# COURT OF APPEAL FOR ONTARIO

CITATION: Burnham v. Co-operators General Insurance Company, 2023 ONCA 384
DATE: 20230529
DOCKET: COA-22-CV-0218

Doherty, Zarnett and Sossin JJ.A.

BETWEEN

Joshua Burnham

Plaintiff

and

Co-operators General Insurance Company

Defendant
(Respondent)

and

His Majesty the King in Right of Ontario as represented by
The Minister of Public and Business Service Delivery
(formerly Government and Consumer Services)

Defendant in Related Action
(Appellant)

John Friendly and Todd M. Wasserman, for the appellant

Monica Dhanani, for the respondent

Heard: April 17, 2023

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated August 29, 2022, with reasons reported at 2022 ONSC 4934.

**Sossin J.A.:**

**OVERVIEW**

[1] This appeal involves a dispute over the interpretation of a provision of the standard Ontario Automobile Policy ("Policy") dealing with the circumstances where a vehicle covered by the Policy is driven by a person without permission (in this case, a stolen vehicle). The question facing the motion judge was whether the provision excludes coverage for passengers of the vehicle who do not know the vehicle is being driven without consent.

[2] The motion judge concluded that the exclusion did extend to Joshua Burnham, the passenger in the case at bar and plaintiff in the original action, even though he alleged he did not know the vehicle he was in was stolen. As a result, the motion judge dismissed a claim against the respondent insurer, Co-operators General Insurance Company ("Co-operators"), resulting in liability for the Motor Vehicle Accident Claims Fund (the "Fund").

[3] The Minister of Public and Business Service Delivery (the "Minister"), responsible for the Fund, appeals this decision. Mr. Burnham did not participate in the motion below or this appeal.

[4] For the reasons that follow, I conclude the motion judge erred in his interpretation of the Policy. I would allow the appeal.

**BACKGROUND**

[5] On August 25, 2014, Mr. Burnham was a passenger in the back seat of a pickup truck involved in a motor vehicle accident. The stolen pickup truck was involved in a collision with a transport truck. The driver and a front-seated passenger of the pickup truck were killed. Mr. Burnham sustained serious injuries.

[6] At the time of the accident, Mr. Burnham was asleep in the back seat, and he has no recollection of the accident. He also claimed to have had no reason to believe that the pickup truck was stolen and only found out when he woke up days after the accident. The pickup truck was owned by Lorne Morais, who reported the theft on August 22, 2014. The pickup truck was insured with the Co-operators General Insurance Company ("Co-operators").

[7] Mr. Burnham brought two actions. One against the uninsured driver of the stolen pickup truck and one against Co-operators as the insurer of the pickup truck.

[8] The Amended Statement of Claim alleges that as a result of the collision, Mr. Burnham is a person legally entitled to recover damages for bodily injuries from the driver of the uninsured automobile. Mr. Burnham seeks from the Co-operators recovery for any damages occasioned by the negligent operation of the vehicle, pursuant to the uninsured automobile coverage provisions of the Policy.

[9] In its Statement of Defence, Co-operators pleads that Mr. Burnham knew or ought to have known that the deceased was operating the vehicle without

permission or consent of the owner, as he was involved in a joint venture with the deceased in the theft of the vehicle and knew or ought to have known that the deceased driver did not have consent to possess or operate the vehicle.

[10] The Co-operators brought a motion pursuant to r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the grounds that the Amended Statement of Claim disclosed no cause of action against Co-operators. They argued, successfully, that the claim for uninsured motorist coverage was precluded under an exclusion set out in s. 1.8.2 of the Policy that prohibits coverage when the vehicle under the Policy is driven without permission or consent.

[11] Mr. Burnham did not participate in the r. 21.01 motion. Instead, the parties to the motion were the Co-operators and the Minister, in the name and on behalf of Dana Piilo, Administrator for the Estate of John Franklin Hill (the deceased driver of the stolen pickup truck).

[12] The motion judge ruled in favour of Co-operators and held that Mr. Burnham had no cause of action as against Co-operators, as his claims for uninsured motorist coverage were precluded under s. 1.8.2. of the Policy, whether or not his allegation that he did not know the pickup truck was stolen were true. Mr. Burnham's action as against Co-operators was therefore dismissed.

