IN THE MATTER OF SECTION 275 OF THE *INSURANCE ACT,* R.S.O. 1990, AND *ONTARIO REGULATION 668*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY also known as ZURICH AMERICAN INSURANCE COMPANY

Respondent

PRELIMINARY DECISION

COUNSEL:

Ruby Tatla for the Applicant

Jason Frost for the Respondent

ISSUE:

1. Do the Loss Transfer provisions in section 275 of the *Insurance Act* apply in the circumstances described below?

RESULT:

1. No, the provisions in section 275 of the *Act* do not apply. The Personal's Application for Arbitration is hereby dismissed.

BACKGROUND FACTS:

1. A vehicle driven by Vera Nikolic and insured by The Personal Insurance Company ("The Personal") was struck by a tractor trailer on November 5, 2009 in Chicago, Illinois. Ms. Nikolic was a resident of Hamilton, Ontario. The truck was insured under a policy issued by Zurich American Insurance Company ("Zurich American"). Zurich American's head office is in Schaumberg, Illinois and the policy covering the truck was issued in Illinois.

2. Ms. Nikolic applied for payment of accident benefits under the *SABS* from The Personal, and various benefits have been paid to her and on her behalf.

3. The Personal contends that the driver of the truck is fully liable for the accident, and seeks indemnification for the benefits it has paid from Zurich American, pursuant to section 275 of the *Insurance Act.* A Notice to Submit to Arbitration was sent in December 2013, and when no response was received, The Personal brought an Application in the Ontario Superior Court seeking my appointment to arbitrate the dispute. An Order was issued on July 17, 2015, noting the consent of the parties, appointing me to arbitrate the dispute under section 275 of the *Act.* The Respondent was described as "Zurich Insurance Company also known as Zurich American Insurance Company".

4. An initial pre-hearing teleconference was convened with counsel in December 2015. Subsequent calls were held in February 2016, September 2016, and May 2017. A hearing to determine liability for the accident was scheduled for September 12, 2017, and a timetable for filing factums was confirmed. Two weeks before the first set of submissions were due, I was advised that counsel for the Respondent was raising a new issue, and a further call was convened.

5. Mr. Frost advised at that time that Zurich American was not licensed to sell insurance in Ontario. He contended that as the accident occurred in Illinois, his client's policy was issued in that state, and the truck that it insured was not required to be insured under Ontario law, The Personal should not consequently be able to pursue indemnification under section 275 of the *Act.*

6. The parties agreed that this issue should be determined as a preliminary matter, on the basis of an exchange of written submissions. I received detailed and thorough submissions from both counsel. Various documents were also filed and relied on by counsel in their arguments.

DOCUMENTARY EVIDENCE:

7. One of the questions raised by this dispute is the relationship between the entity known as Zurich Insurance Company and Zurich American Insurance Company, and how that impacts the applicability of the Loss Transfer provisions in these circumstances. Various documents were filed by the parties touching on this issue, which I outline below.

8. The truck involved in the accident was owned by Stericycle Inc. of Lake Forest, Illinois, and was insured under a policy issued by Zurich American Insurance Company. One of the pages of that policy identifies the insurer as "American Zurich Insurance Company" although nothing turns on that fact. The address of the "servicing office" of the company is noted on the policy documents as being in Chicago, Illinois.

9. Zurich American Insurance Company is on record as having filed a Power of Attorney and Undertaking ("PAU") with the Canadian Council of Insurance Regulators on December 4, 2006. Its head office is noted on that form as being in Schaumberg, Illinois. In addition, from the documents filed by counsel, it appears that two different PAUs were filed by an entity identified as Zurich Insurance Company – one dated June 8, 1964, in which the company's head office is noted as being in Chicago, Illinois, and a second, more recent one dated September 27, 2000, which states that the company's Canadian head office is in Toronto, Ontario.

