**CITATION:** Zenith Insurance Company Ltd. v. Chubb Insurance Company of Canada 2025 ONSC 2452
**COURT FILE NO.:** CV-23-00701599
**DATE:** 20250422

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| ZENITH INSURANCE COMPANY LTD./NORTHBRIDGE GENERAL INSURANCE COMPANY | ) | *Amanda M. Lennox and Kara Ramnaraine* for the Applicant |
| APPLICANT | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| CHUBB INSURANCE COMPANY OF CANADA | ) | *Tim Crljenica*, for the Respondent |
| | ) | |
| RESPONDENT | | |
| | | **HEARD:** April 1, 2025 |

**REASONS FOR DECISION**

**PAPAGEORGIOU J.**

## Overview

[1] Zenith Insurance Company Ltd (“Zenith”), an Alberta insurer, appeals the decision of arbitrator Kenneth Bialkowski (the “Arbitrator”), who determined that Zenith was the priority insurer pursuant to s. 268(2) of Ontario’s *Insurance Act*, R.S.O. 1990, c. I.8 (the “*Insurance Act*”).

## Uncontradicted Facts

[2] Zenith is licensed to sell automobile insurance in Ontario and in Alberta.

[3] Zenith issued an insurance policy to the claimant, Ms. Morris, in Alberta in respect of her Lexus automobile (the “Lexus”).

[4] While in Ontario, in October 2021, her Lexus was stolen. She obtained a rental vehicle, a Hyundai, from Enterprise Rental Company to temporarily replace her vehicle. Chubb Insurance Company of Canada (“Chubb”) insured the Hyundai.

[5] On October 21, 2021, Ms. Morris was on her way to return the Hyundai to Enterprise when she had a car accident. She applied to Chubb for accident benefits.

[6] Chubb agreed to provide them, but initiated a priority dispute against Zenith, claiming that Zenith was required to pay these accident benefits.

[7] The Arbitrator concluded that the *Insurance Act* applied to Zenith, and that Zenith was the priority insurer required to pay the claimant Ontario accident benefits. The main basis of the Arbitrator's decision was that Zenith is licensed to sell insurance in Ontario, and the accident occurred in Ontario.

**Grounds of Appeal**

[8] Zenith raises a number of grounds of appeal. Its over-arching argument, however, is that the Arbitrator erred in law in his interpretation of the applicable sections of the *Insurance Act*. It argues that the issues before the Arbitrator were decisively determined by the Court of Appeal in *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382, 151 O.R. (3d) 78, and that he erred in failing to follow this binding authority. As part of this, Zenith also argues that the Arbitrator improperly took into account and referenced s. 33 of the Alberta *Insurance Act*, R.S.A. 2000, c. I-3, and that the Arbitrator's decision results in territorial over-reach.

**Decision**

[9] For the reasons that follow, I dismiss the appeal.

**Issue**

- Issue 1: Should the Court grant leave to Zenith to bring this appeal?
- Issue 2: Did the Arbitrator err in law in determining that the priority scheme in the *Insurance Act* applies, such that Zenith is the priority insurer who is required to pay accident benefits to the insured in this case?

**Analysis**

**Issue 1: Should the Court grant leave to Zenith to bring this appeal?**

[10] There is no signed arbitration agreement.

[11] Section 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, states that if an arbitration agreement does not deal with appeals on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:

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a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

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[12] The amount at issue is not significant as Chubb has only paid the claimant approximately $10,000 in accident benefits.

[13] However, the matter at stake is not the $10,000. The matter at issue is a straight question of law that affect's Ontario's insurance industry. I am satisfied that the importance of the matter justifies an appeal, and that the determination of the question of law will significantly affect the rights of these parties.

[14] I am also satisfied that the standard of review is correctness since the matter is a straight issue of law.

**Issue 2: Did the Arbitrator err in law in determining that the priority scheme in the *Insurance Act* applies such that Zenith is the priority insurer required to pay accident benefits to the insured in this case?**

**The Context**

[15] The regulation of automobile insurance is a provincial matter pursuant to s. 92 of the *Constitution Act*, *1867*. Each province establishes laws for the regulation of automobile insurance in their province and issues licenses to insurance companies to sell insurance.

[16] Some insurers are licensed to sell insurance in more than one province. People in Canada cross interprovincial borders at will, sometimes with their vehicles and sometimes without. Sometimes, individuals residing in one province and insured in that province have accidents in another province.

