

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17**

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990 c. I, 8  
And all Regulation thereto; and in particular, Ontario Regulation 664 and 668/90 (*Fault Determination Rule*)**

BETWEEN:

MANITOBA PUBLIC INSURANCE

Applicant

-and-

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

**AWARD**

**Counsel Appearing:**

Sandi J. Smith: Counsel for the Applicant, Manitoba Public Insurance (hereinafter called MPI)

Debbie Orth: Counsel for the Respondent, Insurance Corporation of British Columbia (hereinafter called ICBC)

**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. 1980 c I.8, as amended.

By way of introduction, this loss transfer claim arises out of a motor vehicle accident that took place on December 18, 2017 near Thunder Bay, Ontario.

Two individuals advanced a claim for Statutory Accident Benefits, QL and ZZ. On the date of loss, these two individual were residents of the province of Manitoba. They applied to MPI for

Accident Benefits and benefits were paid in accordance with the *Manitoba Insurance Corporation Act*.

The accident involved a transport truck owned by Natt Freightways and insured by ICBC.

In this Arbitration MPI claims it is entitled pursuant to Section 275 of the *Ontario Insurance Act* to seek loss transfer as against ICBC for payments made to the two Claimants injured in the accident in Ontario but residing in Manitoba.

ICBC takes the position that there is no such right of loss transfer in the circumstances of this case.

The matter before me is to determine whether or not MPI can advance a claim for loss transfer in these unusual circumstances.

### **THE ARBITRATION PROCESS:**

The parties selected me on consent as their Arbitrator and this matter proceeded to a combined oral and written hearing. The hearing itself took place on December 8, 2021. The parties filed extensive written submissions as well as Books of Authorities. They also prepared a Book of Documents and submitted an Arbitration Agreement. Some of the terms of the Arbitration Agreement however remain in dispute. The issues upon which the parties cannot agree does not have any bearing on my jurisdiction.

The Document Brief included the following:

1. Motor vehicle accident report;
2. Certificate of Registration of the MPI vehicle;
3. A copy of the automobile insurance policy of MPI;
4. Various loss transfer Notices and requests for indemnification; and,
5. Letters from MPI to the Claimants outlining the payments that were made.

Any potential issues with respect to quantum or liability are not the subject matter of this Arbitration.

### **ISSUE IN DISPUTE:**

The Arbitration Agreement did not set out the issue in dispute here other than setting out Section 275 of the *Insurance Act* and the loss transfer provisions.

However, a review of the Facts of the various parties and as well their oral submissions suggests that I am being asked to address the following issues:

1. Is MPI entitled to recover all amounts paid as Accident Benefits to the Claimants, QL and ZZ arising out of a motor vehicle accident that occurred near Thunder Bay, Ontario on December 18, 2017 based on Section 275 of the *Insurance Act* (Ontario) or based on the Arbitrator's equitable jurisdiction as set out under the *Arbitration Act*;
2. Does loss transfer under Section 275(1) of the Ontario *Insurance Act* R.S.O. 1990 c I.8, only apply to an insurer who has paid Ontario Statutory Accident Benefits?

**DECISION:**

I find that Section 275 of the *Insurance Act* does not apply in the circumstance of this case to permit MPI to claim loss transfer as against ICBC.

**FACTS:**

On December 18, 2017 QL and ZZ were residents of the province of Manitoba. They were operating a Honda Civic which was insured by MPI pursuant to the standard Manitoba Motor Vehicle Liability Policy known as MSPF-1.

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

On December 18 the Claimants were travelling in Ontario and were involved in a motor vehicle accident near Thunder Bay Ontario.

The accident involved a tractor trailer owned by Natt Freightways Inc. and insured by ICBC. The ICBC like the MPI is the provincial insurer for all vehicles registered in the province of British Columbia and issues motor vehicle liability policies for residents of that province pursuant to the *Insurance (Motor Vehicle) Act*.

The two Claimants submitted claims for Accident Benefits to MPI. They did not submit an OCF-1. They did not advance any claims for Statutory Accident Benefits in accordance with the *Insurance Act* R.S.O. 1990 c I.8, and its Statutory Accident Benefits Schedule. MPI submitted to ICBC request for loss transfer indemnification.