10. The PAUs contain the standard wording, in which the company undertakes not to "set up any defence to any claim..or proceeding under a motor vehicle liability insurance contract entered into by it" which could not be asserted if the contract had been entered into in and in accordance with the laws relating to motor vehicle liability contracts of the province in which the proceeding may be instituted.

11. A copy of an excerpt from a page on the Canadian Council of Insurance Regulators' website was filed, explaining the Power of Attorney and Undertaking (PAU) for Motor Vehicle Liability Insurance. It provides as follows:

> *The Canada Non-Resident Inter-Province Motor Vehicle Liability Insurance Power of Attorney and Undertaking (PAU) was established in 1964. Generally, this document is filed by insurers in the United States who issue motor vehicle liability policies outside of Canada.*
>
> ***An insurer that files a PAU protects its insureds who drive private passenger vehicles in Canada**. Companies which have filed a PAU can issue a Canadian Non-resident inter-provincial Motor Vehicle Liability Card...to their insureds for driving into Canada. These cards are used as evidence of insurance coverage if stopped by enforcement officials or involved in an accident in Canada. In addition, **signatories to the PAU agree to certain conditions if an insured is involved in a motor vehicle accident in Canada.***
>
> (emphasis mine)

12. It is clear from the above – as well as from the language of the PAU itself - that the effect of insurers based in the United States signing and filing a PAU is restricted to

circumstances in which insured drivers covered under policies issued outside of Ontario are involved in accidents in Ontario (or other provinces).

13. More important for our purposes are two documents titled "Certificate of Status", issued by the Director of Licensing at the Financial Services Commission of Ontario ("FSCO"). One states that as of September 15, 2017 (presumably the date that it was requested by counsel) a search of the FSCO records revealed that "there was no licensed insurer named **Zurich American Insurance Company** on November 5, 2009 under the *Insurance Act."*

14. A second such Certificate, dated September 26, 2017, certifies that a similar search was conducted to determine the licensing status of **Zurich Insurance Company Ltd.** It states that that entity was first licensed in 1924, its head office is in Toronto, Ontario and it continues to be licensed under the Ontario *Insurance Act* to undertake contracts for automobile insurance (as well as other classes).

15. Counsel for The Personal also filed a printout from the FSCO website indicating that Zurich American Insurance Company filed a Protected Defendant Undertaking pursuant to section 226.1 of the Act.

16. The parties filed copies of two pages that appear on the Zurich website titled "Zurich at a glance". Counsel for The Personal noted that the company's Marketplace Leadership Statement provides – "We are Zurich, one global company, with one mission, one set of shared values and a clearly defined commitment to our stakeholders, and the communities in which we live and work". It also provides "We offer the global strength of a leading insurance provider and industry expertise in local markets".

17. The footnotes at the bottom of the webpage indicate that the Zurich North American headquarters is in Schaumberg, Illinois, while Zurich Insurance Company Ltd. (Canadian Branch) has an address in Toronto, Ontario. The footnotes also state that "coverages are underwritten by individual member companies of Zurich in North

America, including Zurich American Insurance Company in the U.S. and Zurich Insurance Company Ltd (Canadian Branch) in Canada."

18. Finally, a document titled "Zurich Insurance Group AG Corporate Organization Charts" was filed by counsel for the Respondent. It has the heading "USA II Zurich American Insurance Group" and indicates various companies, presumably based in the United States, that are owned by Zurich American and appear below it on the chart. There is a notation on the bottom of the page stating "as reported June 30, 2017". Zurich American Insurance Company is shown as being wholly owned by Zurich Insurance Company Ltd., through a holding company. In turn, Zurich Insurance Company Ltd. is shown to be wholly owned by Zurich Insurance Group Ltd., the parent company based in Switzerland. There is no reference to a "Canadian branch" on the chart.

