

**IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, s. 268 and Ontario Regulation 283/95
thereunder;**

AND IN THE MATTER of the *Arbitration Act*, 1991, S.O. 1991, c.17;

AND IN THE MATTER of an Arbitration:

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

and

TTC INSURANCE COMPANY LIMITED

Respondent

AWARD

COUNSEL

Daniel Strigberger, counsel for the Applicant, the Dominion of Canada General Insurance Company (hereinafter called "Dominion").

Nicole Mahadeo and Chad Townsend, counsel for the Respondent, TTC Insurance Company Limited (hereinafter referred to as "the Respondent").

BACKGROUND

This matter comes before me pursuant to s. 268 of the *Insurance Act*, R.S.O. 1980, c. 18 as amended and Ontario Regulation 283/95 and the *Arbitrations Act*, S.O. 1991, c. 17 as amended.

This is a priority dispute between two insurers as to which insurer is responsible for paying statutory accident benefits to the claimant with respect to an accident that occurred on March 16, 2024.

On that date, the claimant was a pedestrian when she was struck by a vehicle insured by Dominion. Dominion received the OCF-1 and commenced paying statutory accident benefits.

The claimant was employed at the time of the accident by the Toronto Transit Commission (hereinafter referred to as "the TTC"). Dominion argues that the TTC is a corporation whose insured vehicle was being made available for the claimant's regular use on the date of loss and accordingly the claimant was a deemed named insured under the Respondent's insurance policy pursuant to s. 3(7)(f) of the Statutory Accident Benefits Schedule and as a deemed named

insured, the Respondent would rank first in priority above Dominion in accordance with s. 268 of the *Insurance Act*.

PROCEEDINGS

The parties selected me on consent as their arbitrator pursuant to Regulation 283/95. Various pre-hearings were held. The matter then proceeded to a written hearing. The parties also made oral submissions although no witnesses were called.

The following documents were filed as part of a Joint Document Brief:

1. Police Report dated March 16, 2024
2. OCF-1 dated March 22, 2024
3. EUO transcript of the claimant dated July 4, 2024
4. EUO transcript of Jason Albom (representative of the employer, the TTC) dated May 22, 2025
5. Affidavit of Jason Albom dated July 10, 2025 (with a number of exhibits)
6. Employee Schedule for the claimant.

FACTS

The facts are not in dispute. The claimant since October 2019 was a bus driver for the TTC. This was full-time employment and at the time of the accident she was working approximately 40 hours per week. In the week leading up to the accident, she had logged 37 hours.

On March 16, 2024 the claimant was scheduled to work a Saturday evening shift. The claimant drove a rental vehicle that she had secured from Enterprise for her personal use to the TTC's McNicoll division which was located at McNicoll Avenue and Milliken Boulevard in Toronto. This was where the claimant was required to clock in before she started her shift. According to the TTC schedule, on the date of the accident the claimant was to report in for work at 8:56 p.m. and was scheduled to start her shift at 9:22 p.m. and finish her shift at 5:04 a.m. The evidence of Jason Albom was that the time between 8:56 p.m. and 9:22 p.m. is referred to as "non-driving time".

The claimant reported in to the McNicoll division as required. She checked in at the "wicket" with the TTC personnel. From the time the claimant reported in to the wicket, she was considered on the clock and being paid by the TTC. On that day, the claimant was scheduled to operate bus 3285.

TTC bus operators do not operate the same bus every day. According to the claimant's evidence, you are assigned a schedule roughly every six weeks and you are obliged to drive that route for those six weeks but you will not necessarily drive the same bus and there could be different bus numbers for each shift. However, the route remains the same. In this case, the claimant was scheduled to drive Route 39.

Once the claimant checked in and was on the clock, she then had to get to the location of the beginning of her bus route in order to take over the bus from the prior operator. This was to be accomplished in the "non-driving time" between 8:56 and 9:22 on the date of the accident.

According to the TTC's evidence, the schedule was created and planned with the knowledge that there would be sufficient time for the claimant to get from the check-in point to the relief point. The claimant was expected to take a TTC bus that is publicly scheduled in order to get from the check-in point to the relief point.

On the date of the accident, the claimant intended to take bus 43 as a passenger in order to get to her relief point.

The TTC provides all their bus operators with a bus pass (employee identification card) in order to assist them in getting from the check-in point to the relief point.

On the day of the accident, the claimant's relief point was Kennedy Road and Finch Avenue where she was scheduled to take over operation of bus 3285 on route 39, run 75.

