.

The fork-lift operator was in the process of raising the plate in this way, when the accident occurred. Mr. Portch had climbed on to the back of his trailer to help. He took hold of the raised plate to pull it out into its extended position, but the fork-lift operator could not lower it into place slowly enough and dropped the forks. The load came crashing down on Mr. Portch's feet. The force fractured both feet and tore his left rotator cuff. Mr. Portch had to stop working because of his injuries and claimed income loss benefits, mandated in every automobile policy. Statutory accident benefits are payable with respect to an insured person who dies or sustains injury as a result of an "accident" as defined in the *Statutory Accident Benefits Schedule - Accidents before January 1, 1994*, R.R.O. 672 ("Schedule"). Section 2 of the *Schedule* states:

In this Schedule,

"accident" means an **incident** in which **the use or operation** of an automobile **causes, directly or indirectly**, physical, psychological or mental injury or causes damage to any prosthesis, denture, prescription eyewear, hearing aid or other medical or dental device.

(Emphasis added)

Mr. Portch's truck and trailer are both automobiles under Part VI of the *Insurance Act*, R.S.O. 1990 c.I-8.¹ The parties agree that the forklift is not. In order for Mr. Portch to recover benefits, his injuries must have been caused directly or indirectly by the use or operation of either his truck or trailer regardless of whether the fork-lift was also involved.

¹ *Insurance Act*, s. 224, *Compulsory Automobile Insurance Act*, R.S.O. 1990, c.25, s. 1(1); O.P.F. 1 (Owner's policy) s. 5.2.2 (vi).

Any analysis must start from the specific words of the policy as dictated by the regulation. The meaning of the language in the regulations must be established by examining the words used in context, applying accepted principles of statutory construction.

Most of the case-law cited in this area deals with the more common policy words, “arising from” or “arising out of”, often in the context of determining whether an insurance policy covered liability resulting from a policy holder’s negligence. This language is used in the *Insurance Act*, although the words “directly or indirectly” have been added. The *Schedule* uses different language. It uses the term “causes”, but modifies the verb by the phrase “directly or indirectly”.

In *Amos v. Insurance Corp. of British Columbia* (1995), 127 D.L.R. (4th) 618, the Supreme Court of Canada stated that the phrase “arising out of ” is broader than the term “caused by”, and should be interpreted in a more liberal manner. It also held that the approach taken in previous cases was useful, even though the benefits in issue were no fault benefits prescribed by statute. The recent Court of Appeal decision in *Alchimowicz v. Continental Insurance Company of Canada* (September 3, 1996), No. C23058 (Ont. C.A.)² confirmed the difference in language in the *Schedule*, but also stated that the addition of the words “causes... indirectly” broadens the scope of recovery under the *Schedule*.

A two-fold test has evolved in Canadian case law to determine whether injuries arose out of or from the use or operation of an automobile: the first aspect involves the “purpose test” as set out in *Stevenson v. Reliance Petroleum Ltd.* [1956] S.C.R. 936: whether the accident results from the ordinary and well-known activities to which automobiles are put. The second is the “chain of causation” test, established in *Law, Union & Rock Insurance Company Limited v. Moore’s Taxi Limited* [1960] S.C.R. 80: whether there is a continuous chain of causation, unbroken by an intervening act which is the factor giving rise to the injury. *Amos* reaffirmed and restated these tests. The court held that some causal connection between the injuries and the use or operation of

² *Amos*, but not *Alchimowicz*, was issued prior to the appeal hearing.

the vehicle was necessary, although a direct or proximate relationship was not required. The court allowed the plaintiff's claim, even though his injuries were directly caused by a criminal shooting.

In dealing with the different language of the *Schedule*, the arbitrator in *Portch* found that the word "...indirectly" allows for a more remote causal connection than otherwise, although a sufficient connection must still be established between the injuries and the use or operation of the vehicle. I reached a similar conclusion in *Vineski and Federation Insurance Company of Canada* (October 18, 1996, OIC P96-000034).

It has been recognised that ordinary activities associated with a commercial truck's operation are not limited to the transportation of goods but extend to the delivery of those goods. In *Hubba v. Schulze* (1963), 37 D.L.R. (2d) 570 (Man Q.B.), the court held that injuries suffered when the raised tailgate of a dumptruck fell while it was being unloaded, were covered. *Stevenson* involved the delivery of gas by a tanker to a gas station. In *Royal Insurance Co. of Canada v. Guardian Insurance Co. of Canada* (1995), 31 C.C.L.I. (2d) 42 (Gen. Div), Justice Macdonald asked whether the activity was "one of the ways in which a service may be provided by an automobile, on a common sense basis...or an integral and necessary part of accomplishing the truck's purpose" (at page 55).

