

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL & SUNALLIANCE INSURANCE
COMPANY OF CANADA

Applicant

- and -

WAWANESA MUTUAL INSURANCE
COMPANY

Respondent

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) *Jamie R. Pollack and Edmund K. Chan, for*
) *the Applicant*
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) *Derek V. Abreu, for the Respondent*
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) **HEARD:** December 14, 2006

NEWBOULD J.

REASONS FOR JUDGMENT

Overview

[1] This is an appeal by Royal & Sunalliance Insurance Company of Canada (“Royal”) under section 45 of the *Arbitration Act, 1991* from a decision of an arbitrator in an arbitration held under section 275 of the *Insurance Act* (the “*Act*”) to determine whether Royal or Wawanesa Mutual Insurance Company (“Wawanesa”) should be responsible for the statutory accident benefits paid to the driver of a truck that was involved in a motor vehicle accident in Vermont in

2001. The driver elected under the Statutory Accident Benefits Schedule (“Schedule”) to be paid the statutory accident benefits under the Schedule rather than under the law of Vermont. The driver was required under section 268(2) of the *Act* to claim the benefits from Wawanesa, the insurer of his own private passenger vehicle. Royal was the insurer of the truck involved in the Vermont accident and Wawanesa has claimed against Royal under the loss transfer provisions in section 275 of the *Act*. Royal contends that because the accident occurred in Vermont, it was Vermont law, and not the loss transfer provisions under section 275 of the *Act*, that should apply, and that as there are no loss transfer provisions under Vermont law, Wawanesa has no right to claim against Royal. The arbitrator held that section 275 of the *Act* applied and that Wawanesa had the right to claim from Royal the benefits paid to the driver under the Schedule.

[2] The parties agreed as part of the arbitration that the decision of the arbitrator could be appealed on a question of law or mixed fact and law. Royal contends that the arbitrator erred in law. In my view, the decision of the arbitrator was correct although I so hold for reasons different from the reasons of the arbitrator. Accordingly, this application should be dismissed.

Factual Setting

[3] Mr. Sarabjet Bhangu is an Ontario resident who was involved in a motor vehicle accident in Vermont in August 2001. At the time of the accident, he was employed as a truck driver and driving a tractor-trailer not owned by him that was licensed and registered in Ontario. Mr. Bhangu swerved to avoid another vehicle that cut him off and he lost control over the tractor-trailer which ended up in a ditch and caught fire. Royal insured the tractor-trailer under a motor vehicle insurance policy issued in Ontario.

[4] At the time of the accident, Mr. Bhangu also owned a private passenger vehicle which was licensed and registered in Ontario and insured by Wawanesa under a motor vehicle policy issued in Ontario. He claimed statutory accident benefits under the Schedule and, by virtue of section 268(2) of the *Act*, his recourse was against Wawanesa as the owner of his own passenger vehicle.

[5] Section 275(1) provides for what is commonly referred to as loss transfer from one insurer to another. It provides:

275(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. I.

[6] Wawanesa paid statutory accident benefits to Mr. Bhangu derived from losses and expenses incurred in Ontario and claimed indemnification from Royal under section 275 of the *Act*. Royal took the position that Wawanesa was not entitled to the indemnification under that section as the accident occurred in the United States and the law of Vermont, the *lex loci delicti*, should apply rather than the *lex fori*. There are apparently no loss transfer provisions in Vermont and therefore Royal submitted that there could be no reliance by Wawanesa on section 275 of the *Act*.

[7] Prior to *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, a former British rule adopted in this country in *McLean v. Pettigrew*, [1945] S.C.R. 63, directed that when adjudicating on torts committed in another country, our courts should apply our law, the *lex fori*, subject to the wrong being “unjustifiable” in the other country. *Tolofson v. Jensen* set aside that rule and held that insofar as torts committed in Canada are concerned, the tort law of the province where the tort took place, the *lex loci delicti*, should apply to the dispute regardless of the province in which the claim is made. With respect to a claim in Canada arising from an incident that took place internationally, Justice La Forest carved out an exception with the following cryptic statement:

However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

[8] Royal took the position before the arbitrator that the general rule in *Tolofson v. Jensen* should apply and that the *lex loci delicti*, the law of Vermont, rather than the law of the forum, the *lex fori*, should apply and as there is no loss transfer in Vermont, Wawanesa could not make a loss transfer claim against Royal. Wawanesa, on the other hand, took the position that there would be an injustice if it had to pay the benefits as directed by the *Act* without having the ability to make a claim under the same *Act* against Royal and therefore the arbitrator should exercise the discretion to apply Ontario law as discussed by La Forest J. in *Tolofson v. Jensen*.

[9] The arbitrator dealt with the case using a *Tolofson v. Jensen* analysis and held that it would be unjust for Wawanesa not to be entitled to pursue a loss transfer claim against Royal under section 275 of the *Act*. He stated:

The mere fact that Vermont does not have a statute allowing Wawanesa to recover statutory accident benefits paid, might not, in and of itself, have been a sufficient injustice to allow the Court to exercise its discretion and deviate from the general rule. It is necessary, however, to look at the issue more closely and see whether a further injustice, if any, exists. In our case, Mr. Bhangu received statutory accident benefits pursuant to his Ontario motor vehicle liability policy. The providing of these benefits is mandatory pursuant to Ontario Law. To have the insurer be forced to pay accident benefits pursuant to Ontario law and an Ontario contract for an accident in Vermont, and then forbid them from recovering the costs of those benefits which it would be allowed to do under Ontario law (loss transfer), has all the hallmarks of injustice.

[10] In its appeal, Royal submits that the arbitrator erred in law by finding that the *lex fori* rather than the *lex loci delicti* should apply to the loss transfer claim. In particular, Royal submits that the arbitrator erred in not following the result of the case of *Wong v. Lee*, (2002) 58 O.R. (3d) 398, a decision our Court of Appeal.

Analysis

[11] At first blush it seems counter-intuitive that the claimant in this case can claim statutory accident benefits under a statutory scheme that directs him to claim from his own insurer without the provisions of the same scheme being applicable that call for a transfer of the loss from one insurer to another. Both the claim made by Mr. Bhangu and the claim by Wawanesa against Royal were made under that statutory scheme. In his analysis, the arbitrator translated that counter-intuitive notion into a notion of injustice, which led him to exercise his discretion to apply the *lex fori* and allow Wawanesa to claim against Royal under section 275 of the *Act*.

[12] In my view the outcome of this case should not rest upon an analysis as to whether there would be an injustice, using the *Tolofson v. Jensen* language, for Wawanesa not to have a loss

transfer claim against Royal. The *Tolofson v. Jensen* cases, like a number of the other cases cited by counsel and referred to by the arbitrator, involved actions between the parties to the accidents in question. The issue in each case was whether the tort law of the forum in which the plaintiffs resided or the tort law in the place of the accident should govern the determination of the tort action.

[13] In discussing this issue, La Forest J. stated at p. 1050 of *Tolofson v. Jensen, supra*:

...it seems axiomatic to me that, at least as a general rule, the law to be applied in tort is the law of the place where the activity occurred, i.e., the *lex loci delicti*.

[14] That is not the issue that is alive between Wawanesa and Royal. It is not a tort claim. Rather, the claim by Wawanesa is a statutory claim under section 275 of the *Act* that is a separate and distinct claim from any underlying tort claim that might be brought between the parties involved in the accident. There would be no purpose served in this case by looking to the law of Vermont to settle a dispute between two Ontario insurers arising from a claim made under the *Act*, an Ontario statute.

[15] This distinction was recognized in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003], 2 S.C.R. 40. In that case, Ontario residents were injured in a motor vehicle accident in British Columbia. They sued for damages in British Columbia and were awarded a large sum. They also claimed statutory accident benefits under the *Act* and the Schedule as their insurer was licensed to carry on business in Ontario. ICBC, the insurer for the defendant in the tort action, is the sole provider of motor vehicle insurance in British Columbia and is generally

the payor of both the no-fault benefits and any final award. For that reason, the British Columbia legislation does not contain a loss transfer provision similar to section 275 of the *Insurance Act* of Ontario.

[16] *Unifund* made a claim under section 275 of the *Act* against ICBC. ICBC took the position that it was not bound by the *Act* as it did not carry on business as an insurer in Ontario. *Unifund* brought an action in Ontario under section 275 of the *Act* and the issue was whether the *Act* could have extraterritorial jurisdiction over ICBC. In the Supreme Court of Canada, it was held by the majority that the *Act* could have no extraterritorial jurisdiction over ICBC. Binnie J. for the majority, however, recognized the distinction between an underlying tort action between the parties to the accident and the statutory claim between the two insurers. He made clear that if ICBC were an Ontario insurer, the loss transfer provisions of section 275 of the *Act* would apply. Justice Binnie made the following statements:

[9] *Unifund's* problem is to find a cause of action. 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 the "SABs" under the Ontario *Act*.

[10] It is important to emphasize that *Unifund* asserts no common law or equitable cause of action against the appellant, ICBC in these proceedings. In the case before us, *Unifund* either has a statutory cause of action against the British Columbia insurer under the *Ontario Act* or it has no cause of action at all.

[12] The Ontario insurance scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated "without regard to" SABs (s. 267.1(8) para. 2(i)). However, the payor of the SABs (usually the victim's insurer) is entitled by statute to indemnification from the insurer of any "heavy commercial vehicle" (Automobile Insurance Regulations, R.R.O. 1990, Reg. 664, s. 9) involved in the motor vehicle accident in question, "according to the respective

degree of fault of each insurer's insured as determined under the fault determination rules" (s. 275(2)), **i.e., allocated not by general principles of tort but by the rules set out in Ontario regulations.** Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. **There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate *Unifund's* claim.**

[17] Counsel for Royal submits that this last quoted sentence of Justice Binnie is *obiter* and therefore not binding in the case at bar. While that last sentence may be *obiter*, it is the only conclusion that one could draw from the other principles enunciated by Justice Binnie, i.e., a claim under section 275 of the Act is separate and distinct from the underlying tort action and the allocation between insurers under this section is not to be made by a consideration of general principles of tort law but by the rules set out in the Ontario regulations.

[18] The dissenting judgment of Bastarache J. in *Unifund v. ICBC* did not differ in this regard. Rather, Justice Bastarache was of the view that section 275 of the Act applied to the loss transfer claim because ICBC had sufficiently attorned to the jurisdiction of Ontario to make the section applicable to it. None of the judges on the Court, therefore, considered whether the law of British Columbia should apply to the loss transfer claim even though the tort claim was dealt with in British Columbia under British Columbia tort law.

[19] In the case at bar, the arbitrator was not dealing with a tort claim between the parties to the Vermont accident but rather was dealing with the second leg of the statutory benefits scheme under the Act requiring an allocation of the cost between two Ontario insurers. An analysis of underlying Vermont tort law is not of any assistance in determining that issue, nor is it of

assistance to consider that under the Vermont accident benefits legislation there is not a loss transfer provision that allocates the cost of benefits paid under that Vermont legislation between insurers.

[20] In my view the statements of Justice Binnie in *Unifund v. ICBC* govern the results of the case at bar and Royal is bound by the provisions of section 275 of the *Act*. Therefore the result reached by the arbitrator was correct, albeit for the wrong reasons.

[21] Even if it could be said that the proper analysis in this case is a *Tolofson v. Jensen* analysis and a consideration of whether there would be an injustice if section 275 of the *Act* were not applicable, in my view there would be no sustainable appeal from the decision of the arbitrator.

[22] Counsel for Royal submits that the test on an appeal from the arbitrator is to be found in *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230. In that case, involving an appeal from an arbitrator under the *Arbitration Act, 1991*, Swinton J., adopted principles from a leading case on judicial review, *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, and held that as the appeal concerned a question of law, the standard of review to be applied was one of correctness. Royal contends that the error of the arbitrator was an error of law and that the standard of review is correctness.

[23] In an appeal under the *Arbitration Act 1991* from an arbitrator, I prefer to look at the test to be applied on an appeal on a question of law or on a question of mixed fact and law. In this case, if the analysis of *Tolofson v. Jensen* were to be used, the question would be whether the

arbitrator properly exercised the discretion which La Forest J. stated was retained under our law to deal with injustices in international cases. The standard of appellate review of an exercise of judicial discretion is fairly well proscribed. The arbitrator must have misdirected himself, failed to give sufficient weight to a relevant circumstance, act on a wrong principle, or the like. See the authorities referred to by Borins J.A., in *Wong v. Lee* (2002), 58 O.R. (3d) 398.

[24] In this case, the arbitrator reviewed and considered all the factors put to him by both Royal and Wawanesa. Royal relies upon the *Wong v. Lee* case and statements of Feldman J.A. that were critical of a number of cases in which the *lex fori* had been applied in apparent deviation from the rule set by La Forest J. in *Tolofson v. Jensen*. In the *Wong v. Lee* case, if Ontario law were applied, the defendant would lose the benefits of Bill 164 which set limits on the damages that could be claimed by the plaintiff. The motions judge held that Ontario law should apply as it would be an injustice for the defendant to lose the benefits of Bill 164 which constituted the public policy of Ontario. On appeal the decision was reversed. It was held that differences in public policy between Ontario and New York that gave rise to a different quantum of damages available to a plaintiff were not sufficient to cause an injustice. However, Feldman J.A. distinguished the case before her from a case such as *Hanlan v. Sernesky* (1998), 38 O.R. (3d) 479, in which it was held by the Ontario Court of Appeal that it would be an injustice if the law of Minnesota, the *lex loci delicti*, were to apply to the tort claim as the plaintiff would be without any remedy under that law. Counsel for Wawanesa contends that this distinction between no remedy and only a different quantum of damages in the two jurisdictions has been recognized by our courts and supports the decision of the arbitrator as Wawanesa would have no loss transfer claim against Royal if the law of Vermont were to apply.

[25] Each case must be decided on its own facts. If the *Tolofson v. Jensen* analysis were applicable, which for reasons stated I do not believe is the case, the arbitrator would have been well within his jurisdiction to apply Ontario law and hold that section 275 of the *Act* governs the claim by Wawanesa against Royal. There would be no grounds to overturn the exercise of his discretion.

Conclusion

[26] This application by way of appeal from the decision of the arbitrator is dismissed. If costs are sought, Wawanesa may make written submissions within ten days and Royal may make written reply submissions within a further ten days. The submissions are to be no longer than three pages, double-spaced and should cover both the question of liability for costs and quantum.

NEWBOULD J.

Released: December 21, 2006

COURT FILE NO.: 06-CV-307567 PD2
DATE: 20061221

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