

IN THE MATTER OF THE INSURANCE ACT,  
R.S.O. 1990, c. 1.8 SECTION 268 AND  
REGULATION 283/95 MADE UNDER  
THE INSURANCE ACT

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALLSTATE INSURANCE COMPANY

Applicant

-and-

YASUDA CANADA/CIGNA, ROYAL & SUNALLIANCE INSURANCE COMPANY, and the MOTOR  
VEHICLE ACCIDENT CLAIMS FUND and MARK ANTHONY BROWN

Respondents

Counsel for the Applicant, Allstate Insurance Company

Ian Kirby

Counsel for the Respondent, Yasuda Canada/Cigna

Jamie Trimble

Counsel for the Respondent, Royal & Sun Alliance Insurance Company

D'Arcy McGoey

Counsel for the Respondent, Motor Vehicle Accident Claims Fund

John Petrosioniak

Counsel for the Respondent, Mark Anthony Brown

David Payne

This arbitration addresses the entitlement, if any, of Mark Anthony Brown to statutory accident benefits as a result of serious injuries sustained in a motor vehicle accident on September 2, 1996. The accident happened in the state of New York. At the time of the accident Mr. Brown was a passenger in a 1994 Nissan Pathfinder which was registered in the name of Nissan Canada Finance Inc. (hereinafter referred to as "NCFI"). The vehicle had been leased by NCFI to Leanora Brown, mother of Mark Anthony Brown, on or about May 18, 1994. In fact the de facto lessee of the Pathfinder was Mark Anthony Brown and he was responsible for payment of all expenses associated with the Pathfinder including lease payments and automobile premiums. There is no dispute that the Pathfinder was insured by the applicant, the Allstate Insurance Company, during the period May 18, 1994, to May 18, 1996 with the named insureds being Nissan Canada Finance and Leanora Brown, Lessee. There is a substantial issue as to whether the vehicle continued to be insured by the Allstate Insurance Company after May 18, 1996 and more particularly as of September 2, 1996. NCFI, the Lessor of the Pathfinder, had contingent liability coverage pursuant to an SPF 8 standard lessor's contingent automobile policy issued by the Yasuda Fire & Marine Insurance

Company Limited with various endorsements attached thereto which was in full force and effect throughout the calendar year 1996. Yvonne Lai was designated as the principal driver on a standard policy of automobile insurance issued by the Royal & SunAlliance Insurance Company to her father, Stephen Lai, for the policy period September 30, 1995 to September 30, 1996.

As a result of the injuries sustained in the accident on September 2, 1996, Mark Anthony Brown filed no-fault application forms during the month of February 1997 in the following order:

Allstate, Royal, Yasuda and the Motor Vehicle Accident Claims Fund (hereinafter referred to as "the Fund").

The Allstate declined to pay statutory accident benefits on the basis that there was no valid policy of insurance in existence at the time of the accident, the policy having expired on May 18, 1996. Mr. Brown applied for mediation to the Financial Services Commission which closed all but the application served on the Allstate. The Allstate application proceeded to mediation which failed leading to an arbitration heard by Senior Arbitrator Frederika Rotter on May 29, 1997. The Senior Arbitrator ordered Allstate to pay interim statutory accident benefits on the basis that there was a prima facie case of sufficient connection between the Allstate and Mr. Brown to generate such an obligation. She further indicated that if the Allstate felt that it was not the insurer who was ultimately responsible for paying the benefits in this case it could proceed by a private arbitration under the *Arbitration Act* as provided by O.Reg. 283/95 to determine whether any other insurer or the Fund was responsible for payment of statutory accident benefits to Mr. Brown as a result of the accident of September 2, 1996. The decision of the Senior Arbitrator was appealed to the Divisional Court by Allstate Insurance Company and their application was dismissed by way of a Judgement dated June 9, 1998. The above forms a backdrop for the private arbitration held before me between April 12 and April 15, 1999.

All parties (save and except the Fund) agree that the determination of both the responsibility for payment and the priority of payment of no-fault benefits is set out in Section 268 of the *Insurance Act* which provides:

268 (1) Every contract evidenced by a motor vehicle liability policy, including..... shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

268 (2) The following rules apply for determining who is liable to pay no-fault 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 11, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose,
  - (iv) if recovery is unavailable under subparagraph i, ii, or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

268 (3) An insurer against whom a person has recourse for the payment of no-fault benefits is liable to pay the benefits.

Hence the parties before me all agree that I am to decide the following issues:

1. Was there a valid policy of insurance issued by the Allstate Insurance Company to NCFI and Leanora Brown in effect as of September 2, 1996?
2. Was there a valid policy of insurance issued by Yasuda Canada/Cigna pursuant to which Mark Anthony Brown could recover accident benefits as a result of his accident of September 2, 1996?
3. Did the policy issued by Royal & SunAlliance Insurance Company to Stephen Lai under which Yvonne Lai was designated as a principal driver allow access to Mark Anthony Brown for statutory accident benefits?

4. Does Mark Anthony Brown have recourse for statutory accident benefits to the Motor Vehicle Accident Claims Fund?

Hypothetically if a finding is made by me that the Allstate Insurance Company had a valid policy of insurance in effect as of September 2, 1996, it is unnecessary for me to address the potential legal responsibility of any of Yasuda/Cigna, Royal & SunAlliance and the Fund. Notwithstanding that fact, all the parties have agreed that regardless of the determination of liability made as against any particular insurer, I am being asked to decide the potential liability of all of the insurers and the Fund. I propose to deal with the liability of each insurer and the Fund in the order of the priority set out in Section 268 (2) of the *Insurance Act* namely, the Allstate Insurance Company, Yasuda Canada/Cigna, Royal & SunAlliance Insurance Company and the Fund. It was agreed during the course of the arbitration that under no circumstances could Mark Anthony Brown qualify for payment of statutory accident benefits by the Respondent, Yasuda Canada/Cigna, and as such their counsel withdrew from the proceedings on the basis that any claim for accident benefits by Mr. Brown was being abandoned as against that insurer and any assertion by any of other parties in the arbitration that Yasuda Canada/Cigna was the proper payer of statutory accident benefits was abandoned. As such this decision will address the legal liability, if any, of the Allstate Insurance Company, Royal & SunAlliance Insurance Company and the Fund to pay statutory accident benefits to Mark Anthony Brown.

#### Allstate Insurance Company

To properly determine the potential liability of the Allstate Insurance Company to pay statutory accident benefits, it is necessary to review the entire history of insurance dealings between the Brown family and the Allstate Insurance Company. Leanora Brown who owned her own vehicle, a Chevrolet Lumina, had had prior insurance dealings with Mr. Mark West, an Allstate Company agent. When her son, Mark, became the defacto lessee of the Nissan Pathfinder, she and Mark went to meet Mr. West during the month of May 1994 to arrange insurance on the Pathfinder. Although Mrs. Brown and Mark indicated that it was made quite clear to Mr. West that the Pathfinder was in fact Mark's vehicle and he would be driving it at all times and that he would be responsible for all insurance costs, the application for insurance completed with respect to the Pathfinder on May 17, 1994 (see Tab 1 of Exhibit 11), makes no reference to Mark Brown whatsoever and describes Leanora Brown as the only driver of the Pathfinder. It is interesting to note that

no allegation of misrepresentation is being made by Allstate in these proceedings. A policy of insurance was issued by the Allstate Insurance Company for a six month term effective from May 18, 1994 to November 18, 1994 with NCFI and Leanora Brown, Lessee described as the named insureds. At the time of issuing the policy of insurance Mr. West gave Leanora Brown the option to pay the automobile insurance premiums on a monthly basis pursuant to automatic withdrawals from her bank account. She elected this option and provided a void cheque drawn on an account in the joint names of Keith Brown and Leanora Brown at the Toronto-Dominion Bank, Account No. 0267625 along with a monthly payment plan authorization authorizing the Toronto-Dominion Bank to debit her account for all payments to the Allstate Insurance Company of Canada in payment of her insurance premiums. At this point reference should be made to Regulation 664 of *the Insurance Act*, Section 3 (4) which reads as follows:

As a precondition for permitting an insured to pay the premium in instalments an insurer may (my emphasis) require that the insured,

- a) make an initial payment equal to two monthly instalments of the premiums;
- b) agree to make all payments under the contract by preauthorized payments from the insured's account at a financial institution.

Based on the financial records of the Allstate Insurance Company, it appears that a two month payment was made by Leanora Brown at the inception of the insurance term and subsequent monthly payments were withdrawn from her account uneventfully during the first six month term of the policy. The evidence of both Mrs. Brown and Mark was to the effect that although the payments were being withdrawn from her account during this time period, she was being reimbursed by her son for the cost of the premiums. On or about October 28, 1994, a Renewal Offer was forwarded by the Allstate to NCFI and Leanora Brown, Lessee to renew the policy of insurance effective from November 18, 1994 to May 18, 1995 with no increase in premium. Enclosed with this letter were pink slips for the relevant policy period. Either noted just above or just below the pink slips were the following words:

MOTOR VEHICLE LIABILITY CARDS ARE EFFECTIVE ONLY IF AUTOMOBILE INSURANCE  
OFFER IS ACCEPTED. IF OFFER NOT ACCEPTED PLEASE RETURN OR DESTROY THE  
MOTOR VEHICLE LIABILITY CARDS.

Immediately below the above words was the following:

IT IS TIME FOR YOU TO RENEW YOUR AUTOMOBILE INSURANCE COVERAGE. UNLESS RENEWED, YOUR PRESENT POLICY WILL EXPIRE ON NOVEMBER 18, 1994. IN ACCORDANCE WITH YOUR MONTHLY PAYMENT PLAN AUTHORIZATION, THIS RENEWAL OFFER WILL BE DEEMED TO BE ACCEPTED AND YOUR PROTECTION WILL CONTINUE TO MAY 18, 1995 UNLESS WE RECEIVE WRITTEN NOTIFICATION THAT YOU DO NOT ACCEPT THIS OFFER. (my emphasis)

Immediately following the above, the Renewal Offer contained the following words:

#### YOUR MONTHLY PAYMENT PLAN

YOU REMAIN ENROLLED IN OUR MONTHLY PAYMENT PLAN. YOUR TOTAL POLICY PREMIUM FOR THIS POLICY PERIOD IS ON THE LEFT SIDE OF THIS RENEWAL OFFER. YOUR NEW MONTHLY PAYMENTS WILL BE DEBITED TO YOUR BANK ACCOUNT AND WILL BE \$215.85, WHICH INCLUDES A SERVICE FEE AND PROVINCIAL TAX. YOUR WITHDRAWAL WILL BE NO EARLIER THAN NOVEMBER 22, 1994. SUBSEQUENT WITHDRAWALS WILL BE \$107.92. IF YOU DO NOT ACCEPT THIS RENEWAL OFFER, ALL WITHDRAWALS MADE FOR THIS NEW TERM WILL BE REFUNDED.

As is apparent from the above, if the insured is paying his or her premiums pursuant to the monthly payment plan (hereinafter referred to as the MPP), the policy is deemed to be renewed at the end of the policy period unless he/she notifies the Allstate in writing of the fact that he/she does not wish to extend the insurance coverage.

The first payment due under the policy period November 18, 1994 to May 18, 1995 could not be withdrawn by the Allstate because of insufficient funds in the account of Mrs. Brown. A letter was forwarded by Allstate to NCFI and Leanora Brown, Lessee advising of that fact dated November 28, 1994 and further advising that Mrs. Brown had been removed from the MPP and that there was a present outstanding balance owing of \$664.65 which amount represented a payment of the total premium for the entire policy period including a \$25.00 service fee. On or about December 4, 1994, a Notice of Termination was forwarded by Allstate by registered letter to NCFI and Leonora Brown, Lessee advising that the policy would

terminate on December 25, 1994, with an attached Offer of Reinstatement offering to immediately reinstate the policy after cancellation with payment of the sum of \$664.65. Although there was little or no evidence adduced with respect to these events, a letter dated December 29, 1994 was sent by Allstate to NCFI and Leanora Brown, Lessee advising that the coverage on the policy had been reinstated as of December 25, 1994 with no lapse with the words "Please disregard the last notice of cancellation that we sent to you". (See Tab 12 of Exhibit 11.) Prior to that letter Mr. Brown had presumably attended at the offices of the Allstate and had provided them with a void cheque on his own account number C045308 at the National Bank Mortgage Corporation and an MPP authorization form dated December 16, 1994 authorizing the bank to debit all payments to the Allstate Insurance Company of Canada in payment of insurance premiums. It appears from reviewing the accounting history of the Allstate (see Tab 40 of Exhibit 11) that a payment was made by Mr. Brown in the amount of \$348.82 on or about December 28, 1994. Although it must have been apparent to the Allstate that Mr. Brown was responsible for payment of the insurance premiums (he having supplied a void cheque and MPP Authorization form in December 1994), all future correspondence with respect to the account continued to be addressed by the Allstate to NCFI and Leanora Brown, Lessee.

On or about March 28, 1995, a letter was forwarded by the Allstate to NCFI and Leanora Brown, Lessee, indicating that they have been unable to withdraw the sum of \$109.70 from the bank because of insufficient funds. The letter advised that the Allstate had removed Mrs. Brown from the MPP and that there was an outstanding balance on the account of \$134.40 which included a service fee of \$25.00. Although there was no evidence whatsoever during the course of the arbitration proceedings as to how this event occurred, Mr. Brown, in some fashion was reinstated to the MPP prior to the renewal of his coverage on May 18, 1995. He was initially sent a Renewal Offer dated April 12, 1995 for the period May 18, 1995 to November 18, 1995 which indicates he was not on the MPP and required him to either pay his premium in full or to apply to be put on the MPP (see Tab 20 of Exhibit 11). However, a revised Renewal Offer dated May 16, 1995 for the period May 18, 1995 to November 18, 1995 was forwarded to NCFI and Leanora Brown, Lessee, indicating that he was on the MPP and as such unless he rejected the Renewal Offer in writing he would be deemed to accept the Renewal Offer and his insurance coverage would continue. Again, there was no evidence to explain the events that took place between March 28, 1995 and May 18, 1995 as to how Mr. Brown was reinstated to the MPP. There was no evidence in the Allstate file apparently of either a further void cheque or new Authorization form having been supplied by Mr. Brown during this period.

On or about September 28, 1995, a letter was sent by the Allstate to NCFI and Leanora Brown, Lessee, indicating that they had been unable to withdraw \$113.43 because of insufficient funds in the account and the letter included a warning that Mrs. Brown would be taken off the MPP if there were future defaults. The policy was renewed for the period November 18, 1995 to May 18, 1996, pursuant to an Offer of Renewal issued October 13, 1995 with the coverage being renewed automatically as the policy was still on the MPP which again involved no positive step being taken by Mark Anthony Brown to renew the policy.

On or about January 29, 1996, a letter was sent by the Allstate to NCFI and Leanora Brown, Lessee, indicating that they have been unable to withdraw the amount of \$119.45 for the following reason:

RETURN CHQ - NTP REINSTATEMENT SIGNATURE(S)  
UNAUTHORIZED.

The letter went on to provide that the Allstate had removed Mrs. Brown from the preauthorized chequing plan and if she wished to continue on the plan, they required three things:

1. A new void cheque.
2. An Authorization form for an active account.
3. A payment in the amount of the returned item (\$119.45).

Prior to this letter having been sent, in the Allstate files (see Tab 42 of Exhibit 11), there is an entry made by Barbara Armstrong which is described as Memo 10 dated January 26, 1996 which reads as follows:

INSURED CALLED TO ADVISE THAT THE BANK WILL RETURN THE 01.22.96  
PAYMENT. INSURED IS GOING TO AN AGENT'S OFFICE 01.26.96 TO REPLACE THE  
CHEQUE - DO NO REMOVE FROM MPP. (my emphasis)

Leonore Haus who was identified as a Coverage Investigation Specialist for the Allstate was called as a witness by the Allstate at the arbitration. She stated that the letter of January 29, 1996, was automatically generated by the computer as a result of the cheque of January 22, 1996 bouncing and would be done without knowledge of the dealings between Barbara Armstrong and Mr. Brown on January 26, 1996. On or about February 1, 1996, Allstate mailed by registered mail a Notice of Termination advising NCFI and

Leanora Brown, Lessee, that the policy would terminate on February 22, 1996. Attached thereto was an Offer to Reinstate the policy immediately after cancellation upon payment of the sum of \$357.80. Mark Anthony Brown who gave evidence in the arbitration acknowledged receipt of both the letter of January 29, 1996 and the Notice of Termination dated February 1, 1996. He was unable to state which of these pieces of correspondence prompted him to go to the Allstate office but he indeed did so on February 16, 1996 meeting with William Ball, an Allstate agent at the Allstate Head Office which is located at Highways 404 and 7. His evidence was that prior to attending at the office, he had spoken to some unidentified person at the Allstate who had told him that if he paid \$120.00 and brought in a void cheque with him and signed a Preauthorization Monthly Payment Plan form, that he would be reinstated under that payment scheme. His evidence was that at the meeting he paid Mr. Ball the sum of \$120.00, provided him with a void cheque and signed a Preauthorization Monthly Payment Plan form. The Allstate accounting records indicate receipt of a cheque in the amount of \$120.00 on February 16, 1996. A letter dated February 16, 1996 was sent by the Allstate to NCFI stating:

We recently sent you notification that the policy for our insured named above was going to terminate for non-payment unless a payment was received.

I am pleased to advise that a payment was received and the policy remains in force with no lapse in coverage.

In the Allstate file (see Tab 42 of Exhibit 11), there is an entry designated as Memo 11 made by Sue Delafranier which reads:

REC'D MPP INFORMATION - INS'D DID NOT SIGNED THE AUTHORIZATION FORM. SENT TO AGENT.

Allstate mailed by registered mail a Notice of Termination dated February 27, 1996 advising NCFI and Leanora Brown, Lessee, that the policy would be terminated effective March 9, 1996 with an Offer to Reinstate attached thereto indicating that the policy would be reinstated immediately after cancellation upon payment of the sum of \$242.30. Mr. Brown acknowledges receiving this Notice of Termination, although he has no specific recollection of what if any steps he took thereafter in terms of payments on the auto policy. The accounting records of the Allstate indicate that the sum of 224.00 was paid on March 20, 1996. Although Mr. Brown was somewhat unclear on the specific details, it was his evidence that it was

his understanding that based on his telephone conversation with the representatives of the Allstate and his personal meetings with the agents of the Allstate that he had paid his policy in full for the policy period ending May 18, 1996 and that he remained on the MPP and starting in May of 1996, his monthly premiums would be withdrawn automatically from his bank account as they had in the past. The next activity on the policy appears to be an Offer to Renew the insurance on the Pathfinder for the period of May 18, 1996. The documents that were forwarded by the Allstate under cover of letter dated April 12, 1996 to the Brown residence were marked as Exhibit 4 during the course of the arbitration proceedings. Those documents indicate that the total premium including tax was \$750.78 which could either be paid in full or by way of a partial payment of \$387.26 with a payment due date of May 13, 1996. There was also a form attached headed Allstate Monthly Payment Plan allowing one to enroll in this plan indicating that there would be moneys withdrawn automatically from your bank account with the first withdrawal to be two months premium or \$260.10 and subsequent monthly premiums of \$124.10. Also included in the package of documents identified as Exhibit 4 were pink slips naming NCFI and Leanora Brown, Lessee, as insureds for the policy period May 18, 1996 to November 18, 1996 with the words noted below:

MOTOR VEHICLE LIABILITY CARDS ARE EFFECTIVE ONLY IF TI-HS AUTOMOBILE  
INSURANCE OFFER IS ACCEPTED. IF OFFER NOT ACCEPTED, PLEASE RETURN  
OR DESTROY THE MOTOR VEHICLE LIABILITY CARDS.

The payment notice which outlined the alternative payment schemes as described above, i.e. the one lump sum payment or the partial payment had the following words thereon which were capitalized:

DISREGARD BILL. THE FIRST OPERATOR HAS BEEN BILLED.

There was some issue initially as to whether that phrase, "Disregard Bill. The first operator has been billed." would have been included on the material sent to the Brown residence but it was conceded by Ms. Haus in her evidence that indeed that phrase would have been on the material sent to the Brown residence.

Mr. Brown acknowledged receipt of the letter of April 12, 1996 with enclosures. His evidence was that he felt he had no need to respond to this letter because of his meeting with Mr. Ball in February of 1996 and his understanding that he was already on the MPP and that it was not necessary for him to send in any forms or any cheque or payment at this point in time and that he assumed that the policy premiums

commencing in May 1996 would be automatically deducted from his account. On May 28, 1996 (ten days after the alleged expiration of the policy), Allstate sent a letter to NCFI and Leanora Brown, Lessee headed RENEWAL REMINDER indicating that they had not received a response to the Renewal Offer and that Mrs. Brown is a valued customer and that they are extending every opportunity to continue her insurance protection with Allstate and requesting her to contact an Allstate agent.

It was the evidence of both Mrs. Brown and Mark Anthony Brown at the arbitration that although all of the correspondence was being addressed to Leanora Brown that these letters would automatically be passed on to Mark Anthony Brown for his attention. Mrs. Brown said that anything that had the word Nissan on it, she knew involved the Pathfinder which was Mark's vehicle. The evidence is that Mr. Brown was living at all relevant times with his parents. Mr. Brown denies ever receiving the letter of May 28, 1996 and says had he done so he would immediately have contacted the Allstate. Both Leanora Brown and Mr. Brown deny receiving any communication from NCFI to the effect that there was no insurance on the Pathfinder.

No monies were withdrawn by the Allstate Insurance Company from Mr. Brown's account for insurance premiums for the period May 18, 1996 up to November 18, 1996. It was during this period that the accident occurred on September 2, 1996 giving rise to the claim for statutory accident benefits. Mr. Brown's bank records for the period May 1, 1996 to and beyond September 2, 1996 were filed as Exhibit 5 during the arbitration proceedings. It is apparent from the review of those bank records that Mr. Brown maintained a very small balance in the account over the period May through September of 1996. However, from the review of the bank records, it appears if a withdrawal had been made by the Allstate on May 22, 1996 which would have been the effective date of the first withdrawal, there were sufficient funds to cover that withdrawal. It appears thereafter it is questionable whether there would have been sufficient funds in the account to cover any subsequent attempts to withdraw had such attempts been made by the Allstate.

Mr. Kirby, counsel for the Allstate takes the position that Mr. Brown had been removed from the MPP pursuant to the letter of January 29, 1996 and never been reinstated to the MPP prior to May 18, 1996 and as such, when his policy came up for renewal at that time there was a positive obligation upon him to respond to the Offer of Renewal made by the Allstate and by his failure to do so the policy had simply lapsed or expired on that date. As a corollary to that argument the policy having simply expired on May 18, 1996, there is no requirement on the Allstate to send out a Notice of Termination letter by registered mail to the Brown residence and NCFI. Mr. Kirby further states that with respect to Memo 10, the entry of Barbara

Armstrong dated January 26, 1996, the only reasonable interpretation of that memo is that for Mr. Brown to remain on the MPP required him to attend at an agent's office on that very date and failure to do so meant that he was not going to be reinstated to the MPP. In addition Mr. Kirby states that the Allstate required three things for someone to be reinstated to the MPP namely:

1. A void cheque
2. A signed Preauthorization form
3. Payment for two months premium.

Mr. Kirby says there is no evidence of a void cheque and certainly no evidence of a signed Preauthorization form. In that regard Mr. Kirby dismisses the entry of Sue Delafranier at Memo 11 on February 23, 1996 as that simply refers to an unsigned Authorization form which he says has no force and effect. Mr. Kirby goes on to submit that any reasonable person receiving the letter of April 12, 1996 would have read same and it would have been abundantly apparent to Mr. Brown that he was not on the MPP and that he had an obligation to respond in a positive way to Offer to Renew had he wished his policy to continue after May 18, 1996. That position of course is confirmed says Mr. Kirby by the letter of May 28, 1996 from the Allstate to the Brown residence indicating that they have not had any response to their Offer to Renew. Finally Mr. Kirby states that the fact that no monies were withdrawn from Mr. Brown's account starting in May 1996 was a fact that had to be known to Mr. Brown and is more consistent with Mr. Brown's belief that he was no longer insured than with a belief that he indeed continued to remain on the MPP. With respect to the meeting of February 16, 1996 between Mr. Brown and Mr. Ball, the fact of the meeting itself was not disputed by Mr. Kirby or the Allstate although there is a denial of assertion that Mr. Ball was not called as a witness during the course of the arbitration. There was evidence adduced through Ms. Haus that Mr. Ball had been spoken to by a Kevin McConkey, a claims manager of the Allstate, in April of 1997 at which time Mr. Ball apparently stated that he had no specific recollection of what took place during the meeting of February 16, 1996 with Mr. Brown.

The question then to be decided is, was Mr. Brown still on the MPP as of May 18, 1996 and/or was it reasonable for him to believe that he was on the MPP as of May 18, 1996? If either of those questions are answered in the affirmative, Mr. Brown's policy of insurance would have been automatically renewed on May 18, 1996 and would have been in full force and effect on September 2, 1996 in the absence of a Notice of Termination being sent by registered mail to Mr. Brown by the Allstate. It is conceded that no Notice of

Termination was ever sent by the Allstate during this timeframe.

After a careful review of all of the evidence particularly involving a close scrutiny of the Allstate productions, I have concluded that Mr. Brown was probably still on the MPP as of May 18, 1996 (by this I mean it was not the intention of the Allstate personnel to remove Mr. Brown from the MPP even though the Allstate computer may have done so), and certainly it was reasonable for him to have concluded that he was on the MPP and as such his policy of insurance did not expire on May 18, 1996 and was in full force and effect on September 2, 1996. I have reached that conclusion for the following reasons:

1. There was no consistent treatment of reinstating Mr. Brown to the MPP during his tenure of insurance with the Allstate. Specifically when he was reinstated to the plan in the period March through May of 1995, there appeared to be no requirement for a further void cheque or a signed Preauthorization form. As such the absence of that documentation during the period of February/March 1996 in my view is not a relevant consideration in assessing the credibility of Mr. Brown's evidence about the meeting on February 16, 1996 with Mr. Ball.
2. Mr. Brown's evidence as to the events in the months of January and February 1996 seems to have substantial corroboration in Memos 10 and 11 in the Allstate file, the entries made by Barbara Armstrong and Sue Delafranier respectively. Ms. Armstrong's entry of January 26, 1996 specifically states DO NO REMOVE FROM MPP. The evidence of Mr. Brown was that he had indeed been given that assurance that he was not removed from the MPP by a representative of the Allstate which seems to be totally corroborated by this entry. Furthermore the letter of January 29, 1996 is a computer generated letter acknowledged by the Allstate to have been sent without knowledge of Ms. Armstrong's conversation with Mr. Brown on January 26. It was reasonable for Mr. Brown to have effectively ignored the letter of January 29, 1996 in light of his conversation some three days earlier with Ms. Armstrong.
3. Memo 11, the entry of Sue Delafranier of February 23, 1996 was some seven days after the meeting of February 16, 1996 with Mr. Ball and it specifically refers to receiving MPP information. That appears to completely corroborate Mr. Brown's evidence that he provided "MPP information" to Mr. Ball during the meeting some seven days earlier.

4. Neither Ms. Armstrong nor Ms. Delafranier were called as witnesses in this proceeding although both are still in the employ of the Allstate. I have drawn an adverse inference as to the failure of both of these ladies to give evidence and as such I have applied a favourable but entirely plausible interpretation of Memos 10 and 11 in assessing Mr. Brown's evidence as to the events of January through May 1996.
  
5. I also have drawn an adverse inference against the Allstate for the failure to call Mr. Ball as a witness. The events of the meeting between Mr. Brown and Mr. Ball on February 16, 1996 are critical to any determination as to the existence of coverage for Mr. Brown after May 18, 1996. Although I am sensitive to the problems of insurance agents remembering the precise details of a discussion held years earlier with one of I am sure hundreds of clients, Mr. Ball could have given evidence as to the Allstate corporate policy about the reinstatement of defaulting insureds to the MPP. For example, he may have indicated under no circumstances would he have reinstated Mr. Brown to the MPP in the fashion as alleged by Mr. Brown. Ms. Haus was totally unable to give any evidence on this issue during the course of the arbitration. As noted earlier there appears to be no real consistency in the method used by Allstate to reinstate people to the MPP based on the two year insurance history it had with Mr. Brown.
  
6. Mr. Brown had gone through three renewals of his automobile insurance prior to the renewal of May 18, 1996. On each of those occasions he was not required to do anything to extend his insurance coverage and indeed he was deemed to have done so unless he specifically rejected the extension of coverage in writing. That is so even though included in each of these renewal notices right underneath the pink slips contained therein were the following words:

MOTOR VEHICLE LIABILITY CARDS ARE EFFECTIVE ONLY IF AUTOMOBILE INSURANCE OFFER IS ACCEPTED. IF OFFER NOT ACCEPTED PLEASE RETURN OR DESTROY THE MOTOR VEHICLE LIABILITY CARDS.

If it was reasonable for Mr. Brown to have ignored that boldly written directive, which is what Allstate expected him to do, why was it not reasonable for him to have ignored similar directives in the April 12, 1996 Offer of Renewal) That is particularly true when on the payment notice included in the April 12, 1996 Offer to Renew are the following words:

DISREGARD BILL. THE FIRST OPERATOR HAS BEEN BILLED.

The Offer to Renew of April 12, 1996 and the subsequent letter of May 28, 1996, have to be viewed in light of the past insurance history between Mr. Brown and the Allstate and particularly the events of January 26 through February 23, 1996. Both these documents are computer driven and seem incongruous and inconsistent with specific entries made by both Ms. Armstrong and Ms. Delafranier.

7. What about Mr. Brown not noticing that the premiums were not deducted from his bank account in the four month period prior to the accident? As noted earlier, there was sufficient funds in Mr. Brown's account to cover the two months of premium due on May 22, 1996. Therefore in fact we are looking at a three month period over which perhaps funds were not available in the account to cover the insurance premiums had attempts been made to withdraw monies from the account by the Allstate. The fact of the matter is Mr. Brown was running close to the line with his finances as evidenced by his not infrequent defaults on premium payments in the past. As and when he would go into default he would expect to receive a notice from Allstate advising him of that fact and he would bring his account into good standing. There is no evidence before me to expect that practice would not have continued after May 18, 1996. Mr. Brown was employed full time throughout the period of May to September 1996 with Bell Canada and although financial management was a problem for him, he had always paid his premiums in the past.
8. I was asked by Mr. Kirby to conclude that the payment of \$750.78 on December 29, 1996 representing the full amount of the insurance premium for the period May 18 to November 18, 1996 well after the date of the accident is evidence of his knowledge of the fact he was not insured by the Allstate. It is important to note that this payment was made by Mr. Brown upon advice of his legal counsel. Certainly the payment is evidence that he knew he had made no payments towards insurance for that period as of December 1996 but it is not determinative nor indeed of little value in ascertaining his belief as to his insurance status for the period May 18 through September 2nd, 1996.

Having concluded that the Allstate policy had not on the balance of probabilities expired on May 18, 1996 and/or it was reasonable for Mr. Brown to conclude that it had not expired, with no formal

notice of termination having been sent by the Allstate to Mr. Brown (via his mother), Mr. Brown is an insured person under the Allstate policy as defined by the Statutory Accident Benefit Schedule and has recourse against the Allstate for payment of the benefits therein.

Royal & SunAlliance

Although I have found that the Allstate is responsible for payment of statutory accident benefits to Mr. Brown, I propose to address the potential legal liability of Royal & SunAlliance to pay statutory accident benefits to Mr. Brown as per the request of all of the parties in this proceeding.

Pursuant to the decision of the Court of Appeal in *Warwick v. Gore Mutual* to determine entitlement for no-fault benefits one must start by looking at the definition of an insured person within the No-Fault Schedule. Pursuant to the Schedule an insured person is defined as follows:

- a) The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependent of the named insured or spouse, if the named insured, specified driver, spouse or dependent,
  - i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile, or
  - ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside of Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependent or spouse's dependent,
- b) In respect of accidents in Ontario, the person who is involved in an accident involving the insured automobile, or
- c) In respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the sixty days before the accident.

The only provision of the above definitions that might apply to Mr. Brown is subparagraph (c).

The next question is was Mr. Brown an occupant of the insured automobile (my emphasis). In addressing this question one must look to Section 2 of the owner's policy - O.A.P. No. 1 where automobiles are defined as:

- a) Described automobile
- b) Newly acquired automobiles
- c) Temporary substitute automobiles
- d) Other automobiles.

Clearly the Nissan Pathfinder is not a described auto under the Royal & SunAlliance policy nor was it a newly acquired automobile and the evidence was that the Pathfinder was not used as a result of any breakdown, repair, theft, etc. of the Lai Honda and accordingly the Pathfinder was not a temporary substitute automobile. As such, the question then becomes, was the Nissan Pathfinder an "other automobile"?

Other automobiles are defined in Section 2 as follows:

Automobiles, other than a described automobile, are also covered when driven by you, or your spouse who lives with you.

In the definition section of the standard automobile policy, we and you is defined as follows:

Throughout this policy the words you and your refer to the person or organization shown on the certificate of automobile insurance as the named insured.

The named insured is defined in the definition sections of the owner's policy as:

The named insured is the person or organization to whom a certificate of automobile insurance is issued.

The Royal & SunAlliance policy was issued to Stephen Lai and as such following this chain Mr. Brown does not qualify for statutory accident benefits under the Royal & SunAlliance policy.

Another possible approach is to refer back to the definition of we and you which in addition to the terms as set out above, includes the following words:

Other people may also be covered under certain conditions. We call both them and you insured persons (my emphasis).

Referring to Section 4 of the Ontario automobile policy which provides for accident benefit coverage under the heading who is covered, it provides the following:

For the purposes of Section 4, insured person is defined in the Statutory Accident Benefit Schedule. In addition, insured persons are also involved including any person who is injured or killed in an automobile accident involving the automobile.....

Even following this alternative route, one is again brought back to the definition of an insured person in the Statutory Accident Benefit Schedule and also drawn back to the definition of automobile in the policy which takes me to my earlier conclusion that Mr. Brown is not qualified as an insured person under the Statutory Accident Benefit Schedule and is therefore not eligible to receive statutory accident benefits from the Royal & SunAlliance Insurance Company.

I have been asked by Mr. Payne, counsel for Mr. Brown, to rectify the insurance contract between Mr. Stephen Lai and the Royal & SunAlliance covering the period September 30, 1995 to September 30, 1996 and to describe Yvonne Lai as a named insured on that policy.

In the case of *Sharom v. Sharom Estate*<sup>2</sup>, Madam justice Chapnik, when considering the issue of rectification of a life insurance policy stated the following:

In MacGillivray and Parkington on Insurance Law, 8th edition, at p. 458 the issue of rectification, in such circumstances, is reviewed, in part, as follows:

There is a presumption that a policy which is issued by the insurers and accepted by the assured contains the complete and final contract between the parties.

Consequently, the courts' equitable jurisdiction to rectify insurance policies is exercised with restraint inside certain well established limitations, or else it would tend to destroy certainty in the insurance business. When a plaintiff seeks rectification, he must establish as a fact that the parties were agreed upon the

point in question, and that the policy accidentally fails to record their agreement.

It is argued that when the insurance on the 1995 Honda which was registered in the name of Stephen Lai but almost exclusively driven by Yvonne Lai was placed, it was clear the person being insured was Yvonne Lai. That is why the risk was written through the facility association and the premium was so high (in excess of \$5,000.00). As such Yvonne Lai should be treated as if she is the named insured under the Royal & SunAlliance policy which would result in Mark Anthony Brown being eligible for SABS under that policy. It is further argued that that is particularly so if an O.P.C.F. 2 endorsement had been added to the policy which could have been done for the nominal cost of \$10.00 which would have resulted in her being treated as if she was a named insured under the policy.

The fact is Yvonne Lai is not the named insured nor was an O.P.C.F. 2 purchased. The law has clearly recognized a distinction between a named insured and a principal driver [see *Collins v. Wright* (Ont.C.A.)]<sup>3</sup>. I, like the Court of Appeal in the *Collins* case, am not prepared to elevate Yvonne Lai's status to that of a named insured. Nor am I prepared to grant rectification of the Royal & SunAlliance policy for the following reasons:

1. Neither of the parties to the contract, Stephen Lai or Royal & SunAlliance Insurance have sought rectification.
2. Yvonne Lai has not sought rectification of the contract.
3. Yvonne Lai would have been fully covered for SABS under the Royal & SunAlliance policy had she been insured in the accident of September 2, 1996.
4. The protection of Mark Anthony Brown or any other passenger for full SABS coverage in circumstances such as prevailed in this case, was clearly never contemplated by any member of the Lai family at the time of taking out the Royal & SunAlliance policy.
5. The existence of an O.P.C.F. 2 endorsement which effectively provides the same coverage to a principal driver as a named driver when operating an "other automobile" makes it clear that that in the absence of this endorsement the principal driver has different insurance coverage under limited circumstances than a named insured.

Accordingly I conclude that Mark Anthony Brown does not have legal recourse against the Royal & SunAlliance Insurance Company for statutory accident benefits.

Motor Vehicle Accident Claims Fund

Clearly the Fund is the point of last resort for victims of automobile accidents, both in tort and for statutory accident benefits and the Fund is only called upon to pay in the event there is no insurance money available. In light of my conclusion that the Allstate is liable to pay Mr. Brown's statutory accident benefits, no recourse can be had against the Fund. However, in the event I am wrong in that finding and pursuant to the wishes of the parties to this proceeding, I propose to address the liability of the Fund to pay statutory accident benefits to Mr. Brown.

Prior to the introduction of the first no-fault scheme in Ontario on June 22, 1990, the Fund did not pay no-fault or accident benefits to victims of automobile accidents. Only innocent victims injured by uninsured motorists had recourse to the Fund subject to a statutory maximum payment of \$200,000.00. This statutory right of recourse for tort damages against the Fund is created by Section 4 (1) of the *Motor Vehicle Accident Claims Act* which reads:

Where the death of or personal injury to or loss of or damage to property of any person is occasioned in Ontario (my emphasis) by an uninsured motor vehicle, any person who would have a cause of action against the owner or driver of such uninsured motor vehicle, in respect of such death, personal injury, loss or property damage, except a person entitled to make an application under subsection 7 (1), may make application, In a form approved by the Director, for payment out of the Fund of the damages in respect of such death, personal injury, loss or property damage.

Included in Section 4 (1) is a clear territorial limitation on the Fund's responsibility namely the incident giving rise to death or injury must occur within the Province of Ontario. I am advised by Mr. Petrosoniak, counsel for the Fund, that Section 4 was not amended in any way with the passage of the OMPP legislation on June 22, 1990.

It is argued by Mr. Petrosoniak that the starting point in ascertaining the Fund's liability is the *Motor Vehicle Accident Claims Act*. Only after having determined that the Fund is legally liable pursuant to the provisions of the MVACA does one look to Section 268 of the *Insurance Act* which Mr. Petrosoniak says does not create liability but only creates an order of priority among insurers and the Fund. Continuing this reasoning, Mr. Petrosoniak says the issue of entitlement of any automobile accident victims to the Fund is governed by Section 4 of the Act and Section 6 of the *MVACA* which deals with statutory accident benefits is merely

a sub set of Section 4 and the territorial limitation of Ontario set out in Section 4 applies equally to Section 6. Alternatively Mr. Petrosniak argues that as the *MVACA* is Provincial legislation, it cannot apply to accidents outside of its provincial boundaries. Further he submits to extend the Fund's obligation to pay statutory accident benefits for accidents outside of Ontario would require the legislature to have expressly provided for that in the Act.

I disagree with the position of Mr. Petrosniak. The starting point in my view in ascertaining the legal liability of the Fund is Section 268 of the *Insurance Act* which although set out earlier in this decision will in part be repeated below.

**268. (2) Liability to pay.** The following rules apply for determining who is liable to pay no-fault 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 no-fault benefits arose,
  - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the *Motor Vehicle Accident Claims Fund*.

**268. (3) Liability.** An insurer against whom a person has recourse for the payment of no-fault benefits is liable to pay the benefits.

Section 6 (1) of the *Motor Vehicle Accident Claims Act* reads as follows:

6. (1) Any person who has recourse against the Fund for no-fault benefits, under section 268 of the *Insurance Act* may make application, in a form prescribed by the Minister, for payment out of the Fund of the benefits. R.S.O. 1990, c. M.41, s. 6(1).

In my opinion Section 6 (1) of the *MVACA* clearly indicates that the liability of the Fund to pay is created by Section 268 of the *Insurance Act* and Section 6 (1) merely outlines how one goes about applying for payment by the Fund. I draw comfort in that conclusion by reading Section 6 (2) (a) which provides:

6.(2) If a person has recourse against the Fund under section 268 of the *Insurance Act*,  
 (a) a reference to an insurer in the Statutory Accident Benefits Schedule shall be deemed to be a reference to the Fund and a reference to an insured person shall be deemed to be a reference to the person who has recourse against the Fund;

Again this provision clearly provides that the Fund stands in the same position as an insurer as far as the Statutory Accident Benefit Schedule is concerned. The Ontario Court of Appeal in *Prasad v. Gan Canada Insurance Co.*<sup>4</sup> in considering territorial limitations with respect to payment of statutory accident benefits by an insurer have effectively eliminated all territorial limitations and there is no issue in this case that an automobile insurer could raise a territorial limitation in terms of denying Mr. Brown's benefits, this accident having occurred in the State of New York.

In my opinion a review of both Section 268 of the *Insurance Act* and Section 6 of the *MVACA* in isolation does not warrant imposing a territorial limitation on the responsibility of the Fund to pay statutory accident benefits.

Should the territorial limitation of Section 4 of the *MVACA* be read into Section 6 of the *Act*? I think not. There is a legion of cases where the courts have held that accident Benefit provisions are remedial in nature and should be given a broad and liberal interpretation to the benefit of the injured person. To read a territorial limitation in Section 6 of the *Act* would be contrary to the spirit of those decisions. In my view if the legislature had intended to limit the Fund's obligation to pay statutory accident benefits to victims of accidents occurring only in Ontario, it could and would have clearly said so as it has done in Section 4 of the *Act*.

What about Mr. Petrosniak's submission that to extend the Fund's responsibility to pay statutory accident benefits to victims of accidents occurring outside of Ontario would be in effect "ultra vires" the provincial legislature? Unfortunately I was not provided with a great deal of law on this potentially complex constitutional question.

Mr. Petrosniak referred me to certain provisions of the Canadian Encyclopaedic Digest dealing with constitutional law and the limitations imposed by the Constitution on a provincial legislature. Within the material provided to me by Mr. Petrosniak, although not specifically referred to by him in his submissions, it includes the following:

But where the pith and substance of legislation is the protection of a right or interest within the province and the regulation of the enforcement of the common law tort of injury to that right or interest, it is intra vires the provincial legislature, notwithstanding that the harm against which the legislation is directed was set in motion outside the boundaries of the province. That the legislation might affect adversely rights arising outside the province is not necessarily fatal to its validity. Such legislation is not concerned with the existence of a right outside the province, but rather with the assertion and exercise of a right within it.

The authority for this passage is the decision of the Manitoba Court of Appeal in *R. v. Interprov. Co-Op Ltd.*<sup>5</sup> Although that decision was reversed by the Supreme Court of Canada<sup>6</sup>, it does not affect the underlying principle outlined above. The Supreme Court of Canada held that Manitoba legislation could not purport to regulate conduct in the provinces of Saskatchewan and Ontario and to that extent was ultra vires the Manitoba legislature.

The pith and substance of Section 268 of the *Insurance Act* and Section 6 of the *MVACA* is to protect the rights of victims of automobile accidents, who have no insurance available to them, to the level of protection provided by the Statutory Accident Benefit Schedule. Although the harm suffered by Mr. Brown was set in motion in the State of New York, the ongoing harm is occurring within the Province of Ontario. His rights to appropriate compensation within the Province of Ontario are validly a concern of the provincial legislature. Furthermore there is neither a party nor legislative body outside of Ontario affected by allowing Mr. Brown access to the Fund for payment of statutory accident benefits. After all Mr. Brown's entitlement to statutory accident benefits is not based on fault principles but merely the event of an automobile accident with resultant injury.

In conclusion then I find that Mr. Brown has legal recourse against the Motor Vehicle Accident Claims Fund for payment of statutory accident benefits.

In light of my earlier finding that the Allstate Insurance Company is responsible to pay accident benefits to Mr. Brown, my decision with respect to the Fund is in statutory accident benefits to Mr. Brown, my decision with respect to the fund is in fact somewhat academic. I repeat I made the decision with respect to the potential liability of the Fund at the request of all parties to this proceeding and confirm that the Fund is the point of last resort and based on the totality of my decision, is not obliged to respond to Mr. Brown's application for payment of statutory accident benefits.

I was authorized to award costs of the arbitration proceeding. It is my present inclination to order the Allstate Insurance Company to pay the cost of the arbitration including costs to the remaining insurers and the Fund, although I am open to receiving submissions from Mr. Kirby and other counsel on that issue.

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Terence J. Collier

April 20, 1999

**SCHEDULE TO THE DECISION OF  
TERENCE J. COLLIER  
EXHIBITS**

1. Business Card of Mark West
2. Business Card of William Ball
3. Pink Liability Certificates for the period May 18, 1996 to November 18, 1996.
4. Automobile Insurance Renewal Offer dated April 12, 1996.
5. National Bank Records of Mark Brown for the period May 2, 1996 to November 29, 1996.
6. Copy of Cheque dated December 30, 1996 payable to Allstate.
7. Original Cheque of Allstate dated January 7, 1997 payable to Nissan Canada.
8. Certificate of Superintendent of Financial Services re SPF No. 8 dated April 8, 1999.
9. Certificate of Superintendent of Financial Services re O.P.C.F. - 2 dated April 13, 1999.
10. Documentation sent to Nissan Canada Finance by Allstate on April 12, 1996.
11. Insurers Supplementary Brief.
12. Response to Application for Mediation.
13. Letter of Allstate dated March 18, 1997 to David Payne.
14. Yasuda Fire & Marine Gap Policy for NFCL.
15. Yasuda Fire & Marine Brief of Documents.
16. Broker Agreement between Facility Association - Royal and Agincourt Insurance Brokers.
17. Royal Document Brief.

**CASE AUTHORITIES TO THE DECISION OF  
TERENCE J. COLLIER**

1. *Warwick v. Gore Mutual Insurance Co.* [1997] 32 O.R. (3d) 76 (O.C.A.)
2. *Sharom v. Sharom Estate* [1992] O.J. N. 285
3. *Collins v. Wright* [1981] O.J. No. 389
4. *Prasad v. Gan Canada Insurance Co.* (1997), 33 O.R. (3d) 481 (C.A.)
5. *Regina v. Interprovincial Co-Operators Ltd.* [1973] W.W.R.(3d) 673 (Man. C.A.)
6. *Interprovincial Co-Operators Ltd. v. The Queen* 53 D.L.R. (3d) 321