The accident occurred when the claimant was crossing Kennedy Road at McNicoll Avenue while en route to catch the TTC bus which would transport her to her relief point at Kennedy and Finch. According to the police report, she was struck in the pedestrian crosswalk by a left-turning vehicle insured by Dominion. The report indicates that the accident was reported to the police at 9:23 p.m.

The Safety Connect Report, which is created by the TTC supervisor who attended the scene of the accident, indicates that the incident occurred at 9:20 p.m. There does not appear to be any dispute that the accident therefore occurred sometime before 9:20.

The Respondent provided a great deal of evidence and information with respect to how the TTC operates in terms of its bus schedule and the duties, obligations and responsibilities of bus operators.

Every TTC employee is entitled to ride the TTC at any time without charge if they provide their identification badge upon boarding the vehicle. This is essentially the bus pass that is referenced above.

A TTC employee, while having the right to ride on the TTC at any time without charge, otherwise has no control over that vehicle when they are riding it as a passenger. They are no different than any transit user and they simply have the right to get on and off at designated stops without pay, providing they give their identification badge.

According to the Bus Operator Initial Resource Book C1: Working With Your Crew, if an operator is picking up their bus from another operator on the street, they must:

"Travel on the TTC with your equipment to the location - called the relief point - where you are scheduled to meet your bus (see page 132 C1-4 getting your bus)."

The same document at C1-3 notes that in terms of reporting for work the bus operator must each working day report in person to the wicket clerk at their division. They must report in by their report time shown on the crew guide.

When they report into the wicket clerk they must give them their name, employee number, report time and crew.

The same document at C1-5, "Setting Up For Service", provides the bus operator with details as to what to do when getting their bus ready for service either at the garage or, as in the claimant's case, when they are relieving an operator on the street. The steps are set out below:

1. Visually inspect the outside of the bus looking for any fresh damage;
2. Ask the operator if the bus is the right run number and if there has been any damage or defects when it arrives and if so, that is to be reported;
3. Log on to the TRUMP unit when you board the bus and follow the appropriate procedure;
4. Write the required information on the bus's waybill;
5. Adjust the driver's seat, steering wheel and mirrors;
6. Begin operating along the route following the schedule on the waybill.

Jason Albom provided some more detail with respect to the TTC's process and expectations with respect to taking over a bus on the street.

Mr. Albom has worked with the TTC for 24 years exclusively in bus transportation. He is the chief instructor of the operations training centre of the Toronto Transit Commission. There was no dispute that he had full knowledge of the training, expectations and practices with respect to TTC bus operators.

With respect to taking over from another bus driver on the street, Mr. Albom states that the TTC bus operator must follow the TTC standard procedure before starting to operate her bus. She would have to log on to bus (in this case bus 3285). An electronic vision system on the bus would then have recorded that she was operating the bus, where the bus was located and at what time. In addition, a system called Clever Devices also tracks the bus and its operator. It will note whether the operator has adhered to the preset timing points and route in order to assist in notifying the public when the next bus will arrive.

Mr. Albom's evidence was that TTC bus operators are only permitted to operate the buses within the confines of their schedule and only after they have logged on to the bus and taken the other required steps as outlined in the manual.

He notes that the TTC bus operators have no discretion to operate a TTC bus for personal reasons. They do not have any discretion to start or end their route at the time of their choosing. They must follow the scheduled route. A TTC bus operator does not have discretion to deviate from either the schedule or the route and should they do so, it can result in dismissal.

Mr. Albom in his affidavit states:

"I do not believe that at the time the claimant was struck crossing the street to get on a TTC bus and ride the bus as a passenger that any TTC vehicle was made available to her for her use because she could not drive a bus until after her passenger trip and then she could only take over the pre-assigned bus after she had completed the required logging-in requirements."

Mr. Albom also confirmed that during the time period that a bus operator is transiting to their relief point, that that is considered to be part of their job and that they are getting paid during that non-driving time.

Mr. Albom also confirmed by reviewing the TTC schedule that the claimant had been operating a TTC bus on March 9, 10, 11 and 14 and but for the accident was scheduled to drive the bus on March 16.

Attached to Mr. Albom's affidavit was a copy of the TTC bus operator's manual and the TTC's policy on the operation of vehicles. These manuals confirmed that the claimant was prohibited from driving a TTC vehicle other than pursuant to her designated schedule. Further, the bus could not be operated until:

1. The operator had been checked in at the wicket and confirmed fit for duty;
2. The previous operator of the bus had signed out and the current operator signed in according to the established protocol;
3. The pre-trip inspection has occurred;
4. The details on the waybill have been completed;
5. The operator has signed into the Clever Devices system and the vision system.

POSITION OF THE PARTIES

Dominion

Dominion takes the position that the claimant had regular use of the TTC vehicle in two respects. Firstly, as a driver operating their buses on a scheduled route and secondly as a passenger travelling to relief points on a TTC bus as mandated by the TTC policy. Before turning to the actual submissions of Dominion, it is helpful to set out the legislative provision that deals with regular use. This is s. 3(7)(f) of the Statutory Accident Benefits Schedule. It provides as follows:

- "(f) An individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
- (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, ..."

Dominion submits that this provision has five distinct elements, all of which are satisfied on the facts in this case.

The first element is that the claimant must have been living and ordinarily present in Ontario. There is no dispute with respect to that.

The second requirement is "at the time of the accident" and Dominion submits this means there must be a temporal connection between the use that is being made available and the time of the accident. Dominion submits that that too is satisfied here on the facts.

The third requirement is that "the insured automobile is being made available". Dominion submits that this requires that the vehicle be made available for the claimant's use but that the claimant does not need to be using it at the time of the accident.

The fourth component is regular use itself. Dominion submits that regular use means that the claimant's use is habitual, normal and recurs uniformly according to a predictable time and manner.

The fifth and last component is the requirement that the use being made available must come from a corporation, unincorporated association, partnership, sole proprietorship or other entity. Dominion submits that in this case that is not in dispute as the TTC is a corporation.

Therefore, Dominion submits that the first and last criteria are not in dispute and their submissions centre around the other three.

A. Was the TTC making its vehicles available for the claimant's use?

Dominion submits that the claimant had regular use of the TTC buses in two capacities. Firstly,

she was a TTC bus driver with a regular route and it was a requirement of her employment that she operate a bus. Dominion suggests that there can be no argument to say that the claimant did not have regular use of the TTC bus through her employment as a bus operator.

Dominion also submits that the claimant had regular use of other TTC buses as she was required to transit from her check-in point at the wicket to the relief point where she would pick up her bus via a TTC bus. Dominion points out that this was a requirement of her employment and that she was given a pass for that purpose.

Therefore, Dominion submits that TTC made its vehicles available to the claimant both as a bus driver when she was driving her designated route and when she was a passenger travelling from the division to her relief point.

B. Was the use regular?

Dominion submits that regular use is "habitual, normal and recurs uniformly according to a predictable time and manner" (*Zurich Insurance Company v. The Personal Insurance Company*, 2009 CanLII 26362 (ONSC)).

Dominion also submits that regular use does not have to be with respect to the same vehicle. Rather, it can apply to a number of vehicles in the fleet as long as one or other of those vehicles are being made available for regular use (*Schneider v. Maahs Estate*, 2000 CanLII 22705 (ONSC)).

Dominion submits that the claimant was a full-time bus driver for the TTC. The evidence shows she had regularly operated TTC buses in the weeks leading up to the accident. She had worked as a bus driver since October of 2019 and in the week leading up to the accident had already logged in 37 hours. Accordingly, as she regularly operated TTC buses according to a schedule, this use would be described as habitual, normal and recurring uniformly according to a predictable schedule.

C. Did the claimant have regular use **at the time of the accident**?

Dominion submits that the evidence in this case does establish a temporal connection between the availability of the TTC buses to the claimant at the time of the accident.

Firstly, the claimant had already clocked on at 8:56 p.m. and was on duty. Dominion submits the evidence is clear that she was on the TTC payroll as soon as she clocked on at 8:56 p.m. Dominion submits that at that point the claimant was effectively working as a bus driver.

After clocking in, the claimant was on her way to the relief point. While this was described as "non-driving time", Dominion submits that the claimant was still acting in her employment as a bus driver and was being paid for the non-driving time. Dominion submits that it was part of her job requirement to get from the check-in wicket to the relief point.

At the time the accident occurred, Dominion notes that the TTC had already assigned the claimant to operate bus 3285 and was scheduled to begin that operation at 9:22. Dominion submits that the vehicle was being held at the relief point for the claimant's use once she arrived in accordance with the TTC schedule.

In addition, Dominion submits that there is a further temporal connection between the availability of the TTC buses to the claimant and the accident. The accident happened while the claimant was crossing the road in order to catch the TTC bus that would take her to the relief point. Again, this was per the requirement of the TTC rules and regulations relating to their bus operators.

Dominion submits that the claimant was in the scope of her employment from her check-in time at 8:56 until the accident happened. At the time of the accident one could describe her as reporting to work, travelling to a relief point via TTC and preparing to operate her assigned bus.

Dominion submits "it would be absurd if the regular use provisions did not apply to an on-duty TTC employee who was involved in an accident while meeting a TTC vehicle as part of her assigned duties and procedures".

Dominion submits that the Respondent's denial defies logic and law stating "accepting its position would create an arbitrary coverage gap that renders the regular use provision meaningless for transit employees".

Dominion also made submissions with respect to the Respondent's position that the claimant did not have regular use of the TTC bus at the time of the accident as she did not have control or authority over the bus. The Respondent argues that she did not have access to the bus and would not have access as required by the TTC provisions until she actually boarded the bus and went through all the prerequisites needed by the manual before she could actually commence operating it.

On this point, Dominion submits that access and control is not the test of regular use. While it may be some evidence of regular use, Dominion submits it does not have to provide evidence of access and control in order to establish regular use.

Dominion points to the decision of Justice Belobaba in *ACE INA Insurance v. The Co-operators General Insurance Company*, 2009 CanLII 13625 (ONSC). In that case, Justice Belobaba gave an example of some circumstances when a vehicle might be made available to their employee. Firstly, Justice Belobaba pointed out that the regular use provision did not require that a "specific vehicle" was being made available to the employee, but only that any vehicle was being made available. The example he gave was that an employee was at work and on duty and ready to drive one of several cars of their employer. However, no specific car had yet been selected. That individual then walked across the street to get a cup of coffee and was hit by a car. Justice Belobaba held that the regular use provisions would apply even though no specific vehicle had yet been made available. Dominion relies on the following statement: "It is enough that at the time of the accident, one or more insured vehicles were being made available to that employee."

Dominion also relied on the decision of Justice Goldstein in *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110. This case was an appeal from a decision of Arbitrator Cooper where he, reaching his decision on regular use, referenced a need for "authority and control" with respect to finding regular use.

Justice Goldstein, in upholding Arbitrator Cooper's decision, noted that the arbitrator did not employ "authority and control" as a test, but rather as evidence. Justice Goldstein pointed out that actual use is not necessary. While actual use may be evidence of availability, regular use does not require actual use. Justice Goldstein noted that even though the claimant in the case before Arbitrator Cooper was not in the vehicle at the time of the accident and was a few minutes away from arriving at work, he still had regular use.

Dominion therefore submits that in this case where a claimant who was on the clock as a bus driver and en route to take over her scheduled bus for the purpose of her employment, it is irrelevant in terms of regular use whether as a bus operator she did not have control and access at the time of the accident.

Respondent

The Respondent does not take issue with the claimant being ordinarily resident in Ontario, nor that the TTC is a corporation. Their argument revolves around whether at the time of the accident a bus was made available for the claimant's regular use. Their submissions suggest that they do not dispute that the claimant regularly used buses of the TTC, as indeed she would in the course of her employment, but that at the time of the accident she did not have regular use as she had no authority or control over the bus at that time. She was no different than a pedestrian going to catch a bus or crossing the street near a bus.

The Respondent points out the following facts in support of their position:

1. The claimant could have been terminated from her employment if she attempted to drive or control a TTC bus at the time of the accident;
2. A TTC bus operator cannot exercise any level of control over the TTC vehicle outside of their employer-controlled and scheduled driving assignments. Such would violate the terms and conditions of their employment;
3. The claimant had no right of control over a TTC vehicle while riding a TTC bus as a passenger;
4. Her control consisted of getting on and off at designated stops, no different than regular transit users;
5. The claimant was prohibited from driving any TTC vehicles at any time other than those strictly designated schedules and times listed on her personal schedule;

6. While the claimant was prohibited from driving any TTC vehicle other than under the schedule, she was also only given the right to use a designated vehicle after she had completed several mandatory prerequisites. None of those prerequisites had been completed at the time of this accident.

The prerequisites as set out in the TTC policies for bus operators include:

1. You must check in and ensure you are fit for duty;
2. You cannot use the vehicle until the previous operator has signed out and the new operator has signed in using the established protocol;
3. You must do the required pre-trip inspection;
4. You have to complete the details on the waybill;
5. You have to sign into the Clever Devices system for the specific bus;
6. In this case, the vision system documentation for the claimant's bus that she was trying to drive (bus 3285) shows she had not signed on to the bus at the time of the accident;
7. The waybill for bus 3285 showed that the claimant had not taken over the bus and vault at the time of the accident;
8. The accident occurred during the claimant's non-driving time between 8:56 and 9:22;
9. The claimant was struck before she was able to board a bus taking her to the relief point.

The Respondent submits that all the above establishes that the claimant did not have regular use at the time of the accident of the bus she was scheduled to operate nor of the bus she was scheduled to board.

With respect to the bus that she was going to board in order to get to the relief point, the Respondent submits that simply boarding and riding a regularly scheduled TTC bus as a passenger simply does not satisfy the requirement of regular use.

The Respondent submits that the purpose of the deemed insured/regular use provision is "a clear recognition that in these types of transactions the regular user is in such a relationship with the vehicle and the vehicle insurer that the person should claim their benefits first from the insurer of the vehicle, rather than claim benefits from any other insurance company" (see *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, 2012 ONCA 683).

The Respondent submits that the idea that all TTC bus drivers might be deemed insureds simply because they hold a free public transit pass as a perk of their job is inconsistent with the purpose of the regular use provisions. The Respondent also relies on the decision of Justice Echlin in *Gore Mutual Insurance Company v. The Guarantee Co. of North America*, 2010 ONSC 3826. In that case, Gore argued that a 16-year-old gentleman who sustained serious injuries while in a stolen Dodge Caravan would be covered under an insurance policy through the Hamilton Street Railway. The injured person in that case argued that he was dependent on his mother for financial support and care, and as his mother had a monthly pass for the Hamilton Street railway and used it regularly to get to and from work, that therefore she had regular use of their vehicles and accordingly their insurer, The Guarantee Company, should stand in priority. That case proceeded initially before Arbitrator Lee Samis who observed:

"In respect of passengers, the vehicles of a public transit system are either made available for no one's use or everyone's use. Everyone is entitled to be a passenger on a scheduled route, simply by payment of a fare. If this means that the vehicles are made available for regular use in accordance with the regulation, the result is that all of those persons are entitled to SABS benefits from the transit's insurer and as such entitlement would apply to accidents that do not involve transit vehicles, that are outside the Hamilton area and indeed may be outside of Canada."

Justice Echlin agreed with Arbitrator Samis and concluded that there would be far-reaching ramifications not to uphold Arbitrator Samis's position. Justice Echlin stated:

"The significant and far-reaching ramifications of holding otherwise would result in nearly every time a public transit authority presumably anywhere in Ontario sells a token, ticket or bus pass it will be seen to be including a policy of insurance as a 'added extra bonus premium' to members of the public."

Regular use was not found in that case. The Respondent submits that the facts, analysis and interpretation of that case is equally applicable to the circumstances here and submits that such a finding in this case would similarly impose "an astonishing amount of risk on insurers resulting in an increase in the cost of public transit".

With respect to the argument that the claimant had regular use of the bus that she was scheduled to operate that day, the Respondent's position is that simply because the claimant was being paid on an hourly basis at the time of the accident and on her way to get to her scheduled route, that that does not mean she had regular use.

The Respondent submits that the claimant had no discretion to use a company vehicle at the time of the accident. The Respondent submits that the phrase "is being made available" must speak to reality and not to hypotheticals.

The Respondent points out that the TTC prohibits their bus drivers from using a TTC vehicle until they get to the relief point and follow the required protocol. When this accident occurred, the TTC bus was simply not available to the claimant as it was being operated by a different driver

and/or in the control of a different driver. The claimant could not have regular use of a bus over which she had no control or authority either in fact at the time or according to the policies of the TTC.

The Respondent relies on a number of cases to support their position.

The Respondent relies on the decision of the Ontario Court of Appeal in *Continental Casualty Co. v. Chubb Insurance Co. of Canada*, 2022 ONCA 188. In that case, the claimant's name appeared on the scheduled drivers attached to a fleet policy insured by Continental. The evidence was undisputed that he had never driven any of the corporate vehicles, most of which were tractor-trailers used in the forestry products business. While he was involved into the day-to-day operations and did have access to the keys of the fleet vehicle as they were kept in his office, he had never actually driven one of them. The arbitrator who initially heard the case was found by the court that he had erred by focusing on the claimant's potential access to and control over the company vehicles and in doing so ignored or failed to give effect to the evidence that he had never once used a company vehicle insured under the Continental policy. The Court of Appeal noted:

"By focusing on the time of the accident and adding the phrase 'is being' the current requirement speaks to reality, not hypotheticals."

The Respondent also relies on the decision of *ACE INA Insurance v. The Co-operators General Insurance Company (supra)*. In that case, an employee of a rental car company had regular use of rental car vehicles during working hours. However, the accident in that case did not occur during working hours. The Respondent points to Justice Belobaba's comments in that case set out below:

"The question is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car."

As in this case, the *ACE v. Co-operators* case was not an issue about regular use, but rather was whether the vehicle was being made available at the time of the accident. The answer turned on whether the employee had access and control at the time of the accident, and as the claimant in that case was off work and on his way downtown in a friend's car, he did not have access and control at the time of the accident. The Respondent submits that that is the case here.

The Respondent also relies on the decision of Justice Nishikawa in *TD Insurance Company v. Dominion of Canada General Insurance Company*, 2018 ONSC 2594. In that case, the claimant was a bus driver who worked for a company that operated buses to transport children to and from school. These buses did not operate on the weekend. An accident occurred on the weekend. However, the claimant had keys to the vehicle and could keep her bus at her residence at all times. Drivers were allowed to use the buses for personal use during business hours but were not permitted to drive the school buses for personal use outside business hours. The court noted that accessibility of the vehicle and the keys were important facts in looking at regular use.

While accessibility to the keys was one factor, accessibility to the vehicle also had to be considered and in the context of this case, even though the keys and vehicle were accessible, as the employees were not permitted to drive school buses on the weekend, and this accident occurred on the weekend, therefore it was not being made available to the claimant at the time of the accident.

The Respondent also relies on *Intact Insurance Company v. Old Republic Insurance Company (supra)*. In that case, the claimant worked as a short-haul truck driver. The employer had a fleet insurance policy issued by Old Republic and the claimant was listed as a driver on the fleet insurance policy.

However, the claimant was not permitted to take the truck home. He was required to make his own way to and from work. However, he was allowed to sleep in a truck on the night before a haul. The accident occurred when the claimant was driving his mother-in-law's vehicle on the way to work on the day of the haul.

Arbitrator Cooper found that the employer made the insured vehicle available for the claimant's regular use because he had permission to sleep in a truck the previous night before starting the haul and therefore the vehicles were accessible, available and he had control of them the night before. Therefore, even though he was on his way to work and not actually in a truck, driving a truck or sleeping in a truck, the arbitrator found that there was regular use and this was upheld by Justice Goldstein.

The Respondent relies on this case because of the emphasis on access and control. Once again, there was no dispute in that case that the claimant had regular use of the vehicle. The question was whether he did so at the time of the accident. Old Republic argued that the employee had to be working at the time of the accident and that was a condition precedent to there being regular use provided at the time of the accident. The claimant had not "started work", therefore regular use was not being provided at the time of the accident. Arbitrator Cooper, as agreed to by Justice Goldstein, held that the claimant was in fact in a position to use the vehicle the night before the accident as he could have slept in it, and therefore there was a vehicle available to him at the time of the accident even though technically he had not reached his place of employment.

The Respondent points to the comment by Justice Goldstein in upholding Arbitrator Cooper's decision that as the claimant had authority to go to the lot at the time of his choosing, pick up keys to a vehicle and sleep in it the night before he was required to drive, that therefore he had regular use. The Respondent submits in this case that at the time of the accident, while the claimant was working, that she did not have authority to go to the lot at the time of the accident, pick her own bus, pick up keys, or indeed access the vehicle until all the preconditions had been met and none of the TTC's preconditions had been met at the time of the accident.

The last case relied on by the Respondent with respect to their control and access argument/regular use at the time of the accident is *Unica Insurance Inc. v. Chubb Insurance Company of Canada* (decision of Arbitrator Shari Novick, December 18, 2020). In that case, the

claimant was hit by a car insured by Unica as he was crossing the street to catch a bus on his way to work. The accident occurred on November 6, 2018 and the claimant had started training as a school bus driver in Woodstock in August of 2018. He began driving full-time shifts on October 18, 2018, about three weeks before the accident. He would pick up students each morning, Monday to Friday, drive them to school, then drive them home. He travelled to the lot where the buses were kept each morning by public transit. He was not permitted to drive the buses he was assigned for personal use.

The claimant was required to complete a pre-trip inspection each day before he drove the bus off the lot. He was supposed to arrive at the yard sometime before 7:30 a.m. The evidence was that his first pickup on the morning route of the day of the accident was at 8:06.

The pre-trip inspection required the driver to do a circle check of the bus, check the bus's engine fluid, brakes, tires, gauges, lights. They were required to start the vehicle and check whether anything was broken or loose under the hood. They were then to call the dispatcher on the lot to confirm they completed their inspection, all was in order and they would then be given clearance to begin their route.

An electronic vehicle inspection system called ZONAR was used to recall the results of the vehicle inspection and each driver was given a handheld unit and they had to log on to the system once they entered their bus in the morning.

As in this case, the parties agreed that a school bus was made available for the claimant's regular use when school was in session but the issue was whether the bus was made available at the time of the accident which occurred at 5:38 a.m.

Arbitrator Novick found that the bus was not being made available for the claimant's regular use at the time of the accident. She found he was not in the middle of his work day. She found the factual circumstances of the case before her to be different than those before Justice Belobaba in *ACE v. Co-operators*. She noted that the evidence supported that the claimant had not started his shift as he had not contacted the dispatcher and been given clearance to proceed. Further, the evidence suggested that the claimant had not previously started work on other occasions before 5:38 a.m., suggesting that a vehicle would have therefore been available to him at that time. Arbitrator Novick stated:

"My view is that the phrase 'being made available' in s. 3(7)(f)(i) of the Schedule requires the entity making the vehicle available to the individual in question to be taking active steps to do so, at the time of the accident. Mere theoretical access is not enough."

The Respondent therefore submits that at the time of the accident the claimant did not have access or control over any bus. She was still a considerable distance away from accessing a vehicle (the bus she was scheduled to drive) and that bus would not be available for her use until she arrived at the relief point to take over.

The Respondent submits that to find the claimant in this case as a deemed named insured while on their way to work would stretch the meaning of the regular use provision to suggest that anyone who drives for a living and is involved in an accident while they are on their way to pick up the vehicle that they will be driving later that day therefore fits within the definition.

The Respondent submits that even though the claimant in this case was taking active steps to arrive at work and access the vehicle, that in fact she did not have access and was not known to usually have access at the time of the accident. She was not permitted to have access and control over a TTC vehicle at the time of the accident and in fact did not have access and control and therefore was not being provided with regular use of a TTC vehicle **at the time of the accident**.

ANALYSIS AND DECISION

In reviewing the submissions of the parties, the key issue in dispute is whether "the insured automobile was being made available at the time of the accident". The Respondent concedes that the claimant had regular use of their buses as a bus driver but argues that no bus was being made available to her at the time of the accident.

Having carefully reviewed the submissions, I agree with the Respondent that the fact that the claimant was going to get on a TTC bus as a passenger to get to her relief point and the fact that she was given a bus pass as part of her employment does not result in the claimant having a TTC bus made available to her at the time of the accident. While the facts of this case are slightly different than those in *Gore v. Guarantee (supra)*, I find the comments of Justice Echlin in that case to be applicable here. While Dominion tries to distinguish the facts of this case on the basis that the claimant was an employee of the TTC and was obliged to take a TTC bus to get to the relief point, I do not find that that elevates the claimant into any significantly different position than anyone who has a bus pass.

Justice Echlin noted in the decision that for passengers on a public transit system, either the vehicle is made available for no one's use or everyone's use as everyone is entitled to be a passenger on a scheduled route. To find that a passenger with a bus pass has regular use of a vehicle, whether it is a bus pass because they are employed by the TTC or a bus pass that they found monthly, would have significant and far-reaching effect on the coverage that would fall to insurers of the public transit system throughout Ontario.

I do not find the claimant's employment with the TTC to be a significant enough distinguishing factor that would allow me to deviate from Justice Echlin's conclusions in *Gore v. Guarantee* to which I would otherwise be bound.

However, while I find that the circumstances of the claimant intending to become a passenger on the TTC bus to get to the relief point not meeting the requirements of s. 3(7)(f), it is certainly relevant when looking at the second argument put forward by Dominion and that is whether at the time of the accident the claimant had a TTC bus available to her by virtue of her employment as a bus driver.

On that issue, I agree with Dominion's analysis of the case, and on the facts of this case, at the time of the accident the claimant, as part of her employment with the TTC, had a bus available to her.

On this issue, I find the following facts compelling. Firstly, the claimant was on the clock. She had already checked into the wicket and was there at 8:56 and she was now at the beginning of her employment as a bus driver.

Secondly, she was required as part of her employment to get from the wicket to the relief point via a bus. She was in the process of doing that when the accident occurred. While that may be described as "non-driving time", the case law is clear that to have a vehicle available to you at the time of the accident you do not have to be in the vehicle or operating the vehicle but only that it is available to you.

The claimant had been working as a bus driver for a number of years. The week prior to the accident she operated a TTC bus on March 9, 10, 11 and 14 and was scheduled to operate bus 3289 on Route 39 at the time the accident occurred. Therefore, she already had a bus assigned to her and a route.

While I understand the Respondent's argument with respect to "access and control", I note Justice Goldstein's comments in *Intact v. Old Republic (supra)* noting that that is not the test but only part of the evidence. While the evidence does establish that there were a number of steps that the claimant had to take before she started her route, I do not see that as affecting the clear evidence that at the time of the accident she had reported to work, was on her way to her bus, had an assigned bus and an assigned route. To accept the Respondent's arguments that the preconditions to actually starting the bus and operating it that day prohibits the claimant from having the bus available to her, would result in too narrow an interpretation and one that would, in essence, result in a requirement in regular use cases for the claimant to be actually operating the vehicle at the time of the accident, and the case law is clear that that is not a requirement.

If the Respondent's position were accepted, then we would see arguments that regular use was not being provided at the time of the accident if a tractor-trailer driver had not completed its pre-inspection or when an operator of a vehicle had not yet put on their seatbelt.

I carefully reviewed the decisions referred to by the Respondent and I find that they are distinguishable. In the *Continental Casualty v. Chubb* decision (*supra*) the claimant had never driven any of the corporate vehicles. In this case, the claimant regularly drives a bus and the Respondent has acknowledged that. This is not, in my view, a hypothetical situation as noted by the Court of Appeal in *Continental*, but rather the reality of the claimant's employment. She was being paid as a bus driver and had started her employment at the time of the accident and was being paid to work as a bus driver when the accident occurred.

In the *ACE v. Co-operators* case (*supra*) the claimant was off work and was on his way downtown in a friend's car. Clearly, he did not have access and control at the time of the accident. In the case before me, the claimant was cleared for work, on her way to work with a designated bus and

all she had to do was get there in accordance with the TTC's regulations. The bus was available to her.

Similarly, in the case of *TD v. Dominion*, while the claimant was a bus driver taking children to and from school, the accident occurred on a weekend. The evidence established that while the claimant could keep the bus at her home, that they were not allowed to operate the buses over the weekend. The accident occurred on a weekend. The claimant in the *TD* case was not in the course of her employment and was not on her way to get her assigned bus as is the case here.

With respect to the *Intact v. Old Republic* case (*supra*), I find that the decision of both Arbitrator Cooper and Justice Goldstein supports my finding here. In this case, the claimant had authority, having completed the check-in at the wicket, to proceed to the relief point and start her shift. The fact that none of the TTC preconditions had been met does not, in my view, support the argument that she did not have the vehicle available for her use.

In the *Unica v. Chubb* case (*supra*) the claimant was hit by a car crossing the street while he was on his way to work. He had not started work. His shift was not scheduled to begin. The facts are quite different here. Arbitrator Novick noted that the claimant in that case was not in the middle of his work day as he had not started his shift, not contacted the dispatcher and had not yet been given clearance to proceed. The claimant in this case had started her shift, contacted and cleared the start of her shift with the wicket, been given clearance to proceed and in fact was on her way to get to her bus.

I find the facts of this case to fall squarely within the scenario put forward by Justice Belobaba in *ACE v. Co-operators* (*supra*). In that case, Justice Belobaba noted that if an individual was at work, on duty, ready to drive and had not yet chosen a car and was hit while crossing the street to get a cup of coffee, that he would find the regular use provisions applied. Justice Belobaba stated in that case, "It is enough that at the time of the accident, one or more insured vehicles were being made available to that employee." I find that that is the case here.

I therefore conclude that the claimant, at the time of the accident had a TTC bus being made available to her for her regular use thus meeting the requirements of s. 3(7)(f) of the Statutory Accident Benefits Schedule. Accordingly, the claimant is a deemed named insured of the Respondent and the Respondent stands in priority to Dominion.

ORDER

The claimant is a deemed named insured under the Respondent's policy at the time of the accident and the Respondent is required to pay the claimant statutory accident benefits pursuant to s. 268 of the *Insurance Act*.

The parties did not argue quantum and if there is any dispute with respect to the quantum of benefits and related expenses then the parties should contact me and we can schedule a further pre-hearing.

COSTS

As Dominion was successful in this matter, I find that the costs of the arbitration, legal fees and disbursements are payable on a partial indemnity scale by the Respondent.

I have not fixed the amount of costs and hopefully the parties will be able to reach some agreement but if there is any dispute, the parties should notify me within the next 60 days so we can schedule a further pre-hearing.

DATED THIS 2nd day of December, 2025 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', with a long horizontal flourish extending to the right.

Arbitrator Philippa G. Samworth

DUTTON BROCK LLP