RELEVANT PROVISIONS:

Counsel referred to the following provisions of the ***Insurance Act*** in their submissions –

Section 1

> ***1.*** *In this Act, except where inconsistent with the definition sections of any Part,*
>
> *"insurer" means the person who undertakes or agrees or offers to undertake a contract;*

Section 224

> *(1) In this Part,*
>
> *"automobile" includes,*
>
> *(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and*
>
> *(b) a vehicle prescribed by regulation to be an automobile;*
>
> *"contract" means a contract of automobile insurance that,*
>
> *(a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or*

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

Section 226

(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.

226.1 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 Superintendent, in the form provided by the Superintendent, 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.

Section 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.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

RELEVANT CASE LAW:

19. The parties referred to various cases in their submissions. There are essentially five judicial decisions, all decided within the last fifteen years, that inform the discussion on whether the Loss Transfer provisions are applicable to insurers that operate outside of Ontario. All but one of the cases involve accidents that occurred outside of Ontario. As

these form the framework against which this case must be analysed, I will summarise them in chronological order below.

ICBC v. Unifund [2003] 2 S.C.R. 63

20. In this case, an Ontario couple were driving a rental vehicle in British Columbia when they were struck by a tractor trailer. Both vehicles involved in the accident were registered in British Columbia and insured by the Insurance Corporation of British Columbia ("ICBC"). Upon returning to Ontario, the Claimants applied to Unifund, their insurer, for payment of accident benefits under the *Schedule.* Unifund paid out about $750,000 in benefits, and sought indemnification for these benefits from ICBC, as insurer of the tractor trailer, under the Loss Transfer provisions of the Ontario *Insurance Act*.

21. ICBC resisted payment, claiming that the Ontario regulatory insurance scheme did not apply in these circumstances. Unifund claimed that ICBC does business in Ontario, and should therefore be subject to its insurance laws. Unifund also argued that the terms of the PAU signed by ICBC provide that ICBC agrees to be bound by Ontario's insurance scheme, including the Loss Transfer provisions in section 275 of the *Act.* It applied to the Ontario Superior Court for the appointment of an arbitrator, pursuant to section 275(4).

22. The Superior Court judge stayed Unifund's application. The Court of Appeal reversed that decision, finding that an arbitrator should have been appointed and that he or she could have determined the jurisdictional question. The Supreme Court of Canada then considered the issue. The majority opinion found that section 275 of the *Act* did not apply in these circumstances. Justice Binnie stated that the Ontario *Insurance Act* is not applicable to out-of-province insurers under ordinary constitutional principles, when the accident occurs outside of Ontario. He noted that ICBC is not authorised to sell insurance in Ontario and does not do so. ICBC had filed a PAU, although British Columbia was deleted from the list of provinces to which it applied. Justice Binnie determined that the filing of a PAU should not be interpreted as a "general attornment ...to Ontario insurance law in respect of a motor vehicle accident that occurred in British Columbia".

23. In discussing the general effect of a PAU, Justice Binnie confirmed the Ontario Court of Appeal's statement in *Healy v. Interboro Mutual Indemnity Insurance Co*. (1999) 44 O.R. (3d) 404 that the PAU form assures the same statutory protection to someone who is injured in an accident in Ontario, whether the policy responding to the claim was issued in Ontario or in another participating jurisdiction. He states:

> *The PAU is about enforcement of insurance policies, not about helping insurance companies, which have been paid a premium for the no-fault coverage, to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction, and where the claims arising out of the accident were litigated there.*
>
> *(emphasis in the original)*

The above comments indicate the court's clear view that the fact that an out-of-province insurer has filed a PAU in Ontario does not result in that company being subject to the Loss Transfer provisions, when an accident takes place outside of Ontario.

