

IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 as amended, and Ontario Regulation  
283/95 made under the *Insurance Act*  
AND IN THE MATTER of the *Arbitration*, S.O. 1991 c.17 as amended  
AND IN THE MATTER of an Arbitration

**BETWEEN**

**DEFINITY INSURANCE COMPANY**

Applicant

and

**UNIFUND ASSURANCE COMPANY**

Respondent

**DECISION**

**COUNSEL**

Danielle M. Gauvreau for the Applicant, Definity Insurance Company (hereinafter referred to as "Definity").

Kevin Mitchell for the Respondent, Unifund Assurance Company (hereinafter referred to as "Unifund").

This matter comes before me pursuant to s. 268 of the *Insurance Act* and Regulation 283/95 as amended. This is a priority dispute between two insurers with respect to which of Definity and Unifund stand in priority for payment of statutory accident benefits to a claimant who was involved in an incident on March 29, 2022.

On that day the claimant was operating an uninsured e-bike when he was struck by a motor vehicle operated by Hamza Omar Ismail Hussein. The claimant applied to Definity for statutory accident benefits pursuant to a policy issued to Kolar Collision Centre Ltd (hereinafter referred to as "Kolar") bearing policy number 500508674. Definity claims this policy was cancelled two months prior to the date of loss. Definity also takes the position that irrespective of the cancellation, their policy never insured the motor vehicle that struck the claimant.

Unifund insures Omar Ismail Hussein pursuant to a standard automobile policy (OAP-1) bearing policy number PR98AE255. This policy insured a 2013 Toyota RAV4. This policy was in force on the date of loss. However, the Toyota RAV was not the striking vehicle. The vehicle that struck the claimant was a Honda registered to Kolar effective December 3, 2021.

Hamza Omar Ismail Hussein is the son of Omar Ismail Hussein.

It is Unifund's position that their policy did not cover the Honda at the time it struck the claimant and further that the driver of the striking vehicle was not a named insured under their policy and therefore coverage is not extended to him through the Unifund policy.

## **PROCEEDINGS**

The parties elected me on consent as their arbitrator. They filed an Arbitration Agreement dated July 3, 2025. After a number of pre-hearings, they agreed to proceed to a hearing that took place via written submissions and also a half day with supplementary oral submissions. No *viva voce* evidence was called.

The documentary evidence before me included various OCF forms including the OCF-1 dated March 31, 2022, the Police Report (a partial Police Report) dated March 30, 2022, a Statutory Declaration dated June 16, 2022 completed by the Applicant, the Economical Certificate of Insurance January 21, 2022 to January 21, 2023, the Unifund Certificate of Automobile Insurance December 1, 2021 to December 1, 2022, driving record for Hamza Omar Ismail Hussein dated January 16, 2023, transcript of the EUO of the claimant dated February 28, 2024, Intrepid Investigation report July 27, 2024 and November 14, 2024, undated Rental Agreement between Kolar and Hamza Hussein, various pictures of the e-bike, the front side of Hamza Hussein's driver's licence, various e-mails between counsel to Unifund and counsel to Definity, a full copy of the Motor Vehicle Accident Report, a copy of the OPCF-27, a copy of Economical's cancellation letter for Kolar Auto Collision dated December 29, 2021, billing statement Economical to Kolar February 2, 2022, and log note Economical dated April 18, 2022.

The parties also submitted various Books of Authority.

## **FACTS**

On March 29, 2022 at 5:18 pm the claimant was operating his e-bike when he was struck by a 2018 Honda CR-V bearing licence plate number CVJV754 and VIN number 2HKRW2H50JH114571.

The Honda was registered to Kolar Auto Collision Centre Ltd, operating as Kolar Towing. It had been registered to Kolar on December 3, 2021.

The driver of the Honda at the time of the accident was Hamza Omar Ismail Hussein.

The claimant was not a named insured under any policy nor was he a spouse or dependant or a listed driver under any policy.

The claimant submitted an OCF-1 to Definity on or about April 28, 2022.

Definity acknowledged that their policy insured Kolar but claims the policy had been cancelled effective January 31, 2022. Therefore, there was no policy in effect on March 29, 2022. Further, Definity advised that having reviewed the policy history, that the 2018 Honda CR-V was never listed under their policy.

By letter dated July 4, 2022 Definity wrote to Unifund putting them on notice of the priority dispute. The Definity letter makes reference to the Unifund insured, being Hussein Omar and the Unifund policy number PR98AE3255.

In the July 4, 2022 letter Definity states that the driver of the vehicle that struck the claimant was Mr. Hussen Hamsah Omar Ismail. They noted that they had determined that this individual was insured under the Unifund policy and thus the notice of dispute was being issued as the Unifund insured was the driver of the striking automobile. The letter to Unifund enclosed the OCF-1, the Police Report, an Autoplus, a licence search, an Autoplus search of the claimant, an Autoplus search for Omar Ismail Hussein and a copy of their cancellation letter.

