

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Helen Friedman - Economical Mutual Insurance Company (Respondent, Applicant in this preliminary issue)

Benjamin Lee and Serena Genova - Certas Direct Insurance Company (Applicant, Respondent in this preliminary issue)

Introduction:

This matter comes before me pursuant to the *Arbitration Act, 1991* to arbitrate a dispute as between two insurers with respect to a priority issue pursuant to the *Insurance Act* and its Regulations: Specifically Regulation 283/95 as amended.

This claim arises out of a motor vehicle accident that occurred on March 9, 2016. At that time T.P. was struck as a pedestrian by a 2014 Peterbilt Tractor with a loaded trailer.

The tractor trailer is insured by Economical Mutual Insurance Company. Certas Direct Insurance Company (hereinafter called "Certas") insures J.K. who is T.P.'s son. Certas received the first application for accident benefits (OCF-1) dated March 10, 2016.

Certas served a Notice of Dispute to Economical taking the position that T.P. was not principally dependent for financial support on her son and accordingly the striking vehicle (Economical's

insured) was the priority insurer. Ultimately this matter was referred to an Arbitration pursuant to Regulation 283/95 and on consent I was appointed as Arbitrator.

The issue that I have been asked to determine is a preliminary issue. This issue arises by virtue of the fact that Economical may not only be the priority insurer with respect to the claim for accident benefits for T.P. but also potentially would be responsible pursuant to Section 275 of the *Insurance Act* for loss transfer payments to Certas if Certas were the priority insurer.

In this Arbitration no determination been made as yet with respect to the dependency issue and whether Certas is or is not the priority insurer. However, Economical takes the position by virtue of Certas' behaviour on the loss transfer side of this file that Certas is either estopped from disputing priority or that the loss transfer submission to arbitration resulted in a waiver of Certas' right to dispute priority.

The parties prepared an Arbitration Agreement (Exhibit 1) dated November, 2018 in which the issue in dispute was identified as follows:

1. Is Certas estopped from disputing priority by virtue of the loss transfer submission to arbitration dated January 9, 2018; or,
2. Alternatively, did the loss transfer submission to arbitration constitute a waiver of its right to dispute priority.

The parties each filed a Factum and Book of Authorities. In addition, I considered the following documents:

1. Exhibit 1, Joint Document Brief, Tabs 1 – 25;
2. Exhibit 2, Affidavit of Shelley C. Khan, sworn November 23, 2018, together with Exhibits A through S;
3. Exhibit 3, Supplementary Document Brief of Economical: Notices of Examination Under Oath and excerpts from the examination under oath of T.P.

The matter proceeded before me on December 7th.

Background Facts:

In order to fully understand the arguments being made in this case and the context of my award, it is necessary to review the interaction between Certas and Economical both with respect to priority and loss transfer and as well the information and positions exchanged at the various pre-hearings before me in the priority dispute.

The relevant facts with respect to the interaction between Certas and Economical on the priority dispute and loss transfer are set out below:

1. An application for accident benefits dated March 10, 2016 was submitted to Certas on March 22, 2016. The application identified that the basis upon which coverage was being sought was on the grounds that T.P. was a dependant of the named insured, J.K.;
2. By letter dated March 31, 2016 Certas wrote to Economical advising that they took the position that the Economical policy stood in priority. The letter enclosed a Notice to Applicant of Dispute Between Insurers. A similar letter was sent to T.P. on the same date;
3. Also on March 31, 2016 Certas sent a separate letter to Economical putting them on notice of the potential loss transfer claim. This letter noted that as Section 275 of the *Insurance Act* applied (the Economical vehicle was a heavy commercial vehicle) that Certas was looking for reimbursement of their SABS payments. A notification of loss transfer was attached to that letter. The notice of loss transfer was dated March 31, 2016. In that document Certas identifies itself as “the first party insurer responsible for paying accident benefits” and notes Economical as “a second party insurer responsible for indemnifying the first party insurer”;
4. On February 10, 2017 Certas sent a further letter to Economical with respect to the loss transfer. This letter enclosed a loss transfer request for indemnification in the amount net of the deductible of \$15,036.91. Additionally, that letter stated the following:

