IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990, AND *ONTARIO REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TD GENERAL INSURANCE COMPANY

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Juliano Pichini for the Applicant, TD General

Nathalie Rosenthall and Nathan Fabiano for the Respondent, Aviva

BACKGROUND:

1. Shane Chaulk was working at a Mr. Transmission franchise in St Catharines, Ontario when he was injured in a motor vehicle accident on July 15, 2019. He had taken a Volkswagen Golf out for a test drive that morning, and was rear-ended by another vehicle while stopped at an intersection. Mr. Chaulk was a named insured under a policy issued by TD General at the time, and submitted an application to TD for payment of benefits under the *SABS*.

2. TD accepted his application and has paid benefits to him and on his behalf.

3. Aviva issued a "Garage Automobile Policy" (OAP 4) to Mr. Chaulk's employer that was in effect at the time of the accident. TD contends that Mr. Transmission made a vehicle available for Mr. Chaulk's "regular use" at the time of the accident, and that he would therefore be a deemed named insured under the Aviva policy, by virtue of section 3(7)(f) of the *SABS*. TD argues that Aviva is therefore in higher priority to pay benefits, as section 268(5.2) of the *Insurance Act* provides that if a person is an "insured" under more than one policy, the person must claim benefits from the insurer of the vehicle in which he was an occupant at the time of the accident.

4. The "twist" in this case is that the vehicle that Mr. Chaulk was driving at the time of the accident had been brought to Integrity Car Care, a repair shop located next door to Mr. Transmission. The owner of Integrity then sought assistance from the staff at Mr. Transmission to diagnose the source of a noise that the car was making while being driven in first gear. Mr. Chaulk, who was employed by Mr. Transmission, took the car out for a test drive for this purpose. He had not driven this vehicle before that date, and it is unclear whether the owner of the vehicle was aware that Integrity Car Care had provided his vehicle to Mr. Transmission.

5. Aviva resists TD's claim that it is in higher priority to pay Mr. Chaulk's claims on two grounds – it disputes that its insured made a vehicle available for the Claimant's "regular use" in the circumstances outlined above, and also contends that the OAP 4 Garage Policy issued to Mr. Transmission does not provide coverage to Mr. Chaulk for accident benefits in these circumstances.

ISSUES:

1. Does the OAP 4 Garage Policy issued by Aviva to Mr. Transmission provide coverage for Mr. Chaulk's accident benefits claim in these circumstances ?

2. If so, did Mr. Transmission make a vehicle available for Mr. Chaulk's regular use at the time of the accident, such that he was a deemed named insured under the Aviva policy pursuant to section 3(7)f of the *SABS*?

RESULT:

1. Yes, the Garage Policy issued by Aviva would provide coverage for accident benefits to the Claimant in these circumstances.

2. No, Mr. Transmission did not make a vehicle available for Mr. Chaulk's regular use at the time of the accident, and he was accordingly not a deemed named insured under the Aviva policy. TD consequently remains the "priority insurer".

EVIDENCE:

6. The parties filed a Statement of Agreed Facts outlining many of the facts underlying this dispute. They also filed a Joint Document Brief containing several documents, including a transcript of evidence provided by Mr. Chaulk at an Examination Under Oath, the Certificate of Insurance issued by Aviva to the garage, as well as a copy of the OAP 4 (Ontario Garage Automobile Policy).

7. The Mr. Transmission franchise at which the Claimant worked was owned by Eric Duerksen at the relevant time. Mr. Duerksen provided "*viva voce*" evidence at the hearing, which was held via videoconference. Some of his evidence, which was transcribed by a court reporter, contradicted the evidence provided by the Claimant at his EUO. Counsel forwarded a copy of a transcript of Mr. Duerksen's evidence to me shortly after the hearing was completed.

8. The evidence filed sets out the following facts – Mr. Chaulk was employed as a Transmission Rebuilder at the Mr. Transmission franchise located at 128 Vine Street South, in St Catharines at the relevant time. Mr. Duerksen testified that he had been operating the franchise through a numbered company since late 2018, and had operated a business known as "Skyway Transmission" at the same location for approximately three years prior to that. Both companies provided transmission repair services. Mr. Duerksen advised that Mr. Chaulk had worked for him for about three months at the time of the accident on July 15, 2019.

9. Mr. Duerksen testified that he was the sole owner of the business, and that he had two employees (including the Claimant) at the time of the accident who assisted him with repairs. He was the only licensed technician at the shop.

10. Mr. Duerksen explained that Integrity Car Care performed general automotive repairs and operated out of the unit next door to his location, in the same plaza. He testified that the owner of Integrity would occasionally refer vehicles in need of transmission repairs to his shop. Mr. Duerksen explained that this arrangement dated back to 2015, and that there was no written or formal agreement documenting this. He explained that he would simply invoice the owner of Integrity Car Care, who he referred to as "Gerry", for the work that he or his staff performed, and that Gerry would pay him. He explained that "referrals" between auto shops was a regular practise in the industry.

11. Mr. Duerksen testified that in this instance, Gerry brought over a transmission from a Volkswagen Golf vehicle, owned by a person I will refer to as LM,[1] that required a repair. He stated that he rebuilt the transmission and returned it to Integrity, who then reinstalled it into their customer's vehicle. Some concern apparently remained regarding a noise the car made while being operated in first gear, and a test drive was arranged to assess what further steps to take. Mr. Chaulk performed the test drive on the morning in question and was rear-ended by another vehicle shortly after driving out of Mr. Transmission's premises.

[1] I have anonymised the owner's name to protect his privacy; he has no interest in this dispute and may not be aware of it

12. Mr. Duerksen advised that he had never met the owner of the Volkswagen Golf, and that he considered Gerry, the owner of Integrity Car Care, to be his "customer". He was not aware of whether Gerry had advised the owner of the Volkswagen that the transmission repair was being conducted by Mr. Transmission rather than by Integrity Car Care, or whether Gerry had told him that his vehicle would be road tested.

13. When asked how often his shop performed transmission work on vehicles that were brought to Integrity Car Care for repair, Mr. Duerksen responded that it was not a frequent practise. He estimated that this had occurred "less than ten times in six years".

14. Mr. Chaulk testified that he drove his personal vehicle, insured by TD Insurance, to work while he was employed at Mr. Transmission. He worked full-time hours, and his duties included removing, rebuilding and installing transmissions, conducting road tests, ordering parts as needed and doing any cleaning required. When asked how frequently he had taken vehicles out for road tests, Mr. Chaulk responded that it varied by the day depending on how busy the shop was. He estimated that he had conducted between two and fifteen road tests each day.

15. Mr. Duerksen's evidence at the hearing differed significantly from Mr. Chaulk's on that point. He acknowledged that the Claimant occasionally took vehicles out for road tests, but stated that he conducted most of the road tests himself. When asked to estimate the number of road tests they each had done in the summer of 2019, Mr. Duerksen responded that Mr. Chaulk might have done on average three road tests in the course of a five-day work week, while he would have conducted between thirty and fifty. He stated that Mr. Chaulk would only perform a road test if he specifically instructed him to do so, and that the frequency of him doing so depended on how many vehicles Mr. Duerksen was working on. He estimated that each road test took approximately 5 to 10 minutes.

16. Mr. Duerksen stated that the Claimant was not permitted to drive the vehicles that the shop worked on for his personal use. He explained that the keys to the vehicles were kept in a lockbox,

and that he was the only one who had a key to that box, but admitted that the lockbox was left open during business hours.

17. The Certificate of Insurance for the Garage Policy (O.A.P. 4) issued by Aviva was filed into evidence. The insured is listed as "Eric Duerksen o/a Skyway Transmission" and the "effective date of change" is listed as January 9, 2019. The parties agree that this policy was in effect on the date of the accident.

18. Section 3 of Part 1 of Aviva's policy provides that "the automobiles in respect of which insurance is to be provided are those used in connection with the insured's business of "Repair Garage including transmissions – PPV's and Light Commercial Vehicles only". Counsel for Aviva advised that PPV is an acronym for "private passenger vehicles".

19. The certificate sets out the coverage provided, including Third Party liability, Accident Benefits, Property Damage and the like. Two Endorsements are noted on the certificate – the OEF 71 Excluding Owned Automobiles Endorsement and the OEF 77 Liability for Comprehensive Damage to a Customer's Automobile Endorsement.