24. Perhaps the most cited passage of Justice Binnie's judgement is his statement (at the end of para. 12) that -

> *There is no doubt that if the appellant (ICBC) were an Ontario insurer, it would be required to arbitrate Unifund's claim.*

Royal & SunAlliance v. Wawanesa (2006) 84 O.R. (3d) 449

25. The driver of a tractor trailer, resident in Ontario, was injured when he was involved in a single-vehicle accident while driving his truck in Vermont. The truck was licensed in Ontario and insured under a policy issued in Ontario by RSA. The driver sought payment of accident benefits from his personal insurer, Wawanesa. Wawanesa paid benefits, and then sought indemnification from RSA under section 275 of the *Act*. RSA resisted payment on the grounds that there is no provision for "loss transfer" among insurers in Vermont, and that the law of Vermont should apply.

26. On appeal, Justice Newbould of the Ontario Superior Court stated that no purpose is served by looking to Vermont law to settle a dispute between two Ontario insurers. He noted Justice Binnie's distinction in *Unifund v ICBC, supra,* between a tort claim involving parties to an accident (in which the "lex fori", the law of the place, would apply) and a statutory claim under section 275 of the *Act* between two insurers, applying Ontario law. Citing Justice Binnie's statement that if ICBC were an Ontario insurer it would be subject to a loss transfer claim, he determined that RSA was bound by the Loss Transfer provisions.

Economical Mutual v. Liberty Mutual Fire Insurance (2008) 90 O.R. (3d) 370

27. The Claimant in this case was injured when a truck registered in Illinois and insured by Liberty Mutual Fire Insurance rear-ended her vehicle. The accident occurred in Ontario. She sought accident benefits from her insurer, Economical, and they sought repayment of those benefits from Liberty Mutual, under the Loss Transfer provisions in the *Act.* Liberty Mutual is not licensed to undertake automobile insurance in Ontario and has not filed an Undertaking under section 226.1 of the *Act.* It contended that it was not an "insurer" for the purposes of Part VI of the *Act*, and that Economical could therefore not recover the payments it made through the Loss Transfer provisions. The Arbitrator appointed to hear the case agreed, and determined that section 275 of the *Act* did not apply.

28. Justice Low allowed Economical's appeal and found that Liberty Mutual was subject to the Loss Transfer provisions in the *Act*. The focus of her decision was on whether the term "insurer" defined in section 1 of the Act should be interpreted in a more restrictive manner for the purposes of Part VI of the *Act* (containing provisions for automobile insurance), as Liberty Mutual claimed and the Arbitrator had accepted. She ruled that the definition in section 1 should be applied consistently throughout the *Act*, given the ordinary and grammatical meaning of the word and the purpose of the Loss Transfer provisions. Justice Low found that if the meaning of "insurer" suggested by Liberty Mutual was adopted, interpretive absurdities would result. She concluded that

Liberty Mutual met the definition of "insurer" in the *Act,* and that the Loss Transfer provisions applied.

29. It is notable that Justice Low makes no reference to the Supreme Court's decision in *Unifund v. ICBC, supra*, nor to any other case law, for that matter. As was pointed out by Arbitrator Densem in *Wawanesa Mutual v AXA Insurance* (March 26, 2015), her decision "does not appear to be in accord with the law in this area set out in other cases both from the Superior Court and higher courts".

Gore Mutual v. John Deere Insurance and Sentry Insurance (2008) CanLii 32318

30. This case was decided three months after the *Economical v Liberty Mutual* decision referred to above. A tour bus and a tractor trailer collided in New York State. The bus was registered in Ontario, and some or all of the passengers were Ontario residents. The tractor was registered in Pennsylvania. Some of the bus passengers applied for and received accident benefits from Gore Mutual, the insurer of their personal vehicles in Ontario. Gore sought reimbursement for the benefits paid out from Sentry Insurance, the insurer of the tractor trailer, pursuant to section 275 of the *Act.*

31. The Sentry policy covering the tractor trailer was issued in Pennsylvania. Sentry did not carry on business or sell insurance in Ontario, and was not licensed to do so. It was a signatory to a PAU filed with the Canadian Council of Insurance Regulators. Sentry resisted Gore's claim for repayment, and Gore applied to the court for the appointment of an arbitrator under section 275 of the *Act.*