“Please accept this notice of our demand to submit this request to arbitration under Section 275 of the *Insurance Act* and the *Arbitration Act*, 1991. If you intend to dispute your obligation to reimburse this loss transfer request then we ask that you contact us to make arrangements for an arbitrator to be appointed.”;
5. The evidence before me suggests that Economical did not respond to the loss transfer request of March 31, 2016 or of February 10, 2017;
6. On March 6, 2017 Certas served a Notice to Submit to Arbitration with respect to the priority dispute;
7. By e-mail dated March 29, 2017 counsel who had been retained on behalf of Economical noted to counsel for Certas as follows:

“I see that there is a loss transfer claim on this as well (this only comes into play after priority has been dealt with). That said, it would be helpful for both of us to use the pending EUO to address liability issues for LT purposes, rather than potentially having two attendances. Do you know if there is a tort claim with a pending discovery date?”

8. By e-mail dated April 4, 2017 counsel for Certas provided counsel for Economical with copies of the police report and a signed statement of T.P. noting “this should provide clarity in terms of both the class of vehicle and fault”;
9. By letter dated April 6, 2017 Economical wrote to Certas referencing a letter from Certas of April 3, 2017 requesting the outstanding loss transfer repayment. Economical advises that they are still in the process of completing their investigation on loss transfer and on completion they will advise them of their position;
10. By letter dated April 27, 2017 Certas wrote to Economical asking what information they needed in order to assist in the loss transfer investigation and what information remained outstanding from their loss transfer acceptance;
11. By letter dated April 28, 2017 Economical replied to Certas advising that they needed the driver’s statement for review, and any police notes or records apart from the police report. They note that they will advise of their position with respect to loss transfer once their investigation is completed;
12. The first pre-hearing before me in the priority dispute took place on May 2, 2017. The counsel who had exchanged the e-mails noted earlier were counsel on the pre-hearing. The only issue identified in dispute during the course of that pre-hearing was with respect to dependency/priority. It was noted that counsel had exchanged productions and that an EUO was still to take place of T.P. that was scheduled for June 8th. Of significance with respect to this preliminary issue is the fact that at no time during that pre-hearing was an issue ever raised with respect to the fact that Certas had already put Economical on notice of a loss transfer claim and had, by letter dated February 10, 2017, put Economical on notice that they had demanded that the loss transfer matter be submitted to an arbitration;
13. The EUO of T.P. and J.K. took place on June 8, 2017. The documents produced as Exhibit 3 would suggest that the EUO was with respect to priority issues only;
14. By e-mail dated September 27, 2017 counsel for Economical advised counsel for Certas as follows:

“I spoke to my client about Certas’ concerns/questions re: loss transfer issues. As you appropriately put it, to avoid a broken game of telephone

and to make sure all issues are covered off, my client has suggested a conference call with you and Adam so that everyone is on the same page.”;

15. According to the Affidavit of Ms. Khan (counsel at the time for Certas) the telephone call above took place on January 9, 2018. Ms. Khan advised counsel for Economical that she had now assumed carriage of this file as counsel for Certas. She reiterated Certas’ position that priority ought to be accepted 100% by Economical and additionally advised that there was a loss transfer aspect to the matter. Counsel for Economical indicated she was aware of the same. Ms. Khan advised that she would be sending a Notice to Submit with respect to the loss transfer and that it was being sent as a means of protecting Certas’ limitation period to dispute loss transfer in the event it was determined that Certas stood in highest priority. There was a discussion with respect to the amounts that would be paid under priority but not under loss transfer;

16. By letter dated January 9, 2018 counsel for Certas served on counsel for Economical a Notice to Submit to Arbitration with respect to the loss transfer matter. The covering letter suggested that Economical agree to appoint Philippa Samworth as the Arbitrator noting “She is currently hearing the corresponding priority dispute”;

17. By e-mail dated January 10, 2018 at 11:58 a.m. counsel for Economical advised Ms. Khan that Economical was prepared to accept loss transfer and that the appointment of an arbitrator was not required. There was some reference to the amounts that may be payable. The e-mail ended with the following:

