IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

INTACT INSURANCE COMPANY

Applicant

and

ST. PAUL FIRE & MARINE INSURANCE CO.

Respondent

AWARD

Heard: October 1, 2012

Counsel:

Joseph Lin for the Applicant

D'Arcy McGoey for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is a loss transfer arbitration pursuant to section 275 of the *Insurance Act*. The dispute arises out of a motor vehicle accident occurring January 18, 2007. A 1996 E350 cargo van ("the cargo van") insured by the respondent ("St. Paul") traveling westbound on Rogers Stevens Drive in Ottawa, Ontario rear-ended a 1997 GMC Safari insured by the applicant ("Intact"), being operated by Ms. Joanne Burwash.

Ms. Burwash applied to Intact for statutory accident benefits ("SABS"). In accordance with its obligations under the legislation governing the payment of SABS Intact has paid SABS to Ms. Burwash.

Pursuant to section 275 of the *Insurance Act* Intact seeks loss transfer indemnity from the St. Paul. St. Paul initially reimbursed Intact in response to loss transfer indemnification claims submitted. A total of $52,571.02 was paid by St. Paul to Intact between August 29, 2007 and June 16, 2008. At that point St. Paul refused to reimburse Intact any further. St. Paul took the position that it had paid loss transfer indemnity by mistake because, it submits, its insured vehicle did not satisfy the weight requirement in the Regulation to give rise to an obligation to pay loss transfer indemnity.

The Issues

1) Is Intact entitled to loss transfer indemnity from St. Paul? If so, what is the appropriate amount of such indemnity?

2) If Intact is not entitled to loss transfer indemnity from St. Paul, is St. Paul entitled to reimbursement for the amounts it has paid so far to Intact in response to Intact's Requests for Loss Transfer Indemnification?

Evidence

Exhibit 1: Factum and Document Brief of Intact, Tabs A – U.

Exhibit 2: Factum of St. Paul, Tabs 1 – 2.

Exhibit 3: Insurance Bureau of Canada Website Printout concerning Gross Vehicle Weight of Ford Truck/Van Bearing Vehicle Identification Number 1FTJS34F1THB02427.

This matter proceeded on the basis of legal argument from the facts and documentary evidence contained in the above exhibits. *Viva voce* evidence was not introduced.

Analysis

The resolution of the issues in dispute requires an analysis of whether the terms of Ontario Regulation 664 made under the *Insurance Act* are satisfied in these circumstances to permit loss transfer indemnity.

I have reproduced here the relevant portions of Regulation 664 for the purposes of this case:

1. In this Regulation,

"**commercial vehicle"** means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation,...

9. (1) In this section,...

"**heavy commercial vehicle**" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;...

9. (3) A second party insurer (St. Paul) under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer (Intact)...

Although at one point while responding to Intact's loss transfer claim St. Paul took the position that the cargo van was not a commercial vehicle, St. Paul later conceded that the cargo van was a commercial vehicle as defined in the Regulation.[1]

The issue for the purposes of Regulation 664 is therefore confined to whether the cargo van satisfied the 4,500 kilogram weight requirement set out in section 9 (1).[2]

Intact takes the position that the cargo van exceeded the 4,500 kilogram weight requirement. It relies upon the case law in asserting that the weight of the cargo van at the time of the accident, *i.e.* the actual weight, is the relevant measure to determine whether the cargo van meets the requirements of the Regulation.

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[1] Exhibit 1, Tabs P and R

[2] Technically, to satisfy the heavy commercial vehicle weight requirement in regulation 664, the weight must exceed 4,500 kilograms. From time to time in this Award, for ease of reference, I refer to the question of whether the 4,500 kilogram weight requirement has been met. I should not be taken to mean that the section is satisfied if the weight is exactly 4,500 kilograms. Any amount of additional weight is required to satisfy the definition. As will be seen, nothing turns on this phraseology for the purposes of my conclusion on this aspect of the case.

At the time the matter was argued before me there was some uncertainty in the case law as to whether the Regulation was open to the interpretation that the 4,500 kilogram weight requirement could be determined based on the capacity rated weight of the vehicle as set by the manufacturer, and not the actual weight of the vehicle at the time of the accident.

St. Paul's position was that the law on the issue was not clear and that it was open to me to find that the capacity weight of the vehicle as rated by the manufacturer was the appropriate weight to be used for the purposes of interpreting the Regulation.

In my view the law that I must follow is now clear, in that the actual weight of the vehicle at the time of accident, rather than the capacity rated weight, must be used to determine whether the vehicle is a "heavy commercial vehicle". The issue nevertheless merits a review of the case law.

In *Royal Insurance Company* v. *Wawanesa Mutual Insurance Company*[3] a minivan that had been modified for use as a supply truck was towing a compressor with a metal plate that was resting on it unsecured. The metal plate came off of the compressor striking a school bus causing a fatality and injuries. Royal insured the school bus. It sought loss transfer against Wawanesa who insured the supply truck. The issue for the purposes of loss transfer was whether the 4,500 kilogram weight requirement was satisfied. The evidence indicated that the supply truck and its load were insufficient to satisfy the weight requirement. As a result the issue became whether the compressor that was being towed behind the supply truck satisfied the

[3] 2004 CanLII 1833, (ONSC), affd. [2005] O.J. No. 2639, (Ont. C.A.), ("*Royal v. Wawanesa*")

definition of a "trailer", thereby making it a "vehicle" so that its weight could be considered in determining whether the 4,500 kilogram requirement was met.

Justice Stach agreed with the arbitrator that the compressor could not be considered a "trailer", and was therefore not a "vehicle" whose weight could be valued in determining whether the 4,500 kilogram weight requirement was satisfied.