**THE ISSUE**

[13] There is a single issue on this appeal: did the motion judge err in his interpretation of s. 1.8.2 of the Policy by finding that Mr. Burnham, who was a passenger of a stolen vehicle, was precluded from uninsured motorist coverage under this exclusion in the Policy, even if the allegation that he did not know the pickup truck was stolen were proven to be true?

[14] The parties agree that the applicable standard of review for this appeal is correctness, as it considers an order made under r. 21.01 determining a question of law. As a result, no deference is owed on this appeal to the motion judge's analysis and decision: see e.g., *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 65, leave to appeal refused, [2019] S.C.C.A. No. 69; and *Canadian Union of Postal Workers v. Quebecor Media Inc.*, 2016 ONCA 206, 129 O.R. (3d) 711, at para. 2.

**The Policy**

[15] Uninsured automobile coverage is coverage mandated by statute included in every motor vehicle liability insurance policy, subject only to the limits prescribed by regulation, as provided by s. 265 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[16] The Policy is a statutory contract. It includes uninsured automobile coverage but also includes certain exclusions from coverage. Section 1.8.2 of the Policy includes an exclusion entitled, “Excluded Drivers and Driving Without Permission”,

the interpretation of which lies at the heart of this appeal. The exclusion at issue in this appeal reads as follows:

> **1.8.2 Excluded Drivers and Driving Without Permission**
>
> Except for certain **Accident Benefits** coverage, there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile policy or a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.
>
> Except for certain **Accident Benefits** coverage, there is no coverage under this policy for a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.

[17] At issue is whether a passenger in a vehicle whose owner is a policyholder is caught by this exclusion where that passenger does not know or ought not reasonably to know that the vehicle is being driven by someone without the owner's consent. Recall that this was a r. 21.01 motion in which the allegations in the statement of claim are taken as true, and that Mr. Burnham alleges he did not know the pickup truck involved in the accident was being driven by someone without the owner's consent. Therefore, the issue is whether on Mr. Burnham's

version of the facts he is exempt from this exclusion, in which case a trial is needed to determine what those facts are, or whether he is not exempt from this exclusion even if his alleged facts are true, and therefore precluded from pursuing his action, as the motion judge found.

[18] Because this exclusion derives from a statutory contract, the principles of statutory interpretation apply. As the Supreme Court of Canada confirmed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at pp. 40-41, quoting Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87, statutory provisions are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and intention of the legislature.

[19] Section 5 of the Policy outlines coverage for injuries arising from accidents involving an uninsured automobile. Section 5.1.2 of the Policy defines an "uninsured automobile" as an automobile whose owner or driver does not have liability insurance. Section 5.1.2 states that a policyholder may not claim uninsured automobile coverage for injuries arising out of the ownership, use or operation of their own automobile since such an automobile, by definition, is not considered to be uninsured. See, for example, in *Fosker v. Thorpe* (2004), 72 O.R. (3d) 753 (S.C.), at paras. 19-30, where the plaintiff (policyholder) was struck by a thief driving the car she owned. The court found that the plaintiff could not claim

uninsured automobile coverage under her policy because her vehicle was by definition insured and explicitly excluded from the definition: at para. 29.

[20] For this reason, the focus of the exclusion in s. 1.8.2 is on passengers in uninsured vehicles (that is, passengers in vehicles not driven by its owner or the spouse of its owner), as in the case at bar. In order to claim under the uninsured automobile provisions of the Policy, a claimant must not otherwise be excluded from coverage under the Policy. Therefore, the exclusion in s. 1.8.2 determines which passengers in uninsured automobiles can claim coverage under s. 5 of the Policy.

[21] The first paragraph of the exclusion sets out that “there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner’s consent or is driven by a person named as an excluded driver of the automobile policy or a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner’s consent” (emphasis added).

[22] The second paragraph of the exclusion sets out that, “there is no coverage under this policy for a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile

is being used or operated by a person in possession of the automobile without the owner's consent."

[23] Each of the two paragraphs that comprise s. 1.8.2 appear to exempt certain passengers from the exclusion who neither know nor ought reasonably to know the vehicle in which they were travelling when injured was driven without permission.

[24] The two questions which must be determined on this appeal are first, which passengers are covered by this exemption to the exclusion under s. 1.8.2 (and how are the two different paragraphs setting out exemptions from the exclusion different from one another); and second, does Mr. Burnham fall into one of the categories of passengers exempted from the exclusion.

[25] On these critical questions, the parties have two competing approaches.

**The position of the parties**

[26] The parties both take the position that the proper interpretation of s. 1.8.2 of the Policy in force at the time of the accident giving rise to this dispute in 2013 requires consideration of the legislative history of this provision, and specifically the way in which this provision has been amended:

> *For use on or after November 1, 1996*
>
> **1.8.2 Excluded Drivers and Driving Without Permission**

Except for certain **Accident Benefits** coverage, there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile.

Except for certain **Accident Benefits** coverage, there is no coverage under this policy for an occupant of an automobile used or operated by a person in possession of the automobile without the owner's consent.

*For use on or after June 1, 2005*

**1.8.2 Excluded Drivers and Driving Without Permission**

Except for certain **Accident Benefits** coverage, there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile.

Except for certain **Accident Benefits** coverage, there is no coverage under this policy for a person <u>who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent</u>.

*For use on or after September 1, 2010*

**1.8.2 Excluded Drivers and Driving Without Permission**

> Except for certain **Accident Benefits** coverage, there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile policy or a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.
>
> Except for certain **Accident Benefits** coverage, there is no coverage under this policy for a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.
>
> [Underlined portions show the new amendments adopted.]

[27] Bulletin A-05/05: Revised Ontario Automobile Policy (O.A.P. 1), which was issued by the Superintendent of Financial Services on May 24, 2005, specifies that the purpose of the 2005 amendments to s. 1.8.2 was to "extend coverage to include unwilling occupants or those occupants who were unaware a vehicle is stolen". That initial change was made to the second clause, as of June 1, 2005, and to the first clause as of September 1, 2010, as set out above.

[28] The Minister highlights that the distinction between "**an** automobile" and "**the** automobile" in the two paragraphs of s. 1.8.2 of the Policy to support its proposed interpretation (emphasis added). The Minister submits that the 2005 amendment

to the second paragraph in s. 1.8.2 of the Policy only protected occupants in any other vehicle, but not “the automobile” covered by the Policy. This means that if someone was insured under the Policy, and they were an innocent passenger in another automobile that was driven without permission, they could claim coverage under their Policy. Therefore, the purpose of the 2010 amendment was to expand coverage to innocent passengers in “the automobile” covered by the Policy. In this case, this interpretation would mean that if found to be an innocent passenger, Mr. Burnham could claim coverage under Mr. Morais’ automobile insurance policy issued by Co-operators.

[29] In support of this interpretation, the Minister relies on *Shipman v. Shipman re: State Farm* (November 17, 2016), CV-08-695 (Ont. S.C.) and *Shipman v. Shipman re: Cumis General Insurance Company* (November 17, 2016), CV-08-695 (Ont. S.C.), in which the court considered the 2005 amendments to s. 1.8.2 of the Policy. In the *Shipman* cases, the injured party was insured through his stepfather under a State Farm automobile policy. However, at the time of the accident, he was a passenger in a car owned by someone holding the Cumis automobile policy, but driven by an uninsured driver. The 2005 amendments added the knowledge requirement for occupants to the second paragraph of the Policy but left the first paragraph unchanged. In *Shipman v. Shipman re: Cumis*, the court held that the first paragraph of s. 1.8.2 addressed the scenario where an innocent passenger is in the automobile insured by the

Policy driven by someone without permission of the owner. As such, the court held the injured party was excluded from coverage under the Cumis policy. The knowledge requirement, introduced in 2005 to the second paragraph, only applied to the injured party's claim under the State Farm policy, under which he qualified as an insured claiming coverage as an innocent "passenger of **an** automobile" (emphasis added).

[30] The Minister argues that this case stands for the proposition that the 2010 amendments were intended to address this gap – being the plaintiff's exclusion from coverage under the policy of the automobile he was in when injured. The Minister argues that the 2010 amendments, which added the knowledge requirement to the first paragraph, are intended ensure plaintiffs in the position of the passenger with no knowledge that the insured vehicle is stolen would be exempt from the exclusion in s. 1.8.2.

[31] The Minister submits this is precisely the scenario involving Mr. Burnham in the case at bar, and therefore, that the motion judge erred in finding Mr. Burnham was caught by the exclusion rather than exempted from the exclusion if he could establish that he did not know it was stolen and was being driven without the permission of the owner.

[32] The Minister also relies on *Simison (Litigation Guardian of) v. Catlyn* (2004), 73 O.R. (3d) 266 (C.A.), at para. 15, which considered the exclusion in s. 1.8.2 of

the Policy. Based on its analysis of s. 1.8.2's evolution and structure, the court accepted that the second paragraph referred to any automobile, while the first paragraph referred to the automobile covered by the Policy: at paras. 19-22.

[33] The Minister submits that the first paragraph of s. 1.8.2 is engaged in this case, as Mr. Burnham claims to have been an innocent passenger in the stolen vehicle, which was uninsured as it was being driven by someone without the permission of the owner or spouse of the owner. The Minister submits that the first paragraph should be read as setting out the circumstances where coverage would be excluded in the scenario of a stolen vehicle, including:

- If the automobile is used or operated without the owner's consent; or
- If the automobile is driven by an excluded driver; or
- If a person who, at the time, he or she willingly becomes an occupant … knows or ought reasonably to know the automobile is being used or operated without the owner's consent.

[34] As the Minister explains, the language of the first clause indicates that a thief could not make a claim against the policy, nor could an excluded driver under the second clause, but the passenger in the third clause is only excluded if that person has (or ought reasonably to have) knowledge that the automobile is being used or operated without the owner's consent.

[35] Co-operators submits that, based on the clear and unambiguous language of the *Insurance Act* and the Policy, the coverage provisions in s. 1.8.2 of the Policy are not intended to apply to the vehicle that is insured under the automobile policy in question, even when that vehicle is operated without consent or stolen. Co-operators argues that there is no coverage for any occupant of the vehicle insured under the Policy once it is driven without the consent of the owner.

[36] Co-operators disagrees with the Minister's submission that the word "or" between the clauses of the first paragraph of s. 1.8.2 signifies that the clauses are to be read as inclusive and overlapping. Co-operators argues that the use of the word "or" between the clauses of the first paragraph of the exclusion indicates that it is to be read disjunctively such that each clause is an independent exclusion, as follows:

> Except for certain Accident Benefits coverage, there is no coverage (including coverage for occupants) under this policy:
>
> i) if the automobile is used or operated by a person in possession of the automobile without the owner's consent;
>
> OR
>
> ii) is driven by a person named as an excluded driver of the automobile policy;
>
> OR

> iii) a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.

[37] According to Co-operators, which also relies on *Simison* and the *Shipman* decisions, the 2005 amendment expanded coverage to innocent passengers in vehicles other than the insured vehicle where third party insurance applies, while the 2010 amendment expanded coverage further to innocent passengers in vehicles where the passenger's insurance could provide coverage. Neither amendment expanded coverage to an occupant of "the automobile" subject to the Policy.

[38] The Minister submits that the Co-operators' disjunctive reading of the provision is contrary to the principles of statutory interpretation: see *Varriano v. Allstate Insurance Company of Canada*, 2023 ONCA 78, at paras. 25-30. First, the Minister argues that the Co-operators' interpretation creates an absurd result by making the second paragraph of the section redundant. Second, the Minister argues that the Co-operators' interpretation overlooks the purpose of the provision to expand coverage to innocent passengers.

**The reasons of the motion judge**

[39] The motion judge accepted the interpretation of s. 1.8.2 advanced by Co-operators that each of the three clauses constitutes a separate exclusion under

the policy, and since Mr. Burnham was an occupant in “the automobile” that was operated by a person without the owner’s consent, he was excluded from coverage under the first clause of the first paragraph of s. 1.8.2.

[40] The motion judge explained why he was persuaded by Co-operators’ argument on interpreting the exclusion under s. 1.8.2 by stating, at para. 37:

> I am persuaded by the Co-operators position that the use of the word “or” between the clauses of the first paragraph of the Exclusion indicates that it is to be read disjunctively such that each [clause] is an independent exclusion.…

The motion judge relied on previous interpretations of this provision in *Fosker* and *Skunk v. Ketash*, 2018 ONCA 450, 142 O.R. (3d) 77, but as the Minister asserts, in both cases, the vehicles at issue were found to be owned by the insured or the spouse of the insured and therefore not to constitute “uninsured vehicles” within the meaning of the *Insurance Act*. In *Fosker*, the plaintiff’s automobile was stolen by her daughter who then struck the plaintiff with the vehicle. As noted above, the court found that the automobile was owned by the plaintiff and was not an uninsured automobile. In *Skunk*, the appellant in that case was a passenger in his spouse's vehicle when it was taken without consent by an uninsured driver. The vehicle was then involved in an accident and the appellant was injured. The definition of an uninsured vehicle under the *Insurance Act* was held to clearly and unambiguously exclude the owner or spouse of the owner of the vehicle involved in the accident. Both cases make no reference to the exclusion under s. 1.8.2.

[41] This court in *Skunk* affirmed the interpretation of “uninsured automobile” to exclude the vehicle under the Policy, which barred the appellant’s access to uninsured automobile coverage. However, the effect of this ruling on s. 1.8.2 is that the occupant contemplated in the third clause of the first paragraph cannot be the owner or spouse of the owner of the vehicle under the Policy. The clear and unambiguous language found in s. 5 of the Policy defining “uninsured automobile” is not instructive for the interpretation of the exclusion under s. 1.8.2.

**ANALYSIS**

**The interpretive principles applicable to the Policy**

[42] Section 1.8.2 of the Policy is not without its uncertainties. Both paragraphs appear to extend coverage to innocent occupants injured in stolen vehicles. Additionally, the distinction between “the automobile” and “an automobile” in the two paragraphs is not defined.

[43] Because of this ambiguity, it is important to begin by setting out the key principles applicable to the Policy.

[44] The first applicable principle, as stated above, is that the Policy as a statutory requirement should be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: *Rizzo*, at para. 21.

[45] The second interpretive principle is that exclusions in insurance policies are interpreted narrowly: *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405, at para. 16. As a general rule, clauses in insurance policies will be granted a liberal meaning "in favour of the insured and those clauses excluding coverage [will be] construed strictly against the insurer": *Chilton v. Co-operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (C.A.), at p. 167.

[46] The third principle is that the purpose of uninsured automobile coverage is to internalize the cost of driving so that payment is made by insurers rather than the Fund. As Hoy J.A. explained in *Bruinsma v. Cresswell*, 2013 ONCA 111, 360 D.L.R. (4th) 484, at para. 24:

> Section 265 requires uninsured automobile coverage. Effective March 1, 1980, uninsured automobile coverage, which had been optional and limited in scope since 1969, became mandatory. The purpose of the provision was to spread the risk of uninsured drivers among drivers (through insurance policies) rather than among the tax base generally (through the Fund): see *Chambo v. Musseau* (1993), 15 O.R. (3d) 305, at para. 11. Section 265(1) of the Act requires that every contract evidenced by a motor vehicle liability policy provide, inter alia, for payment to an insured of all sums the insured is entitled to recover from the owner or driver of an uninsured automobile as damages for bodily injury, "subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations." [Italics in original; underlining added.]

**The principles applied**

[47] Applying these principles to this case addresses the ambiguity in s.1.8.2 of the Policy.

[48] Interpreting the first paragraph of the exclusion in s. 1.8.2 of the Policy as a series of disjunctive exclusions does not accord with a contextual and harmonious reading of the provision. The word “or” does not necessarily indicate an exclusive relationship between clauses nor create a presumption that the clauses be read disjunctively. The interpretation of ambiguous connecting language, such as “or”, will depend on grammatical considerations and context: see *Varriano*, at paras. 25-26; see also Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham: LexisNexis Canada Inc., 2022) at § 4.05.

[49] Co-operators’ proposed interpretation would create a list of three separate exclusions that cannot be read together to inform the collective meaning of the paragraph. This interpretation would erroneously strip the statutory interpretation exercise of all context and would create the absurd result of excluding from coverage innocent passengers in stolen vehicles based on the first clause of the first paragraph.

[50] Further, the disjunctive interpretation, advanced by Co-operators and accepted by the motion judge, renders the second paragraph of the exclusion redundant, since the scenario of an innocent passenger of a vehicle other than the

vehicle covered under the Policy already would be dealt with under the third clause of the first paragraph. I would reject such an interpretation.

[51] In my view, the reference both to “the automobile” and “an automobile” in the first paragraph of s. 1.8.2 is not dispositive.

[52] According to Co-operators, this distinction supports its disjunctive approach to interpreting the exclusion. Under this approach to the first paragraph, the occupants of “the automobile” are excluded from coverage as a whole, while occupants of “an automobile” (that is, a vehicle other than the one covered under the Policy) who know or ought to know it is stolen, also are excluded.

[53] In contesting this approach, the Minister raises the French translation of the Policy. That translation of s. 1.8.2 uses “l’automobile” throughout the first paragraph of the exclusion and does not distinguish between the automobile (“l’automobile”) in the first clause of the paragraph and an automobile (“une automobile”) in the third clause as the English translation does. When put to them in oral submissions, Co-operators responded that the French translation may simply be in error. I do not find this view persuasive.

[54] The wording of s. 1.8.2 of the Policy and its legislative history support an interpretation of the first paragraph which exempts innocent passengers in a stolen vehicle from the exclusion of coverage. As this court noted in *Simison*, “in light of the history of the exclusion provision”, the second paragraph of s. 1.8.2 sought to

expand coverage to occupants of *any* automobile, while the first paragraph applied to *the* automobile covered by the Policy. While the provision has been amended twice since 2004, I have seen nothing to suggest that the amendments altered this fundamental difference between the two paragraphs of s. 1.8.2.

[55] In any event, in my view, the motion judge should have been guided by the second principle set out above, that exclusions are to be interpreted and applied narrowly.

[56] Additionally, in the context of uninsured vehicles, the motion judge also should have been alive to the third principle that the overall legislative purpose of the Policy reflects the goal of internalizing the risks associated with driving among insurers. As the Minister observed with respect to this appeal, “the real issue for the Court’s consideration is whether an insurer, the Co-operators, or the public’s Fund ought to pay for an accident where the passenger does not know (or ought to know) the vehicle is stolen.”

[57] In this case, in light of the ambiguity as to the scope of the exclusion in s. 1.8.2, I would favour the interpretation advanced by the Minister for the following reasons:

- This interpretation flows from the text of the first paragraph of s. 1.8.2 which excludes coverage to occupants of a stolen vehicle, where those occupants

know or ought to know the vehicle is being driven without permission of the owner;

- This interpretation allows for a coherent distinction between the two paragraphs which comprise s. 1.8.2 of the Policy, with the first paragraph exempting an innocent passenger in the insured, stolen vehicle ("the automobile"), and the second paragraph dealing with a passenger covered by the Policy in any stolen vehicle other than the insured vehicle ("an automobile");

- This interpretation is the narrower one with respect to the exclusion and favours the insured rather than the insurer;

- This interpretation accords with the legislative history and the goal in the 2010 amendments of addressing the gap left by the 2005 amendments regarding innocent passengers in an uninsured vehicle; and

- This interpretation is consistent with the legislative intent of the Policy to increase insurance coverage for uninsured vehicles and decrease recourse to the Fund.

**DISPOSITION**

[58] For these reasons, I conclude that the motion judge erred in his interpretation of the Policy as excluding coverage for Mr. Burnham.

[59] I would allow the appeal, and set aside the dismissal of the action.

[60] The Minister is entitled to costs of the appeal and the motion. If the parties are unable to agree on these costs, each may make written submissions not exceeding three pages each. The submissions of the Minister shall be delivered within ten days of the release of these reasons; those of Co-operators shall be delivered within ten days thereafter.

Released: May 29, 2023 “D.D.”

“L. Sossin J.A.”
“I agree. Doherty J.A.”
“I agree. B. Zarnett J.A.”