“As the loss transfer claim under Section 275 has been made by Certas and accepted by Economical, Certas is conceding they are the insurer responsible for the payment of accident benefits under Section 268(2) of the *Insurance Act*. Accordingly, the arbitrator should be advised the priority dispute has been resolved. We ask this be done prior to the February 1, 2018 resumed pre-hearing.”;

18. On January 10, 2018 at 12:05 p.m. Ms. Khan responded to counsel for Economical advising as follows:

“My client is not conceding that priority is not in dispute. My client is simply protecting their limitation period on the loss transfer matter, should they be found to be the insurer highest priority. The priority issue will need to be heard first after which the loss transfer matter can be heard if necessary. If your client is the insurer highest in priority, then the loss transfer matter is moot. If my client is, they have protected their limitation period and the loss transfer matter can be heard by Arbitrator

Samworth subject, if your client is disputing fault or reasonableness of payments. I am confused by your e-mail as you were aware during our phone call yesterday that my client was serving the Notice to Submit on the loss transfer matter simply to protect the limitation period and that it was their intent to pursue the priority matter first.”;

19. By letter dated January 19, 2018 Economical’s adjuster wrote to Certas’ adjuster advising that they were accepting loss transfer and that they were issuing reimbursement for \$15,036.91;
20. By letter dated March 5, 2018 counsel for Certas wrote to counsel for Economical returning the cheque for \$15,036.91 and maintaining their position that as there is an ongoing priority dispute loss transfer cannot yet be accepted by Economical;
21. By letter dated March 8, 2018 counsel for Economical wrote to counsel for Certas advising that it was their position that Certas having returned the cheque was now estopped from seeking indemnity or reimbursement for those amounts and has also lost its right to claim interest;
22. By letter dated March 9, 2018 counsel for Certas wrote to counsel for Economical simply noting that they disagreed with the position that had been taken;
23. At the pre-hearing before me on February 1, 2018 counsel for Economical first raised the issue as to whether or not Certas having served the Notice with respect to loss transfer and Economical having accepted that the priority dispute was now moot.

The last relevant evidence before turning to analysis of the parties’ positions and my conclusions comes from Ms. Khan’s Affidavit. At paragraph 23 of her Affidavit Ms. Khan states the following:

“I state and do swear that at no point during the course of both the priority and loss transfer arbitration proceedings was it ever my or my client’s intention to abandon pursuit of the priority matter.”

Additionally at paragraph 24 of the Affidavit Ms. Khan swears that at no point during her discussions with counsel for Economical was it agreed or contemplated that the discussions with respect to the loss transfer matter would in any way prejudice Certas’ ability to proceed with the priority dispute.

Position of the Parties:

Economical takes the position that under Section 275 of the *Insurance Act* (the loss transfer provisions) that only the insurer who is responsible for payment for Statutory Accident Benefits

under Section 268(2) of the *Insurance Act* is entitled to claim loss transfer indemnification. Economical points to a number of cases where Arbitrators have confirmed that where the right claim in a priority dispute has been lost that that insurer does not then become the insurer pursuant to Section 268(2) of the *Insurance Act* with the right to pursue a claim for loss transfer. Economical submits that unless you are the actual insurer who ranks in priority under 268(2) of the *Insurance Act* that there is no right to pursue loss transfer.

Economical therefore argues that if Certas seeks loss transfer from Economical that Certas must therefore accept that it is the priority insurer under Section 268(2).

Economical rightly points out that Certas had no reason to issue a notification for loss transfer in March of 2016 or a demand to submit to arbitration which would then start the limitation period running. Economical points out that there is no limitation period under the *Insurance Act* or its relevant regulations with respect to loss transfer that would require Certas to start the loss transfer process in any fashion. Economical points out that the Court of Appeal has confirmed "*Laches*" does not apply in the context of loss transfer. The limitation period only begins to run when that first request for indemnification is presented and it is a rolling limitation period. The first request was February 10, 2017 which gave Certas to February 10, 2019. The request having been made Certas would have had to initiate its arbitration proceedings by February 10, 2019. By its own action Certas started that limitation period running and therefore had to serve the Demand for Arbitration as done by Mr. Khan on January 9, 2018.

