

**IN THE MATTER** of the *Insurance Act*, R.S.O. 1990 c. I.8, s. 275

**AND** Ontario Regulations 664 and 668 thereunder

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

**AND IN THE MATTER OF AN ARBITRATION**

**THE COMMONWELL MUTUAL INSURANCE GROUP**

Applicant

and

**ECONOMICAL MUTUAL INSURANCE COMPANY AND INTACT INSURANCE COMPANY**

Respondents

**AWARD**

**COUNSEL/REPRESENTATIVE**

Cecil R. Jaipaul, representative for the Applicant, The Commonwell Mutual Insurance Group (hereinafter called Commonwell).

Megan Murphy, counsel for the Respondent, Intact Insurance Company (hereinafter called Intact).

Daniel Strigberger, counsel for the Respondent, Economical Mutual Insurance Company (hereinafter called Economical).

**INTRODUCTION**

This matter comes before me pursuant to s. 275 of the *Insurance Act* and Regulation 664 as amended. This is a dispute among three automobile insurers with respect to a claim for loss transfer arising out of an accident that occurred on September 27, 2017.

The parties, on consent, appointed me as an arbitrator pursuant to s. 275(4) of the *Insurance Act*, Regulation 664 and the *Arbitration Act*. The parties signed an Arbitration Agreement dated February 5, 2025.

By way of background, on September 27, 2017 the two claimants were the driver and passenger

of a 2012 Mazda 3 insured by Commonwell. This vehicle was rear-ended by a 2004 Peterbilt truck. It has been accepted that the Peterbilt truck was 100% at fault for the accident.

The two claimants applied to Commonwell for statutory accident benefits.

It is also agreed amongst the parties that the Peterbilt truck was a heavy commercial vehicle as defined under s. 9(1) of Regulation 664. Commonwell claims entitlement to loss transfer in accordance with s. 275 of the *Insurance Act* against Economical and Intact.

This dispute is primarily about whether Economical can resile from an acceptance of loss transfer in the circumstances of this case.

Commonwell and Intact stand together arguing that Economical is bound by its acceptance of loss transfer and cannot resile from that position.

## **PROCEEDINGS**

The hearing was conducted in writing together with a half day for oral submissions. The parties submitted an Agreed Statement of Facts, a Joint Book of Documents, Factums and case law. The Joint Book of Documents included a copy of the Police Report, various letters and e-mails as well as relevant loss transfer documents exchanged between Commonwell and Economical and Commonwell and Intact. Also included were the log notes of Economical and a copy of the relevant Intact insurance policy.

## **ISSUE FOR DETERMINATION**

The Arbitration Agreement set out a number of broad issues for my consideration but having reviewed all the materials, the issue can be narrowed down to the following:

Has Economical waived its right to deny and dispute loss transfer following its acceptance of loss transfer by letter dated January 24, 2019?

## **AWARD**

I conclude that Economical has waived its right to deny and dispute loss transfer with respect to Commonwell's claim arising out of the accident of September 27, 2017 and subject to any arguments with respect to quantum, Economical has the obligation to reimburse Commonwell with respect to reasonable statutory accident benefits paid to the two claimants.

## **FACTS**

On September 27, 2017 the claimant and her daughter were occupants of a 2012 Mazda 3 insured under the Commonwell policy bearing policy number 227912A01 (DBX).

The Commonwell vehicle was rear-ended by a 2004 Peterbilt truck which according to the Police Report was driven and owned by Florent Perreault.

Also, according to the Police Report the Perreault vehicle was insured by Economical under policy 64013387.

The claimants applied to Commonwell for statutory accident benefits and Commonwell has paid various benefits to both claimants over the course of the years.

On February 16, 2018 Commonwell sent Economical a Notification of Loss Transfer. The covering letter identified the insured as "Florent Perrault" and the policy number of 64013387.

Within the letter of February 16, 2018 Economical described where the loss took place, the name of the driver (the same as the insured) and that the vehicle involved was a 2004 Peterbilt. The letter indicated that Commonwell took the position that Economical's driver was 100% responsible for the accident. The Commonwell claims specialist included a copy of the Motor Vehicle Accident Report as well as the formal Notification of Loss Transfer. Also attached to the letter of February 16, 2018 was a copy of a Commonwell document called a "Third Party Automobile Report". This document had been e-mailed (date unknown) from Commonwell to Economical. Economical had acknowledged receipt of it by e-mail dated January 11, 2018 and advising that the document would be forwarded to the appropriate unit for review.

The Third Party Automobile Report included the following:

Your insured: Florent Perrault  
Your policy number: 64013387  
Your vehicle: 2004 Peterbilt

It also advised that the Economical vehicle had rear-ended the Commonwell vehicle and that the claim had not yet been reported to Economical. The note ended that on receipt of this report that there was a request for Economical to contact Commonwell to:

- Acknowledge receipt of claim;
- Verify your policy was in force at the time of the loss;
- Discuss and confirm any issues concerning liability.