The loss transfer for the Claimant QL is dated September 17, 2019 and net of the \$2,000.00 deductible is a claim for \$115,072.04.

The loss transfer for the Claimant ZZ dated September 17, 2019 net of the \$2,000.00 deductible is in the amount of \$2,199.81.

In a letter dated August 15, 2019 from MPI to QL it is confirmed that \$84,843.55 is being paid to the Claimant as a result of a permanent impairment. This is pursuant to Section 127(1) of the

*Manitoba Public Insurance Corporation Act*. The letter indicates that as of March 1, 1994 there are no provisions under the Act that allow for payment of general damages for pain and suffering. It then outlines a list of injuries and how they are rated under the Regulation. The letter indicates that this payment of \$84,843.55 is based on what colloquially is described as a meat chart.

Similarly there is a letter of the same date directed to ZZ indicating that Claimant's permanent impairment is in the amount of \$2,853.83.

These two payments for permanent impairment make up the majority of the claim of MPI for loss transfer.

There have been no further payments by MPI since April 4, 2019.

MPI signed a Power of Attorney and Undertaking in 1991 and ICBC executed one in 1973. This is generally referred to as a PAU.

A copy of the PAU is attached as an Appendix to this decision.

The parties agree that the PAU requires insurers to appear in any action or proceeding against it or its insured in the province or territory where such action has been instituted. It also requires the insurer who files the PAU not to set up any defence to any claim, action, or proceeding under a motor vehicle liability insurance contract entered into it which might not have been available if the contract had been entered into in accordance with the laws of the province where the action or proceeding has been instituted.

### **POSITION OF THE PARTIES:**

#### **MPI**

MPI takes the position that if one follows through the *Insurance Act* of Ontario and its Regulations together with the PAU and the relevant case law on a logical basis, the only conclusion is that MPI has the right to pursue a claim for loss transfer under Section 275 when the accident takes place in Ontario irrespective of the fact that the policies insurance involved are out of province and are providing non-Ontario Statutory Accident Benefits.

MPI suggests that the starting place is Section 224(1) of the *Insurance Act*. This provides a definition of the word "contract".

(b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or jurisdiction designated in the Statutory Accident Benefits Schedule by an insurer that has filed an undertaking under Section 226.1

MPI points to the fact that this makes their automobile policy insurance a “contract of automobile insurance” under Section 224(1).

This is because Section 226.1 describes an out-of-province insurer as:

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

This submits MPI, is in essence a provision that results in it and ICBC amongst others to filing the Power of Attorney and Undertaking known as the PAU. MPI filed such an undertaking and therefore its policies qualifies as a contracts of automobile insurance under Section 224.

MPI also points to the following provisions under the *Insurance Act* as part of their analysis:

1. Section 224(1) – Definition: Insured

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

2. Section 224(1) – Definition: Statutory Accident Benefits

Means the benefits set out in the Regulations under paragraphs 9 and 10 of Subsection 121(1)

Statutory Accident Benefits Schedule means:

The regulations made under paragraphs 9 and 10 of Subsection 121(1)

MPI also refers to Section 243(1) of the *Insurance Act* which sets out the territorial limits. Territorial limits under Sections 239 and 241 apply to the ownership and use of operation of an insured automobile in Canada and the United States, a jurisdiction designated in the SABS or on vessels plying between the ports of Canada and the USA. Similarly, statutory benefits provided under Section 268 also apply to those territorial limits.

MPI then takes us to Section 268(1) of the *Insurance Act* which sets out the rules to determine entitlement to Statutory Accident Benefits.

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

Finally, MPI says the last piece in the puzzle is Section 275 of the *Insurance Act* which is the loss transfer provisions and it is set out below:

The Insurer responsible under Subsection 268(2) for the payment of Statutory Accident Benefits to such classes of person as may be named in the regulations is entitled, subject to the terms, conditions, provision, exclusions and limitations as may be prescribed, to indemnification in relations to such benefits paid by it from the Insurer of such class or classes of automobiles as may be named in the regulations involved in the incident from the which the responsibility to pay the Statutory Accident Benefits arose.

The MPI also points to the following provision from the Statutory Accident Benefits schedule of the *Ontario Insurance Act* defining who is an insured person.

- (a) An insured person in respect of a motor vehicle liability policy is someone who is involved in an accident involving the insured automobile if the accident occurs in Ontario.

MPI submits that as the accident occurred in Ontario that the substantive law of Ontario must be used to determine the issues in dispute. ICBC does not take issue with that.

MPI submits that it issued a contract of insurance which meets the definition of Section 224 and 226.1 of the *Ontario Insurance Act* in that it is a motor vehicle liability policy.

MPI submits that based on Section 268 of *Insurance Act*, and the PAU that the MPI is obliged to pay Statutory Accident Benefits to one of their insureds who is involved in an accident in Ontario.

MPI submits that had the claimants in this case requested that MPI pay Statutory Accident Benefits pursuant to the Ontario regulation, rather than pursuant to the MPI policy, that MPI would have been required to pay those benefits pursuant to 268 of the *Insurance Act* and the PAU. However, MPI acknowledges that that did not occur in this case but rather they applied to MPI for the available benefits under their own provincial policy. MPI acknowledges in its submissions that no OCF-1 or Application for Ontario Statutory Accident Benefits was ever received by it from either of the Claimants.

MPI goes on to submit that it is obliged under Section 268 of the *Insurance Act*, and the PAU to pay benefits to an “insured”. It suggests that the two Claimants here meet the definition of

insured as they were a person involved in an accident involving the MPI insured vehicle in Ontario.

As such, the Claimants are therefore entitled to claim the Statutory Accident Benefits under the *Ontario Act* from MPI. MPI submits that it is irrelevant that the Claimants did not submit or request Ontario Statutory Accident Benefits. MPI submits that it meets all the requirements under the legislation that would trigger Section 275 of the *Insurance Act*.

MPI submits that Section 275 references “the Insurer responsible under Subsection 268(2) for the payment of Statutory Accident Benefits.” MPI submits that based on the process of analysis that they have outlined that it is an Insurer responsible for paying Statutory Accident benefits under Subsection 268(2). MPI submits that it is irrelevant and not required by Section 275 as to whether or not they actually paid Ontario benefits. A form of benefit is being paid in accordance with MPI. All that is required to trigger 275 of the *Insurance Act* is that they be “the Insurer responsible under Subsection 268(2) for the payment of Statutory Accident Benefits.”

MPI goes on to submit that Section 275 in terms of the indemnification provisions doesn't specifically reference that one has had to pay Ontario Statutory Accident Benefits to trigger Section 275. The wording is “indemnification in relationship to such benefits paid by it”. MPI submits that the words “such benefits” does not only refer to Ontario Statutory Accident Benefits but simply refers to the benefits that have been paid by the Insurer. In this case MPI says it has paid benefits to its Claimants, it is the Insurer responsible for the payment of benefits under Section 268(2) and therefore it is entitled to indemnification from ICBC.

As to the case law, MPI points out that despite the passage of 30 years since the loss of transfer provision under Section 275 was initiated, that there has never been a decision that has considered the recovery of Accident Benefits paid to an Insured who has been injured in Ontario but who was paid Accident Benefits pursuant to their own provincial legislation. MPI submits that the payment of Statutory Accident Benefits pursuant to home legislation does not alter the availability or applicability of the substantive law of Ontario and does not prevent MPI's recovery from benefits payable under Section 275. MPI submits that there are no decisions that would bind me in terms of having to follow precedent.

However, MPI did point to some case law which it suggests is instructive and of assistance in terms of their position with relationship to the interpretation of Section 275.

MPI points to the decisions of *ICBC v. Royal* [1999] OJ No. 1668 decision of the *Ontario Court of Appeal*, and *Travelers v. CAA* [2018] ONSC 3911, a more recent decision of the *Ontario Court of Appeal*.