Economical submits that Certas having asserted its right to loss transfer indemnification that it now should not be permitted to reverse that decision. Economical submits that when Certas served its Notice to Submit to Arbitration for the loss transfer in January of 2018 that it, by implication, meant that it was accepting that it was the priority insurer as otherwise it would not have the right to pursue the loss transfer. Economical submits that Certas has therefore waived its right to dispute priority. Economical particularly relies in its submissions on the service of the Notice to Submit to Arbitration on January 9, 2018 and Economical's acceptance of the loss transfer shortly thereafter. Economical submits that when it accepted the loss transfer, made the payment as requested in Certas' demand for loss transfer that the matter therefore resolved and Certas could not now take the position that there was no "offer and acceptance". It is important to note that I understand that Economical's position is that it was the submitting of the loss transfer dispute to Arbitration that resulted in Certas conceding it was the priority insurer. It was not just the acceptance of the loss transfer which determined priority but rather Economical submits it was Certas' assertion of the right to indemnity which is key as that right only accrues to the priority insurer. Economical does concede that priority was not determined but rather it submits that priority was accepted.

Certas submits that at no time did its behaviour, action or communication with Economical ever suggest that it was waiving or otherwise conceding that it would not be pursuing the priority dispute for which an arbitration had already commenced and was ongoing. Certas submits that

Economical at all times was aware that it was Certas' intention to pursue the claim for priority and submits that as the correspondence and in particular the e-mails between counsel indicates that there was some discussion about the loss transfer and priority dispute arbitrations proceeding before the same Arbitrator. Certas submits that the arbitrations would proceed so that the priority dispute would be determined first and then the loss transfer would proceed depending on the outcome of the priority dispute.

Certas points to the course of conduct and communication of Economical and its counsel from March of 2016 through to January of 2018 and submits that at no time did Economical ever take the position that if Certas was requesting loss transfer that it was deeming or accepting itself as the insurer under 268(2) of the *Insurance Act*.

Certas submits that Economical's position is based on an erroneous premise that a loss transfer proceeding and a priority proceeding cannot proceed simultaneously and that if they do that that proceeding somehow precludes the priority matter from proceeding itself.

Certas in its submissions does accept the fact that only the priority insurer under Section 268(2) of the *Insurance Act* has the right to claim indemnification in loss transfer. However, its position is that if there is no agreement made or no determination yet as to whom that priority insurer is that that priority dispute must be determined before a loss can be transferred. This however does not prevent the insurer paying Statutory Accident Benefits in accordance with Regulation 283/95 (the first insurer to receive the application) from notifying another insurer with respect to loss transfer and pursuing that loss transfer claim pending resolution of the priority dispute and the determination of who is actually the 268(2) insurer.

Certas submits that Economical deliberately chose to concede the loss transfer in January of 2018 in an attempt to circumvent the priority procedure. Certas submits that Economical was aware it was at serious risk of losing both the priority and loss transfer proceedings. As payment under loss transfer does not include certain payments made in an accident benefit claim (adjustment costs, costs of assessments). Certas submits that it was to Economical's benefit to accept the loss transfer and the more reduced payments made under that scheme and then to argue that Certas' right to claim priority was extinguished.

With respect to the issue of waiver and estoppel Certas submits that Economical must prove that Certas by words or conduct made a promise that it would forego its priority rights and that Economical relied on that promise and changed its position to its detriment. Certas submits that there was a 7 minute time period between Economical "accepting" loss transfer and Certas' reply. Certas submits there could be no prejudice or detrimental reliance during that time period.

Certas also submits that the question of waiver should be applied against Economical. Certas submits that Economical by its conduct accepted that priority and loss transfer disputes can co-exist and led Certas to believe that the manner in which they had been proceeding was

acceptable and that there mere existence of the loss transfer proceeding started by Certas in March of 2016 did not mean that priority was precluded or deemed to be accepted by Certas.

