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:

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Applicant

and

INTACT INSURANCE COMPANY OF CANADA

Respondent

AWARD

Heard: April 11, 2013

Counsel:

Avi Cole for the Applicant, St. Paul Fire & Marine Insurance Company

Joseph Lin for the Respondent, Intact Insurance Company of Canada

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This arbitration arises out of an accident occurring November 6, 2009, on Hurontario Street near its intersection with Britannia Road in the City of Mississauga. A collision occurred when a cube van ("the van") insured by the Respondent ("Intact") made a left turn in front of a bus("the bus") owned by the City of Mississauga ("the City"), and insured by the Applicant ("St. Paul").

The parties agree that the van was a heavy commercial vehicle as defined inOntario Regulation 664 of the *Insurance Act*, R.S.O. 1990, c. I.8 ("the loss transfer regulation").

The parties agree that Fault Determination Rule 12 (5) of Ontario Regulation 668 of the *Insurance Act* ("the FDR") applies to the circumstances of the accident. Therefore, the van is 100% at fault for the accident.

The City paid Statutory Accident Benefits ("SABS") to eight passengers on the bus. The City, rather than St. Paul, paid SABS to the eight claimants because of an agreement between the City and St. Paul that formed part of the automobile insurance contract in force between the City and St. Paul at the time of the accident.

St. Paul seeks loss transfer indemnification from Intact pursuant to section 275 of the *Insurance Act*, the loss transfer regulation, and the FDR.

[1] The introduction is based on facts either in the Agreed Statement of Facts and Documents (Exhibit 1), or that are not dispute.

The Issues

The issues for determination as stated in the Arbitration Agreement[2] are as follows:

1) Whether (Intact) is obligated to indemnify (St. Paul) pursuant to the loss transfer provisions for (SABS) paid to the claimants;

2) Liability pursuant to the (FDR) or otherwise arising from the accident;

3) The extent of the indemnification owed by (Intact) to (St. Paul) for (SABS) paid to the claimants, if any;

4) Interest and costs of the parties and costs of the Arbitration and Arbitrator.

As indicated in the Introduction, the parties have resolved issue 2. The matter proceeded before me on issue 1 – the entitlement issue. The determination of the monetary aspects of issues 3 and 4 will be dealt with later, should that be necessary.

The Evidence

One document was introduced into evidence at the arbitration hearing. *Viva voce* evidence was not required.

Exhibit 1: Agreed Statement of Facts and Documents, Tabs 1 – 4.

As mentioned in the Introduction, there was an agreement in place between the City and St. Paul that formed part of the automobile insurance contract between the City and St. Paul in force at the time of the accident.

[2]Exhibit 1, tab 1.

The agreement was not made an exhibit because the City and St. Paul understandably had concerns regarding the proprietary nature of the agreement. The parties cooperated with each other and helpfully assisted me in being able to refer to the part of this agreement that I consider relevant to the issue in this arbitration.[3]

This agreement is entitled, *Self-Insured Retention Claims Handling Agreement between St. Paul Fire and Marine Insurance Company Inc. and the Corporation of the City of Mississauga*. For convenience, at the arbitration hearing, and in their documents, the parties referred to this agreement as, the "Side Agreement". I will refer to the agreement as the Side Agreement henceforth in this Award.

Analysis

I am of the opinion, and the parties agree, that the result in this case turns on the correct interpretation of section 275 (1) of the *Insurance Act*. As a result of bulletins issued by the Ontario Insurance Commission (now known as the Financial Services Commission of Ontario "FSCO"), section 275 and Regulation 664 are commonly referred to in the insurance industry as the "loss transfer" legislation. Neither section 275 nor Regulation 664 actually includes the words, "loss transfer". Both provisions use the term "indemnification" in the context of one insurer recovering SABS from another insurer. For ease of reference I will refer to these provisions either individually or collectively as the loss transfer legislation. I have set out below section 275 (1) in its entirety, with emphasis added to the words specifically relevant for this case.

[3] This part is referred to in the Analysis section of this Award.

> **275 (1) Indemnification in certain cases** – the insurer responsible under section 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

The parties have agreed that the van insured by Intact was a heavy commercial vehicle, that it was involved in the incident, and that it was 100% at fault for the incident. In my view, this reduces the scope of the section 275 (1) wording to be interpreted in this case to the following:

> the insurer responsible under section 268 (2) for the payment of statutory accident benefits…is entitled…to indemnification in relation to such benefits paid by it…

I think it is helpful to start with a review of how the loss transfer legislation evolved, and to examine its purpose.