32. The court determined that section 275 did not apply in these circumstances, and declined to appoint an arbitrator. Justice Hoy cited various statements from Justice Binnie's reasons in *Unifund v ICBC, supra,* to support her conclusion that the PAU signed by Sentry does not prevent it from contesting the extraterritorial jurisdiction of the Ontario Act. She noted Justice Low's decision in *Economical Mutual v. Liberty, supra*, cited above, and distinguished it based on the accident in that case having occurred in Ontario. She also noted that that ruling turned solely on the statutory interpretation of the

word "insurer" , and did not refer to the Supreme Court of Canada's decision in *Unifund v. ICBC, supra.*

Primmum Insurance v. Allstate Insurance (2010) 100 O.R. (3d) 788, aff'd by Ct of Appeal at 107 O.R. (3d) 159

33. This case is perhaps the closest factually to the instant case. An Ontario resident driving a motorcycle in North Carolina was involved in an accident with a pickup truck. The pickup truck was insured by Allstate Insurance under a policy issued in North Carolina. The injured motorcycle driver applied to Primmum, his Ontario-based insurer, for payment of accident benefits. Primmum sought repayment for the benefits paid from Allstate under section 275 of the *Act*. When Allstate resisted payment, Primmum served it with a Notice to Submit to Arbitration. Allstate replied that the loss transfer scheme did not apply, as it was not an Ontario insurer and the accident did not occur in Ontario.

34. Primmum applied to the court for the appointment of an arbitrator. Justice Cameron noted that Allstate Insurance, of Skokie, Illinois had filed a PAU in Ontario in 1964. It was also an Ontario Licensed Insurer, with an office in Markham, entitled to sell automobile insurance in Ontario. Based on this fact, he determined that both Primmum and Allstate met the definition of "insurer" in the *Insurance Act*. He noted Justice Newbould's findings in *RSA v. Wawanesa, supra,* that if both insurers are registered in and carry on business in Ontario, they are subject to the Loss Transfer provisions of the *Act*, even if the accident occurred in another jurisdiction. He also referred to excerpts from the *Unifund v ICBC c*ase, as well as the decision in *Gore Mutual v. Sentry*, *supra,* summarised above.

35. The core of Justice Cameron's findings read as follows:

> *The issue here is whether Allstate can be forced to arbitrate a statutory claim which depends on whether it is an "insurer of such class or classes of automobiles as may be named in the regulations" for the purpose of section 275.*
>
> *Primmum and Allstate are licensed to sell automobile insurance in*

> *Ontario. Accordingly, it is an Ontario insurer, notwithstanding an address in Illinois. It is registered with a chief agent in Markham, Ontario.*
> …
>
> *Allstate argues that its policy was issued in North Carolina by a U.S. insurer, with much lower maximum limits and without statutory benefits, which result in much lower premiums. It ought not to be subject to Ontario law.*
>
> *In the Insurance Act, Allstate is an "insurer" under s.1 and it issues "contracts" because it is licensed to sell insurance in Ontario under s.224(1)(a). The premiums it charges for the insurance or the limits of coverage in North Carolina are of no concern to Ontario.*
>
> *On the authority of Royal & SunAlliance v. Wawanesa, Allstate can be made subject to the statutory cause of action in Ontario even though the accident occurred in North Carolina. This was not an impermissible extraterritorial exercise of Ontario jurisdiction. It was a case of enforced arbitration of a statutory cause of action between two Ontario insurers.* ***If Allstate wishes to avoid such a result because North Carolina has a different insurance regime, it should deregister as an Ontario insurance company or incorporate a subsidiary to sell insurance in North Carolina.***
>
> *(emphasis mine)*

36. In a brief ruling, the Court of Appeal upheld Justice Cameron's decision and stated that they agreed with his finding that the issue was resolved by Justice Binnie's statement in *Unifund v. ICBC, supra*, that if the appellant (ICBC) were an Ontario insurer, it would be required to arbitrate Unifund's claim.

