

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1999,
c. I. 8, S. 275 AS AMENDED;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

LONBARD CANADA LTD.

Respondent

DECISION

COUNSEL:

Derek V. Abreu for the Applicant

Harry P. Brown for the Respondent

ISSUES:

1. Was the bus involved in the accident in which Ms. Rita Lingwood was injured on January 7, 2003 a “heavy commercial vehicle” for the purposes of loss transfer Regulation 664, and if not, what are the implications?

RESULT:

1. The bus was not a heavy motor vehicle within the meaning of Regulation 664 and therefore Wawanesa is not entitled to loss transfer in this matter.

FACTS AND ANALYSIS:

This matter arises out of a slip and fall accident which occurred on January 17, 2003. Jake's Oyster Bar & Grill had contracted with "Have Bus Will Travel" and their drivers to provide two buses to transfer skiers from Burlington, Ontario to Elliotville, New York for the purpose of skiing. "Have Bus Will Travel" insured the bus through the respondent, Lombard Canada Ltd.

The injuries occurred when Ms. Rita Lingwood slipped while exiting from the bus. Ms. Lingwood had a valid policy of motor vehicle liability insurance with Wawanesa at the time of the accident. She submitted an application for accident benefits to Wawanesa who paid the benefits and then made a claim for loss transfer against Lombard, claiming that at the time of the accident the bus was a "heavy commercial vehicle" within the meaning of section 1 of Regulation 664 and therefore Wawanesa was entitled to loss transfer. Lombard takes the position that the bus was not a heavy commercial vehicle at the time of the accident.

Loss transfer between insurers arises out of the provisions of section 275 of the Insurance Act, R.S.O. 1990, c. I 8, with respect to accident benefits paid. Section 9 of Regulation 664/90, in effect, provides reimbursement to first party's insurers for payment of accident benefits from a second party insurer, who's insured was partially or fully at fault for the accident, and where the second party insured is the insured of a "heavy commercial vehicle".

Section 1 and 9 of Regulation 664 define a heavy commercial vehicle as follows:

A "commercial vehicle" means an automobile used primarily to transport material, 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 designated specifically for construction or maintenance purposes, a vehicle rented for 30 days or less, or a trailer intended for use with a commercial vehicle.

“Heavy commercial vehicle” means a commercial vehicle with a gross weight greater than 4500 kilograms.

The parties have agreed that the bus in question weighed more than 4500 kilograms.

Lombard takes the position that the bus was a “public vehicle” for the purposes of loss transfer.

Section 1 of Regulation 664 defines a “public vehicle” as meaning:

An automobile used primarily to provide transportation services to the public, and includes an ambulance, a bus, a funeral vehicle, limousine taxi.

I have some difficulty with Wawanesa’s position in this matter. Wawanesa’s position requires that I accept the bus was used primarily to transport material, goods, tools or equipment in connection with the insured’s occupation. Wawanesa takes the position that the insured is the bus company, which I accept, but also that the “equipment” that the bus transports is the bus itself and the equipment in it, such as the washroom, video equipment etcetera.

Such an interpretation would, in my view, be somewhat tortured at best. Cross: Statutory Interpretation, second edition, page 36, states:

In determining the meaning of any word or phrase in a statute the first question to ask is always is the natural or ordinary meaning of that word or phrase in its context in the statute.

I am in agreement with that statement and am of the view that it applies to this situation. To suggest that the bus and its washrooms, video machines, etcetera constitute the “equipment” transported is a difficult interpretation at best. To me the bus in question fits far better into the definition of “public vehicle” where the term “bus” is actually included.

Counsel for Wawanesa submitted that the bus was not “public” in the sense that not anyone could get on it. Only those people who contracted with the bus company could use it. In this case it was the patrons of Jake’s Oyster Bar & Grill who paid to go on the ski trip. I accept that it is different than a TTC or a Go bus, in the sense that the bus company in question contracted with another company or persons to use the bus. Nonetheless, the “public” was still able to have access to the bus if they paid for it. In that sense, it was “public” and the definition is applicable to this situation.

Counsel for Wawanesa also submitted that the vehicle “was rented for 30 days or less” and therefore qualified as a heavy commercial vehicle. Even if I were to accept that the bus fit into the rest of the definition, which I do not, for reasons expressed above, I am not convinced that the vehicle was “rented for 30 days or less”. The Supreme Court of Canada in Johnson vs. British Canadian Insurance Company [1932] 4D.L.R. 281, set out what was required to

constitute “renting”. The fact situation in our case does not fulfil the requirements of exclusivity required to come within the meaning of the term “rented”.

Counsel for Wawanesa also submitted that the definition of “heavy commercial vehicle” and “public vehicle” were not necessarily mutually exclusive. That may well be, the difficulty I have is that the bus simply does not meet the definition of “heavy commercial vehicle”. Accordingly loss transfer does not apply and Wawanesa is not entitled to loss transfer in this matter.

In the event that the parties are unable to agree with regard to the issue of cost, I may be spoken to.

Dated in the city of Toronto, on the _____ day of August, 2005.

**M. Guy Jones
Arbitrator**