[17] Some provinces have taken steps to ensure the consistency of the coverage their residents have when driving in other provinces, including reciprocal legislation, as I will further outline.

**The No Fault Scheme and Relevant Provisions in Ontario's *Insurance Act***

[18] In or around 1990, Ontario's tort system for addressing automotive accident claims was replaced by a no-fault scheme for statutory accident benefits. The overall goal of the new system was to ensure that drivers involved in accidents would be able to obtain accident benefits quickly, so that they could obtain treatment quickly and recover, instead of waiting until the outcome of a tort action to obtain funds which could be used for treatment.

[19] Section 268 of the *Insurance Act* compels insurance companies to pay accident benefits to insured parties as part of the no-fault scheme.

[20] Section 268(1) provides the following:

> **Statutory accident benefits**
>
> **268** (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, 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*. 1993, c. 10, s. 26 (1).

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[21] To be entitled to coverage, a person must be an insured person under an insurance policy. There is a statutory accident benefits schedule that includes definitions used to determine who is an insured person. The term insured person in a policy covers the spouse of a named insured, the dependent of any named insured, and someone who is listed as a driver or a secondary driver.

[22] Other provinces in Canada do not all have the same system as Ontario. Some have accident benefit schemes and some do not.

**Priority of Coverage**

[23] It is also sometimes the case that an individual is an insured person under more than one policy. For example, an injured person could be the driver of the vehicle involved in the accident and have his own insurance where he is the named insured. Or the injured party could be an occupant of the vehicle which was involved in the accident and also have their own insurance. In that case, the injured party would be able to make a claim under the driver's policy as well as their own.

[24] Thus, there is a priority issue when an injured party has recourse to more than one insurer.

[25] Section 268(2) addresses the priority of insurers as follows:

> **Liability to pay**
>
> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

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iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

[26] In general, these provisions mean that there is an order whereby an injured party should make a claim to his own insurer first, which has the highest priority. Then, pursuant to the priority scheme of the Act, in defined circumstances, the first insurer may be able to claim an indemnity, i.e., from another insurer.

[27] The fact that priorities are specifically set out, however, does not mean that the issue is always clear cut. Sometimes, injured parties make an application for benefits to the wrong insurer, or insurers take issue with whether or not an individual has coverage. And so, the legislature created a priority dispute resolution scheme in O. Reg. 283/95: *Disputes Between Insurers*, whereby the first insurance company that receives the claim pays it and then disputes among insurers are adjudicated usually without the participation of the injured party. In that way, the injured party receives their benefits in a timely manner and it is the responsibility of the insurance company to pursue a priority claim.

**The Arbitrator's Decision**

[28] The Arbitrator began the analysis with s. 45(1) of the Ontario *Insurance Act*:

**45** (1) A licence to carry on automobile insurance in Ontario is subject to the following conditions:

1. In any action in Ontario against the licensed insurer or its insured arising out of an automobile accident in Ontario, the insurer shall appear and shall not set up any defence to a claim under a contract made outside Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in Ontario and such contract made outside Ontario shall be deemed to include the statutory accident benefits referred to in subsection 268 (1).

2. In any action in another province or territory of Canada, a jurisdiction in the United States of America or a jurisdiction designated in the *Statutory Accident Benefits Schedule* against the licensed insurer, or its insured, arising out of an automobile accident in that jurisdiction, the insurer shall appear and shall not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in that jurisdiction. R.S.O. 1990, c. I.8, s. 45 (1); 1993, c. 10, s. 6; 1996, c. 21, s. 12.

[29] He noted that Alberta's *Insurance Act*, as amended, has a similar reciprocal requirement in s. 33 which provides that every automobile insurer licensed to sell insurance in Alberta must provide their insured with no-fault benefits available in the jurisdiction where an accident occurs:

**Automobile insurance**

**33** An insurer's licence to undertake automobile insurance in Alberta is subject to the following conditions:

(a) in any action in Alberta against the licensed insurer or its insured arising out of an automobile accident in Alberta, the insurer must appear and must not set up any defence to a claim under a contract made outside Alberta, including any defence as to the limit or limits of liability and prescribed accident benefits under the contract, that could not be set up if the contract were evidenced by a motor vehicle liability policy issued in Alberta;

(b) in any action in another province or territory against the licensed insurer or its insured arising out of an automobile accident in that province or territory, the insurer must appear and must not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Alberta, including any defence as to the limit or limits of liability and prescribed accident benefits under the contract, that could not be set up.