The Notification of Loss Transfer document attached to the letter of September 16, 2018 identified the policy number of 64013387. It indicated the name of the policyholder was Florent Perrault and that the class of vehicle insured was a heavy duty - commercial.

On March 22, 2018 Economical requested a copy of Commonwell's declaration pages with respect to their policy as well as copies of the OCF-1, OCF2 and OCF3.

According to Economical log notes, when the Notification of Loss Transfer was made the adjuster

indicated that the claim was being made under Fault Determination Rule 6(2) indicating 100% liability and that "T/P rear-ended by ins." A review of the Police Report also noted in the log notes showed "ins charged; HTA130."

In a log note of March 22, 2018 the Economical adjuster indicates that they are awaiting a copy of the declaration page, the OCF-1, 2 and 3 and also notes "Confirm veh and drivers listed comply with loss transfer." The note goes on to say:

"If loss transfer accepted respond to request for indemnification ... if loss transfer accepted request copy of file, summary of benefits, exposure."

The Economical log notes indicate no further activity on their behalf until September 11, 2018 when the Commonwell adjuster contacts Economical to enquire as to the status of the loss transfer claim. The Economical adjuster advises "We sent letter in March requesting the declaration page, OCF-1, 2 and 3 which remain o-s."

The log notes indicate that the Commonwell adjuster reported that she will forward the declaration page but until Economical accepts loss transfer, she will not provide copies of the OCF-1, 2 or 3 due to privacy.

On November 11, 2018 Commonwell again contacted Economical to enquire as to the status of the loss transfer claim. Economical responded asking for the information that had been outlined in the correspondence of March 22, 2018.

According to the Economical log notes of November 15, 2018 the letter from Commonwell advised that if Economical does not accept loss transfer within a month, that they will retain legal counsel to pursue the matter.

On January 24, 2019 Economical received Commonwell's Certificate of Insurance and the log note shows that it was reviewed and the key details were recorded in the log note.

There was no evidence in the log notes or in any other materials before me to suggest that between March 22, 2018 when the letter and Notification of Loss Transfer were received by Economical up until January 24, 2019 that there was any investigation with respect to confirming the name of their insured, the policy and whether it covered a Peterbilt truck or if the Peterbilt truck was a heavy commercial vehicle.

On January 24, 2019 Economical wrote to Commonwell accepting loss transfer. It is important to note that under the re line that the insured of Economical was not shown as Florent Perrault but was "Les Serres Stephane Bertrand Inc." The policy number was however the same.

The key points of the letter are set out below:

"Our investigation is now complete and confirms our Insured was at fault for the

accident. As a result we will accept your loss transfer claim.

Please forward your Request for Indemnification to the undersigned on a regular basis. Please ensure you provide supporting documentation (proof of payment, invoices OCF-6s, etc.)."

The letter goes on to ask for various documents and information relating to the nature of the accident benefit claim.

The Economical log notes for the same date (January 24, 2019) simply indicate that they are accepting the loss transfer and have requested copies of the AB file, PD file and a summary of the exposure to date.

According to the Economical log notes from January 24, 2019 to December 2, 2019 nothing is received from Commonwell and there are a few follow-ups by the Economical adjuster with respect to the status of the claim and receiving a copy of the AB file.

Although it is unclear from the log notes, it appears that Economical may have received a Request for Indemnification from Commonwell on June 17, 2019 but receipt of that is not acknowledged or noted in the log notes until December 2, 2019. The request for indemnification is for \$6,474.03 less the \$2,000 deductible for a net claim of \$4,474.03. The adjuster makes some notes about concerns that the medical totals do not add up and it is unclear for what actual time period an IRB has been paid.

On December 2, 2019 Economical writes to Commonwell requesting clarification and some additional documentation in order to respond to their request for loss transfer.

The log notes show that the adjuster for Economical reviewed what had been received and there are some comments with respect to the nature of the claimant's injuries.

The log note shows that on September 14, 2020 the Economical adjuster called Deslauriers & Associates to "enquire about the Intact policy details for the vehicle involved in this accident."

There is no evidence in the log notes or elsewhere to explain how the Economical adjuster became aware of the Intact policy at this stage or why that call to Deslauriers was initiated.

On September 24, 2020 the Economical adjuster received an e-mail from the broker (presumably Deslauriers & Associates) advising that the 2004 Peterbilt with VIN ending in 3507 was insured by Intact as of August 10, 2017. As of July 20, 2020 that same vehicle is insured with Economical under policy 64013387.

This information resulted in a letter from Economical to Commonwell dated September 24, 2020. The relevant portions of the letter are set out below:

"It has come to our attention that the 2004 Peterbilt that was involved in the accident of September 27, 2017 was not actually insured with Economical Insurance at the time of the accident. We have confirmed that the 2004 Peterbilt with VIN ending in 3507 was actually insured with Intact under policy 672-5716 at the time of the accident on September 27, 2017. Therefore, we withdraw our acceptance of loss transfer and ask that you please forward your Notification of Loss Transfer to Intact."