In *Royal Insurance*, a fork-lift was towed to a delivery site by a truck. The fork-lift was parked in such a way that, while it was being unhitched, it rolled downhill crushing the purchaser. The issue was whether the driver's negligence was covered by his employer's automobile insurance policy or its general liability insurance policy.

Justice Macdonald held that unhitching the fork-lift was an aspect of the ordinary use of a delivery truck:

Using a loaded delivery truck to tow other necessary equipment to the delivery site is an ordinary and relatively frequent use of such a truck, and is also a common

sense way to use it to facilitate the delivery process. However, towing equipment such as a forklift to the delivery site accomplishes nothing unless it is detached from the truck, so that it may complete delivery in ways not possible for the truck alone. For this reason, unhitching the towed equipment from the delivery truck in issue was an integral and necessary part of accomplishing the truck's purpose, which was making a delivery.

(Page 56)

The judge also concluded that liability arose out of the use or operation of the truck, even though it may have also involved an aspect of the use of the forklift.

The primary purpose of Mr. Portch's transport truck was to transport goods and deliver them to a site. The unloading of the goods was an "integral and necessary" aspect of this. Mr. Portch was injured while assembling the means to unload his cargo; this involved the ordinary use or activities to which a commercial truck is put.

Both Royal and Markel argue that while the incident may have involved Mr. Portch's transport truck, his injuries were not **caused by** its use. They take the position that Mr. Portch's injuries were caused solely by the improper use of the fork-lift or steel plate or by the malfunctioning of the hydraulic system. They argued that the transport truck was not in operation at the time, and that its only connection to the incident was that Mr. Portch happened to be standing in it when the accident occurred - it was simply the location of the accident. The arbitrator rejected these arguments.

Royal and Markel focus their analysis to a great extent on the fact that the plate was attached to the loading dock, and on the negligence of the fork-lift operator. However, recovery is not limited to injuries caused directly by the use or operation of an automobile; injuries caused "directly or **indirectly**" by such use or operation are also included. As stated earlier, the use of "indirectly" broadens the scope of recovery and allows a more remote causal connection. Moreover, the fact that liability may arise from the use or operation of the fork-lift does not preclude the finding that the injuries are also caused by the use of the truck trailer.

Whether there is a sufficient causal connection between the injuries and the use or operation of the automobile is a question of fact, and will turn on the particular circumstances of each case. Not all injuries incurred in the process of loading or unloading a truck will be sufficiently connected to the use of the vehicle to qualify. However, in this case, Mr. Portch was in the process of connecting his truck trailer to the loading dock, in order to effect delivery of his cargo. He was positioned in the trailer, when injured. His presence there was not incidental or by happenstance, but a necessary element in the task of accomplishing the connection. While the plate was not attached to the truck, it was designed to extend to it, linking it with the dock. The incident occurred as the equipment was in the immediate stage of being lowered to the trailer floor. In these particular circumstances, I agree with the arbitrator that the process of preparing the trailer for unloading (an aspect of its ordinary use) caused Mr. Portch's injuries, at least indirectly. The arbitrator's finding that Mr. Portch's injuries resulted from an accident within the meaning of the *Schedule* is therefore confirmed.

III. WHICH INSURER?

The second question is which insurer, Royal or Markel, is liable to pay Mr. Portch's accident benefits.

Mr. Portch drove for Norris Transport Limited, a transportation company. Most of the company's work was performed by owner-operators, who owned their own rigs. Mr. Portch was one of the company's owner-operators. He owned a 1987 Ford tractor and a 1981 Highway trailer, which he drove exclusively for the company. Although he owned these vehicles, they were licensed in the company's name and insured under the company's commercial fleet policy, issued by Markel. The cost of the insurance was deducted from Mr. Portch's pay on a monthly basis. The company's policy was in the name of Norris Transport Limited.³ A number of endorsements and riders were attached to the policy, including a standard fleet endorsement (OEF. 21A). The certificate of insurance listed the vehicles covered as "All vehicles owned by a/o operated on

³ Endorsement #4 listed the full name of the Insured as Norris Transport a/o Paul Cathcart a/o Al Ward.

behalf of the named insured”.⁴ None of the owner-operators were listed as insureds by name in the policy.

In addition to his rig, Mr. Portch owned two cars for his personal use: a 1987 Cadillac Seville and a 1984 Ford Thunderbird. These vehicles were insured with Royal. Mr. Portch and his wife were named as insureds on the certificate of insurance.

Both the fleet policy and Mr. Portch’s personal vehicle policy are in the standard form of owner’s policy (O.P.F. 1), approved under legislative authority.

After his accident, Mr. Portch initially applied to Markel for benefits and received weekly income benefits for almost a year. At that point, Markel took the position that Royal, not it, was responsible for payment, even though the accident involved Mr. Portch’s truck trailer. Its position was upheld at arbitration and forms the subject of this appeal. The arbitrator also concluded that Mr. Portch was not barred from obtaining accident benefits from Royal although the accident was work-related, because he did not qualify for workers’ compensation benefits. This part of the arbitrator’s order was not appealed.

A. The Legislation

The appeal concerns the interaction between the *Insurance Act*, the *Schedule* and the terms of the standard owner’s policy.

The enhanced no fault benefits scheme introduced in 1990 changed the rules for determining which insurance company must pay accident benefits in any given situation, and to whom. The changes expand the class of persons who can recover benefits under a particular automobile policy, and contemplate overlapping coverage under more than one policy. The legislation sets out the priority in which insurers must pay benefits, where more than one insurer is involved. The

⁴ Like the arbitrator, I take this to mean “all vehicles owned by and/or operated on behalf of Norris Transport”.

previous legislative scheme⁵ made the insurer of the vehicle involved in the accident primarily liable. Section 268(2) of the *Act* reversed this approach: it requires a person to look to their own insurance policy, before seeking recourse under the policy of the owner of another vehicle involved in the accident.

The relevant part of section 268(2) states:

Liability to pay

- (2) The following rules apply for determining who is liable to pay statutory accident benefits:
 1. In respect of an occupant of an automobile,
 - i. The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
 - ii. If recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
 - iii. If recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
 - iv. If recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

A similar set of rules applies in respect of a person injured in an accident while not an occupant of a vehicle.

Under these rules, benefits are paid first by the person's own automobile insurer; next by the insurer of the automobile in which he or she was riding. If neither the occupant nor the vehicle

⁵ *Insurance Act*, R.S.O. 1980, c. 218, s. 236.

has insurance, benefits can be claimed from the insurer of any vehicle involved in the accident. Only as a last resort can a claim be made to the Motor Vehicle Accident Claims Fund.

Where the person is an insured under more than one policy under section 268(2) i.e., the rules provide that he or she may choose the insurer against which to claim. However, there is an important qualification. Subsection 268(5) states that:

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 ...Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy and, if there is more than one such policy, the person in his or her discretion may decide the insurer from whom he or she will claim the benefits.

In other words, if the person is a named insured under a policy, he or she must claim under that policy. There is no choice about this unless more than one such policy exists.

At arbitration, the parties agreed that Mr. Portch was an insured under both policies; they also agreed that he was a named insured under the Royal policy. However, they disagree about his status under his employer's policy with Markel. Royal argues that Mr. Portch is a "named insured" under the Markel policy, even though his name does not appear on the certificate of insurance. This would entitle Mr. Portch to choose either Markel or Royal to pay his benefits under section 268(5). Royal argues that Mr. Portch exercised that choice by initially claiming benefits from Markel.

The arbitrator rejected Royal's position, with reluctance. He found that Mr. Portch was a named insured only under his own vehicle policy and therefore had to seek recourse from Royal under the terms of section 268(5), even though the accident involved his transport truck insured through Markel.

It is fair to assume that many members of the driving public might be surprised by this result. Mr. Portch paid premiums through his employer to insure against the risk of an accident involving his

transport truck, a premium which he testified was substantially higher than his regular car insurance. While there was no specific underwriting evidence, there is no dispute that commercial vehicles, and specifically transport trucks such as this one, involve higher risks than private passenger vehicles and are rated differently because of this. It is not unreasonable to assume that the risk of exposure to payment of first party benefits is also higher. However, instead of claiming against the policy that insured the specific risk that materialised, Mr. Portch was forced to claim benefits under his private car insurance, even though that insurer did not insure the risk of his driving a commercial truck. That result does not seem logical or consistent with well-established principles of assessing risk and setting premiums.

At first blush, it seems that the drafters of the policy have addressed this problem head-on through what is sometimes referred to as the “commercial vehicle exception or exclusion”, (it is not strictly an exemption or exclusion). The commercial vehicle exception was not argued to the arbitrator, but was raised by Royal on appeal as an alternative position. It argued that Mr. Portch’s car insurance expressly provided that it did not cover him while he was driving a heavy commercial truck. Therefore, Mr. Portch was not “an insured” of Royal for the purposes of the priority rules, especially where he had recourse to the truck insurance.

B. Is Mr. Portch an insured under the Royal policy?

Whether the commercial vehicle exception in the policy applies depends on the interpretation given to the language of the *Schedule* and policy, and the relationship between the policy, (which is in an approved form), the *Schedule*, (which is a regulation) and the enabling legislation, the *Insurance Act*.

The problem is that there seems to be a conflict between the *Schedule* and the policy. This relates to an insurer’s liability to pay accident benefits when the insured person drives a vehicle other than the one specifically insured under the policy. At the time of the accident, Mr. Portch was not driving either of the cars listed in the Royal policy, but a different vehicle - his truck-trailer.

The language of the *Schedule* seems to cast a much broader net than the policy. It ostensibly extends to accidents occurring when the insured or his or her family is driving or riding in any other vehicle, regardless of the circumstances. However, the policy is much more restrictive. Mr. Portch would appear to qualify under the former but not the latter. The question is how to reconcile these differences, and which takes precedence.

The form and content of automobile insurance policies is stringently regulated. All motor vehicle liability policies must be approved by the Commissioner of Insurance. Under section 227(5) of the *Act*, the Commissioner may approve a uniform owner's policy containing agreements and provisions in conformity with that part of the legislation which deals with automobile insurance. The same is true for standard endorsements to the policy. Applications for insurance likewise must be in an approved form. The standard form owner's policy consists of a combination of legislated provisions and other provisions approved by the Commissioner.

The content of accident benefits coverage is specifically legislated pursuant to section 268(1) of the *Insurance Act*, which states:

Every contract evidenced by a motor vehicle liability policy shall provide for the ...benefits set out in the ...*Schedule*, **subject to the terms, condition, provisions, exclusions and limits set out in that Schedule.**

(emphasis added)

Who is insured or entitled to benefits, and under what circumstances, depends on the coverage the claim relates to. The relationship of coverage to a specific vehicle is clearest in third party situations because liability is based on ownership of a negligently driven vehicle.

Section 239(1) sets out the liability coverage of an owner's policy in respect to specific automobiles. It deals with automobiles owned by the insured named in the contract within the description or definition in the contract.

Section 239(3) deals with coverage of automobiles that are not owned by the person. It states:

Where the contract evidenced by an owner's policy also provides insurance against liability in respect of an automobile not owned by the insured named in the contract, an insurer may stipulate in the contract that the insurance is restricted to such persons as are specified in the contract.

Liability coverage in the standard policy extends beyond the described vehicle to other vehicles that the insured, or if an individual is provided with a company car, the individual, and his or her spouse, is driving in certain set circumstances (sometimes called "drive other automobiles" coverage).

The policy defines the automobiles to which the contract of insurance relates. The definition of "the automobile" is contained in Part E - General Provisions, Definitions and Exclusions in OPF. 1 (Owner's Policy), under the heading "Automobile - Defined".

The relevant provisions of section 5.2.2 of the policy state:

"the automobile" except where otherwise stated, means **for the purposes of Parts A** (Third Part Liability), **B (Accident Benefits)** C (Loss or Damage to Insured Automobile, and D (Uninsured Automobile Coverage):

- i. the **Described Automobile**: an automobile or trailer described in this Policy
- ii. a **Newly Acquired Automobile**...

and for the purposes of Parts A (Third Part Liability), **B (Accident Benefits)** and D. (Uninsured Automobile Coverage):

- iii. a **Temporary Substitute Automobile**:....
- iv. **any Other Automobile**: other than the described automobile, which is of a gross weight of 4,500 kilograms or less, while personally driven by the insured or by his or her spouse, if residing in the same dwelling premises as the insured, provided that

- (a) the described automobile is of a gross vehicle weight of 4,500 kilograms or less;
- (b) the insured is an individual or are spouses of each other;
- (c) neither the insured nor his or her spouse is driving the automobile in connection with the business of selling, repairing, maintaining, servicing, storing or parking automobiles;
- (d) **EXCEPT for the purposes of Part B (Accident Benefits)** the other automobile is not owned or regularly used by the insured or by any person residing in the same dwelling premises as the insured....
- (e) **EXCEPT for the purposes of Part B (Accident Benefits)** the other automobile is not owned, hired or leased by an employer of the insured or by an employer of any person residing in the same dwelling premises as the insured....
- (f) **the other automobile is not used** for carrying passengers for compensation or hire or **for commercial delivery at the time of the loss.**⁶
.....

