CITATION: Manitoba Public Insurance v. Insurance Corporation of British Columbia, 2023 ONSC 3658
COURT FILE NO.: CV-22-00677224-0000
DATE: 20230713

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MANITOBA PUBLIC INSURANCE	)	Sandi Smith, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Debbie Orth, for the Defendant
INSURANCE CORPORATION OF BRITISH COLUMBIA	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** December 12, 2022

A.P. RAMSAY J.

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I. **Overview**

[1] This is an appeal from a decision of a private arbitrator pursuant to s. 45(1) of the *Arbitration Act* 1991, S.O. 1991, c.17, involving two out of province insurers. At issue is whether one of them, Manitoba Public Insurance ("MPI"), may avail itself of the statutory action for indemnification pursuant to s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, to recover the amounts paid to its insureds for accident benefits under the *Manitoba Public Insurance Act*, from the Insurance Corporation Bureau of British Columbia ("ICBC"), the insurer of the transport truck involved in an accident. The accident occurred in the Province of Ontario.

[2] Section 275 of the *Insurance Act* and related regulations, colloquially referred to as the "loss transfer", allows in certain circumstances, insurers of certain classes of vehicles who have paid statutory accident benefits to its insured under s. 268(2) of the *Insurance Act*, to be indemnified by the insurers of certain other classes of vehicles, i.e., heavy commercial vehicle, as defined under the regulations, and in accordance with the fault determination rules set out in R.R.O. 1990, Reg. 668.

[3] As the parties were unable to resolve their dispute, they proceeded to an arbitration under Unable to resolve their dispute, the parties proceeded to arbitration.

[4] The question, as framed by ICBC, for the arbitrator, was whether MPI was entitled to claim loss transfer pursuant to s. 275(1) of the Insurance Act, as it had not paid out Ontario statutory accident benefits but rather, had made payments in accordance with its own regulatory scheme.

[5] The primary argument advanced by MPI on this appeal is that the arbitrator concluded that the insurer could not avail itself of s. 275 of the *Insurance Act*, as MPIC had had not paid Ontario benefits.

II. **Nature of the Appeal**

[6] The appellant, MPI, appeals the decision of private Arbitrator Philippa Samworth, dated January 21, 2022, wherein she concluded that the appellant was not entitled to recover the amounts paid for accident benefits to its insureds from ICBC pursuant to s.275 of the *Insurance Act.*

[7] MPI asks that the decision be aside and asks the court to find that MPI is entitled to recover the accident benefits paid to the claimants plus interest. MPI also seeks costs of the proceedings below and of the appeal.

III. **The Facts and Adjudicative History**

[8] The motor vehicle accident occurred in Ontario on December 18, 2017. At the time of the accident, MPI's insureds, the claimants Qi Li and Zhe Zhang, were occupants of a 2000 Honda Civic passenger. The other vehicle involved in the collision was a transport truck owned by Natt Freightways.

[9] The claimants were residents of the province of Manitoba. The accident occurred outside of Thunder Bay in the Province of Ontario. The claimants were both injured in the accident.

[10] The Honda Civil was insured under Manitoba's standard Manitoba Motor Vehicle Liability Policy, commonly known as MSPF No. 1. The MSPF No. 1, issued by MPI in the Province of Manitoba.

[11] A Certificate of Registration from MPI confirms that a policy was issued to the Honda Civic in accordance with s. 324(1) of the *Highway Traffic Act* (Manitoba), and the policy was valid on December 18, 2017.

[12] The claimants applied to MPI and collected accident benefits from MPI under the Personal Injury Protection Plan under the *Manitoba Insurance Corporation Act*, C.C.S.M, c. P. 215, as amended.

[13] MPI is the provincial insurer for all vehicles registered in the Province of Manitoba and issues motor vehicle liability policies for residents of the Province of Manitoba pursuant to the *Manitoba Insurance Corporation Act*.

[14] MPI takes the position that the accident was caused by the negligence of the operator of the Natt Freightways. The transport truck was insured by ICBC.

[15] ICBC is the provincial insurer for all vehicles registered in the Province of British Columbia and issues motor vehicle liability policies for residents of the Province of British Columbia pursuant to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231.

[16] Payments made to the claimants under the Personal Injury Protection Plan were subject to the amounts set out under the *Manitoba Insurance Corporation Act*. The payments included a payment of $84,843.55 as compensation for a permanent impairment for the claimant Qi pursuant to s. 127(1) of the Act, and a payment of $2,853.83 for a permanent impairment for the claimant Zhang pursuant to the same section. As of April 2019, MPI paid Li $117,027.09 for Medical Benefits and Permanent Impairment Benefits and $4,199.81 to the claimant Zhang pursuant to the

Manitoba Insurance Corporation Act. No further payments have been made. The two payments for permanent impairment make up much of the claim of MPI for loss transfer.

[17] The loss transfer claim being sought by MPI for the claimant Li is dated September 17, 2019, and net of the $2,000 00 deductible prescribed by subsection 275(3) the Ontario Insurance Act, amounts to $115,072.04. The loss transfer for the claimant Zhang, is dated September 17, 2019, and amounts to $2,199.81 net of the $2,000.00 deductible. The case law in Ontario establishes that the deductible is applicable to each claimant: *Economical Mutual Insurance Company* v *Northbridge Commercial Insurance Company*, 2016 ONSC 458.

[18] The claimants did not submit an application for accident benefits, commonly referred to as an OCF-1, to seek statutory accident benefits under the Ontario Insurance Act and the Statutory Accident Benefits Schedule[i], nor were such benefits paid to the claimants.

[19] MPI provided notification of loss its transfer requests to ICBC (Loss Transfer Indemnification dated September 17, 2019, and March 26, 2018, with a Summary of Payments of Benefits), with respect to each claimant, seeking recovery of the full amounts paid to the claimants.

[20] ICBC refused to pay, and the parties were unable to resolve the dispute and proceeded to arbitration as mandated by the *Insurance Act*.

[21] Both MPI and ICBC are signatories of the Power of Attorney and Undertaking ("PAU") filed with the Canadian Council of Insurance Regulators.

[22] Both insurers have apparently also filed MPI and ICBC indicate that they have also filed an undertaking with the Financial Services Commission of Ontario (FSCO) under s. 226.1 of the *Insurance Act.* The undertaking obliges insurers from the United States and other provinces to provide certain mandatory coverages, when the vehicle is operated in Ontario, including Ontario statutory accident benefits.

[23] The issues of quantum or liability were not the subject of the Arbitration.

[24] An Arbitration Agreement was not executed by the parties. The Arbitrator noted in her reasons that some of the terms remained in dispute.

[25] MPI indicates the Arbitrator was asked to determine the following questions:

a) Pursuant to Section 275 of the Insurance Act, is MPI entitled to recover all amounts paid as Accident Benefits to the Claimants, Qi Li and Zhe Zhang, arising as a result of a motor vehicle accident that occurred near Thunder Bay, Ontario, on December 18, 2017?

b) Is MPI entitled to recover all amounts paid as Accident Benefits to the Claimants, Qi Li and Zhe Zhang, arising as a result of a motor vehicle accident that occurred near Thunder Bay, Ontario, on December 18, 2017, based on the arbitrator's equitable jurisdiction set out in the Arbitrations Act?

IV. **The Decision of the Arbitrator**

[26] In her decision dated January 21, 2022, Arbitrator Samworth determined that MPI was precluded from claiming a Loss Transfer on the basis that Ontario Statutory Accident Benefits were not paid. She indicated that the position urged by MPI would "invoke some unwarranted extra territorial application of the Ontario Insurance Act, its regulations, its priority provisions, and its loss transfer provisions." In arriving at her decision, the Arbitrator stated at page 11 of her reasons:

> I find that the Insurer under section 275(1), the Insurer responsible under Subsection 268(2) for the payment of Statutory Accident Benefits to trigger their right to indemnification must have paid Ontario Statutory Accident Benefits. I find that the reference to "indemnification in relationship to such benefits" refers back to the opening words of the Section that references "Statutory Accident Benefits" and that being a defined term under the Insurance Act must reference Ontario Statutory Accident Benefits pursuant to the definition provisions. In my view no other interpretation makes sense and to find otherwise would be to invoke some unwarranted extra territorial application of the Ontario Insurance Act, its regulations, its priority provisions, and its loss transfer provisions.