Notably this letter indicated that the name of the insured was still Les Serres Stephane Bertrand Inc.

On receipt of this information, Commonwell then put Intact on notice of the loss transfer claim. By letter dated May 14, 2021 Intact advised Commonwell that it would not be accepting loss transfer. Their letter indicates that their insured's name is Denis Bertrand et Fils. There is no policy number given. No reason is given by Intact in their communication for refusing to accept the loss transfer claim other than their position that loss transfer had been accepted by Economical on January 24, 2019. In the letter, Intact asks Commonwell to "advise Economical Insurance that we will not be accepting loss transfer."

In terms of insurance coverage, the parties accept as fact that on the date of loss Economical insured Les Serres Stephane Bertrand Inc. under a Quebec fleet policy bearing number 64013387. There were 28 numbered vehicles described on the policy and the 2004 Peterbilt involved in the accident was vehicle number 21.

However, on August 8, 2017 Economical received a request from the insured's broker to delete the Peterbilt truck from the policy. That change was made effective August 10, 2017.

While a copy of the Intact insurance policy covering the named insured, Denis Bertrand et Fils Inc. was submitted as part of the Joint Document Brief, it is to be noted that the policy period was July 20, 2018 to July 20, 2019 and that policy is not relevant to the date of loss. However, this policy does show the 2004 Peterbilt (VIN number 3507) on the listed vehicles.

As a result of the positions of Economical and Intact, Commonwell then commenced this loss transfer arbitration against both insurers.

It is also agreed among the parties that no loss transfer payments have ever been made by Economical to Commonwell.

## **POSITION OF PARTIES**

### **Intact and Commonwell**

Intact and Commonwell filed joint submissions.

Their position is that the letter of January 24, 2019 from Economical to Commonwell accepting loss transfer was clear and unequivocal and that there is no right in law for Economical to resile from this acceptance irrespective of a factual background where it is admitted that Economical did not actually insure the heavy commercial vehicle involved in the incident on September 27, 2017.

Intact and Commonwell both accept that on the date of loss the insurer of the heavy commercial vehicle involved in the incident was in fact Intact. However, both parties submit that for policy reasons and based on the line of cases in this area that Economical cannot now take back its acceptance.

These two parties submit that loss transfer is a statutory scheme that allows for the quick and efficient transfer of risk between insurers when there are collisions between a certain class of vehicles such as a heavy commercial vehicle or a motorcycle (see *Motors Insurance Corporation v. Old Republic Insurance Company*, November 2008, Arbitrator Guy Jones affirmed [2009] OJ No. 3005 (SCJ)).

Intact and Commonwell submit that Economical, as are other users of the loss transfer system, sophisticated in their knowledge of loss transfer and sophisticated with respect to the litigation process that arises from disputes. They submit that Economical deals with these types of disputes on a regular basis and cannot therefore be seen to suggest that they are not familiar with the process.

Both Intact and Commonwell rely heavily on the decision of *Motors and Old Republic (supra)*. In that case one party accepted responsibility for loss transfer and later, after further investigation, determined there was an issue with liability and sought to resile from that agreement. Arbitrator Jones concluded they could not and that was upheld by Justice Herman.

Intact and Commonwell submit that this case must be looked at based on waiver and estoppel.

With respect to waiver, these parties submit that Economical had full knowledge of its rights at the time it accepted the loss transfer. The letter of January 24, 2019 from Economical to Commonwell confirmed that it had completed its investigation, confirmed that their insured was at fault for the accident and confirmed without any conditions that they were accepting the loss transfer claim. This, it is submitted, clearly was meant to be a waiver with an unequivocal intention to relinquish any rights to rely on any deficiencies.

Intact and Commonwell submit that the letter from Economical of January 24, 2019 was clear and unequivocal and was intended to convey a conscious intention to waive any reliance on any defence to loss transfer including a defence that Economical did not insure the vehicle on the date of loss. These parties submit that Economical's letter did not reserve any right to rely upon any defence whether it was based on liability, the weight of the vehicle or the coverage under their policy.

These parties submit that the behaviour of Economical after their letter was consistent with their waiver. They requested copies of Requests for Indemnification, proofs of payment, copies of the AB file and relevant documents from the AB file.

These two parties submit that waiver is defined as the voluntary and intentional relinquishment or abandonment of a legal right or advantage (see Black's Law Dictionary, 7th ed.). They also submit that waiver can only be found where the evidence demonstrates that the waiving party had:

1. Full knowledge of their rights; and
2. An unequivocal and conscious intention to abandon them.

(*Saskatchewan River Bungalows Ltd. v. Marine Life Insurance Company* [1994] 2 SCR 490 at page 500.)

These parties submit that Economical as a sophisticated insurer who regularly deals with loss transfer matters had full knowledge of its rights and that its letter and subsequent behaviour showed an unequivocal and conscious intention to abandon them.

It is these parties' position that only in the rarest of circumstances should an insurer have the right to resile from such an agreement in loss transfer matters (*Motors v. Old Republic*, Guy Jones, *supra*).

These parties submit that there was no evidence presented by Economical to suggest that their waiver was based on a mistake of fact or a mistake of law at the time the waiver was communicated. Economical they say had full opportunity to investigate all the circumstances of the loss transfer before accepting it including the most basic first step in a loss transfer matter which is to confirm the policy provides coverage on the date of loss to the vehicle involved in the loss.

Intact and Commonwell rely on a recent decision of Arbitrator Bialkowski (*SGI v. Old Republic*, October 29, 2024), where the arbitrator, after having reviewed the recent case law, commented that in loss transfer cases an insurer should not be able to withdraw from an agreement where it was entered into based on a less than diligent investigation. Arbitrator Densem similarly in his decision of *Belair v. Northbridge* (April 25, 2003) noted that there was a practical onus on insurers in loss transfer cases to conduct an adequate investigation into the claims.

Economical had 44 weeks to conduct its investigation and during that time, despite the available evidence, it did not determine that it did not insure the Peterbilt truck on the date of loss.

Intact and Commonwell also submit that there are good policy reasons to disallow an insurer in circumstances like this to resile from its agreement. If Economical is allowed to revoke its waiver simply because it made a mistake in its initial investigation, then this will lead to other insurers doing the same which will result in increased uncertainty, unnecessary long and drawn-out



litigation and increased expense costs for a dispute that is intended to be resolved quickly and efficiently between representatives of insurance companies and without resort to arbitration.

### **Economical**

Economical does not dispute that in the letter of January 24, 2019 that it accepted loss transfer in this case and thus waived its right to dispute the loss transfer. However, Economical's position is that it should be permitted to retract its waiver in the circumstances of this case.

Economical submits that its acceptance of loss transfer was based on a factual error that goes to the root of the application of loss transfer under s. 275 of the *Insurance Act*. At the time it accepted loss transfer Economical was under the belief that its policy of insurance covered the heavy commercial vehicle involved in the incident and that therefore loss transfer applied. However, the fact is that Economical did not insure the vehicle on the date of loss and accordingly s. 275 simply cannot apply to Economical as it does not fall within the definition of the second party insurer as it is not an insurer required under s. 275 of the *Act* to indemnify the first party insurer. On the date of loss it was not "an insurer of such a class or classes of automobiles as may be named in the regulation involved in the incident from which the responsibility to pay the statutory accident benefit arose." Economical submits that the only insurer that would fall within the definition of second party insurer in the circumstances of this case is Intact. Intact admits it insures the heavy commercial vehicle on the date of loss yet declines without reason to accept loss transfer.

Economical submits that Intact should have simply accepted loss transfer when advised of the mistake and put on notice by Commonwell rather than rely on Economical's mistake.

Economical also submits that there is no prejudice to Commonwell in Economical being permitted to retract its waiver as Commonwell has a full right to advance the claim for loss transfer against Intact, the actual second party insurer. Economical points to the report of enquiry into the Motor Vehicle Accidents Compensation Ontario (Honorable Mr. Justice Osborne 1998) and various extracts from Hansard with respect to the debates around Justice Osborne's recommendation. Economical submits that when the Ontario legislature reformed the automobile insurance scheme in 1990, that it acknowledged that insurers of certain types of automobiles would incur higher costs to provide no fault accident benefits when their cars were involved in accidents with a heavy commercial vehicle. Loss transfer was designed to shift those costs from the first party insurer to the second party insurer based on fault.

Economical submits that one of the objectives of the loss transfer scheme is indeed to provide an efficient and expedited method of reimbursement but this objective is merely a means to accomplish the primary objective which is to "balance the cost of no fault benefits between different classes of vehicles." Economical submits that the concept of efficiency and expediency should not override the underlying purpose of loss transfer and that if Economical is obliged to pay for loss transfer in the circumstances of this case then that underlying purpose is not being met as it is compelling an insurer, who is not subject to a valid loss transfer claim, to pay loss

transfer. This, Economical submits, does not result in levelling the playing field between two different classes of insured vehicles.

Economical submits that the only insurer who benefits from a ruling against Economical is in fact Intact who is the true second party insurer and it will result in it being able to avoid its statutory obligations to pay loss transfer.

Economical submits that equitable remedies are available to an arbitrator in loss transfer. Economical says that arbitrators have the inherent power and jurisdiction to apply equitable remedies under s. 275(4) of the *Insurance Act* and s. 31 of the *Arbitration Act*, 1991.

Economical also relies on the Supreme Court of Canada decision in *Saskatchewan River Bungalows v. Maritime Life (supra)*. As noted, Economical concedes that its loss transfer acceptance meets the two criteria of waiver set out in that case. Economical accepts that they had full knowledge of their rights and that their letter demonstrated an unequivocal and conscious intent to abandon their rights.

