

COURT OF APPEAL FOR ONTARIO

CITATION: Smith v. Taylor, 2024 ONCA 223

DATE: 20240327

DOCKET: COA-23-CV-0002

Gillese, Trotter and Coroza JJ.A.

BETWEEN

Kerry Smith

Plaintiff (Appellant)

and

Robert Taylor and Aviva Canada Inc.*

Defendants (Respondent*)

Nick de Koning, for the appellant

Steven Stieber, for the respondent

Heard: September 22, 2023

On appeal from the order of Justice Michael J. Valente of the Superior Court of Justice, dated December 8, 2022.

Gillese J.A.:

[1] This appeal turns on the correct interpretation of a comprehensive homeowners insurance policy that includes a “Personal Excess Liability Policy” endorsement. In interpreting the excess endorsement, this court must: (1) consider the interplay between it and the insured’s automobile insurance policy, which includes the standard optional family protection coverage; and (2) determine whether the insured is required to exhaust the optional family protection coverage

in her automobile policy before she can have recourse to the excess endorsement coverage.

I. OVERVIEW

[2] On August 18, 2017, Ken Schlimme suffered fatal injuries when the motorcycle he was driving was struck by a vehicle, driven by Robert Taylor, that failed to stop at a stop sign.

[3] At the time of the accident, Mr. Schlimme and Kerry Smith (“Ms. Smith” or the “appellant”) were common law spouses. Ms. Smith had an automobile insurance policy with Aviva Canada Inc. (“Aviva”) (the “Primary Auto Policy”). Mr. Schlimme had a comprehensive homeowners insurance policy with Aviva (the “Primary Homeowners Policy”). Each spouse was covered under the other’s policy.

[4] Ms. Smith started an action against Mr. Taylor and Aviva in which she claims damages of \$3,500,000, including for substantial financial dependency losses.

[5] At the time of the accident, Mr. Taylor was insured under an automobile insurance policy issued by Wawanesa Mutual Insurance Company (“Wawanesa”). The Wawanesa policy provides Mr. Taylor with \$1 million of liability coverage for claims of bodily injury made against him. Wawanesa is defending Mr. Taylor in the action.

[6] The Primary Auto Policy is the standard Ontario Automobile Policy (OAP1) Owner’s Policy. It includes the optional family protection coverage added by the

standard Ontario Policy Change Form 44R (the “OPCF 44R”). The OPCF 44R is attached to this judgment as Appendix A. The OPCF 44R indemnifies Ms. Smith for up to \$1 million if an insured under the Primary Auto Policy is injured or killed by an “inadequately insured motorist.” An “inadequately insured motorist” is defined in the OPCF 44R to mean a third-party motorist with “total motor vehicle liability insurance” less than the “limit of family protection coverage” provided by the policyholder’s OPCF 44R. Ms. Smith has \$1 million of family protection coverage under the OPCF 44R.

[7] The Primary Homeowners Policy includes a “Personal Excess Liability Policy” endorsement (the “Excess Endorsement”). The Excess Endorsement provides \$1 million of excess “Family Protection Coverage”. The Excess Endorsement is attached to this judgment as Appendix B.¹

[8] Aviva agreed that Ms. Smith was covered by the two policies. However, it took the position that Ms. Smith was not entitled to recover under either the OPCF 44R or the Excess Endorsement.

[9] Ms. Smith acknowledged that she is not entitled to payment from Aviva under the OPCF 44R. Because the \$1 million indemnity under the OPCF 44R is equal to the \$1 million indemnity under Mr. Taylor’s Wawanesa policy, Mr. Taylor

¹ The limit of liability under the Excess Endorsement is not set out in the Excess Endorsement itself. The \$1 million limit is set out in Mr. Schlimme’s Certificate of Property Insurance, under the heading “Endorsements”.

is not an “inadequately insured motorist” under the OPCF 44R and, therefore, Aviva need make no payment to her under it. However, Ms. Smith did not accept Aviva’s denial of coverage under the Excess Endorsement.

[10] As a result, Aviva moved under r. 21.01(1)(a), or alternatively r. 20, of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to have the action dismissed as against it (the “Motion”).

[11] The motion judge interpreted the Excess Endorsement as not providing Ms. Smith with coverage for damages arising from the accident. He interpreted the Excess Endorsement as requiring Mr. Taylor to be an inadequately insured motorist, as that term is defined in the OPCF 44R, for Ms. Smith to claim under the Excess Endorsement. He reasoned that since Mr. Taylor was not an “inadequately insured motorist” under the OPCF 44R, he could not be an inadequately insured motorist under the Excess Endorsement.

[12] The motion judge also interpreted the Excess Endorsement as requiring Ms. Smith to have exhausted the OPCF 44R limits before she could recover under the Excess Endorsement. Because Ms. Smith could recover nothing under the OPCF 44R, its limits were not exhausted and, for this reason too, he found that Ms. Smith could not have recourse to the Excess Endorsement.

[13] Accordingly, by order dated December 8, 2022 (the “Order”), the motion judge dismissed the action as against Aviva.

[14] Ms. Smith appeals. She submits the motion judge incorrectly interpreted the Excess Endorsement to deny her coverage under it.

[15] I accept Ms. Smith's submission. Accordingly, I would allow the appeal.

II. THE RELEVANT PROVISIONS IN THE POLICIES

A. The OPCF 44R

[16] The Primary Auto Policy is the standard Ontario Automobile Policy (OAP 1) Owner's Policy. It includes the optional family protection coverage added by the OPCF 44R. The relevant provisions in the OPCF 44R are set out below.

OPCF 44R

FAMILY PROTECTION COVERAGE

DEFINITIONS

...

1.4 "family protection coverage" means the insurance provided by this change form and any similar indemnity provided under any other contract of insurance.

1.5 "inadequately insured motorist" means

(a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance ... is less than the limit of family protection coverage; ...

PROVIDED THAT

(A) where an eligible claimant is entitled to recover damages from an inadequately insured motorist and the owner or operator of any other automobile, for the purpose of

- (i) (a) above, and
- (ii) determining the insurer's limit of liability under section 4 of this change form, the limit of motor vehicle liability insurance shall be deemed to be the aggregate of all limits of motor vehicle liability insurance ..., for all of the automobiles;

...

1.7 "limit of family protection coverage" means the amount set out in the Certificate of Automobile Insurance with respect to this change form, but if no amount is set out in the Certificate, the limit for liability coverage set out in the Certificate with respect to the automobile to which this change form applies is the limit of family protection coverage.

...

MULTIPLE COVERAGES

18. The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:

- (a) (i) if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance and any other such insurance is excess;
- (ii) if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess.

...

- (c) the applicable first loss insurance shall be exhausted before recourse is made to excess insurances,

B. The Excess Endorsement

[17] The Primary Homeowners Policy includes the Excess Endorsement.

The relevant provisions of the Excess Endorsement are set out below.

PERSONAL EXCESS LIABILITY POLICY

IMPORTANT

The insurance provided by this policy only applies to personal property, personal automobile and personal watercraft policies issued to the “Named Insured” and “Spouse” of the “Named Insured” through Aviva Insurance Company (Canada) or any affiliated member of the Aviva group of companies (Canada).

...

DEFINITIONS

“Family Protection Coverage” means the standard O.P.C.F 44R/S.E.F. 44 – Family Protection Coverage and any similar indemnity provided under any other contract of insurance.

...

“Underlying Insurance” means the insurance provided by personal property, personal automobile and personal watercraft policies issued to the “Named Insured” and “Spouse” of the “Named Insured” through Aviva Insurance Company (Canada) or any affiliated member of the Aviva group of companies (Canada).

...

ADDITIONAL COVERAGE FEATURE

...

“Family Protection Coverage”

Subject to the terms and conditions of this policy coverage provided by this policy is extended to pay amounts which “You” are legally entitled to recover as “Compensatory Damages” for “Bodily Injury” or for damage to property from an inadequately insured motorist.

Subject to the terms and conditions of this policy, this additional coverage feature will only pay in excess of and subject to all the same terms and conditions as the “Family Protection Coverage” on the primary underlying motor vehicle liability policy under which “Your” Automobile(s) is insured.

This coverage only applies when “Family Protection Coverage” forms part of the motor vehicle liability policies under the “Underlying Insurance.”

III. THE DECISION BELOW

[18] The term “inadequately insured motorist” appears in the “Family Protection Coverage” provision of the Excess Endorsement but is not a defined term in the Excess Endorsement. However, the term “inadequately insured motorist” is defined in the OPCF 44R.