(emphasis added)

Part E of the policy is stated to specifically apply to “every part of this policy” except where stated. The “drive other automobiles” coverage, including specified exceptions, are **expressly** stated to relate to accident benefits under Part B of the policy as well as to third party coverage under Part A and uninsured automobile coverage under Part D.

The definition of “insured person” in section 2.2.3 of Part B of the policy identifies the people who are entitled to claim statutory accident benefits under a particular policy, subject to the priority rules. It states, in part:

⁶ Corresponding provisions apply in respect of an employee, with a company car, who is involved in an accident while driving another vehicle. In that case, however, the employer’s policy is not liable if the employee owns his or her own vehicle under 4,500 kilograms.

“Insured person” **in respect of this Policy** means

(a) in respect of accidents in Ontario, an occupant of **the automobile**

.....

(c) the named insured, his or her spouse and any dependant of either of them while the occupant of **any other automobile;**

(emphasis added)

Subsection (c) mirrors the language of section 2(c) of the *Schedule*, although subsection (a) is somewhat different.

Section 2 of the *Schedule* provides, in part:

“insured person”, **in respect of a particular motor vehicle liability policy**, means

(a) in respect of accidents in Ontario, an **occupant of the insured vehicle**

.....

(c) **the named insured**, his or her spouse and any dependant of either of them **while the occupant of any other automobile**

.....

“Insured automobile” is defined as follows:

“insured automobile”, **in respect of a particular motor vehicle liability policy**, means **the described automobile**, and includes a newly acquired or temporary substitute automobile, **all as defined by the policy.**

(Emphasis added)

Royal’s position, in a nutshell, is that “any other automobile” in subsection (c) does not mean any other automobile, but “any other automobile” as qualified by the general provisions of the policy. On this construction, Mr. Portch’s transport truck does not qualify because it weighed more than 4,500 kilograms and was in the course of a commercial delivery. Royal argues that the general provisions of the policy recognise the different risk involved in driving heavy commercial vehicles, delivery trucks or taxicabs, and carve those risks out of the standard policy.

While Royal's argument is attractive, it requires an awkward construction of the policy language. There are two relevant parts to the definition of insured person: (a) which captures occupants of "the automobile" i.e. a vehicle described in the policy, a temporary substitute vehicle, a newly acquired vehicle or any other automobile driven by the insured or his or her spouse, subject to the qualifications in subsection 5.2.2(iv); and (c) which refers to any other automobile in which the named insured or his or her family are occupants. Mr. Portch does not qualify as an insured under (a), but appears, on the ordinary meaning of the words used in subsection (c), to meet that definition.

Since the defined term "the automobile" is expressly incorporated into the definition of insured person under section 2.2.3(a) of the policy, it is extremely clumsy to read section 2.2.3(c) as implicitly incorporating part of that definition.⁷ Moreover, if the meaning of subsection (c) is subsumed in subsection (a), what purpose is served by the former? In my view, these problems present a serious barrier to Royal's proposed construction.

If, however, Royal is correct in its approach, there is a more fundamental problem. Section 268(1) of the *Act* states that every policy shall provide for the accident benefits in the *Schedule*, "subject to the terms, conditions, provisions, exclusions, and limits set out in that Schedule". Section 2(c) of the *Schedule* does not include the exceptions to any other automobile set out in section 5.2.2 of the policy.

Mr. Portch was not the occupant of either of the vehicles listed in the Royal policy for the purposes of subsection 2(a). He was however a named insured under the policy and the occupant of another vehicle: his transport truck. On a straightforward reading of the words of the *Schedule*, Mr. Portch would qualify as an insured person under subsection 2(c).

⁷ I note this was also raised in *Adabi-Ghomi and Allstate Insurance Company of Canada, Adabi-Ghomi and Wellington Insurance Company*, (June 28, 1996, A-013683 and A-014141), appeal pending.

It would have been a simple matter to have incorporated the desired provisions of the policy by reference, as has been done in part in the definition of “insured automobile”. I also note that the *Schedule’s* predecessor, Schedule C to the then *Insurance Act*, R.S.O. 1980, c. 218 specifically qualified the meaning of insured person.⁸

The narrower language of the policy, as Royal construes it, appears to be inconsistent with the broader wording of the *Schedule*, giving rise to a conflict between them. As various arbitrators⁹ have pointed out, the difference between the two is substantial. Subsection 2(c) of the *Schedule* includes the named insured, his or her spouse and a dependant of either of them while driving or riding as a passenger¹⁰ in any vehicle. Under the policy, the named insured or his or her spouse residing in the same dwelling, must have been driving the vehicle. They would not be included if they were passengers in a vehicle driven by someone else. The focus on driving fits third party liability coverage, but is more difficult to reconcile with the apparent objective of making the named insurer’s own insurer the insurer of first resort in accident benefits cases.

The relationship between the *Act*, *Schedule* and policy has been considered in a number of cases. A line of arbitration decisions, starting with *Movahedi and State Farm Mutual Insurance Company, Movahedi and Royal Insurance Company of Canada*, (June 13, 1995, A-008245 and A-006901) (appeal pending),¹¹ has held that the *Schedule* prevails in the event of a conflict between its terms and the policy’s.

⁸ Subsection 3(1)(b). Schedule C also expressly stated that “in so far as applicable, the general provisions, definitions, exclusions and statutory conditions of the policy also apply”.

⁹ See note 10.

¹⁰ *Insurance Act*, section 224(1)

¹¹ See also *Boateng and Coachman Insurance Company, Boateng and Progressive Casualty Insurance Company of Canada*, (January 13, 1996, OIC A-009580 and 09581); *Addai-Agyekum and Coachman Insurance Company, Addai-Agyekum and Citadel General Insurance Company*, (October 13, 1995, OIC A-009690 and A-009691, appeal pending); *Brown and Simcoe & Erie General Insurance Company, Brown and State Farm Mutual Automobile Insurance Company*, (October 10, 1995, OIC A-012171 and A-013989, appeal pending) and *Aujula and Progressive Casualty Insurance Company of Canada, Aujula and Old Republic Insurance Company*, (March 20, 1996, OIC A-951628 and A-951629) issued after this appeal hearing.

Movahedi concerned a priorities dispute involving a taxi driver. The taxi driver was injured while driving a leased taxi cab, but held insurance on his own personal vehicle. The insurer of the personal vehicle argued that it was not responsible for Mr. Movahedi's benefits because his taxi cab was excluded under the terms of the policy. The arbitrator rejected this argument. He held that the limitations and exclusions relating to the use of an automobile did not apply because Mr. Movahedi was injured while driving "any other automobile" - the taxi cab- not the car listed in the policy. He went on to say that even if Mr. Movahedi had been using his personal car as a taxi cab, the exclusions would still not apply to him because they were not stipulated in the *Schedule*. This reasoning has been followed in subsequent cases.

The argument in favour of applying the restricted definition of "any other automobile" is that entitlement to accident benefits under the *Schedule* does not stand alone but is in respect to a **particular motor vehicle liability policy**. The outer parameters of the policy are determined, among other things, by the automobiles insured. The Commissioner has been given express legislative authority to determine the form of a standard owner's policy, and has authorised a form of policy that covers vehicles other than the described automobile but only in limited circumstances. Accident benefits are provided under the umbrella of that policy. If benefits are payable under the policy, they are subject only to the terms, conditions and exclusions set out in the *Schedule*. However, one must look at the scope of the policy to determine whether benefits are payable in the first place.

In *Warwick et. al. v. Gore Mutual Insurance Company and State Farm Mutual Automobile Insurance Company*, (December 12, 1995), No. 5546/92 (Gen. Div.)(G.R. Morin J.), a case dealing with a different issue, Justice Morin looked at the entire scheme of the legislation - the *Act*, the regulations and the policy: He stated:

..... it would be inappropriate in circumstances such as these to deprive the parties of access to the Regulation and to the actual policy of insurance that has been

prescribed by law. ...in determining matters of conflict between two or more insurers it is incumbent upon the court to consider not only the provisions of the Act but rather the entire scheme of automobile insurance legislation.¹²

I accept the proposition that the *Insurance Act, Schedule* and approved policy form part of an integrated legislative scheme governing automobile insurance, including accident benefits. To the extent possible, the provisions of the regulations and policy should be construed together, and harmoniously. However, it is difficult to see how the language of the policy, as Royal construes it, can be reconciled with the *Schedule*.

The Commissioner's authority to determine the content of automobile policies is qualified by the terms of section 268(1) of the *Act*, which mandates that every policy shall provide accident benefits subject to the "terms, conditions, provisions, exclusions and limits set out in that Schedule." This includes the definition of the persons who are entitled to benefits under the policy. The definition of insured person under subsection 2(c) does not contain the limiting words Royal seeks to put on them, and in my view, cannot reasonably be read so as to contain them. Accident benefits are governed by the *Schedule* and in so far as there is a conflict, the *Schedule* must prevail.

I therefore agree that "any other automobile" in subsection 2.2.3(c) of the policy as mandated by section 2(c) of the *Schedule* is not restricted to the definition of "any other automobile" in section 5.2.2(iv) of the policy. That term must be given its broad and ordinary meaning: any other automobile. I find that Mr. Portch is the "named insured...while the occupant of any other automobile." and so is an insured person under the Royal policy. He is therefore an insured under section 268(2)1.i of the *Act*.

¹² *Zurich Insurance Company and Luu* (April 7, 1996, OIC P96-00045A), issued after this appeal, also considered the entire legislative context. *Luu* did not concern a priorities dispute.

IV. IS MR. PORTCH A NAMED INSURED UNDER THE MARKEL POLICY?

Mr. Portch is an insured under both policies, and a named insured under the Royal policy. Is he also a named insured under the Markel policy so as to give him the choice of insurer? The term “named insured” or a variant of the phrase appears throughout Part VI of the *Insurance Act*, and is also found in the *Schedule* and the standard form owner’s policy. The term is not defined anywhere.

The arbitrator found that although the term was not defined in the *Act*, it was used consistently to mean “the person or entity in whose name the policy is issued”. In his view, it had the same meaning in section 268(5) of the *Act*.

Even though Mr. Portch was not named as an insured person in the policy, Royal argues that he should be considered a named insured. In its view, firstly, Mr. Portch was, to all intents and purpose, the insured. He owned the truck and paid the premiums - the company’s involvement was a matter of convenience only. In the alternative, Royal argues that Mr. Portch must be treated as if he were the named insured by reason of the application of section 3(1) of the *Schedule*. Royal relies on the arbitration decision in *Sittler and Canadian General Insurance Company, Sittler and Pilot Insurance Company*, (December 3, 1993, OIC A-000951 & A-004495), upheld on other grounds (November 8, 1995, OIC P-000951 & P-004495). The arbitrator rejected both of these positions.

A number of cases have considered the relationship between section 268 of the *Act* and the *Schedule* in the context of priorities disputes. The key sections in issue are sections 224 and 270 of the *Act* and section 2 and 3(1) of the *Schedule*.

Section 224 defines “insured” to mean

a person insured by a contract **whether named or not** and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person.

Section 270 states:

Any person insured by but **not named in** a contract to which section 265 [uninsured automobile coverage] or section 268 [accident benefit coverage] applies may recover under the contract in the same manner and to the extent **as if named therein** as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

“Insured person” is defined in section 2(c) of the *Schedule* to include

- (c) **the named insured**, his or her spouse and any dependant of either of them while the occupant of any other automobile

Under the heading “Interpretation”, section 3(1) states:

If the insured automobile is made available for the regular use of an individual, whether or not a resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Schedule applies to the individual and his or her spouse and their dependants **as if the individual were a named insured**.

The parties accepted that section 3(1) applied to Mr. Portch.

Two early arbitration decisions¹³ held that section 224 and section 270 of the *Act* expand the scope of the definition of insured under section 268(2) beyond that set out in the *Schedule*. They held that a person who was listed as an occasional driver under a policy but was not the named insured could nonetheless claim under that policy in preference to the policy of the vehicle involved in the accident. It was the arbitrators’ view that otherwise there would not be a fair return for the extra premium paid to add the driver to the policy. However neither of these cases concerned the meaning of “named insured”.

¹³ *Cattrysse and the Westminster Mutual Fire Insurance Company, Cattrysse and Anglo Canada General Insurance Company*, (June 21, 1993, OIC A-001618 and A-001789); *Tripone and Guardian Insurance Company of Canada, Tripone and Liberty Mutual Fire Insurance Company*, (May 16, 1994, OIC A-004757).

The arbitrator in *Sittler* extended this reasoning to the definition of named insured. In *Sittler*, Ms. Sittler was injured while driving a taxi-cab she rented from its owner. She was not named on the taxicab policy but the insurance company charged the owner extra for the additional driver. Ms. Sittler also owned a personal vehicle insured with another insurer, and was named as the insured under this policy.

The arbitrator held that the taxicab was made available for the regular use of Ms. Sittler and that therefore, in the terms of section 3(1), the *Schedule* applied to her “**as if [she] were a named insured**”. The arbitrator reasoned that this provision, combined with section 270 of the *Act*, gave Ms. Sittler the same rights as a named insured for the purposes of section 268(5) of the *Act*.

The reasoning in *Sittler* has not been followed in subsequent judicial and arbitration decisions, including the arbitrator in this case. In *Axa Home Insurance Company v. Western Assurance Company*, [1994] I.L.R 1-3033, (Gen. Div.), Justice Roberts concluded that it was wrong in law. He said:

Section 3(1) deals solely with the identification of persons covered by the no-fault provisions. It does not extend the definition of “named insured” for any other purposes and, in particular, does not extend the definition of “named insured” under section 268(5) to include those persons eligible for no-fault benefits as defined in section 3(1).

In *Axa*, Mr. Lazaridis was hurt while driving the company vehicle. Because the company, not Mr. Lazaridis, was named as the insured in the policy, he was forced to go to his own insurance company for benefits, even though the accident involved the company car.

The arbitrator in *Portch* agreed with the reasoning of Justice Roberts in *Axa*. This view has been followed in subsequent arbitration decisions.¹⁴ I also prefer the reasoning in *Axa* that while

¹⁴ See the arbitration decisions listed in note 10.

Mr. Portch is protected for accident benefits under his employer's policy, section 3(1) of the *Schedule* does not make him a "named insured" when deciding which insurance company must pay these benefits.

Royal also argues that Mr. Portch is the "real" insured under his employer's policy, even if his name is not on the certificate of insurance. However, I was given no authority to support the view that an arbitrator is entitled to look behind the form of the policy, and substitute one person for another as the named insured. The cases before me indicate that the term "named insured" has a common and well-understood meaning in insurance. It means the person specified in the contract or certificate of insurance as the insured. On a plain reading of the Markel policy, this does not include Mr. Portch.

V. CONCLUSION

I agree with the arbitrator that Mr. Portch must claim benefits from the insurer of his personal vehicles even though he was injured while driving his truck trailer in the course of his employment. I find this result troubling and I am unconvinced that the result was intended by the drafters. However, based on the arguments before me, I can find no reason to depart from this conclusion. The parties made some brief reference to the doctrine of reasonable expectations in their argument. This doctrine has been developed to assist in the interpretation of insurance contracts, in particular where there is an ambiguity.¹⁵ However, nothing before me suggests that these principles can operate to override the express provisions of the legislation and regulations. The arbitrator's order is therefore confirmed.

VI. REPAYMENT

Markel claimed repayment of \$28,200 it had paid to Mr. Portch. This issue was not dealt with in the arbitrator's reasons. Both insurance companies asked the Ontario Insurance Commission for a ruling on their respective liability to pay Mr. Portch benefits. In my view, this necessarily

¹⁵ See Brown & Menezes, *Insurance Law In Canada*, 2nd ed. (Toronto: Carswell, 1994).

includes the ability to make an order adjusting the payments already made as between them both, where such relief is requested.

Royal argued that, even if it could be ordered to repay money to Markel, it should not have to do so. It cited a line of arbitration decisions, starting with *Levenson and General Accident Insurance Company of Canada*, (February 18, 1992, OIC A-000260) appealed on other grounds (September 29, 1992, OIC P-000260), which have considered when a claimant should have to repay an insurance company under section 27 of the *Schedule*. In my view, these cases have no application in the case of repayment as between two insurance companies.

Mr. Portch claimed benefits from Markel, who paid them promptly in accordance with its obligations under the accident benefits scheme. Subsequently, it turned out that Royal, rather than Markel, was responsible for paying the benefits. It was not suggested that Royal was prejudiced in any way by Markel's payment. In the circumstances, Royal has an obligation to repay Markel the full amount of the benefits.

VII. EXPENSES

Mr. Portch was successful at arbitration and on appeal. He is entitled to his appeal expenses, to be paid by Royal.

Susan Naylor
Director's Delegate

December 17, 1996