(i) if the contract were evidenced by a motor vehicle liability policy issued in the other province or territory, or

(ii) under a scheme of no fault insurance that has been established by statute in the other province or territory.

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[30] The Arbitrator accepted Chubb's argument that because of the reciprocal nature of s. 45(1) of the Ontario Act, and section 33 of the Alberta Act, if an accident occurs in Ontario involving a person insured out of province, and if that person's insurer is licensed to carry on automobile insurance in Ontario and is subject to a reciprocal clause, that insurer is subject to Ontario's insurance regime and must provide their insured with Ontario statutory benefits. He therefore concluded that such insurer, Zenith in this case, was subject to the priority dispute provisions.

[31] The Arbitrator did not accept Zenith's argument that the Court of Appeal decision in *Travelers v. CAA* (or certain other cases referenced), compelled a different outcome.

***Travelers v. CAA***

[32] In *Travelers v. CAA*, the claimant was an Ontario resident who owned a car in Ontario that was insured by an Ontario insurer, CAA. While in Nunavut, the claimant was driving a Nunavut-plated car owned by the Government of Nunavut and covered by a Nunavut insurance policy issued by Travelers to the Government of Nunavut. Travelers was licensed to sell insurance in Ontario and had executed an undertaking pursuant to s. 226.1 of the Act. The claimant had an accident in Nunavut and sought accident benefits from her Ontario insurer, CAA. CAA began a priority dispute with Travelers.

[33] The Court of Appeal considered s. 224, 226(2) and 226.1.

[34] Section 224 provides the following relevant definitions:

> 224(1) In this Part,
>
> "automobile" includes,
>
> (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy
>
> [...]
>
> "contract" means a contract of automobile insurance that,
>
> (a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or
>
> (b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the *Statutory Accident Benefits Schedule* by an insurer that has filed an undertaking under section 226.1[…]

[35] Section 226(2) provides:

> This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* unless it is insured under a contract evidenced by a form of policy approved under this Part.

[36] Section 226.1 provides:

> **Out-of-province insurers**
>
> 226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the *Statutory Accident Benefits Schedule* may file an undertaking with the Chief Executive Officer, in the form provided by the Chief Executive Officer, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario. 1996, c. 21, s. 16; 1997, c. 28, s. 110; 2018, c. 8, Sched. 13, s. 22.

[37] The undertaking pursuant to s. 226.1 is typically referred to as a PAU.

[38] The Court stated that even though Travelers had executed an undertaking (the PAU) pursuant to s. 226.1, the use and application of the PAU is context specific.

[39] The Court of Appeal further concluded as follows at para. 25:

> Mere licensing, or the presence of an office, does not convert these insurers into Ontario insurers for all purposes, nor does it make the Ontario *Insurance Act* the governing legislation for all of the automobile insurance policies they underwrite. Treating mere Ontario licensing as the sole reason to constitute an insurer as an "Ontario insurer" would give Ontario insurance legislation extraterritorial effect, which would be contrary to the essential holding in *Unifund*. [In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, the Supreme Court concluded that Ontario's insurance laws do not have extraterritorial effect as a matter of constitutional law.]

[40] However, if the claimant had driven the Nunavut vehicle into Ontario and had the accident there, Travelers would have to provide her with statutory accident benefits at the Ontario level. "That is how the PAU is designed to work.": para 22. See also paragraph 35:

> [35] ….The extent to which extra-provincial policies are caught by s. 224(1)(*b*) is generally limited by s. 226.1 to situations where the vehicle that is registered and insured extra-provincially is actually operated in Ontario.

**Did the Arbitrator improperly distinguished *Travelers v. CAA*?**

[41] Zenith argues that *Travelers v. CAA* is a full and complete answer to this case and the Arbitrator erred when he distinguished it.

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[42] Indeed, the Arbitrator distinguished a number of cases which he grouped into two categories.

[43] The first group involved claimants who were not involved in an accident in Ontario. *Travelers v. CAA; Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Economical v. Intact,* 2021 ONSC 3249. The Arbitrator concluded that the principal concern in these cases was constitutional which is not the case here because the accident occurred in Ontario. That is, in these cases even though the insurer was licensed to sell insurance in Ontario and had even executed a PAU, the accident (and/or loss) did not occur in Ontario. Therefore, applying the priority rules would result in extra-territorial reach.

[44] The second group of cases involved accidents in Ontario where an out of province insurer had executed a PAU, e.g. *Healy v. Interboro Mutual Indemnity Insurance Co*., (1999), 44 O.R. 404 (ONCA).

[45] In *Healy v. Interboro*, a claimant was insured in New York and was injured in a car while travelling in Ontario as a passenger owned and operated by an Ontario resident insured in Ontario. Thus, the car insured in New York was not operated in Ontario when the accident occurred but the insured was. The New York insurer had signed an undertaking (the PAU) but was not licensed to sell insurance in Ontario. There was a dispute as to which insurer would have to pay the Ontario level benefits. The court held that it was the New York insurer who had to pay the benefits because it had signed the PAU. Justice Speigel, at first instance, considered and applied the priority rules in section 268(2) to the New York based insurer.

[46] On appeal, the Court of Appeal held that as a result of filing the PAU the New York insurer was a participant in the reciprocal scheme that exists in Canada for the enforcement of provincial motor vehicle insurance obligations. When a participating insurer signs a PAU, it agrees to be bound by the law concerning compulsory insurance coverage of the province where the action against it is brought rather than the automobile insurance coverage of the state or province where it is issued. The court further held that the vehicle in question did not have to be in Ontario for the PAU to be triggered. This was because the insured was in Ontario when the accident occurred and that was sufficient. Finally, it also concluded that the priority rules apply. It specifically stated:

> In summary, I conclude that the 1964 PAU was in force on November 8, 1996, and applies to the circumstances of this accident. Because of its undertaking, the appellant is obliged by s. 268(2), para (1) to pay SABS to its insured Mr. Healy. It cannot raise a defence to this claim that it could not raise if its contract with Mr. Healy was validly entered into in Ontario: pp. 8 to 10.

[47] *Healy v. Interboro* has never been overturned. Indeed, the Court of Appeal implicitly affirmed it when it referenced it in *Travelers v. CAA* in Footnote 2. There it stated that Part VI of the Ontario Act also applies to a foreign insured when they are injured in any vehicle driven in Ontario through the operation of the PAU.

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[48] Multiple arbitrators have considered and applied *Healy v. Interboro* in the context of a non-Ontario policy or non-Ontario insurer who was required to pay Ontario accident benefits pursuant to the reciprocal licensing provisions or the PAU where an accident was in Ontario: *Certas Direct Insurance Co. v. Wawanesa Mutual Insurance Co* (Arbitrator Lee Samis, 25 January 2017); *Co-Operators General Insurance Co. v. Belair Direct Insurance Co*. (Arbitrator Bialkowski, 10 August 2022); *Intact Insurance Co. v. Security National Insurance Co*. (Arbitrator Philippa Samworth, 15 July 2024); *Travelers v. Guardian* (Arbitrator Malach—February 7, 2000)

[49] In *Coseco Insurance Co v. Liberty Mutual General Insurance Co*., (Arbitrator Philippa Samworth, 21 December 2018), the arbitrator specifically found that the priority rules in s. 268(2) applied to a New York insurer who had executed a PAU where the accident was in Ontario. This was upheld by Nakatsuru J. in *Coseco v. Liberty,* 2019 ONSC 4918. Importantly, in *Coseco v. Liberty*, the losing party sought leave to appeal. The arbitrator in *Intact Insurance v. Security National* was the same arbitrator as in *Coseco v. Liberty*. In her decision in *Intact Insurance v. Security National* she referenced the fact that the Court of Appeal adjourned the motion for leave to appeal in *Coseco v. Liberty* until the Court had an opportunity to decide the appeal in *Travelers v. CAA*. And then after it released *Travelers v. CAA*, the Court of Appeal dismissed the motion for leave to appeal in *Coseco v. Liberty*. This is important because the *Coseco v. Liberty* decision presented the exact argument that Zenith makes in this case. By denying leave, the Court of Appeal implicitly concluded that the *Travelers v. CAA* decision did not warrant a further appeal of the *Coseco v. Liberty* decision.

[50] I agree with the Arbitrator's assessment that *Travelers v. CAA* and the other cases in the first group have no bearing on the outcome of this case. The principle arising out of *Travelers v. CAA* is that the Ontario *Insurance Act* will not apply to automobile insurance policies issued outside of Ontario when the accident occurs outside of Ontario even where the out of province insurer is also licensed to write insurance in Ontario and has executed a PAU. This is because that would constitute territorial over-reach.