[19] On the Motion, the parties disputed whether the definition of “inadequately insured motorist” in the OPCF 44R applied to that term in the Excess Endorsement. Aviva contended it did, whereas the appellant maintained it did not. The motion judge agreed with Aviva and found that it did apply. He said that because there is no language in the Excess Endorsement showing an intention to modify the meaning of “inadequately insured motorist”, that term has the same

meaning as stipulated in the OPCF 44R. He was fortified in his interpretation by the provision in the Excess Endorsement stating the policy “is subject to all the same terms, conditions, limitations and exclusions as the Underlying Policy”. In this case, the Underlying Policy is the Primary Auto Policy, which includes the OPCF 44R.

[20] Having concluded that Mr. Taylor was not an inadequately insured motorist for the purposes of the Excess Endorsement, the motion judge said that Ms. Smith could not recover under it. He acknowledged that this result might cause hardship but said there was no “principled reason” to expand the definition of “inadequately insured motorist” in the Excess Endorsement beyond that in the OPCF 44R.

[21] The motion judge further interpreted the Excess Endorsement as requiring Ms. Smith to exhaust the OPCF 44R limits before she could recover under the Excess Endorsement. He relied primarily on paras. 18(a)(ii) and (c) of the OPCF 44R for this interpretation. He added that requiring the policyholder to first exhaust the OPCF 44R limits accords with the purpose of the Excess Endorsement which does not increase the total OPCF 44R limits but, rather, creates a source of coverage once the policyholder exhausts its limits. As support for this, the motion judge pointed to this wording in the Excess Endorsement, “in no event will this policy provide broader coverage than the Underlying Insurance”.

IV. THE ISSUES ON APPEAL

[22] Did the motion judge err in interpreting the Excess Endorsement so as to preclude Ms. Smith from having recourse to its \$1 million of excess family protection coverage? That is the central question to be decided on this appeal.

[23] To answer this question, the court must determine whether the motion judge erred in (1) his interpretation of the relevant provisions of the Excess Endorsement; and (2) concluding that Ms. Smith had to exhaust the OPCF 44R limits before she could claim under the Excess Endorsement.

[24] The appellant asks this court to also decide (3) whether the Order should be set aside on the basis that it nullifies coverage and/or is commercially unreasonable.

V. THE STANDARD OF REVIEW

[25] The parties agree that this court is to apply a correctness standard of review to the motion judge's interpretation of the Excess Endorsement. I share that view and review the motion judge's interpretation accordingly.

ISSUE 1 Correctly interpreting the Excess Endorsement

[26] For the purposes of this appeal, the Family Protection Coverage provision (the "FPC provision") is the key provision in the Excess Endorsement. It consists of three paragraphs. For ease of reference, the FPC provision is set out again below.

“Family Protection Coverage”

Subject to the terms and conditions of this policy coverage provided by this policy is extended to pay amounts which “You” are legally entitled to recover as “Compensatory Damages” for “Bodily Injury” or for damage to property from an inadequately insured motorist.

Subject to the terms and conditions of this policy, this additional coverage feature will only pay in excess of and subject to all the same terms and conditions as the “Family Protection Coverage” on the primary underlying motor vehicle liability policy under which “Your” Automobile(s) is insured.

This coverage only applies when “Family Protection Coverage” forms part of the motor vehicle liability policies under the “Underlying Insurance”. [Emphasis added.]

A. The motion judge’s error

[27] The motion judge’s primary reason for concluding that Ms. Smith could not claim indemnity under the Excess Endorsement flowed from his interpretation of the words “inadequately insured motorist” in the first paragraph of the FPC provision. His reasoning can be summarized as follows.

1. Mr. Taylor had to be an “inadequately insured motorist” for Ms. Smith to claim indemnity under the Excess Endorsement.
2. The term “inadequately insured motorist” is not defined in the Excess Endorsement.

3. The definition of “inadequately insured motorist” in the OPCF 44R applies to that term in the FPC provision.
4. Because Mr. Taylor was not an inadequately insured motorist as defined in the OPCF 44R, he was not an inadequately insured motorist under the FPC provision. Therefore, Ms. Smith could not claim indemnity under the Excess Endorsement.

[28] In my view, the motion judge erred in the third step, namely, by applying the definition of “inadequately insured motorist” in the OPCF 44R (the “Definition”) to those words in the first paragraph of the FPC provision. For motorists like Ms. Smith who are injured by tortfeasors with coverage that matches their OPCF 44R limit, the motion judge’s interpretation essentially converts the Excess Endorsement into a second OPCF 44R policy, with the result that they cannot recover under the Excess Endorsement. Accordingly, the motion judge’s interpretation cannot be correct because it leads to an outcome that undermines the purpose of the Excess Endorsement which, as I will explain, is to provide Ms. Smith with coverage in excess of that provided by the OPCF 44R.

[29] Furthermore, the motion judge gave three reasons for using the Definition to interpret the words “inadequately insured motorist” in the first paragraph of the FPC provision, all of which are incorrect.

[30] First, the motion judge relied on this court's decision in *Kahlon v. ACE INA Insurance*, 2019 ONCA 774, 148 O.R. (3d) 318, to state that "where terms are not defined in the endorsement, they adopt their definitions from the underlying policy". Second, he found "no language in the Excess Endorsement intending to modify the meaning of 'inadequately insured motorist' to anything other than the definition in the OPCF 44R". Third, he was fortified by a term in the Excess Endorsement that coverage is "subject to all the same terms, conditions, limitations and exclusions" as the Primary Auto Policy.

1. The first reason

[31] The motion judge's reliance on *Kahlon* was misplaced. *Kahlon* stands for the proposition that where an endorsement is tethered to an underlying policy, undefined terms in an endorsement take their meaning from the use of the term in the underlying policy. I take no issue with this general proposition. However, in *Kahlon*, adopting the underlying definition raised no inconsistency with the endorsement. That is not the situation in the present case where, correctly interpreted, the Excess Endorsement provides for an additional layer of insurance that stacks on top of the OPCF 44R limits.

2. The second reason

[32] That the Excess Endorsement is to stack coverage on that provided by the OPCF 44R is evident from the definition of “Family Protection Coverage” in the Excess Endorsement coupled with the terms of the FPC provision.

[33] Family Protection Coverage is defined in the Excess Endorsement to mean “the standard O.P.C.F. 44R/S.E.F. 44 – Family Protection Coverage and any similar indemnity provided under any other contract of insurance” (emphasis added).

[34] The Primary Homeowners Policy is a contract of insurance. It includes the Excess Endorsement. The Excess Endorsement includes the FPC provision. Like the OPCF 44R, the FPC provision provides family protection coverage. Therefore, the FPC provision is a “similar indemnity provided under another contract of insurance”. Accordingly, the definition of Family Protection Coverage includes the OPCF 44R limits and the Excess Endorsement limits. Thus, on a plain reading of the definition of Family Protection Coverage in the Excess Endorsement, coverage under it is to stack on top of the OPCF 44R limits.

[35] As I explain below, this interpretation is consistent with the FPC provision, when that provision is correctly interpreted.

[36] On the other hand, the Definition of “inadequately insured motorist” in the OPCF 44R excludes any consideration of additional or excess coverage. That is

because the Definition expressly refers to the “limit of family protection coverage” in the OPCF 44R. “Limit of family protection coverage” is defined in the OPCF 44R as “the amount set out in the Certificate of Automobile Insurance.”

[37] The Excess Endorsement exists outside of the automotive insurance regulatory regime. It is not coverage that is, or can be, set out in the Certificate of Automobile Insurance. Thus, the additional coverage provided by the Excess Endorsement cannot fall within the “limit of family protection coverage” in the OPCF 44R.

[38] In summary, as the Definition in the OPCF 44R expressly refers to the “limit of family protection coverage” and the limit of family protection coverage is inconsistent with the additional grant of coverage intended by the Excess Endorsement, one cannot interpret the FPC provision in accordance with the Definition because to do so conflicts with the very purpose of the Excess Endorsement.

3. The third reason

[39] The motion judge’s third reason for using the Definition to interpret “inadequately insured motorist” in the FPC provision is a provision in the Excess Endorsement that states it is “subject to all the same terms, conditions, limitations and exclusions” of the Primary Auto Policy. The motion judge does not identify the provision in the Excess Endorsement to which he is referring. However, as those

words appear in para. 2 of the section of the Excess Endorsement entitled “INSURING AGREEMENT” (the “Insuring Agreement provision”), I assume that is the provision to which he is referring.

[40] The Insuring Agreement provision reads as follows:

INSURING AGREEMENT

“We” will pay on behalf of the “Insured(s)” the “Ultimate Net Loss” that is legally liable to be paid as “Compensatory Damages” arising from an “Occurrence” that takes place during the policy period within the “Coverage Territory”.

- 1) “We” will only pay in excess of the “Underlying Insurance” or in excess of the minimum required underlying limit, whichever is greater. In addition, the insurance provided by this policy shall be liable only after the insurers under each of the “Underlying Insurance” policies have been paid or have been held liable to pay the full amount of the underlying limits of liability.
- 2) This policy is subject to all the same terms, conditions, limitations and exclusions as the “Underlying Insurance” and in no event will this policy provide broader coverage than the “Underlying Insurance”. [Emphasis added.]
- 3) In the event of any conflict between the provisions of the “Underlying Insurance” and this policy, the provisions of this policy will apply.

[41] However, the Insuring Agreement provision relates to liability coverage, not family protection coverage. It addresses the circumstances in which the insurer will pay on behalf of an insured who is found legally liable to pay damages. This is

evident from the definition of “Ultimate Net Loss” and the reference to it in the first sentence of the Insuring Agreement provision.

[42] “Ultimate Net Loss” is defined in the Excess Endorsement to mean:

[T]he total sum, after reduction for recoveries or salvages collectible, that the “Insured(s)” becomes legally obligated to pay as “Compensatory Damages” by reason of settlement or judgments or any arbitration or other alternate dispute method entered into with “Our” consent or the underlying insurer’s consent.

[43] Bearing in mind the definition of Ultimate Net Loss, on a plain reading of the Insuring Agreement provision, it governs the insurer’s promise to pay the amount that the insured becomes legally obligated to pay as compensatory damages. It does not address an insured’s right to claim indemnity under family protection coverage.

[44] Accordingly, it was an error for the motion judge to rely on para. 2 of the Insuring Agreement provision to support his conclusion that the term “inadequately insured motorist” in the Excess Endorsement should be given the same meaning as those words are given in the OPCF 44R.

B. The FPC provision correctly interpreted

1. The first paragraph of the FPC provision

[45] The words “inadequately insured motorist” are found only in the first paragraph of the FPC provision. That paragraph states that coverage provided by

the Excess Endorsement is “extended to pay amounts” (emphasis added) the insured is legally entitled to recover as damages for bodily injury “from an inadequately insured motorist”.

[46] The insured is entitled to recover damages for bodily injury from an inadequately insured motorist pursuant to the OPCF 44R, in certain circumstances. Therefore, on a plain reading of the first paragraph of the FPC provision, it extends coverage under the Excess Endorsement to pay amounts Ms. Smith is entitled to recover, as damages for her husband’s death, beyond that which might be recovered under the OPCF 44R.

[47] Because the words “inadequately insured motorist” are not defined in the Excess Endorsement and, for the reasons already given, ought not to be interpreted using the Definition in the OPCF 44R, they should be given their plain meaning. On that basis, Mr. Taylor is an inadequately insured motorist for the purpose of the first paragraph of the FPC provision.

[48] In her statement of claim, Ms. Smith claims damages of \$3.5 million. She seeks to recover \$1 million in damages pursuant to Mr. Taylor’s Wawanesa policy. If successful, a shortfall of \$2.5 million of the claimed damages remains. Mr. Taylor is an inadequately insured motorist because his insurance is not sufficient to pay the damages that Ms. Smith may be entitled to recover from him.

In short, Mr. Taylor is an inadequately insured motorist as those words are used in the first paragraph of the FPC provision.

[49] This interpretation of the first paragraph of the FPC provision does not ignore the beginning words of the first paragraph, namely, “Subject to the terms and conditions of this policy”. Aside from para. 2 of the Insuring Agreement provision, which I have explained is not applicable, the court was not pointed to any other terms or conditions in the Excess Endorsement that would affect this interpretation.

2. The second paragraph of the FPC provision

[50] The second paragraph of the FPC provision is to the same effect as the first. It provides that “this additional coverage feature will only pay in excess of” the “primary underlying motor vehicle liability policy” (emphasis added). The primary underlying motor vehicle liability policy is the Primary Auto Policy, which includes the OPCF 44R. Therefore, according to the second paragraph, the Excess Endorsement provides Ms. Smith with additional coverage to that provided under the OPCF 44R.

[51] The second paragraph is not easily interpreted. It consists of a single, lengthy, convoluted sentence. In that single sentence, it uses both the phrase “subject to the terms and conditions of” and the phrase “subject to all the same terms and conditions as”. The first time the “subject to” phrase is used, it is referring to the terms and conditions of the Excess Endorsement. As I have explained, I see

no provision in the Excess Endorsement that conflicts with interpreting it as providing Ms. Smith with \$1 million of additional family protection coverage.

[52] The second time the “subject to” phrase is used, it is referring to the terms and conditions of the OPCF 44R. This creates ambiguity: which of the two policies terms and conditions are to prevail – those of the Excess Endorsement or those of the OPCF 44R? In a case of ambiguity, the interpretation most favourable to the insured should be adopted. Moreover, the FPC provision is a provision granting coverage. Thus, it must be construed broadly: *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729, at paras. 39, 41; *Sam's Auto Wrecking Co. Ltd. (Wentworth Metal) v. Lombard General Insurance Co. of Canada*, 2013 ONCA 186, 114 O.R. (3d) 730, at para. 37; *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Co.*, 2020 ONCA 487, 151 O.R. (3d) 663, at para. 19.

[53] Accordingly, the second paragraph of the FPC provision must be read in a way that gives effect to the grant of additional family protection coverage afforded by the Excess Endorsement.

3. The third paragraph of the FPC provision

[54] There is no dispute that the requirements of the third paragraph of the FPC provision are met. The third paragraph says that coverage under the Excess Endorsement only applies when “Family Protection Coverage” forms part of the

motor vehicle liability policies under the underlying insurance. The OPCF 44R provides family protection coverage and is included in the Primary Auto Policy, which is the underlying personal automobile insurance policy. Therefore, the Excess Endorsement coverage applies.

[55] In conclusion, subject to the issue of exhaustion which is dealt with in Issue 2, when the FPC provision is correctly interpreted, Ms. Smith can claim coverage under the Excess Endorsement.

ISSUE 2 THE OPCF 44R need not be exhausted before Ms. Smith has recourse to the Excess Endorsement

A. The motion judge's interpretation

[56] The motion judge gave the following three reasons for interpreting the Excess Endorsement as requiring that Ms. Smith must exhaust the OPCF 44R limits before she can have recourse to family protection coverage under the Excess Endorsement:

1. the wording of paras. 18(a)(ii) and (c) of the OPCF 44R;
2. requiring the policyholder to first exhaust the OPCF 44R limits accords with the purpose of the Excess Endorsement which is not to increase the total OPCF 44R limits but, rather, to create a source of coverage once the policyholder has exhausted its limits; and

3. the wording of para. 2 of the Insuring Agreement provision that “in no event will this policy provide broader coverage than the Underlying Insurance”.

[57] In my view, all three reasons are incorrect. As I explain below, the first and third reasons are not relevant to the issue of exhaustion of family protection coverage under the Excess Endorsement, and the second is not available on the wording of the Excess Endorsement.

1. The first reason

[58] The motion judge’s first reason for finding that Ms. Smith must exhaust the OPCF 44R limits before she can claim under the Excess Endorsement is the wording of paras. 18 (a) (ii) and (c) of the OPCF 44R. It will be recalled that those paragraphs read as follows.

MULTIPLE COVERAGES

18. The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:

- (a) (i) if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance and any other such insurance is excess;
- (ii) if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess.

...

(c) the applicable first loss insurance shall be exhausted before recourse is made to excess insurances.

[59] However, correctly interpreted, para. 18 of the OPCF 44R applies to situations in which an insured has coverage under multiple OPCF 44Rs. It does not apply to this situation where Ms. Smith seeks family protection coverage under two different types of policies – the OPCF 44R included in the Primary Auto Policy on the one hand and the Excess Endorsement included in the Primary Homeowners Policy on the other. My interpretation of para. 18 of the OPCF 44R is based on its plain wording and reinforced by this court’s decision in *Keelty v. Bernique* (2002), 57 O.R. (3d) 803 (C.A.).

[60] Paragraph 18 (a)(ii) follows para. 18(a)(i). Paragraph 18 (a)(i) provides that “such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance” and “any other such insurance is excess” (emphasis added). The second reference in para. 18(a)(i) to “such insurance” must be a reference to automobile insurance, in light of the preceding emphasized words. Given that the same words – “such insurance” – appear in para. 18(a)(ii), they must be given the same meaning as in para. 18(a)(i). Thus, they are referring to another automobile insurance policy. Consequently, para. 18(a)(ii) cannot be read, as the motion judge did, to include a different type of insurance policy, namely, the Primary Homeowner Policy which includes the Excess Endorsement.

[61] Paragraph 18(c) provides that the “first loss insurance” shall be exhausted before recourse is made to “excess insurances”. When paras. 18(a)(i) and (ii) are correctly interpreted, para. 18 (c) simply requires that where two or more OPCF 44R policies are engaged, the applicable first loss automobile insurance shall be exhausted before recourse can be made to the other OPCF 44R policies.

[62] In sum, para. 18 of the OPCF 44R governs priorities in situations involving more than one OPCF 44R; it is not relevant to a determination of whether Ms. Smith must exhaust the limits of her OPCF 44R policy before she can claim under the Excess Endorsement.

[63] This interpretation of para. 18 finds support in *Keelty*, a decision of this court. In *Keelty*, para. 18 was contained in an O.E.F. 44 endorsement, the predecessor to the OPCF 44R. The wording of para. 18 is the same in both the O.E.F. 44 and the OPCF 44R. At para. 28 of *Keelty*, Rosenberg J.A., speaking on behalf of this court, said “[i]t seems to me that the intent of s. 18 is to govern priorities among O.E.F. 44 endorsements in Ontario policies or similar endorsements in automobile policies from other jurisdictions. Unlike the State Farm Fire umbrella policy, it is part of the automobile liability policy regulatory scheme.”

[64] That same reasoning applies in this case. The intent of para. 18 in the OPCF 44R is to govern priorities among OPCF 44R endorsements or similar automobile policies. Unlike the OPCF 44R, the Primary Homeowners Policy – which includes

the Excess Endorsement – is not part of the automobile liability policy regulatory scheme.

[65] Accordingly, the motion judge erred in relying on para. 18 of the OPCF 44R in deciding the issue of exhaustion.

2. The second reason

[66] The motion judge's second reason for requiring exhaustion was his view that exhaustion accords with the purpose of the Excess Endorsement. According to the motion judge, that purpose is not to increase the total OPCF 44R limits but, rather, to create a source of coverage once the policyholder exhausts its limits.

[67] The motion judge's view was based, in part, on his interpretation of para. 18 of the OPCF 44R. For the reasons already given, that interpretation is incorrect.

[68] The motion judge also relied on this court's decision in *Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.* (2001), 199 D.L.R. (4th) 654 (Ont. C.A.), for his view that the purpose of the Excess Endorsement was to create a source of coverage once the policyholder exhausted the OPCF 44R limits. He referred to para. 24 of *Trenton*, where this court adopted the distinction between primary and excess insurance developed in American jurisprudence and stated, "the limits of the primary insurance must be exhausted before the primary carrier has a right to require the excess carrier to contribute to a settlement".

[69] However, that statement from *Trenton* must be understood in context. In *Trenton*, there were two different insurers and the issue was the determination of the relative contributions of each to a settlement. Significantly, the terms of the excess policy in *Trenton* made it clear that it was liable only for the excess of that which might be collected on the primary insurance.

[70] That is not this case. The terms of the Excess Endorsement are fundamentally different from those of the excess policy in *Trenton*. As I explain in the analysis of Issue 1, correctly interpreted, the Excess Endorsement coverage “stacks” on the OPCF 44R coverage. Had Aviva wished to make recovery under the Excess Endorsement contingent on exhaustion of the OPCF 44R limits, it had to make that clear in the Excess Endorsement.² It did not.

3. The third reason

[71] The motion judge also relied on the following words in the second paragraph of the Insuring Agreement provision: “in no event will this policy provide broader coverage than the [OPCF 44R]”. The Insuring Agreement provision is considered above in the analysis of Issue 1. As I demonstrate there, it relates to liability

² The wording of the Excess Endorsement can be usefully contrasted with that of the State Farm excess policy considered in *Cohn v. Calovic*, 2011 ONSC 1398 and *Suchan v. Casella* (2005), 81 O.R. (3d) 73 (Ont. Sup. Ct.). In those cases, the excess policy did not fully stack because the policy terms specifically required the deduction of both any recovery from the tortfeasor and any recovery under the OPCF 44R from the stated limits of the excess policy.

coverage; it does not relate to the insured's right to claim indemnity under family protection coverage.

[72] Because the Insuring Agreement provision as a whole is not relevant to a claim for indemnity under family protection coverage, nor are the selected words from the second paragraph of that provision. Accordingly, the motion judge erred in relying on them to require that Ms. Smith must exhaust the OPCF 44R limits before she can have recourse to the Excess Endorsement.

B. Correctly deciding the issue of exhaustion

[73] I first address Aviva's submission that para. 12 of the Excess Endorsement is relevant to the issue of exhaustion. I do not accept this submission. Paragraph 12 of the Excess Endorsement is entitled "Loss Payable". It is not relevant to the question of exhaustion in the family protection coverage context because it deals with Ultimate Net Loss which, as I have already explained, addresses liability rather than indemnity under family protection coverage.

[74] I now turn to the crux of this matter: does the FPC provision permit recovery under the Excess Endorsement absent exhaustion of the OPCF 44R limits? In my view, it does.

1. The first paragraph

[75] The first paragraph of the FPC provision does not engage the concept of exhaustion. As I explain above on Issue 1, it extends coverage provided by the

Excess Endorsement to pay amounts that Ms. Smith is legally entitled to recover as damages for bodily injury from Mr. Taylor, an inadequately insured motorist.

2. The second paragraph

[76] What then of the second paragraph in the FPC provision in the Excess Endorsement? Does it require exhaustion under the OPCF 44R before the insured can claim under the Excess Endorsement? There is no simple answer to this question.

[77] In my analysis of the second paragraph in Issue 1, I identify the ambiguity caused by two “subject to” phrases being used in the same sentence. That ambiguity is magnified in the context of exhaustion. Two interpretations (at least) of the second paragraph are available: (1) subject to the terms and conditions of the Excess Endorsement, its “additional coverage” will “only pay in excess of” that recovered under the OPCF 44R; or (2) the additional coverage under the Excess Endorsement will only pay in excess of and “subject to all the same terms and conditions as” the OPCF 44R.

[78] There are no terms or conditions in the Excess Endorsement requiring exhaustion. Therefore, on the first interpretation, Ms. Smith can claim payment under the additional coverage provided by the Excess Endorsement in excess of that which she recovers under the OPCF 44R, which is \$0.

[79] On the second interpretation, because the terms and conditions of the OPCF 44R preclude Ms. Smith from recovery under it, she cannot claim under the Excess Endorsement. Aviva submits this interpretation properly recognizes the difference between requiring exhaustion of the underlying OPCF 44R limits and requiring that the OPCF 44R is “triggered”, in that the insurer must be liable to pay some amount under the OPCF 44R before Ms. Smith can have recourse to the Excess Endorsement. In Aviva’s view, a contractual precondition to its liability under the Excess Endorsement is an obligation for payment (a “trigger”) under the OPCF 44R.

[80] I reject Aviva’s submission for two reasons. First, it relies in part on the language in the Insuring Agreement provision and para. 12 of the Excess Endorsement. As I have already explained, neither is relevant to indemnity for family protection coverage.

[81] More fundamentally, I reject this submission because it demonstrates the ambiguity of the second paragraph of the FPC provision and ambiguity must be resolved in favour of the insured. The first interpretation is the most favourable to the insured and, therefore, must be adopted. Further, and in any event, because the FPC provision is a coverage granting provision, it must be construed broadly and in a way that gives effect to the grant of additional family protection coverage afforded by the Excess Endorsement.

[82] Thus, when the second paragraph is correctly interpreted, Ms. Smith need not exhaust recovery under the OPCF 44R limits before having recourse to the Excess Endorsement.

3. The third paragraph

[83] The third paragraph of the FPC provision does not engage the concept of exhaustion. As explained above, it simply provides that the Excess Endorsement coverage applies when “Family Protection Coverage” forms part of the underlying motor vehicle liability policies. And, the OPCF 44R, which is family protection coverage, does form part of the underlying motor vehicle liability policy (i.e., the Primary Auto Policy).

ISSUE 3 Should the Order be set aside because it nullifies coverage or is commercially unreasonable?

[84] The appellant asks this court to set aside the Order on the basis that the motion judge’s interpretation nullifies coverage under the Excess Endorsement in most situations, which the appellant submits is a commercially unreasonable result. The appellant’s request is based on its view that this court can take judicial notice that most individuals in Ontario have \$1 to \$2 million of automobile liability coverage and only a small proportion of the motoring public drives without automobile insurance.

[85] I decline to decide this issue for two reasons. First, in light of my conclusions on Issues 1 and 2 it is unnecessary. Second, the appellant has not demonstrated that the requested judicial notice is available.

[86] Courts may take judicial notice of facts that are: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48. The appellant's request meets neither criterion.

[87] In my view, neither the assertion that (i) only a small percentage of the motoring public in Ontario drives without automobile insurance or (ii) "most" individuals in Ontario have \$1 to \$2 million of liability coverage is "notorious" nor are they facts that are "generally accepted" and not subject to debate by reasonable people. Furthermore, this court was not pointed to a "source of indisputable accuracy" to demonstrate those assertions, much less a readily accessible one. If there is such a source, the appellant should have identified it, both below and before this court.

VI. DISPOSITION

[88] For these reasons, I would allow the appeal, set aside the Order, and dismiss the Motion. I would order costs of the appeal in favour of the appellant fixed at the agreed-on sum of \$15,000, all inclusive.

[89] If the parties are unable to agree on the matter of costs of the Motion, I would permit them to file written submissions on the matter, limited to three typewritten pages. I would give the appellant one week, from the date of release of these reasons, to file her submissions, and the respondent two weeks from that same date, in which to file its submissions.

Released: March 27, 2024 *MS*

J. A. Silvers

I agree. K. J. A.

I agree. Croza J.A.

**OPCF 44R
FAMILY PROTECTION COVERAGE**

DEFINITIONS

1. Subject to section 2, in this change form,
 - 1.1 "automobile" means a vehicle for which motor vehicle liability insurance would be required if it were subject to the law of Ontario.
 - 1.2 "dependent relative" means
 - (a) a person who is principally dependent for financial support upon the named insured or his or her spouse, and who is
 - (i) under the age of 18 years;
 - (ii) 18 years or over and is mentally or physically incapacitated;
 - (iii) 18 years or over and in full time attendance at a school, college or university;
 - (b) a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support;
 - (c) a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured; and
 - (d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile, or a temporary substitute automobile, as defined in the Policy.

BUT subsections 1.2(c) and 1.2(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own, or lease for more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.
 - 1.3 "eligible claimant" means
 - (a) the insured person who sustains bodily injury; and
 - (b) any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.
 - 1.4 "family protection coverage" means the insurance provided by this change form and any similar indemnity provided under any other contract of insurance.
 - 1.5 "inadequately insured motorist" means
 - (a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance or bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, obtained by the owner or driver is less than the limit of family protection coverage; or
 - (b) the driver or owner of an uninsured automobile or unidentified automobile as defined in Section 5, "Uninsured Automobile Coverage" of the Policy.

PROVIDED THAT

 - (A) where an eligible claimant is entitled to recover damages from an inadequately insured motorist and the owner or operator of any other automobile, for the purpose of
 - (i) (a) above, and
 - (ii) determining the insurer's limit of liability under section 4 of this change form,

the limit of motor vehicle liability insurance shall be deemed to be the aggregate of all limits of motor vehicle liability insurance and all bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, for all of the automobiles;
 - (B) where an eligible claimant is entitled to recover damages from the identified owner or identified driver of an uninsured automobile as defined in Section 5 of the Policy, for the purpose of
 - (i) (a) and (b) above; and
 - (ii) determining the limit of coverage under section 4 of this change form;

other uninsured automobile coverage available to the eligible claimant shall be taken into account as if it were motor vehicle liability insurance with the same limits as the uninsured automobile coverage;
 - (C) where an eligible claimant alleges that both the owner and driver of an automobile referred to in clause 1.5(b) cannot be determined, the eligible claimant's own evidence of the involvement of such automobile must be corroborated by other material evidence; and
 - (D) "other material evidence" for the purposes of this section means
 - (i) independent witness evidence, other than evidence of a spouse as defined in section 1.10 of this change form or a dependent relative as defined in section 1.2 of this change form; or
 - (ii) physical evidence indicating the involvement of an unidentified automobile.
 - 1.6 "insured person" means
 - (a) the named insured and his or her spouse and any dependent relative of the named insured and his or her spouse, while
 - (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;
 - (ii) an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile, unless family protection coverage is in force in respect of the other automobile; or
 - (iii) not an occupant of an automobile who is struck by an automobile; and
 - (b) if the named insured is a corporation, an unincorporated association, partnership, sole proprietorship or other entity, any officer, employee or partner of the named insured for whose regular use the described automobile is provided and his or her spouse and any dependent relative of either, while
 - (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;
 - (ii) an occupant of an automobile other than
 - (a) the automobile referred to in (i) above;
 - (b) an automobile leased by the named insured for a period in excess of 30 days; or
 - (c) an automobile owned by the named insured,

PROVIDED family protection coverage is in force in respect of the other automobile, or
 - (iii) not an occupant of an automobile, who is struck by an automobile;

EXCEPT THAT

where the Policy has been changed to grant permission to rent or lease the described automobile for a period in excess of 30 days, any reference to the named insured shall be construed as a reference to the lessee specified in that change form.
 - 1.7 "limit of family protection coverage" means the amount set out in the Certificate of Automobile Insurance with respect to this change form, but if no amount is set out in the Certificate, the limit for liability coverage set out in the Certificate with respect to the automobile to which this change form applies is the limit of family protection coverage.
 - 1.8 "limit of motor vehicle liability insurance" means the amount stated in the Certificate of Automobile Insurance as the limit of liability of the insurer with respect to liability claims, regardless of whether the limit is reduced by the payment of claims or otherwise;

PROVIDED THAT in the event that an insurer's liability under a policy is reduced by operation of law to the statutory minimum limits in a jurisdiction because of a breach of the Policy, the statutory minimum limits are the limits of motor vehicle liability insurance in the Policy.
 - 1.9 "Policy" means the Policy to which this change form is attached.
 - 1.10 Spouse means either of two persons who:
 - (a) are married to each other;
 - (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person making a claim under this policy; or
 - (c) have lived together in a conjugal relationship outside marriage,
 - (i) continuously for a period of not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.
 - 1.11 "uninsured automobile" means an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or his or her spouse.
2. The definitions in section 1 apply as of the time of the happening of an accident for which indemnity is provided under this change form.

INSURING AGREEMENT

3. In consideration of a premium of \$ or as stated in the Certificate of Automobile Insurance to which this change form is attached, the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to or death of an insured person arising directly or indirectly from the use or operation of an automobile.

LIMIT OF COVERAGE UNDER THIS CHANGE FORM

4. The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as required by law in lieu of such insurance, of the inadequately insured motorist and of any person jointly liable with that motorist.
5. Where this change form applies as excess, the insurer's maximum liability under this change form is the amount calculated under section 4 of this change form, less the amounts available to eligible claimants under any first loss insurance referred to in Section 18 of this change form.

AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

6. The amount payable to an eligible claimant under this change form shall be calculated by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist, and deducting from that amount the aggregate of the amounts referred to in Section 7 of this change form, but in no event shall the insurer be obliged to pay an amount in excess of the limit of coverage as determined under Sections 4 and 5 of this change form.
7. The amount payable under this change form to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from
- the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;
 - the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;
 - the Société de l'assurance automobile du Québec;
 - an unsatisfied judgment fund or similar plan in a jurisdiction other than Ontario, or which would have been payable by such fund or plan had this change form not been in effect;
 - the uninsured automobile coverage of a motor vehicle liability policy;
 - an automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
 - a law or policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;
 - any applicable Workers' Compensation Act or similar law of the jurisdiction in which the accident occurred;
 - the family protection coverage of another motor vehicle liability policy.
8. If the insurer is presented with claims by more than one eligible claimant and the total amount payable to the eligible claimants exceeds the limit of the insurer's liability under sections 4 and 5 of this change form, the insurer shall pay to each eligible claimant a pro rata portion of the amount otherwise payable to each eligible claimant; and if payments are made to eligible claimants prior to the receipt of actual notice of any additional claim, the limits in sections 4 and 5 shall be the amount calculated under those sections less the amounts paid to the prior eligible claimants.

DETERMINATION OF THE AMOUNT RECOVERABLE

9. The amount that an eligible claimant is entitled to recover shall be determined in accordance with the procedures set forth for determination of the issues of quantum and liability under Section 5 of the Policy "Uninsured Automobile Coverage".
10. In determining the amount that an eligible claimant is entitled to recover from the inadequately insured motorist, issues of quantum shall be decided in accordance with the law of Ontario, and issues of liability shall be decided in accordance with the law of the place where the accident occurred.
11. In determining any amounts that an eligible claimant is entitled to recover, no amount shall be included with respect to prejudgment interest which accumulated prior to notice as required by section 15 of this change form.
12. In determining any amount that an eligible claimant is entitled to recover, no amount shall be included with respect to punitive, exemplary, aggravated or other damages awarded in whole or in part because of the conduct of the inadequately insured motorist or the person jointly liable with him or her, unless these damages are for the purpose of compensating the eligible claimant for losses actually incurred.
13. In determining any amounts an eligible claimant is entitled to recover from an inadequately insured motorist, no amount shall be included with respect to costs.
14. For the purposes of this change form the findings of a court with respect to issues of quantum or liability are not binding on the insurer unless the insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

PROCEDURES

15. The following requirements are conditions precedent to the liability of the insurer to an eligible claimant under this change form:
- the eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury to or death of an insured person and of any claim made on account of the accident;
 - the eligible claimant shall, upon request, provide details of any policies of insurance other than life insurance to which the eligible claimant may have recourse;
 - the eligible claimant and the insured person shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the insurer or its representative, all relevant documents in their possession or control, and shall permit extracts and copies of them to be made.
16. Where an eligible claimant commences a legal action for damages for bodily injury or death against any other person owning or operating an automobile involved in the accident, a copy of the initiating process shall be delivered or sent by registered mail immediately to the chief agent or head office of the insurer in Ontario together with particulars of the insurance and loss.
17. Every action or proceeding against the insurer for recovery under this change form shall be commenced within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred, but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident.

MULTIPLE COVERAGES

18. The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:
- if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance and any other such insurance is excess;
 - if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess.
 - all applicable first loss family protection coverage shall be apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage provided by any one of such first loss insurances,
 - the applicable first loss insurance shall be exhausted before recourse is made to excess insurances,
 - all applicable excess family protection coverage shall be similarly apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage as defined in section 5 of this change form, which is provided by any one of such excess insurances.

ACCIDENTS IN THE PROVINCE OF QUEBEC

19. This change form does not apply to an accident occurring in the Province of Quebec for which compensation is payable under the *Automobile Insurance Act* (Quebec) or under an agreement referred to in that Act.

SUBROGATION

20. Where a claim is made under this change form, the insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in section 7 of this change form.

ASSIGNMENT OF RIGHTS OF ACTION

21. Where a payment is made under this change form, the insurer is entitled to receive from the eligible claimant an assignment of all rights of action, whether judgment is obtained or not, and the eligible claimant undertakes to cooperate with the insurer, except in a pecuniary way, in the pursuit of any subrogated action or any right of action so assigned.

MISCELLANEOUS

22. If more than one automobile is insured under this Policy, this change form shall apply only to the automobile(s) described as automobile(s) number in the schedule of automobiles attached to and forming part of this Policy, or as stated in the Certificate of Automobile Insurance. If this change form is designated with respect to more than one automobile, coverages shall be construed as if provided by separate policies of insurance with respect to each automobile to which this change form applies, subject to the provisions of section 18 of this change form.

Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.

Appendix B: Excess Endorsement

PERSONAL EXCESS LIABILITY POLICY

IMPORTANT

The insurance provided by this policy only applies to personal property, personal automobile and personal watercraft policies issued to the "Named Insured" and "Spouse" of the "Named Insured" through Aviva Insurance Company (Canada) or any affiliated member of the Aviva group of companies (Canada).

This Personal Excess Liability Policy wording represents the legal contract of indemnity that exists between the "Named Insured" and "Us".

DEFINITIONS

"**Abuse**" means any act or threat involving molestation, harassment, corporal punishment or any other form of physical, sexual or mental abuse.

"**Action**" means a civil proceeding in which "Compensatory Damages" because of injury or damage to which this insurance applies are alleged. "Action" includes:

- An arbitration proceeding in which such "Compensatory Damages" are claimed and to which the "Insured(s)" must submit or does submit with "Our" consent; or
- Any other alternative dispute resolution proceeding in which such "Compensatory Damages" are claimed and to which the "Insured(s)" submits with "Our" consent.

"**Automobile(s)**" means any self-propelled private passenger land motor vehicle, trailer or semi-trailer (including attached machinery, apparatus or equipment), which is subject to motor vehicle registration and is required by law to be insured under a contract evidenced by a motor vehicle liability policy.

This does not include any vehicle used for commercial purposes.

"**Bodily Injury**" means bodily injury, sickness or disease sustained by a person, including care, loss of services or death resulting from these at any time.

"**Business**" or "**Business Pursuits**" means any continuous, regular or occasional activity of any kind undertaken for financial gain, and includes a trade, profession or occupation. However, the following business uses by you are permitted:

- school, if not more than three students are under instruction at any one time;
- babysitting or daycare, provided a license for such daycare or babysitting is not required by provincial by-law as per the province shown on the Certificate of Property Insurance of the policy to which this policy is attached.

"**Business Property**" means property on which a "Business" is conducted, property rented in whole or in part to others, or held for rental.

"**Compensatory Damages**" means damages due or awarded in payment for actual injury or economic loss. "Compensatory Damages" does not include punitive or exemplary damages or the multiple portion of any multiplied damage award.

"**Coverage Territory**" means anywhere in the world.

"**Family Protection Coverage**" means the standard O.P.C.F. 44R/S.E.F. 44 - Family Protection Coverage and any similar indemnity provided under any other contract of insurance.

"**Fungi**" includes, but is not limited to, any form or type of mould, yeast, mushroom or mildew whether or not allergenic, pathogenic or toxigenic, and any substance, vapor or gas produced by, emitted from or arising out of any fungi or "Spore(s)" or resultant mycotoxins, allergens, or pathogens.

"**Insured(s)**", "**You**" or "**Your**" means the "Named Insured" and, while living in the same household:

- his or her "Spouse";
- the relatives of either; and
- any person under the age of 21 in their care.
- a student who is enrolled in and actually attends a school, college or university and who is principally dependent on the "Named Insured" or his or her "Spouse" for financial support and care is also insured even if temporarily residing away from the principal residence stated on the Certificate of Property Insurance to which this policy is attached.

It also includes:

- any person or organization legally liable for "Compensatory Damages" caused by a watercraft or animal owned by "You", and to which this insurance applies. This does not include anyone using or having custody of the watercraft or animal in the course of any "Business" or without the owner's permission;

- a "Residence Employee" while performing duties in connection with the ownership, use or operation of motorized vehicles and trailers for which coverage is provided by this policy;
- "Your" legal representative having temporary custody of the insured premises, if "You" die while insured by this policy, for legal liability arising out of the premises;
- any person who is insured by this form at the time of "Your" death and who continues residing on the premises stated on the Certificate of Property Insurance to which this policy is attached.

Only the person(s) named on the Certificate of Property Insurance may take legal action against "Us".

"**Bodily Injury**" means bodily injury, sickness or disease sustained by a person, including care, loss of services or death resulting from these at any time.

"**Named Insured**" means person(s) named as insured(s) on the Certificate of Property Insurance to which this policy is attached.

"**Occurrence**" means a loss, accident or offence to which this insurance applies, including continuous or repeated exposure to substantially the same general harmful conditions or series of related offences which occurs during the policy period.

"**Personal Injury**" means injury, including consequential "Bodily Injury", arising out of one or more of the following offenses:

- false arrest, false imprisonment, wrongful detention
- wrongful entry, eviction invasion of rights to privacy
- malicious prosecution
- humiliation
- libel, slander, defamation of character

"**Professional Service(s)**" shall include but not be limited to:

- Medical, surgical, dental, x-ray or nursing service or treatment, or the furnishing of food or beverages in connection therewith;
- Any professional service or treatment conducive to health;
- Professional services of a pharmacist;
- The furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances;
- The handling or treatment of deceased human bodies including autopsies, organ donations or other procedures.

"**Property Damage**" means:

- physical damage to, or destruction of, tangible property;
- loss of use of tangible property.

"**Residence Employee**" means a person employed by "You" to perform duties in connection with the maintenance or use of the premises. This includes persons who perform household or domestic services or duties of a similar nature for "You". This does not include contractors or sub-contractors. It also does not cover persons while performing duties in connection with "Your" "Business".

"**Spore(s)**" includes, but is not limited to, any reproductive particle or microscopic fragment produced by, emitted from or arising out of any "Fungi".

"**Spouse**" means either of two persons who are married to each other or who have together entered into a marriage that is voidable or void, or either of two persons who are living together in a conjugal relationship outside marriage and have so lived together continuously for a period of 3 years or, if they are the natural or adoptive parents of a child, for a period of 1 year.

"**Terrorism**" means an ideologically motivated unlawful act or acts, including but not limited to the use of violence or force or threat of violence or force, committed by or on behalf of any group(s), organization(s) or government(s) for the purpose of influencing any government and/or instilling fear in the public or a section of the public.

"**Ultimate Net Loss**" means the total sum, after reduction for recoveries or salvages collectible, that the "Insured(s)" becomes legally obligated to pay as "Compensatory Damages" by reason of settlement or judgments or any arbitration or other alternate dispute method entered into with "Our" consent or the underlying insurer's consent.

The following is not included in this definition:

- the cost to investigate or settle any claim, including legal fees court costs and interest on any judgment or award;
- any office expenses;
- all salaries of employees.

"Underlying Insurance" means the insurance provided by personal property, personal automobile and personal watercraft policies issued to the "Named Insured" and "Spouse" of the "Named Insured" through Aviva Insurance Company (Canada) or any affiliated member of the Aviva group of companies (Canada).

"Off-Road Motor Vehicle" means any self-propelled private passenger land motor vehicle, trailer or semi-trailer (including attached machinery, apparatus or equipment) that is not subject to vehicle registration and is not required by law to be insured under a contract evidenced by a motor vehicle liability policy, is owned by the "Named Insured" and operated solely on land owned and principally occupied by the "Named Insured".

"We", "Us" or "Our" means the company providing this insurance.

INSURING AGREEMENT

"We" will pay on behalf of the "Insured(s)" the "Ultimate Net Loss" that is legally liable to be paid as "Compensatory Damages" arising from an "Occurrence" that takes place during the policy period within the "Coverage Territory".

- "We" will only pay in excess of the "Underlying Insurance" or in excess of the minimum required underlying limit, whichever is greater. In addition, the insurance provided by this policy shall be liable only after the insurers under each of the "Underlying Insurance" policies have paid or have been held liable to pay the full amount of the underlying limits of liability.
- This policy is subject to all the same terms, conditions, limitations and exclusions as the "Underlying Insurance" and in no event will this policy provide broader coverage than the "Underlying Insurance"
- In the event of any conflict between the provisions of the "Underlying Insurance" and this policy, the provisions of this policy will apply.

ADDITIONAL COVERAGE FEATURE

Ownership, Use or Operation of "Automobile(s)" Insured under a Motor Vehicle Liability Policy in Canada

Subject to the terms and conditions of this policy, the provision of "Automobile(s)" insurance under this additional coverage feature is confined solely to that provided by, and shall be subject to all the terms and conditions as the Standard Excess Automobile Policy (S.P.F. No 7/O.P.C.F. No 7) applicable to the province or territory where the "Automobile(s)" are registered. This insurance does not provide coverage for any liability arising out of the ownership, use or operation of "Automobile(s)" except to the extent that coverage is provided by the Standard Excess Automobile Policy (S.P.F. No. 7 / O.P.C.F. No. 7).

This coverage only applies to motor vehicle liability policies forming part of the "Underlying Insurance".

This additional coverage feature does not increase "Our" limit of liability.

"Family Protection Coverage"

Subject to the terms and conditions of this policy coverage provided by this policy is extended to pay amounts which "You" are legally entitled to recover as "Compensatory Damages" for "Bodily Injury" or for damage to property from an inadequately insured motorist.

Subject to the terms and conditions of this policy, this additional coverage feature will only pay in excess of and subject to all the same terms and conditions as the "Family Protection Coverage" on the primary underlying motor vehicle liability policy under which "You" "Automobile(s)" is insured.

This coverage only applies when "Family Protection Coverage" forms part of the motor vehicle liability policies under the "Underlying Insurance".

WHAT "WE" DO NOT COVER - EXCLUSIONS

"You" are not insured for claims made against "You" arising:

- from the ownership, maintenance, operation, use, loading or unloading of any "Automobile(s)", "Off-Road Motor Vehicle" or watercraft.
Subject to the terms and conditions of this policy, this exclusion does not apply to any "Automobile(s)", "Off-Road Motor Vehicle", or watercraft forming part of the "Underlying Insurance", in which case coverage is no broader than the "Underlying Insurance" and subject to all the same terms and conditions as the "Underlying Insurance".
- out of the ownership, maintenance, use or entrustment to others by or on behalf of any "Insured(s)" of any aircraft or air cushion vehicle.

Use includes operation and loading or unloading.

This exclusion applies even if the claims against any "Insured(s)" allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that "Insured(s)", if the "Occurrence" which caused the "Bodily Injury", "Personal Injury" or "Property Damage" involved the ownership, maintenance, use or entrustment to others of any aircraft or watercraft.

This exclusion does not apply to aircraft that is chartered by, loaned to, or hired by "You" or on "Your" behalf and is not owned by any "Insured(s)"

- from any "Property Damage" to aircraft rented to or used by "You" or on "Your" behalf or in "Your" care, custody or control;
- out of the ownership, use or operation of any "Automobile(s)", "Off-Road Motor Vehicle", watercraft or aircraft used during the participation in, during any instruction, practice or preparation for any type of competitive racing or stunting event including any timed event or performance or skill testing event. This exclusion applies on or off a race track, test track or any other kind of course.
This exclusion does not apply to sailboats that are insured under a policy forming part of the "Underlying Insurance".
- from "Personal Injury" to "You" or any other person residing in "Your" household;
- from "Bodily Injury" to "You" or any other person residing in "Your" household other than a "Residence Employee";
- from "Property Damage" claims made against "You" by any "Insured(s)" or any person residing "Your" household;
- out of any intentional or criminal act or failure to act by:
 - any person insured by this policy; or
 - any other person at the direction of any person insured by this policy;
- out of any "Business" or "Business Pursuits" or "Business Property".
- directly or indirectly out of the wrongful acts of any insured person as an officer or member of a board of directors of a corporation or organization, unless otherwise covered by this policy.
Where coverage is provided by the "Underlying Insurance" for "Your" wrongful acts as a Director or Officer of a Condominium Corporation or non-profit corporation/organization, notwithstanding any other similar clause in this policy or any other policy, if any other insurance applies to a loss, or would have applied if this policy did not exist, this policy will be considered excess and will not pay or contribute any loss until the amount of such other insurance has been used up.
- from "Bodily Injury", "Personal Injury" or "Property Damage" due to the rendering of or failure to render by "You" or on "Your" behalf of any "Professional Service(s)" for others, or any error or omission, malpractice or mistake in providing those services.
- out of war, invasion, act of a foreign enemy, hostilities, civil war, rebellion, revolution, insurrection or military power;
- which is required to be insured under a nuclear energy liability policy issued by the Nuclear Insurance Association of Canada, or any other group or pool of insurers;
- out of liability "You" have assumed by contract unless "Your" legal liability would have applied even if no contract had been in force, but "We" do insure claims made against "You" for the legal liability of other persons in relation to "Your" premises that "You" have assumed under a written contract;
- from liability imposed upon or assumed by "You" under any workers' compensation statute
- from the transmission of communicable disease by any person insured by this policy;
- from damage to property used, occupied, leased or rented by or in the care, custody or control of an "Insured(s)", except for unintentional "Property Damage" to premises owned by others, or their contents, which "You" are using, renting or have in "Your" custody or control caused by fire, explosion, water damage or smoke. This means smoke due to a sudden, unusual and faulty operation of any heating or cooking unit in or on the premises, but not smoke from fireplaces.
- for damage to property owned by an "Insured(s)";
- arising from the actual, alleged or threatened discrimination or harassment due to age, race, colour, sex, religion, national origin, sexual preference, handicapped status or any other type of discrimination.

20. (1) directly or indirectly from "Abuse" committed or alleged to have been committed by an "Insured(s)", including the transmission of disease arising out of any act of "Abuse";
- (2) from "Your" practices of employee, hiring, acceptance of volunteer workers or supervision or retention of any person alleged to have committed "Abuse";
- (3) alleged knowledge by an "Insured(s)" of, or failure to report, the alleged "Abuse" to the appropriate authority(ies);
21. from the wrongful termination of employment;
22. when coverage by an underlying policy (whether scheduled or not) has been denied due to a violation of conditions in such a policy;
23. directly or indirectly, in whole or in part, by "Terrorism" or by any activity or decision of a government agency or other entity to prevent, respond to or terminate "Terrorism". This exclusion applies whether or not there are one or more other causes or events (whether covered or not) that contribute concurrently or in any sequence to the occasioning of the loss or damage. If any portion of this exclusion is found to be invalid, unenforceable or contrary to statute, the remainder shall remain in full force and effect.
24. from the distribution or display of data via a Website, the internet, intranet or similar device or system designed or intended for electronic communication of data.
25. from rust or corrosion, wet or dry rot, or "Fungi" or "Spore(s)".
26. from the use, growing, manufacturing, processing, storing, possession or distribution, by anyone of any drug, narcotic or illegal substances or items of any kind. This includes any alteration of the premises to facilitate such activity whether or not "You" have any knowledge of such activity;
27. from any liability to the extent it is excluded by any endorsement attached to the "Underlying Insurance";
28. from punitive or exemplary damages, meaning that part of any award by a court which is in excess of "Compensatory Damages" and is stated or intended to be a punishment to "You".
29. from any liability covered by any other policy, notwithstanding any other clause in this policy or any other policy, if any other insurance applies to a loss, or would have applied if this policy did not exist, this policy will be considered excess and will not pay or contribute any loss until the amount of such other insurance has been used up.

POLICY CONDITIONS

1. Additional Insured.

In the event of additional Insureds being added to the coverage under "Underlying Insurance" during the policy period prompt notice shall be given to "Us" and "We" shall be entitled to charge an appropriate additional premium.

2. Appeals

If the "You" or the underlying insurer elects not to appeal a judgment which would require payment of loss under this policy, "We" may do so at "Our" own expense. If so, "We" will be liable for taxable costs, post judgment interest and disbursements. "We" will not be liable for more than the limit shown on the Certificate of Property Insurance for this policy.

3. Bankruptcy or Death

- (a) Bankruptcy or Death of "Insured(s)"
Bankruptcy, insolvency or death of the "Insured(s)" or of the "Insured(s)" estate will not relieve "Us" of "Our" obligations under this policy.
- (b) Bankruptcy of Underlying Insurer
Bankruptcy of the underlying insurer will not relieve "Us" of "Our" obligations under this policy.

However, this insurance will not replace the "Underlying Insurance" in the event of bankruptcy or insolvency of the underlying insurer. This insurance will apply as if the "Underlying Insurance" were in full effect.

4. Canadian Currency

All limits of insurance, premiums and other amounts as expressed in this policy are in Canadian currency.

5. Changes

This policy contains all the agreements between "You" and "Us" concerning the insurance afforded. The first "Named Insured" shown in the Certificate of Property Insurance is authorized to make changes in the terms of this

policy with "Our" consent. This policy's terms can be amended or waived only by endorsement issued by "Us" and made a part of this policy.

6. Notice of "Occurrence"

Upon the happening of an "Occurrence" reasonably likely to involve "Us" under this policy the insured shall give written notice as soon as practicable to "Us". Such notice shall contain particulars sufficient to identify the "Insured(s)", and fullest information available at the time. If legal proceedings are begun the "Insured(s)" shall forward to "Us" each paper therein, or a copy thereof, received by the "Insured(s)" or the "Insured(s)" representative, together with copies of reports of investigations with respect to such claim proceedings.

7. Examination After Notice of "Occurrence"

After submission of a Notice of "Occurrence" in respect of a loss which may be insured by this policy each of "You" may be required separately to:

1. submit to examination under oath,
2. produce for examination all documents in "Your" possession or control that relate to the application for insurance and Proof of Loss, and
3. permit extracts and copies of such documents to be made, all at a reasonable place and time designated by "Us".

8. Expanded Coverage Territory

- (a) If the "Insured(s)" becomes legally obligated to pay sums because of "Compensatory Damages" to which this insurance applies in a part of the "Coverage Territory" that is outside Canada, the United States of America (including its territories and possessions) and Puerto Rico, and "We" are prevented by law, or otherwise, from paying such sums on the "Insured(s)" behalf, "We" will reimburse the "Insured(s)" for such sums.
- (b) All payments or reimbursements "We" make for "Compensatory Damages" because of judgments or settlements will be made in Canadian currency at the prevailing exchange rate at the time the "Insured(s)" became legally obligated to pay such sums.
- (c) Any disputes between "You" and "Us" as to whether there is coverage under this policy must be filed in the courts of Canada.
- (d) The "Insured(s)" must fully maintain any coverage required by law, regulation or other governmental authority during the policy period, except for reduction of the aggregate limits due to payments of claims, judgments or settlements.

Failure to maintain such coverage required by law, regulation or other governmental authority will not invalidate this insurance. However, this insurance will apply as if the required coverage by law, regulation or other governmental authority was in full effect.

9. Legal Action Against "Us"

No person or organization has a right under this policy:

- (a) To join "Us" as a party or otherwise bring "Us" into an "Action" asking for "Compensatory Damages" from an "Insured(s)"; or
- (b) To sue "Us" on this policy unless all of its terms have been fully complied with.

A person or organization may sue "Us" to recover on an agreed settlement or on a final judgment against an "Insured(s)"; but "We" will not be liable for "Compensatory Damages" that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by "Us", the "Insured(s)" and the claimant or the claimant's legal representative.

10. Liberalization

If during the term of this policy "We" change the insurance of the kind provided by this policy to provide more coverage at no additional cost, "You" will automatically benefit from that change at no increase in premium.

11. Limits of Liability

1. The limit of insurance shown on "Your" Certificate of Property Insurance or the maximum limit of liability stated in this policy, whichever the case may be, is the most "We" will pay regardless of the number of:
 - (a) "Insured(s)";
 - (b) Claims made or "Action" brought; or
 - (c) Persons or organizations making claims or bringing "Action".
2. The limit of insurance shown on "Your" Certificate of Property Insurance is the most "We" will pay for the sum of all "Ultimate Net

Loss" because of all "Bodily Injury", "Personal Injury" and "Property Damage" arising out of any one "Occurrence".

12. Loss Payable

Liability under this policy shall not apply unless and until the "Insured(s)" or the "Insured(s)" underlying insurer has become obligated to pay the available limits of the "Underlying Insurance" or self-insured retention, whichever applies. Such obligation by the "Insured(s)" to pay part of the "Ultimate Net Loss" shall have been previously determined by a final settlement or judgment after an actual trial or written agreement between the "Insured(s)", claimant, and "Us".

13. Minimum Required Underlying Limit

Unless otherwise specified in this policy, the following amounts are the minimum required underlying limits of liability that must be maintained, or that must be available for "Bodily Injury", "Personal Injury" or "Property Damage". Failure to maintain the minimum required underlying limit will not invalidate this insurance. However, this insurance will apply as if the minimum required underlying limit were in full effect.

"You" will be responsible for the difference between the actual limit insured by the underlying policy and minimum required underlying limit.

"Automobile(s)" Insured through a Canadian Insurer:	\$1,000,000
"Family Protection Coverage" (O.P.C.F 44R/S.E.F. 44):	\$1,000,000
Comprehensive Personal Liability through a Canadian Insurer:	\$1,000,000
Watercraft Insured through a Canadian Insurer:	\$1,000,000

14. Maintenance of "Underlying Insurance"

The "Underlying Insurance" shall remain in full effect throughout the policy period except for reduction of the aggregate limit due to payment of claims, settlement, or judgments. Failure to maintain "Underlying Insurance" will not invalidate this insurance. However, this insurance will apply as if the "Underlying Insurance" were in full effect.

"You" must notify "Us" as soon as practicable when any "Underlying Insurance" is no longer in effect.

16. Representations or Fraud

By accepting this policy, "You" agree:

- The statements in the Declarations are accurate and complete;
- Those statements are based upon representations "You" made to "Us";
- "We" have issued this policy in reliance upon "Your" representations; and
- This policy is void in any case of fraud by "You" as it relates to this policy or any claim under this policy.

17. Severability of Insurance

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first "Named Insured", this insurance applies separately to each "Insured(s)".

18. Termination

(a) The first "Named Insured" shown on the Certificate of Property Insurance may terminate this policy by mailing or delivering to "Us" advance written notice of termination.

(b) Subject to paragraph c. below, "We" may terminate this policy by giving to the first "Named Insured"

- 5 days written notice of termination personally delivered, or
- 15 days notice of termination by registered mail if termination is for any other reason.

Registered mail termination takes effect 15 days after receipt of the letter by the post office to which it is addressed, depending upon the reason for termination.

(c) To the extent that the Civil Code of the Province of Quebec is applicable to this policy General Conditions and Provisions as set out in the Civil Code of the Province of Quebec apply. Accordingly, "We" may terminate this policy by giving to the first "Named Insured"

- 15 days notice of termination by registered mail if termination is for any other reason.

Registered mail termination takes effect 15 after receipt of the notice at the last known address of the first "Named Insured", depending upon the reason for termination.

(d) The policy period will end on the date termination takes effect.

(e) If this policy is terminated, "We" will send the first "Named Insured" any premium refund due. If "We" terminate, the refund will be pro rata. If the first "Named Insured" terminates, the refund will be short rate. The termination will be effective even if "We" have not made or offered a refund.

19. No Duty to Defend

At no time shall "We" be called upon to assume charge of the settlement or defense of any claims made or suites brought or proceedings instituted against "You", but "We" shall have the right and shall be given the opportunity to associate with "You" or the underlying insurer or both in the control of defense and/or trial of any claims, suits, proceedings or "Action" which, in "Our" opinion, involves or appears reasonably likely to involve "Us".

20. Transfer of Rights of Recovery Against Others to "Us".

If the "Insured(s)" has rights to recover all or part of any payment "We" have made under this policy, those rights are transferred to "Us". The "Insured(s)" must do nothing after loss to impair them. At "Our" request, the "Insured(s)" will bring an "Action" or transfer those rights to "Us" and help "Us" enforce them.

21. Transfer of "Your" Rights and Duties Under This Policy

"Your" rights and duties under this policy may not be transferred without "Our" written consent except in the case of death of an individual "Named Insured".

If "You" die, "Your" rights and duties will be transferred to "Your" legal representative but only while acting within the scope of duties as "Your" legal representative. Until "Your" legal representative is appointed, anyone having temporary custody of "Your" property will have "Your" rights and duties but only with respect to that property.