MPI points out that the *Court of Appeal* has provided a framework for a legal analysis to be provided when considering whether Section 275 of the *Insurance Act* is applicable. Those cases suggest that the starting point is for the Arbitrator to ask “is the Insurer who was seeking loss

transfer required to pay Accident Benefits pursuant to Section 268(2) of the *Insurance Act of Ontario?*”

MPI submits based on its preceding legal analysis and how it brings itself within Section 268 of the *Insurance Act* that indeed it is required to pay Accident Benefits to its Claimants in accordance with Section 268 and therefore the key question asked by the *Court of Appeal* has to be answered in the affirmative in this case thus opening up Section 275 for the purposes of MPI’s claim.

MPI also submits that those two decisions of the *Court of Appeal* and particularly *Travelers v. CAA* support the fact that the triggering event, whether it be in terms of priority or loss transfer is whether or not the accident occurred in Ontario. Once the accident has occurred in Ontario, then you simply go to Section 268 to determine whether the Insurer is one responsible under Section 268 to pay the Statutory Accident Benefits.

MPI finally says that it would be an absurdity to interpret this legislation that only the payment of Ontario benefits would entitle an Insurer to recovery of loss transfer. MPI suggests that this type of absurdity in the legislation has been rejected by the *Court of Appeal* as seen in their decision of *Tomec v. Economical* [2019] ONCA 882.

Just prior to the oral hearing MPI submitted a decision in the case of *Allstate Insurance Company of Canada v. TD Home*, a decision of Justice Dow dated November 12, 2020. MPI submits that this case supports their position in this matter.

In the Allstate case there was a priority dispute between Allstate and TD Home. The Claimant had been injured in an automobile accident in Michigan. At the time of the accident he was operating a vehicle leased by his fiancée and insured by Allstate. However, the Claimant owned a motor vehicle himself insured with TD. Both the Claimant and his fiancée lived in Ontario.

Allstate received an OCF-1. In that the Claimant elected to receive (pursuant to Section 59 of the SABS) benefits available to him in Michigan as it was more generous than the scheme in Ontario.

Allstate disputed that it was the priority Insurer TD accepted priority. Having accepted priority TD then looked at what was being requested in terms of reimbursement.

At issue was whether or not TD was obliged to pay the monies that Allstate had paid based on Michigan benefits as opposed to Ontario benefits.

The matter had originally gone before a private Arbitrator who concluded that TD did have to pay Allstate for the Michigan benefits.

Justice Dow agreed that the Arbitrator was correct in his decision and that he had authority to make that decision. He noted that Allstate was legally required to pay the Claimant Accident Benefits at the Michigan level pursuant to Section 59 of the *Ontario SABS*. In addition he found



that Section 31 of the *Arbitration Act* permits an Arbitrator to decide a dispute in accordance with law “including equity”. Therefore from that perspective the Arbitrator had the power to order the repayment of benefits on an equitable basis.

### **POSITION OF ICBC:**

ICBC’s position is relatively simple. It states that MPI is not entitled to loss of transfer under the *Ontario Insurance Act*. It submits that MPI did not pay **Ontario Statutory Accident Benefits** and therefore Section 268 does not apply and therefore Section 275 of the *Insurance Act* is not triggered.

ICBC submits that the two Claimants chose not to submit an OCF-1 and seek Ontario Statutory Accident Benefits. They had an option to do so as MPI had signed the PAU and had thus undertaken to provide Ontario Statutory Accident Benefits to their Insureds where they were injured in an accident in Ontario.

However, the two Insureds did not choose to apply for Ontario benefits but elected to apply for Manitoba compensation payments available in their own jurisdiction through their own Manitoba policy. Manitoba did not pay Ontario Statutory Accident Benefits but rather they paid benefits in accordance with the Manitoba law and the Manitoba policy.

ICBC submits that MPI having not made any payments under the Ontario Statutory Accident Benefits schedule that Section 268 and 275 of the *Insurance Act* cannot be triggered and there is no mechanism available for MPI to seek reimbursement from the ICBC.

ICBC points to the decision of the Court of Appeal in *Travelers v. CAA* (supra). The Court of Appeal states the following:

“The purpose of Section 268 is to permit two or more insurers who might have responsibility in paying Ontario Statutory Accident Benefits to determine responsibility on a set of prescribed priority rules.”

ICBC stresses that the Court of Appeal references Ontario Statutory Accident Benefits.

ICBC also points out to the fact that the majority of the loss transfer payment made by MPI (over 72%) is for the permanent impairment entitlement (the meat chart) for which there is not an equivalent under the Ontario Statutory Accident Benefits schedule. ICBC points out that it would be an absurdity to have an Ontario Arbitrator review and apply the MPI’s insurance policy and relevant law to determine what amounts the Claimants would have been entitled to and whether those payments would be considered reasonable and subject to indemnification in the context of the Ontario Loss Transfer Scheme under Section 275.

ICBC strenuously disagrees with MPI's interpretation of the triggering of Section 275 of the *Insurance Act*. ICBC submits that the Insurer responsible under Section 268(2) for the payment of the Statutory Accident Benefits must be the Insurer that paid such benefits. The words "to such benefits paid by it" can only refer back to the introductory lines in Section 275 and the reference to the Insurer responsible for paying Statutory Accident Benefits. Statutory Accident Benefits is defined under the *Insurance Act* as those benefits made under Regulation 9 and 10 of Subsection 121(1). Those are the Ontario Benefits pursuant to the *Ontario Insurance Act* and they are not MPI benefits.

ICBC submits the Ontario legislature can only legislate within its borders and the term "Statutory Accident Benefits Schedule" or "Statutory Accident Benefits" cannot be interpreted to mean any foreign payments made as a result of an accident by an Insurer. ICBC points out that Section 275 of the *Insurance Act* must refer to Ontario Statutory Accident Benefits as it refers to Section 268(2) of the *Insurance Act*. Any other interpretation would be absurd.

In support of their position ICBC points to the priority provisions under Regulation 283/95 of the *Ontario Insurance Act*. That regulation requires that an Insurer must "receive an OCF-1 and have paid Ontario Statutory Accident Benefits" before it can proceed to a dispute as to which of two Insurers is required to pay those benefits.

An OCF-1 was not submitted in this case. No Insurer paid Ontario Benefits. Therefore, ICBC submits Section 275 cannot be triggered for the purposes of MPI and its request for indemnification.

ICBC agrees with MPI that in the 30 years that this loss transfer scheme has been in place there has not been one decision where an Ontario Arbitrator or Court has issued an Order requiring an Insurer to reimburse a foreign Insurer for foreign payments made in another province under a different legislation, policy, plan or regulation. ICBC suggests that is because there is no legal or legislative authority to do so.

ICBC submits that if I follow MPI's suggested interpretation that this would revolutionize loss transfer disputes. It would require an Ontario Arbitrator to review, consider, and apply different payment regulations and policies issued in all the Canadian provinces, including Quebec, and all 50 states of the United States of America. ICBC submits that cannot be the purpose of the Ontario legislation. It can only have been intended to apply to a claim for benefits or loss transfer where accidents occurred in Ontario, and where the Insurer paid Ontario Statutory Accident Benefits pursuant to the Schedule.

As to the decision of Justice Dow in *Allstate v. TD*, ICBC points out that that involved an accident in Michigan and not an accident in Ontario. Further, it involved an Insured who resided in Ontario, submitted an OCF-1, and while he was paid in Michigan benefits it was pursuant to Section 59 of the Ontario Statutory Accident Benefits Schedule.

## **DECISION AND ANALYSIS:**

I have carefully reviewed the provisions of the *Insurance Act* and its regulations as outlined by MPI. It is clear that the words Statutory Accident Benefits and Statutory Accident Benefits Schedule are a defined term under the *Ontario Insurance Act*. Specifically, they are the benefits that are set out under Subsection 121(1), paragraphs 9 and 10, and these make reference to the actual Statutory Accident Benefits Schedule that forms a part of the *Ontario Insurance Act* and the standard automobile insurance policy of Ontario.

