IN THE MATTER OF the *Insurance Act,*
R.S.O. 1990, c. I.8 Section 275 and Regulation 664/90

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

AND IN THE MATTER of an Arbitration **BETWEEN**:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

AVIVA CANADA INC., GUARANTEE COMPANY OF NORTH AMERICAN AND
ZURICH INSURANCE COMPANY LTD

Respondents

AWARD

Counsel:

The Dominion (Applicant): Michael H. O'Brien

Aviva Canada Inc. (Respondent): Andrew M. Baerg

Zurich Insurance Company Ltd. (Respondent): Thomas Hughes

Introduction:

This matter came before me pursuant to the *Arbitrations Act*, 1991, to arbitrate a dispute as between insurers with respect to a claim for loss transfer pursuant to Section 275 of The *Insurance Act* and Regulation 664/90. Specifically this claim is with respect to a motor vehicle accident that occurred on March 7, 2008 as a result of which a claim for Statutory Accident Benefits was advanced by Greg McKnight to The Dominion of Canada General Insurance Company.

The parties selected me as their Arbitrator on consent and the matter proceeded to a single day hearing in Hamilton on December 17, 2014.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated November 15, 2013

Exhibit 2: Further Document Brief of the Applicant: The Dominion of Canada General Insurance Company

Exhibit 3: Transcripts of Examination for Discovery of Gord Troughton

Exhibit 4: Transcripts of Examination for Discovery of Tammy Blackburn

Exhibit 5: Agreed Statement of Facts

Exhibit 6: Winter Maintenance Operations Protocol: TWD

Issue:

Was the snow plow operated by IMOS or the snow plow operated by TWD, both of which were involved in an incident resulting in injuries to Gregory McKnight on March 7, 2008 "heavy commercial vehicles" for the purposes of loss transfer pursuant to Regulation 664 and Section 275 of the Insurance Act, R.S.O. 1990 C.I.8.

Result:

Both of the snow plows are "heavy commercial vehicles" within the meaning of Regulation 664 and Section 275 of the Insurance Act, R.S.O. 1990 C.I.8 and therefore The Dominion of Canada General Insurance Company is entitled to loss transfer in this matter.

Facts and Analysis:

Counsel provided an Agreed Statement of Facts and a Book of Documents. The key facts as I find them are as follows:

1. Gregory McKnight was travelling westbound on Highway 403 in his vehicle on March 7, 2008.

2. As he travelled under the Wilson Street overpass, his vehicle was hit from above with some ice and snow and as a result, Mr. McKnight was injured.

3. At that time, a snow plow operated by TWD Roads Management Inc. (TWD) and a snow plow operated by Integrated Maintenance and Operating Services Inc. (IMOS) may have been travelling on the overpass conducting snow clearing operations.

4. The snow clearing operations may have included the spreading of salt or brine and the use of snow blades.

5. The IMOS snow plow is insured by the Respondent, Zurich Insurance Company LTD. (Zurich) under a standard motor vehicle liability policy. It is agreed the IMOS snow plow weighs in excess of 4,500 kilograms.

6. The TWD snow plow is insured by Aviva Canada Inc. (Aviva) under a standard motor vehicle liability policy and it too weighs in excess of 4,500 kilograms.

7. The City of Hamilton Requests for Tender with respect to providing winter road maintenance for various locations at Section 18 notes that the successful bidder must obtain and maintain, at its own expense, a standard form automobile liability insurance policy that complies with all the requirements of the current legislation of the Province of Ontario as well as having an inclusive limit of not less than $5,000,000 per occurrence for third party liability with respect to the use or operation of the vehicles owned, operated or leased by the successful bidder for the provision of the snow plow services.

8. That same document required that the successful bidder must ensure that all vehicles used to carry out this contract must have an Ontario Ministry of Transportation Annual Inspection Certificate and sticker prior to approval by the City in each year.

Mr. Gregory McKnight, having sustained injuries as a result of the incident described above, submitted an Application for Accident Benefits to The Dominion, who paid the benefits and now makes a claim for loss transfer against Aviva, Zurich and initially Guarantee Company of North America. However, it was determined that the vehicle insured by Guarantee Company of North America did not weigh greater than 4,500 kilograms and they were let out of this arbitration.

Dominion claims that one or both of the snow plows involved in this incident constituted a "heavy commercial vehicle" within the meaning of Section 1 of Regulation 664 and therefore Dominion is entitled to loss transfer under Section 275 of The Insurance Act.

Aviva and Zurich take the position that either the snow plows are not automobiles under the Insurance Act and therefore are not a heavy commercial vehicle under the Regulation and/or that if the snow plows are automobiles, that they are not subject to loss transfer as they do not meet the definition of "heavy commercial vehicle".

Loss transfer between insurers arises out of the provisions of Section 275 of The Insurance Act R.S.O. 1990 C.I.8 with respect to accident benefits paid. Section 9 of Regulation 664/90, in effect, provides reimbursement to first party insurers for payment of statutory accident benefits from a second party insurer whose insured is either partially or fully at fault for the accident as long as the second party insurer is the insurer of a "heavy commercial vehicle".

Section 275(1) reads as follow:

> *"The insurer responsible under subsection 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 relationship 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"*

Regulation 664 defines "heavy commercial vehicle" as:

> *"A commercial vehicle with a gross vehicle weight greater than 4,500 kilograms"*

There is no argument in this case that both the snow plows weighed more than 4,500 kilograms.

"Commercial vehicle" is defined under Regulation 664 as follows:

> *""Commercial vehicle" means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation, and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes, a vehicle rented for 30 days or less or a trailer intended for use with a commercial vehicle"*
> *(* Underlining done by Arbitrator Samworth)*

Aviva and Zurich argue that the snow plow is not a vehicle/automobile or alternatively, it is not an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation.

Dominion argues that the snow plows are automobiles as defined under the Insurance Act and in any event points out that both Aviva and Zurich insure the snow plows pursuant to a standard automobile liability policy. Dominion further argues that the snow plows meet the definition of commercial vehicles as they transport materials (sand, salt, brine), equipment such as the snowblade which is in connection with the occupation of clearing snow from the roadway and/or, are vehicles designed for maintenance purposes.

Issue 1: Are the snow plows automobiles?

I am satisfied that these snow plows are automobiles. I do not propose to go through the torturous route of analyzing all the tests that the Court of Appeal has outlined (Morton v. Rabito: see below) to determine whether the snow plow is an automobile. I am satisfied that the snow plows meet the first branch of the test set out by the Court of Appeal in Regele v. Slusarczk (1997 OJ. #1849) and that is the snow plows would be considered to be an automobile " in ordinary parlance".

Specifically looking at the photos of these vehicles, I conclude they are trucks. They have mirrors on each side for purposes of driving, there is a seat for the driver and a passenger seat. As counsel for Dominion submitted, "if it looks like a truck, it must be a truck and therefore must be an automobile". I accept that argument.

However, In this case I am also satisfied that as the snow plows are both insured under a standard automobile liability policies that it does not lie with Aviva and Zurich to argue that they are not automobiles. If they were not automobiles then why were they insured under an "automobile policy"?

A number of cases were referred to me to support the argument that the snow plows were not automobiles. I have carefully reviewed those cases and note each and every one can be distinguished from this case as the vehicles in question were either not insured under a standard automobile liability policy but were insured under a commercial general liability policy or were not insured at all.

1. Morton v. Rabito 42 O.R. (3d) 161: backhoe

2. ING Ins. v. Chubb Ins., Arbitration Decision of S. Tessis, May 7, 2007: street cleaner/street sweeper

3. Grummett v. Federation Insurance Co. of Canada, 46 O.R. (3d) 340: racecar/no insurance

4. Clement v. ING Insurance Co. of Canada, 2004 CarswellOnt 5413 (FSCO): crane

5. CAA Insurance Co. (Ontario) v. Turner, 2000 CarswellOnt 898 (FSCO) (Appeal Director Delegate) Cushman Turf-Truckster: golf course maintenance vehicle: uninsured

6. Adams v. Pineland Amusements Ltd., 2007 ONCA 844: go kart: no insurance

I am also mindful of the decision of the Court of Appeal in Rougoor v. Co-operators General Insurance Co., 2010 ONCA 54. In that case the Co-operators insured a dirt bike in Ontario. Ms. Rougoor was a riding another dirt bike in Florida that was similar to the dirt bike insured under her Ontario policy. However, the dirt bike in Florida was not insured and was not required to be

insured under Florida law. Co-operators argued that as the dirt bike was not required to be insured that therefore it was not an automobile within the applicable legislation.

The Court of Appeal concluded that as Co-operators insured a dirt bike in Ontario under an automobile policy, they had therefore accepted it within the definition of automobile and the word must therefore be given a consistent meaning. If the dirt bike is an automobile for the purpose of coverage on The Co-operators policy then the dirt bike in Florida similarly had to be considered an automobile under that policy. If the policy provides coverage for a dirt bike by treating it as an automobile then it must be an automobile.

I conclude therefore that the snow plow is an automobile as it is a vehicle which would be considered to be an automobile in ordinary parlance. In addition, as Aviva and Zurich agreed to accept premiums and insure the trucks/snow plow under a standard automobile liability policy, I also find on that basis the snow plows are automobiles.

I am therefore satisfied that the snow plows were automobiles.

Issue 2: Were the snow plows commercial vehicles?

Not only do I accept that snow plows are automobiles, I also find that they fall within the definition of commercial vehicle and therefore the two snow plows are heavy commercial vehicles for the purposes of loss transfer. I do this on the basis not that the snow plow would be found to be an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation but rather it is a "vehicle designed specifically for construction or maintenance purposes".

With respect to the first portion of the definition of commercial vehicle, I find in fact that the snow plow is not an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation.

All the evidence that was provided including the contract from the City of Hamilton, the photographs of the vehicles, as well as the evidence from the examinations for discovery satisfied me that these vehicles were used primarily, if not exclusively to clear snow from roadways and salt and sand the roadways. I do not find that the use of the salt and sand and the carrying of those materials during the maintenance operations result in the snow plow being a vehicle used primarily "to transport material, goods, tools or equipment". I also do not find that having a snowblade attached to the vehicle constitutes the transporting of equipment.

I was referred to a few decisions on this issue. I found the decision of Justice Mandel in Lloyd's of London v. Guarantee Company of North America 26 O.R. (3d) 204 from October of 1995 to be helpful. In that case the vehicle in issue was a garbage truck. The issue was whether the garbage transported by the garbage trucks could be considered to be materials and thus fall within the definition of commercial vehicle. The argument was that garbage could not be considered to be a material as in effect; garbage was useless or worthless and therefore did not

constitute material. Justice Mandel concluded that one could not limit the meaning of material in that way and found that the garbage truck was a heavy commercial vehicle. He noted:

> *"To put it another way, it is not the economic use of the vehicle, viz. trading, that governs but rather its functional use, viz transporting. 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."*

In looking at the operation of the snow plow, I cannot find that its primary use is to transport materials, when in fact those materials are disbursed during transport. Further, I do not find that the primary purpose of the snow plow is to transport those materials from one point to another. It's primary purpose is to maintain the roadway.

I also found helpful the case of Wawanesa Mutual Insurance Company and Lombard Canada Ltd, a decision of Arbitrator Guy Jones from August of 2005. In that case an individual had slipped while exiting from a bus. Wawanesa, who insured the insured's personal vehicle and had received the Application for Accident Benefits claimed that the bus was a heavy commercial vehicle and that loss transfer applied. Wawanesa argued that the bus was used primarily to transport materials, goods, tools or equipment. In particular they argued that the equipment such as the washroom, video equipment, etc resulted in it being qualified as a commercial vehicle. Arbitrator Jones concluded it did not. I also note that in fact a bus would be found to be a "public vehicle", which is excluded from loss transfer.

Dominion urged upon me that I should conclude that irrespective of whether or not the snow plow were used primarily for transporting materials, goods, tools or equipment in connection with its occupation that if I found that the snow plow was a vehicle designed for maintenance purposes that that would be sufficient. I agree with Dominion's approach.

Counsel for Aviva and Zurich conceded that the snow plow was used for maintenance purposes but argued that was not sufficient. Rather, to meet the definition of "commercial vehicle" I must find that not only is the snow plow a maintenance vehicle but that it is also an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation. I do not agree with Zurich's submissions. I find that such an interpretation would not be purposeful and in harmony with the scheme and object of Section 275 of the Insurance Act and the purpose of loss transfer.

The approach to statutory interpretation has been repeatedly stressed by the Supreme Court of Canada that it must be contextual and purposeful. In determining the meaning of a word or phrase in a statute, one must first look to the natural or ordinary meaning, read the words in their entire context and ensure that the interpretation is in a manner that is in harmony with the scheme, objects and intention of the legislature. (Francis v. Baker, 1999 CANLII 659 (SCC)).

In my view, in order to qualify as a commercial vehicle there are two separate parts to the test to be met under the definition pursuant to Regulation 644. A commercial vehicle firstly will be one that meets the test of whether it is an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation. If the vehicle in question however does not meet that definition, you must then go on to see if it falls within the "and included" provisions. I note that the use of the word "automobile" is not used in the second part of this definition. Rather, the legislature has used the word "vehicle". A commercial vehicle now no longer needs to be an automobile but now needs to be a vehicle that meets certain criteria. This seems to suggest that we have a broader definition of commercial vehicle in the second part of the test than in the first part of the test.

The purpose of loss transfer is to require that vehicles of a certain weight that are on the road for commercial purposes and that are at fault for an accident repay a non-commercial vehicle insurer for accident benefits paid out. This policy recognizes that commercial vehicles that carry greater weight give rise to greater potential of injury, both with respect to their size and as a result of the frequency that they are on the road. The definition of commercial vehicle should be interpreted in keeping with the broader purpose of loss transfer.

If I accept Aviva's submissions that in order to be a commercial you must meet both parts of the test, there would therefore never or rarely be any circumstances in which vehicles such as a fire department vehicle, a police department vehicle or a driver training vehicle would ever meet the requirements of loss transfer. I cannot conceive of many or any circumstances in which a police department vehicle or a driver training vehicle would also be an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation. Therefore, it must be that the legislature intended that these other vehicles were also included within the definition of commercial vehicle, irrespective of whether they were an automobile used primarily to transport materials, goods, tools, or equipment.

I therefore conclude that the snow plows insured by Aviva and Zurich are commercial vehicles, as they are vehicles designed specifically for construction or maintenance purposes. Therefore, they are subject to the loss transfer provisions pursuant to Section 275 of the Insurance Act and Regulation 664/90.

Order

The Dominion of Canada General Insurance Company has a right to pursue loss transfer pursuant to Section 275 of the Insurance Act as against Aviva Canada Inc. and Zurich Insurance Company Ltd.

Costs

With respect to costs, the Arbitration Agreement provides that the costs of the arbitration, including the arbitrator's fees, expenses and disbursements shall be determined at the sole discretion of the Arbitrator. As Dominion has been completely successful in this preliminary

portion of the arbitration, I conclude that Aviva and Zurich are each 50% responsible for the arbitrator's fees, expenses and disbursements, as well as paying Dominion's expenses of the arbitration.

If counsel are unable to reach an agreement with respect to costs within the next 60 days then we will schedule a further prehearing to set up a date for costs submissions. A further prehearing will be scheduled in any event in order to determine if there are now other issues that must proceed forward to arbitration relating to either quantum or liability.

DATED THIS day of February, 2015 at Toronto.

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Arbitrator Philippa G. Samworth
DUTTON BROCK LLP