Section 275 of the *Insurance Act* came into force with the introduction of Ontario's first no-fault automobile insurance legislation in June, 1990.[4] The Ontario Motorist Protection Plan (OMPP) brought in new rules for tort claims, and introduced the Statutory Accident Benefits Schedule ("SABS"). The SABS included regulations and schedules governing the provision of first party benefits to accident victims.

[4] This discussion of the evolution of the loss transfer legislation is taken mainly from *The Wawanesa Mutual Insurance Company* v. *Axa Insurance (Canada)* 2012 ONCA 592, ("*Wawanesa*v. *Axa*"), paragraphs 6 – 9.

The purpose of this combination of new rules for tort claims and SABS was set out by the Court of Appeal in one of its seminal decisions dealing with the new legislation.[5]The court stated as follows:[6]

> …The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemptions, but receives more generous first party benefits, regardless of fault, from his or her own insurer. The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses…regardless of fault.

The Court of Appeal in*Wawanesa* v. *Axa* made reference to the court in *Meyer* v. *Bright* describing the new legislation as "remedial". It then cited with approval the description of the legislation made by Jennings J. in *Guardian Insurance Company* v. *Jevco Insurance Company*.[7] Justice Jennings stated, "*this is remedial legislation, designed to get needed funds to an insured expeditiously and with a minimum of fuss*".[8]

With getting funds to accident victims quickly and efficiently as the primary objective of the new automobile legislation, the Court of Appeal described the impact of the legislation's objective on insurers who pay the claims.

In *Wawanesa* v. *Axa*, the Court of Appeal stated:[9]

> From the insurers' perspective, the legislative changes to the *Insurance Act* meant that the costs of claims would largely be determined by the injuries to

[5]*Meyer* v. *Bright* (1993) 15 O.R. (3d) 129.
[6]At paragraph 6.
[7] November 20, 2000, unreported.
[8]At page 2.
[9]At paragraph 9.

> their own insured rather than being limited to their insured's degree of negligence. As a result, an insurer that predominantly provides insurance to, say, motorcyclists, faced greatly increased costs because their insured are highly vulnerable to suffering injuries. By contrast, the costs of an insurer that primarily insures heavy commercial trucks decreased because their insured are relatively less likely to suffer injury.

Court decisions have given a consistent and enduring description of the purpose of the loss transfer legislation in dealing with the impact of the no-fault automobile legislation on insurers.An early statement of this purpose is found in the judgment of Justice Mandel in *Oppenheim et al* v. *The Guarantee Company of North America.*[10] He stated:[11]

> The purpose of s. 275 (1) is to require all insurers of certain classes of commercial motor vehicles to bear a greater burden to pay accident benefits than the insurers of automobiles…And the purpose of the regulation is to have insurers of heavy vehicles transporting materials indemnify insurers of automobiles for no-fault benefits paid by them.

A recent statement of the loss transfer legislation purpose can be found in *Markel Insurance Company of Canada* v. *ING Insurance Company of Canada, and Federation Insurance Company of Canada* v. *Kingsway General Insurance Company*[12], where the Court of Appeal stated as follows:[13]

> Under s. 268 the *Insurance Act*, insurance companies, known for these purposes as "first party insurers", must pay SABS to their insureds when the insureds are injured in a motor vehicle accident. In certain circumstances, defined by regulation, s. 275 allows a first party insurer to claim indemnification

[10]Court File No.RE5545/95, (Ont. Ct. Gen. Div.).
[11]At page 6.

[12]2012 ONCA, 218 ("*Markel* v. *ING"*).
[13]At paragraph 6.

> for the SABS paid to its insured from a "second party insurer" that has insured another vehicle involved in the accident. The claim for indemnification is made on the basis of the fault of the second party insurer's insured. This fault-based loss-transfer obligation arises under the regulationswhen, *inter alia*, the accident involved a heavy commercial vehicle, insured by the second party insurer. The loss transfer scheme was introduced as part of the no-fault SAB regime to achieve an appropriate balance between the insurers of various classes of vehicles in meeting the cost of providing SABS to injured motorists.