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

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

I agree with MPI that the case law and in particular the decisions in *Travelers v. CAA* from the Ontario Court of Appeal make it clear that the Section 268(2) of the *Insurance Act* which sets out the priority scheme applies to an Insurer who is obliged to pay Ontario Statutory Accident Benefits. To find otherwise would mean that the *Ontario Insurance Act* would have extra territorial application in my view.

While I appreciate that this accident occurred in Ontario, and that would have obliged MPI to pay Ontario Statutory Accident Benefits had their Insureds so chosen, that is not in fact what happened. The Claimants did not elect under Section 59 the Schedule through their right per the PAU filed by MPI, to receive Ontario benefits. They elected to receive benefits from the MPI which included a payment in essence for pain and suffering or at least a replacement for a payment for pain and suffering that had been removed by the Manitoba legislature years earlier.

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

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

extra territorial application of the *Ontario Insurance Act*, its regulations, its priority provisions, and its loss transfers provisions.

I reviewed the decision of the Supreme Court of Canada in the Insurance Corporation of *British Columbia v. Unifund* [2003] 2 SCC 63. This was case where Ontario residents were injured when their rented car was struck by a tractor trailer in British Columbia. The Ontario residents applied for Statutory Accident Benefits to their home insurer Unifund pursuant to their Ontario policy. Unifund elected to bring a claim under Section 275 of the *Insurance Act* as against ICBC seeking indemnification based on the loss transfer provisions of Ontario. The Supreme Court of Canada found that Section 275 of the *Ontario Insurance Act* was inapplicable as to apply that provision in the circumstances of the case would not respect territorial limits on provincial jurisdiction. The Court stated the following:

Section 275 on the *Ontario Insurance Act* is constitutionally inapplicable to the Appellant because its Application under the circumstances of this case would not respect territorial limits on provincial jurisdiction. This territorial restriction is fundamental to our system of Federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres and expect the same in return.

The territorial limits on the scope of provincial legislative authority prevent the Application of the law of a province to matters not sufficiently connected to it. Different degrees of connection to the enacting province may be required according to the subject matter.

The Court goes on to examine the statutory cause of action as presented by Unifund. The Court notes that Unifund's problem is finding a cause of action. The Court states "in this Appeal we are dealing only with Unifund's quite separate and distinct Claim under Section 275 of the *Ontario Act* which provides a Statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABS under the "*Ontario Insurance Act*".

The Supreme Court of Canada clearly indicates here that Section 275 is to deal with the payment of the SABS under the *Ontario Insurance Act*.

The Supreme Court in their review of this issue also noted the case of *McDonald v. Proctor* (1977), 86 DLR (3d 455), a decision of the Ontario Court of Appeal. In that case a Manitoba driver was involved in an accident in Ontario. Issues arose with respect to the PAU when an action was commenced in Ontario.

In the Unifund case the Supreme Court of Canada pointed to that decision noting that the PAU filed by the Manitoba Public Insurance Corporation required it to observe Ontario rules to a certain extent where its insured was involved in Ontario proceedings. However, the Court emphasized that does not render the Manitoba policy one that is "made in Ontario." I feel the same analysis must be applied to this case. The fact that the accident occurred in Ontario and

that the MPI filed a PAU does not make the Manitoba policy one that was made in Ontario even though its insureds could have elected to seek Ontario benefits pursuant to that PAU.

I also carefully reviewed the case referred to by the MPI of the *ICBC v. Royal* (supra). In that case a resident of British Columbia was driving a motor vehicle in Ontario when it was involved in a collision with a transportation truck. The resident of British Columbia was in a vehicle that was owned by an Ontario resident and was insured by Wawanesa under a standard motor vehicle Ontario liability policy. Mr. Lee, the Claimant who was injured was also insured by the ICBC under his own automobile policy at home.

Mr. Lee applied to ICBC for no fault benefits and they were paid to him. Key to this case, however, is that Mr. Lee did not apply for ICBC benefits but rather applied pursuant to Section 268 of the Statutory Accident Schedule for Ontario benefits.

As a result, ICBC now applied to Royal pursuant to Section 275 of the *Insurance Act* to recover those benefits paid to Mr. Lee.

The Court of Appeal concluded that the ICBC did have the right to pursue loss transfer. That was because it met the pre-condition of Section 275 as having filed the PAU, it became the Insurer responsible under Section 268(2) for the payment of Statutory Accident Benefits. There is a critical difference between this case and the case before me. In the *ICBC v Royal* case the Insurer seeking to access Section 275 did receive an OCF-1 and did pay Ontario Statutory Accident Benefits.

Finally, with respect to the decision of Justice Dow in *Allstate v TD*, I do not find that decision to be helpful. In that case the accident occurred in Michigan. The Claimant did submit an OCF-1 but elected under Section 59 of the Ontario SABS to receive the more generous Michigan benefits. That is a completely different set of circumstances to the ones before me here. There is no OCF-1, Section 59 was not used by the Claimants to elect Ontario benefits and no Ontario benefits were paid.

I therefore conclude in all the circumstances that Section 275 does not apply to the circumstances of this case and MPI does not have the right to pursue loss transfer against ICBC.

In light of my conclusions on Section 275, I make no finding with respect to whether or not the monies being claimed by MPIC would be recoverable. My understanding is that if this matter proceeded further that that would have to be dealt with in a separate proceeding with further evidence.

#### **DECISION:**

The Manitoba Public Insurance Company does not have the right to pursue to claim loss transfer under Section 275 of the *Insurance Act* RSO 1990 c18 as against the Insurance Corporation of

British Columbia with respect to payments made to QL and ZZ pursuant to the Manitoba Public Insurance Policy arising out of the motor vehicle accident of December 18, 2017.

**COSTS:**

The draft Arbitration Agreement before me provided that the costs of the Arbitration proceeding is to be determined by me, or is to be agreed upon by the parties.

I make no ruling with respect to costs at this time other than I find the Manitoba Public Insurance having being unsuccessful in this matter is responsible for paying the Arbitrator's fees. With respect to legal costs, if the parties cannot reach agreement both with respect to who is to pay costs and the quantum of costs, then they can request a further pre-hearing at which time we will schedule a costs hearing.

DATED THIS 21<sup>st</sup> day of January, 2022 at Toronto.



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Arbitrator Philippa G. Samworth  
**DUTTON BROCK LLP**

**CANADA NON-RESIDENT INTER-PROVINCE  
MOTOR VEHICLE LIABILITY INSURANCE CARD**

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**POWER OF ATTORNEY AND UNDERTAKING**

(denoting compliance with minimum coverage requirements  
and facilitating acceptance of service)

\_\_\_\_\_  
(Name of Company)

the head office of which is in the City of \_\_\_\_\_, in the  
State/Province of \_\_\_\_\_ in the Country of \_\_\_\_\_,  
hereby with respect to an action or  
proceeding against it or its insured, or its insured and another or others, arising out of a motor-  
vehicle accident in any of the respective Provinces or Territories, appoints severally the  
Superintendents of Insurance\* of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario,  
New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, and Yukon  
Territory, the Northwest Territories and Territory of Nunavut, to do and execute all or any of the  
following acts, deeds, and things, that is to say: To accept service of notice or process on its  
behalf.

\* 'Superintendent of Insurance' means the Superintendent of Insurance or any other provincial  
or territorial official or Public Body authorized by law or designated by his or her government to  
accept such service of notice or process.

\_\_\_\_\_  
(Name of Company)

aforsaid hereby undertakes:-

- A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:
- B. That upon receipt from any of the officials aforesaid of such notice or process in respect of its insured, or in respect of its insured and another or others, it will forthwith cause the notice or process to be personally served upon the insured:
- C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgement rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of
  - (a) the amounts and limits for that kind or class of coverage or coverages provided in the contract or plan, or
  - (b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory.
- D. That it will not issue Canada Non-Resident Inter-Province Motor Vehicle Liability Insurance Cards to persons other than those who are non-residents of Canada and who are