

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.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

B E T W E E N:

THE ECONOMICAL INSURANCE GROUP

Applicant

and

THE CO-OPERATORS

Respondent

**AMENDED AWARD**

**Scott W. Densem – Arbitrator**

**Heard: November 3, 2011**

Counsel:

Kevin Mitchell for the Applicant

Mark Donaldson for the Respondent

This Amended Award is issued pursuant to the *Arbitration Act*, Section 44  
(1) (b), and replaces the Award dated September 7, 2012

### **Introduction**

The parties appointed me pursuant to the *Arbitration Act*, 1991, and Section 275 of the *Insurance Act*, to arbitrate a loss transfer dispute concerning the applicant's entitlement to indemnity, if any, for statutory accident benefits ("SABS") paid to the claimant, David Thompson.

The arbitration was conducted pursuant to the terms of a written arbitration agreement signed by the applicant on May 4, 2011, and by the

respondent on April 13, 2011, as well as a letter from Densem ADR Solutions Inc. dated March 1, 2010.

### **Factual Background to the Issues<sup>1</sup>**

The SABS claimant is David Thompson. His son Nathan Thompson was struck by a dump truck and killed on September 11, 2007. At all material times the dump truck was insured by the Co-Operators. The dump truck was a heavy commercial vehicle. The dump truck was 100% at fault for the accident.

David Thompson was not involved in the accident. He advanced a claim for SABS alleging psychological or mental injury as a result of his son Nathan being struck and killed by the dump truck. At all material times Economical insured David Thompson's father Michael Thompson. David Thompson was not a named insured, specified driver, or spouse under the Economical policy issued to Michael Thompson.

In the application for SABS submitted by David Thompson he asserted that he was a dependant of his father, Michael Thompson. For the purposes of this arbitration the parties agree that David Thompson was **not** a dependant of Michael Thompson.

Economical paid SABS to David Thompson. Economical served a Notice of Dispute Between Insurers on Co-operators asserting that Co-operators was the priority insurer responsible to pay SABS to David Thompson. Co-operators disputed Economical's position. Co-operators subsequently served a Notice of

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<sup>1</sup> These facts are derived from an Agreed Statement of Facts and Issues introduced into evidence as Exhibit 1 at the arbitration hearing

Dispute Between Insurers on Unifund Assurance who insured David Thompson's separated spouse Shannon Thompson. Shannon Thompson was the mother of the deceased boy, Nathan Thompson. Economical served a Notice of Dispute Between Insurers on Unifund on March 18, 2008, after the 90 day period prescribed by 283/93 3 (1).

The parties agree that Economical did not commence arbitration against either Co-operators or Unifund within the one year limitation period stipulated by Regulation 283/95 of the *Insurance Act*. Economical did serve three Loss Transfer Indemnity Requests on Co-operators.

### **The Issues**

The parties agree that the following questions are to be determined by the arbitrator.

(a) Is the applicant entitled to make a claim for loss transfer indemnification as against the respondent, further to Section 275 of the *Insurance Act* and related legislation?

(b) What amount, if any, is the respondent required to indemnify the applicant with regard to Statutory Accident Benefits paid to or on behalf of David Thompson arising from the September 11, 2007 motor vehicle accident?

(c) Is the respondent required to pay the applicant interest upon the indemnity amount owed?

(d) What is the scale of costs and which party has the burden of payment.

## The Evidence

The following exhibits were introduced into evidence at the arbitration hearing:

Exhibit 1 - Agreed Statement of Facts and Issues.<sup>2</sup>

Exhibit 2 – Applicant’s Arbitration Record (29 tabs)

Exhibit 3 – Respondent’s Arbitration Record (1 tab)

## Chronology

I have set out below a chronology of events that I have derived from the exhibits and the applicable law.

September 11, 2007:	Accident <sup>3</sup>
December 3, 2007	David Thompson’s SABS application received by Economical’s adjusters <sup>4</sup>
February 15, 2008	Ontario Ministry of Transportation documents confirming Unifund Assurance Automobile coverage for Shannon Thompson <sup>5</sup>

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<sup>2</sup> This document was executed by counsel for the applicant on November 2, 2011, and by counsel for the respondent, November 3, 2011

<sup>3</sup> Police report, tab 2, Exhibit 2

<sup>4</sup> Date stamped SABS application, Tab 3, Exhibit 2

<sup>5</sup> Exhibit 2, Tab 4

February 28, 2008	Notice of Dispute Between Insurers served by Economical on Co-operators <sup>6</sup>
March 3, 2008	Expiry of 90 day period to serve Notice of Dispute Between Insurers by Economical <sup>7</sup>
March 10, 2008	Notice of Dispute Between Insurers served by Co-operators on Unifund <sup>8</sup>
March 13, 2008	First Loss Transfer Request for Indemnification served by Economical on Co-operators <sup>9</sup>
May 15, 2008	Second Loss Transfer Request for Indemnification served by Economical on Co-operators <sup>10</sup>
March 14, 2010	Limitation Period expires with respect to Economical's March 13, 2008 Loss Transfer Request Indemnification <sup>11</sup>
May 24, 2010	Limitation Period expires with respect to Economical's second Loss Transfer Request for Indemnification <sup>12</sup>

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<sup>6</sup> Exhibit 2, Tab 5

<sup>7</sup> Regulation 283/95 Section 3(1)

<sup>8</sup> Exhibit 2, Tab 6

<sup>9</sup> Exhibit 2, Tabs 10, 11. Note that the service date has been assumed to be the same date as the letter from Economical's adjusters to the Co-operators – tab 10 exhibit 2.

<sup>10</sup> Exhibit 2, Tabs 16, 17

<sup>11</sup> *Limitations Act R.S.O., 2002, as amended, Markel Insurance Company of Canada v. ING Insurance Company of Canada, Federation Insurance Company of Canada v. Kingsway Insurance Company of Canada, 2012 (ONCA 218) (CanLII)*

May 11, 2009	Economical serves Co-operators with a third Loss Transfer Request for Indemnification <sup>13</sup>
August 4, 2009	Economical serves Notice Demanding Arbitration – re loss transfer, on Co-operators <sup>14</sup>
August 31, 2009	Economical serves Notice Demanding Arbitration – re priority, on Unifund <sup>15</sup>

**The Positions of the Parties**

The position of the applicant Economical can be summarized as follows:

- As the first insurer to receive a SABS application, by operation of Regulation 283/95, Section 2 (1) it was required to pay SABS to David Thompson. The first insurer to receive a SABS application is required to pay SABS where there is a sufficient “nexus” between the applicant and the insurer, notwithstanding that there may be another insurer that might ultimately have the priority obligation to pay SABS by operation of section 268 of the *Insurance Act*, or because the first insurer has no legal obligation to pay SABS. Regulation 283/95 requires the first insurer to pay SABS first and dispute its obligation to pay later.

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<sup>12</sup> See previous footnote regarding legal authority. Note that the limitation period could have expired sometime between May 15, 2010 and May 24, 2010, depending on the exact date that Co-operators received the second Loss Transfer Request for Indemnification. The May 24, 2010 date is the latest point at which the limitation period could expire as evidenced from tab 18, Exhibit 2, a May 23, 2008 letter from the Co-operators to Economical’s Adjusters acknowledging that the second Loss Transfer Request for Indemnity had been received.

<sup>13</sup> Service date noted here is assumed to have been the same date as the letter from Economical’s adjusters to the Co-operators enclosing the Loss Transfer Request for Indemnity.