V. **Position of the Parties on Appeal**

A. MPI's Position

[27] MPI argues that it met its obligation to the claimants by paying them statutory accident benefits under the Ontario *Insurance Act*. MPI submits that the accident occurred in Ontario, MPI is a signatory of the PAU, and a s a result, the MPI contract of insurance is subject to the Ontario *Insurance Act* provisions, including the s. 275 loss transfer provisions.

[28] MPI argues that the decision creates a lacuna in the legislation as pursuant to s. 268 of the Insurance Act, all insurers, subject to the Power of Attorney and Undertaking, must provide statutory accident benefits, but can then only recover if only Ontario benefits are paid to their insureds. MPI submits that the Arbitrator erred in her interpretation of Section 268 of the Insurance Act, as being only applicable to Ontario Statutory Accident Benefits, as she failed to appreciate that the wording of the legislation did not exclude or limit the ability of an injured claimant to seek the payment of an Ontario benefit or the reciprocal version of the Statutory Accident Benefit available in his or her own Province or Territory

[29] MPI submits that pursuant to the substantive law of Ontario, s. 268 (1) of the *Insurance Act* required MPI to pay benefits to the claimants as the priority insurer. MPI argues that the Arbitrator erred in determining that to permit MPI to recover the amounts paid would amount to an extra territorial application of Ontario law. MPI submits that the Arbitrator erred in in failing to properly apply the correct statutory interpretation and legal analysis as set out by the Court of Appeal in *ICBC* v *Roya*l 1999 CanLII 818 ON CA and *Travelers* v *CAA* 2018 ONSC 3911 CanLII

to extend the availability of the loss transfer provisions and recovery by MPI of the amounts paid to its insureds.

[30] MPI submits that the Arbitrator erred in failing to consider recovery based on equitable principles, and her failure to provide reasons as to why MPI on this issue was an error of law.

B. ICBC's Position

[31] ICBC submits that for s. 275 (1) to be triggered the insurer must be the insurer responsible to pay Ontario Statutory Accident Benefits under subsection 268(2) of the Ontario Insurance Act and paid Statutory Accident Benefits. ICBC argues that MPI does not meet any of the requirements of the Ontario Insurance Act to trigger a Loss Transfer Request against ICBC. It points to the fact that MPI had not received an OCF-1 (Application for Accident Benefits).

[32] ICBC submits that to interpret s. 268 as not applying the Ontario policy (as the Arbitrator found) would result in the Ontario legislature legislating the accident recovery schemes of other provinces. ICBC argues that the PAU is only relevant to establish that the MPI had to make available to the claimants, Ontario Statutory Accident Benefits.

[33] ICBC submits that s. 268 have been applied to out of province insurers who are responding to claims arising as a result of an Ontario accident, and the sections have only been applied when benefits have been paid in accordance with the Ontario Statutory Accident Benefit Schedule.

[34] ICBC submits that neither an Ontario court or arbitrator has jurisdiction to determine what accident benefits the claimants are entitled to receive under the MPI policy.

[35] ICBC submits that s. 226.1 of the Insurance Act as well as s.243(1) of the Act are not relevant to the dispute. ICBC also submits that s. 59 of the Statutory Accident Benefits Schedule, and in the result, the decision of Allstate v TD Home & Auto, 2020 ONSC 6969, relied upon by MPI are not relevant as the claimants did not elect Ontario statutory accident benefits. .

VI. **The issues on this appeal**

[36] The following issues are raised on this appeal:

i. Is leave to appeal required?

ii. What is the applicable standard of review?

iii. Does s. 275 of the Insurance Act have extra territorial application to insurers of other provinces?

iv. Does the substantive law of Ontario apply to the MPI policy?

v. Did the Arbitrator err in her interpretation of the Insurance Act and regulations?

vi. Can MPI avail itself of the loss transfer provisions as a signatory of a PAU?

vii. Did the Arbitrator err in failing to provide reasons for equitable relief?

VII. **Disposition**

[37] Leave to appeal the decision of the Arbitrator is granted, for the reason which follow.

[38] The appeal is dismissed. For the reasons that follow, I find that the Arbitrator made no error in concluding that MPI does not have a right to pursue a claim to loss transfer under s. 275 of the Insurance Act against ICBC as a result of the accident.

VIII. **Leave to Appeal**

[39] There is no signed Arbitration Agreement by the parties.

[40] The Appellant states that leave is not required as the Arbitration that was originally commenced with the late Guy Jones as private arbitrator confirmed that the parties agreed that their appeal rights on a question of law or mixed fact and law were as a matter of right. Alternatively, MPI submits that the test for leave has been met on the basis of the importance of the question of law to the parties and the determination of the question of law will significantly affect the rights of the parties.

[41] I would grant leave to appeal for the following reasons. Section 45 of the Arbitrations Act states that if the Arbitration Agreement does not deal with appeals on question of law, a party may appeal an award to the Court on a question of law with leave. While there appears to be a dispute between them as to other aspect of the Agreement, they agree that leave is not required to appeal. An arbitration agreement need not be in writing: *Arbitrations Act*, s. 5(3), or may be an independent agreement or part of another agreement, s. 5(1) o the *Act.* Any further agreements made by the parties is deemed to form part of the arbitration agreement make, s. 5(2) of the Act.

[42] I would therefore grant leave to appeal in the circumstances. I need not address MPI's alternative grounds for leave.

IX. **Standard of Review**

[43] MPI submit that the standard of review from a decision of a private arbitrator is correctness, and the respondent submits that it is reasonableness.

[44] The court is not bound by the parties' position and must determine the correct standard of review, which is question of law: *Monsanto Canada Inc* v *Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 6; *Voice Construction Ltd.* v. *Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23. The parties have a statutory right of appeal under the Arbitration Act, 1991.

[45] This is a statutory appeal under the Arbitration Act. The Act does not set out the applicable standard. Since the Arbitrator was asked to interpret s. 275 of the Insurance Act, that is whether s. 275 was available to MPI to seek indemnification from ICBC, this was a question of law, the standard of correctness applies: *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at paras. 37, 53; *Travelers Insurance Company of Canada* v. *CAA Insurance Company*, 2020 ONCA 382, at para. 14.

[46] I now turn to the reasons for upholding the decision of the Arbitrator.

X. **Analysis**

[47] MPI submits that the Arbitrator did not appreciate that recovery pursuant to Section 275 is not contingent on the claimant's electing Ontario Statutory Benefits. MPI argues that the provision is contractual provision but rather is an indemnity provision that forms part of the Ontario legislative scheme. MPI further submits that loss transfer does not relate to the issuance of a motor vehicle liability policy but is a statutory right of recovery for benefits paid as a result of accidents that occurred in Ontario, or out-of-Province accidents that involve an Ontario insurer. MPI submits that the substantive law of Ontario should apply.

i. **Choice of Law**

[48] In her reasons for decision, Arbitrator stated:

> Throughout Section 268 of the Insurance Act there are multiple references to Statutory Accident Benefits or to the Statutory Accident Benefits Schedule. In my view there is no logical or persuasive interpretation that can be applied to suggest that reference was intended to apply to any other policy other than the Ontario policy.

[49] Both MPI and ICBC agree that the substantive law of Ontario applies of Ontario given that the accident occurred in the province of Ontario.

[50] MPI argues persuasively that the *lex loci deliciti* applies, and as the accident occurred in Ontario, the application of the substantive law of Ontario (s. 268) requires that MPI pay Statutory Accident Benefits to an "insured" injured in an accident in Ontario. It is well established that in relation to domestic matters the choice of law rules for tort matters depends on the place where the tort (accident) occurred, that is, the lex loci delicti, wherever the action is brought. The Supreme Court of Canada made that clear in *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, [1994] 3 S.C.R. 1022, and at the same time clarified that the procedural issues are to be determined in accordance with the law where the proceeding is brought.

[51] I disagree that the Arbitrator erred in not applying the lex loci delicti. While MPI focuses on the insurer's right to seek indemnification under the loss transfer provisions arising as a result of the accident itself, and not the contract (policy), MPI's argument, including in its factum, repeatedly refer to the contract. For instance, the insurer submits that "MPI issued a contract of insurance, which is a 'motor vehicle liability policy'. MPI also submits that: "This contract of

insurance included the requirement that MPI pay Statutory Accident Benefits to an insured person who was injured in an accident in Ontario". In Unifund Assurance Co. v. Insurance Corp. of British Columbia, 2003 SCC 40 (CanLII), [2003] 2 SCR 63, the Supreme Court in fact noted that "… s. 275 of the Ontario Act is an indemnity provision that does not arise out of the motor vehicle policy itself."

[52] MPI also points to the expanded definition of insured espoused by the Ontario Court of Appeal in *Taggart* v. *Simmons*, 2001 CanLII 24003 (ON CA), and *McArdle* v. *Bugler*, 2007 ONCA 659 (CanLII). These cases relate to whether individuals had coverage under the liability section of an automobile insurance policy. The Court, in those cases, noted that section 224(1) includes every person who is entitled to Statutory Accident Benefits under the contract.

[53] I start by distinguishing *Taggart* and *McArdle*. In Taggart, the issue before the court was whether a dependent, unnamed insured, entitled to receive statutory accident benefits, was an insured for the purpose of uninsured motorist coverage of s. 265 of the *Insurance Act.* In *McArdle*, Court of Appeal revisited the issue, reiterating that the broader definition of "insured" in s. 224 informs the narrower definition of s. 265 of the unsured motorist provision of the *Insurance Act*.

[54] MPI points to the fact that s. 226.1 and s. 224(1) of the Insurance Act, both define the "contract of insurance", which it argues, includes the MPI contract as it is a motor vehicle liability policy issued by an insurer who has filed the Protected Defendant Undertaking.

[55] The claimants are not involved in the dispute. This is a dispute between two insurers. However, it is MPI's payment of accident benefits to its insured under their insurance policy which give rise to the request, by MPI, for recovery of those payments from ICBC. MPI's insurance contract therefore provides the necessary nexus in this case for MPI's request to avail itself of the Ontario loss transfer provisions.

[56] Not surprisingly, the starting point for MPI is the definition for "contract", in s. 224(1) of the Insurance Act, under Part VI -Automobile Insurance. MPI also relies, on the definition contained in subsection 224(1)(b) in support of its position that the MPI policy is a "contract", governed by the Ontario Insurance Act. The relevant provision reads as follows:

> "contract" means a contract of automobile insurance that,
>
> (a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or
>
> (b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule by an insurer that has filed an undertaking under section 226.1

[57] MPI also relies on the definition of "insured" in s. 224(1) of the Act. The provision states that:

> "insured" means a person insured by a contract whether named or not and includes every person who is entitled to Statutory Accident Benefits under the contract whether or not described therein as an insured person.

[58] Next, MPI points to the definition of Statutory Accident Benefits set out in s. 224(1) of the Act, which reads:

> "statutory accident benefits" means the benefits set out in the regulations made under paragraphs 9 and 10 of subsection 121 (1);
>
> "Statutory Accident Benefits Schedule" means the regulations made under paragraphs 9 and 10 of subsection 121 (1).

[59] Insurance in Ontario and across the country is highly regulated, with a web of inter-provincial agreements and arrangements. But, as noted by author Craig Brown in *Insurance Law in Canada*, the regulation of contracts of insurance is largely a provincial matter. He explains:

> Subject to statute, the basic rule for determining what law governs any kind of contract with multijurisdictional connections is that which is intended by the parties to apply. This choice may be expressed in the contract or may be inferred from the circumstances. If an intention cannot be discerned, the rule is that "the system of law with which the transaction has its closest and most real connection" applies. This is known as the "proper law" of the contract.

[60] At common law, the proper law of the contract is ascertained by determining the express or implied choice of law by the parties to the contract. This law will normally govern the contract and legal rights and obligations generated by the contract: Drew Brown Ltd. v. The "Orient Trader", 1972 CanLII 194 (SCC), [1974] S.C.R. 1286, at pages 1288, 1314 and 1318. In the absence of expressed intent of the parties, it must be inferred from the circumstances: Family Insurance Corp. v. Lombard Canada Ltd., 2002 SCC 48, para. 17, (Re) Pope & Talbot Ltd., 2009 BCSC 1552 at para. 33; Imperial Life Assurance Co. of Canada v. Colmenares, 1967 CanLII 7 (SCC), [1967] S.C.R. 443, at p. 448; J.-G. Castel, Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997) at p. 593.

[61] The Ontario Court of Appeal has stated that: As this court clarified in Benson, it is a "legal misapprehension that the lex loci delicti [principle] should be applied to a contract and statutory interpretation issue involving an Ontario contract and Ontario legislation where that legislation specifically directs that Ontario law is to apply": Benson v. Belair Insurance Co. (2019), 148 O.R. (3d) 589, [2019] O.J. No. 5437, 2019 ONCA 840, at para. 52; Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382 (CanLII), at para. 36.

[62] In this case, MPI relies on the definitions in the Ontario Insurance Act, starting with the definition of "contract" in s. 224(1) of the Act. The section, titled, "Interpretation" appears under Part VI (of which I will say more below), under the section headed "Automobile Insurance".

[63] The Court of Appeal has made it clear that the phrase "required under any Act" in s. 224(1) refers only to an Ontario statute: Benson, at para. 41; Travelers Insurance Company of Canada v. CAA Insurance Company, at para. 29. In the latter decision, the Court of Appeal indicated that s. 224(1) must be read together with ss. 226 and 226.1 of the Ontario *Insurance Act*, at. Para. 30.

[64] The Arbitrator stated:

> "I find that Section 268 of the Insurance Act the reference to the contract being evidenced by a motor vehicle liability policy being required to include Statutory Accident benefits refers to the Statutory Accident Benefits provided for under the Ontario Act, not under an insurance act or Motor Vehicle Liability policy of some other province or state.

[65] In my view, the Arbitrator made no error in her conclusion. I agree with the Arbitrator that it is not logical or persuasive to interpreted Statutory Accident Benefits as apply to any other policy other than an Ontario policy.

[66] MPI relies on s. 243(1) of the Insurance Act which sets out the territorial limits for insurance under s. 239 and non-owner's policy under s. 241 of the Insurance Act. The relevant provision reads as follows:

> 243(1) Insurance under Sections 239 and 241 applies to the ownership, use or operation of the insured automobile in Canada, the United States of America and any jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction.
>
> (2) "Same" – Statutory Accident Benefits provided under section 268 apply to the use or operation of any automobile in Canada, the United States of America and any other jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel plying between ports in Canada, the United States of America or a designated jurisdiction.

[67] I pause here to note that an owner's policy (s. 239) and non-owner's policy (s.241) insure the owner, and any person who operates the vehicle with the owner's consent, against liability arising out of bodily injury, death, or damage to property, because of the use and operation of the insured vehicle. Section 268(1) of the Insurance Act, mandates that every contract evidenced by a motor vehicle liability policy shall be deemed to provide Statutory Accident Benefits. MPI also relies on s. 268(2) of the Act, which prescribes the rules for determining the hierarchy of which insurer is liable to pay Statutory Accident Benefits (often refer to as the priority rules).

[68] The provisions state as follows:

> 268 (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

….

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

ii. Does Part VI of the Ontario Insurance Act apply the policy issued by MPI?

[69] Further support for the Arbitrator's conclusion is found in s. 226 of the Insurance Act, and the jurisprudence. Part VI of the *Insurance Act*, titled "Automobile Insurance" does not apply to a contract of insurance in respect of an automobile unless the vehicle is required to be registered under the *Highway Traffic Act*: Young v. Ontario (Minister of Finance), 2003 CanLII 23640 (Ont. C.A.), at para. 29; Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382, at paras. 35- 36.

[70] The entire legislative framework relied upon by the MPI is contained under Part VI of the Insurance Act, titled "Automobile Insurance". In my view, two Ontario Court of Appeal decisions, Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382 and Young v. Ontario (Minister of Finance), 2003 CanLII 23640 (Ont. C.A.) may be dispositive of this appeal. MPI only relies on the lower Court decision in Travelers v. CAA. The question turns on whether the claimants Honda Civic was required to be registered in Ontario. The vehicle was already insured by the province of Manitoba as evidenced by the certificate before the court and the confirmation from MPI that the insurance was valid on the date of the accident.

[71] Section 226(2) of the Ontario Insurance Act limits the application of the Ontario Insurance Act by providing that Part VI "does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act.*

[72] The relevant provision provides as follows:

> 226 (1) This Part does not apply to contracts insuring only against,
> (a) loss of or damage to an automobile while in or on described premises;
> (b) loss of or damage to property carried in or upon an automobile; or
> (c) liability for loss of or damage to property carried in or upon an automobile.
> (2) This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* unless it is insured under a contract evidenced by a form of policy approved under this Part.

[73] In *Young* v. *Ontario (Minister of Finance)*, 2003 CanLII 23640 (ON CA) the Court of Appeal summed up the requirement as follows:

> The Highway Traffic Act requires all motor vehicles driven on a highway in Ontario to be registered and plated in Ontario. Cars belonging to residents of other Canadian provinces or of foreign countries are exempted from the requirement of Ontario registration while being operated in Ontario, provided that the extra provincial or foreign vehicle is validly registered according to the laws of the jurisdiction in which the person resides. However, extra provincial or foreign vehicles must, while being operated in Ontario, have the three mandatory insurance coverages prescribed by the Compulsory Automobile Insurance Act.

[74] In Ontario, the owner of vehicle is required to register their vehicle with the Ministry of Transportation and to have a permit. The Highway Traffic Act sets out exceptions to residents of other provinces, permit requirements, or registration of vehicles of certain non-residents, where certain conditions are met. Section 13 of the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25, requires that the vehicle be insured before a person may apply for a permit.

[75] Section 2 (1) of the *Compulsory Automobile Insurance Act* reads as follows:

> Subject to the regulations, no owner or lessee of a motor vehicle shall,
> (a) operate the motor vehicle; or
> (b) cause or permit the motor vehicle to be operated,
> on a highway unless the motor vehicle is insured under a contract of automobile insurance.
>
> (2) For the purposes of subsection (1), where a permit for a motor vehicle has been issued under subsection 7 (7) of the Highway Traffic Act,
>
> "contract of automobile insurance", with respect to that motor vehicle, means a contract of automobile insurance made with an insurer.

[76] Section 1(1) of the *Compulsory Automobile Insurance Act* provides a definition of insurer as follows:

> "insurer" means an insurer licensed under the *Insurance Act* and carrying on the business of automobile insurance, but does not include an insurer whose licence is limited to contracts of reinsurance;

[77] Subsection 7(7) of the *Highway Traffic Act*, prescribes the issuance permits and plates, and provides, as follows:

> (7) The Ministry may issue a permit of any prescribed class, number plates and evidence of validation to any person who meets the requirements of this Act and the regulations.

[78] However, subsection 15(1) of the HTA contains the exceptions to residents of other provinces to the permit requirements. Section 7 of the HTA is not applicable to a motor vehicle owned by someone who does not reside or carry-on business in Ontario for more than six consecutive months each year where the person is a resident of another Province and has complied with the law in that province, and similar exemptions are afforded to residents of Ontario.

[79] The relevant provision provides as follows:

> 15 (1) Section 7 and subsection 13 (1) do not apply to a motor vehicle owned by a person who does not reside or carry on business in Ontario for more than six consecutive months in each year if the owner thereof is a resident of some other province of Canada and has complied with the provisions of the law of the province in which the person resides as to registration of a motor vehicle and the display of the registration number thereon, and provided the province of residence grants similar exemptions and privileges with respect to motor vehicles owned by residents of Ontario for which permits are issued and in force under this Act and the regulations. R.S.O. 1990, c. H.8, s. 15 (1).

[80] In Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382, at para. 30, Lauwers J.A., speaking for the Court, observed at para. 35, that "contract" in s. 224(1) refers to Ontario policies (s. 224(1)(a)), and to policies issued extra-provincially by insurers who file an undertaking in Ontario (s. 224(1)(b)). The extent to which extra-provincial policies are caught by s. 224(1) (b) is generally limited by s. 226.1 to situations where the vehicle that is registered and insured extra-provincially is actually operated in Ontario." However, Lauwers J.A. went on to state, at para. 36:

> Section 226(2) limits the application of the Ontario Insurance Act in providing that Part VI "does not apply to a contract providing insurance in respect of an automobile not required to be registered under the Highway Traffic Act". The Nunavut Insurance Act, R.S.N.W.T. (NU) 1988, c. I-4 contains similar provisions: ss. 1(1), 2(2), (3), 39, 40, 124(1), (3). An insurance policy cannot both be governed by Ontario and Nunavut law at the same time. As this court clarified in Benson, it is a "legal misapprehension that the lex loci delicti [principle] should be applied to a contract and statutory interpretation issue involving an Ontario contract and Ontario legislation where that legislation specifically directs that Ontario law is to apply": at para. 52. By parity of reasoning the same is true with respect

> to a Nunavut insurance policy where the Nunavut legislation clearly states that Nunavut law governs the contract [emphasis added].

[81] Applying the same logic, the MPI policy cannot be governed by Ontario and Manitoba law at the same time. MPIC in fact refers to both the Ontario statute and Manitoba statue at times in its factum. In this case, s.4.2 of the *Manitoba Highway Traffic Ac*t, S.M. 1985-86, c. 3, provides that no person shall drive a motor vehicle on a highway, or who owns the vehicle, shall permit another person to drive it on a highway, unless a registration card has been issued under the Drivers and Vehicles Act and is valid.

[82] The mirror provisions dealing with Registration and number plate requirements are contained in s. 34 of the Manitoba Drivers and Vehicles Act, CCSM c D104 (DVA).

[83] Section 226(1) of the *Manitoba Highway Traffic Act* makes it an offence to operate a care without motor vehicle liability insurance. The provision reads as follows:

> 226(1) Subject to subsection (7), no person shall drive, cause or permit to be driven, upon a highway any vehicle registered or required to be registered under The Drivers and Vehicles Act, other than a vehicle that is of a type or class not required to be insured under The Manitoba Public Insurance Corporation Act, unless there is in full force and effect a motor vehicle liability insurance card issued in respect of the vehicle under The Manitoba Public Insurance Corporation Act and the regulations made thereunder

[84] The Manitoba Insurance Corporation Act governs the amount of premiums paid for the universal compulsory automobile insurance.

[85] And, while some cautious is required in merely applying the law dealing with priority disputes to loss transfer cases, there are elements in *Young* v. *Ontario (Minister of Finance)* (2003), 2003 CanLII 23640 (ON CA), 68 O.R. (3d) 321 (C.A.), which is such a cases, which are applicable to these facts. *Young* involves an appeal of an order declaring that the plaintiff, who had been catastrophically injured in a single motor vehicle accident in New Mexico, had recourse to the Ontario Motor Vehicle Accident Claims Act (MVAC) for statutory accident benefits. The plaintiff had moved to New Mexico in 1995 to work as a veterinary nurse and owned a truck that was registered and insured in New Mexico. She was transported to a hospital in Toronto. While the appeal turned on whether the plaintiff ordinarily resided outside of Ontario and, if so, whether MVAC was responsible for paying benefits, I note at the Court of Appeal, noted at para. 31, held that the New Mexico insurer was not bound by the Ontario legislation. In arriving at its decision, the Court observed that Statutory Accident Benefits under s. 268(1) of the Insurance Act and the Statutory Accident Benefits Schedule only applies to a contract providing insurance in respect of an automobile required to be registered under the *Highway Traffic Ac*t (para. 29). In this case, the Court found that since her vehicle need to be registered in Ontario and since her insurance policy did not need to comply with the mandatory coverage provisions, the benefits in the Schedule that would be triggered by s. 268(1) of Ontario's Insurance Act did not apply.

[86] While the Arbitrator did not expressly refer to s. 226 of the Insurance Act, the restriction set out yields the same result. For example, MPI relied on s. 121(1) of the Insurance Act which suggests that the Lieutenant Governor in Council may make regulations establishing benefits under Part VI and requiring insurers to offer optional benefits. The Arbitrator stated: "Specifically they are the benefits that are set out under Subsection 121(1) paragraphs 9 and 10, and these make reference to the actual Statutory Accident Benefits Schedule that forms a part of the Ontario Insurance Act and the standard automobile insurance policy of Ontario." She concluded that the reference under s. 268 of the Insurance Act to the contract being evidenced by a motor vehicle liability policy being required to include Statutory Accident Benefits refers to the benefits under the Ontario Act, not under an Insurance Act or Motor Vehicle Liability policy of some other province or state. She was not persuaded that s. 268 of the Insurance Act was intended to apply to any other policy other than the Ontario policy. In arriving at her conclusion, the Arbitrator relied on the Ontario Court of Appeal decision of Travelers v. CAA stating:

> "…the decisions in Travelers v CAA from the Ontario Court of Appeal make it clear that the Section 268 2 of the Insurance Act which sets out the priority scheme applies to an Insurer who is obliged to pay Ontario Statutory Accident Benefits. To find otherwise would mean that the Ontario Insurance Act would have extra territorial application in my view.

[87] It stands to reason that if Part VI of the Insurance Act does not apply to the MPI contract then the relevant provisions of s. 121(1), clause 9 and 10, which also refer to Part VI of the Insurance Act, also has no application. The Arbitrator made no error in her conclusion that the Statutory Accident Benefits refer to those benefits referred to in the Statutory Accident Benefits Schedule under the Ontario Act. Her conclusion is supported by the very definition of the Statutory Accident Benefits Schedule relied upon by MPI, which references the Regulations made under paragraphs 9 and 10 of subsection 121(1) of the Insurance Act and the restriction in s. 226(2) of the Insurance Act.

[88] As the claimants were residents of Manitoba with valid insurance in Manitoba at the time of the accident, their policy of insurance could not be governed by both Ontario law and Manitoba law. In the result, given the insurance contract issued by MPI because of the claimants' vehicle being registered in that province, the restriction in s. 226(2) means the contract would not be governed by the Ontario Insurance Act. As noted also by author Donnelly in the text, Insurance Law in Canada, "the courts have held that if a vehicle is required to be registered in another province, the insurance attached to the registration in the former province is no longer in effect."

iii. **The Arbitrator did not err in her interpretation of the statute and regulations**

[89] The Arbitrator also stated in her reasons:

> I find that the Insurer under Section 275(1) the Insurer responsible under Subsection 268 (2) for the payment of Statutory Accident Benefits to trigger their right to indemnification must have paid Ontario Statutory Accident Benefits. I find that the reference to indemnification in relationship to such benefits refers back to the opening words of the Section that references Statutory Accident Benefits and that being a defined term under the Insurance Act must reference Ontario Statutory Accident Benefits pursuant to the definition provisions. In my view no other interpretation makes sense and to find otherwise would be to invoke some unwarranted extra territorial application of the Ontario Insurance Act its regulations its priority provisions and its loss transfers provisions.

[90] In my view, the Arbitrator made no error in her interpretation of the Insurance Act and the related regulations and in arriving at the conclusion that s. 275 was not available to MPI in the result.

[91] The modern principle or approach to statutory interpretation read the words of a statute 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: Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 41, at para. 21; Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10.; Meloche v. Meloche, 2021 ONCA 640 (CanLII), at para. 65Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at 87.

[92] The provisions of related legislation must be read in the context of the others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act: Alexis v. Alberta, 2020 ABCA 188, n. 32; 8 Alta. L.R. 7th 314, n. 32, leave to appeal ref'd, [2020] S.C.C.A. No. 227 per Wakeling & Greckol, JJ.A. See R. Sullivan, Sullivan on the Construction of Statutes 408 (7th ed. 2022). The presumption of consistent expression also applies statutes dealing with the same subject matter:

[93] Where the provision at issue is clear and unambiguous, its terms must simply be applied: The Queen v. Zundel, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731, 771; Covert v. Nova Scotia, 1980 CanLII 229 (SCC), [1980] 2 S.C.R. 774, 807. Although a court may look to the purpose of the Act, it must still respect the actual words which express the legislative intention: Hill v. The Queen, 1976 CanLII 173 (SCC), [1977] 1 S.C.R. 826, 850 (1976).

[94] One of the principles of statutory interpretation is to look at the plain works of the provision: Thomson v. Canada, 1992 CanLII 121 (SCC), [1992] 1 S.C.R. 385, 399-400. Where the words used in the Act are clear and unambiguous, no other step is needed to identify the intention of Parliament: The Queen v. Rodgers, 2006 SCC 15, ¶ 20; [2006] 1 S.C.R. 554, 573. Statutory Accident Benefits has a defined statutory meaning throughout the Insurance Act and the regulations. Statutory Accident Benefits Schedule also has a defined statutory meaning. In this case, the words used by the legislature are clear and unambiguous and sustain the interpretation arrived at by the Arbitrator, that is, to say, that the reference to the contact being evidenced by a

motor vehicle policy being required to include Statutory Accident Benefits refers to the Statutory Accident Benefits under the Ontario Act, and not to an Act or motor vehicle liability policy of some other province or state.

[95] As indicated above, the loss transfer regime is governed by section 275 of the *Insurance Act*, and the companion regulation which spells out the fault determination rules (FDRs). The regime may apply to accidents involving certain classes of vehicles, such as motorcycles, motorized snow vehicles and smaller vehicles, to seek indemnification for payments for statutory accident benefits made from the insurer of certain other classes of vehicle, i.e. heavy commercial vehicle, as defined by the regulation. The insurer who pays the benefit is the "first party insurer" and the insurer to whom the claim is transferred is the "second party insurer". Each insurer is responsible for payment in accordance with the degree of fault of their respective insured as determined by the fault determination rules.

[96] Section 9(1) of R.R.O. 1990. Reg. 664, sets out the following key definitions:

i. "First Party Insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits.

ii. "Second Party Insurer" means an insurer required under section 275 of the Act to indemnify the First Party Insurer.

[97] The insurer's entitlement to loss transfer is solely a creature of Part VI of the *Insurance Act*, section 275. Section 275(1) of the Insurance Act provides indemnification between insurers in certain circumstances. The section reads as follows:

> 275(1) 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 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.

[98] Pursuant to s. 275(2) of the Act, the percentage allocation for indemnification is made "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules". The provision reads as follows:

> 275(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

[99] Subsection 275(4) of the *Insurance Act* requires the insurers to submit to arbitration where there is a disagreement between them under that section:

> 275(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitrations Act.

[100] The same rules of statutory interpretation apply to regulations. A regulation must be read in the context of the enabling legislation, having regard to the purpose of the enabling legislation: Hickman Motors Ltd. v. Canada, 1997 CanLII 357 (SCC), [1997] 2 S.C.R. 336, 148 D.L.R. (4th) 1, at para. 37 State Farm Mutual Automobile Insurance Co. v. Old Republic Insurance Co. of Canada, 2015 ONCA 699, 127 O.R. (3d) 465; Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533, [2005] S.C.J. No. 26, 2005 SCC 26, at paras. 37-38; S.H. v. D.H., 2019 ONCA 454, 146 O.R. (3d) 625, at para. 31; see also Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed. (Markham: LexisNexis, 2014) at § 13.18.

[101] The relevant regulations, with respect to loss transfer, R.R.O. 1990, Reg. 664, titled “Automobile Insurance” and the fault determination rules found in R.R.O. 1990, Reg. 668 under the Insurance Act. Since s. 121(1) refers to “establishing benefits for the purposes of Part VI” and my earlier comments above, the applicability of this section is already dealt with. However, it is necessary to consider

[102] Under s. 9 of R.R.O. 1990, Reg. 664, "Automobile Insurance", under the heading titled "Indemnification for Statutory Accident Benefits (Section 275 of the Act) indicates that the insurer of an automobile other than motorcycles is a "second party insurer" that would be required to indemnify the "first party insurer" responsible under s. 268(2) for the payment of statutory accident benefits if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises.

[103] The relevant definitions are:

9. (1) in this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

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

…

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

> (a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

> (i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
>
> (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or
>
> (b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,
>
> (i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
>
> (ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy.
>
> (3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

[104] The term Statutory Accident Benefits and Statutory Accident Benefit Schedule are defined terms in the Insurance Act and related regulations.

[105] Section 268(1) reads as follows:

> Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[106] "Benefits" are defined in that Regulation as "statutory accident benefits as defined in subsection 224(1) of the Act.

[107] "Schedule" is defined in that Regulation as "in respect of an accident, the Statutory Accident Benefits Schedule as defined in subsection 224(1) of the Act that applies in respect of the accident."

[108] "Statutory Accident Benefits" is defined under s. 224(1) of the Ontario Insurance Act to mean "the benefits set out in the regulations made under paragraphs 9 and 10 of subsection 121(1)".

[109] "Statutory Accident Benefit Schedule" is defined under s. 224(1) of the Ontario Insurance Act to mean "the regulations made under paragraphs 9 and 10 of subsection 121(1).

[110] Section 121(1) of the Ontario Insurance Act sets out that "The Lieutenant Governor in Council may make regulations

> 9. Establishing benefits for the purposes of Part VI that must be provided under contracts evidenced by motor vehicle liability policies and establishing terms, conditions, provisions, exclusions and limited related to such benefits."
>
> 10. requiring insurers to offer optional benefits in excess of the benefits that must be provided under paragraph 9 prescribing the circumstances in which the optional benefits are to be offered and establishing terms, conditions, provisions, exclusions and limits related to such benefits.

[111] The Arbitrator noted that no Ontario Statutory Accident Benefits were paid, and therefore s. 275 was not available to MPI. She noted:

> "There having been no Application by way of an OCF-1 by these Claimants to seek Ontario Statutory Accident Benefits, and no Ontario Statutory Accidents (sic) having been paid, I find that Section 275 of the Insurance Act is not triggered in favour of MPI.

[112] An "Application" is defined in that Regulation as "an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule."

[113] MPI looks to the intention of the loss transfer provisions in and submits that the intention of the loss transfer provisions to distribute the burden evenly among insurers required to participate in the Ontario legislation. MPI argues that the intention is rendered meaningless as a result of the Arbitrator's decision. I disagree.

[114] A series of FSCO Bulletins highlight the objective of the loss transfer regime. Based on the expressed objectives, which were highlighted by the Ontario Court of Appeal in State Farm Mutual Automobile Insurance Co. v. Old Republic Insurance Co. of Canada, 2015 ONCA 699, 127 O.R. (3d) 465, it would be unreasonable for the court to assume the Ontario legislature intended to regulate or impact the stability of or of the cost of automobile insurance in the province of Manitoba.

[115] The Arbitrator referred relied on the decision of the Supreme Court of Canada in the Insurance Corporation of British Columbia v Unifund 2003 2 SCC 63. In her reasons, she stated:

> The Supreme Court of Canada found that Section 275 of the Ontario Insurance Act was inapplicable as to apply that provision in the circumstances of the case would not respect territorial limits on provincial jurisdiction. The Court stated the following:
>
> Section 275 on the Ontario Insurance Act is constitutionally inapplicable to the Appellant because its Application under the circumstances of this case would not respect territorial limits on provincial jurisdiction. This territorial restriction is fundamental to our system of Federalism in which each province is obliged to respect the sovereignty of the other

> provinces within their respective legislative spheres and expect the same in return. The territorial limits on the scope of provincial legislative authority prevent the Application of the law of a province to matters not sufficiently connected to it. Different degrees of connection to the enacting province may be required according to the subject matter.

[116] As noted by C. Brown & T. Donnelly, Insurance Law in Canada 13-18, n. 2 (looseleaf 2022 rel. 2: "All provinces have legislated schemes for first-party coverage for personal injury in auto accidents. These schemes vary widely ... including as regards subrogation. In some, subrogation is essentially eliminated while in others it is preserved in part".

[117] Section 92(13) of the Constitution Act, 1867 gives the province authority to legislate in relation to automobile insurance. As noted by Binnie J. in *Unifund Assurance Co.* v. *Insurance Corp. of B.C.*, 2003 SCC 40, [2003] 2 S.C.R. 63, 88: "The authority to legislate in respect of insurance is founded in s. 92(13), which confers on each legislature the power to make laws in relation to 'Property and Civil Rights in the Province'".

[118] The loss transfer regime was ushered in June 1990. The FSCO Bulletins indicate this was to address the costs implications of the tort-based compensation and Accident Benefits Schedule which expanded no-fault benefits. FSCO Bulletin No. A-11/94 provides the following overview of the loss transfer regime:

> Loss Transfer permits insurers that pay accident benefits (the "first party insurer") to be indemnified by another insurer (the "second party insurer") for all or part of the accident benefits paid to an insured person, under certain circumstances.
>
> Loss transfer was introduced in order to balance the cost of providing accident benefits between specified classes of vehicles.
>
> Loss transfer operates between insurers of classes of automobiles specified in the Regulation … and applies only when the insured of the second party insurer was partly or entirely at fault in the accident.
>
> …
>
> It should be noted that **there is no right of subrogation for accident** benefits.

[119] Bulletin No. A-11/94 also addresses the question "Which statutory accident benefits may be the subject of a loss transfer indemnification request?" as follows:

> First party insurers are entitled to be reimbursed for all accident benefit payments made under the Statutory Accident Benefits Schedule, subject to the $2,000 deductible discussed below. Now that the new Schedule is in effect, loss transfer is now available for the following kinds of benefits: the cost of any assessment conducted under the Schedule; the cost of services provided by a case manager related to the coordination of medical,

> rehabilitation and attendant care services; and all expenses covered by the Schedule (emphasis added).

[120] In *State Farm Mutual Automobile Insurance Co.* v. *Old Republic Insurance Co. of Canada*, the Court of Appeal reviewed the rationale for the loss transfer scheme. The Court noted that the rationale for the loss transfer was explained in the series of Bulletin by the Financial Services Commission of Ontario (formerly the Ontario Insurance Commission), with the expansion of the no-fault system in 1990. The intent was to balance the costs of providing compensation for no-fault benefits between insurers of specified classes of vehicles in certain circumstances.

[121] The rationale was examined by the Ontario Court of Appeal in *State Farm Mutual Automobile Insurance Co.* v. *Old Republic Insurance Co. of Canada*, 2015 ONCA 699, 127 O.R. (3d) 465. Simmons J.A., speaking for the Court, explained, at paras. 25 to 28, as follows:

> [25] Thus, the loss transfer provisions shift the financial burden of first party SABs payments to insurers of heavy commercial vehicles from other classes of automobiles in certain circumstances where one or more heavy commercial vehicles is involved in an incident. In certain circumstances, they also shift the financial burden of first party SABs payments from insurers insuring motorcycles, off-road vehicles and motorized snow vehicles to insurers of other classes of automobiles…
>
> [27] Bulletin A-9/92 explains loss transfer as follows:
>
> Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay no-fault benefits (the first-party insurer) may be reimbursed by another insurer (the second-party insurer) for all or part of a claim.
>
> Loss transfer only operates between insurers of different classes of vehicles . . . and only applies when the policyholder of the second-party insurer was at least partly at fault in an accident. <u>The purpose of loss transfer is to balance the cost of no-fault benefits between different classes of vehicles</u>. [Emphasis in original text)
>
> [28] Bulletin A-11/94 points out that there is no right of subrogation for SABs and explains in more detail the rationale for loss transfer:
>
> Since June 1990, insureds look to their own insurers for accident benefits instead of seeking compensation from third parties. Certain types of vehicles that might have been less likely to experience bodily injury claims under a tort-based compensation system are more likely to require accident benefits payments for such claims under a no-fault system. Loss Transfer balances the cost of providing compensation on a first party basis between these specified classes of vehicles. For example, <u>loss transfer shifts costs from insurers insuring motorcycles to insurers of other classes of automobiles under certain circumstances. Loss transfer also shifts</u>

> costs to insurers of heavy commercial vehicles from other classes of automobiles under certain circumstances.

[122] In *Jevco Insurance Co.* v. *York Fire & Casualty Co.* (1996), 27 O.R. (3d) 483, [1996] O.J. No. 646 (Ont. C.A.), at p. 486 O.R., the Court of Appeal observed that 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", or, as reframed by the same court in State Farm Mutual Automobile Insurance Co. v. Old Republic Insurance Co. of Canada, 2015 ONCA 699, 127 O.R. (3d) 465, at para. 86, in interpreting the provisions at issue in the Fault Determination Rules: “Those provisions are designed to balance the financial costs of SABs payments among insurers of different classes of vehicles ‘in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude’.” Fault is determined strictly in accordance with the prescribed regulation: *State Farm Mutual Automobile Insurance Co.* v. *Old Republic Insurance Co. of Canada*, 2015 ONCA 699, 127 O.R. (3d) 465; Jevco Insurance Co. v. Canadian General Insurance Co. (1993), 14 O.R. (3d) 545, [1993] O.J. No. 1774 (C.A.), at p. 545.

[123] As ICBC points out, in Manitoba, a person injured in an automobile accident has no right to sue for personal injury or death. Manitoba is a pure no-fault jurisdiction while Ontario is a mixture of tort and no-fault with restrictions on the right to sue in tort. In Manitoba, there is a right of subrogation. C. Brown & T. Donnelly, Insurance Law in Canada 13–25 (looseleaf 2022 rel. 2), pointed out: “It is an important policy question whether compensation for injuries suffered in automobile accidents should be paid primarily from no-fault insurance or from persons at fault”.

[124] The same would be true with respect to whether there is a right of subrogation. In Ontario, there is no right of subrogation. Under the *Manitoba Public Insurance Corporation Act*, s. 76 affords MPI a right of subrogation for accidents which occur outside Manitoba. The section reads:

> 76(2) Notwithstanding section 72 (no tort actions), where a person is entitled to compensation under this Part in respect of an accident that occurred outside Manitoba, the corporation is subrogated to the person's rights and is entitled to recover the amount of the compensation from any person
>
> (a) who is not resident in Manitoba and is responsible for the accident under the law of the place where the accident occurred; or
>
> (b) who is liable for compensation for bodily injury caused in the accident by the non-resident.

iv. Can MPI avail itself of s. 275 by virtue of being a signatory to the PAU?

[125] MPI also relies on section 226.1 describes “Out-of-Province Insurers” as:

> an Insurer that issues motor vehicle liability policies in another Province of Territory of Canada, the United States of America or a jurisdiction designed in the Statutory Accident Benefits Schedule may file an undertaking with the Chief Executive Officer in the form provided by the Chief Executive Officer providing that the insurer's motor vehicle liability policies will provide at least the coverage described in Sections 251, 265 and 268 when the insured automobiles are operated in Ontario.

[126] The undertaking under s. 226.1 therefore obliges an out of province insurer to make available certain minimum coverages available under its home policy while the vehicle insured is being operated in Ontario. The minimum limits are third party liability limits of $200,000 (s. 251), uninsured motorist coverage (s. 265) and stat, uninsured motorist coverage, and statutory accident benefits.

[127] As for the PAU, upon which MPI heavily relies, it requires out of province insurers to appear in any action or proceeding against it or it's insured in the province or territory where such action has been instituted. It also requires the insurer who files the PAU not to set up any defence to any claim, action or proceeding under a motor vehicle liability insurance contract entered into in which it might not have been available if the contract had been entered into in accordance with the laws of the province where the action or proceeding has been instituted.

[128] I agree with ICBC that the effect of MPI signing the PAU was that MPI had undertaken to provide Ontario Statutory Accident Benefits to the Claimants, had they so chosen to receive them, because they were injured in an accident in Ontario.

[129] In my view, the Arbitrator was correct in the first part of her analysis by examining the contractual nexus and the requirement to pay benefits. She was correct in her application of Unifund when she stated that "The Supreme Court of Canada clearly indicates here that Section is to deal with the payment of the SABS under the Ontario Insurance Act". I agree with her proposition that the PAU filed by MPI "required it to observe Ontario rules to a certain extent where its insured was involved in Ontario proceedings, and her conclusion that "….that does not render the Manitoba police one that is made in Ontario". She went on to state: "The fact that the accident occurred in Ontario and that MPI filed a PAU does not make the Manitoba policy one that was made in Ontario even though its insureds could have elected to seek Ontario benefits pursuant to the PAU.

[130] The PAU does not make MPI an Ontario insurer. I also note that there is no proceeding against MPI or its insured but rather, s. 275 is a statutory cause of action. In my view, the Arbitrator made no error in conclusions that the fact that the accident occurred in Ontario and MPI filed a PAU does not make the Manitoba Policy an Ontario policy even though the claimants could elect to receive Ontario benefits under the PAU.

[131] MPI suggests that the Arbitrator relied on *McDonald* v *Proctor* (1977), 86 D.L.R. (3d) 455. I disagree. Although she referred to the case and noted that issues arose with respect to the PAU, she then turned to the Supreme Court of Canada decision in Unifund Assurance Company of

Canada v. ICBC, 2003 SCC 40, [2003] 2 S.C.R. 63. It is evident from her reasons and discussion of Unifund that the Arbitrator accepted Unifund to be the controlling authority on extra territorial application of provincial law. In my view, she did not err in her application of the law. She noted that the Supreme Court examined "the statutory cause of action" and took note of the observation from that Court that it was a "statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABS under the 'Ontario Insurance Act'". The Arbitrator went on to state: "The Supreme Court of Canada clearly indicates here that Section 275 is to deal with the payment of the SABS under the Ontario Insurance Act."

[132] ICBC insured the parties who had caused the accident and had to pay $2.5 million in tort damages. S. 25(5) of the British Columbia Insurance Motor Vehicle Act entitles insurers to deduct from a damage award benefits such as the benefits paid by Unifund to the insured persons. Since there is no such provision in the Ontario Automobile Insurance Regulations, Unifund, sought to appoint an arbitrator under s. 275(4) of the Ontario Insurance Act. The Supreme Court held that the Ontario regulatory scheme did not apply to an out-of-province insurer in the circumstances of that case. The court disagreed with Unifund's claims that ICBC was bound either because there was a "real and substantial connection" between ICBC and Ontario or, alternatively, because of the PAU it had signed. Binnie J reviewed the caselaw on the meaning of a "sufficient connection" that could justify the application of provincial legislation to out-of-province defendants. He found that a flexible standard must be applied based on the subject matter, persons sought to be subjected to extraterritorial relations, and the relationships among enacting authorities (paras. 63-79).

[133] The following principles are drawn from Unifund, which, in my view, the Arbitrator relied on as the controlling authority:

i. A province cannot legislate extra-territorially, which flows from the constitutional restriction in s. 92 of the Constitution Act, 1867, and is a fundamental principle in our system of federalism, Unifund, para. 50 and 51.

ii. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it.

iii. What constitutes a "sufficient" connection will depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it.

iv. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements.

v. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation. (para. 56)

[134] The main connection that MPI seems to rely on is the existence of the PAU. MPI submits that the purpose of the PAU is to create an interprovincial enforceability of automobile insurance

contracts. MPI relies on Potts v. Gluckstein, 1992 CanLII 7623 (ON CA), and Healy v. Interboro Mutual, 1999 CanLII 1485 (ON CA), which both pre-date the Supreme Court of Canada decision in Unifund. The Supreme Court referred to this proposition in Unifund. The Supreme Court also noted: "The Court thus recognized the limited effect of the PAU and did not accept as correct the theory of interprovincial integration urged in this case by the respondent". The Court recognized the "pro-compensation, consumer-protection function"[ii] urged by Professor V. Black. The Court also observed that a PAU is not intended to help insurance companies by extending the loss transfer and priority obligations to extraterritorial insurers: para. 24.

[135] In addition, Potts is distinguishable. In this case, ICBC had signed had filed an Undertaking but sought to raise a defence to uninsured motorist coverage. Healy involved a similar situation. The question was whether the PAU precluded the insurer from asserting the defence that its policy does not include statutory accident benefits coverage mandated by s. 268(1) of the Insurance Act. In this case, there is no dispute that as a result of the PAU signed by MPI, the claimants could not elected to receive statutory accident benefits at the Ontario level.

[136] Counsel for MPI attempted to distinguish Unifund on the basis that the accident occurred in British Columbia. At issue in Unifund, was whether the respondent, ICBC, as an out-of-province insurer was bound by an Ontario regulatory scheme. The central issue on appeal was whether allowing an Ontario insurer to rely on a regulatory scheme in Ontario in relation to an accident in British Columbia would violate territorial limits of provincial jurisdiction even though ICBC had signed a PAU. Unifund was the insurer of an Ontario resident injured in a motor vehicle accident in British Columbia. It had paid $750,000 in statutory accident benefits.

[137] In Unifund, the Supreme Court agreed with the comments of the Ontario Court of Appeal in Healy v. Interboro Mutual Indemnity Insurance Co. (1999), 1999 CanLII 1485 (ON CA), 44 O.R. (3d) 404 (C.A.), at p. 409, that: "The PAU is about enforcement of insurance policies, not about helping insurance companies, which have been paid a premium for the no-fault coverage, to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction, and where the claims arising out of the accident were litigated there." [emphasis added].

[138] Accordingly, MPI cannot rely on the PAU as a means of pursuing a right of indemnification against ICBC in the circumstances of this case. This view is further supported by a further observation made by the Supreme Court in Unifund, and that is that "the PAU is aimed at litigation arising directly out of the motor vehicle accident itself is confirmed by the nature of the three undertakings". At para, 101, the Court observed:

> While the Protected Defendant Undertaking operates in addition to the PAU, which remains in full force and effect, its terms seem to me to reinforce the nature of the arrangements between the appellant and Ontario, which have to do with defending claims under the appellant's insurance policies, not defending a claim under the Ontario Act to re-allocate the cost of payments required by the Ontario Act amongst insurance companies subject to the Ontario Act.

[139] Here, there is no proceeding by or against MPI's insured for which MPI must enter an appearance or defend. There is no proceeding against MPI either. MPI was not called upon to pay benefits under the Ontario Statutory Accident Benefit Schedule. The obligations of the insurer under the PAU are therefore not triggered.

[140] The fact that MPI and ICBC are signatories of the PAU, without more, does not mean that the contracts insurance issued in their respective provinces are subject to the Ontario Insurance Act and related regulations, because the accident occurred in Ontario. To hold otherwise would amount to an "impermissible extraterritorial application of provincial legislation".

[141] MPI relies on the recent decision of Dow J. in *Allstate* v. *TD Home & Auto*, 2020 ONSC 6969. Counsel for MPI argues that this case is a mirror image of the issue in this appeal. I disagree. In the Allstate v. TD Home, the claimant was an Ontario resident who was involved in an accident in Michigan. There were two Ontario policies at issue in that case. Under the Statutory Accident Benefit Schedule, the claimant had the choice of electing benefits under the Ontario statutory regime or Michigan benefits. He elected to receive Michigan benefits, and the insurer who received the application first paid Michigan benefits. The insurer who was in priority under s. 268(2) of the Insurance Act, accepted priority but only wanted to pay benefits at the level available under the Statutory Accident Benefit Schedule. In my view, the case is distinguishable as it involved neither a loss transfer but rather quantum to be paid in a priority dispute.

[142] Dow J. himself commented that he doubted whether s. 275 applied. He also noted that there were two standard Ontario automobile policies for accident benefits under the SABS. On the facts before me, none of the policies are standard Ontario policies. In *Young* v. *Ontario (Minister of Finance)* (2003), 2003 CanLII 23640 (ON CA), 68 O.R. (3d) 321 (C.A.), the Court of Appeal held that the priority dispute process set out in s. 268 of the Ontario Insurance Act applies only if both insurers are bound by the Act.

XI. **Does the failure to provide reasons amount to an error in law?**

[143] MPI argues that absent recourse to Section 275 of the *Insurance Act*, the Arbitrator retains equitable jurisdiction, either by agreement or pursuant to the Arbitrations Act, to consider restitution. MPI relies on the following cases: *Coseco* v. *Liberty Mutual*, 2019 ONSC 4918 (CanLII), at paras. 18 and 19; *Intact* v. *Gore*, 2019 ONSC 4508 (CanLII), at paras. 84-90; *Allstate* v. *TD Home & Auto*, 2020 ONSC 6969 (CanLII), at para. 18.

[144] MPI submits that the parties submitted the following issues dispute:

a) Pursuant to Section 275 of the Insurance Act is MPI entitled to recover all amounts paid as Accident Benefits to the Claimants Qi Li and Zhe Zhang arising as a result of a motor vehicle accident that occurred near Thunder Bay Ontario on December 18 2017?

b) Is MPI entitled to recover all amounts paid as Accident Benefits to the Claimants Qi Li and Zhe Zhang arising as a result of a motor vehicle accident that occurred near Thunder Bay

> Ontario on December 18, 2017, based on the arbitrator's equitable jurisdiction set out in the Arbitrations Act

[145] MPI submits that it asked that the Arbitrator exercise equitable jurisdiction to allow for restitution of the amounts paid by MPI to its insureds, but the Arbitrator failed to provide any reasons as whether she would exercise her jurisdiction to allow for the repayment of benefits, or if not, why she would not exercise her discretion in this regard.

[146] ICBC submits that this issue was not within the scope of the Arbitration Agreement. ICBC further argues that it would not be equitable nor reasonable to order ICBC to reimburse foreign payments under the MPI policy, as the payments encompass a lump sum disability which has no equivalent in the Ontario SABS.

[147] Despite counsel for MPI's persuasive argument I see no error by the Arbitrator in failing to provide reasons with regarding equitable relief for the reasons which follow.

[148] In resolving a dispute for indemnification under s. 275 of the *Insurance Act*, the parties must resort to the Arbitration Act, 1991, SO 1991. Section 31 of the Act provides that: "An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies." However, the Arbitrator's authority is derived from the Arbitration Agreement entered between the parties: *Smyth* v. *Perth & Smiths Falls District Hospital et al*., 2008 ONCA 794, 92 O.R. (3d) 656. The Arbitrator noted in her overview of the process that the parties "submitted an Arbitration Agreement. Some of the terms of the Arbitration Agreement however remain in dispute. The issue upon which the parties cannot agree does not have any bearing on my jurisdiction." Turning to the "Issues in Dispute", the Arbitrator indicated: "The Arbitration Agreement did not set out the issue in dispute here other than setting out Section 275 of the Insurance Act and the loss transfer provisions."

[149] The only document before me evidencing what issue the parties agreed to put to the arbitrator is found in the letter of Guy Jones dated March 27, 2020 and stated as follows: "Is MCI entitled to Loss Transfer as a result of the accident benefit payments made to the injured parties as a result of the accident of December 18, 2017." I note that the Arbitrator turned to the parties' factum in order to identify the two issues set out at the top of page two of her decision.

[150] In the absence of an arbitration agreement, the court is not able to determine whether the Arbitrator was authorized to deal with any equitable remedies, a matter that is disputed by ICBC.

[151] I also do not find the cases cited stand for the proposition advanced by counsel for MPI. *Coseco* v. *Liberty* does not address the issue at all. Intact v. Gore is distinguishable as the parties had entered into an Arbitration Agreement, and in fact, the paragraphs that the court was referred to merely state the law, outlined above. In fact, at para. 93 of *Intact* v. *Gore,* Nakatsuru J., after reviewing much of the Arbitration Agreement before him, commented that:

> In this case, the terms of the Arbitration Agreement are clear and focused. I recognize that clause four of the Arbitration Agreement gives the power to the Arbitrator to grant any

> relief appropriate to the facts and circumstances that a judge of the Ontario Superior Court would have at trial. I have considered whether this clause could provide the jurisdiction for the Arbitrator to proceed under the Alberta scheme. Certainly, it could provide the Arbitrator the jurisdiction to invoke the equitable remedy of restitution, as he did when he ordered Gore to reimburse Intact the Alberta-level benefits paid to date. However, I find that clause four is merely a remedial provision. Clause four does not provide the Arbitrator with the jurisdiction to determine priority under the Alberta legislation (emphasis added).

[152] Just as in the case of *Intact* v. *Gore*, similarly, in *Allstate* v. *TD Home & Auto* there was an Arbitration Agreement, and as noted by Dow J., at para. 18: "The answer to whether the Arbitrator had the authority to make the order that he made arises from the Arbitration Agreement entered into between the parties."

[153] In any event, MPI has not provided any authority to support its position that a private arbitrator must provide reasons on every issue raised by the parties, and as appears in this case, beyond the scope of the agreement of the parties.

XII. **Conclusion**

[154] Section of the Insurance Act does not operate in a vacuum. The insurer's statutory right to seek indemnification under s. 275 of the Insurance Act, derives its existence from a contract of insurance issued to the owner of a particular automobile. The extent to which the second party insurer must indemnify the first party insurer is based on the degree to which the insured automobile is at fault based on the prescribed regulation. The Arbitrator did not err in concluding that the Ontario Insurance Act, and associated regulations, in the circumstances, do not have extra territorial application.

[155] The appeal is dismissed.

XIII. **Costs**

[156] If the parties are not able to resolve the issue of costs, the respondent ICBC may submit its submission on costs within fifteen days of the date of these reasons, and the appellant within fifteen days thereafter.

Justice A.P. Ramsay

Released: July 13, 2023

CITATION: Manitoba Public Insurance v. Insurance Corporation of British Columbia, 2023 ONSC 3658

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MANITOBA PUBLIC INSURANCE

Plaintiff

– and –

INSURANCE CORPORATION OF BRITISH COLUMBIA

Defendant

REASONS FOR JUDGMENT

A.P. Ramsay J.

Released: July 13, 2023

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[i] O. Reg. 34/10, as amended

[ii] (V. Black, "Interprovincial Inter-Insurer Interactions: Unifund v. ICBC" (2002), 36 Can. Bus. L.J. 436, at p. 444)