20. Mr. Duerksen testified that he had obtained the Aviva garage policy in order to provide coverage for the vehicles that he and his staff worked on in the shop. He understood that it was a requirement of the franchisor that he do so. He stated that he had advised the broker from whom he purchased the policy that his business had changed from Skyway Transmission to Mr. Transmission when that change occurred. He also advised that the numbered company through which the franchise was operated did not own or lease any vehicles. He stated that he believed that the policy would provide coverage for any loss sustained while a customer's vehicle was being worked on or road tested.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act

> ***268(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > *1. In respect of an occupant of an automobile,*
> >
> > > *i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,*

> ***268(5)*** ***Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy... the person shall claim statutory accident benefits against the insurer under that policy.***

> ***268(5.2)*** *If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*

Statutory Accident Benefits Schedule ("SABS")

> ***3.*** *(7) For the purposes of this Regulation,*
>
> > *(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*
> >
> > *(ii) the insured automobile is being rented by the individual for a period of more than 30 days;*

The relevant provisions of the OAP 4 are set out below:

Ontario Garage Automobile Policy (OAP 4)

> *2. Please note that the General Provisions, Definitions, Exclusions and Statutory Conditions of this Policy found in Section 7 and Section 8, except as otherwise stated in those Sections, apply to every Section of the Policy.*
>
> *Each Section of the Policy should be read subject to the provisions in Sections 7 and 8.*
>
> ***2.1 Who is Covered***
> *For the purposes of Section 2, insured persons are defined in the Statutory Accident Benefits Schedule and an insured automobile for this purpose includes an owned, a non-owned, and a customer's automobile as defined in this Policy.*
>
> *In addition, insured persons also include any person who is injured or killed in an automobile accident involving an owned, non-owned or customer's automobile as defined in this Policy, and is not the named Insured, or the spouse or dependant of a named Insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them.*
>
> ***7.2.4** For the purposes of Section 1 (Third Party Liability), Section 2 (Accident Benefits), Section 3 (Uninsured Automobile Coverage) and Section 6 (Liability for Damage to a Customer's Automobile):*
>
> *"customer's automobile" means an automobile owned by another, while the automobile is being towed or pushed by an automobile driven by the Insured or an employee or partner, or while in the care, custody or control of the Insured in the business stated in Item 3 of the Certificate of Insurance but DOES NOT INCLUDE an automobile,*
>
> > *(a) owned, rented or leased by any person insured by this Policy or by any person residing in the same dwelling premises as the Insured; or*
> >
> > *(b) sold by the Insured but not yet delivered to the purchaser*

PARTIES' ARGUMENTS:

TD's submissions

21. Counsel for TD submitted that the facts outlined above fit within the requirements of section 3(7)(f) of the *SABS*, and that the Claimant is therefore a deemed named insured under the Aviva policy. He noted that the accident occurred while Mr. Chaulk was in the course of his employment with the Aviva insured, performing one of his core work tasks, and that there was no

evidence to suggest that he should not have been taking the vehicle for a road test when the accident occurred.

22. Counsel acknowledged that Mr. Chaulk's recollection of the number of road tests he performed differed from that of Mr. Duerksen. He suggested however that it was clear that the Claimant was assigned to do these on a weekly basis, and contended that this was sufficient to constitute "regular use". He contended that the Claimant's employer "made vehicles available" to him at the time of the accident in order for him to assist with its business of transmission repair, and that he therefore satisfied the conditions to be a 'deemed named insured' under the Aviva policy.

23. Counsel noted that the case law provides that as long as an entity makes "a vehicle" available to an individual for their regular use at the time of the accident, the above provision will apply, noting that the use of a specific vehicle, or the one that was involved in the accident, is not required. He contended that it did not matter whether Mr. Chaulk had driven the Volkswagen in question before or whether it was his first time doing so, noting that he was often asked by his employer to take vehicles out for test drives. Counsel cited Justice Belobaba's findings in *ACE INA Insurance v Co-operators General Insurance Company* (2009) CarswellOnt 1668 in this regard. He also noted that Arbitrator Densem stated in *Dominion of Canada o/a Chieftain Insurance v Federated Insurance Company of Canada* case (unreported, October 31, 2012) that if "an individual has control over or permission to use a vehicle, then the status of deemed named insured" will exist.

24. Mr. Picchini submitted that the fact that the owner of the vehicle that was involved in the accident brought the car into Integrity Car Care for a repair, rather than to Mr. Transmission, does not affect the analysis. He contended that the vehicle would be covered under the Aviva policy in either instance, as the policy provided coverage for any loss or injury arising from the use of a vehicle, as long as it was being used in connection with the stated business of "transmission repair" noted on the Certificate filed. Counsel pointed to sections 1.2 and section 7.2.4 (excerpted above) of the OAP 4 Garage Policy, which he submitted provide coverage for such a claim.

25. Counsel further submitted that the "regular use" provisions do not require that a claimant's employer own the vehicle involved in the accident, and that it is sufficient if the vehicle falls within the class of vehicles covered by the policy. He cited the Ontario Court of Appeal's decision in *Security National Insurance Company v Markel Insurance Company* (2102) ONCA 683 as authority for this proposition, and noted that in discussing the legislative intent of the "regular use" provisions in the *SABS*, Justice Pepall stated that "the intent of the section is that the commercial insurer should be responsible for the accident benefits arising from the operation of the commercial vehicles…if a vehicle is made available for regular use by any of the listed entities, the risk is to be borne by the insurer of that vehicle". (at paras. 63-64)

Aviva's submissions

26. Counsel for Aviva noted that Mr. Chaulk was a named insured under the TD policy insuring his personal vehicle at the relevant time, and that the only question to determine is whether he was also a deemed insured under the Aviva policy at the time of the accident by virtue of section 3(7)f of the *SABS*. She submitted that the evidence does not support a finding that Mr. Transmission made a vehicle available for the Claimant's regular use at the time of the accident, and pointed out that Mr. Transmission neither owned nor had a close connection to the vehicle involved in the accident.

27. Counsel highlighted the fact that the owner of the Volkswagen Golf brought the car to Integrity Car Care to be repaired, rather than to Mr. Transmission. Integrity then gave the vehicle to Mr. Transmission, who in turn allowed the Claimant to take it for a road test. She contended that the owner of the vehicle had no connection to Mr. Transmission, and that there were many "links in the chain" that led to Mr. Chaulk driving the vehicle on the day of the accident. She suggested that TD should pursue the argument under section 3(7)f of the *SABS* against Integrity Car Care's insurer, who may have made the vehicle available to Mr. Duerksen at the relevant time, rather than against Mr. Transmission, the Aviva insured. She contended that there were many layers of possession connecting the vehicle to Mr. Chaulk, and that it is too much of a 'stretch' to say that Mr. Transmission made the vehicle available to Mr. Chaulk at the time.

28. Counsel for Aviva also noted Mr. Duerksen's evidence that the Claimant was asked to conduct approximately three road tests a week, and that each test typically lasted only five or ten minutes. She suggested that a task that took up only fifteen to thirty minutes each week in the course of a 35 or 40 hour work week comprised a small percentage of Mr. Chaulk's job, and that driving a vehicle for a few minutes as he did on the day in question did not rise to the level of "regular use".

29. Counsel also argued that the Aviva policy restricts coverage to private passenger vehicles and light commercial vehicles that were owned or leased by the business, and submitted that if the policy was meant to cover customer owned automobiles, it would reference that in section 3 of Part 1 of the Certificate of Insurance, discussed above. She acknowledged that section 2.1 of the OAP 4 provides that an insured automobile includes a customer's automobile, but noted that the first paragraph of Section 2 provides that each section of the Policy must be read "subject to the provisions in Sections 7 and 8", and that Section 7.2.4 refers back to section 3 of the Certificate of Insurance. Counsel submitted that on a plain reading of these provisions, any losses resulting from the use of customer vehicles were not covered, and that there would accordingly be no coverage for Mr. Chaulk's accident benefits claim under Aviva's policy.

30. Finally, Ms. Rosenthall noted that the cases relied on by TD involved vehicles that were either owned by the garages or car rental agencies that the claimants were associated with. She submitted that the circumstances here are quite different, and that the direct relationship that existed between the employer and the vehicles in those other scenarios is absent here. Counsel contended that while it may have made sense on a practical level to find that the claimants driving the vehicles in these other cases were insured by their employer's insurer, the facts in this case merit a different result.