Initially there appeared to be some confusion as to whether the driver of the striking vehicle was also the named insured under the Unifund policy. Once the complete Police Report was produced (sometime later) it became clear that the actual driver of the striking vehicle was not the named insured under the Unifund policy (although they had very similar names) but was in fact the son. It is an accepted fact that the named insured under the Unifund policy was not operating the striking vehicle on the date of loss. It is also agreed that the driver of the striking vehicle was Unifund's named insured's son and that he himself was not a named insured or listed driver under the Unifund policy.

In addition to putting Unifund on notice, Definity also put the Motor Vehicle Accident Claims Fund on notice. Definity did not commence an arbitration against the Fund. Unifund brought MVACF into the arbitration under section 10 (Regulation 283/95) but they were later released from the proceeding on consent prior to the first pre-hearing.

Definity's insured, Kolar operated a repair garage. A Certificate of Automobile Insurance confirms that for the relevant policy period in terms of this date of loss, the following vehicles were described automobiles under the policy:

- Automobile 1: 2015 Chrysler
- Automobile 2: 2018 Mazda
- Automobile 3: 2012 BMW truck van
- Automobile 4: 2011 Volkswagen
- Automobile 5: 2013 Kia truck/van
- Automobile 6: 2015 GMC truck/van
- Automobile 7: 2014 Lexus

The 2018 Honda registered in the name of Kolar involved in the accident does not appear as a described vehicle on the relevant Definity policy.

A review of the Unifund policy shows that the named insured is Mr. Omar Hussein of 702-320 Dixon Road. The policy period relevant to this date of loss shows that the only described automobile under that policy is a 2013 Toyota truck/van RAV4. There are no listed drivers on the policy and specifically Hamza Omar Ismail Hussein (the driver of the striking vehicle) is not listed

under the policy. I do note that the Motor Vehicle Accident Report shows his address to be the same as his father's: 702-320 Dixon Road.

The question then arises is, how did Omar Hussein, the son, come to be in possession of the Kolar vehicle? Considerable effort was made by counsel in this arbitration to have the Unifund insured and his son attend and give evidence at an EUO. They were contacted, they were served with Summons, but unfortunately they were unco-operative and never attended any EUOs and therefore we do not have the benefit of their oral evidence.

However, the evidence is that Kolar was an auto collision centre.

According to a log note dated April 5, 2022 the adjuster at Definity contacted someone at Kolar: one Omar Abullah. The log note indicates that Omar advised his supervisor was out right now and he will contact the adjuster the next day. Ultimately, the adjuster spoke with "Ahmed Moheed" who is described as the Economical insured. On April 20, 2022 during a phone call Ahmed advised that he did not have the vehicle and driver information but he would get someone to look it up and get back to the adjuster. The log note goes on to state, "As per Ahmed, customer took his vehicle for repairs and Kolar Auto provided one of their rental to the customer while his vehicle was being repaired."

Also produced at the hearing was a copy of a Kolar Rental Agreement dated April 6, 2022. The Rental Agreement notes that the vehicle was taken out March 28, 2022. The vehicle bears licence plate number CVJV754. The vehicle is noted to be "vehicle number 754". The renter is Hussein Ismail of 702-320 Dixon Road. The driver's licence given matches up to the driver's licence of the driver of the striking vehicle: the son of Unifund's named insured.

I pause here to note that it appears that it was not until February of 2024 that Unifund and their counsel became aware that it was the son of the named insured operating the Kolar vehicle and not their actual named insured. This occurred when a full copy of the Motor Vehicle Accident Report was provided through the EUO of the claimant which took place on February 28, 2024. Prior to that time only a partial Police Report had been circulated which did not have the full name of the driver of the vehicle and his driver's licence number.

A Statutory Declaration was completed by the claimant at the request of Definity on June 16, 2022. This provided information that satisfied Definity and later Unifund that the claimant did not have any access to any motor vehicle accident policies of his own. Notably, this document identifies the driver of the vehicle that struck him as Hussien Hamizah Omar-Ismail.

A review of the transcripts of the EUO of the claimant reveals little information of relevance to the issues in dispute in this arbitration. The majority of the evidence deals with the claimant's own circumstances.

With respect to the cancellation of the Economical policy, two relevant documents were put into evidence. The first was a copy of a registered letter dated December 29, 2021 from Economical to Kolar Auto Collision Centre Ltd. This is the cancellation letter and the key parts are set out

below.

"Your Economical auto insurance policy premium was due on December 21, 2021 and we have not received your payment. To avoid having your policy cancelled please pay the total amount due (this includes any applicable service charges for return payments and provincial tax) by January 28, 2022.

Total amount now due \$1,422.07.

**Payment must be received in our office by January 28, 2022. The amount due must be paid by money order, certified cheque, cash or secure online payments through our website at [www.economical.com](http://www.economical.com).**

**Our office is located at:**

Customer Accounts Centre, 590 Riverbend Drive, Kitchener, Ontario N2K 352.

If we do not receive your payment by January 28, 2022, your policy will be cancelled on January 31, 2022 at 12:01 am in accordance with the policy provisions and statutory conditions.

If you have any questions please call your broker BROKERLINK at 905-876-4607."

The letter also provides Economical's address.

In addition, a confirmation that efforts had been made to deliver the letter by registered post were provided. The tracking information provided for the registered letter indicates that on December 31, 2021 at 8:04 am the letter was sent out for delivery. At 10:37 it was scanned and delivered. Through a Canada Post online chatline an agent confirmed that the recipient refused to sign for the letter so there was no signature captured. Proof of delivery was also attached.

Lastly, there was a billing statement produced dated February 2, 2022. This indicated that the amount due for the next payment was \$489.52 and that is indicated as being the amount of the monthly payment. The billing statement also shows that the policy renewal took place January 21, 2022 with a premium of \$17,886. As the policy was cancelled, the sum of \$17,378.48 was deducted leaving a term balance for the short period before the cancellation of \$489.52.

Also relevant to some of the positions taken by the parties in this matter is a series of emails between the parties and/or their counsel dealing with who the driver of the vehicle was and whether he was also the named insured under the Unifund policy and whether or not the Motor Vehicle Accident Claims Fund should be let out of the arbitration.

The arbitration records show that while the Notice of Dispute was issued and provided to both Unifund and the Motor Vehicle Accident Claims Fund, Definity only chose to bring an arbitration against Unifund. Unifund then added the Motor Vehicle Accident Claims Fund under s. 10 of regulation 283/95. As noted earlier, it is also clear because of the similarity of the names of

Unifund's named insured and his son that there was some confusion as to whether they were the same individual. The evidence shows that for some time Unifund believed the driver was their named insured. Economical, as shown by their letter of July 4, 2022, also was under the same impression.

In an initial email of April 10, 2023 counsel for Unifund advises counsel for Definity that they are going to be adding MVACF to the arbitration and sets out a number of requests for documents. There does not appear to be any suggestion in that email that the driver and the Unifund insured are not the same individual.

The Motor Vehicle Accident Claim Funds appoints counsel. In an email from their counsel to counsel for Intact and Definity dated May 29, 2023 counsel for MVACF states the following:

"Kevin, as per our discussion your understanding at present is that Hussen Hamsa Omar-Ismail and Omar Ismail Hussein are one and the same and that there are no coverage issues. Can you please take steps to confirm that. If there are any issues in that regard, that will likely affect whether an EUO of the driver is necessary."

There then must have been some discussions amongst counsel as a further email from counsel for MVACF to the other parties on July 20, 2023 states:

"On these facts, where Unifund is the insurer of the driver of the vehicle that struck the claimant, MVACF will never have to respond to this claim. I appreciate that Unifund wants to further investigate the issue of whether Economical is the proper insurer but that is an issue between your clients. Regardless of the outcome of the investigation, MVACF is still the payer of last resort and will never be called upon to respond to the claimant's AB claims."

Shortly after this email, MVACF is let out of the arbitration before ever proceeding to a pre-hearing.

The last relevant email on this issue is dated February 19, 2024 from Mr. Mitchell to counsel for Definity. This was after the EUO of the claimant had taken place and the Police Report had been produced. The relevant portions of the email are set out below:

"My client advises it was the son of their named insured who was operating the Kolar vehicle at the time of loss. Check the date of birth of D1 on the police report. The son is not listed upon the Unifund policy. My client wants an EUO done of the named insured to understand better how the son came to be driving the Kolar vehicle. ..."

In a later email from Counsel for Unifund to Definity dated July 7, 2025 it is confirmed that the insured son, Hamza Omar Ismail Hussein, was never a named insured under the Unifund policy, never listed, specified or an excluded driver under the Unifund policy.

## ISSUES FOR DETERMINATION

Multiple issues arise out of this unusual set of facts:

1. Was the Economical policy properly cancelled on March 29, 2022?
2. Irrespective of issue 1 above, did the Economical policy provide coverage to the 2018 Honda CRV?
3. Does the Unifund policy cover the Honda CRV as a temporary substitute vehicle on the date of loss?
4. Is Unifund estopped from relying on a coverage defence.

## POSITION OF THE PARTIES

### Definity

Definity takes the position that their policy was properly cancelled on the date of loss but that that issue is really a red herring as their policy, even if not properly cancelled, never covered the striking vehicle: the Honda 2018 CRV.

Definity submits that Mr. Hussein (junior) left the Toyota RAV vehicle at Kolar for repairs and then rented the Honda from Kolar to use while the repairs were being completed. Therefore, when the vehicle was involved in an accident, Unifund as the insurer of the Toyota RAV insured the Honda as a temporary substitute vehicle.

With respect to whether the Economical policy insured the Honda, Definity points to the policy documentation submitted at the hearing which clearly indicates that the Honda is not a described vehicle under their policy. Definity submits that the claimant would only be entitled to accident benefits from Definity if the Honda had been insured under the Economical policy. In order to be insured, the Honda would have to be a described automobile in accordance with s. 2.1 of the standard OAP-1. The Kolar policy was not a garage policy but was a standard OAP-1.

With respect to whether the Honda was somehow or other covered under the Economical policy even though it was not listed, Definity submits that firstly the Honda was not a newly acquired automobile. In accordance with s. 2.2.1 of the OAP-1, in order for coverage to be available the insurer must be advised within 14 days of the insured acquiring a vehicle and to pay any additional premium.

The registration history for the Honda shows it was acquired by Kolar in December of 2021, nearly four months prior to the date of loss and therefore outside the 14-day time period for notification for it to be considered a newly acquired automobile.

Definity also submits that the Honda would not qualify as a "temporary substitute vehicle" under

their policy. Firstly, there was no evidence that any of the actual described vehicles under the Economical policy were out of service. Further, under s. 2.2.2 of the OAP-1 it is a condition precedent to coverage for a temporary substitute vehicle that the actual temporary substitute vehicle cannot be owned by the named insured. Kolar was the registered owner of the Honda, therefore the Honda could never be considered a temporary substitute vehicle and Definity submits no coverage is available there either.

Definity also addressed whether or not the Honda might be covered as an "other automobile". However, other automobiles are only covered if they are being driven by a named insured or a listed driver under the Economical policy. Mr. Hussein, the driver, was not a named insured or listed driver under the Economical policy and therefore there is no coverage available.

With respect to the issue of cancellation Definity takes the position that there is no issue with their notice of cancellation and that it is completed in accordance with the relevant statutory conditions.

In response to Unifund's argument that the cancellation notice does not provide that the payment was due by 12 noon, Definity submits that there is no case law to support their position that the failure of the cancellation letter to specifically state the 12 noon deadline for payment is sufficient in and of itself to make the cancellation letter ineffective. Definity references the decision of Arbitrator Bialkowski in *Co-operators v. Jevco*, May 3, 2025 wherein he found that a cancellation notice that did not state the time was still effective.

In response to Unifund's submissions that the cancellation letter is deficient because it does not set out an administration fee separate from any amount due under the contract, Definity submits that the facts of this case are distinguishable from other cases which held that the failure to separate out the administrative fee and the amount due on the premium is fatal to the cancellation notice. Definity submits that based on the documents they produced, and specifically the billing summary, that the amount stated in the cancellation notice is the exact amount of the missed December 2021 premium payment and that no administrative fee was charged and therefore there could be no requirement that the administrative fee be separated out. Therefore, the cancellation notice contains all the essential elements including:

1. States the amount due;
2. States the effective date of termination;
3. Provides a payment delivery address;
4. Specifies the options for payment including cash;
5. Provides the insurer with the right to avoid termination by paying the amount outstanding on the business day before the day on which the termination takes place.

As Kolar did not make a premium payment, the policy was therefore cancelled effective January 31, 2022.

Definity also made some submissions with respect to the question of coverage of the Unifund policy and who was their named insured. Definity submits that essentially Unifund should be estopped from raising a coverage defence at this point because they had accepted that the driver was their named insured and based on that representation, the Motor Vehicle Accident Claims Fund was let out of the arbitration by Unifund. Definity submits that Unifund's abandonment of its claim against the Motor Vehicle Accident Claims Fund was in essence evidence of their concession that their policy provided coverage to the driver at the time on the basis that he was their named insured.

Definity submits that as Unifund was the party with the most knowledge as to their policy coverage, that it was reasonable for Definity to rely on their representations and to similarly agree to release MVACF from the proceedings.

The other relevant submissions of Definity are in response to Unifund's position that the Honda cannot be a temporary substitute vehicle under their policy with coverage to the driver based on the fact that the Unifund policy had an OPCF-27. Unifund in their submissions argues that this endorsement restricts coverage under the temporary substitute automobile provisions.

The OPCF-27 is an endorsement entitled "Liability for Damage to Non-Owned Automobiles and other coverages when insured persons drive, rent or lease other automobiles". The purpose of the OPCF-27, Definity points out, is that it is intended to extend and not restrict coverage for other automobiles.

Definity submits that the OPCF-27 does not make a reference to a "temporary substitute automobile" as defined under s. 2.2.2 of the OAP-1. Definity submits that the OPCF-27 does not apply to a temporary substitute vehicle as to do so would restrict coverage under that provision.

Definity submits that when an accident involves a temporary substitute vehicle, there is no need to look at or have recourse to the OPCF-27 as a temporary substitute vehicle stands in the place of the described vehicle under the OAP-1 with the same coverage, terms and conditions of the described vehicle.

Definity submits that the OPCF-27 is not applicable to the circumstances of this case and is not intended to change or restrict the coverage under the OAP-1 for a temporary substitute automobile.

Definity submits that under s. 2.2.2 coverage is available when the described vehicle is out of service and there are no conditions attached as to who has to be operating the vehicle. Coverage is available regardless of who operates the car.

Definity submits that it does not matter whether the operator of the striking vehicle was an insured person under the Unifund policy as coverage is available to whoever is operating the

vehicle as it stands in the place of the described automobile.

### **Unifund**

With respect to Definity's submissions that their policy never covered the Honda CRV, Unifund raises a question with respect to the lack of evidence available to support this position.