By way of reply on the issue of waiver as against Economical, it takes the position that at no time did it forego its rights to accept the loss transfer claim. Economical submits that once the loss transfer cause of action was asserted in March of 2016 that it was open at any time for Economical to accept the loss transfer once it had completed its investigation and had sufficient information to determine liability. Economical submits that that is what it did.

Finally, Economical submits that it did not attempt to circumvent the priority procedure as alleged by Certas. Economical submits that at the time it accepted the loss transfer there was in fact no priority procedure as Certas having served the demand to submit to arbitration and its assertion of its rights as the highest ranking insurer meant that the priority procedure had been resolved.

Analysis:

Before turning to any analysis of the issues it is important to look carefully at the relevant legislation with respect to the priority and with respect to the loss transfer.

Section 268(2) of the *Insurance Act* is set out below:

1. *Insurance Act*, R.S.O. 1990, c.I.8

Liability to Pay

268(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"
2. In respect of non-occupants,
- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
 - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. 1.8, s. 268 (2); 1993, c.10, s. 1; 1996, c.21, s. 30 (3, 4).

The relevant legislation with respect to the loss transfer issue is Section 275 of the *Insurance Act* set out below:

Indemnification in certain cases

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. R.S.O. 1990, c. 1.8, s.275 (1); 1993, c. 10, s. 1.

Idem

(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. R.S.O. 1990, s. 1.8, s. 275 (2).

Deductible

(3) No indemnity is available under subsection (2) in respect of the first \$2,000 of

statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c . 10, s. 1.

Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitration Act*, 1991. R.S.O. 1990, c. I.8, s. 275 (4); 2015, c.20, Sched. 17, s. 5.

Stay of arbitration

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a proceeding before the Licence Appeal Tribunal under section 280 or to an appeal from such a proceeding. 2014, c . 9, Sched. 3, s. 13.

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;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*;

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

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

Turning first of all to Section 268(2) of the *Insurance Act* which sets out the priority provisions. Section 268(2) provides a hierarchy for insurers to follow in determining who would be the responsible insurer for paying statutory accident benefits where a claim has been made. I agree with Arbitrator Samis (*TD General Insurance & Markel Insurance Company*, private arbitration Samis, December 13, 2013 and by way of appeal Justice Lederman, 2014 ONSC 6461

(CanLII) where in a similar case but with some important distinctions, Arbitrator Samis concluded that Section 268(2) of the *Insurance Act* does not create a responsibility to pay benefits. This responsibility is in fact found under Section 268(3) which states:

“An insurer against whom a person has recourse for the payment of Statutory Accident Benefits is liable to pay the benefits.”

Further, as Arbitrator Samis also points out, and with which I agree Section 268(2) is not even a complete hierarchy or scheme with respect to priority. Sections 4, 5, 5.1 and 5.2 of Section 268 are also directive of the priority regime.

To add into this complex mix is the fact that the priority dispute mechanism system is regulated pursuant to Ontario Regulation 283/95 (as amended by Regulation 34/10). It is that Regulation that requires (Section 2(1)) that the first insurer who receives a completed application for benefits is “responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the Act.”

I find, as other arbitrators before me (Arbitrator Samis, Arbitrator Densem (*Economical Insurance Group & Co-operators*, decision November 6, 2012)), that the obligation of the insurer who receives the first completed application for accident benefits does not elevate that insurer to be the insurer under Section 268(2) who is responsible for the payment of the accident benefits. The insurer who receives the first application, while they are responsible for paying benefits, is only paying pending any priority dispute. Section 268(2) contemplates the insurer who is responsible for paying accident benefits because they are the priority insurer in that hierarchy.

This becomes important when looking at the right to a loss transfer.

Section 275 of the *Insurance Act* provides that only the insurer responsible under subsection 268(2) for the payment of Statutory Accident Benefits is entitled to pursue a claim for indemnification.

Again, I agree with Arbitrator Samis (supra and as upheld on appeal) and Arbitrator Densem that the insurer who receives the first application for accident benefits and is paying in accordance with Regulation 283/95 is **not** the “insurer responsible under subsection 268(2) for the payment of the statutory accident benefits”.

Therefore, I conclude and indeed am bound by Justice Lederman’s decision (supra) to conclude that Certas would not have a right to pursue a claim for loss transfer in this case unless it was the insurer responsible under Section 268(2) of the *Insurance Act* for paying Statutory Accident Benefits to T.K.

It is my conclusion that Certas is not the insurer under Section 268(2) for the payment of Statutory Accident Benefits to T.P. Indeed, that is still, in my view, a live issue before me. There has not yet been any determination in the priority dispute commenced before me in March of 2017 as to whether Certas is or is not the priority insurer under Section 268. There has been no determination made as to whether T.P. is principally dependent for financial support on her son. In my view, priority remains a live issue.

Further, I find that Certas in no way by its actions, communications, either through Certas itself or through its counsel, was ever estopped from pursuing its claim in priority nor did it waive its right to proceed with that claim.

The sequence of events that I outlined with respect to the communications between Certas and Economical makes it clear that Certas was pursuing its claim for priority and loss transfer at the same time. It sent two letters out on March 31 to Economical advising that it was advancing a claim against Economical for priority and at the same time indicating that it was also making a claim for loss transfer. While I certainly agree with Economical that there was no need for Certas to pursue its claim for loss transfer at that time and indeed it might have been better had it not, there is still nothing in my view with respect to the legislation or process for priority and loss transfer that prohibited Certas from seeking to have both issues proceed forward in a simultaneous arbitration or process with the priority dispute to be heard first and the loss transfer matter to be heard thereafter.

A review of the communication between Certas and Economical and particularly the e-mails between counsel made it abundantly clear to me that Economical was well aware that there were duplicate processes proceeding along at the same time. Economical at no time took a position after March 31, 2016 and prior to January 9, 2018 took a position that if Certas advanced a claim for loss transfer that it would be deemed to have accepted priority. Economical seems to take the position that the key event that allowed them to make the argument was the service on January 9, 2018 of the Notice to Submit to Arbitration. In my view, that is a red herring. The Notice of January 9, 2018 was merely a culmination of the process that had been commenced by Certas back in March of 2016. If one accepts Economical's position that Certas having pursued a claim for loss transfer is deemed to be establishing itself as the priority insurer then that should have been Economical's position on March 31, 2016. I see no difference between Certas providing a letter advising Economical of its position on loss transfer and requesting indemnification or submitting a letter in February of 2017 noting that this was a demand to submit to arbitration pursuant to Section 275 of the *Insurance Act* and the Notices to Submit to Arbitration. Arguably only the insurer under Section 268(2) of the *Insurance Act* could have validly sent out these Notices. Economical never raised any issue with respect to that until January 10, 2018, nearly two years later this implicitly agreeing that the loss transfer dispute and priority dispute could proceed simultaneously.

The communication between Economical and Certas and the communication between counsel for Economical and Certas in my view clearly indicate that both agreed that the loss transfer

process and the priority process would proceed along simultaneously in some fashion. These communications in my view clearly establish that Certas intended to have the priority dispute heard first and a determination made with respect to dependency and only then to pursue the loss transfer arbitration if Certas had been found to be the Section 268(2) insurer.

Therefore, I agree with Certas' submission that by its own conduct and through the conduct of its counsel, Economical is estopped from claiming that Certas has accepted priority or deemed to have accepted priority by virtue of its pursuit of a loss transfer claim. I find that Economical waived any right it may have to assert that position. Certas clearly relied on Economical's apparent acceptance of Certas' right to pursue both loss transfer and priority simultaneously and ultimately relied upon that to their detriment as evidenced by Economical's pursuit of this preliminary issue.

It is my view that in the absence of a determination of dependency in the still live and open priority dispute it is not open to Economical in the circumstances as I have outlined above to accept loss transfer. It is my view that the legislation above contemplates that a loss transfer claim can only be accepted by the loss transferee (second party insurer) under Section 275 of the *Insurance Act* once a determination has been made as to who the priority insurer is under Section 268(2) of the *Insurance Act*. I find that at this juncture it is not open to Economical to thwart the ongoing priority dispute before me by accepting loss transfer when no priority determination has as yet been made.

Economical relied heavily on the decision of Arbitrator Samis in *TD General & Markel* and the appellate result (*supra*). It is important to review the facts of the case as there is one significant difference.

In the case before Arbitrator Samis there were duplicate proceedings before him. He was tasked with making a decision on a priority dispute as between TD and Markel and then once that priority dispute was determined within the same arbitration process he was asked to rule on loss transfer. I note that at no time did Arbitrator Samis conclude that that process was inappropriate. While it may lack some practicalities, there was never any decision or conclusion from Arbitrator Samis or on the appeal that TD having commenced both a priority proceeding and a loss transfer proceeding was somehow deemed to be the priority insurer.

In many ways the facts of that case are similar to these. While various notices were sent out with respect to the priority dispute, similar notices were sent out by the same insurer with respect to loss transfer. However, in that case the problem for TD was that it did not initiate its priority dispute in time. Arbitrator Samis concluded that contrary to Regulation 283/95 TD had not commenced its arbitration within one year of the Notice of Dispute. Therefore, TD had no right to proceed as against Markel with respect to priority. Further Arbitrator Samis concluded that had TD had the right to pursue the claim in priority that Markel would have been the higher ranking insurer under Section 268(2) of the *Insurance Act*.

This then brought in the question of who was the insurer under Section 275 of the *Insurance Act* who had the right to claim for loss transfer. TD took the position that as it had to pay the Statutory Accident Benefits by virtue of its failure to pursue priority in a timely fashion that it therefore became the insurer under Section 268(2) and therefore had the right to claim loss transfer. Arbitrator Samis concluded that TD did not. As Markel was the highest ranking insurer in priority it was the insurer under Section 268(2) of the *Insurance Act* even though it did not have the obligation to pay. Therefore, only Markel would have the right to pursue a claim for loss transfer and as the priority dispute had been dismissed against Markel, TD was left not only with priority but with no right to proceed against Markel for loss transfer. This decision was upheld by Justice Lederman.

Arbitrator Samis at page 17 of his decision states the following:

“There are compelling policy reasons to conclude that loss transfer is a right that should accrue only to the highest ranking insurer, after all the priority rules are applied to the facts.

... I must conclude that this means that priority needs to be resolved in order for loss transfer to follow. The insurer and the characteristics of the policy must be known before loss transfer can be determined. Therefore, Section 275 should be read as conferring a right to loss transfer only on the highest ranking insurer. Until that highest ranking insurer is known and the features of its coverage revealed, loss transfer cannot be dealt with.”

In upholding Arbitrator Samis on appeal Justice Lederman stated at paragraph 59:

“That reference is made to Section 268 at all suggests that loss transfer is contemplated only after the resolution of any priority disputes. Had the legislature intended to make loss transfer available to whichever insurer pays pursuant to Section 2 of Ontario Regulation 283/95 or any other provision it would have done so. Further, accepting the appellants interpretation would allow an insurer who would be entitled to loss transfer to circumvent the priority dispute process including the stricter applicable limitation periods altogether rendering the priority regime irrelevant in circumstances where loss transfer is available notwithstanding the reference to it in Section 275.”

I believe that this case clearly supports the position being taken by Certas. With a live priority dispute which both parties were well aware was proceeding there could not be a determination of loss transfer and there was no right for Economical to accept loss transfer until the priority dispute had been determined.

Arbitrator Samis reached a similar conclusion in an earlier case (*Kingsway General Insurance Company & Zurich Insurance Company* (decision April 4, 2011) as did Arbitrator Densem (*supra*).

Notably in Arbitrator Densem's case the same issue was before him as before Arbitrator Samis in the TD & Markel case. Economical in that case had accepted that it had failed to commence its arbitration against Co-operators within the one year period stipulated under Regulation 283/95. Without the right to proceed with a priority dispute, Arbitrator Densem concluded that Economical did not now become the Section 268(2) insurer responsible for the payment of Statutory Accident Benefits and therefore did not meet the first requirement under Section 275 of the *Insurance Act*. He concluded it did not have any right to proceed to loss transfer indemnity.

In reaching my conclusion I am as always mindful of the words of the Court of Appeal from the Kingsway General Insurance Company v. West Wawanosh Insurance Company (2002, CanLII, 14202), and I quote paragraph 10:

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

With all due respect to Economical it is my view that Economical's argument in this case is exactly what the Court of Appeal warns against in the Kingsway & West Wawanosh decision.

Lastly, as issues have been raised with respect to waiver and estoppel, I note the case of Saskatchewan River Bungalows v. Maritime Life Insurance Company (1994, CanLII, 100 SCC 115 DLR (4th) 478) where the Supreme Court of Canada notes at page 499 that:

"Waiver occurs when one party to a contract or to proceedings takes steps which amounts to foregoing reliance on some known right or defect in the performance of the other party."

My findings with respect to Economical's waiver of their right to take the position that Certas cannot now claim it is not the priority insurer is based upon my understanding of waiver as noted above.

The Supreme Court of Canada goes on to say at page 500:

“The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely upon it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish that right is communicated, however, the conscious intention to do so is what must be ascertained. Waiver will be found only where the evidence demonstrates that the party waiving had:

- i. a full knowledge of rights; and,
- ii. an unequivocal and conscious intention to abandon them.”

Economical did not file any Affidavit material in this case. From the information before me, the communication between counsel and the documents I conclude that Economical by its conduct and its communication consciously and unequivocally chose not to take the position that Certas in asserting its rights for loss transfer in March of 2016 was now prohibited from taking the position that it could continue to pursue its claim for priority.

Alternatively I have also concluded that Economical is estopped from pursuing its position as set out in January of 2018 that Certas has accepted priority by virtue of their position in loss transfer. With respect to the legal implications of estoppel, I reviewed the case of Kingsway General Insurance Company & The Personal Insurance Company (private arbitration decision Guy Jones, June, 2006). Arbitrator Jones at page 6 of that decision made reference to the doctrine of estoppel by convention as set out by the Supreme Court of Canada in Ryan v. Moore, [2005] S.C.J. No. 38. Arbitrator Jones outlined the criteria with respect to estoppel by convention with which I agree. Those criteria are as follows:

- “1. The parties’ dealings must have been based upon a shared assumption of fact or law estoppel requires manifest representation or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (implied);
2. A party must have conducted itself by ie. acting in reliance on such shared assumptions, its actions resulting in a change of its legal position; and,
3. It must be unjust or unfair to allow one of the parties to resile or to part from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from presumed position.”

I conclude that Certas through the conduct and communication of Economical presumed that there was a mutual agreement that Certas had the right to pursue loss transfer and priority in simultaneously with the priority dispute to be heard first and ultimately, if needed, the dispute

on loss transfer to proceed next. Certas relied on this assumption. Therefore I conclude that Economical cannot now resile from that assumption as it would be unjust and unfair to Certas.

Conclusion:

I therefore conclude with respect to the issues set out in the arbitration agreement as follows:

1. Certas is not estopped from disputing priority by virtue of the loss transfer submission to arbitration dated January 9, 2018; and,
2. The loss transfer submission to arbitration did not constitute a waiver of Certas' right to dispute priority.

Therefore the issue with respect to whether or not T.P. is principally dependent for financial support on her son, J.K., will now proceed forward to an arbitration. I will contact counsel with respect to scheduling a further pre-hearing subject to any appeal so that we can set out a timely process for moving this matter forward to arbitration.

Costs:

The Arbitration Agreement provides that legal costs will be paid as agreed upon by the parties or as assessed under the *Arbitrations Act*. Normally I would award costs in favour of Certas as Economical was not successful in this matter. However, the Arbitration Agreement appears to prohibit me in this case from making any award with respect to costs until the priority dispute with respect to dependency has been heard. The Arbitration Agreement does provide that the unsuccessful party will pay the Arbitrator's account and I order Economical to cover the arbitrator's account.

If any submissions are required with respect to the costs issue and I have misread the Arbitration Agreement I would ask counsel to contact me so we can set up a costs hearing.

DATED THIS 10th day of April, 2019 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP