CITATION: TD General Insurance Company v. Markel Insurance Company, 2014 ONSC 6461
COURT FILE NO.: CV-14-496059
DATE: 20141112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TD GENERAL INSURANCE COMPANY	)	*Maya S. Krishnaratne*, for the Appellant
	)	
Appellant	)	
	)	
– and –	)	
	)	*Kadey B.J. Schultz and Jason Frost*, for the
MARKEL INSURANCE COMPANY	)	Respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** September 22, 2014

LEDERMAN J.

I. INTRODUCTION AND OVERVIEW

[1] This is an appeal by TD General Insurance Company ("the Appellant") from the Award dated December 13, 2013 of Arbitrator Lee Samis ("the Arbitrator") concerning a loss transfer indemnification and priority dispute between the Appellant and Markel Insurance Company ("the Respondent") as to the payment of accident benefits to the claimant, Mr. Kuldip Marok ("Marok").

[2] The Arbitrator denied both the Appellant's claims. The Arbitrator concluded that loss transfer indemnification is a right that only accrues to the highest priority insurer, which in this case was the Respondent. The Appellant was therefore not entitled to claim loss transfer indemnification. The Appellant's claim for recovery on the basis that the Respondent was a higher priority insurer was also defeated because the Appellant had not commenced priority dispute arbitration within the applicable limitation period. The Arbitrator concluded that he had no statutory power to grant relief from a missed limitation period.

[3] The Appellant requests that this Court reverse the decision of the Arbitrator and hold the Respondent liable for loss transfer indemnification.

[4] The Appellant advances three grounds of appeal: first, that the Arbitrator erred in law and made unreasonable findings of fact in concluding that the vehicle insured by the Respondent was made available for Marok's "regular use"; second, that the Arbitrator erred in law in concluding that the Respondent was the insurer highest in priority with respect to payment of accident benefits; and third, that the Arbitrator erred in law in holding that only the highest ranking priority insurer is entitled to loss transfer indemnification.

[5] For the reasons that follow, I would not give effect to any of these grounds and would dismiss the appeal.

II. BACKGROUND OF THE DISPUTE BETWEEN INSURERS

[6] On November 26, 2008, Marok sustained injuries as an occupant in a vehicle classified as a 'heavy commercial vehicle' and insured as such by the Respondent. Marok had a personal automobile insurance policy with the Appellant however, and submitted a completed application for accident benefits to it on January 28, 2009. The Appellant began paying benefits to Marok and continued to do so until the arbitration hearing.

[7] The regime established by the *Insurance Act* R.S.O. 1990, c.I.8 ("the Act") and related regulations obliges the recipient insurer of a valid application for accident benefits to process and commence payment of benefits if necessary, irrespective of the presence of a higher priority insurer. This initial payor may recover from a higher-ranking insurer however, pursuant to the priority rules in s. 268(2) of the Act and the procedure outlined in O. Reg. 283/95.

[8] One insurer may also recover from another through the loss transfer indemnification scheme set out in s. 275 of the Act and O. Reg. 644. A second party insurer that is liable to pay accident benefits under a policy insuring a heavy commercial vehicle will be required to indemnify a first party insurer, unless the first party insurer is paying accident benefits to the claimant under a heavy commercial vehicle insurance policy as well. The policy under which Marok was receiving accident benefits from the Appellant did not provide heavy commercial vehicle insurance, whereas the Respondent's policy covered heavy commercial vehicles.

[9] The Appellant sent the Respondent a Notice to Applicant of Dispute Between Insurers, alleging that the Respondent was the insurer with priority to pay accident benefits. The Respondent received this Notice on February 20, 2009.

[10] On March 3, 2009, the Appellant sent a Loss Transfer Request for Indemnification to the Respondent, requesting full indemnification.

[11] On June 22, 2009, the Respondent sent the Appellant a letter claiming that it was not liable to pay benefits to Marok according to the priority rules because Marok did not meet the requirements of s. 66 of the *Statutory Accident Benefits Schedule — Accidents on or after*

November 1, 1996[1] ("SABS"). Specifically, the Respondent submitted that the vehicle in question had not been made available for Marok's regular use.

[12] The Appellant initiated priority dispute arbitration proceedings against the Respondent by serving a Notice of Commencement of Arbitration on February 23, 2010. The Appellant also initiated a loss transfer arbitration proceeding at this time. The Appellant's priority dispute application fell outside the relevant limitation period. There were, however, no limitation issues with the Appellant's loss transfer application.

III. BACKGROUND OF THE ACCIDENT

[13] At the time of the accident, Marok was employed on a fulltime basis with CCT Logistic and had been working there since the summer of 2008 as a General Labourer. He had obtained his AZ licence in 2008 and was looking for trucking experience.

[14] Marok's friend, Jasbir Kaura ("Kaura"), saw an online ad for a truck driving job with 6840981 Canada Inc., a trucking company ("the Company") and met with Fayyaz Malik ("Malik"), a manager with the Company on the Wednesday before the accident. At that meeting, Kaura and Malik entered a verbal contract for Kaura to act as a truck driver for the Company on a trip from Toronto to Regina that would commence on Friday and last 5 or 6 days. Malik required Kaura to drive as a team with a second driver. Malik understood that Kaura was going to bring someone he knew—Marok—as his second driver.

[15] Marok did not apply for the job and did not meet Malik before the trip. Marok and Malik had no contact.

[16] Kaura asked Marok to join him a day or two before the trip was to commence. Malik had requested that Kaura provide him with Marok's resume, but this never happened.

[17] At the arbitration hearing, Marok indicated that he believed the trip would take 2 days. He had never been out of Toronto and was unaware of how long a trip to western Canada would take. He asked his employer for one day off, falsely advising that he needed the time to attend his daughter's graduation. Marok suggested that he intended to return to his job at CCT Logistics after the trip.

[18] Marok testified that he had not spoken to anyone other than Kaura about going on the trip. According to Kaura, Marok had spoken to his wife about a career as a truck driver and she had apparently restricted his driving in the winter season, but not during the summer. Marok indicated that he did not believe he would be paid for the trip, and that he did not believe there was any agreement in place for him to go on any further trips after returning from Regina. Kaura

[1] O. Reg. 403/96.

testified that Marok was indeed going to be paid, after he himself received compensation from the Company. Kaura indicated that he was never in fact paid for the trip.

[19] Kaura stated that he anticipated this would be a regular route that would take him away from home 5 – 6 days per week. Both Kaura and Malik expected that this employment relationship would continue with the Company. Kaura indicated that he had not yet decided whether Marok would join him on the next trip. Malik stated however that he spoke with Marok via telephone while Marok and Kaura were on their way back to Toronto. Malik said that Marok told him at that time that that Marok "was satisfied with the job and he was okay with it". Malik testified that he did not have any notice that Marok would not continue driving with Kaura for the Company. In fact, Malik visited Marok at his home after the accident to see if he was going to return to the driving job.

[20] As a condition to providing regular use of company vehicles, Malik said that he expected drivers to have had 3 years' experience and to work only for him. He suggests that this was because the Respondent would not insure drivers without 3 years' experience. Malik did not, however, speak with Marok prior to the trip about his experience or whether he intended to work exclusively for him.

[21] Marok had driven about 40% of the time during the trip when the accident occurred. At the time of the accident, Kaura was driving.

[22] After the accident, Marok issued a claim for personal injuries against Kaura and the Company. According to the testimony of a representative of the Appellant, Marok's lawyer advised the Appellant on February 18, 2009 that Marok was not a worker at the time of the accident and his client would pursue a tort claim. Marok claims he had no knowledge of possible Workers' Compensation entitlement and that he was unaware of any potential negative impact on his tort or accident benefits claim if it were found out that he was a truck driver.

[23] No evidence was led at the hearing to show that, in defending the tort action, the Respondent denied Marok's entitlement to pursue a tort action against the Company. The only evidence at the hearing with respect to the outcome of the tort action is Marok's evidence that the action had settled at the time of the hearing.

IV. ISSUES

[24] The following issues are raised in this appeal:

a. What is the appropriate standard of review on an appeal of an arbitration decision under the *Arbitration Act*, S.O. 1991, c. 17 concerning a loss transfer indemnification and priority dispute between insurers?

b. Did the Arbitrator err in finding that the heavy commercial vehicle insured by the Respondent had been made available for Marok's regular use at the time of the accident?

c. Did the Arbitrator err in concluding that s. 275(1) of the Act applies only to the priority insurer under s. 268(2), rather than any insurer who has paid benefits?

V. ANALYSIS

a. Standard of Review

[25] The standard of review of an arbitration award in a priority or loss transfer dispute under the Act is correctness in relation to questions of law and reasonableness in relation to questions of mixed fact and law: *State Farm Mutual Automobile Insurance Co. v. Old Republic Insurance Co. of Canada*, 2014 ONSC 3887, 120 O.R. (3d) 740, at paras. 33-35; *Security National Insurance Co. v. Markel Insurance Co*., 2010 ONSC 5309, O.J. No. 4074, at paras. 23-24; *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co*. (2006), 83 O.R. (3d) 591 at paras. 22-23, CanLII 37956 (C.A.). See also *Zurich Insurance Co. v. Personal Insurance Co.*, 2009 CanLII 26362, O.J. No 2157 (S.C.) for Justice D. M. Brown's particularly helpful and comprehensive review of the case law.

[26] Issue [b] is a question of mixed fact and law in which the legal issues cannot be easily separated from the factual issues. It is therefore appropriately reviewed on a reasonableness standard.

[27] As explained hereafter, I am of the view that Issue [c] is a question of law that is properly subject to correctness review.

[28] Arbitrators and administrative tribunals are generally entitled to deference with respect to the interpretation of their home statutes and laws or legal rules closely connected to them: *McLean v. British Columbia (Securities Commission),* 2013 SCC 67, 3 S.C.R. 895; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, 3 S.C.R. 471. However, the presumption of reasonableness review for home statutes is rebuttable. Indeed, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 made it clear that at least some categories of questions of law warrant review on a correctness standard, notwithstanding that they may involve the interpretation of a home statute (*Dunsmuir,* at paras. 58-61). Similarly, a contextual analysis may rebut the presumption: *McLean,* at para 22. In case at bar, several contextual factors militate in favour of a correctness standard.

[29] First, and most importantly, the existence of contradictory interpretations of s. 275 of the Act amongst arbitrators (see, e.g. *RBC General Insurance Company v. Lloyd's Underwriters*, Arbitrator Bruce Robinson, June 24, 2005; *Kingsway General Insurance Company v. Zurich Insurance Company*, Arbitrator Lee Samis, April 4, 2011; *The Economical Insurance Group v. The Co-Operators*, Arbitrator Scott Densem, November 6, 2012) raises serious rule of law concerns about clarity, consistency, and predictability in the law.

[30] Predictability and efficiency are of particular importance given that this legislative scheme is designed to resolve disputes between sophisticated litigants who deal with these

matters on a daily basis. As Sharpe J.A. observed in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co* (2002), 58 O.R. (3d) 251, 155 O.A.C. 238 at para. 10 (C.A.), "there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases" in this regulatory setting. These virtues are best fostered by removing doubt and inconsistency in the interpretation and application of the statute, which in turn is best achieved by determining which interpretation amongst competing reasonable alternatives is correct.

[31] The issue of conflicting interpretations was raised in *McLean*. The majority of the Court in that case concluded that the presumption of deference was not rebutted and that the appropriate standard of review was reasonableness. Importantly however, the conflict discussed in *McLean* involved the potential for different provincial and territorial securities commissions to arrive at different interpretations of their own statutory limitation periods. The potential *inter*-jurisdictional conflict considered by the Court in *McLean* is markedly different than the actual *intra*-jurisdictional conflict that is apparent in this case. As the Court in *McLean* noted, the legislatures of each province and territory could enact entirely different limitation periods if they choose (and indeed, Manitoba had) and any 'problem' of inconsistency would be "a function of our Constitution's federalist structure—not the administrative law standards of review." (*McLean*, at para. 29).

[32] The resolution of unclear language in the home statute is, in general, best left to the administrative decision maker because of their specialized expertise (*McLean*, at paras. 32-33). However, the context of this case is again unique. Here, there are conflicting interpretations amongst individual arbitrators, all of whom are equally qualified experts in their domain. Resolving this sort of conflict by reviewing on a correctness standard does not therefore derogate from the requisite respect for expertise demanded by *Dunsmuir* and *McLean*.

[33] Finally, in *Dunsmuir* at para. 62 the Court made a point of encouraging consistency, suggesting that courts should follow existing case law where the jurisprudence has already determined the issue of deference satisfactorily. As noted above, the case law in this domain has consistently favoured the use of a correctness standard when confronted with questions of law arising out of arbitral decisions concerning *Insurance Act* matters.

[34] I am therefore persuaded that, vis-à-vis issue [c], the Arbitrator is not entitled to deference and his decision must be reviewed on a standard of correctness.

b. "Regular Use" Under s. 66 of the SABS

[35] The Arbitrator concluded that Marok was a deemed named insured under the Respondent's insurance policy covering the vehicle at the time of the accident. The Arbitrator drew this conclusion on the basis that the vehicle was made available for Marok's "regular use" by the Company. According to at s. 66(1) of the *SABS*,

> [A]n individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

> a. the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or
>
> b. the insured automobile is being rented by the individual for a period of more than 30 days.

[36] The Appellant argues that the vehicle was not made available for Marok's regular use. Though Marok certainly used the vehicle for "many hours" during the trip, the Appellant contends that use must be "periodic, routine, ordinary or general" to be characterized as regular. According to the Appellant, regular use can only be supported by ongoing, ordinary use. The Arbitrator erred in determining Marok to be a regular user, according to the Appellant, because "one time use" is not regular use, and Marok's participation as a driver was "out of the ordinary."

[37] The Respondent counters that the vehicle was regularly and predictably made available to Marok for the purposes of completing a round-trip truck route. There is no requirement that the usage be longstanding: indeed, regular use could apply in circumstances where the insured was using a vehicle for the first time. The Respondent submits that the facts amply support the reasonableness of the Arbitrator's conclusion that Marok was a regular user.

[38] The owner of the vehicle, Malik, had effective control over the use of the vehicle. Malik knew that Marok was joining Kaura as a second driver on the 5 – 6 day trip out west. At the time of the accident, Marok had been driving approximately 40% of the time. While it would appear that Marok did not, in fact, meet the employment criteria that Malik suggested in his evidence were necessary, it is clear that Malik believed Marok was satisfactory. Malik stated that he had no reason to believe Marok would not continue working with the Company after the trip and indeed, Malik visited Marok at his home after the accident to see if he would be continuing in the job.

[39] The Arbitrator disbelieved Marok's evidence about the one-time nature of the trip. He noted that Marok had reason to "shape" his testimony regarding the nature of his relationship with Malik and Kaura, as his entitlement to statutory accident benefits could be prejudiced if he turned out to be a person entitled to Workers' Compensation benefits.

[40] Kaura and Malik on the other hand both gave evidence that supported the conclusion that Marok was using the trip as a 'trial run' and that he would become part of the team if he found the experience suitable. While Malik admitted that he had not personally met Marok prior to the accident, and that there was no contract evidence by any document, he was certainly aware of and agreeable to Marok's participation in the trip. Both he and Kaura gave evidence regarding the financial arrangement by which both drivers would be paid for the trip.

[41] The Arbitrator observed that, while a longstanding relationship would afford greater evidence of regular use, a lengthy relationship is not necessary. The Arbitrator noted in a similar vein that the regulation does not require that the use be frequent, exclusive, or personal either: it is sufficient that there is some use available that can be characterized as regular.

[42] The Arbitrator found that the brief pre-accident history was sufficient to demonstrate regularity of use at the time of the accident. While the usage was relatively short-lived, it involved many hours of operation on this particular trip and, prior to the accident, there was every expectation that the use of the vehicle would continue. As mentioned above, arbitrators and administrative tribunals are generally entitled to deference with respect to the interpretation of their home statutes and laws or legal rules closely connected to them. In this case, the Arbitrator's interpretation of "regular use" and his application of that concept to the facts as found were reasonable and I see no reason to disturb them. The Appellant's first ground of appeal is accordingly dismissed.

c. "The Insurer Responsible" Under s. 275(1) of the Insurance Act

[43] Section 275 outlines a variety of circumstances wherein the insurer responsible for the payment of accident benefits is entitled to indemnification by another insurer. Subsection (1) provides as follows:

> 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.
>
> (emphasis added)

[44] The scheme created under s. 275 provides for loss transfer payments where an insurer who pays statutory accident benefits may be repaid, i.e. indemnified by another insurer. The purpose of this scheme was discussed in *Wawanesa Mutual Insurance v. Axa Insurance*, 2012 ONCA 592, 112 O.R. (3d) 254. With reference to the 1992 and 1994 interpretation bulletins issued by the former Ontario Insurance Commission (now the Financial Services Commission of Ontario), the Court observed that the purpose of loss transfer "is to balance the costs of no-fault benefits between different classes of vehicles" (*Wawanesa,* at para. 10).

[45] The Arbitrator concluded that the Appellant was not entitled to loss transfer indemnification from the Respondent because the Appellant was not "the insurer responsible" for the purposes of s. 275(1). This conclusion followed a series of specific determinations made by the Arbitrator:

a. That s. 268(2) of the Act creates a hierarchy of insurers that allows insurers to sort out their respective responsibilities for payment of benefits to victims of automobile accidents amongst themselves.

b. That an insurer who is not the "highest ranking insurer" according to the hierarchy created by s. 268(2) of the Act, but is nevertheless responsible for paying benefits in accordance with s. 2 of O. Reg 283/95,[2] has recourse against a higher ranking insurer by way of priority dispute.

c. That "[t]he insurer responsible" described in s. 275(1) of the Act refers to the "highest ranking insurer" under the s. 268(2) hierarchy, rather than the first insurer responsible for benefits according to s. 2 of O. Reg. 283/95.

d. That, as a result, the issue of loss transfer indemnification cannot be dealt with until the highest ranking insurer is determined in accordance with the s. 268(2) priority hierarchy. In this case, the Respondent was found to be the highest ranking insurer.

[46] It is necessary to review the statutory and regulatory provisions upon which disputes are resolved. Section 268(2) of the Act contemplates the possibility of multiple insurers who are all liable to pay accident benefits. Through the use of a series of conditional rules for determining liability to pay, the section establishes a hierarchy amongst possible insurers. Importantly, however, the actual obligation to pay benefits flows from s. 268(3), which provides that "[a]n insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits."

[47] As the Arbitrator himself observed, s. 268(2) is not an exhaustive outline of the priority scheme that applies in determining disputes between insurers. Subsections (4), (5), (5.1), and (5.2), which define the contours of an insured person's discretion to choose amongst insurers against whom he or she has recourse, are all relevant to the priority analysis. Of particular significance in this case is s. 268(5.2):

> If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

[48] An "insured" is defined in s. 224(1) as "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." As discussed above, s. 66(1) of the *SABS* deems an individual to be a named insured under the policy insuring the vehicle if that vehicle was made available for the individual's "regular use."

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[2] Which states that "[t]he first insurer that 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."

[49] Section 2 of O. Reg. 283/95 requires that "the first insurer that receives a completed application for benefits is responsible for paying benefits… pending the resolution of any dispute as to which insurer is required to pay benefits under s. 268." As a result, the Appellant was obliged to pay Marok accident benefits, as it did, upon receipt of his completed application. This obligation ensures that an individual entitled to benefits is not consigned to wait on the proverbial sidelines pending a dispute between insurers. The mandatory language in, for example, s. 268(5.2) must, therefore, be interpreted as clarifying the priority hierarchy, rather than imposing an obligation on the insured to apply for benefits to the "right" insurer—an issue which will often be the subject of disputation.

[50] Turning back to the parties' positions, the Appellant submits that the Arbitrator erred by concluding that the Respondent was the highest ranking insurer, "[d]espite there being no valid priority dispute" before the Arbitrator. Any obligation on the Respondent to pay could only result from a priority dispute, which, in this case, is precluded by the limitation set out in s. 7(3) of O. Reg. 283/95. Thus, the conclusion that the Respondent is the highest ranking insurer is "merely a theoretical result". The Appellant argues that as it is *in fact* liable to pay benefits according to s. 2 of O. Reg. 283/95, it must be entitled to loss transfer indemnification as the insurer responsible, irrespective of what would have happened had the issue of priority been resolved on the merits.

[51] The Respondent contends that since the claimant was a deemed named insured under the Respondent's policy at the time of accident, the Respondent is the insurer responsible for the payment of benefits under s. 286 of the Act. The Respondent's position is, therefore, that any entitlement to loss transfer indemnification requires a determination of priority according to the s. 268 scheme, irrespective of whether or not an the limitation period for priority disputes has elapsed. Indeed, the Respondent suggests that the statute requires "responsibility" to be determined with reference to s. 268, whether or not the insurer responsible on that account is the insurer who actually pays the benefits.

[52] Both the Appellant and Respondent are liable to pay the benefits to which Marok is entitled. The Appellant, as Marok's personal automobile insurer is liable under s. 268(2)(1)(i) whereas the Respondent's liability can be traced to O. Reg. 403/96, s. 66(a). The Arbitrator concluded that the Respondent was a higher priority insurer than the Appellant as a result of s. 268(5.2) which, it will be recalled, provides that in a situation where more than one insurer is liable to pay benefits to the occupant of a vehicle, "the [occupant] shall claim… against the insurer of the automobile in which the person was an occupant" (emphasis added).

[53] Section 268(2) frames priority in terms of "recourse". The Arbitrator's conclusion vis-à-vis priority was predicated, in part, on the fact that the mandatory language in s. 268(5.2) suggests that, technically speaking, Marok's ultimate recourse was against the Respondent. Marok pursued his claim with the Appellant even though s. 268(5.2) is clear that his recourse lay against the Respondent. Since Marok's recourse was against the Respondent, the Respondent was the "insurer responsible" for the purposes of s. 268 (and, therefore, s. 275). The Appellant was liable to pay upon receipt of Marok's application, not because the Appellant was responsible—that issue was contested and unresolved at the time the payments began. Rather,

the Appellant was liable to pay because of the deliberate legislative choice, embodied in O. Reg. 283/95, to insulate claimants from disputes about responsibility between insurers. As Justice Strathy (as he then was) noted in *ING Insurance Co. of Canada v. State Farm Insurance Companies* (2009), 97 O.R. (3d) 291, CanLII 45850 at paras. 13-16 (S.C.),

> The 'no fault' insurance system in Ontario is intended to ensure that people injured in automobile accidents obtain immediate access to certain insurance benefits, regardless of fault.
>
> …
>
> The first insurer [that receives a completed application] cannot refuse to pay benefits because it thinks that the insurer person is covered by another policy. It must pay benefits under its policy, but it can transfer responsibility to another insurer through the dispute resolution process set out in the Regulation. As the Arbitrator noted, "The public policy reasons in favour of this kind of approach are obvious." The injured person receives benefits regardless of a priority contests between insurers, and the insurers resolve priority themselves, largely in the background.
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> …
>
> The effect of this system is that a claimant receives benefits in spite of the dispute between insurers. The seeming arbitrariness of making the first insurer initially responsible, despite the potential liability of another insurer, is compensated for by the system of arbitration between insurers. The first insurer pays benefits without acknowledging its ultimate liability and without affecting its ability to argue that another insurer is responsible.
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> (Emphasis added)

[54] To ensure that responsibility falls on the appropriate shoulders, an insurer—such as the Appellant—is entitled to seek recourse against a higher priority insurer—such as the Respondent. In effect, the insurer who is liable to pay in the first instance inherits the insured person's right of recourse against a higher priority insurer, if one exists. This arrangement allows sophisticated litigants, such as the parties in this case, to resolve issues of responsibility without frustrating the insured person's entitlement to benefits (see e.g. *Allstate Insurance Co. of Canada v. Motor Vehicle Accident Claims Fund,* 2007 ONCA 61 at para. 3, 84 O.R. (3d) 401). For this arrangement to work properly, however, insurers must be diligent about pursuing any rights of recourse they might inherit.

[55] As the Arbitrator discussed, at the time of the arbitration hearing, Marok had no unpaid claims and thus only theoretical recourse against the Respondent. The Appellant on the other hand *did* have a form of recourse: a priority dispute, on the basis that the application should have been made to the Respondent pursuant to s. 268(5.2) of the Act. The question remains, however, whether there is any reason why the Appellant should be able to recover under s. 275 as well, notwithstanding its failure to successfully seek recourse through a priority dispute.

[56] As mentioned above, the purpose of loss transfer "is to balance the costs of no-fault benefits between different classes of vehicles." (*Wawanesa,* at para. 10) In the 1994 interpretation bulletin issued by the former Ontario Insurance Commission (now the Financial

Services Commission of Ontario), Commissioner D. Blair Tully described loss transfer as "[permitting] insurers that pay accident benefits (the 'first party insurer') to be indemnified by another insurer (the 'second party insurer') for all or part of the accident benefits paid to an insured person, under certain circumstances."[3] The reference to insurers that pay accident benefits favours the interpretation of the Appellant, that "the insurer responsible" in s. 275 must be interpreted as 'the insurer that *actually* pays.' The Arbitrator himself took notice of this, commenting that the Bulletin suggests, at least prima facie, that the provision "should not be read in some narrow way to defeat the remedial nature of the loss transfer concept."