Reply submissions - TD

31. Mr. Pichini noted that Mr. Duerksen testified at the hearing that he believed that the Aviva policy covered losses that were sustained involving customers' vehicles and that his franchise agreement required that he have an OAP 4 "garage policy". He reiterated that section 3 of Part 1 of the Certificate of Insurance referred to vehicles used "in connection with the business of"

repairing transmissions, and contended that an employee conducting a road test of a customer vehicle would fall within this scope, regardless of whether customer vehicles were specifically mentioned.

ANALYSIS & REASONS:

32. There are two questions to answer in this case – whether the OAP 4 Garage Policy issued by Aviva provides coverage for accident benefits in the event that an employee is involved in an accident while driving a customer's vehicle, and if so, whether Mr. Transmission can be said to have made a vehicle available for Mr. Chaulk's regular use at the time of the accident, such that he was a deemed named insured under the Aviva policy.

33. I have no trouble reaching the conclusion that the garage policy in question would provide coverage in these circumstances . Counsel for Aviva argued that a plain reading of the Certificate of Insurance and the OAP 4 provisions suggests that coverage would only apply to vehicles owned or leased by the business and would not apply in these circumstances. I do not agree. Section 3 of Part 1 of the Certificate of Insurance states clearly that the automobiles in respect of which insurance is to be provided are those used in connection with the insured's business of "Repair garage including transmissions – PPVs and Light Commercial Vehicles only". As I read that phrase, coverage is provided for losses arising from any incidents involving vehicles on which repairs are being performed, as long as they are either private passenger or light commercial vehicles. The Volkswagen Golf in question belonging to LM clearly fits within this provision.

34. Mr. Duerksen testified that his business did not own or lease any vehicles. There would accordingly be no point in him having this coverage if it did not cover losses arising from the use of customer vehicles. He also testified that he believed that the Aviva policy provided coverage for any losses sustained in the use or operation of customer vehicles, and that it was a requirement of the franshisor that he maintain such coverage. I find that it was reasonable for him to hold this belief, given the language in section 3 of the Certificate noted above, and the wording of Section 2 of the OAP 4. That section refers to "Accident Benefits", the first part of which (section 2.1) is titled "Who is covered". It states that "for the purposes of Section 2, insured persons are defined

in the *SABS,* and an insured automobile for this purpose includes an owned, a non-owned and *a customer's automobile* as defined in this Policy".

35. Counsel for Aviva pointed out that the preamble to section 2 states that it should be read subject to the exclusions provided in section 7, and specifically referenced section 7.2.4. Customer's automobile" is defined in that section to mean an auto "while in the care, custody or control of the insured in the business stated in item 3 of the Certificate of Insurance but DOES NOT INCLUDE an automobile owned rented or leased by any person insured by this policy" or anyone living in the same premises as they are. I find nothing in this section to support Aviva's argument, and am satisfied that the OAP 4 would provide coverage to an employee who submitted an accident benefits claim arising from the use of a customer's vehicle.

36. Given the above, Mr. Chaulk would potentially have coverage under two policies – his TD policy insuring his personal vehicle, and that of his employer. If he is found to be a deemed named insured under the Aviva garage policy, section 268(5.2) requires him to claim accident benefits under that policy, as he was an occupant of a vehicle insured under that policy at the time.

37. Considering all of the evidence, I find that the facts do not support a finding that at the time of the accident, a vehicle was being made available for Mr. Chaulk's "regular use" by Mr. Duerksen or by Mr. Transmission, such that he was a deemed named insured under the Aviva policy. While the accident took place while he was conducting a road test on a vehicle, and there was no suggestion that he was not entitled to be driving the vehicle at the time, I find that this is not enough to ground a finding of "regular use" under section 3(7)f of the *SABS.*

38. Firstly, Mr. Duerksen, the owner of the garage, testified that the Claimant conducted road tests at his request approximately three times per week, while he completed thirty to fifty weekly tests himself. While Mr. Chaulk testified at his EUO that he road tested vehicles more frequently than that, I prefer the evidence of Mr. Duerksen on this point, who seemed to have a clearer recollection of details relating to work tasks assigned. Counsel for TD submitted that even the lower estimate provided by Mr. Duerksen suggests a pattern of use by the Claimant that was "regular". This may be so. However, the evidence also indicated that each test only took between

five and ten minutes, and would therefore have amounted to no more than thirty minutes per week, a small fraction of Mr. Chaulk's work week. In my view, this falls short of the level required to justify a finding of "regular use".

39. The term "regular use" is not defined in the *SABS*. It has long been accepted, however, that in order to qualify as a deemed named insured under a policy pursuant to section 3(7)f(i) of that regulation, a claimant's use of a vehicle must be more than occasional. In *Zurich Insurance Company v. Personal Insurance Company* [2009] O.J. No. 2157, Justice Brown noted that the term "regular use" has been described in the case law as use that is "habitual, normal and that recurred uniformly according to a predictable time and manner". On the evidence before me, I find that Mr. Chaulk's test drives, that seemingly occurred when Mr. Duerksen was too busy to conduct them himself, did not occur with enough frequency or predictability to meet the required standard, as flexible as it may be.

40. The bigger challenge for TD in this case, however, is its argument that the vehicle that the Claimant was driving at the time of the accident was "being made available" to him by the Aviva insured. Counsel for TD argued that the entity making the vehicle available need not necessarily own it, and relied on the Court of Appeal's decision in *Security National v Markel Insurance, supra.* I find that case to be of no assistance here. The issue before the court there was whether the "regular use" provision (then s 66) in the *SABS* contemplates a vehicle being "made available" for an individual's regular use by that individual's sole proprietorship, a situation that occasionally arises in the trucking industry. Justice Peppall's comments cited above about commercial insurers bearing risk must be taken in that context.

41. In my view, the requirements in section 3(7)f of the *SABS* imply a direct connection between the vehicle and the parties involved. It was not clear from the evidence whether the owner of the Volkswagen Golf was aware that his vehicle was being provided by Integrity to Mr. Transmission for the transmission to be rebuilt, or to be road tested. Even if he was, the fact that he brought the vehicle to Integrity Car Care to be repaired, who then provided it to Mr. Transmission, who then permitted Mr. Chaulk to drive it creates a "chain of possession" with several links. While there may have been consent for the vehicle to be driven at every stage, that

should not be conflated with the notion of the vehicle "being made available" to Mr. Chaulk by Mr. Transmission.

42. In my view, the phrase "being made available" requires something more than providing mere consent for someone to drive a vehicle: it suggests that the entity has ultimate control over the vehicle and is choosing to make it available to someone else. The facts described above do not meet that standard. The Aviva insured was provided with the customer's vehicle by another entity, for a defined and narrow purpose, namely to repair and diagnose a problem with the transmission. It simply did not have the required connection to or control over the vehicle to "make it available" to someone else. I find that to conclude otherwise would be to unduly stretch the notion of making a vehicle available, and take it far beyond what the legislators intended by enacting the "company car" provision now found in section 3(7)f(i) of the *SABS*.

43. I also note that Mr. Duerksen testified that while he could not recall exactly how many times the owner of Integrity Car Care brought a transmission to his shop for repair, it was not a frequent practise. He estimated that it had occurred "less than ten times over six years". I note that this amounts to, on average, less than two occasions per year. In my view this describes a situation that while not perhaps unusual, is certainly not "regular" and predictable, and does not justify a finding that Mr. Transmission was making a vehicle available for Mr. Chaulk's regular use at the relevant time.

44. For the reasons set out above, I find that Mr. Chaulk was not a deemed named insured under the Garage Policy issued by Aviva to the garage, and that TD is accordingly the priority insurer responsible to pay his accident benefits claims.

ORDER:

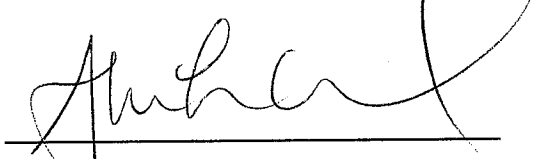
The application for arbitration is hereby dismissed.

COSTS:

In view of the result, Aviva is entitled to recover its costs, on a partial indemnity basis, from TD. I leave it to counsel to agree on the quantum of costs payable, failing which I invite them to contact me so that a process can be arranged for that to be determined.

I will forward my account for all arbitration fees associated with this matter to counsel for TD, under separate cover.

DATED at TORONTO, ONTARIO this 9th DAY OF MARCH, 2022



Shari L. Novick
Arbitrator