

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, s. 275 and O. Reg. 664;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17;

AND IN THE MATTER of an Arbitration

BETWEEN:

ING INSURANCE COMPANY

Applicant

- and -

TEMPLE INSURANCE COMPANY

Respondent

AWARD

Introduction

Pursuant to the Order of the Honourable Justice McCartney dated November 16, 2006, I have been appointed as arbitrator for a dispute between ING Insurance Company, and Temple Insurance Company.

Each of the parties is an insurer carrying on business in the province of Ontario, and each of them is licensed to conduct the business of automobile insurance in Ontario. The dispute between the two insurers arises out of the payment of statutory accident benefits to an individual, Dean J.

ING Insurance Company has been paying statutory accident benefits with respect to Dean J. and seeks reimbursement from Temple Insurance Company based on the concept of "loss transfer".

Loss transfer is a statutory scheme of reimbursement mandated by section 275 of the *Insurance Act* of Ontario. Section 275 of the *Act* provides as follows:

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. 1.

O. Reg 664 under the *Insurance Act* has set forth the following provisions applicable to loss transfer cases:

"commercial vehicle" means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation, and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes, a vehicle rented for thirty days or less, or a trailer intended for use with a commercial vehicle;

INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

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

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

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

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s. 9 (3); O. Reg. 780/93, s. 1.

The parties entered into an Arbitration Agreement which posed the following question to me:

"Is Temple Insurance Company responsible for payment of loss transfer to ING Insurance Company?"

The parties exchanged documentation and we had a hearing on this issue. Prior to the hearing, counsel for Temple indicated an intention to file a report from Mr. James Cameron with respect to the issues in this matter. I considered the nature of the evidence to be offered, and I rejected that as proper evidence in a case of this nature. I found the submission to be more in the nature of a legal analysis or argument, rather than expert assistance.

Factual Background

The parties submitted an Agreed Statement of Facts in this matter which was marked as Exhibit 2 to the proceedings. That Agreed Statement provides the salient details of the underlying accident and contractual arrangements.

It is indicated that this matter arises out of a collision which occurred on July 31, 2003. A tractor trailer operated by Mark B., an employee of Kenogami Lake Lumber, collided with a pickup truck operated by Dean J. Dean J. sustained injuries and received accident benefits from ING.

The location of the accident is germane. The accident occurred on a private road which was open to members of the public.

The tractor trailer involved was a 1979 International Paystar tractor with a flat deck trailer with a combined gross vehicle weight greater than 4500 kg. It was not registered with the Ministry of Transportation. It was not licensed to be operating on a highway.

Kenogami Lake Lumber was the named insured in a commercial general liability policy, with endorsements, issued by Temple Insurance.

Temple is a licensed insurer in the province of Ontario, licensed to provide automobile insurance.

The Hearing

This matter proceeded via way of an electronic hearing by telephone conference call. During the course of the hearing, the parties submitted to me various documents. The Arbitration Agreement between the parties was marked as Exhibit 1 to the proceeding. The Agreed Statement of Facts was marked as Exhibit 2 to the proceedings, and a Joint Brief of Documents was marked as Exhibit 3 to the proceedings.

The Joint Book of Documents contains many of the insurance documents related to the Temple contract of insurance and will be referenced further in this award.

Nature of Loss Transfer Proceedings

In accordance with the above-quoted statutory and regulation provisions, a statutorily created reimbursement scheme exists with respect to statutory accident benefits. Reimbursement is not available in most cases where statutory accident benefits are paid by an insurer. In a limited number of cases, and in particular in those cases described by section 275 of the *Insurance Act* and the regulations, reimbursement can be obtained by one insurer from another.

The question which arises in this case is whether or not these particular circumstances fall within the circumstances which give rise to a loss transfer right and obligation.

It is my conclusion that there is no loss transfer in these circumstances.

Issues

I have identified the pertinent issues as the question of whether or not a Standard Policy Form, "SPF 6", was applicable to the insurance contract issued by Temple, and if so, the impact of that on the possible loss transfer in accordance with the statute and regulation provisions.

Does the Temple Policy Include SPF 6 Coverage?

A great deal of the argument and evidence focused on the issue of whether or not the Temple policy included an SPF 6 Endorsement. The SPF 6 Endorsement is a coverage that relates to liability arising out of the use or operation of automobiles, and might be relevant to these proceedings. But the evidence as to whether this coverage was actually part of the policy of insurance issued, part of the contract between Temple and Kenogami, is unclear. As is common in insurance matters the contractual arrangement is evidenced by a "declaration" document that identifies the parties, the term of insurance and other particulars. Such "declarations" seldom set out all of the terms of the insurance undertaking, but only incorporate same by reference to other forms or documents.

One would expect the declarations of the policy to identify the SPF 6 as part of the arrangement, if that was the intent of the parties. Further one would expect that the applicable wordings would be delivered to the insured in addition to the declarations. The declaration sheet of the Temple policy is part of the record in these proceedings and is found at Tab 1 of Exhibit 3. That declaration does not include a reference to SPF 6 coverage.

Additionally the policy documentation produced from the Temple files (also from Tab 1 of Exhibit 3) does not include an SPF 6 as part of the policy either as an annexed Endorsement or as a wording incorporated into their standard wording.

This evidence would tend to lead to the conclusion that SPF 6 coverage was not included as part of the contract.

However, there are indicia that an SPF 6 may have been part of the contractual arrangements contemplated by the parties. Firstly, the Temple policy does have an Endorsement No. 94 and an Endorsement No. 96 attached, and those Endorsements are unambiguously self-described as to be used only as attachments to SPF 6. They seem to be Endorsements which would be expected to be found only in association with SPF 6, even though there is no SPF 6 in the documentation.

Additionally, counsel for ING has pointed out that the renewal documentation associated with the policy includes an application. This is the renewal documentation found at Tab 3 of Exhibit 3 which is an application for coverage after this accident took place. Thus, it is of limited value as evidence of the contract of insurance at the time of the loss. However, it is noted that in that renewal application document there is the following statement:

**"Included in our CGL are the following coverages:
Non-Owned Automobile - Excluding Long Term Leased Vehicles..."**

In other words, the application document makes a representation that the CGL coverage includes Non-Owned Automobile Coverage also known as SPF 6 coverage. CGL coverage is provided by Temple's contract.

Looking at that application document, I would be strongly inclined to conclude that SPF 6 would apply to any policy of insurance which was made based on that application. In particular, I note the representation that it is the right of the insurer to modify or delete the Non-Owned Automobile Coverage by endorsement, and no such endorsement is, of course, found in the relevant policy materials. However, I am troubled by the fact that this application for insurance is the application for renewal, subsequent to the loss, and, therefore, I am reluctant to give it great weight as evidence of the contract in force at the time of the accident. It is evidence which suggests that some custom in the insurance business of automatically including Non-Owned Automobile Coverage in CGL policies. However, the document also makes it clear that CGL policies are issued without this coverage. Importantly, I note that the application document is particularized to reference Temple Insurance Company. It seems to be a document that is used by the intermediary for more than one insurer, but at the end of the document, it does include privacy contact information for four insurers, including Temple Insurance Company.

Based on the information before me, and upon review of the SPF 94 and 96 Endorsements, I am persuaded that there is evidence for me to conclude on a balance of probabilities that the SPF 6, Non-Owned Automobile Coverage, formed part of the contract of insurance between Temple and Kenogami.

Section 16 of the *Statutory Powers Procedure Act*, which is incorporated into this proceeding by operation of section 21 of the *Arbitrations Act*, provides:

16. A tribunal may, in making its decision in any proceeding,

- (a) take notice of facts that may be judicially noticed; and
- (b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

I take notice of the fact that SPF 6 coverage is commonly provided as part of a program of insurance centered on providing Commercial General Liability insurance, such as that admittedly provided by Temple.

Having reviewed this information and having reviewed Endorsements 94 and 96, I am compelled to conclude that the contract of insurance issued by Temple did include SPF 6 coverage. Indeed, Endorsement No. 94 can have possible application to coverage other than SPF 6, but, Endorsement No. 96, can have no possible function unless an SPF 6 is part of the contract of insurance. Attaching the Endorsement 96 to the document, in conjunction with the evidence of the practice of including SPF 6 as coverage in general liability policies, leads me to conclude that the Temple contract of insurance does include an obligation to provide SPF 6 coverage.

The Scope and Application of SPF 6 Coverage

The scope of coverage provided by SPF 6 can be seen by the standard form wording found at Tab 17 of Exhibit 3. The first two pages consist of the application for SPF 6 coverage with the insuring agreement found on the third page. In particular, I find this important language under the heading "Section A – Third Party liability":

"The insurer agrees to indemnify the insured against the liability imposed by law upon the insured for loss or damage arising from the use or operation of any automobile not owned in whole or in part by or licensed in the name of the insured, and resulting from bodily injury to or the death of any person or damage to property of others not in the care, custody or control of the insured;"

In my view, the purpose of SPF 6, Non-Owned Automobile Coverage, is to provide indemnity for a business which may have liability arising out of the use or operation of an automobile, not owned by the business. This can quite easily arise when an employee, in the course of employment, operates their own car, a rented car, or someone else's vehicle. The use or operation could create a liability for the employer as a result of the master-servant relationship, but the liability does not arise from a vehicle which is owned or licensed in the name of the employer. Hence, a very valuable coverage is granted by the Non-Owned Automobile Coverage, the SPF 6, because it provides the insured, the employer, with protection for that vicarious liability.

However, that coverage only applies if the vehicle involved is an "automobile", and if it is an automobile that is not owned in whole or in part by, or licensed in the name of, the insured.

In the record before me, there is no evidence that the vehicle involved in this case is licensed in any name. There is simply no evidence of any licensing status at all. The police report for this accident, at Tab 2 of Exhibit 3, indicates that the vehicle is unlicensed. With respect to ownership, there is some information. Once again, the police report indicates that the owner of the vehicle is Kenogami Lake Lumber. At Tab 7 of Exhibit 3 counsel filed the bill of sale for the purchase of the vehicle showing the purchaser to be Kenogami Lake Lumber. At Tab 8 of Exhibit 3, there is a truck appraisal from September 2003 for this vehicle issued in the name of Kenogami Lake Lumber. On the evidence before me, I conclude that this vehicle was owned in whole or in part by Kenogami Lake Lumber. As a result, the SPF 6, Non-Owned Automobile Coverage, does not apply to liability arising out of use of this vehicle.

This conclusion logically furthers the objective of requiring insurance on vehicles. It would be inappropriate for a business to leave its vehicles uninsured, but then to protect itself from vicarious liability by purchase of SPF 6.

For the purpose of this stage of my analysis it is not necessary for me to address whether or not the vehicle involved is an "automobile" within the meaning of the SPF 6.

Based on the evidence before me, the SPF 6, the non-owned coverage, would not provide any coverage with respect to the vehicle involved in the accident.

The Loss Transfer Regime and Part VI of the Insurance Act

The entitlement to loss transfer is entirely a creature of statute, supplemented by regulatory provisions. In Part VI of the *Insurance Act*, section 275 creates an obligation on insurers of certain classes of automobiles to reimburse other insurers. The question immediately arises as to whether or not section 275 has any application in this case. The section 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. 1.

But the implementing regulation, O. Reg. 664, defines the obligation differently:

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory

accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

Notably, the regulation speaks of insurers of "vehicles" whereas the statute confines loss transfer to insurers of "automobiles". In my view, the regulation must be read as subservient to the statute and therefore the "vehicles" contemplated by the regulation must be interpreted to be some subset of "automobiles" as prescribed by the *Act*.

Therefore, loss transfer would not have any application if the Temple policy does not insure "automobiles" as that term is used in the *Insurance Act*. I note that the Temple policy includes a definition of automobile, at page 10 of Tab 1 of Exhibit 3, which might not include this vehicle as the definition restricts the term to vehicles "being used for transportation of persons or property on public roads". However, in interpreting section 275 of the *Act*, I look to the statute and the caselaw which has interpreted "automobile" as that term is used in Part VI of the *Insurance Act*.

A similar issue arises with respect to section 226 of the *Insurance Act*. That provision provides that Part VI of the *Act* does not apply in various circumstances:

(2) This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act* unless it is insured under a contract evidenced by a form of policy approved under this Part.

Section 275 of the *Act* imposes the loss transfer obligation as a corollary of having a contract of insurance on certain vehicles. If the Temple contract is exempted from Part VI by 226 (2), then section 275 does not apply to Temple. Temple's only possible connection with loss transfer arises out of its contractual relationship with Kenogami, and if that contract is outside of Part VI because of 226 (2), loss transfer does not apply to Temple.

The law with respect to determining whether or not the vehicle involved is an "automobile" for the purposes of Part VI of the *Insurance Act* has been addressed by a number of cases at the appellate level and other courts in Ontario. Since the Court of Appeal decision in *Regele*¹ it has been clear that we are to determine a vehicle's status as "automobile" by reference to section 224 of the *Insurance Act*.

In my view, the law now requires a three-stage test to determine whether or not a vehicle is an "automobile" for the purpose of Part VI of the *Insurance Act*. The first stage of the test is to determine whether or not the vehicle is an "automobile" in ordinary parlance. The second stage of the test is to determine whether or not the vehicle was required under any act to be insured under motor vehicle liability policy. The third stage, looking at regulations, is contemplated by the statute to see if the vehicle is deemed to be an "automobile".

If the vehicle is determined to be an automobile by any of these tests, the question is resolved.

In *Morton v. Rabito*², the Court of Appeal held:

Bergsma is very different from the present case. Although neither the reasons of Hogg J. nor the endorsement of this court indicates what types of DND vehicle were involved in the accident, the facts filed on the appeal indicates that the vehicles were trucks. A truck, in ordinary parlance, is an automobile [citation omitted]. One need not resort to the statutory definition of "automobile" in s. 224(1) to deem a truck to be an automobile, and the fact that the truck was not "a motor vehicle

¹ *Regele v. Slusarczyk* 1997 CanLII 3648 (ON C.A.), (1997), 33 O.R. (3d) 556

² 1998 CanLII 5865

required under any Act to be insured under a motor vehicle liability policy" did not exclude it from being an automobile.

This analysis determines the status of the truck in this case. In ordinary parlance a truck is an automobile, and we need go no further as far as an interpretation of that term is concerned in respect of section 275. This interpretation is consistent with the legislative scheme applicable to "automobiles" that describes its application to various heavy commercial vehicles.

Therefore for the purposes of sections 226 and 275 of the *Insurance Act*, I conclude that the vehicle is an "automobile".

That, however, does not end the inquiry. It is necessary to examine whether Part VI of the *Act* is inapplicable as a result of section 226 (2). Having found that the truck involved is an "automobile", I turn to the questions of whether it was required to be registered under the *Highway Traffic Act*, and whether it was insured under a contract of insurance evidenced by a form of policy required to be approved under Part VI.

The *Highway Traffic Act* addresses registration. In section 7 of that *Act*, various provisions require vehicles to be licensed, but always restricted to vehicles being used on a highway. The vehicle involved in this accident was not operated on a highway. Accordingly, it was not required to be registered under the *Highway Traffic Act*. Therefore, Part VI of the *Insurance Act* does not apply to a contract unless the automobile was insured by a form of policy approved under Part VI.

At this point in the analysis, it is necessary to recall the nature of the SPF 6 coverage that I have found applicable to the Temple policy. The SPF 6 is not insurance on an automobile, it is not insurance in respect of an automobile. It is unlike most forms of automobile insurance that cover the vehicle and cover liability imposed upon the owner and all consent operators. The SPF 6 does not cover the vehicle, the owner of the vehicle, or the driver of the vehicle. Its sole coverage is for the liability that might be imposed on an insured (employer) in respect of use or operation of a vehicle which is not owned by the insured. In my view, it can not be said that the Temple policy insures the automobile involved in this accident at all.

This means that section 226 (2) exempts the Temple contract from the application of Part VI, which exempts Temple from loss transfer.

Furthermore, if loss transfer provisions were to apply to Temple, it would be necessary to find that obligation in section 275 of the *Act*, and O. Reg. 664. Subsection 9 (3) of the regulation specifies that loss transfer is to be found against insurers of heavy commercial vehicles, in the following words:

- (3) **A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.**

Any loss transfer obligation in this case must be found in this provision. Temple must be demonstrated to be such "second party insurer". But this is not the case. Temple is not, in this instance, the insurer of a heavy commercial vehicle. Temple is the insurer of a business against liability, but that policy does not extend to providing coverage in respect of any particular vehicle or group of vehicles. In my view, the insurance arrangement can not be characterized as creating a policy "insuring a heavy commercial vehicle".

Whether or not Part VI of the *Act* applies to Temple's contract, the provisions of O. Reg. 664 do not define a class of insurers liable for loss transfer in a way that encompasses Temple, where the only coverage possibly in question is SPF 6. SPF 6 is not a form of policy that insures a vehicle. Furthermore the SPF 6 does not apply to a vehicle owned by the insured, and would not be applicable in this case.

The Effect of the Tort Defence

Counsel for ING made an extensive argument that Temple has, by its conduct, elected to participate in a pool of insurance arrangements which includes gaining the benefit of the statutory protections under the *Insurance Act* with respect to tort claims. It is argued that position means that Temple must also accept the obligations imposed by the statute for loss transfer obligation. I have been directed to pleadings filed in respect of tort litigation.

From a policy point of view, the argument is attractive. But I decline to create legal obligations and rights that are not prescribed by the legislation or the regulations. It is not for me to implement policy that is not called for by the regulations or the legislation. I would certainly be prepared to look at those goals if I were faced with an ambiguity, or lack of clarity of some sort in the scheme, but I do not consider it appropriate to consider such criteria in order to create new rights and obligations which are not described in the statute or the regulations.

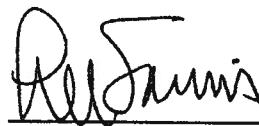
Accordingly, I find that ING, to succeed in this application, must establish that the legislation requires Temple to make loss transfer indemnities in accordance with the rules set out in section 275 of the *Insurance Act* and regulations thereunder. ING has not established this obligation.

Conclusion

I conclude that no loss transfer is available from Temple based on its policy. Temple is not the insurer of a heavy commercial vehicle. Part VI of the *Insurance Act* does not apply to Temple's contract of insurance in this instance.

In accordance with the Arbitration Agreement, ING is responsible for the costs of the arbitration and party and party costs of Temple. I expect that counsel may be able to agree on the costs to be awarded to Temple. If not, I will make an award following receipt of brief submissions from each party. Please advise me within 30 days of this award if you wish to make such submissions.

Dated at Toronto this 7th day of May.



LEE SAMIS
Arbitrator