[57] However, the fact that loss transfer is remedial in nature does not mean that its remedial functionality is unlimited in scope. As noted above, loss transfer was implemented to facilitate the move from tort-based compensation towards a no-fault regime by re-distributing costs according to vehicle class. There is no indication that it had some alternative purpose in ensuring that the insurer who first pays pursuant to s. 2 of O. Reg. 283/95 will not bear unwarranted costs properly handled by another insurer. There is already a procedure in place to deal with such issues, complete with its own unique procedural requirements: the priority dispute. At the risk of repetition, it will be recalled that the Appellant had recourse to that procedure to recover the costs of Marok's benefits, but failed to complete their application in a timely manner.

[58] Further, the language of s. 275—"…the insurer responsible under s. 268(2)…"—plainly suggests a *single* insurer who not only pays statutory accident benefits, but pays as a result of its responsibility under the priority hierarchy. The Arbitrator took this to mean that only the highest priority insurer, as determined with reference to s. 268(2) and s. 268(5.2) may be entitled to loss transfer indemnification. This is eminently sensible. While s. 268(2) can be fairly characterized as the primary outline of the priority hierarchy, subsections (4), (5), (5.1), and (5.2) attach further conditions to specific components of s. 268(2), clarifying and fleshing out the nuances of the main structure contained therein. These provisions do not make sense independent of s. 268(2), and s. 268(2) is incomplete without these provisions. I agree, therefore, that the language and logic of the priority scheme requires that all those provisions—ss. 268(2), (4), (5), (5.1), and (5.2)—be read in concert, such that the reference to s. 268(2) found in s. 275 must be interpreted as a 'short-hand' reference to the priority regime as a whole, the overarching structure of which is found at s. 268(2), rather than a version of the priority regime arbitrarily limited to the 'four corners' of s. 268(2) itself.

[59] That reference is made to s. 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 s. 2 of O. Reg. 283/95 or any other provision it would have done so. Further, accepting the Appellant's interpretation would allow an insurer who would be entitled to loss transfer to circumvent the priority dispute process, including the

[3] Bulletin No. A-11/94, https://www.fsco.gov.on.ca/en/auto/autobulletins/archives/Pages/a-11_94.aspx

stricter applicable limitation periods altogether, rendering the priority regime irrelevant in circumstances where loss transfer is available, notwithstanding the references to it in s. 275.

[60] The Appellant submits that it is inequitable that the Respondent escapes liability even though Marok was a deemed named insured under the Respondent's policy insuring the heavy commercial vehicle.

[61] The Appellant submits that the Respondent should not be permitted to deny priority until the passage of a limitation period and then rely on a finding that it is the priority insurer to get out of paying benefits that the legislative scheme intended it to pay.

[62] The Appellant was denied indemnification on the basis that the Respondent is a higher priority insurer, at a point when the Appellant is no longer able to recover by way of a priority dispute.

[63] The words of Sharpe J.A., however, bear repeating: "there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases" in disputes between insurers (*Kingsway General Insurance*, at para. 10). Again, both the Appellant and Respondent are sophisticated litigants. The Appellant initiated a priority dispute against the Respondent, but did not fulfill the procedural requirements for such a dispute within the limitation period. The fact that the Appellant is therefore unable to transfer responsibility for payment of accident benefits onto the Respondent (as it would have been, had the limitation period been observed) does not entitle it to recover under an alternate, and otherwise inapplicable section of the Act. The Appellant's second and third grounds of appeal must also, therefore, fail.

VI. CONCLUSION

[64] As a result of the foregoing analysis, I have concluded that the Arbitrator was correct to interpret s. 275 as accruing only to the highest priority insurer, determined with reference to the hierarchy priority set out primarily, but not exclusively, within s. 268(2).

[65] The Respondent is therefore not liable to indemnify the Appellant pursuant to s. 275 of the *Insurance Act*. The appeal is therefore dismissed.

[66] Counsel have advised that they have reached an agreement as to the costs of the appeal and the arbitration.

Lederman J.

Released: November 12, 2014

CITATION: TD General Insurance Company v. Markel Insurance Company, 2014 ONSC 6461
COURT FILE NO.: CV-14-496059
DATE: 20141112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TD GENERAL INSURANCE COMPANY

Appellant

– and –

MARKEL INSURANCE COMPANY

Respondent

REASONS FOR JUDGMENT

Lederman J.

Released: November 12, 2014