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

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE

Respondents

AWARD

Counsel:

Wawanesa Mutual Insurance Company (Applicant): Kevin D.H. Mitchell

ACE INA Insurance (Respondent): George Wray

Introduction:

This matter comes before me pursuant to the *Arbitration 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* R.S.O. 1990 c. I.8 and its Regulation 664/90. Specifically this claim is with respect to a motor vehicle accident that occurred on February 29, 2012. As a result of that accident Clifford Macdonald and Cody Haskett sustained injuries. They submitted a claim for statutory accident benefits to Wawanesa. The underlying accident benefit claims of both Mr. Macdonald and Mr. Haskett were resolved prior to the arbitration in this matter with a total amount being paid of $57,575.91.

Wawanesa Mutual Insurance Company (hereinafter called "Wawanesa") claims that ACE INA Insurance (hereinafter called "ACE") is responsible for indemnifying it pursuant to the loss transfer provisions of the *Insurance Act*. The parties selected me as their Arbitrator on consent and this matter ultimately proceeded to a single day hearing on October 26, 2016.

Issue:

An Arbitration Agreement was submitted which identified 3 issues for my determination. However counsel agreed that only the first issue would proceed at this time. That issue is identified as:

1. Is Wawanesa Mutual Insurance Company entitled to seek loss transfer as against ACE INA Insurance?

The crux of this preliminary issue is whether Wawanesa has a right of loss transfer against ACE taking into consideration a claims handling agreement entered into between the City of Toronto and ACE.

Result:

I find that Wawanesa does have a right to pursue loss transfer against ACE in the circumstances of this case.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated October 14, 2016

Exhibit 2: Agreed Statement of Facts dated October 17, 2016

Exhibit 3: Joint Document Brief (tabs A through to L)

In addition counsel filed extremely well thought out and detailed Factums and Books of Authority.

Facts:

The parties filed an Agreed Statement of Facts. The keys facts are reproduced below:

1. The motor vehicle accident on February 29, 2012 occurred when a City of Toronto owned tractor trailer vehicle collided with a Ford Explorer (owned by Stephanie Macdonald and insured by Wawanesa) in the pickup/delivery area located on the south side of 104 Wendell Avenue, Toronto.

2. It is agreed that the City of Toronto vehicle was a heavy commercial vehicle, as defined, pursuant to Ontario Regulation 664 made pursuant to the *Insurance Act* R.S.O. 1991 c. I.8.

3. Michael Johnson was operating the City of Toronto vehicle. Clifford Macdonald was the driver of the private passenger automobile which belonged to his sister, Stephanie Macdonald. Cody Haskett was a passenger in the Macdonald vehicle.

4. The City of Toronto had in place a policy of automobile insurance issued by ACE for the period of June 1, 2011 to June 1, 2012. The named insured under that policy was the City of Toronto and the policy covered "all vehicles owned, registered, licensed, leased to or operated on behalf" of the City of Toronto. The liability limits under the policy are $5,000,000.00. No deductible is stated in the certificate of automobile insurance evidencing the policy.

5. The City of Toronto has in place a "Deductible and Claims Handling Side Agreement" with ACE. This agreement provides for a $5,000,000.00 deductible per occurrence to all damages including bodily injury, tort/property damage, direction compensation/property damage, uninsured motorist, accident benefit and all perils, losses/claims resulting from any one occurrence and all costs incurred by the City.

6. The amount of premium paid by the City of Toronto to ACE for the accident benefit coverage was more than zero.

7. On April 9, 2012 Wawanesa faxed a notification of loss transfer to ACE in respect to each claimant.

8. On October 31, 2012 Wawanesa served a notice demanding arbitration on ACE.

As part of the Joint Document Brief an Affidavit was filed of a Mr. Jim Kidd. Mr. Kidd holds the position of project manager, insurance and risk management at the City of Toronto. In his Affidavit Mr. Kidd indicated that the primary purpose of the claims handling agreement is to ensure the efficient handling of claims, including cost effectiveness. All claims that fall within the coverage under the policy are handled by the City of Toronto's adjusting firm. All expenses, including all adjusting and legal expenses, incurred in the handling of the claims are paid for by the City of Toronto not ACE. The City retains all authority and approval of any settlement of any claim under the $5,000,000.00 deductible.

A copy of the Deductible and Claims Handling Side Agreement was also part of the Joint Document Brief. The introduction to that document notes and I quote:

> "In consideration of the reduced premium for which policy number CAC301537 has been issued by ACE INA Insurance to the City of Toronto, both parties agree to the following...".

Therefore the essence is that in return for the City of Toronto handling the adjusting expenses and other related costs as well as the implementation of the $5,000,000.00 deductible ACE will offer a reduced premium for the coverage provided under the contract.

In addition the agreement provides that the insurer (ACE) is not responsible for settling any loss within that $5,000,000.00 deductible amount, but it does have the right but not the duty to assume control of any claim/loss at any time as long as it provides written notice to the insured of such interest. Should the insurer exercise that right then the City of Toronto is to promptly reimburse ACE 100% for claims, loses and associated expenses within the deductible amount. The agreement does not speak to any loss transfer issues.

In essence this side agreement results in the City of Toronto paying for all claims, costs and damages including accident benefits with respect to motor vehicle accidents where the amount falls within the $5,000,000.00 deductible. The City of Toronto under the agreement is required to use due diligence and prudence to settle all claims and suits but are not to make any settlement for a sum in excess of the deductible amount without the approval of the insurer.

The question then for my determination was whether this side agreement which results in the City of Toronto making the payments for statutory accident benefits pursuant to the agreement as opposed to the payments being made by ACE INA Insurance results in a prohibition for Wawanesa to recover the payments it made pursuant to the *Insurance Act* and relevant regulations for statutory accident benefits.

Position of the Parties:

Wawanesa submits that the claims handling side agreement between the City of Toronto and ACE is irrelevant for the purposes of determining loss transfer entitlement between Wawanesa and ACE. Wawanesa notes that ACE is an insurer licensed to sell insurance in Ontario and issued a policy of insurance to the City. Wawanesa submits that ACE cannot through such a side agreement contract with its named insured out of that legislated responsibility.

Wawanesa submits that there is considerable case law that establishes that the loss transfer scheme is intended to provide an expedient and summary method of reimbursing the first party insurer for payment of the accident benefits when the insured of the second party insurer (heavy commercial vehicle) is either fully or partially at fault for the accident. Wawanesa

submits that the loss transfer scheme is to "spread the load among insurers in a gross and somewhat arbitrary fashion favouring expedition and economy over finite exactitude". (*Jevco Insurance Co. v York Fire & Casualty* 27 O.R. 3d (483) (Ontario Court of Appeal page 5).

Finally Wawanesa submits that both it and ACE are insurers licensed to sell automobile insurance in Ontario and therefore fall within the definition of insurer pursuant to Section 1 of the *Insurance Act*. Wawanesa argues that ACE cannot contract out of its legal obligations under the *Insurance Act* irrespective of any side agreement with the City of Toronto.

Wawanesa submits that if ACE wants to restrict its ability to recover in loss transfer by way of a side agreement with its insured that it has the right to do so. However Wawanesa submits that ACE cannot do so in reverse and by a side agreement affect another insurer's right to pursue a claim for loss transfer. Wawanesa submits that that would be changing the laws of Ontario by way of private agreements. Wawanesa submits that there is no statutory authority that would allow ACE to contract out of its loss transfer obligations Vis-à-vis Wawanesa.

ACE relies on 2 main arguments to support its position. The first argument is that when interpreting Section 275 of the *Insurance Act* I must follow the "purposive approach" that has been established by the Court of Appeal. (*Wawanesa Mutual Insurance Company and AXA Insurance Canada* 2012 ONCA 592 paragraphs 33 and 34). ACE submits that means I must review the entire context of the relevant wording including 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 and to ensure that a just and reasonable result is one that promotes the applications of the *Act* to advance its purpose and avoids applications that are foolish and pointless. I agree that I must approach the statutory interpretation to Section 275 on that basis and it does not appear that Wawanesa argues against that approach. The question is what results in this case in applying the "purposive approach".

ACE asked me to consider that the loss transfer scheme was introduced to provide an appropriate balance between the insurers of various classes of vehicles in meeting the costs of providing SABS to injured motorists. ACE notes the case of *Markell Insurance Company of Canada v ING Insurance Company of Canada* (2012 ONCA 218 paragraph 6) in support of that. Again there does not appear to be any issue that that is an appropriate description of the purpose of the loss transfer scheme.

Where Wawanesa and ACE part ways is with respect to the application of the decision of Arbitrator Scott Densem upheld on appeal by Justice Whitaker in the decision of *St. Paul Fire & Marine Insurance Company v Intact Insurance*. Arbitrator Densem's decision was dated March 21, 2014 and the appeal decision is found at 2014 ONSC 6461 (CanLII). ACE argues that I must follow this decision and that I am bound by Justice Whitaker's conclusion on the appeal. In that case an accident occurred on November 6, 2009. A bus owned by the City of Mississauga and insured by St. Paul Fire & Marine Insurance Company (hereinafter called "St. Paul") struck a

cube van insured by Intact. There was no dispute that the van was a heavy commercial vehicle. Eight passengers were injured on the bus and pursued a claim for statutory accident benefits. Pursuant to a similar side agreement as is in dispute in this case the City of Mississauga paid the statutory accident benefits to the 8 passengers on the bus. While St. Paul was the insurer under the policy the City in accordance with the side agreement was responsible for paying the actual benefits as they fell within the deductible. St. Paul then (despite not having paid the accident benefits) initiated a loss transfer claim against Intact claiming that under Section 275 of the *Insurance Act*, Intact was responsible for reimbursing St. Paul for the benefits paid to the 8 passengers on the bus. Intact argued that as St. Paul had not paid the statutory accident benefits and the City of Mississauga had, therefore St. Paul did not fall within the provisions of Section 275 of the *Insurance Act*. Intact noted the wording under Section 275 (1): "The insurer responsible under Section 286 (2) for the payment of statutory accident benefits...is entitled...to indemnification in relation to such benefits paid by it from the insurers...". Arbitrator Densem concluded that as St. Paul had not paid the benefits, that it did not come within Section 275 (1) and that the loss transfer provisions did not apply to it. Justice Whitaker upheld that in his decision of October 10, 2014.

ACE argues that the circumstances in this case are no different than the circumstances in the St. Paul case. ACE argues that while Wawanesa did pay the accident benefits to the 2 claimants in this case, that any claim for loss transfer as against ACE would result in ACE paying out monies to Wawanesa pursuant to the side agreement that should be paid by the City of Toronto. As the City of Toronto is not an insurer, loss transfer does not apply. ACE argues it cannot be found responsible for paying monies to Wawanesa that it is not obliged to pay pursuant to its agreement with the City. ACE notes that it has no responsibility for payments pursuant to the claims handling agreement and that if Wawanesa is successful the City would pay the loss transfer as long as it fell within the self-insured retainer of $5,000,000.00. ACE therefore argues that to allow Wawanesa to pursue the loss transfer claim against ACE does not further the objective of loss transfer, it does not result in a fair distribution of risk or loss. In fact it results in penalizing ACE rather than fairly distributing the risk between the various insurers.

ACE interprets the decision of Arbitrator Densem and Justice Whitaker as prohibiting municipalities and other self-insured entities such as the City from seeking loss transfer where the payment of the underlying accident benefits are made directly by it rather than the auto insurance. If that is true on one side of the loss transfer coin then it must be true on the other side of the loss transfer coin as otherwise the regime would become skewed and would not balance the costs pursuant to the Ontario no-fault automobile regime. As the arbitration was commenced against ACE and not against the City of Toronto there is no obligation for the City to reimburse ACE pursuant to the claims handling agreement and therefore ACE would be penalized. This is a result that could not have been intended based on a purposeful interpretation of the legislation.

With the greatest of respect I must disagree with ACE's interpretation.

Analysis:

In conducting my analysis of this issue I have, as agreed upon by ACE and Wawanesa, approached the matter following the "purposive approach" as set out by the Ontario Court of Appeal in *Wawanesa Mutual Insurance Company v AXA Insurance Company* (supra). I outlined what the purposeful approach is in more detail above. I accept that the loss transfer scheme was introduced in Ontario in June of 1990 with the purpose of achieving an appropriate balance between insurers of various classes of commercial vehicles (heavy commercial vehicles and motorcycles in particular) to meet the costs of providing statutory accident benefits to injured motorists. In other words an individual who was on a motorcycle who is struck by a car or somebody who is operating a heavy commercial vehicle and strikes another vehicle is more likely to either be injured or to cause greater injury than individuals operating or occupants of regular motor vehicles. The loss transfer scheme is to provide a redistribution of such risk based on the fault chart in terms of liability.

I also accept that when interpreting this legislation that I must keep in mind that the loss transfer scheme was to provide an expedient and summary method of reimbursement between these 2 insurers. The Court of Appeal has made it clear in *Jevco Insurance Company v York Fire & Casualty* (supra) that the scheme does not do so with any exactitude. It is a scheme that spreads the load in a "gross and somewhat arbitrary fashion". In other words the process is designed to be quick, effective but not necessarily approached with "finite exactitude".

Section 275 (1) of the *Insurance Act* is the place where one has to begin this analysis. Section 275 provides as follows:

> "The insurer responsible under subsection 286 (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."

This is a statutory cause of action only. Section 275 and the regulations are a complete code that govern loss transfer between insurers that fall within its provisions.

Applying Section 275 (1) to the circumstances of this case I note that Wawanesa is the insurer responsible under subsection 268 (2) to pay statutory accident benefits to Clifford Macdonald and Cody Haskett. I further note that the parties agree that the City of Toronto vehicle was a heavy commercial vehicle as defined under Ontario Regulation 664. There is also no argument that ACE issued a policy of automobile insurance that included statutory accident benefits to the City of Toronto that covered the vehicle involved in this accident. Therefore ACE is an

insurer of a vehicle that falls within the class of automobiles named in the Regulation to which loss transfer indemnification is applicable in accordance with Section 275 (1). But for the deductible and claims handling side agreement clearly ACE would have no argument that Wawanesa could not pursue a claim against it in loss transfer.

The only case really of any relevance to this issue is *St. Paul Fire & Marine Insurance v Intact Insurance Company of Canada* (supra). However I find that that case is quite distinguishable on its facts. I do not agree with ACE that I am obliged to follow the *St. Paul v Intact* case for the following reasons.

In that case St. Paul was advancing the claim for loss transfer and Intact was resisting it on the grounds that St. Paul had not paid the 8 passengers on the bus the statutory accident benefits but rather the City of Mississauga had. Arbitrator Densem concluded that based on the wording of Section 275 of the *Insurance Act* an insurer could only pursue loss transfer if a claim was for "indemnification in relationship to such benefits paid by it". Arbitrator Densem properly held that St. Paul had not paid any benefits. Therefore St. Paul was pursuing money that it had not paid and therefore the principle of indemnification would not be applicable to it. St. Paul and the City of Mississauga had made its own agreement. This agreement prevented St. Paul from pursuing loss transfer.

However in this case Wawanesa has paid the benefits for which it is claiming indemnification pursuant to Section 275 (1). Wawanesa is in a totally different position than St. Paul was in the case decided by Arbitrator Densem. Arbitrator Densem correctly interpreted Section 275 (1) based on the facts before him. Those facts are quite different then the facts in this case. I do not agree that what is "good for the goose is good for the gander". In other words the ratio of the *St. Paul v Intact* case does not apply when the roles are reversed. Arbitrator Densem's decision was based entirely upon the fact that St. Paul did not fall within Section 275 (1) as it had not paid for those benefits. There is nothing under Section 275 (1) using the purposeful interpretation approach that allows ACE to avoid its obligations under the loss transfer scheme. Whatever agreement it has with the City of Toronto cannot affect the right of Wawanesa to pursue a proper claim for loss transfer/indemnification against an "insurer of such class or classes or automobiles as may be named in the regulation involved in the incident from which the responsibility to pay the statutory accident benefits arose." I find that ACE is the insurer of a class of automobile that was named in the regulation (heavy commercial vehicle), that automobile was involved in the incident and the responsibility to pay statutory accident benefits by Wawanesa arose as a result of that incident thus giving the right to Wawanesa to pursue a claim for loss transfer against ACE.

I do not see any relevance in the circumstances of this case to the fact that ACE and the City of Toronto have a side agreement that results in the City of Toronto making payments for various coverages within the deductible of $5,000,000.00. The City of Toronto has paid some premium

(more than zero) for statutory accident benefit coverage under the policy with ACE. How ACE and the City of Toronto choose to make private arrangements with respect to the payment or reimbursement of those benefits has no bearing on the right of Wawanesa to pursue a proper claim for loss transfer pursuant to Section 275 (1).

I believe that my interpretation as set out above is in keeping with the overall scheme of the *Insurance Act*, the objective of the provisions of the indemnification/loss transfer set out under Section 275 and the legislature's intent in enacting the provision. I am further of the view that the result herein is a just and reasonable one that promotes the application of the loss transfer provisions and advances its purpose and avoids a foolish and pointless result. Indeed to find as ACE has submitted would in my view would result in a foolish and pointless result as it would allow an insurer to, by way of a side agreement, to opt out of proper reimbursement of loss transfer under Section 275 of the *Insurance Act*. That cannot be a result that was intended by the legislature.

As Justice Sharpe stated in *Kingsway General Insurance Company v West Wawanosh Insurance Company* (2002) (58 O.R. 3d 251, 155 O.A.C. 238 at paragraph 10) there is little room for creative interpretation or carving out judicial exceptions designed to deal with the equities of particular cases in disputes between insurers. While that case dealt with a priority dispute it is equally applicable to loss transfer claims between insurers.

I therefore find that Wawanesa Mutual Insurance Company has the right to pursue the claim for loss transfer pursuant to Section 275 (1) of the *Insurance Act* as against ACE INA Insurance.

As a result, subject to any appeal, a further prehearing will be scheduled to discuss any issues that may need to be dealt with in order to move forward with the arbitration on the questions of liability and quantum in this loss transfer matter. I do note that it does appear that counsel are agreed that the quantum net of the deductible is $53,557.91 and therefore there may be no argument on that issue. This can be clarified at the next prehearing.

Costs:

Pursuant to paragraph 6 of the Arbitration Agreement costs are in the discretion of and are to be determined by the Arbitrator. I am to take into consideration the conduct of the arbitration proceedings and any conduct which lead to any unnecessary costs or delay. I do not find any such conduct nor have I been provided with any formal offer to settle. In light of the fact that Wawanesa has been completely successful in this matter I find that ACE is responsible for paying to Wawanesa the legal costs flowing from this preliminary issue hearing and as well the costs of the Arbitrator to date.

DATED THIS 22nd day of December, 2016 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP