

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c I.8, as amended,
Section 268 and Regulation 283/95 made under the *Insurance Act*;

AND IN THE MATTER of the *Arbitration Act*, 1991, S.O. 1991, c.I.7, as amended;

B E T W E E N:

ECONOMICAL MUTUAL INSURANCE GROUP COMPANY

Applicant

and

INTACT INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Kadey B.J. Schultz: Counsel for Economical Mutual Insurance Group Company (hereinafter called Economical)

Joseph Lin: Counsel for Intact Insurance Company of Canada (hereinafter called Intact)

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991, to arbitrate an issue between the above noted insurers with respect to a claim for loss transfer pursuant to section 275 of the *Insurance Act* R.S.O. 1990, c I.8, as amended. However, the loss transfer claim can only be determined once an issue with respect to priority has been determined. The parties agreed that only an insurer who is the highest priority insurer pursuant to section 268 of the *Insurance Act* can proceed with a claim for loss transfer.

In this matter, Economical claims that it is the priority insurer and therefore has a right to pursue loss transfer as against Intact. Intact takes the position that Economical is not the priority insurer and that priority in fact rests with Northbridge who is not a party to this proceeding. If priority rests with Northbridge then Economical does not have a right to pursue a loss transfer claim against Intact. While this matter is styled as a loss transfer claim, it is really a determination of priority that is at the heart of the dispute.

This claim is with respect to a motor vehicle accident that occurred on May 4, 2019. Mr. VN advanced a claim for Statutory Accident Benefits to Economical.

The parties selected me as their Arbitrator on consent and this matter proceeded to a combined oral and written Hearing. No witnesses were called however, the parties made oral submissions in addition to their written materials. An issue did arise with respect to the written materials. Counsel for the applicant submitted written submissions as well as a Book of Documents. Counsel for Intact provided a response and Economical filed their reply on May 14, 2021. After Economical filed their reply, counsel for Intact sent an email on May 19, 2021 submitting a “sur-reply”. Counsel for Economical objected to the sur-reply on the grounds that it had not been contemplated in the Arbitration Agreement nor had the right to file a sur-reply been discussed or agreed upon during the course of the pre-hearings. Counsel for Economical therefore asked that that the sur-reply not be accepted. I indicated to both counsel that I would accept the sur-reply but I would give counsel an opportunity to make oral submissions. Originally, this matter had been contemplated as proceeding as a written Hearing only. The oral submissions took place on July 16, 2021.

With respect to the sur-reply, while the issues raised in the sur-reply do form part of this Arbitration, counsel for Economical argued that I should take the circumstances in which the sur-reply was filed in terms of a possible costs award. Counsel for Intact took the position that the private Arbitration process is an informal one and that the sur-reply was intended to assist the Arbitrator with alternate arguments and alternate interpretations of the legal issue in dispute in this case. Counsel for Intact argued that the Arbitration Agreement cannot be agreed upon as prohibiting any sur-reply. I have considered all these arguments and will comment on that in my costs award.

Exhibits:

In addition to the written and oral submissions provided by the parties, I also received the following exhibits:

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| Exhibit 1 | Document Brief of the Applicant |
| Exhibit 2 | Document Brief of the Respondent |
| Exhibit 3 | Arbitration Agreement signed by both parties on May 12, 2021 |
| Exhibit 4 | Agreed Statement of Facts |

The document brief as submitted included a Certificate of Insurance from Economical, the Economical property damage file, claims notes from Crawford, a Vaughan Car Rental receipt dated May 7, 2019 and the motor vehicle accident report dated May 4, 2019.

Issues in Dispute:

The Arbitration Agreement identifies the following issue in dispute:

“Whether Economical is the priority insurer for the claimant’s Statutory Accident Benefits pursuant to section 268 of the *Insurance Act*”.

Facts

An Agreed Statement of Facts was filed. There is no issue between the parties with respect to the facts surrounding this dispute. The issue is a legal one only.

On May 4, 2019, VN (hereinafter called the claimant) was operating a rental vehicle insured by Economical when it was involved in a collision with a heavy commercial vehicle insured with Intact. The rental vehicle was also insured under a fleet policy with Northbridge.

The claimant had been involved in a previous motor vehicle accident in March of 2019. In that accident, the claimant had rear-ended a third party vehicle. He was operating his personal car: a 2011 Mazda GX insured by Economical. Crawford was an independent adjusting firm that had been retained on behalf of Economical to handle and adjust the March 2019 accident claim. As the Mazda was under repair, Crawford arranged for the claimant to rent a vehicle from Vaughan Car Rental on March 28, 2019.

The Mazda had sustained significant damage to the front end and was ultimately declared a total loss. According to the claim notes from Crawford, the claimant was told that Economical would pay for a comparable size rental vehicle. The notes state the following:

“We will pay for a comparable size rental vehicle to the one you have. Please be aware that we do not cover gas, any excessive mileage, any tickets as well as extra insurance because your own coverage will transfer to the rental vehicle. The rental vehicle will be due back once the 30-day policy limit is reached, when repairs are complete or when settlement is offered which ever comes first”.

Unfortunately, it took some time for a decision to be made by Economical/Crawford that the Mazda could not be repaired and that it was determined to be a total loss. During that time, extensions were made to the claimant’s right to continue to rent the vehicle from Vaughan.

On April 18, 2019, Crawford extended permission for a further 10-day rental extension from April 15.

On April 26, Crawford/Economical approved a further 10-day extension of the rental vehicle. The extension time took the rental period beyond the 30 days contemplated when the rental was initially approved.

It was not until May 17, 2019 that it was confirmed that the Mazda was a total loss. On that day, the Crawford notes show that there was an email sent to the rental company confirming the final rental date was May 7. By that time, the claimant had been involved in the May 4, 2019 accident. According to the Vaughan Car Rental invoice dated May 7, 2019 the car rental commenced March 28 and ended May 7 for a total of 41 days.

On May 4, 2019, the claimant was operating his rental vehicle. He was travelling eastbound on Steeles Avenue when he was struck by a tractor-trailer operated by BS who was making a left-hand turn onto Winston Churchill Boulevard. The rental vehicle operated by the claimant was a 2017 Hyundai. The claimant is the named insured under Economical policy 20420689 and that policy was in effect January 9, 2019 to January 9, 2020.

The parties are agreed that on May 4, 2019 the Hyundai would have been a temporary substitute vehicle under the claimant's personal policy with Economical. The parties also agree that on the date of loss that the Hyundai was insured by Northbridge pursuant to its fleet policy insuring Vaughan Car Rental.

It also is agreed between the parties that on May 4, 2019 the claimant was a deemed named insured under the Northbridge policy as he had rented their vehicle for more than 30 days pursuant to Section 3(7) of the Statutory Accident Benefit scheduled.

The claimant sustained serious injuries in the May 4, 2019 accident and applied to Economical for Statutory Accident Benefits submitting an OCF-1 dated May 7, 2019. The claimant has been accepted as catastrophically impaired and as of the date of this Hearing close to \$150,000.00 had been paid out in benefits.

On July 29, 2019, Economical served Intact with a Notice of Loss Transfer pursuant to Rule 12(5) and a loss transfer request for indemnification was served on October 3, 2019.

A Notice of Commencement of Arbitration was served by Economical on Intact on April 8, 2020 with respect to the loss transfer claim.

The parties agree that for the purposes of this Arbitration that the tractor-trailer insured with Intact was a heavy commercial vehicle pursuant to Section 9(1) of R.R.O. 1990, Regulation 664. There is no issues for the purposes of this Hearing with respect to the tractor-trailers liability pursuant to the Fault Chart with respect to the accident of May 4, 2019.

Position of the parties:

Economical

Economical takes the position that it is the priority insurer. Economical insured the vehicle that the claimant was occupying on the date of loss by virtue of its agreement to extend coverage to

the rental vehicle as a temporary substitute vehicle while the car actually covered under the Economical policy was undergoing repairs.

Economical further submits that the claimant was also a deemed named insured under the Northbridge policy as the vehicle was rented for more than 30 days. As the claimant was also an occupant of the vehicle that Northbridge insured Section 268 of the *Insurance Act* requires the claimant to choose which of the two insurers he will claim Accident Benefits from (Section 268 (5.1) of the *Insurance Act*). That section provides that if there is more than one insurer against which a person may claim benefits at equal rank then the person may decide the insurer from which he or she will claim the benefits in his or her discretion.

Economical submits that as the claimant submitted an OCF-1 to Economical that results in the claimant choosing Economical pursuant to Section 268 and makes them the priority insurer.

Intact

Intact conceded through their written and oral submissions that for the first 30 days of the rental of the Hyundai vehicle that the claimant was insured by Economical while driving that vehicle on the grounds that it was a temporary substitute vehicle pending the Mazda repairs. Intact distinguished between Economical insuring the Hyundai as opposed to Economical insuring the claimant. Intact takes the position that at no time did Economical actually insure the Hyundai but rather Economical's policy that covered the claimant extended to the claimant for Statutory Accident Benefits while he was an occupant of the Hyundai vehicle.

Intact takes the position that Northbridge was the insurer of the Hyundai vehicle. However, it also conceded in its oral and written submissions that the claimant was a deemed named insured under the Northbridge policy once he had rented the vehicle that he was driving for more than 30 days. Once again Intact asked me to distinguish between the Hyundai being a described vehicle under the Northbridge policy as opposed to the claimant having access to the Northbridge policy by virtue of the renting and driving of their vehicle for more than 30 days.

Intact also conceded during oral submissions that a rented vehicle under 3(7)(F) of the Statutory Accident Benefit Schedule can also be a temporary substitute vehicle pursuant to section 2.2.2 of the OAP1 (definition of temporary substitute automobile).

Intact however submits that a rented vehicle ceases to be a temporary substitute vehicle after the 30 days contemplated by Section 3(7)(F) of the *SABS* has passed. Intact submits that for the first 30 days of the rental that the Economical policy would extend to cover the claimant while in the rental vehicle is a temporary substitute vehicle. However, at the end of 30 days Intact submits that Economical no longer extends that coverage and rather the Northbridge policy kicks-in as the vehicle has now been rented in excess of 30 days. As such the claimant becomes the deemed named insured under the Northbridge policy switching coverage to Northbridge. As I understand the argument, Intact suggests that the temporary substitute vehicle coverage only operates for

30 days and thereafter the Economical policy no longer provides coverage. The Northbridge policy does not cover for the first 30 days and only starts providing coverage after 30 days. Intact submits that this makes sense of the deemed named insured provision under the *SABS*. Intact submits that it would be pointless to have this section if the Economical policy were to continue to provide coverage.

Reply: Economical

Economical submits that there is no legal authority for Intact's argument and that a plain reading of Section 3(7)(F) does not support Intact's submissions. They submit there is no provision in the *Insurance Act* nor in the O.A.P. which supports an interpretation that the extension to coverage for the claimant under their personal policy while driving a temporary substitute vehicle is limited to a 30-day period only.

Legislative and policy provisions

Section 268 of the *Insurance Act* (R.S.O. 1990, c, 1.8) provides a cascading allocation of insurance coverage for the purposes of priority.

Generally speaking, an insured person's first claim is against a vehicle with respect to which he or she is a named insured. However, if one is a named insured under a number of policies then occupancy becomes relevant and the priority insurer is the one under which the insured is a named insured and an occupant of the car. Finally, Section 268 recognizes that in some cases there can be one or more insurers that rank equally and in that case the claimant has the right in his or her discretion to choose which insurer he or she wishes to apply for Statutory Accident Benefits. In this case, the claimant is an occupant of a vehicle in which he or she is potentially the named insured under two policies: the Economical policy by virtue of the extension of coverage to a temporary substitute vehicle or Northbridge as the insurer of the rental vehicle itself.

Relevant to this dispute is Section 3(7)(F) of Ontario Regulation 34/10 dealing with the "deemed named insured" provision. That section is as follows:

An individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident, the insured automobile is being rented by the individual for a period of more than 30 days."

In this case both Economical and Intact have conceded that the claimant was a deemed named insured under the Northbridge policy as the vehicle had been rented from Vaughan for more than 30 days.

However, both Intact and Economical also agree that at one point the claimant was covered by Economical while driving the rental car by virtue of the temporary substitute provisions under the O.A.P.1. Pursuant to Ontario Automobile Policy, a temporary substitute automobile is defined under Section 2.2.2 as follows:

A temporary substitute automobile is an automobile that is temporarily used while a described automobile is out of service. The described automobile must not be used by anyone insured by this policy, because of its breakdown, repair, service, theft, sale or destruction.

Coverage for a temporary substitute automobile is provided under the automobile policy of the owner of the temporary substitute automobile.

Also relevant is the definition of other automobiles defined under Section 2.2.3 as:

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

Again, the parties agree that for the first 30 days that the claimant was renting the vehicle that it was a temporary substitute vehicle and therefore the claimant was covered under the Economical policy. Where they differ is what happens on day 31.

Factually, I find it important to reflect on what Crawford/Economical did after the 30-days had expired for which they had originally offered the rental vehicle to the claimant. The initial note from Crawford was that the claimant was told that the rental vehicle would be due back once the 30-day policy limit was reached, when repairs are complete or when settlement is offered whichever comes first. Clearly in this case the 30-days came first as the repairs were never completed and no settlement was offered within 30-day period. This would seem to provide support to the argument for Intact that Economical only considered its policy coverage to be a 30-day limit. However, counsel for Intact could not refer to any portion of the O.A.P.1 to suggest that there was a such a 30-day limit within the contract of automobile insurance. They were also unable to point to any specific provision in the *Insurance Act* or the *SABS* that stated that a temporary substitute vehicle is only a temporary substitute vehicle for a period of 30 days and that the extended coverage under the personal policy ends at the 30-day mark.

Further, in this case, it is relevant that even if one accepts Intact's argument that there may have been a 30-day limit Crawford/Economical agreed to extend that 30-day limit on two occasions. The first occasion by an additional 10 days and then a further 10 days during which the accident occurred. During the extension Economical agreed to pay for the car rental. The car rental invoice shows that it was sent to Perth (Economical) and that Economical was asked to pay for the full 41-day rental. There is no evidence before me to suggest that the claimant was told that while the payment for the rental vehicle was extended past the 30 days that the policy coverage would not be extended.

While Intact's argument with respect to the interaction between the temporary substitute vehicle and the deemed named insured 30-day rental provision is creative it does not, in my view, hold water. The one thing inherent in the Ontario Automobile Insurance system is that there can be multiple insurers against whom claims can be made for Statutory Accident Benefits. Intact's argument appears to assume that we must interpret these provisions to identify only one insurer that the claimant can access or who would be the top of the priority hierarchy. The fact is that Section 268 of the *Insurance Act* clearly contemplates that there are circumstances when two or more insurers may rank equally. I find that, that is what has occurred in this case.

I find that on the date of loss Economical continued to provide coverage to its insured while driving the rental vehicle as that vehicle continued to be a temporary substitute vehicle. I find nothing in the *Insurance Act*, the provisions of the standard automobile policy (O.A.P.1) or the SABS to support that the Economical coverage of the claimant while in the rental vehicle ended at 30 days.

I also find that on day 31 that the Northbridge policy would then also provide coverage by virtue of the deemed named insured provisions. From day 31 to 41, Northbridge insured the rental vehicle and the claimant would have been a deemed named insured under their policy while at the same time continuing to be a named insured under the Economical policy.

I find that the claimant elected Economical by virtue of submitting the OCF-1 and accordingly Economical is the priority insurer for the purposes of Statutory Accident Benefits for the claimant for the accident of May 4, 2019.

As the parties have agreed that if Economical ranks in priority to Northbridge that there is a right of loss transfer I therefore find that Economical has the right to pursue loss transfer against Intact.

Award

Economical Mutual Insurance Company is the insurer who is the priority payer for Statutory Accident Benefits of the claimant VN arising out of the injuries he sustained in the accident of May 4, 2019.

Economical Mutual Insurance Company as the priority insurer has a right to pursue a claim for loss transfer pursuant to Section 275 of the *Insurance Act* as against Intact Insurance Company.

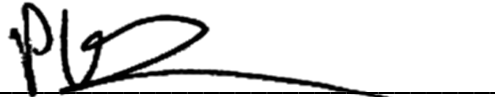
Costs

Pursuant to the Arbitration Agreement, legal costs are to be determined by me taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in litigation before the courts of Ontario.

Despite the very creative submissions of Intact's counsel, Economical has been wholly successful in this Arbitration and accordingly I find that the legal costs of the Arbitration and the costs of the Arbitrator are to be borne by Intact. In light of my finding with respect to Economical being awarded costs I do not have to deal with whether there should be any specific order with respect to the costs of the sur-reply. However, I do agree with counsel for Intact that in proceedings such as this it is important to be flexible. The proceedings are more informal and from an Arbitrator's perspective any helpful arguments that can be advanced before making the decision are to be encouraged. In this particular case some of the issues relating to the sur-reply could have been avoided if Intact had simply requested an opportunity to make further submissions and/or have oral submissions rather than simply serving them via email without canvassing with counsel prior to that time.

I would like to thank both counsel for their most helpful submissions both orally and in writing and in the event counsel are unable to agree with respect to the quantum of costs they can contact me to schedule a costs Hearing.

DATED THIS 19th day of July, 2021 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written over a horizontal line.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP