



FSCO A07-001441

**BETWEEN:**

**VLADIMIR DANILOV**

**Applicant**

**and**

**UNIFUND ASSURANCE COMPANY**

**Insurer**

**and**

**ECONOMICAL MUTUAL INSURANCE COMPANY**

**Intervenor**

## **DECISION ON A PRELIMINARY ISSUE**

**Before:** Robert Bujold

**Heard:** January 19, 2009, at the offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Arvin Gupta for Mr. Danilov  
Daniel Strigberger for Unifund Assurance Company  
Nathalie Rosenthal for Economical Mutual Insurance Company

The Applicant, Vladimir Danilov, was injured in a motor vehicle accident on November 29, 2005. He applied for statutory accident benefits payable under the *Schedule*<sup>1</sup> from Unifund Assurance Company (“Unifund”). Unifund has not responded to Mr. Danilov’s claim. Unifund takes the position that it is not the first “insurer” to receive a completed application for accident benefits from Mr. Danilov, pursuant to section 2 of O. Reg. 283/95, on the grounds that there is no nexus between it and Mr. Danilov.

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<sup>1</sup> *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The parties were unable to resolve their disputes through mediation, and Mr. Danilov applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

Economical Mutual Insurance Company (“Economical”) insured the only other vehicle involved in the accident and requested that it be permitted to participate in this preliminary issue hearing as an intervenor. Economical was granted intervenor status on consent of Mr. Danilov and Unifund.

### **Preliminary Issue:**

1. Is Unifund Assurance Company the first insurer to receive Mr. Danilov’s completed Application for Accident Benefits, pursuant to section 2 of O. Reg. 283/95 to the *Insurance Act*?

### **Result:**

1. Unifund Assurance Company is the first insurer to receive Mr. Danilov’s completed Application for Accident Benefits, pursuant to section 2 of O. Reg. 283/95 to the *Insurance Act*.

### **EVIDENCE AND ANALYSIS:**

#### **Agreed Facts**

The facts in this matter are not in dispute. The agreed facts are as follows:

1. Unifund Assurance Company (“Unifund”) is an insurance company licensed to write and sell automobile insurance in Ontario. Unifund writes auto insurance policies exclusively through one broker named Johnson’s Insurance Brokers (“Johnson’s”).
2. Vladimir Danilov is an individual who was involved in a two-vehicle motor vehicle accident on November 29, 2005 in Vaughan, Ontario, while operating a 1996 Plymouth van described more fully in the Motor Vehicle Report No. 05-2528821 (“the police report”). Georgiy Gnidenko owned that vehicle. The only other vehicle involved in the accident was listed in the police report as insured with Economical Insurance.

3. The police report indicates that at the time of the accident Unifund insured the 1996 Plymouth under the policy number PR86AD7705 (“the policy”), based upon a pink Motor Vehicle Liability Insurance Card shown to the reporting police officer indicating that the 1996 Plymouth was insured with Unifund under the policy and further indicating that the agent or broker was Ensurco Insurance Group (“Ensurco”). The named insured indicated on the pink card was Georgiy Gnidenko.
4. Neither Unifund nor Johnson’s ever wrote or issued the policy and no similar policy was in force at the time of the accident insuring either the Plymouth or Gnidenko or Danilov. Neither Unifund nor Johnson’s ever sent Gnidenko or Danilov any pink card.
5. Neither Unifund nor Johnson’s have ever had any relationship whatsoever with Ensurco. Ensurco has never had any authority to write, issue, or sell auto insurance policies on behalf of Unifund or Johnson’s.
6. Neither Gnidenko nor Danilov have ever contracted with or approached Unifund or Johnson’s to apply for a policy of automobile insurance.
7. At some point after the accident, Danilov submitted an Application for Statutory Accident Benefits to Unifund.
8. Unifund does not have any evidence that Danilov was complicit in a fraud.

### **The Relevant Legislative Scheme**

Section 268 of the *Insurance Act* provides that every contract evidenced by a motor vehicle liability policy in Ontario is deemed to provide for the statutory accident benefits set out in the *Schedule*. Section 268 also provides rules for determining which insurer is liable to pay statutory accident benefits.

Ontario Regulation 283/95 - Disputes Between Insurers (the “*Priority Regulation*”) provides the framework for resolving disputes between insurers as to which insurer is required to pay under section 268 of the Act. These disputes are resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17.

Section 2 of the *Priority Regulation* also provides as follows:

2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.

While any priority dispute between insurers is outside the jurisdiction of the Commission, the determination of whether an insurer was the first insurer to receive a completed application (and thereby responsible to pay benefits pending resolution of any dispute between insurers) is within the jurisdiction of an arbitrator at the Commission.<sup>2</sup>

### Sufficient Nexus

Case law has established that, in order to trigger the obligation to pay pursuant to section 2 of the *Priority Regulation*, there must be a “sufficient nexus” between the applicant and the insurer.<sup>3</sup> The parties agree that the issue before me is confined to the question of whether there was a sufficient nexus between Mr. Danilov and Unifund in the circumstances of this case.

The purpose of section 2 of the *Priority Regulation*, and the principles guiding the inquiry into whether a sufficient nexus exists to trigger the obligation to respond, have been discussed in several cases and include the following:

- The priority regulation is “designed to ensure that injured persons will get prompt determination of their entitlement to accident benefits, even if they have chosen the wrong insurer. It is inherent in this scheme that an insurer may have to pay benefits that another insurer should be paying, but only on an interim basis. If the first insurer to receive a completed application wants to shift responsibility to another insurer, it must follow the procedures in the regulation;”<sup>4</sup>
- “insurer” in the context of the regulation must be interpreted broadly based on the claim being asserted, not the ultimate determination;<sup>5</sup>
- The threshold for establishing a nexus is not a high one;<sup>6</sup>

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<sup>2</sup> *Brown and Allstate Insurance Company of Canada*, (FSCO A97-000579, May 29, 1997); affirmed by the Divisional Court at 40 O.R. (3d) 610

<sup>3</sup> *Ibid*

<sup>4</sup> *Vieira and Royal & SunAlliance Insurance Company of Canada*, (FSCO P04-00016, February 15, 2005)

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

- Although the threshold is not a high one, the choice of insurer cannot be arbitrary. A link must be established between the applicant and the named insured, in the particular circumstances of the claim;<sup>7</sup>
- A valid policy of insurance need not be in effect for there to be a sufficient nexus between the applicant and insurer to trigger the obligation to respond;<sup>8</sup>
- An insurer may not need to respond to a claim where the applicant candidly admits that he or she has simply applied for benefits from a randomly selected insurance company, without asserting any contractual relationship or nexus.<sup>9</sup>

The “sufficient nexus” approach was endorsed by the Court of Appeal in the fairly recent decision of *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*.<sup>10</sup> In that case, the Court observed that “the nature of the nexus or connection required to trigger the insurer’s obligation under section 2 will vary from case to case.” In keeping with that observation, the Court stopped short of any hard and fast rule, stating that it need not be precise about the extent of the connection required. Still, the Court expressed its “inclination to agree” with Arbitrator Jones in *Minister of Finance v. Royal & SunAlliance et al.*<sup>11</sup> wherein he expressed his view that “[o]nly in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay.”

In the case at hand, the facts create an apparent tension between two guiding principles that inform the inquiry into whether there is a sufficient nexus to trigger section 2 of the *Priority Regulation*. On the one hand, it is clear that no relationship exists or has ever existed between Mr. Danilov or Mr. Gnidenko and Unifund, other than the purported relationship created by the fraudulent pink insurance slip. On the other hand, it is also clear that Mr. Danilov’s decision to apply to Unifund was not random or arbitrary.

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<sup>7</sup> *Valauskas and Motor Vehicle Accident Claims Fund*, (FSCO A05-001749, June 20, 2007); affirmed on appeal by the Director’s Delegate at FSCO P07-00023, February 3, 2009

<sup>8</sup> *Brown, supra*, note 2; See also, *Bianca and Wawanesa Mutual Insurance Company*, (FSCO A03-001571, December 20, 2004)

<sup>9</sup> *Brown, supra*, note 2

<sup>10</sup> *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*, 84 O.R. (3d) 507 (Ont. C.A.)

<sup>11</sup> *Ontario (Minister of Finance) v. Royal & SunAlliance et al.*, (January 2003, Arbitrator Guy Jones)

Unifund submitted that the question of “sufficient nexus” is essentially an objective test and depends on a finding that at least *some* relationship, in fact, does or did exist between the applicant and the insurer. Unifund pointed out that, although the threshold is not a high one, all cases that have found a sufficient nexus have also found at least some past dealings between the applicant and the insurer. Even where an applicant’s state of mind or belief regarding the existence of a policy was given explicit consideration, there were past dealings between the parties that established the connection.<sup>12</sup> In short, whether the nexus is found on the basis of a mistaken belief, a lapsed policy<sup>13</sup> or merely an understanding formed during a telephone inquiry,<sup>14</sup> there still needs to be some connection, in fact, between the applicant and the insurer.

Unifund also submitted that it would be an undue burden, and ultimately unworkable, to require an insurer to investigate an applicant’s state of mind where there is no apparent objective indicia of a relationship, past or present.

Mr. Danilov and Economical respond that the case law is clear that the purpose of section 2 of the *Priority Regulation* is to ensure that injured persons receive accident benefits in a timely manner, even if they have chosen the wrong insurer to respond to their claim. The only bar is that their choice of insurer not be random or arbitrary. In that regard, it is necessary to look at all facts that informed the applicant’s choice of insurer, whether those facts speak to a relationship, in fact, or from which the applicant’s belief in a relationship may be inferred. As long as the decision to apply to a particular insurer was not random or arbitrary, then that insurer must respond to the claim, at least in the short-term. If that insurer believes that another insurer is responsible for payment of accident benefits, then it has available to it the other provisions of the *Priority Regulation* to seek redress. It is not, however, open to that insurer to refuse to respond to the applicant’s claims, and thereby frustrate the purpose of section 2, simply because it has arrived at the conclusion that there is no basis upon which it could be found responsible to pay benefits in the ultimate determination.

I prefer the position of Mr. Danilov and Economical on the facts of this case. Certainly, there can be no nexus where an applicant attempts to create a relationship by participating in a fraud.

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<sup>12</sup> *Rozmerets and Wawanesa Mutual Insurance Company*, (FSCO A01-000579, July 22, 2002)

<sup>13</sup> See, for example, *Brown*, *supra*, note 2

<sup>14</sup> *Moore and Kingsway General Insurance Company*, (FSCO A01-000580, January 28, 2002)

However, that is not the case here. In the absence of evidence that Mr. Danilov was complicit in any fraud, it is reasonable to infer from the agreed facts that Mr. Danilov relied on the information contained in the police report when he applied to Unifund. To borrow the phrase used in *Valauskas*, Mr. Danilov “turned his mind”<sup>15</sup> to the choice of insurer and applied to Unifund on the basis of the information available to him. No matter how incorrect or false that information turned out to be, Mr. Danilov’s choice of insurer was clearly not arbitrary or random. In my view, this was sufficient to establish the nexus necessary to trigger Unifund’s obligation to respond to Mr. Danilov’s application for accident benefits. To hold otherwise would risk compromising the predictability and integrity of the “pay now, dispute later” scheme envisioned by section 2 and undermine its purpose of extricating applicants from the consequences of choosing the wrong insurer. In arriving at this conclusion, I also draw support from the consumer protection objective of insurance legislation<sup>16</sup> and the requirement that its provisions be interpreted in a large and liberal manner consistent with its remedial purpose.<sup>17</sup>

With respect to Unifund’s concern that this decision will transform the nexus issue into a burdensome and unworkable inquiry into an applicant’s state of mind, I disagree. In most cases, the connection between the applicant and the insurer to whom he or she applies for accident benefits will be obvious on its face. Where the connection is not clear, I do not see anything inherently objectionable or unworkable in the proposition that the insurer receiving the application should make appropriate inquiries to ascertain what information and/or documentation, if any, the applicant based his or her belief that the insurer might be required to pay accident benefits. If the applicant is unable or unwilling to provide information that would explain the purported connection, the insurer may not be required to respond to the application.<sup>18</sup> If, however, the applicant provides a basis for his or her choice that is not random or arbitrary, then, it seems to me, the insurer must not act in a manner that will frustrate the purpose of section 2.

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<sup>15</sup> *Valauskas*, *supra*, note 7 at para. 28

<sup>16</sup> *Smith v. Co-operators General Insurance Company*, [2002] 2 S.C.R. 129

<sup>17</sup> *Legislation Act, 2006*, S.O. 2006, c. 21, subsection 64(1); see also, the former *Interpretation Act*, R.S.O. 1990, c. I.11, section 10

<sup>18</sup> In *Valauskas*, the applicant provided no evidence on how he came to the conclusion that recovery was not available against the insurers of any of the vehicles involved in the accident before submitting his application for benefits to the Motor Vehicle Accident Claims Fund that provides coverage as an insurer of last resort. As a result, the arbitrator reached the “inescapable inference” that Mr. Valauskas’ decision to apply to the Fund was arbitrary.

Where there has been an obvious mistake,<sup>19</sup> the first insurer may be able to sort out the matter with the applicant and another insurer, especially where there is only one other insurer involved (as in the case at hand) or it is clear which insurer will ultimately bear responsibility for paying accident benefits. If, however, the parties are unable to resolve the matter between themselves, for whatever reasons, the first insurer may still avail itself of the *Priority Regulation* to have an arbitrator determine which insurer is ultimately obligated to pay. The first insurer is not left without a remedy. The first insurer's obligation to pay benefits continues only until another insurer accepts responsibility or the matter is resolved through private arbitration. If the matter proceeds to arbitration and the first insurer is successful, it is *prima facie* entitled to its costs from the unsuccessful parties.<sup>20</sup>

While the process may require an insurer to make follow up inquiries of an applicant and conduct an investigation to determine if another insurer is liable to pay benefits, even where it is clear that the first insurer will not have to pay in the ultimate determination, this is an inconvenience and expense contemplated by the scheme.

For all of the above reasons, I find that Unifund is the first insurer to receive Mr. Danilov's completed Application for Accident Benefits, pursuant to section 2 of O. Reg. 283/95 to the *Insurance Act*.

**EXPENSES:**

The parties made no submissions on expenses. Should the parties be unable to resolve this issue, any party may request a determination in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

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Robert Bujold  
Arbitrator

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June 15, 2009

Date

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<sup>19</sup> Unifund gave the example of an applicant confusing RBC ("Royal") and Royal & SunAlliance.

<sup>20</sup> See section 9 of the *Priority Regulation*



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**Intervenor**

## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Unifund Assurance Company is the first insurer to receive Mr. Danilov's completed Application for Accident Benefits, pursuant to section 2 of O. Reg. 283/95 to the *Insurance Act*.
2. Should the parties be unable to resolve the issue of expenses, any party may request a determination in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

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Robert Bujold  
Arbitrator

June 15, 2009

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Date