However, Economical submits that the *Saskatchewan River Bungalows* case also provides that that waiver can be retracted if on reasonable notice and where it would not be unfair to allow the retraction of the waiver. This approach is consistent with the decision of Arbitrator Samis in *Waterloo v. ACE/INA (Waterloo Insurance Company v. ACE/INA Insurance Company, April 19, 2018)*. In that case, while Arbitrator Samis found that in a loss transfer matter that the second party insurer had waived their rights, he also found that they had retracted their rights on reasonable notice and that that retraction would not be unfair to the other party. Accordingly, he permitted the waiver to be withdrawn.

Economical submits that as soon as it found out that it did not insure the Peterbilt truck on the date of loss that it immediately gave notice to Commonwell. Economical submits that the time period (40 weeks) was reasonable. Finally, Economical submits that clearly this is not unfair to Commonwell as they have rights against Intact.

Lastly, Economical does take issue with Intact's role in this arbitration. It is submitted that there is no connection in law between Economical and Intact. There is no privity between Economical and Intact. Economical's acceptance letter was sent to Commonwell with no reference to Intact and there was never any consideration flowing from Economical's acceptance of loss transfer with Commonwell.

It is submitted there is nothing under s. 275 of the *Insurance Act* that allows Intact to insert any claim against Economical and Intact has provided no authority that it can rely on Economical's communications with Commonwell to defeat Commonwell's loss transfer claim against it.

Economical accepts that there are many private arbitration cases dealing with waiver and retraction in loss transfer cases but none of them have facts similar to this case. Economical says that none of those cases allowed a "true second party insurer (Intact) to avoid its statutory

obligation to pay loss transfer."

Economical therefore seeks an order that it is not liable to pay Commonwell's loss transfer claim and that it be permitted to retract its acceptance of loss transfer.

## **ANALYSIS AND DECISION**

Loss transfer is a creature of statute pursuant to s. 275 of the *Insurance Act* together with Regulation 664. This is a scheme of indemnity that allows an insurer who is paying statutory accident benefits to an individual to seek reimbursement from another insurer as long as that insurer covers certain classes of vehicles. These include heavy commercial vehicles or motorcycles. Loss transfer is created when there is an accident between a "first party insurer" and a "second party insurer". The regulation provides a definition of heavy commercial vehicle which requires the gross weight of the vehicle to be more than 4,500 kg at the time the accident occurs.

A second party insurer that insures a heavy commercial vehicle as defined is obliged under s. 275 of the *Insurance Act* to indemnify the first party insurer based on the respective degree of faults of each insurer's insured. The degree of fault is determined pursuant to the fault chart.

There are a number of loss transfer arbitration cases where notices are provided to an alleged second party insurer claiming entitlement to loss transfer based on a certain degree of fault presumption with respect to the class of vehicle involved or presumptions with respect to the class of vehicle involved. In these cases second party insurers have accepted that loss transfer is applicable but later decided that determination was in fact incorrect and that the second party insurer seeks to retract or resile from the acceptance of loss transfer. These cases have involved instances where there has been a misapprehension with respect to the nature of the accident and therefore a request to resile from a determination of liability. In other cases it has been where the second party insurer has determined that in fact a heavy commercial vehicle was not involved in the incident.

Generally arbitrators in these cases have determined that the second party insurer can only resile from their acceptance in rare circumstances. The arbitrator's rationale for this is that the regime of loss transfer is designed to provide a quick and expedient method of providing rough justice between sophisticated insurers in the context of this indemnification scheme.

Arbitrators have recognized that the first party insurer and second party insurer will have been engaged frequently in loss transfer matters and that insurers are well aware of the legislative provisions, the requirements under s. 275 and the regulations for loss transfer to apply and the importance that not only that this be an expedient and cost-effective method for dealing with these disputes but that there also be some certainty in the process.

With that background I turn to an analysis of this loss transfer dispute keeping in mind the general principles that I have outlined above.

Counsel for Economical argues that this is a unique case in the context of loss transfer claims where second party insurers seek to resile from an acceptance of loss transfer. Economical submits that what differentiates this case from the others is that Economical did not in fact insure a heavy commercial vehicle on the date of loss. The vehicle involved in the accident, while it was a heavy commercial vehicle, had been removed from the listed vehicles under their policy prior to the date of loss. However, it is to be noted that Economical's policy was a fleet policy and that in fact it did insure heavy commercial vehicles on the date of loss. It just did not insure the vehicle involved in the incident.

Economical states that that differentiates this case from others where the threshold requirements of s. 275 of the *Insurance Act* were met in that the second party insurer did insure a class of vehicle that was covered under s. 275 but there were issues with respect to the applicability of the fault chart. Economical suggests that there is simply no right of loss transfer to be made against them in this case. Economical states that if it does not meet the definition of a second party insurer under s. 275 of the *Insurance Act* as it did not insure a heavy commercial vehicle that was involved in the accident, that there can be no right to claim against it in loss transfer particularly in light of the fact that Intact acknowledges that it did insure the heavy commercial vehicle on the date of loss that was involved in the incident.

While I appreciate the apparent unfairness of Economical being obliged to provide indemnification in the circumstances of this case, I do not see the facts of this case as standing on any different level than the decisions where the mistake that was made was whether or not the vehicle was a heavy commercial vehicle.

The majority of cases dealing with this area of loss transfer involve an insurer who insured the vehicle involved in the accident but they believed it was a heavy commercial vehicle when it was not. I see no difference in law between mistaking whether the vehicle meets the definition of a heavy commercial vehicle under s. 275 and Regulation 664 and the circumstances of this case. Both are threshold requirements to the applicability of the loss transfer regime. You must insure a certain class of vehicle for it to be applicable to you. I therefore find the case law that I will review below dealing with the "heavy commercial vehicle" qualification mistake to be on point.

However, before turning to the case law there are some key facts in this case that are critical to my decision that Economical does not meet the criteria to be permitted to resile from its acceptance of loss transfer. The facts show that Economical simply failed to make any reasonable investigations to determine whether loss transfer applied to it. Economical received the notification of loss transfer on February 16, 2018. The insured that was identified was Florent Perrault and a policy number of 64013387. There has never been any explanation as to why Economical did not flag the insured's name. We know that the Economical insured was Les Serres Stephan Bertrand Inc. We know the policy number was the same but the insured was different. In fact Mr. Florent Perrault was the driver of the vehicle. There seemed to be no investigation done with respect to that.

Economical knew on February 16, 2018 that the vehicle involved in this incident was a 2004 Peterbilt. Economical knew that it had a fleet policy that covered a number of vehicles. One would have thought that it would have been critical to Economical's decision-making process to confirm that the 2004 Peterbilt involved in the accident was listed under their policy, particularly when their insured was not properly identified in the notification of loss transfer.

Economical also received on February 16, 2018 the third party automobile report from Commonwell in which Commonwell asked Economical to "verify your policy was in force at the time of loss". Economical is a sophisticated insurer and would know that the first step in any loss transfer matter would be to verify that a claim was being made under the correct policy, that the policy was in full force and effect and most importantly that the policy provided coverage to the vehicle involved in the accident and that that vehicle was a heavy commercial vehicle. The evidence before me suggests Economical did none of that. Economical seeks copies of Commonwell's declaration pages but does not appear to do any investigation into their own policy coverage. This despite the fact that the Economical adjuster on March 22, 2018 seems to suggest in the log notes that Economical will confirm that the vehicle and drivers listed comply with loss transfer. Despite that note there is no evidence that anyone in Economical sought confirmation that the vehicle was listed under their policy on the date of loss.

There is no evidence of any activity by Economical between the March 22 log note and the acceptance of loss transfer on January 24, 2019 (almost 10 months). There is no evidence that during that 10-month period that Economical spoke to the broker, spoke to the driver of the vehicle, looked up its policy and/or cross-referenced the 2004 Peterbilt involved in the accident with the vehicles listed on its policy. In fact, Economical states in its acceptance letter of January 24, 2019 that "Our investigation is now complete." It would appear the only investigation that they conducted was to look at the police report and get a copy of the declaration page from the Commonwell policy to confirm that it insured a personal vehicle.

Thereafter, from January 24, 2019 to December 2, 2019 again no further investigation was done presumably as loss transfer had been accepted. Economical was simply waiting for requests for indemnification, copies of the AB file and information in order to allow them to adjust reserves and determine exposure.

Finally, there was no evidence presented at this hearing as to why it took Economical until September 14, 2020 to contact the broker Deslauriers & Associates and to ask about the "Intact policy". There was no evidence presented to explain how the Economical adjuster became aware of the Intact policy at this stage or when Economical actually became aware that the 2004 Peterbilt was not listed under their policy. In all the cases dealing with the request to resile from loss transfer acceptance arbitrators had looked carefully at the investigation done by the insurer seeking to resile with respect to the loss transfer coverage. To that end I found the decision of Arbitrator Scott Densem in *Belair Direct Insurance Company v. Northbridge General Insurance Company* (April 25, 2023) to be very helpful. In that case Belair sought loss transfer from Northbridge as a result of a rear-end collision. Belair claimed the Northbridge vehicle was a heavy commercial vehicle in that it was the required 4,500+ kg weight. Northbridge conducted some

investigation and accepted loss transfer in May 2019. Further investigation was completed after that date ultimately determining that the vehicle may not meet the requirements to qualify for loss transfer and Northbridge sought to resile from its acceptance of loss transfer. Arbitrator Densem noted that an insurer who seeks loss transfer must exercise due diligence in pursuing its loss transfer claim by seeking answers from the potential second party insurer about the existence of the policy, degree of fault and more importantly the weight of the vehicle. The second party insurer is in a superior position to the first party insurer to determine that information as they insure the vehicle. Arbitrator Densem stated that once the alleged heavy commercial vehicle insurer undertakes to get answers to those questions, that the first party insurer is entitled to rely on their representations. Arbitrator Densem pointed out that once Northbridge accepted that the weight requirement for loss transfer had been satisfied, that Belair was entitled to rely upon that admission.

In looking at whether or not Northbridge should be permitted to resile from that admission Arbitrator Densem noted that the decision to accept loss transfer by Northbridge was a deliberate decision. It was not an “honest mistake or a mutual mistake of fact or law”. Rather, it was a deliberate decision made by a loss transfer claims handler who had not conducted an adequate investigation into the matter

Arbitrator Densem concluded that the unexplained and unreasonable delay by Northbridge to adequately investigate and attain information relevant to the loss transfer claim before confirming its acceptance was such that it undermines any legal argument that Northbridge should be allowed to resile from that agreement. He therefore concluded that Northbridge could not retract its waiver in those circumstances.

I find the facts of the case before Arbitrator Densem to be more or less on all fours with the facts before me. I conclude that Economical did not adequately investigate and obtain the information relevant to determining whether it should or should not accept loss transfer in this matter and as a result it should not be allowed to resile from its agreement with Commonwell.

I now turn to the four criteria that I must review in law in determining whether or not Economical can retract from its agreement with Commonwell.

These four criteria were set out by Arbitrator Samis in his decision *Waterloo Insurance Company v. ACE/INA Insurance Company*, April 19, 2018, Arbitrator Samis). The four criteria laid down by Arbitrator Samis which had been accepted by other arbitrators making similar decisions on loss transfer retraction cases are set out below.

1. Did the person have full knowledge of their rights?
2. Does the evidence demonstrate an unequivocal and conscious intent to abandon their rights?
3. Has the waiver been retracted on reasonable notice?

4. Would it be unfair to allow the retraction of the waiver?

These four factors are the relevant matters to review when determining when a waiver can be retracted and flow primarily from the decision of the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company* [1994] 2 SCR 490.

1. **Did Economical have full knowledge of their rights?**

Economical does not argue that they did not have full knowledge of their rights. Economical accepts that it is a sophisticated litigant in automobile insurance including loss transfer and that they were fully aware of their loss transfer rights. The answer to this is therefore yes, Economical had full knowledge of their rights.

2. **Was there an unequivocal and conscious intent to abandon their rights?**

Again, Economical acknowledges that their acceptance letter of January 24, 2019 demonstrates an unequivocal and conscious intent to abandon their rights with respect to loss transfer.

3. **Has the waiver been retracted on reasonable notice?**

Economical submits that their retraction (40 weeks) constitutes reasonable notice. In the case before Arbitrator Samis (*Waterloo v. ACE/INA*) the first two criteria outlined above were accepted by ACE/INA. They agreed they had full knowledge of their rights and that their acceptance of loss transfer had demonstrated an unequivocal and conscious intent to abandon their rights. However, they claimed that the waiver had been retracted on reasonable notice. In that case the request to retract their acceptance came less than two months after their initial acceptance (loss transfer accepted April 16, 2014 and sought to be retracted June 11, 2014). Notably in that case the rationale for the request to resile from the acceptance was based on an argument that there had been an error in law. ACE/INA now took the position that loss transfer did not apply when a pedestrian was involved. I note this as in my view this is similar to the argument that is being made by Economical here. ACE was arguing that s. 275 of the *Insurance Act* threshold requirements were not met as there were not two different classes of vehicle involved in the loss. Arbitrator Samis concluded the less than two-month turnaround time seeking the retraction was reasonable and in fact contrasted with the turnaround time for many claims investigations which took much longer. He concluded that ACE/INA made that determination within a reasonably prompt timeframe and that the retraction was clear and accordingly found that ACE/INA met criterion 3.

I do not conclude in this case that Economical meets criterion 3. In my view, not only must the retraction be made within a reasonable time period, but as pointed out by Arbitrator Densem there must also be evidence of a reasonable investigation having been

made in the first place and some explanation as to the failure to recognize the inapplicability of loss transfer in the circumstances of the case. That does not exist here. Economical had from February 16, 2018 to January 24, 2019 to investigate the basis of loss transfer before it accepted it. It then had again from January 24, 2019 until September 24, 2020 to complete its further investigations. Absent any evidence of reasonable investigations, I do not find that the waiver in this case was retracted on reasonable notice. Economical needed only to review its policy and the vehicles listed on it to determine if loss transfer applied and the evidence suggests that that was not done until September 2020. Therefore, Economical does not get a check mark with respect to criterion 3.

**4. Would it be unfair to allow the retraction of the waiver?**

Arbitrator Samis suggested that under this criteria one should look at whether or not it will be unfair to the first party insurer to allow the second party insurer to retract the waiver. He reviewed whether or not there was any basis to presume that there was prejudice. He noted that in the case before him that Waterloo did not necessarily lose its right to pursue a claim for loss transfer against Waterloo. Rather, Waterloo can continue to pursue its claim for loss transfer and have a determination made as to whether or not a claim with respect to a pedestrian is covered under the loss transfer provisions. He therefore concluded that it would not be unfair to Waterloo.

In this case, if I were to find that Economical could retract their waiver I would conclude that it would not be unfair to Commonwell. Clearly, Intact insures the heavy commercial vehicle that was involved in the accident and Commonwell has a claim against Intact pursuant to s. 275 of the *Insurance Act* in loss transfer.

There is no limitation period at play here. Commonwell put Intact on notice of loss transfer and when it declined on the grounds that Economical had accepted the loss transfer, Commonwell quite properly commenced this arbitration against Intact as well. Therefore if I had concluded that Economical could retract its acceptance of loss transfer, I would have also concluded that there would be no unfairness to Commonwell to do so.

However, I have concluded in the circumstances of this case that this is not one of those rare circumstances where an insurer should be permitted to retract its acceptance of loss transfer and I conclude that Economical is obliged to reimburse Commonwell for any reasonable expenses.

I also want to comment on my decision in *Aviva and Economical* from April 5, 2024. In that case, I concluded that equity did not apply to statutory relief for loss transfer. I relied on the decision of the Court of Appeal in *Intact Insurance Company of Canada v. Lombard General Insurance*, 2015 ONCA 764. This was a case involving laches. Based on that, I did not accept Arbitrator Samis's decision in Waterloo and ACE/INA to the extent that he suggested that equitable relief could be granted in a loss transfer case. I concluded that criteria 3 and 4 set out in Arbitrator Samis's Waterloo decision as not being appropriate considerations for loss transfer.



Counsel in a companion matter before me (Intact & Co-operators) argued that that aspect of my decision was wrong and provided valid arguments to support that.

Firstly, counsel pointed out that my reliance on the decision of the Court of Appeal in Intact and Lombard as a basis for determining equity did not apply to loss transfer was misplaced. Counsel pointed out that that decision dealt with laches. In that case, the Court concluded that the defence of laches cannot be invoked in response to a claim for loss transfer. The Court stated, "Loss transfer is not an equitable claim or a claim for equitable relief." However, that comment by the Court was strictly to whether the common law principle of laches could be imported into the loss transfer scheme to create a limitation defence where one had not been provided on a statutory basis.

Under the loss transfer claim, there is no statutory limitation period. I agree with counsel that the comments of the Court of Appeal in that case with respect to the applicability of equitable relief in loss transfer cases is strictly restricted to the doctrine of laches and not to the waiver and estoppel issue before me as set out and the four criteria set out in *Saskatchewan River Bungalows v. Maritime Time Life (supra)*.

However, I still stand by the conclusions and rationale for my decision in the *Aviva and Economical* case. Loss transfer is a regulatory scheme set out by the government to provide an expedient and summary method of reimbursement for a first party insurer for the payment of no-fault benefits from the at-fault second party insurer (*Jevco Insurance Company v. Canadian General Insurance Company* (1993) 14 O.R. (3d) Ontario Court of Appeal). As I said in that decision, loss transfer cases are approached on the basis that it is a "quick and dirty" method to quickly and efficiently assess entitlement to loss transfer based on both the statutory regulation and the fault determination rules. I maintain the principle I stated in that case that to read into the loss transfer legislation the right of an insurer to retract an acceptance of loss transfer based on errors by an adjuster who failed to complete an adequate investigation will result in significant uncertainty, delay in loss transfer matters and an increase in loss transfer litigation. There are no time limits under the loss transfer process. A loss transfer adjuster has more than enough time to investigate a claim, look into issues of liability, gross weight, coverage and to make an appropriate decision on the investigation.

No loss transfer claim should be accepted until all the appropriate investigation has been completed and the first step in completing appropriate investigation is for an adjuster to pull up their policy, confirm that the policy is in full force and effect on the date of loss, confirm it is the correct insured and confirm that the vehicle involved in the accident was covered under their policy and if appropriate is a heavy commercial vehicle.

#### **AWARD.**

I therefore conclude that Economical in the circumstances of this case cannot retract its waiver and that the waiver was not retracted on reasonable notice. Therefore Economical is responsible

to pay reasonable indemnification to Commonwell.

## **COSTS**

According to the Arbitration Agreement, legal costs and the costs of the arbitration are to be determined by me taking into account the success of the parties, offers to settle and the conduct of the proceedings.

I am not aware of any offers to settle. With respect to the costs of Commonwell, I find that their legal costs are payable by Economical. If there is any dispute with respect to those costs, counsel can contact me and we can arrange a costs hearing. I also find that Economical is responsible for paying the costs of the arbitration.

However, with respect to the costs of Intact, I do not find that Economical is obliged to pay the legal costs of Intact. I agree with Economical that there was no right for Intact to “make a claim” against Economical. The claim for loss transfer was properly between Commonwell and Economical and the issue as to whether Economical could or could not resile was solely an issue between those parties. Therefore, Intact will bear its own legal costs.

DATED THIS 14<sup>nd</sup> day of April, 2025 at Toronto.



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