

Case Summary: Enterprise Rent-A-Car v Intact Insurance

Defence + Indemnity

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The legislation setting out priorities among insurers in a rental/leased vehicle situation only applies to those policies which provide coverage and the term “listed driver” in an auto policy is not “an insured named in the contract”.

Enterprise Rent-A-Car v. Intact Insurance, 2018 ONSC 3517 (Divisional Court), per Conway, J. [4300]

FACTS AND ISSUES:

On June 29, 2013, Perets was involved in a motor vehicle accident while operating a vehicle she had rented from Enterprise Rent-A-Car (Enterprise). At the time, she lived with her parents and was insured under her father’s Standard Ontario Auto Policy (OAP 1) issued by Intact Insurance for the two vehicles she regularly drove. She was a “listed driver” under the Intact policy, but was not a named insured.

Section 2.2.4 of Perets’ OAP 1 provides that coverage for rental vehicles exist only when rented by the named insured:

Automobiles, other than a described automobile, are covered as described in this subsection when rented by you, or by your spouse who lives with you, for periods of not more than 30 days, but only with respect to the liability of the person renting the automobile arising from the negligence of the driver of that automobile...

In June 2015, Perets was sued for the accident. Enterprise agreed to defend her under a reservation of rights letter until the priority dispute among the insurers involved could be resolved. In October 2017 the action was settled and \$30,000 was contributed by Enterprise on behalf of Perets.

Enterprise brought an application for a declaration that Intact was the “first loss” insurer pursuant to the *Ontario Insurance Act*, R.S.O. 1990, c. I.8 section 277(1.1) and sought indemnity from Intact for the amount paid by way of the settlement.

Ontario s. 277(1.1) enunciates the order in which multiple auto insurance policies are to respond in a rental vehicle situation, as follows:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.
2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the

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insurance referred to in paragraph 1.

3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2.

The application judge dismissed Enterprise's application, holding that the Intact policy did not provide coverage to Perets with respect to the rental vehicle and, accordingly, priority provisions of section 277(1.1) of the *Insurance Act* did not apply.

Enterprise appealed. It argued that the application judge erred in concluding that Perets was not "an insured named in the contract" or "a driver named in the contract".

HELD: For Enterprise; appeal dismissed.

The Divisional Court held that insurance under the Intact policy issued to Perets' father was not "available" to Perets, since she was a listed (but not a named) insured, concluding that section 2.2.4 of the OAP 1 provided coverage for rental vehicles only to the named insured:

[11] Section 2.2.4 of the OAP 1 provides that liability coverage is available for rental vehicles, but only when rented by "you" (defined in s. 1.3 as the named insured) or your spouse:

Automobiles, other than a described automobile, are covered as described in this subsection when rented by you, or by your spouse who lives with you, for periods of not more than 30 days, but only with respect to the liability of the person renting the automobile arising from the negligence of the driver of that automobile...

[12] The term "named insured" means the person or entity in whose name the policy is issued: ***Portch v. Markel Insurance Co. of Canada***, 1996 CarswellOnt (Ont Insurance Comm.), para 82. In this case, Ms. Perets' father was the named insured. She was a "listed driver" only.

[13] Since Ms. Perets was not the named insured or his spouse, under the clear and unambiguous language of the OAP 1 she was not covered for a rental vehicle: see ***Ontario (Minister of Finance) v. Intact***, 2013 ONSC 1457, paras. 32-34.

The Court rejected Enterprise's argument that there was a discrepancy between the wording of the OAP 1 and the *Insurance Act*, and that the statutory language should prevail in Enterprise's favour. The Court noted that the priority provisions of the *Insurance Act* only apply where the policy provides coverage and that the *Act* does not purport to create insurance coverage where none is available:

[15] We reject these submissions. First, we see no conflict between the interaction of s. 277(1.1) of the *Act* and terms of the Policy. Section 277(1.1) only applies if indemnity under a policy is available. That availability must first be determined according to the terms of the policy. If coverage is not available under those terms, the statutory provisions do not come into play.

[16] Second, s. 277(1.1) of the *Act* simply sets out the priority ranking of the various insurance coverage that is available where a rental car is involved in an accident. It does not purport to create insurance coverage where none is available. In this case, it is clear that insurance coverage was not available to Ms. Perets for the rental car since she was only a listed driver under the Policy. Section 277(1.1)(2) therefore did not apply and it fell to Enterprise's insurer to provide coverage for the accident.

COMMENTARY:

Although the *Ontario Insurance Act* priority provisions with respect to rental vehicles are somewhat different (and definitely less complex) than those set out in the Alberta legislation (the *Insurance Act*, R.S.A 1980, c. I-3, section 596 and the *Miscellaneous Insurance Provisions Regulation*, Alta Reg 120/2011, section 7.1), these principles should apply in Alberta. Accordingly, for an insurer to even have standing to be considered for priority, it must provide coverage to the party specified in the legislation. Also, the term "insured named in a contract" means the named insured and not a listed driver (such as a principal or occasional driver).