The case law that has developed with respect to the loss transfer legislation establishes that the right to loss transfer indemnity is limited strictly to the parameters of the loss transfer legislation. In effect, the legislation creates its own code that sets out the requirements for a successful loss transfer indemnity claim.

For example, Canada's highest court has made it clear that the right to loss transfer indemnity is a statutory cause of action only. There is no legal basis for such a claim either at common law, or in equity.

In *Unifund Assurance Co.* v. *Insurance Corp. of British Columbia*[14], the Supreme Court of Canada dealt with a claim for loss transfer indemnity by Unifund against ICBC.

Two Ontario residents were injured in an accident in British Columbia. They were operating a rented vehicle registered and insured in British Columbia. The other vehicle involved in the accident was a tractor trailer registered in British Columbia. The Ontario residents were paid SABS under their Ontario insurance policy with Unifund.

[14] [2003] S.C.J. No. 39 ("*Unifund* v. *ICBC*")

The case turned on whether Unifund had a right to claim loss transfer indemnity from ICBC under the Ontario loss transfer legislation, when ICBC was not a licensed Ontario insurer.

In addressing the basis for Unifund's claim, Justice Binnie, writing for the majority, stated as follows:[15]

> Unifund's problem is to find a cause of action. In this appeal, we are dealing only with Unifund's quite separate and distinct claim under section 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABS under the Ontario Act.
>
> It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

The majority concluded that Unifund was not entitled to loss transfer indemnity from ICBC. The key to the decision appears to have been that ICBC is not an insurer licensed to undertake contracts of automobile insurance in Ontario. Justice Binnie describes the Ontario loss transfer legislation indicating that it is a specific statutory code to address loss transfer indemnity for SABS between Ontario insurers. He states as follows:[16]

> (*indemnity is made*) …according to the respective degree of fault of each insurer's insured as determined under the fault determination rules (s. 275 (2)), *i.e.* allocated not by general principles of tort but by the rules set out in Ontario

[15] At paragraphs 9 and 10.
[16] At paragraph 12.

> regulations…There is no doubt that if the appellant (*ICBC*) were an Ontario insurer, it would be required to arbitrate Unifund's claim.

Subsequent decisions of the Ontario Superior Court of Justice confirm that Ontario's loss transfer legislation is designed to be a complete code governing loss transfer indemnity between insurers licensed to undertake contracts of automobile insurance in Ontario.

In *Royal &SunAlliance Insurance Company of Canada* v. *Wawanesa Mutual Insurance Company*[17] the court was dealing with an appeal from an arbitrator's decision granting loss transfer indemnity to Wawanesa. The accident occurred in Vermont. The two vehicles involved were insured by two, licensed Ontario insurers. Royal argued that the Ontario loss transfer legislation should not apply because the accident happened in Vermont. Royal submitted that the tort choice of law rule –*lex loci deliciti*[18]should apply, in which case there would be no loss transfer because Vermont did not have a loss transfer system.

The arbitrator applied a tort analysis, but allowed loss transfer on the basis of the "injustice" exception to the *lex loci delicti*rule. Justice Newbould upheld the arbitrator's decision, but stated that the tort analysis did not have to be applied. The claim being advanced by Wawanesa was a statutory cause of action created by the Ontario loss transfer legislation, and was not dependent upon the requirements for a tort cause of action. He stated as follows:[19]

[17]2006 CanLII 42663, (ONSC) ("*Royal &SunAlliance*v. *Wawanesa")*.
[18] As stated by the Supreme Court of Canada in *Tolofson*v. Jensen et al., [1994] 3 SCR 1022.
[19]At paragraphs 12 – 19.

> In my view, the outcome of this case should not rest upon an analysis as to whether there would be an injustice using (*Tolofson*)…for Wawanesa not to have a loss transfer claim against Royal...the claim by Wawanesa is a statutory claim under s. 275 of the Act that is a separate and distinct claim from any underlying tort claim that might be brought between the parties involved in the accident. There would be no purpose served in this case by looking to the law of Vermont to settle a dispute between two Ontario insurers arising from a claim made under the Act, an Ontario statute…
>
> This distinction was recognized in (*Unifund*v. *ICBC*)…Binnie J. for the majority…recognized the distinction between an underlying tort action between the parties to the accident and the statutory claim between two insurers. He made clear that if ICBC were an Ontario insurer, the loss transfer provisions of s. 275 of the Act apply.
>
> Counsel for Royal submits that…(*Justice Binnie's statement that if ICBC were an Ontario insurer it would be required to arbitrate Unifund's claim*) is *obiter* and therefore not binding…while that last sentence may be *obiter*, it is the only conclusion that one could draw from the other principles enunciated by Justice Binnie, *i.e.* A claim under s. 275 of the Act is separate and distinct from the underlying tort action and the allocation between insurers under this section is not to be made by a consideration of general principles of tort law but by the rules set out in the Ontario regulations…

Primmum Insurance Co. v. *Allstate Insurance Co*.[20] perhaps best illustrates my point that Ontario's loss transfer legislation is a self-contained code for SABS indemnity claims between insurers licenced in Ontario to undertake automobile insurance contracts.

In that case Justice Cameron was dealing with a situation where an accident happened in North Carolina. Primmum, an Ontario licensed insurer, paid SABS to its insuredwho had been operating a motorcycle. Primmum claimed loss transfer indemnity

[20][2010] O.J. No. 600.

from Allstate. Allstate insured the at fault vehicle involved in the accident, but the policy insuring this vehicle was issued by Allstate in North Carolina.

Allstate argued that the Ontario loss transfer legislation should not apply because the Allstate company issuing the policy fortheat fault vehicle was not a licensed Ontario insurer, and the accident did not occur in Ontario.

Justice Cameron rejected that argument. He found that both Primmum and Allstate were licensed Ontario insurers carrying on business in Ontario, even though this particular Allstate policy was issued by an Allstate company in North Carolina. He relied upon, and quoted extensively from *Unifund* v. *ICBC*, and *Royal &SunAlliance v. Wawanesa*, in concluding as follows:[21]

> If both of the insurers are registered in and carry on business in Ontario, they may claim loss transfer even if the accident occurred in a non-loss transfer jurisdiction such as Vermont: (*Royal &SunAlliance* v. *Wawanesa*), per Newbould J. who followed Binnie J. in *Unifund…*
>
> In the *Insurance Act*, Allstate is an "insurer" under s. 1 and issues "contracts" because it is licensed to sell insurance in Ontario under s. 224 (1) (a).

The same interpretation of the purpose of Ontario's loss transfer legislation can be seen in the courts' approach to the application of the FDR in loss transfer indemnity cases. In *Jevco Insurance Co.* v. *Canadian General Insurance Co.*[22], the Court of Appeal stated as follows:[23]

[21]At paragraphs 20 – 29.
[22](1993) 14 O.R. (3d) 545 (C.A.).
[23]At page 547.

> The scheme of the legislation under s. 275 of the Insurance Act and companion regulations is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the fault determination Rules, prescribed by regulation, and any determination of fault in the litigation between the injured plaintiff and the alleged tort feasor is irrelevant.

In *Jevco Insurance Co.* v. *York Fire & Casualty Co.*[24], another case dealing with the FDR, the court stated:

> The purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion favouring expedition and economy over finite exactitude.[25]

Having addressed the evolution and purpose of Ontario's loss transfer legislation I will now review the principles of statutory interpretation that are relevant to a proper application of section 275 (1) of the *Insurance Act*.

Justice Weiler very clearly sets out the current law applicable to the interpretation of statutes in *Wawanesa* v. *Axa*. I do not believe that I can improve upon her statement of the law so I propose to simply quote extensively from her judgment, omitting only the citations of the authorities that she has referred to.

> The Supreme Court of Canada has consistently endorsed Elmer Driedger's purposive approach to statutory interpretation…As Driedger explains, at page 87 of his Construction of Statutes, 2d, ed., (Toronto: Butterworths, 1983):

[24](1996) 27 O.R. (3d) 483 (C.A.).
[25]At page 486.

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the provision is located within…; and (3) it must consider whether the proposed interpretation produces a just and reasonable result…
>
> The factors comprising the "entire context" include the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue…A just and reasonable result promotes applications of the Act that advance its purpose and avoids applications that are foolish and pointless…[26]

I will now summarize the positions advanced by the parties.

St. Paul's position is founded upon what it submits is a proper application of the purposive approach to statutory interpretation, to section 275 (1) of the *Insurance Act*. It submits that St. Paul is responsible in law for the payment of SABS to the SABS claimants by operation of section 268 (1) of the *Insurance Act*. The essential part of section 268 (1) reads as follows:

> **268. (1) Statutory accident benefits** – Every contract evidenced by a motor vehicle liability policy…shall be deemed to provide for the statutory accident benefits set out in the *Schedule*…

[26] *Wawanesa* v. *Axa*, pages 15 – 16.

There is no dispute in this case that St. Paul had issued a motor vehicle liability policy to the City[27] insuring the bus involved in the accident, and that the policy was required to provide SABS.

St. Paul submits that by operation of section 268 (2) 1. ii of the *Insurance Act*, the eight claimants were entitled to seek payment of SABS from St. Paul. They were occupants of the City bus, and were not insured under another automobile policy. This too, is not disputed.

To give effect to the terms of the Side Agreement, the City, submits St. Paul, has paid and continues to pay St. Paul's SABS obligations to the eight claimants. St. Paul submits that the City is acting as St. Paul's agent in paying the benefits on St. Paul's behalf.

The relevant part of the Side Agreement for the purposes of the issue in this arbitration reads as follows:

> St. Paul has issued Automobile Transit Fleet Policy No. 277JG5302…which…Policy has a Self Insured Retention ("S.I.R.") in the amount of $1,000,000, (One Million Dollars), maximum per occurrence for all occurrences for which coverage is provided under the policy…

St. Paul submits that considering the facts of this casein the context of the purpose of the loss transfer legislation – to require insurers of heavy commercial vehicles to absorb their fair share of SABS payments, as the section 268 (2) insurer responsible for the payment of SABS to the eight claimants, St. Paul should be entitled to indemnification from Intact for the SABS payments made on its behalf by the City.

[27] Exhibit 1, tab 4 is the Certificate of Insurance which is evidence of the underlying motor vehicle liability policy (see section 232 (5.1) of the *Insurance Act*).

St. Paul urges me to reject Intact's argument that the wording in section 275 (1) – "*…indemnification in relation to such benefits paid by it…*" means that the benefits must be paid by the section 268 (2) insurer, for that insurer to be entitled to indemnity in respect of those benefits.

St. Paul argues that this would place undue emphasis on which entity was "cutting the cheque" for the SABS. St. Paul submits that this would not give proper weight to the last two factors of the purposive approach to statutory interpretation. The legislative context of section 275 (1) is to adjust the inequities created by the no-fault automobile legislation with respect to the insurers' responsibility for the payment of SABS. St. Paul submits that this purpose would be achieved, and a "just and reasonable result" obtained, if Intact, as the insurer of the heavy commercial vehicle involved in the accident, was required to indemnify St. Paul for the SABS paid (or payable) to the eight claimants.

Intact's position is that the requirements of section 275 (1) are not satisfied in this case to entitle St. Paul to loss transfer indemnity. Intact's position focuses on the section 275 (1) wording, "…*indemnification in relation to such benefits paid by it…*".

Intact submits that indemnification means to compensate for a loss sustained. Therefore, to be entitled to indemnification, St. Paul must demonstrate that it has suffered a loss. Intact argues that on the facts of this case St. Paul has not suffered a loss because it has not paid any SABS to the claimants. Instead, the SABS have been paid by the City. There is no loss to indemnify since St. Paul has not paid SABS to the claimants.

Intact submits that the words "*paid by it*" should be given their plain and ordinary grammatical meaning, and must be read in conjunction with the first part of the phrase, "*…indemnification in relation to such benefits…*". If the benefits are not "*paid by it*" *(i.e.* St. Paul), then there is no loss suffered by St. Paul to be indemnified.

Intact accepts that there was a loss suffered here through the payment of SABS, but that loss was suffered by the City, not St. Paul. It is only a section 268 (2) insurer however, which is entitled to advance a claim for loss transfer indemnity. The City is not a section 268 (2) insurer. Therefore, it is not entitled to be indemnified for its loss incurred by the payment of SABS to the claimants because section 275 (1) does not give it the necessary status to advance the claim. Since there is no basis for the claim at common law, or in equity, the City is without a remedy for its loss.

In support of its argument for this interpretation of section 275 (1), Intact cites the reasoning of the arbitral and court decisions that have applied Ontario's *Limitations Act, 2002,* to the operation of section 275. Arbitrators concluded, and they were supported by the Court of Appeal[28], that the limitation period to advance a loss transfer indemnity claim begins to run when the insurer who has paid SABS discovers that it has suffered a "loss".For the purposes of the *Limitations Act, 2002,* The loss is created by an unsatisfied demand from the first insurer to be indemnified by the second insurer for the value of SABS paid. In *Markel v. ING*, Justice Sharpe states:[29]

> I agree with the arbitrator in *Federation* v. *Kingsway* that the first party insurer suffers a loss caused by the second party insurer's omission in failing to satisfy the claim the day after the Request for Indemnification is made.

[28] See *Markel v. ING*.
[29] At paragraph 27.

To summarize Intact's position, it does matter which entity is "cutting the cheque". It is only a section 268 (2) insurer which cuts the cheque for the payment of SABS, which has the necessary status, and which has sustained the "loss" required under section 275 (1) to be entitled to indemnification for the SABS it has paid.

Taking a purposive approach to interpreting the relevant wording in section 275 (1), I will begin with an analysis of the ordinary and grammatical meaning of the words, "…*the insurer responsible under subsection 268 (2) for the payment of (*SABS*)…is entitled…to indemnification in relation to such benefits paid by it…"*.

Grammatically speaking, the words, "*paid by it"*, modify the subject of the phrase, which is, "*the insurer responsible under section 268 (2)*". In my view, the plain meaning of this phrase then is that the insurer responsible under section 268 (2) must pay the benefits to be entitled to indemnification in relation to such benefits.

The wording of section 275 (1) does not provide for the indemnification of another entity other than a section 268 (2) insurer in relation to the payment of SABS benefits. Had the legislature intended to permit entities other than section 268 (2) insurers to be indemnified for SABS paid, the section could have been worded something like, "*the insurer responsible under subsection 268 (2) for the payment of* (SABS)*, <u>its agent, assignee or guarantor,</u>…is entitled…to indemnification in relation to such benefits paid by it…*".[30]

To be clear, St. Paul did not argue that the City is entitled to pursue a claim for loss transfer indemnity against Intact. The position advanced by St. Paul is that St. Paul

[30]Arbitrator's fictitious additional words and underlining.

is entitled to advance the loss transfer indemnity claim for SABS paid on its behalf by the City, and that is how this proceeding was framed.

In my opinion however, if the legislature had intended to allow a section 268 (2) insurer to pursue loss transfer indemnity for benefits paid not by it, but by another entity, then section 275 (1) might have been worded, "…*the insurer responsible under subsection 268 (2) for the payment of* (SABS)…*is entitled to indemnification in relation to such benefits paid by it, its agent, assignee, or guarantor.*[31]

Section 275 (1) does not however, contain the fictional wording I have suggested. In my opinion, to give proper effect to the section 275 (1) the words "*paid by it*" must be read in conjunction with the word, "*indemnification*". I agree with counsel for Intactthat the concept of indemnification involves a party being compensated, or as some definitions state, "made whole", for a loss that the party has sustained. Whatever the nature of the compensation, the concept of indemnification requires that there first be a loss suffered by the party seeking indemnification.

In this case, there is no evidence that St. Paul has suffered any loss that requires indemnification. If there has been a loss, in the sense required for the concept of indemnification, that loss was suffered by the City, not by St. Paul. I have already set out the reasonswhy the City is not entitled to advance a loss transfer indemnity claim under section 275 (1).

Counsel for St. Paul in his submissions referred me to some excerpts from Waddams' well-known treatise on the *Law of Damages*, arguing that because St. Paul

[31]Arbitrator's fictitious additional words and underlining.

may have, through the Side Agreement with the City, indemnified itself against a loss, that does not detract from the existence of the loss at the time of its occurrence. Therefore, there is still a loss to be indemnified by the party responsible for the loss – in loss transfer terms, Intact.

The problem I see with this reasoning is that a plain reading of section 275 (1) requires that the section 268 (2) insurer sustain the loss. Entitlement to loss transfer indemnification is not granted at large for any loss produced by the involvement in an incident of a heavy commercial vehicle insured by the second party insurer. It is only the loss sustained by the section 268 (2) insurer that qualifies for indemnification.

To accomplish the result sought by St. Paul would require the importation of common law principles of insurance subrogation law into section 275 (1). At common law, if an insurer indemnifies an insured for a loss suffered by the insured, subrogation principles allow the insurer to “step into the shoes” of the insured, acquiring the insured’s rights against the party who has caused the loss.

I have already set out the statements of law that confirm that the right given to a section 268 (2) insurer under section 275 (1) to indemnification for SABS paid is a statutory cause of action only. There is no basis for the claim at common law, or in equity. Therefore, on this ground alone, I do not think it appropriate to apply what amounts to a subrogation analysis to the operation of section 275 (1).

In any event, even if a subrogation type approach to section 275 (1) was permissible, and I do not think it is,on the evidence before me there is nothing to establish that St. Paul has indemnified the City for the value of the SABS paid to the

claimants, such that St. Paul would then somehow acquire any rights the City could have against Intact.

In fact, if anything, the Side Agreement confirms the opposite has occurred. The effect of the operative wording of the Side Agreement that I have cited in this Award exempts St. Paul from having to pay out money for any of the coverages stipulated in the policy (and this would include SABS) until the amount required to be paid exceeds one million dollars.

Therefore, rather than St. Paul indemnifying the City for the loss generated by the payment of SABS in this case, the City is effectively indemnifying St. Paul, at least up to an amount of one million dollars, against St. Paul's*Insurance Act* obligation to pay SABS. St. Paul cannot contract out of its legal obligations in the *Insurance Act* that require it to provide for the payment of SABS where, as here, it has issued a policy of motor vehicle liability insurance. Technically speaking, had the eight claimants applied to St. Paul directly for SABS, rather than going through the City appointed adjusters, St. Paul would have been obliged to pay SABS. In those circumstances, under the terms of the Side Agreement, St. Paul would have been entitled to seek recovery from the City for any SABS that it paid, up to one million dollars.

Obviously for efficient claims handling and cost reasons however, since the City is self-insuring for one million dollars it made sense in this case to have the eight claimants seek payment of SABS directly from the City.

I will turn now to the second factor to be considered in applying the purposive approach to interpreting section 275 (1), the entire context of the provision. As the

courts have indicated, this analysis must consider the history of the provision, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue.

I have already discussed in detail at pages 5 – 13 of this Award the factors outlined in the preceding paragraph concerning the *Insurance Act*no-fault amendments, and accompanying loss transfer legislation.

St. Paul submits that permitting it to recover loss transfer indemnity from Intact in these circumstances promotes the purpose of the loss transfer legislation. St. Paul argues that requiring Intact to reimburse St. Paul achieves the objective of the loss transfer legislation which is to require the insurers of heavy commercial vehicles to pay an equitable share of SABS to claimants under the no-fault automobile legislation.

In my opinion this analysis looks at only one side of the equation. The purpose of the loss transfer legislation is not simply to require the insurers of heavy commercial vehicles to pay a greater share of SABS than might otherwise be the case without the loss transfer legislation. The purpose of the loss transfer legislation is to balance amongst all of the Ontario licensed insurers the cost of paying SABS under the no-fault automobile legislation.

This balancing only becomes necessary ifnon-heavy commercial vehicle insurers have paid a greater amount for SABS by operation of the no-fault automobile legislation than they would have been required to pay,because of incidents involving heavy commercial vehicles.

The loss transfer legislation does not, for example, require the insurers of heavy commercial vehiclesto makepayments into a compensation fund forgeneral distribution to insurers or other entitiesbased on some calculation of accident frequency involving heavy commercial vehicles.

Promoting the balancing, or greater equalization of SABS payments by insurers under the no-fault legislation is accomplished by the loss transfer legislation on an incident by incident basis.The legislation is clear, and the case law is consistent, that the only parties heavy commercial vehicle insurers are required to indemnifyare other licensed Ontario insurers of non-heavy commercial vehicles. The only circumstances requiring indemnification are that a timely claim for indemnification is made by the non-heavy commercial vehicle, section 268 (2) insurer which has paid SABSas a result of aspecific incident involving the heavy commercial vehicle.

The parameters of the indemnification are governed by the strict code established by the loss transfer legislation, and the *Limitations Act, 2002*. There is no requirement in law for indemnification in relation to SABS paid by an Ontario licensed insurer outside of the statutory cause of action created by the loss transfer legislation.

In my opinion it would not advance the purpose of the loss transfer legislation to allow St. Paul to recover loss transfer indemnity in circumstances where it has sustained no loss. There is no balancing or equalization between insurers purpose to be achieved to justify requiring Intact to indemnify St. Paul,if St. Paul has not suffered a loss.

It was submitted by St. Paul that to deny St. Paul loss transfer indemnity in this case would have an undesirable, “chilling effect” on the ability of insurers to negotiate commercial agreements such as the Side Agreement between the City and St. Paul in this case. The reasons for this impact were not clearly outlined, other than the suggestion in argument, not supported by any evidence as to why, that St. Paul and the City might have to consider revising their Side Agreement.

My first response to that argument must be that I am obliged to interpret the loss transfer legislation in accordance with the legal principles that I have tried carefully to enunciate and apply, notwithstanding any impact it might have on commercial arrangements between insurers and their insureds.

As a more general observation however, in my experience the purpose of self-insured retention provisions in automobile insurance contracts (as found in the Side Agreement in this case) between insurers and large municipalities like the City,is to facilitate insurance coverage at a much lower premium cost to the City than would be possible with no self-insured retention. It is the quantum of the self-insured retention for all coverages for which amounts might have to be paid to claimants that is critical to the premium cost, not whetherthe payments are made for any specific coverage such as SABS.

In any event, If what I believe to be the correct interpretation of the loss transfer legislation does have an impact on how insurers negotiate commercial side agreements to automobile insurancecontracts with insureds such as the City, I am sure with the capable counsel both parties have available to themthey canundoubtedly restructure, if

necessary, their commercial agreements to their mutual satisfaction with a minimum of difficulty.

The last factor to be considered is whether the interpretation of section 275 (1) that I believe to be correct accomplishes a just and reasonable result, promotes the purpose of the loss transfer legislation, and avoids a foolish and pointless application of section 275 (1).

In my opinion it would not be a just and reasonable result to require Intact to indemnify St. Paul for the value of SABS paid not by St. Paul, but by the City. The City is not entitled to loss transfer indemnification, and St. Paul has suffered no loss to require indemnification. There is no balancing of SABS payments between insurers to be accomplished, because neither of the insurers who are parties to this proceeding has sustained any loss through the payment of SABS. Requiring Intact to give money to St. Paul for SABS St. Paul has not paid would simply result in a windfall for St. Paul, not indemnify it for a loss.

The effect of St. Paul's Side Agreement with the City is, in so far as SABS payments are concerned, that it will not sustain any loss requiring indemnification by Intact, or any other heavy commercial vehicle insurer, until the City has paid out more than one million dollars in SABS, and St. Paul is called upon to start funding the payment of SABS itself.

In my view, the interpretation of section 275 (1) that I have concluded is appropriate is both just and reasonable, and not foolish and pointless. It would promote the overall purpose of the loss transfer legislation – balancing or equalizing the impact

of the no-fault automobile legislation on SABS payments by insurers. Requiring heavy commercial vehicle insurers to indemnify non-heavy commercial vehicle insurers where the non-heavy commercial vehicle insurers have sustained a loss balances the equation, and achieves indemnification. The equation is unbalanced if an insurer which has not paid SABS, and thus has sustained no loss,is allowed to recover. This creates a windfall, not indemnification.

To the extent that there is reason to consider commercial arrangements between insurers and insureds in interpreting the loss transfer legislation, it makes more sense to have insurers and insureds entering into commercial contracts adapt the virtually limitless possible array of those arrangements to a singular and straightforward interpretation of the loss transfer legislation. That approach is preferable to straining the words of section 275 (1) beyond their plain and ordinary meaning, or reading into it words not currently there, to possibly give effect toany one of the multitude of different commercial arrangements into which insurers andinsureds might enter.

Conclusion

1. Intact is **not** obligated to indemnify St. Paul pursuant to the loss transfer provisions – specifically section 275 (1) of the *Insurance Act*. St. Paul has not paid SABS to the relevant claimants, and therefore has sustained no loss requiring indemnification by Intact. Therefore, St. Paul has not satisfied the requirements to advance a section 275 (1) claim for loss transfer indemnification.

2.As the successful party, Intact is entitled to its costs of the arbitration. Should there be any issues respecting the quantum of costs requiring determination by me, I invite counsel to contact my Coordinator to arrange a post-arbitration conference to discuss arrangements to have the quantum of costs determined.

Dated at Toronto, March 21, 2014

_____
Scott W. Densem, Arbitrator