Unifund submits that Definity did not produce an underwriter for an EUO. They did not produce an underwriting or broker file to establish what efforts Kolar may have made to add the CRV to the Definity policy. Unifund notes that the Definity policy renewed January 21, 2022. The actual date set for termination was January 31, 2022 and suggests that in the circumstances the renewal notice would likely have been sent out some four to eight weeks prior to the renewal date. Unifund suggests this would be sometime between November 26 and December 24, 2021. There is no evidence with respect to when the actual renewal notice was sent out, but Unifund suggests that the renewal notice may have been sent out before Kolar purchased the CRV so it could not have been brought to the attention of Definity prior to the renewal date. Unifund also submits that there was no evidence with respect to the manner in which the renewal was sent to Kolar. Therefore, Unifund suggests that there should be a negative inference drawn against Definity that the CRV was in fact a described vehicle under its policy on the date of loss.

With respect to the cancellation of the Economical policy, Unifund raises two items in the cancellation letter which they submit are fatal to the cancellation as they do not meet the requirements of statutory condition 11(1.3)(b).

The first position is that the notice termination letter does not state that the payment must be received by noon on January 28, 2022, which is the business day before the day specified in the termination notice. Unifund submits that the statutory condition noted above specifically requires that the words by noon be included in the termination notice. For ease of reference, the wording of statutory condition 11 is set out below:

**"11. Termination**

- (1.3) A notice of termination mentioned in subcondition (1.2) shall,
- (a) state the amount due under the contract as at the date of notice; and
  - (b) state that the contract will terminate at 12:01 a.m. on the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the

business day before the day specified for termination."

Unifund points to the last sentence under the regulation which specifies the wording "not later than 12 noon ...". Economical submits that this is a key piece of required information within the termination notice and that the case law supports failure to have that in the body of the termination letter is fatal and therefore the cancellation is not proper.

Unifund also submits that the Economical termination letter is deficient with respect to the monetary amount that is set out in the notice. The only monetary amount noted in the letter is the sum of \$1,422.07. Unifund submits that this is contrary to the statutory condition as it does not set out separately any amounts owing under the contract from any administration fee. As I understand Unifund submissions, even if there is no administration fee this still remains fatal. Further, Unifund submits that that missing information would be considered to be an essential element of the termination letter and therefore again is fatal to a proper cancellation. Unifund relies on the decision of Arbitrator Ken Bialkowski in *Co-operators v. Jevco*, May 3, 2025 with respect to their position.

With respect to Unifund's own policy, it acknowledges that its policy provided coverage to its named insured, Omar Ismail Hussein and that it covered a 2013 Toyota RAV4 on the date of loss. However, Unifund submits their named insured was not the driver of the vehicle that struck the claimant. Further, the described automobile was not the vehicle that struck the claimant. Unifund submits that the Honda CR-V was not covered under the Unifund policy nor was the driver of the Honda a named insured, specified driver, listed driver or a dependant of the named insured under the Unifund policy and accordingly its policy not only would not be considered in priority, but would not be considered to even cover any of the vehicles or individuals involved on the date of loss.

Unifund submits that the Honda CR-V was rented to Hamzda, their insured's son and not to their named insured. This is evidenced by the rental agreement between Kolar and the son which shows his driver's licence number.

Unifund stresses that there is simply no evidence other than the rental agreement as to how their insured's son came into possession of the Kolar vehicle at the time of the accident. While it seems to be clear that he rented the vehicle, it is not clear under what circumstances he rented the vehicle.

There is nothing in the rental agreement that points to the son dropping off a vehicle for servicing or repairs at Kolar as the reason for being provided with a rental car. Even if that were to be the case, there is no evidence as to what car he dropped off. Unifund argues that at the very least there is absolutely no evidence to suggest that the described vehicle under the Unifund policy was dropped off by the son at Kolar for repairs or services as a result of which he then entered into the rental agreement.

Unifund notes the lengthy efforts that the parties went to to try and arrange sworn testimony from Unifund's insured or his son. That never materialized and therefore there is no evidence,

according to Unifund, as to how the Kolar-owned vehicle came to be in possession of the son. There is no evidence that their named insured's vehicle (the RAV4) was broken down and being repaired or left with Kolar.

Unifund draws from this that absent evidence that the RAV4 had been dropped off by the son for repair work by Kolar, that no argument can therefore be made that the Honda CR-V would be considered a temporary substitute vehicle under the Unifund policy on the date of loss.

Unifund submits that in order to qualify as a temporary substitute vehicle, the Honda CR-V would have to meet the following definition at s. 2.2.2 of the OAP-1:

" 2.2.2.A temporary substitute automobile is an automobile that is temporarily used while a described automobile is out of service. The described automobile must not be in use by anyone insured by this policy, because of its breakdown, repair, servicing, theft, sale or destruction."

Unifund submits that the only described vehicle under its policy is the RAV4 and that there is no evidence that on the date of loss that it was not in use due to its breakdown, repair, servicing, theft, sale or destruction, and also no evidence that the Honda CR-V was being used in place of the RAV4 due to its breakdown.

Unifund also argues that even if the Honda CR-V was considered to be a temporary substitute vehicle, that its policy carried an OPCF-27 endorsement which would result in the temporary substitute vehicle provisions only applying to the named insured (the father) as the son was not a specified driver or any other way connected with the Unifund policy.

I now turn to the "estoppel" argument that Definity raised and Unifund's response. Unifund submits that at no time since the commencement of the arbitration did they "accept priority". Unifund submits that there was no agreement entered into by which they acknowledged that their policy stood in priority to Economical or that the Economical policy had been properly cancelled or did not in some other way cover the striking vehicle on the date of loss.

Unifund points out that it was only during the EUO on February 28, 2024 of the claimant that Unifund was provided with a copy of the complete Police Report which clearly showed the full name of the driver of the vehicle as well as his driver's licence number. It was at that time that Unifund became aware that it was not their named insured driving the vehicle on the date of loss, but rather the son of their named insured who had no coverage under the Unifund policy.

As to what happened prior to the EUO and the involvement of the Motor Vehicle Accident Claims Fund, Unifund points to the fact that Definity actually issued a Notice of Dispute against the Motor Vehicle Accident Claims Fund but then elected to only issue an arbitration against Unifund and not MVACF. This was Definity's choice based on the information they had at the time.

Unifund points to the fact that it was in fact Unifund who added in the Motor Vehicle Accident Claims Fund under s. 10 of the regulation. While Unifund acknowledges the series of emails

between various counsel that ultimately resulted in MVACF being let out of the arbitration, Unifund submits that these emails do not reflect any agreement to accept priority. They do not reflect a specific agreement as to who is or is not covered under the Unifund policy. Lastly, Unifund submits that while it was prepared to let the Motor Vehicle Accident Claims Fund out, that Definity chose to do so as well. Unifund submits Definity could have rejected the Fund's offer to a dismissal without costs and have kept the Fund in and proceeded forward.

Unifund submits any failure of Definity to keep the Fund involved in this claim cannot be used as a basis to find coverage under the Unifund policy where there is none.

Unifund's final position with respect to all of these issues is that the onus of proof is on Definity, the Applicant, and that they simply have not met their onus of proof with respect to any of these issues.

## **DECISION AND ANALYSIS**

Section 268 of the *Insurance Act* provides a hierarchy of insurers with respect to the obligation to pay statutory accident benefits to a claimant who has been involved in a motor vehicle accident.

The mechanism with respect to bringing a priority dispute is mandated by Regulation 283/95 of the *Insurance Act*.

This regulation requires that an insured only submit one Application for Accident Benefits to an insurer that presumably they believe is in a position to respond to their claim. The regulation then requires that insurer to pay those benefits but if they believe another insurer stands in priority under s. 268 of the *Insurance Act* then they can give that insurer notice and commence arbitration proceedings to determine the priority dispute.

In this case, the claimant applied to Definity for statutory accident benefits. This appears to be based on the belief that Definity insured Kolar Auto Collision Centre on the date of loss and that the vehicle that struck the claimant was a described vehicle under that policy.

Definity accepted the OCF-1 and commenced payment of statutory accident benefits to the claimant. Definity however disputed that it was the priority insurer on the basis that while there was a policy of insurance with Kolar, that it did not cover the described vehicle and that the policy in any event had been cancelled prior to the date of loss of March 29, 2022.

Definity served a Notice of Dispute on Unifund believing that Unifund insured the driver of the vehicle that struck the claimant. However, Definity also put MVACF on notice. However, Definity did not commence an arbitration proceeding under Regulation 283/95 against MVACF but only commenced that proceeding against Unifund again, ostensibly on the belief that Unifund insured the driver of the striking vehicle.

Unifund appointed counsel and Unifund commenced a s. 10 application bringing in MVACF. Ultimately, before the matter came before me in that pre-hearing, Unifund let MVACF out and

this arbitration proceeded before me between only Definity and Unifund. Based on the facts presented, it would appear that Unifund let MVACF out ostensibly under the belief that their policy covered the driver of the striking vehicle on the date of loss. There seems to be no other viable reason why Unifund would agree to a dismissal against MVACF.

With that background in mind, I now turn to each of the issues that have been raised in this priority dispute.

**1. On the date of loss, was the Honda CR-V owned by Kolar a described vehicle and therefore covered by the Definity policy?**

I have carefully reviewed the facts and specifically the policy of insurance of Definity and there is no other conclusion that can be reached other than the Definity policy did not cover the Honda CR-V on the date of loss.

Definity's policy 500508674 was issued to Kolar Collision Centre Limited. The certificate of automobile insurance lists seven vehicles as described vehicles under the policy. Nowhere in that list is a 2018 Honda CR-V bearing licence number CVJV574.

I acknowledge that the Honda was registered to Kolar Auto Collision effective December 3, 2021 but there is no evidence to suggest that that vehicle was added to the Definity policy.

Unifund suggested that the vehicle could have been added but that it would not show up on the certificate of insurance due to the timing. There is no evidence of that nor are there any facts that clearly allow me to draw that assumption. As Definity pointed out, Unifund did not request a copy of the broker file. They did not conduct an EUO of a Definity representative. If there was any documentation to support Unifund's suggestion, it was not before me.

I agree with Definity that Unifund's suggestion that the vehicle could be considered a "newly acquired automobile" is without merit. Further, there is no evidence that a premium was paid for the vehicle. There is no evidence that Definity ever received a request to add the striking vehicle.

Therefore, I conclude that the Honda CR-V (striking vehicle) was not a described vehicle under the Definity policy on the date of loss and therefore the Definity policy did not cover the striking vehicle. There are no other viable arguments that coverage would be provided by the Definity policy in any other way.

**2. Was the Definity policy properly cancelled?**

In light of my finding that the Honda was not a described vehicle under the Definity policy and was not covered by the policy, the question of whether that policy was properly cancelled is moot. If the Honda was not a described vehicle under the policy, which is clear, then whether or not the policy was cancelled is not relevant to this priority dispute.

### **3. Did Unifund's policy cover the Honda on the date of loss?**

The key argument put forward by Definity that to establish the Unifund policy should respond to the claimant was that the Honda CR-V was a "temporary substitute automobile" as defined under the OAP-1 and that it was a substitute vehicle for the 2013 Toyota RAV4 insured by Unifund.

I find that on the date of loss Unifund insured Omar Ismail Hussein under a standard automobile policy and that the described vehicle under that policy was a 2013 Toyota RAV4. I find that Omar Ismail Hussein was not the driver of the Honda CR-V when it struck the claimant. The driver of that vehicle was Hamza Omar Ismail Hussein, the claimant's son.

I find that the claimant's son was not insured under the Unifund policy. He was not a named insured. He was not a listed driver. There were no arguments that he was a dependant of the named insured.

In order for the Honda to be covered under the Unifund policy, it must fall under some other definition of automobile other than the described automobile. As noted, the argument put forward is that the Honda CR-V was a temporary substitute vehicle.

There is no doubt that Hamza Omar Ismail Hussein rented the Honda CR-V from Kolar. I also find that Hamza Omar Ismail Hussein likely rented the vehicle from Kolar to use while another vehicle was being repaired or maintained by Kolar. Kolar is a company that operates a repair garage. There is a rental agreement with Mr. Hussein and Kolar dated April 6, 2022. This agreement notes that the Honda was taken out on March 28, 2022 and according to a log note from Definity, a phone call with someone from Kolar indicated that the "customer took his vehicle for repairs and Kolar Auto provided one of their rental to the customer while his vehicle was being repaired".

Therefore, the evidence seems clear that Hamza Omar Ismail Hussein left a car for repairs at Kolar, took their rental vehicle as a substitute, and while driving that vehicle was involved in the incident with the claimant.

However, those facts are not sufficient to establish that the Honda was a temporary substitute automobile under the Unifund policy.

The OAP-1 s. 1.3 provides a definition of automobile. An automobile includes:

- A described automobile;
- A newly acquired automobile;
- A temporary substitute automobile;
- Other automobiles driven by you or driven by your spouse who lives with you.

Under the Unifund policy the Honda was not a described automobile. It would not be covered as a newly acquired automobile or as an automobile driven by the named insured or his spouse. A temporary substitute automobile is defined under s. 2.2.2 of the OAP-1 as:

"A temporary substitute automobile is an automobile that is temporarily used while a described automobile is out of service. The described automobile must not be in use by anyone insured by this policy, because of its breakdown, repair, servicing, theft, sale or destruction."

"Coverage for a temporary substitute automobile is provided under the automobile policy of the owner of the temporary substitute automobile. However, this policy may also provide coverage."

In this case, there is no evidence that the described vehicle under the Unifund policy (the Toyota RAV4) was the vehicle that Hamza Omar Ismail Husain left at Kolar Collision for repair thus resulting in the rental of the Honda vehicle for use during the repair. Unfortunately, neither the named insured under the Unifund policy nor his son ever agreed to attend any EUOs. No evidence was secured from them on this issue. The log note from the Definity adjuster did not identify what vehicle had been dropped off at Kolar, who the owner of it was, or even what the make of it was. While it may very well have been that Hamza Omar Ismail Hussein was driving his father's vehicle and took it to Kolar for repairs, there is simply no evidence to support that statement. There is no evidence that the RAV4 was involved in an accident or was damaged in some way, which perhaps would allow me to draw some inferences. As it stands, there is no evidence to connect the vehicle dropped at Kolar with the Unifund policy at all.

Therefore, I conclude that the Honda CR-V was not a temporary substitute vehicle for the described vehicle under the Unifund policy and therefore the Unifund policy does not cover the Honda CR-V on the date of loss. In light of my finding, with respect to the temporary substitute vehicle issue it is unnecessary to deal with any of the other arguments raised by Unifund with respect to coverage.

#### **WAIVER AND ESTOPPEL**

Considering my findings above, it is important to look at the circumstances surrounding Unifund's letting MVACF out of this arbitration and whether there is any argument that Definity relied on Unifund's position, believing that the Unifund policy covered the driver of the striking vehicle on the date of loss and thus agreeing to let MVACF out of the arbitration.

It is important to look at the law in this area before applying the facts as we know them in this case. There are four criteria that have been set out by arbitrator Samis in his seminal decision of *Waterloo Insurance Company v. ACE/INA Insurance Company*, April 19, 2018, dealing with whether an insurer can resile from an admission with respect to coverage. While arbitrator Samis's case dealt with loss transfer, I find that the criteria are equally applicable to admissions made or acceptance of coverage in a priority dispute.

The four criteria are set out below:

1. Did the person have full knowledge of their rights?

2. Does the evidence demonstrate an unequivocal and conscious intent to abandon their rights?
3. Has the waiver been retracted on reasonable notice?
4. Would it be unfair to allow the retraction of the waiver?

These criteria flow from the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company* [1994] 2 SCR 490.

Turning now to the facts in this case. There is no doubt that the facts establish that there was confusion in the minds of the parties as to whether the driver of the striking vehicle was also the named insured under the Unifund policy. All the earlier communications seem to suggest an assumption by all parties that Omar Hussein was the driver of the vehicle that struck the claimant and the named insured under the Unifund policy. The address for both was 702-320 Dixon Road.

Definity early on was clearly not yet satisfied that the Unifund policy would respond as the Definity Notice of Dispute was served on Unifund and on the Motor Vehicle Accident Claims Fund. When Definity moved forward with their priority arbitration they chose only to proceed against Unifund. Once Unifund retained counsel it then added the Motor Vehicle Accident Claims Fund under s. 10. There is no evidence with respect to the "why" behind either decision.

In an email of April 10th, 2023, counsel for Unifund advises Definity that they are going to be adding MVACF to the arbitration and sets out requests for documentation. There is nothing in that email to suggest that the driver and the Unifund insured are different people or that there is a coverage issue with respect to the Unifund policy.

The Motor Vehicle Accident Claims Fund then appoints counsel and again communication on the facts relating to what occurred is limited to emails.

Counsel for MVACF in an email of May 29th, 2023 to counsel for Unifund confirms, "As per our discussion your understanding at present is that Hussein Hamza Omar Ismail and Omar Ismail Hussein are one and the same and that there are no coverage issues. Can you please take steps to confirm that? If there are any issues in that regard, that will likely affect whether an EUO of the driver is necessary."

There is no evidence before me as to what discussion was held amongst counsel or the parties thereafter. There is no evidence as to what Unifund did to attempt to confirm whether the driver and their named insured were the same individuals and that there were no coverage issues.

The next information is another email from counsel for MVACF to the other parties dated July 30, 2023. This email seems to assume that the facts confirm that Unifund is the insurer of the vehicle that struck the claimant and therefore MVACF will never have to respond to the claim. The email suggests that Unifund has not yet accepted coverage because it wants to further investigate whether Economical is in fact the proper insurer. The email suggests that the dispute is therefore

between Economical and Unifund and the Motor Vehicle Accident Claims Fund should be let out.

There are no subsequent emails that were produced and put into evidence. The only information is that shortly after the July 20, 2023 email Unifund lets MVACF out of the arbitration and Definity agrees.

It is not then until February 19, 2024 that counsel for Unifund advises Definity that the driver of the vehicle is the son of Unifund's named insured and that he is not in fact covered under their policy.

Definity argued that in these circumstances Unifund should not be permitted to raise a coverage defence on the grounds that they had accepted that the driver was their named insured and based on that representation relied upon by Definity, MVACF was let out of the arbitration.

Unifund points to the fact that Definity never advanced a claim against MVACF once they initiated an arbitration and that at no time did Unifund accept priority or confirm coverage. All that was agreed to was to let the Motor Vehicle Accident Claims Fund out.

It should be noted that Unifund does not agree that it provided any admission with respect to coverage and therefore there is no issue with respect to waiving that admission as they say it was never made.

Turning now to the relevant criteria in looking at this issue. The first criterion set out by arbitrator Samis is whether or not the person had full knowledge of their rights. Unifund was represented by counsel and a sophisticated insurer and certainly had full knowledge of its rights with respect to priority disputes and pursuing arbitrations.

While Unifund may not have had full knowledge of the actual coverage under their policy when they let the Motor Vehicle Accident Claims Fund out, they certainly had knowledge of their rights.

However, on the second point I do not find that the evidence demonstrates an unequivocal and conscious intent for Unifund to abandon their rights.

There is no email, letter or any other evidence in which Unifund clearly and unequivocally accepts that it insures the driver of the striking vehicle and that their policy provides coverage on the date of loss. There is no email, letter or any other evidence to show that Unifund accepted priority over and above Economical. While certainly there are some inferences that can be drawn by letting the Motor Vehicle Accident Claims Fund out, it is equally clear from the emails that Unifund intended to continue to pursue the priority dispute. I do not find that there was any admission by Unifund that it was the priority insurer or that it provided coverage through its policy to the driver of the Honda or that it covered the Honda itself.

While it certainly puts the parties in a difficult position, I conclude that Unifund is not estopped from taking the position that their policy did not cover the Honda or its driver on the date of loss, and in fact I have found that the Unifund policy did not.

**AWARD**

I find that on March 29, 2023 Definity did not insure the 2018 Honda CR-V. I also find that on March 29, 2023 the Unifund policy did not cover the driver of the Honda 2018 CR-V nor did it provide coverage under its policy for the automobile itself.

**COSTS**

In light of my findings, I conclude that the parties should share equally in the costs of the arbitrator and any related disbursements. I do not award any legal costs and they will be borne by each party themselves.

DATED THIS 26<sup>th</sup> day of January, 2026 at Toronto.



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Arbitrator Philippa G. Samworth

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