<sup>14</sup> Affidavit of Service, Tab 27, Exhibit 2

<sup>15</sup> Affidavit of Service, Tab 28, Exhibit 2

- Economical submits that because it was required to pay SABS to David Thompson by operation of Regulation 283/95, that it is entitled to indemnity from the Co-operators in loss transfer under Section 275 of the *Insurance Act* because it is “... *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 ...*” Economical submits that David Thompson is one of a class of persons named in the regulations – i.e. Regulation 283/95, therefore making Economical Insurance responsible to pay SABS pursuant to Section 268 (2) of the *Insurance Act*.
- Economical admits that it failed to initiate priority arbitration within the limitation period against either the Co-operators or Unifund. Notwithstanding this Economical argues that a determination of priority is not required for Economical to be entitled to indemnity from the Co-operators in loss transfer pursuant to Section 275 of the *Insurance Act*. Co-operators admits that its insured was 100% responsible for the accident, and that it was the insurer of a heavy commercial vehicle.
- Economical submits that the legislation should be read expansively to bring about the result whereby the insurer who should have ultimate responsibility to pay SABS is the insurer who ends up paying them.

The Co-operators position can be summarized as follows:

- The Co-operators submits that Economical paid SABS to David Thompson through negligence, misinterpretation of the evidence or

law, or through “sheer kindness”. None of these are grounds that would make Economical the insurer “...responsible under subsection 268 (2) for the payment of Statutory Accident Benefits...” to David Thompson. Therefore, if Economical was not the insurer responsible under subsection 268 (2) of the *Insurance Act* to pay SABS to David Thompson, it cannot assert a claim for indemnification under Section 275 of the *Insurance Act* against the Co-operators.

- Co-operators stresses that had Economical acted prudently it had a viable claim in priority under Section 268 of the *Insurance Act* against Unifund Assurance, the insurer of the claimant’s separated spouse. Had Economical properly pursued this priority claim it could have transferred the obligation to pay SABS to Unifund. Co-operators submits that Economical should not be permitted to do indirectly through an expansive interpretation of loss transfer legislation, what it failed to do directly by neglecting to properly pursue its rights under priority legislation.

## **Analysis**

In my view the disposition of the issue in this case must start with a careful examination of the relevant legislation. The claim for loss transfer indemnity advanced by Economical in this arbitration is a statutory claim arising out of Section 275 of the *Insurance Act*. The only rights an insurer has to claim indemnification for Statutory Accident Benefits paid to a claimant are those found



in Section 275. There is no claim that can be advanced at common law or in equity. Therefore, to paraphrase Justice Binnie in *Unifund Assurance Company v. Insurance Corp of British Columbia*<sup>16</sup>, "(Economical) ...either has a statutory cause of action against (The Co-operators) under (Section 275) or it has no cause of action at all."

Economical has submitted that had Unifund taken responsibility for the claim it would have had a right over in loss transfer against the Co-operators. It seems to me that the only way such an argument would have relevance is if it could be argued that Co-operators would be unjustly enriched at Economical's expense by the value of the SABS benefits the Co-operators might have had to pay had other legal formalities been observed.

Unjust enrichment is an equitable remedy. As I have indicated, loss transfer for SABS benefits paid as between insurers is purely a creature of statute. There is no basis to allow an equitable remedy. Either Economical's claim falls within the four corners of Section 275 of the *Insurance Act* or it does not.

In the above context, I will now examine the requirements of Section 275 to determine whether Economical has a valid claim for indemnity in this case.

Section 268 (2) of the *Insurance Act* is a section that determines priority amongst insurers who have a legal obligation to pay SABS. To determine whether Economical is the section 268 (2) insurer responsible to pay SABS, one must first determine whether other statutory prerequisites have been met

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<sup>16</sup> [2003] 2 S.C.R. 63, at paragraph 10

requiring that SABS be paid. The analysis starts with the *Application* section of the SABS Regulation<sup>17</sup>.

Section 3(3) of the SABS Regulation provides as follows:

*3(3) Benefits payable under this regulation in respect of an insured person (Arbitrator's emphasis) shall be paid by the insurer that is liable to pay under subsection 268(2) of the Insurance Act.*

The regulation requires that the person claiming SABS be “an insured person”. Insured person is defined in the *Definitions and Interpretation* section of the SABS regulation.

Before one seeks to apply the priority rules set out in Section 268 of the *Insurance Act*, one must determine whether the person claiming SABS qualifies as an “insured person” entitling the person to the payment of SABS.

In this case, the claimant David Thompson was the father of the boy who was struck by the Co-operators insured vehicle.

David Thompson advanced a claim for SABS against Economical's policy insuring David Thompson's father, Michael Thompson. To qualify as an insured person under that policy on the facts of this case, David Thompson had to be a dependant of his father Michael Thompson.<sup>18</sup>

In paragraph 13 of the Agreed Statement of Facts and Issues the parties agree that the SABS claimant David Thompson, is **not** dependent on Michael

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<sup>17</sup> Ontario Regulation 403/96 – Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996 and before September 1, 2010

<sup>18</sup> The SABS definition of insured person in these circumstances requires such dependency where the claimant is not involved in the accident but suffers psychological or mental injury as a result of an accident causing physical injury to a qualifying relative – in this case, David Thompson's son (see 3 (a) ii).

Thompson. Therefore, David Thompson did not qualify as an “insured person” under Economical’s policy.

On the facts of this case, the only subsection of 268 (2) that could possibly have created a legal obligation for Economical’s policy to pay SABS to David Thompson was Section 268(2) (i). To qualify under that Section David Thompson would have had to have been an insured under the policy. As indicated, the parties agree that he was not insured under Economical’s policy.

In my opinion that is the end of the matter. Economical did not hold the status of a Section 268 (2) insurer responsible for the payment of SABS to David Thompson and thus cannot meet the first requirement of Section 275 of the *Insurance Act* to be entitled to loss transfer indemnity.

Further, as a matter of statutory interpretation I would observe that Section 275 of the *Insurance Act* uses the word “the” in referring to the insurer responsible to pay SABS, and who is entitled to loss transfer indemnity. The use of the word “the”, rather than “a”, or “any”, means in my opinion that there is only one insurer who can claim loss transfer indemnity, and that is the insurer having the highest priority as determined by the terms of Section 268 (2). In this case, the only insurer who could have held that status was Unifund.

Economical argues that because the opening words of Section 275 of the *Insurance Act* make reference to the insurer responsible under Subsection 268(2) for the payment of SABS ... “to such classes of persons as may be named in the regulations...” means that if Economical is required by operation of Regulation 283/95 to pay SABS to David Thompson, then Economical is an

insurer responsible under subsection 268 (2) to pay SABS because David Thompson is a class of person named in the Regulations. I disagree with this submission both on grammatical grounds, and based on how section 268 (2) and Regulation 283/95 are intended to operate.

The opening words of section 275 read, “... *The Insurer responsible under subsection 268 (2) for the payment of statutory accident benefits...*”. It is these words that establish the requirement for loss transfer indemnification rights – that an insurer be the insurer responsible under section 268 (2) for the payment of statutory accident benefits. The words in the second phrase, “...*to such classes of persons as may be named in the regulations ...*” modify, in grammatical terms, the preceding phrase that creates the loss transfer indemnification entitlement. The words in the second phrase modify the preceding phrase by describing to whom the benefits are paid. They do not establish the condition precedent to loss transfer indemnification. The condition precedent is established by the opening phrase.

Regulation 283/95 is not a regulation that establishes ultimate legal responsibility to pay SABS. As section 1 of that regulation states, 283/95 sets out procedures to be followed for the purposes of resolving priority disputes that are to be determined in accordance with the provisions of Section 268 of the *Insurance Act*. Section 2 of Regulation 283/95 requires that the first insurer receiving a completed SABS application is responsible to pay SABS pending the resolution of any dispute as to which insurer must pay under Section 268. All this section does is put in place a temporary protection for the SABS claimant so that

the SABS claimant is not caught in the middle of a dispute between the insurers leaving the claimant without benefits until the ultimate determination of the dispute under section 268. The section does not set out any substantive terms upon which the dispute should be resolved. Those terms are all contained in Section 268 of the *Insurance Act*.

Therefore, apart from establishing a temporary protection for a SABS claimant to receive benefits on an interim basis, and establishing ground rules for resolving the dispute, Regulation 283/95 does not inform at all with respect to the ultimate determination of the dispute nor is it intended to do so. The obligation to pay SABS pending the resolution of a priority dispute makes an insurer responsible to pay SABS under regulation 283/95, not section 268 (2) of the *Insurance Act*.

Economical argues that because it failed to pursue arbitration against the Co-operators and Unifund within the one year limitation period set out in Regulation 283/95<sup>19</sup> it has, through its own default, made itself the priority insurer pursuant to Section 268 of the *Insurance Act*, thereby giving it a right to claim loss transfer against the Co-operators. Once again I disagree.

The only thing that Economical accomplished by failing to properly follow the steps in Regulation 283/95 to pursue its priority claims is that it is now foreclosed from pursuing arbitration as a remedy to transfer responsibility for payment of SABS to David Thompson to Unifund, the insurer who would have been the highest priority insurer as determined by Section 268 of the *Insurance Act*.

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<sup>19</sup> See Section 7(2)

Economical may have deprived itself of a means of transferring its 283/95 responsibility to Unifund for payment of Statutory Accident Benefits to David Thompson, but in my view it does not follow that this confers upon Economical the status of a Section 268 (2) insurer responsible for the payment of Statutory Accident Benefits. Economical does not meet the requirements of a Section 268 (2) insurer.

With respect to this point, the situation is analogous to the cases like *Lombard Canada Ltd. v. Royal & Sun Alliance Insurance Company et al.*<sup>20</sup> In that case Lombard missed the 90 day time limit for serving a Notice of Dispute Between Insurers upon the Motor Vehicle Accident Claims Fund. There was no factual basis justifying the extension of the 90 day period pursuant to 283/95, subsection 3 (2). At first instance, the arbitrator decided that Lombard's failure to give timely notice under Section 3 (1) of the Regulation meant that it was foreclosed from continuing priority arbitration with the consequence that it was obliged to pay accident benefits to the claimant indefinitely. This was the result even though it was found that Lombard had validly cancelled its policy and was paying only because of the requirements of Regulation 283/95 as the first insurer to have received an application for SABS.

On appeal, Strathy J. held said the arbitrator had correctly decided the case. He cited the Court of Appeal's decision in *Kingsway General v. Ontario*<sup>21</sup>, where on the same facts the Court of Appeal held that the insurer's failure to give proper notice under Regulation 283/95 3 (1) prevented the continuation of the

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<sup>20</sup> (2008) Carswell Ont 7839.

<sup>21</sup> (2007) ONTA 61 (Ont. C.A.)

arbitration and that there was no general discretion in the court to provide relief from forfeiture on equitable grounds.

That is exactly what happened here except that Economical made additional errors beyond just failing to commence arbitration against Unifund within a year from serving its Notice of Dispute Between Insurers.

First, Economical attempted to pursue priority against the Co-operators. Co-operators could never have been a priority insurer in this case. The SABS claimant, David Thompson, was not involved in the accident, it was his son who was involved in the accident, and David Thompson suffered psychological or mental injury as a result of his son's death. He could only qualify for SABS by operation of the definition of "insured person", subsection 3 (a) (ii). That would mean he would had to have been a named insured, a specified driver, the spouse of the named insured, or a dependant of the named insured or spouse. He could not qualify under his father's policy with Economical because it was agreed that he was not dependent on his father. It is clear that none of these requirements could be satisfied with respect to the Co-operators policy insuring the dump truck. Therefore, Economical's Notice of Dispute Between Insurers served on the Cooperators was a futile effort and Economical's failure to commence arbitration against the Co-operators was moot.

Perhaps the greater oversight was Economical's failure to serve a Notice of Dispute Between Insurers upon Unifund Assurance in timely fashion. Unifund insured David Thompson's separated spouse, and the mother of their son, Nathan Thompson. David Thompson would have qualified as an "insured person"



under this policy. This option should have been investigated by Economical at the outset as the information that David Thompson was separated appeared in his application for accident benefits. Confirmation that Shannon Thompson, David Thompson's estranged spouse was insured with Unifund Assurance was available from the Ministry of Transportation as can be seen from the documents at Tab 4, of Exhibit 2. Indeed, the parties agree that Unifund Assurance stood in the highest priority to the claimant David Thompson, within the terms of Section 268 of the *Insurance Act*<sup>22</sup>.

Economical did not serve Unifund with a Notice to Applicant of Dispute Between Insurers until sometime between March 18 and March 24, 2008. This would be outside the 90 day period within which such notice should be served, unless Section 3 (2) applies. Any argument on the latter point was rendered moot by Economical's failure to commence arbitration against Unifund within one year from the date it served its Notice of Dispute Between Insurers upon Unifund.

If this was a case where only Economical and Unifund were involved then the matter would have come to an end with Economical's failure to properly follow the steps of Regulation 283/95 to pursue a priority claim against Unifund. As in *Lombard v. Royal & SunAlliance et al*, Unifund is the "rightful" priority insurer but Economical would not be able to transfer responsibility for the payment of SABS benefits to Unifund because it had not properly followed the priority dispute procedures set out in Regulation 283/95. The rationale for this approach is set out by Justice Strathy in *Lombard v. Royal & SunAlliance et al*. He quotes from the Court of Appeal's decision in *Kingsway General v. Ontario*.

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<sup>22</sup> See paragraph 16 of the Agreed Statement of Facts and Issues



*The regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.<sup>23</sup>*

I am unable to see how or why Economical should be in any better position on the facts of this case which involves three insurers instead of two. I have already found to be without merit the argument that Economical could confer upon itself the status of the insurer responsible under Section 268 (2) for the payment of SABS through its neglect in properly pursuing a priority dispute against Co-operators, or more properly, Unifund. The argument is not made stronger by suggesting that if Economical had properly pursued its dispute against Unifund then Unifund could have made a valid loss transfer claim against the Co-operators.

Economical's counsel referred me to the arbitration decisions in *RBC General Insurance Company v. Lloyds Underwriters*<sup>24</sup>, and *Kingsway General*

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<sup>23</sup> Note 21, para. 55

<sup>24</sup> Arbitrator Bruce R. Robinson, June 24, 2005

*Insurance Company v. Zurich Insurance Company*<sup>25</sup>. With respect to *RBC v. Lloyds*, the facts were that the claimant was involved in a single vehicle accident while a passenger in a heavy commercial vehicle insured by Lloyds. By operation of what was then Section 66 of the SABS the claimant was a deemed named insured under Lloyds policy. That policy took priority over the RBC policy of the claimant's spouse insuring a private passenger vehicle. The facts of *RBC v. Lloyds* are distinguishable on a significant point. In that case there is no question that both insurers held the status of Section 268 (2) insurers with responsibility to pay accident benefits. That is a major difference from this case. Economical did not have status as a Section 268 (2) insurer responsible to pay SABS.

In *RBC v. Lloyds*, the claimant first applied to RBC for the payment of SABS. RBC served a Notice of Dispute Between Insurers on Lloyds but failed to commence arbitration against Lloyds within the one year limitation period.

Lloyds took the position that since RBC did not pursue arbitration with regard to priority it should not have standing to apply for loss transfer under Section 275 of the *Insurance Act*, because Lloyds, not RBC, was "the" insurer responsible under Section 268 (2) to pay SABS.

Arbitrator Robinson commented "*this case is somewhat unusual in that the respondent (Lloyds) takes the position that it should have paid benefits from the commencement of the proceeding but now wishes to avoid what it saw as its own responsibility.*"

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<sup>25</sup> Arbitrator Lee Samis, April 4, 2011

Clearly those are not the facts of this case. Neither Economical nor Co-operators held the status of a Section 268 (2) insurer responsible to pay SABS. Cooperators might have had responsibility as a loss transfer insurer, but to Unifund, not Economical, since Economical was not the Section 268 (2) insurer responsible to pay benefits. In any case, since Economical did not properly pursue priority against Unifund, any loss transfer responsibility the Cooperators might have had to Unifund never came to fruition.

In his findings, Arbitrator Robinson states:

*...it is not necessary on a Loss Transfer Issue to make any determination of the priority matter. This is not a precondition to an application under Section 275 of the Insurance Act...the requirements of Section 275 (1) are simply that the insurer "responsible" under Section 268 (2) for the no (sic) statutory accident benefits is entitled to indemnification in respect of such benefits ...*

I am not entirely certain what Arbitrator Robinson intended with these comments. The unfortunate transcription error is not helpful. On the facts of *RBC v. Lloyds*, there is no doubt that both insurers held the status of Section 268 (2) insurers. The question was simply which one was higher in priority and therefore "the" insurer responsible under section 268 (2) to pay SABS.

If Arbitrator Robinson is saying that any insurer who qualifies as a Section 268 (2) insurer can pursue loss transfer under Section 275 of the *Insurance Act*, and it is not necessary that the insurer be the highest priority insurer, then I would disagree with him on that point.

It seems to me that the only way to reconcile Arbitrator Robinson's decision with the use of the word "the" in section 275 would be to say that RBC acquired the status of "the" insurer responsible to pay SABS under Section 268 (2) after it failed to properly pursue the highest priority insurer Lloyd's. Thus RBC, already "a" Section 268 (2) insurer, became "the" Section 268 insurer through its own default in failing to properly pursue priority arbitration against Lloyds.

The question would then be, for the purposes of loss transfer, should "a" Section 268 (2) insurer be able to acquire the status of "the" Section 268 (2) insurer through its own default in improperly pursuing the rightful priority insurer? I do not have to decide that question in this case, but if I had to I would be inclined to favour the approach of Arbitrator Samis in *Kingsway v. Zurich* that is discussed later in this Award, and say no.

In any event, I find that *RBC v. Lloyds* is not applicable to the case before me. The major distinguishing point in this case is that Economical could not, by any means, become the section 268 (2) insurer responsible to pay SABS because it could never qualify as a section 268 (2) insurer in the first place.

In *Kingsway v. Zurich*, the claimant was injured in an accident while the operator of a heavy commercial vehicle insured by Markel. A second heavy commercial vehicle insured by Zurich was involved in the accident. The claimant was insured on his personal automobile with Kingsway. He advanced SABS claims to Kingsway. Like the two insurers in *RBC v. Lloyds*, all three insurers would, on the facts, qualify as Section 268 (2) insurers. Markel would have been

highest in priority in accordance with the operation of Section 66 of the SABS at that time.

Kingsway served a Notice of Dispute Between Insurers upon Markel, but failed to commence an arbitration within one year of the Notice. Arbitrator Samis describes the consequences of Kingsway's failure thusly: "*... in accordance with the Provisions of Ontario Regulation 283/95, no arbitration can be commenced against Markel and Kingsway's assertion that Markel is obligated to pay the benefits in this instance cannot now be enforced.*"

Having missed the limitation period to commence priority arbitration against Markel, Kingsway attempted to pursue loss transfer against Zurich because Zurich insured a heavy commercial vehicle involved in the accident.

Arbitrator Samis held that Kingsway was not entitled to pursue loss transfer against Zurich. He reasoned as follows:

*... There is a range of improper conduct or payment which ought not to be foisted on loss transferees. Whether one characterizes the payments as being those which are made as a result of negligence, gross negligence, or otherwise, it seems to me that it is entirely logical that there should be a dividing line beyond which indemnity cannot be sought from a loss transferee...In view of Kingsway's failure to commence arbitration proceedings against Markel, that opportunity to shift the loss to Markel, where it apparently belonged, was lost. I conclude that these facts illustrate a claim for payment which ought not to be transferred to the loss transferee as a result of the first insurer's mishandling of the claim...This was a failure to follow the well known steps understood to be necessary to pursue a priority dispute. In the circumstances, I conclude that this omission amounts to gross mishandling.*

In a passage in the same section of his decision, Arbitrator Samis sets out further reasoning to support his decision based on the wording of section 275 of the *Insurance Act*. He holds that Economical cannot assert a claim for loss transfer indemnity because it was not the highest ranking insurer responsible to pay SABS under Section 268 (2) of the *Insurance Act*. Arbitrator Samis states:

*...The only insurer who is entitled to pursue loss transfer is the insurer responsible under subsection 268(2) "for the payment of statutory accident benefits"...No other insurer has the right to invoke the indemnity provisions described in Section 275 and in regulation 664. This may be an answer to Kingsway's claim to a right to indemnity. If Kingsway is not the highest ranking insurer, then it is not the insurer responsible under section 268 (2) for the payment of statutory accident benefits.*

Both *RBC v. Lloyds*, and *Kingsway v. Zurich* are distinguishable from the case before me on the major point that Economical could never be the insurer responsible to pay SABS under section 268 (2), and for that reason alone, in my opinion it does not have loss transfer indemnification rights against the Cooperators under section 275 of the *Insurance Act*.

I think that Arbitrator Samis' approach in discussing the consequences for loss transfer claims of improper priority claims handling accords with the arbitration and court decisions in cases like *Lombard v. Royal & SunAlliance*, and *Kingsway v. Ontario*. I also agree with him that the proper interpretation of Section 275 of the *Insurance Act* grants loss transfer indemnity rights to only the highest priority insurer.

For clarity, I would note that it is not necessary for my decision to find that Economical's mishandling of its priority rights claim against Unifund disentitles it from pursuing loss transfer against the Cooperators. Based on my interpretation of Section 275 of the *Insurance Act*, Section 268 (2) of the *Insurance Act*, and the other provisions discussed, on the facts of this case Economical could never have loss transfer indemnity rights against Cooperators.

Therefore, I conclude that Economical is not entitled to pursue loss transfer indemnity against the Co-operators because Economical is not, as section 275 of the *Insurance Act* requires, "...*The insurer responsible under subsection 268 (2) for the payment of Statutory Accident Benefits ...*".

#### **The Quantum of Economical's Loss Transfer Claim against Co-operators**

The November 3, 2011 arbitration hearing proceeded on issue (a), the question of Economical's entitlement to advance loss transfer indemnification claims against the Cooperators. It was agreed by counsel that evidence and submissions on issues (b) and (c) concerning quantum of any loss transfer indemnification would be deferred pending my decision on the entitlement question. Given my conclusion on the entitlement issue, subject to Economical's right of appeal, it will not necessary for me to deal with the issue of quantum.

## Conclusion

For the foregoing reasons I conclude as follows:

1. Economical is **not** entitled to make a claim for loss transfer indemnification against the Co-operators pursuant to Section 275 of the *Insurance Act* and related legislation.
2. If my conclusion in paragraph 1 is correct, the Co-operators is **not** required to indemnify Economical for Statutory Accident Benefits paid by Economical to or on behalf of David Thompson arising from the September 11, 2007 accident.
3. The Co-operators is entitled to its costs of the arbitration payable by Economical, including the Arbitrator's fees and disbursements. If counsel are unable to resolve the issue of costs I invite them to contact my Coordinator to arrange a post arbitration conference to discuss the issue, and if necessary, to make arrangements to have the costs issue determined.

Dated at Toronto, November 6, 2012



Arbitrator Scott Densem