For the purposes of our analysis the important part of Justice Stach's decision is his analysis of the "gross vehicle weight" issue. At the outset of his decision Justice Stach explains the purpose behind the loss transfer scheme whereby smaller and lighter vehicles are entitled to recover the payment of SABS from larger and heavier vehicles. He states:

> ...It is premised upon the probability that insurers of light vehicles (motorcycles and motorized snow vehicles) are apt to pay a disproportionately higher share of accident benefits because drivers and passengers of such vehicles will suffer more serious injury than occupants of other types of (larger and heavier) vehicles. Similarly, insurers of **heavy commercial vehicles** are apt to pay a disproportionately lower share of accident benefits because their occupants are less likely to be as severely injured as the occupants of other (smaller and lighter) vehicles.[4]

The issue of whether the manufacturer's weight ratings for a vehicle or the actual weight of the vehicle at the time of the incident giving rise to the loss transfer claim was the correct interpretation of "gross vehicle weight" in the Regulation, was argued before Justice Stach. He stated:

> The arbitrator was mindful of the significant modification that Roy's Electric made to this particular vehicle, its *actual* weight (when put to its

[4] *Royal v. Wawanesa*, (ONSC), para. 3.

> intended use after the modification) and its *actual* use. It was also practical for the arbitrator to consider a more temporal and use-oriented approach in ascribing meaning to the term "gross vehicle weight".
>
> After considering the various approaches contended for by counsel, the arbitrator found the ordinary sense of the words "gross vehicle weight" to mean the combined loaded weight of the vehicle. This definition incidentally, mirrors that found in section 1 of the *Highway Traffic Act*. I am persuaded that the arbitrator was correct in both his approach to analysis and in his definition of the term.[5]

The Court of Appeal dismissed an appeal by Royal, stating: "*We think that both the arbitrator and Stach J. were correct in their interpretation of "gross vehicle weight" and "trailer". We see no basis to interfere."* [6]

The meaning of "gross vehicle weight" was again considered in *Aviva Canada Inc.* v. *ING Insurance Company of Canada.*[7] A pickup truck insured by ING was pulling a landscaping trailer loaded with two maple trees with their root balls wrapped in burlap. The trailer separated from the truck, entered into oncoming traffic and struck a vehicle insured by Aviva. Aviva paid SABS and sought loss transfer from ING.

The matter proceeded before arbitrator Brown on the sole issue of whether the combination of the pickup truck, trailer, driver, and the load on the trailer weighed more or less than 4,500 kilograms. There does not appear to have been any debate as to the correct approach to be taken in determining how the weight should be calculated.

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[5] *Royal v. Wawanesa*, (ONSC), paras. 19, 21.
[6] *Royal v. Wawanesa,* (Ont. C.A.)
[7] Arbitrator Brown, June 17, 2008, reversed on appeal, Hockin J., February 4, 2009, unreported. ("*Aviva v. ING*").

Although he does not specifically say so, Justice Hockin appears to approve of the approach taken by Justice Stach and the arbitrator in *Royal v. Wawanesa*, that "gross vehicle weight" must mean the actual vehicle weight, including any load, at the time of the incident. Justice Hockin states:

> Regulation 664 defines a heavy commercial vehicle. A heavy commercial vehicle is a vehicle with a gross weight of 4,500 kilograms. Gross vehicle weight is defined by the *Highway Traffic Act*, to be the total weight of a vehicle or a combination of vehicles, including any load and the weight of the driver...[8]

The major focus in this case at both the arbitration hearing and on the appeal was on whether the evidence was sufficient to prove that the combined weight of the vehicle, the trailer, and the load, exceeded 4,500 kilograms. The arbitrator made certain findings of fact resulting in a conclusion that the weight requirement was met. Justice Hockin overturned the arbitrator's decision on the basis that a note made by the police was insufficient evidence to support the conclusions he made about the existence of soil in the trailer at the time of the accident. Essentially Justice Hockin said that the arbitrator's reliance on the police note was unreasonable since it was based on unproven speculation that there was soil in the trailer apart from what was in the burlap tied around the root balls of the trees. This conclusion was unfounded in light of the uncontested evidence of the driver that there was no separate soil in the trailer at the time of the accident.

Although he sympathized with the arbitrator because of the "limitations of the evidence", he stressed that, *"...it is not for the finder of fact to fill in the blanks or simply*

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[8] *Aviva v. ING*, para. 3.

accept uncritically the opinion or conclusion of a witness on the very issue for the arbitrator's decision. There must be some foundation for it in the evidence." [9]

The case illustrates the difficulties faced by the arbitrator in these types of cases where the result hinges on an exact determination of weight at the time of the accident, and the evidence to determine that issue is incomplete.

It seems to me that the question of how one must determine the meaning of "gross vehicle weight" for loss transfer purposes was put to rest in the Ontario Superior Court decision of Justice Goldstein, on appeal from the decision of Arbitrator Coo, in *Republic Western Insurance Company* v. *Economical Mutual Insurance Company.*[10]

This case once again raised the issue of whether the manufacturer's capacity weight rating for a vehicle, or the actual weight of the vehicle and load at the time of the accident, is the appropriate measure to consider in determining whether the 4,500 kilogram weight requirement is established.

The facts were that a Ford E1-G truck insured by Republic Western struck a vehicle insured by Economical and operated by its insured, Bacchus. Economical paid SABS to Ms. Bacchus and sought loss transfer indemnity from Republic Western. The evidence before the arbitrator and the court was that including a driver and a half tank of gas, but no other load, the truck weighed approximately 3,730 kilograms at the time of the accident. The manufacturers rating for the truck when fully loaded with a driver and a full tank of gas was approximately 4990 kilograms.

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[9] *Aviva* v. *ING,* para. 33.
[10] Arbitrator Coo, September 30, 2011, reversed on appeal, 2012 ONSC 5952, November 5, 2012. ("*Republic Western* v. *Economical*")

Economical took the position that it was the manufacturers rating for the vehicle that should be taken to be the "gross vehicle weight" for the purposes of loss transfer. It sought to distinguish *Royal* v. *Wawanesa* on the basis that the minivan involved in the accident in that case had been modified into a delivery truck so the *ratio* of the case should be confined to situations involving only modified vehicles.

It was further submitted by Economical that the approach of using the manufacturer's capacity rating for a vehicle although arbitrary, would simplify matters for those involved in the insurance industry in loss transfer cases involving heavy commercial vehicles. The approach would not require *ex post facto* analysis, or a search for evidence of weight at the time of the accident when it was often quite difficult to obtain such evidence.

Republic Western argued that there was no basis to distinguish the *Royal* v. *Wawanesa* decision that had been approved of by the Court of Appeal. The court's reasoning was not based on an analysis of modified versus unmodified vehicles, it was based on an interpretation of Regulation 664 in light of other regulatory statutes such as the *Highway Traffic Act*, and the purpose of the loss transfer scheme. Republic Western argued further that using the approach advocated by Economical would not necessarily make life in the insurance world any easier since it would simply open up the field for arguments over separate definitions for modified versus unmodified vehicles.

Arbitrator Coo accepted Economical's position as having *"...more business logic in the insurance field...(it) offers a more legitimate and workable solution to the problem here and problems as they may arise in future coverage conflicts."* [11]

Although Arbitrator Coo acknowledged that he was bound by the Ontario Superior Court decision in *Royal* v. *Wawanesa*, he then went on to say that the factual circumstances of the case were quite different than his and presumably on that basis he did not feel he had to follow it.

If Arbitrator Coo's decision in *Republic Western v. Economical* created some uncertainty as to the proper interpretation of "gross vehicle weight", I believe it has been settled by Justice Goldstein's judgment overturning Arbitrator Coo's decision.

Like Justice Stach in *Royal* v. *Wawanesa*, Justice Goldstein begins his analysis with a statement of the theory behind the loss transfer scheme. Putting it somewhat more colloquially then Justice Stach, Justice Goldstein states:

> The theory behind the loss transfer scheme is simple: where a heavier vehicle has an accident with a lighter vehicle, the lighter vehicle (and the passengers) will usually suffer more damage and injury. This makes sense: in a contest between Harley-Davidson and Mack Truck, for example, Harley Davidson will inevitably come out the worst.[12]

Justice Goldstein emphasizes the fact that "gross vehicle weight", although not defined in the Regulation, is defined in at least three other statues regulating the use and operation of vehicles. In particular he cites the definition in Part VIII of the *Highway Traffic Act*, which states:

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[11] Arbitrator Coo, paras. 14, 15.
[12] 2012 ONSC 5952, para. 10.

> 114 (1) "gross vehicle weight" means the total weight in kilograms transmitted to the highway by a vehicle, or a combination of vehicles, and load.

Justice Goldstein states that interpreting "gross vehicle weight" in Regulation 664 in keeping with the definitions in the other legislation referred to is both good statutory interpretation and fits with the objective of the loss transfer scheme. He opines:

> If the objective of the loss transfer scheme is to allocate statutory accident benefit payouts in a more equitable way, then surely using actual weight will account for damage actually, rather than theoretically caused by heavy commercial vehicles. Furthermore, it would make no sense to adopt a definition of "gross vehicle weight" for the purposes of one specific portion of the Regulation that is at odds from the definition used in a case that has been specifically approved by the Court of Appeal and in three statutes concerned with closely related regulatory matters.[13]

Justice Goldstein goes on to cite with approval the same and other passages I have quoted herein from *Royal* v. *Wawanesa*, concluding with the comments I have quoted from the Court of Appeal. He declines to accept the argument that the approach taken in *Royal* v. *Wawanesa* should be confined to only modified vehicles and states that it is binding authority that ought to have been followed by Arbitrator Coo.

Therefore, for the purposes of the case before me, I conclude that "gross vehicle weight" in Regulation 664 means the actual weight of the cargo van at the time of the January 18, 2007 accident, including the load in the vehicle, and its occupants.

I will now examine the available evidence respecting the weight of the vehicle at the time of the accident to determine whether the weight requirement in the Regulation has been satisfied. I will say at the outset that this evidence is quite limited. None of the

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[13] 2012 ONSC 5952, para. 20.

cargo van, its load at the time of the accident, or its occupants, was weighed immediately after the accident. Indeed, there is no evidence before me that they were ever weighed. Perhaps one of the reasons for this is that by the time St. Paul put the weight of the vehicle in issue, more than two and a half years had passed since the accident, and about two years had passed since St. Paul had initially indicated that it would accept loss transfer.[14] I will deal with this in more detail when I come to analyze the waiver and estoppel arguments.

I was advised at the outset of the arbitration hearing that one of the agreed facts between the parties is that the cargo van was sold via auction to a scrap metal company in Québec some time after January 18, 2007.[15]

On July 15, 2011 St. Paul arranged to have weighed a 2006 model of the same cargo van that had been involved in the accident ("the test cargo van"). The test cargo van weighed had been outfitted with the same equipment, and loaded as closely as possible with the same cargo as the cargo van that had been involved in the accident. This equipment included an attachment lift as depicted in a photograph of the original cargo van.[16] The cargo included florescent bulbs similar to what was in the original cargo van at the time of the accident.

The issue of whether the heavy commercial vehicle weight requirement was satisfied was by this time a key issue in the dispute between St. Paul and Intact. I will infer from this that St. Paul made good faith and diligent efforts to reproduce as exactly as possible the weight of the cargo van, its equipment, and its cargo when the test

[14] Exhibit 1, Tabs R and E.
[15] Exhibit 1, paragraph 25.
[16] Exhibit 1, Tab U.

cargo van was weighed. Consequently, I accept that the result of the weighing of the test cargo van is a fair and accurate approximation of the weight of the cargo van at the time of the accident.

The result of the weighing of the test cargo van is contained in a one page report from Cohen and Cohen, Wrecking Contractor Scrap Merchants, in Nepean, Ontario.[17] The weight was recorded as 4,420 kilograms. This weight is 80 kilograms below the 4,500 kilogram requirement to constitute the cargo van a heavy commercial vehicle.

What the weighing of the test cargo van did not account for however, is the weight of the driver of the cargo van at the time of the accident, Jason Williams, and the weight of a passenger in the cargo van, Andrew Loughrin. As the case law indicates, their weight must be included in determining whether the Regulation weight is satisfied.

There is no direct evidence before me as to the weight of either of Mr. Williams or Mr. Loughrin at time of the accident. Therefore, mindful of Justice Hockin's criticism of the arbitrator's approach to the evidence in *Aviva v. ING*, I must be careful not to make findings of fact that are based solely on speculation or on an unreasoned rejection of available evidence that would support a different conclusion than that which I believe appropriate.

In this case, although I do not have specific values for the weight of Mr. Williams and Mr. Loughrin at the time of the accident, I am satisfied that there is sufficient evidence to make a finding that their probable combined weight would have been

[17] Exhibit 1, Tab T.

sufficient to cause the "gross vehicle weight" of the cargo van at the time of the accident to exceed 4,500 kilograms.

I base my finding on the fact that the police report confirms at the time of the accident Mr. Williams was a 29 year old adult male, and Mr. Loughrin was a 26 year old adult male.[18] An Internet search for the "average body weight Canada" reveals at least three sites that confirm the average weight of an adult Canadian male between the ages of 20 and 39 has been approximately 83 kilograms for about 15 years between 1996 and 2011.[19] Since this data is based upon government generated empirical research, I will take judicial notice of its accuracy for the purposes of the issue in this case.

Although this type of information is not the best evidence of the body weight of Mr. Williams and Mr. Loughrin, it is not unfounded speculation. Further, unlike in *Aviva* v. *ING*, where the driver's evidence about the lack of additional soil on the truck contradicted the police officer's note relied upon by the arbitrator, there is no competing evidence in this case that would support the conclusion the combined weights of these men would not exceed 80 kilograms.

I would have more concern in relying upon information about average weights for males in Canada if there had been only one occupant of the cargo van. In that situation it might be a very close call whether the average weight of one adult male would be sufficient to make up the difference to satisfy the 4,500 kilogram gross vehicle weight requirement. Since there were two, adult male occupants of the cargo van however, it seems to me that it would be too remote a possibility to consider that their combined

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[18] Exhibit 1, Tab B.
[19] http://www.statcan.gc.ca/pub/82-626-x/2013001/t024 (years 2009 to 2011), http://www.halls.md/bmi/canada.htm (2005), http://able2know.org/topic170769-1 (years 1996-1997).

weight would not exceed 80 kilograms, even if one or both of them weighed substantially less than the 83 kilogram average.

Since I have concluded on a balance of probabilities that at the time of the accident the gross vehicle weight of the cargo van exceeded 4,500 kilograms, technically that is the end of the matter. Based on that finding Intact is entitled to loss transfer indemnification from St. Paul.

In the event that I have erred in my conclusion that the cargo van was a heavy commercial vehicle at the time of the accident, I will address Intact's alternative argument that even if the cargo van did not meet the 4,500 kilogram weight requirement, St. Paul is precluded by waiver and/or estoppel from disputing Intact's loss transfer indemnity claim.

The requirements to establish waiver are set out in *Saskatchewan River Bungalows v. Maritime Life Assurance Co.*[20] The Supreme Court of Canada had to decide whether an insurer had waived its rights under a life insurance policy to lapse the policy by sending a letter indicating that it would accept the payment of a premium and continue coverage even though the policy had lapsed as of the date of the letter. The court decided that the insurer had waived its rights by sending the letter, but that it had retracted its waiver and properly lapsed the policy before the insured acted to make a premium payment during the period the waiver would have been in effect.

In discussing the case law on waiver the court made the following comments:

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[20] [1994] 2 S.C.R. 490, (SCC) ("*Saskatchewan*.v. *Maritime Life*").

> Recent cases have indicated that waiver and promissory estoppel are closely related...The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so...
>
> ...Waiver occurs where one party to a contract or to proceedings takes steps which amount to forgoing reliance on some known right or defect in the performance of the other party...
>
> ...The elements of waiver were described in *Federal Business Development Bank* v. *Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.)...
>
> ... The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them...[21]

Waiver and estoppel were the issues in *Motors Insurance Corporation* v. *Old Republic Insurance Company*.[22] Motors sought loss transfer from Old Republic. Motors' initial Notification of Loss Transfer was served June 22, 2005. It indicated that Motors was relying on Fault Determination Rule ("FDR") 12 (4) to establish that Old Republic's insured was 100 percent at fault for the accident.

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[21] *Saskatchewan* v. *Maritime Life*, paras. 18, 19, 20.
[22] Arbitrator Guy Jones, November, 2008, affirmed on appeal with respect to waiver, June 24, 2009, Herman J., unreported, (Ont. Sup. Ct.).

In response to two Loss Transfer Requests for Indemnity sent June 22, 2005, and November 25, 2005, Old Republic (through Its agent, Sedgwick) denied liability for loss transfer. Motors commenced arbitration December 21, 2005. Old Republic retained counsel to deal with the arbitration.

Motors sent a third loss transfer request for indemnification on March 23, 2006. This prompted Old Republic to obtain a legal opinion regarding the applicability of FDR 12 (4).

Following receipt of the legal opinion, Sedgwick wrote to Motors on April 19, 2006 stating in part, "*Upon review of the file information and our investigation, we... will accept your loss transfer indemnity request from November 25, 2005...reimbursement in the sum of $44,120.79 therefore follows shortly... We are reviewing your latest indemnification request for March 23, 2006 and shall comment on it shortly.*"

On July 13, 2006 Sedgwick wrote to Motors stating in part, as follows:

"*We have now completed our investigation...we will give no further consideration to your requests for...loss transfer... $45,323.50 was (paid) to you on an interim basis pending completion of our investigation, and we...ask for repayment...*"

Old Republic retained new counsel who on September 26, 2006 indicated their intention to dispute Old Republic's loss transfer obligations.

Evidence was led at the arbitration indicating that part of the reason Old Republic paid the November 25, 2005 loss transfer request was the cost associated with the arbitration proceedings that had been commenced.

On this evidence Arbitrator Jones concluded as follows:

> There is little doubt in my mind but that Old Republic, after conducting an investigation of the facts, and obtaining an (sic) legal opinion, made a conscious decision to pay the loss transfer request and it did so for these reasons and the desire to avoid arbitration expenses.
>
> I do not accept that Sedgwick changed its mind because 'we have now completed our investigation into the motor vehicle accident'... I note that in Sedgwick's letter of April 19, 2006 it states that as a result of its investigation it was paying the loss transfer. It said nothing of a further or ongoing investigation.
>
> ... Loss transfer is a statutory scheme created to allow for the relatively quick and efficient transfer of risk between insurers...In such a system it is desirable, once an agreement has been reached, that it be enforced, except in the most extreme circumstances. Here there had been a clear and unequivocal agreement between the parties. The decision by Old Republic to accept the loss transfer liability was made after obtaining a legal opinion and in the course of litigation. It was not a payment made by mistake or oversight. Old Republic made a deliberate decision after considering all relevant factors.[23]

Arbitrator Jones went on to conclude that the doctrine of estoppel also applied on the evidence, and so he found that Old Republic was prevented on this basis as well from disputing Motors entitlement to loss transfer indemnity.

On appeal to the Ontario Superior Court, Justice Herman upheld Arbitrator Jones on the waiver issue, but not on the estoppel issue.

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[23] *Motors* v. *Old Republic*, Arbitrator Jones, at page 5.

After reciting the facts relied upon by Arbitrator Jones, Justice Herman states, "*The arbitrator concluded that the letter of April 16 constituted a clear and unequivocal agreement between the parties so as to constitute a waiver.*"

Justice Herman reviews the law of waiver as stated in *Saskatchewan* v. *Maritime Life*. He notes the Supreme Court's analysis that waiver and promissory estoppel are closely related, commenting, "*The added feature of estoppel is detrimental reliance.*" He concludes as follows:

> Given the sophistication of the parties, there can be no doubt that Old Republic had a full knowledge of its rights. What is in question is whether Old Republic had an unequivocal and conscious intention to abandon those rights.
>
> The arbitrator found that the April 2006 letter was written on the basis of an investigation of the facts and a desire to avoid arbitration expenses. Sedgwick had also obtained a legal opinion...
>
> In my opinion, the arbitrator applied the correct legal principles. He considered the broader context of loss transfer claims. His finding that Sedgwick did not make a payment by mistake, but rather, made a conscious decision to pay in order to avoid the costs of arbitration was reasonable given the evidence before him and is entitled to deference. So too, was his conclusion that Old Republic had therefore waived its right to dispute Motors loss transfer claim...
>
> The arbitrator's treatment of the issue of estoppel was brief... It is not clear from his reasons how Motors relied on the April 2006 letter to its detriment...

> I have some difficulty in concluding that the arbitrator's decision with respect to the application of estoppel is reasonable given the lack of evidence of detrimental reliance.[24]

I will deal first with the issue of waiver. The first branch of the doctrine of waiver requires that the party who is alleged to have waived its rights, had full knowledge of those rights. The question then is: Did St. Paul have full knowledge of its rights when presented with Intact's loss transfer indemnity claim? To be specific, did St. Paul know that one of the requirements for a valid loss transfer indemnity claim against it was that the vehicle it insured be a heavy commercial vehicle weighing more than 4,500 kilograms?

In my opinion this question must be answered affirmatively. An excerpt from the Ontario Court of Appeal decision in *Kingsway* v. *West Wawanosh Insurance Company*[25] supports this conclusion:

> Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The (loss transfer) scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other... Insurers need to make appropriate decisions with respect to conducting investigations...

In *Motors* v. *Old Republic*, Justice Herman had no doubt that Old Republic was a sophisticated litigant with full knowledge of its rights. In his view the only issue in deciding whether the doctrine of waiver was applicable was to determine whether the evidence indicated Old Republic had demonstrated an unequivocal and conscious intention to abandon those rights.

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[24] *Motors* v. *Old Republic*, Herman J., paras. 46, 47, 52, 54, 56.
[25] 58 O.R. (3rd) 251

In my opinion St. Paul was a sophisticated litigant who must be taken to have had full knowledge of its rights under the loss transfer legislation. As counsel for Intact pointed out, the record of correspondence between Intact and St. Paul clearly demonstrates that St. Paul had knowledge of the requirements of the loss transfer scheme. For example, in accepting Intact's first Loss Transfer Request for Indemnification it applied the $2,000 deductible, and reduced the indemnity citing case law that section 42 and section 24 expenses are not recoverable in loss transfer.[26]

As in *Motors* v. *Old Republic*, it is the second branch of the waiver doctrine that poses the difficult question in this case. Does the evidence demonstrate that St. Paul had an unequivocal and conscious intention to abandon its rights?

There were three important pieces of evidence that Justice Herman cited in approving of Arbitrator Jones' conclusion that Old Republic had waived its rights. After Old Republic twice denied its loss transfer claim, Motors commenced arbitration. As a result, Old Republic obtained a legal opinion on the matters in issue. After receiving the legal opinion Old Republic sent its April, 2006 letter indicating that its decision to accept loss transfer was based upon a review of its file information and an investigation of the facts. The obtaining of a legal opinion on the matters in issue and the fact that Old Republic's letter indicated it had both reviewed its file information and conducted an investigation were two important pieces of evidence Arbitrator Jones and Justice Herman relied upon for their conclusion that Old Republic had waived its rights. The third important piece of evidence came from testimony at the arbitration hearing wherein

[26] Exhibit 1,Tab E.

a witness on behalf of Old Republic indicated that part of the reason for accepting Motors' loss transfer claim was to avoid the expense of arbitration.

These three factors confirmed that Old Republic had turned its mind to the facts and the law, and had weighed other practical considerations (the cost of arbitration), before communicating to Motors its position that it would accept loss transfer. This made it clear to Arbitrator Jones and to the court that Old Republic had demonstrated an unequivocal and conscious intention to abandon its rights.

In this case Intact sent St. Paul a Loss Transfer Request for Indemnification with an August 17, 2007 letter.[27] St. Paul responded with an August 29, 2007 letter.[28] The second paragraph of this letter begins, "*We accept the loss transfer...*". There is no condition attached to the acceptance. No mention is made of the need for St. Paul to conduct or complete any investigation into the facts or the law prior to or as a condition of accepting loss transfer. The letter goes on to indicate however, that St. Paul had clearly turned its mind to the legal requirements for loss transfer because it had reduced its reimbursement cheque enclosed with a letter by the $2,000 deductible stipulated in the loss transfer Regulation. Further, St. Paul had reduced its loss transfer reimbursement by the value of what it deemed to be section 42 and section 24 expenses, based on case authority that held those expenses not to be recoverable in loss transfer.

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[27] Exhibit 1, Tab D.
[28] Exhibit 1, Tab E.

Intact sent a second Loss Transfer Request for Indemnification to St. Paul with a November 29, 2007 letter.[29] St. Paul responded with a December 11, 2007 letter.[30] St. Paul enclosed a second loss transfer indemnification payment. Once again this payment had been reduced by the value of section 24 and section 42 expenses based on the case law previously cited by St. Paul. This payment was not made conditional upon the completion of any factual or legal investigation.

Intact's third Loss Transfer Request for Indemnification was sent to St. Paul with a March 31, 2008 Letter.[31] St. Paul responded with an April 7, 2008 letter.[32] St. Paul enclosed a cheque for loss transfer reimbursement net of the section 24 and section 42 expenses, once again citing the same case law. There was no condition or qualification attached to the terms of this reimbursement.

Further correspondence was exchanged on the issue of whether certain expenses were, or were not section 24 and section 42 expenses excluded from loss transfer. Apart from addressing this issue there was no indication in the correspondence sent by St. Paul that its acceptance of Intact's loss transfer claim was conditional or that it was still being investigated. The evidence indicates that St. Paul accepted Intact's position on certain expenses not being section 42 or section 24 expenses, because St. Paul ultimately sent a cheque to Intact for the $2,104.88 amount of these expenses that were in dispute.[33]

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[29] Exhibit 1, Tab F.
[30] Exhibit 1, Tab G.
[31] Exhibit 1, Tab H.
[32] Exhibit 1, Tab I.
[33] Exhibit 1, Tab K.

On April 16, 2009 Intact sent a fourth Loss Transfer Request for Indemnification to St. Paul.[34] St. Paul responded with an April 20, 2009 letter. Of note, the St. Paul correspondence up until this letter was authored by Marcela Soltys, a Senior Claims Representative. The April 20, 2009 letter was authored by a new St. Paul representative, Zorana Klaic, Claims Specialist. Ms. Klaic's April 20, 2009 letter indicated that she was "*unable to properly assess...*" Intact's Loss Transfer Request until intact provided a detailed list of medical payments. Ms. Klaic also asked Intact to explain why housekeeping and caregiver benefits had been approved after 104 weeks. She asked, "*Has (sic) person sustained a catastrophic impairment?*" She followed up that inquiry with, "*As soon as we receive your response, we will take your Loss Transfer Request for Indemnification for our further review.*"

After four unconditional payments in loss transfer indemnification from St. Paul to Intact, this is the first correspondence from St. Paul to Intact that indicated Intact's loss transfer claim was under review. In my view however, a reasonable reading of Ms. Klaic's April 20, 2009 correspondence suggests that the review St. Paul was going to conduct related to the nature of medical payments made by Intact, and whether the SABS claimant was catastrophically impaired. There is no basis to interpret this letter to suggest that St. Paul was now reconsidering its obligation to indemnify Intact in loss transfer. St. Paul's intended review of the claim related to the quantum of loss transfer, not entitlement to loss transfer.

[34] Exhibit 1, Tab L.

Intact confirmed that the SABS claimant was catastrophically impaired in April 30, 2009 correspondence[35], and in July 3, 2009 correspondence submitted its fifth Loss Transfer Request for Indemnification to St. Paul.[36] St. Paul (Ms. Klaic) responded with July 14, 2009 correspondence. The second paragraph of this letter states, *"...upon review of same (Intact's July 3, 2009 fifth loss transfer indemnity request) we are not accepting the loss transfer of this accident benefits claim due to the fact that our insured's vehicle classifies as a 'public vehicle'..."*

Almost 2 years after unconditionally accepting Intact's loss transfer claim, St. Paul for the first time indicated that it was disputing Intact's entitlement to loss transfer indemnity.

Intact responded within two weeks, on July 24, 2009, requesting documents and information that would substantiate the position being taken by St. Paul that it's insured vehicle involved in the accident was a "public vehicle".[37]

St. Paul sent a July 27, 2009 letter reading, in part, as follows:

> We acknowledge your correspondence of July 24, 2009, and would like to inform you that we stated incorrectly that our insured's vehicle classifies as a 'public vehicle'.
>
> Our intention was to inform you that the gross weight of our vehicle is under 4,500 kilograms and as such it is not subject to loss transfer provision governing 'commercial vehicles'.
>
> The serial number of our vehicle is... It is a 1996 Ford E350 mini-van.

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[35] Exhibit 1, Tab N.
[36] Exhibit 1, Tab O.
[37] Exhibit 1, Tab Q.

> We continue to ask for repayment of all Loss Transfer payments made by our company in error.[38]

The letter attached a Schedule of Vehicles St. Paul insured for its named insured, Osram Sylvania Ltd. The Ford E-350 minivan (the cargo van) that was involved in the accident is shown on this schedule. Under the heading "Class", the letters "LT" appear for this vehicle.

There is no direct evidence before me as to the meaning of these letters. There are other designations that appear beside other vehicles in the Schedule. The letters, "PV" appear beside some vehicles, and the letters, "HV" appear beside others.

In my opinion it is a reasonable inference to draw that the letters, "LT", denote "Light Truck", the letters, "HV", denote "Heavy Truck", and the letters "PV", denote "Public Vehicle".

Again, there is no direct evidence before me on the point, but I am of the view that another reasonable inference to draw from St. Paul's July 27, 2009 letter attaching the Schedule of Vehicles indicates that St. Paul was relying upon the designation "LT" (Light Truck) for its newly advised position that the cargo van involved in the accident did not satisfy the 4,500 kilogram weight requirement in the Regulation. There is no evidence that the cargo van involved in the accident, its equipment, and contents were ever weighed.

Intact commenced arbitration July 12, 2010. As I have previously discussed, the test cargo van with similar equipment and contents (except for the occupants) was not

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[38] Exhibit 1, Tab R.

weighed until July 15, 2011. I want to be careful not to speculate since there is no evidence before me as to what happened between July 27, 2009 and July 12, 2010. I believe it to be another reasonable inference to draw from the evidence however, that once St. Paul denied Intact's loss transfer claim with its letter of July 27, 2009, it is likely that discussions ensued between representatives of Intact and St. Paul to try to resolve the matter before arbitration was commenced.

In any event, in my view nothing turns on the events, or the timing of events occurring after July 27, 2009 in so far as the legal issues of waiver and estoppel are concerned. If either or both of those doctrines apply then the events giving rise to their application occurred between the time Intact first presented its claim for loss transfer indemnification, and when St. Paul finally took a position of denial about two years later, on July 27, 2009.

The case law indicates that an unequivocal and conscious intention to waive rights may be expressed in a formal legal document, in an informal fashion, or it may be inferred from conduct.

In this case, I conclude that St. Paul's conduct demonstrated an unequivocal and conscious intention to waive any reliance on the legal requirement that the actual weight of the cargo van, its equipment, and contents at the time of the accident be proven to be 4,500 kilograms, before accepting Intact's loss transfer indemnity claim.

As the case law demonstrates, insurers are sophisticated litigants. They are taken to know the law in connection with loss transfer claims as they deal with it virtually daily. They must undertake investigations in respect of loss transfer claims, and

negotiate with other insurers on both entitlement and quantum issues with respect to those claims.

In this case St. Paul argued that its loss transfer payments to Intact had been made as a result of mistake of fact, and/or mistake of law, and that the payments should be returned by operation of the equitable doctrine of unjust enrichment.

In my opinion, the evidence in this case does not support St. Paul's position that it initially accepted Intact's claim for loss transfer indemnity by mistake of fact or law as those terms are described in the authorities. This is not a situation where St. Paul accepted Intact's loss transfer claim by mistakenly relying upon inaccurate information that the weight of the cargo van satisfied the requirements of the Regulation, but later discovered that the facts it had relied upon were inaccurate, and the true facts indicated the weight was not sufficient to satisfy the Regulation. The information about the weight of the cargo van that was ultimately relied upon by St. Paul to deny Intact's claim was available from the inception of the claim.

There is no evidence before me that St. Paul was relying upon incorrect information about the weight of the cargo van in accepting Intact's loss transfer claim. The evidence before me is that St. Paul never weighed the cargo van, its equipment, and its contents. The only reasonable inference to draw from the evidence is that St. Paul was either satisfied the cargo van, its equipment, contents, and two occupants were likely of sufficient weight to meet the 4,500 kilogram heavy commercial vehicle requirement so that their weighing was not required, or that it simply did not take any

steps to investigate that issue until two years after it had unconditionally accepted Intact's loss transfer claim.

Making allegedly erroneous assumptions about facts without conducting any or an inadequate investigation of them, or not adverting to facts in its possession, does not amount to a "mistake of fact" that an insurer can rely upon to deny liability for a claim it has otherwise unequivocally accepted.

Similarly, there is no "mistake of law" in this case giving rise to an unjust enrichment claim. St. Paul did not reimburse Intact because of a mistake of law. On the contrary, St. Paul wrongly denied loss transfer indemnity to Intact based on a mistake of law. St. Paul's basis for denying Intact's loss transfer claim did not accord with the prevailing law on the definition of "gross vehicle weight" at the time. Even the uncertainty on the issue that temporarily existed after Arbitrator Coo's decision in *Economical* v. *Republic Western* did not occur until years after the events in question in this case. As I have indicated, any doubt about the issue was laid to rest with the Superior Court's reversal of Arbitrator Coo's decision.

St. Paul knew or ought to have known that it is a requirement of loss transfer indemnity entitlement that it's vehicle satisfy the "heavy commercial vehicle" definition before it is obligated to reimburse in loss transfer.

Based on the law at that time (subsequently confirmed by the Superior Court's decision in *Economical* v. *Republic Western*) St. Paul knew or ought to have known that immediately after Intact presented its claim for loss transfer indemnity (if not immediately after the accident), the cargo van, its contents, and its occupants all should

have been weighed to determine whether the 4,500 kilogram weight requirement was satisfied. This was completely within the power of St. Paul to accomplish since it was St. Paul's insured vehicle that was involved in the accident, and it could solicit cooperation from its insured to complete this task.

Although perhaps not quite as obvious as in *Motors v. Old Republic* where the evidence of unequivocal and conscious intention to waive rights included a legal opinion and an acknowledgment that an investigation of the facts had been completed, the evidence contained in the correspondence that I have previously referred to leads me to conclude that an unequivocal and conscious intention to waive rights should be inferred from St. Paul's conduct in this case.

Two years had elapsed from the time Intact first presented its loss transfer claim before any issue of entitlement was raised. During that time St. Paul first made a formal statement unconditionally accepting loss transfer in its initial piece of correspondence to Intact, and followed that up with four indemnity payments. It did not indicate then, or in the next two years that further investigation of the facts or the law was necessary as a condition precedent to accepting the loss transfer claim.

It was only after an adjuster change, and having been advised that the SABS claimant was catastrophic, that St. Paul indicated any concern regarding Intact's entitlement to loss transfer indemnity. Before that St. Paul had raised only issues respecting the quantum of Intact's loss transfer entitlement.

As Arbitrator Jones observed in *Motors* v. *Old Republic*, St. Paul's change in position regarding Intact's entitlement to loss transfer indemnity appears to have

occurred after the new adjuster on the file took a different (and incorrect) view of what the applicable law might be concerning Intact's entitlement to loss transfer, a view that may well have been influenced in its development by the fact that it had recently been confirmed the loss transfer indemnity claim involved a catastrophic claimant.

To quote Arbitrator Jones (as endorsed by Justice Herman) in *Motors* v. *Old Republic*:

> Loss transfer is a statutory scheme created to allow for the relatively quick and efficient transfer of risk between insurers when there are collisions between certain types of vehicles. The scheme puts a premium on speed and efficient resolution of loss transfer matters. The users of the system, as both arbitrators and the courts have noted, are sophisticated in litigation. In such a system it is desirable, once an agreement has been reached, that it be enforced, except in the most extreme circumstances. Here there had been a clear and unequivocal agreement between the parties...[39]

On the evidence before me I conclude that there was a clear and unequivocal agreement between Intact and St. Paul whereby St. Paul would accept Intact's claim for loss transfer indemnity. In my opinion it would violate the stated purpose of the waiver doctrine to allow St. Paul to go back on its choice of accepting Intact's claim for loss transfer indemnity because to permit that would be unfair to Intact in the circumstances.

I am of the opinion that Intact should also succeed on the basis of the doctrine of promissory estoppel. As has been pointed out in the case law that I have referred to, this doctrine is very similar to waiver, except with the added requirement of detrimental reliance on the part of the party asserting the doctrine.

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[39] Page 5, arbitration decision, para. 52, Ontario Superior Court decision.

In *Travelers Indemnity Company of Canada* v. *Andrew Clifford Maracle Jr.*[40] the Supreme Court of Canada described the requirements for promissory estoppel as follows:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.[41]

In my opinion these requirements are satisfied on the evidence before me in this case. In my view there is no doubt that St. Paul both by its words and conduct made a promise or assurance to Intact in accepting Intact's loss transfer indemnity claim. This was intended to affect their legal relationship and be acted upon by Intact.

I am also satisfied that Intact relied on St. Paul's representation and changed its position. I accept the submission made by Intact's counsel that had St. Paul refused to honour Intact's claim for loss transfer indemnity at the outset, alleging that its cargo van did not meet the 4,500 kilogram weight requirement, Intact would have immediately taken steps to try to gather evidence on the issue while it was fresher and more readily available. I agree with Intact's counsel that relying upon St. Paul's agreement to accept Intact's loss transfer indemnity claim, and therefore taking no steps to investigate the issue of the weight of the cargo van in the ensuing two years, amounts to a change in position and is detrimental to Intact.

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[40] [1991] 2 S.C.R. 50, ("*Travelers* v. *Maracle*").
[41] *Travelers* v. *Maracle*, para. 13.

I do not rely entirely upon the theoretical reasonableness of this submission made by Intact's counsel for my conclusion. In my view the assertion is supported by the evidence of Intact's response to St. Paul's original challenge to Intact's entitlement to loss transfer whereby it alleged that its vehicle was a "public vehicle". Within two weeks of the date of St. Paul's letter outlining this position, Intact clearly indicated an intention to investigate the validity of this position by requesting information from St. Paul. Intact's July 24, 2009 letter reads in part as follows:

> You are claiming that your named insured's vehicle is classified as a "public vehicle" and as such is not subject to loss transfer provision governing "commercial vehicles". In order that you may support your position, we require that you provide us with the following documents for our review:
>
> -copy of the ownership of the vehicle involved in the accident
>
> -copy of photograph of the vehicle of your insured involved in the accident,
>
> -if none of the above is available, please provide us with the serial number of your named insured's vehicle involved in this accident...Please provide us with the above information, no later than August 17, 2009.[42]

In my opinion, given the speed of Intact's response on this issue, and its obvious concern to investigate the available evidence, it is very likely if not certain that Intact would have done exactly the same thing had St. Paul taken the position from the outset that its insured vehicle did not meet the 4,500 kilogram weight requirement.

The evidence is unclear as to when the cargo van was sold for scrap, and there is no evidence as to the whereabouts or availability of the driver and occupant of the cargo van. In my view however, it is more probable than not that the chances of

[42] Exhibit 1, Tab Q.

obtaining information about the weight of the original cargo van and its occupants would have been much better in August – September, 2007, as opposed to July – August 2009.

Having been lulled into a false sense of security by St. Paul's two year acceptance of its entitlement to loss transfer indemnity, Intact changed his position by dispensing with any investigative measures that would otherwise have been taken had the issue of the weight of the cargo van, or other entitlement factors been put in issue by St. Paul when Intact presented its claim.

As I have indicated with my conclusion on waiver, estoppel is a doctrine that is intended to prevent a party from resiling from a deliberately chosen position upon which another party has relied, when the circumstances would make it unfair to allow the first party to change its mind.

In my opinion it would be unfair to permit St. Paul to go back on its choice in the circumstances. Therefore, St. Paul is estopped from taking the position that its insured vehicle did not satisfy the 4,500 kilogram weight requirement in the Regulation.

Conclusion

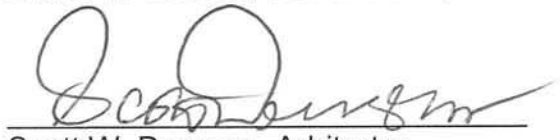
1. The gross vehicle weight of the cargo van insured by St. Paul exceeded 4,500 kilograms, making it a "heavy commercial vehicle" within the meaning of section 9 (1) of Regulation 664 made under the *Insurance Act*. Therefore, Intact is entitled to loss transfer indemnification from St. Paul arising out of the January 18, 2007 accident.

2, If it should be determined that the cargo van insured by St. Paul was not a "heavy commercial vehicle", St. Paul is precluded on the basis of the doctrines of waiver and promissory estoppel from repudiating its acceptance of Intact's entitlement to loss transfer indemnification. Therefore, Intact is entitled to loss transfer indemnification from St. Paul arising out of the January 18, 2007 accident.

4. St. Paul is not entitled to the repayment of amounts paid to Intact on account of Intact's claim for loss transfer indemnification.

5. Intact is entitled to costs of the arbitration. If counsel are unable to agree on costs, I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for me to deal with the costs issue.

Dated at Toronto, November 4, 2013.



Scott W. Densem, Arbitrator