[51] As noted above, even in *Travelers v. CAA*, the Court indicated that if the insured had driven the Nunavut-insured vehicle into Ontario and was involved in an accident in Ontario, she would have been entitled to claim Ontario statutory accident benefits from Travelers under the Nunavut policy: para 22.

[52] However, where the accident is in Ontario and there is reciprocal legislation such as s. 45(1) and 33, the second group of court cases, and *Healy v. Interboro* in particular, are applicable because this reciprocal legislation accomplishes the same thing as the PAU. Indeed, as set out above, the Court of Appeal in *Healy v. Interboro* considered the PAU to be a form of reciprocal legislation.

[53] Another distinction is that the courts in the first line of cases were not addressing reciprocal legislation like s. 45(1) of the Ontario Act and s. 33 of the Alberta Act. These courts did not need to address the meaning of s. 45(1) and whether it accomplishes the same thing as 226.1, but for insurers who are licensed in multiple provinces and who do not need to sign an undertaking (the

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PAU) because there is explicit reciprocal legislation that they have agreed to as a condition of obtaining a licence to sell insurance in Ontario.

**Did the Arbitrator Improperly Reference s. 33 of the Alberta Act?**

[54] Zenith also argues that the Arbitrator improperly focused on s. 33 of the Alberta *Insurance Act*. Its argument is that s. 33 cannot be used to govern the relationship between an Ontario insurer and an Alberta insurer in Ontario. That is true and to that extent, I agree that the Arbitrator focused too much on s. 33 of the Alberta Act. However, in my view, he wasn't using s. 33 as a basis for jurisdiction, but evidentiarily to show that there is reciprocal legislation and the Alberta insurer is also compelled to pay the Ontario benefits under its own Act.

[55] Furthermore, even if s. 33 of the Alberta Act cannot be used to govern an Alberta insurer in Alberta, s. 45 of the Ontario *Insurance Act* can be used in this manner in Ontario under certain circumstances.

[56] Pursuant to s. 45(1)(1), Ontario has made it a condition of any insurer selling insurance in Ontario (and another province), that such insurer agrees to "appear". Given that 45(1)(2) references what a licensed insurer must do in another province where the accident occurs in another province, the reference to "appear" in 45(1)(1) must mean "appear" in Ontario. The term "appear" in a legal context, typically means appear in court or respond to a proceeding.

[57] As well, s. 45(1)(1) requires that when the insurer appears, it "will not set up any defence" to a "claim" under a contract made outside Ontario, that it could not raise if the contract was issued in Ontario. Notably, this section references a "claim under a contract", and not a claim by an insured. An insurer seeking to access priority rules such that the extra provincial insurer would have to pay Ontario level benefits pursuant to its insurance contract, is a claim under the extra provincial insurance contract by that insurance company.

[58] Insurers who sell insurance in Ontario cannot raise the defence that the priority rules do not apply to them. Therefore, Zenith cannot raise a defence that the priority rules in s. 268(2) do not apply to it and this is a condition of its license which it has therefore agreed to. Agreeing to this condition in its license in Ontario is similar (if not identical) to an insurer voluntarily executing an undertaking (the PAU) pursuant to s. 226.1. Recall that *Healy v. Interboro* held that the priority rules in 168(2) apply where an accident occurs in Ontario and the insurer has executed a PAU.

[59] Finally, section 45(1) also says that the statutory benefits in s. 268(1) are deemed to be included in the contract written outside Ontario and this is something that the insurer implicitly agrees to. It would make little sense that an insurer could be obliged to provide Ontario statutory benefits but it was not obliged to participate in a scheme to determine which of a variety of insurers is obliged to pay those benefits.

[60] What the Ontario legislature has done is essentially assumed jurisdiction over companies who obtain an Ontario license to sell insurance, where an insured's accident is in Ontario even if the policy was written outside Ontario. As part of that, they have put in place these conditions to

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which the insurers have agreed. These conditions, set out in s. 45(1), on their face, are worded in a manner that is similar to s. 226.1. Further, the actual PAU that an insurer signs pursuant to s. 226.1 has the similar wording to s. 45(1), that such insurer will not set up a defence to a proceeding that it could not raise if it had issued an Ontario policy. This is clear from the cases that have quoted the PAU.

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[61] It would also be odd and inconsistent for the priority rules to be applicable to insurance sold in Ontario by Ontario insurers, and to insurers not licensed to sell insurance in Ontario but who signed an undertaking (the PAU) where an accident occurs in Ontario, but not applicable at all to insurers who are operating in multiple provinces who have not signed an undertaking, but who have obtained a license to sell insurance in Ontario, and where an accident occurs in Ontario.

[62] In this case, Zenith concedes that if the claimant had made an application for accident benefits directly to it, then because of s. 33 of Alberta's *Insurance Act*, Zenith would have been compelled to provide accident benefits in accordance with the Ontario accident benefit scheme in Alberta. The Ontario Act should not be read in a manner that leads to the somewhat illogical outcome that Zenith would have to pay Ontario benefits if the claim was made directly to it but does not have to pay them if the claim is made to another insurer first.

[63] And so, I agree with the result even if the Arbitrator focused more on s. 33 of the Alberta Act than on s. 45 of the Ontario Act, which is more relevant here.

**Does the Wording of s. 226(2) Preclude the Application of the Priority Rules where s. 45(1) applies?**

[64] I also reject Zenith's argument that the wording in s. 226(2) precludes the application of the priority rules to it because it specifies that Part VI of the *Insurance Act*, where the priority rules are, does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* unless it is insured under a contract evidenced by a form of policy approved under Part VI.

[65] If Zenith is correct, that Part VI only applies to vehicles where a contract is issued in Ontario in compliance with Part VI, then the reciprocal legislation in s. 45(1)(1) of the Ontario Act, cannot work. This is because s. 45(1)(1) which compels such insurer to pay Ontario accident benefits is not in Part VI, the accident benefits are in Part VI, and insurers who write insurance outside Ontario do not issue forms of policy under Part VI. Thus, acceptance of Zenith's argument would render s. 45(1)(1) meaningless or it would result in an irreconcilable conflict in these provisions of the Ontario Act.

[66] If s. 226(2) had the rigid interpretation asserted by Zenith, the priority rules would also not apply to insurers who had executed a PAU either, because they also do not issue policies approved under Part VI. Notably, s. 226.1 does not even expressly say that the priority rules apply to insurers who execute a PAU.

[67] However, *Healy v Interboro* held that Part VI applies to insurers who have executed the PAU by virtue of s. 226.1 of the Act and applied the priority rules in such circumstances as well. As set out above, in *Travelers v. CAA* the court implicitly if not expressly agreed and adopted the court's conclusion.

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[68] There is a way to reconcile the wording in s. 226(2) with s. 226.1, and s. 45(1) and read *Travelers v. CAA* and *Healy v. Interboro* in a consistent manner by using the arbitrator's analysis in *Certas Direct Insurance co v. Wawanesa Mutual Insurance Co. (Arbitrator Samis-January 25, 2018).* In this case an accident occurred in Ontario by a claimant who was insured in Alberta. The insurer of the driver of the Ontario vehicle who struck the claimant initially made the payments but then initiated a priority dispute against the out of province insurer. The arbitrator referenced the undertaking (the PAU) signed by the insurer as well as the conditions on that insurer's license to carry on business because it was also registered in Ontario. The arbitrator concluded:

> 58. The effect is that the Wawanesa policy is to be read as if it were an Ontario policy, and in that circumstance the policy is obliged to respond.

[69] Although *Certas v. Wawanesa* involved both reciprocal legislation and the undertaking (the PAU), the arbitrator's comments related to the impact of both of these which accomplished the same thing.

[70] As such, one can reconcile 226.1, and s. 45(1) with s. 226(2), *Travelers v CAA*, and *Healy v. Interboro*, on the basis that where there is this kind of reciprocal legislation, and/or a PAU, the extra provincial policy is to be read as if it were an Ontario policy. Then, the exclusion in s. 226(2) would not apply.

**Does the Arbitrator's Decision Result in Extra-Territorial Reach?**

[71] As noted above, the Court in *Travelers v. CAA* did say that "mere licensing or a presence of an office does not convert these Ontario insurers into Ontario insures for all purposes, nor does it make the Ontario Insurance Act the governing legislation for all of the automobile insurance policies they write": para 25.

[72] However, as also noted, the accident in *Travelers v. CAA* did not occur in Ontario. This was the principal reason why the court expressed concern about territorial over-reach in that it was sought to apply the Ontario Act to an accident that occurred outside of Ontario. As such, the fact that such insurer may have been licensed to sell insurance in Ontario could not be the sole reason to give Ontario jurisdiction.

[73] Here the accident was in Ontario and the insurer agreed to conditions set out in s.45(1) of the Act as a condition of a license to sell insurance in Ontario. That agreement by the insurer, together with the fact that the accident occurred in Ontario is sufficient to constitute Ontario as the correct jurisdiction. There is both jurisdiction over the insurer by virtue of s. 45(1), and also jurisdiction over the event in question, the accident in Ontario.

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[74] This case is not like *Travelers v. CAA*. Section 45(1) was not engaged because the accident was not in Ontario.

[75] I add that although the Arbitrator distinguished *Travelers v. CAA*, his decision was also a logical extension of it. In *Travelers v. CAA*, at para 35, the Court stated that the priority dispute process only applies if both insurers are bound by the Act. In this case, Zenith, by virtue of s. 45(1)(1) and the accident having occurred in Ontario, is bound by the Act. Chubb is also bound by the Act. If there were jurisdictional issues because the accident or loss did not occur in Ontario, then that would be a different matter, but that is not the case here.

[76] The decision of Ramsay J. in *Manitoba Public Insurance v. Insurance Corporation of British Columbia*, 2023 ONSC 3658, also does not change this analysis. This case is factually quite different and involved the loss transfer provisions. Finally, the fact that the PAU is designed to help insured and not insurance companies, as set out in *Unifund* (p. 105), does not mean that any of this analysis is any less persuasive. The reason for the outcome in this case is not to assist insurers, but to properly interpret and apply provisions of the Act and the reciprocal legislation. Notably, the court in *Unifund* specifically referenced *Healy v. Interboro* when it made the point that the PAU was designed to help insured and not insurance companies, and *Healy v. Interboro* concluded that the priority scheme in s. 268(2) applies to insurers who execute the PAU.

**Conclusion**

[77] As such, the Arbitrator did not err when he concluded that the priority rules apply to Zenith in this case since Zenith is a licensed Ontario insurer, and its insured had an accident in Ontario.

[78] The outcome of the Arbitrator's analysis, is a consistent application of the priority rules which takes into account the need to not exceed territorial jurisdiction such that the following principles emerge when all of the cases he considered are taken into account:

- Where an Ontario insurer writes insurance in Ontario, and an accident occurs in Ontario that insurer is subject to the priority rules. This is quite obvious: s. 226(2).

- Where an insurer does not do business in Ontario, but the insurer has signed an undertaking (the PAU), and the insured has an accident in Ontario, that insurer is subject to the priority rules: s. 226.1 and *Healy v. Interboro.*

- Where the insurer is licensed to sell insurance in Ontario but the accident and/or injury occurs in another province, the mere fact of being licensed in Ontario is insufficient to make the priority provisions in the Ontario *Insurance Act* apply: *Travelers v. Interboro*.

- Where an insurer is licensed in Ontario, and that insurer writes a policy outside Ontario but has not signed an undertaking (the PAU), and the insured has an accident in Ontario, that insurer is subject to the priority rules. This is simply a

condition of the license that it will appear in an Ontario proceeding and not set up any defence that an Ontario insurer could not raise if the policy had been written in Ontario: s. 45(1)

[79] I wish to thank the excellent counsel that were before me. It was a pleasure to listen to their well thought out arguments and read their clear and compelling materials. They were able to argue a complex area of the law clearly and concisely.

[80] They have agreed that the successful party would be entitled to $7,500 in costs, another example of their excellent work for their clients, where they have been able to prepare thoughtful materials and argument, at a reasonable price.

[81] The appeal is dismissed with $7,500 payable to Chubb within 7 days.

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**PAPAGEORGIOU J.**

**Released: April 22, 2025**

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**CITATION:** Zenith Insurance Company Ltd. v. Chubb Insurance Company of Canada 2025 ONSC 2452
**COURT FILE NO.:** CV-23-00701599
**DATE:** 20250422

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ZENITH INSURANCE COMPANY LTD./NORTHBRIDGE GENERAL INSURANCE COMPANY

APPLICANT

**– and –**

CHUBB INSURANCE COMPANY OF CANADA

RESPONDENT

**REASONS FOR DECISION**

**PAPAGEORGIOU J.**

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