PARTIES' ARGUMENTS:

37. Zurich American contends that the above cases support its position that an insurer cannot seek indemnification for benefits paid through the Loss Transfer provisions of the *Act,* when the accident from which the obligation to pay benefits arose occurred outside of Ontario, and the "target insurer" is not licensed to undertake insurance in Ontario.

38. The Personal concedes that Zurich American Insurance Company was not licensed to undertake insurance in Ontario, but argues that it is either a subsidiary of

Zurich Insurance Company Ltd., which has a head office in Toronto, or is part of the global Zurich group to which Zurich Insurance Company belongs. Given that Zurich Insurance Company is licensed to undertake auto insurance in Ontario, counsel contends that Zurich American should also be subject to the provisions in section 275 of the *Act.*

I will set out the parties' submissions in more detail below.

Zurich American's submissions

39. Counsel for Zurich American noted the definition of an" insurer" as well as the definition of the term "contract" in section 224 of the *Act* reproduced above. He contended that as neither part of the definition of "contract" is applicable to the Zurich American policy covering the truck involved in the accident, it is not a contract of automobile insurance under Ontario law. Mr. Frost noted that the Certificate of Status issued by FSCO states that Zurich American was not licensed to sell auto insurance in Ontario at the time of the accident, and submitted that it was therefore clearly not an "Ontario insurer" at the time of the accident.

40. Counsel submitted that based on the case law referred to above, The Personal would only be able to seek indemnification under section 275 of the *Act* if his client was licensed to sell insurance in Ontario, or, if the accident took place in Ontario and his client was a signatory to the PAU. Given that the accident in question occurred in Illinois, and not in Ontario, he contended that The Personal cannot pursue this statutory remedy.

41. Counsel acknowledged that the entity known as Zurich Insurance Company is noted on the PAU it filed as having a head office in Ontario. He submitted that Zurich American is a separate company, and argued that the fact that each company filed separate PAUs at different times further supports the argument that they are two distinct entities. Counsel also noted that the PAUs signed reference actions or proceedings against "it or its insured" arising out of an accident in any Canadian province or Territory, and submitted that these documents are clearly not relevant in these circumstances, where the accident occurred in Illinois.

42. Mr. Frost also referred to the Organisation Chart filed, which indicates that Zurich American is a subsidiary of Zurich Insurance Company Ltd. He noted that Zurich American is not related to the Canadian branch of the Zurich global entity, which does not appear on the chart.

43. Mr. Frost referred to and relied on the Supreme Court of Canada's decision in *Unifund v. Insurance Corp. of British Columbia*, *supra,* submitting that the court made it clear that the only two circumstances under which the Loss Transfer scheme in the *Act* applies is if the "target insurer" is an insurer that is licensed to undertake automobile insurance in Ontario at the time of the accident, or if the accident occurred in Ontario and the other insurer has filed a PAU. He noted that the court stated explicitly that if an insurer is "not otherwise in the legislative jurisdiction of Ontario, the PAU does not put it there by agreement" (at para. 104). He further noted that the lower courts have clearly followed this ruling in similar cases, and that the principles outlined in Justice Binnie's ruling determine this issue.

The Personal's submissions

44. Counsel for The Personal noted that the Order appointing me to arbitrate this dispute names the Respondent as "Zurich Insurance Company also known as Zurich American Insurance Company". She submitted that counsel for the Respondent did not take issue with his client being identified in this manner for more than two years, until shortly before the written materials were due to be filed. She noted that counsel for the Respondent had also conceded earlier in the process that the vehicle that his client insured met the definition of a "heavy commercial vehicle" under Regulation 664 of the *Act*.

45. Ms. Tatla referred to the statement on the Zurich website stating "We are Zurich, one global company, with one mission", and submitted that the information presented online indicates that the company markets itself as having a global presence. She noted that the inter-relationship between the Zurich entities is unclear, as the Respondent did

not provide any documents that attest to the relationship between the companies based in North America at the time of the accident. Counsel noted that the Certificate of Status received from FSCO regarding Zurich Insurance Company Ltd. indicates that its head office is in Toronto, that it was first licensed in 1924, and that it is licensed under the *Insurance Act* to undertake automobile insurance (as well as other classes of insurance) in Ontario. She also noted that this company is described on the Zurich website as the "Canadian branch".

46. Ms. Tatla contended that while Zurich American may not have been licensed to undertake automobile insurance in Ontario on the date of loss, the documents filed indicate that the entity known as Zurich Insurance Company Ltd. was licensed to do so. If the organisational chart filed (dated June 30, 2017) was in place on the date of loss, Zurich American was owned by Zurich Insurance Company Ltd. and by extension, should be deemed to be an Ontario insurer.

47. Counsel referred to the decision in *Economical Mutual Insurance Co. v. Liberty Mutual Fire Insurance, supra,* in which Justice Low overturned the Arbitrator's finding that Liberty Mutual could not be the target of "loss transfer" as it was not licensed to undertake automobile insurance in Ontario. Counsel noted that Justice Low stated that the purpose of the loss transfer provisions is to spread the loss among insurers in a somewhat mechanical fashion, favouring economy over exactitude. She argued that when this purpose is kept in mind and the legislation is interpreted in its grammatical and ordinary sense, the Zurich American policy insuring the tractor trailer should be considered to be a "contract of automobile insurance" under the *Act.*

48. Ms. Tatla contended that the facts considered by the Supreme Court in *Unifund v. ICBC, supra,* are distinguishable from those in this case. She noted that ICBC is not licensed to undertake insurance in Ontario, and is confined to issuing policies in British Columbia, whereas Zurich has a global presence and conducts business in Ontario under the Zurich brand, making it an "Ontario insurer".

49. Ms. Tatla similarly distinguished the decision in *Gore Mutual v. Sentry Insurance, supra,* given that Sentry Insurance had no presence in Ontario, unlike Zurich, which has a head office in Toronto.

50. Counsel submitted that the case of *Primmum v. Allstate, supra,* is directly applicable to this matter. She noted that the Court of Appeal expressly rejected Allstate's argument that the application judge had erred when he concluded that section 275 of the *Act* applied when the accident took place outside of Canada and the "target insurer" was not resident in Canada. She noted that Justice Cameron had determined that Allstate was an Ontario insurer despite the fact that it had an address in Illinois, as it was registered with a Chief Agent in Markham, Ontario. He also rejected the argument that Allstate should not be subject to Ontario law, due to the fact that the policy covering the pickup truck was issued in North Carolina. Ms. Tatla contended that the court's focus on the "big picture" of Allstate's presence in Ontario, rather than an examination of the details of its corporate structure and the relationship between the various Allstate entities, should lead to the conclusion in this case that Zurich American is subject to the provisions in section 275 of the *Act.*

Reply submissions - Zurich

51. Mr. Frost submitted that the fact that the Style of Cause was incorrectly drafted by Applicant's counsel to include the Zurich parent company cannot dictate the result. He stated that the real question is whether Zurich American should be subject to section 275 of the *Insurance Act*, given that it was not a licensed insurer in Ontario at the relevant time.

52. Counsel contended that the court's decision in *Economical v Liberty Mutual, supra*, is not helpful in this analysis, given that the accident in that case occurred in Ontario. He submitted that in any event, Justice Low's decision in that case has been critiscised in subsequent cases and should not be followed. He noted that Justice Hoy pointed out in *Gore v Sentry Insurance, supra*, that while *Economical v. Liberty, supra,* was decided after the Supreme Court's decision in *Unifund v. ICBC*, *supra,* the court in

Economical did not consider that decision or the territorial limitations in the *Act.* He also noted Arbitrator Densem's comments to this effect in *Wawanesa v. AXA, supra,* referred to above.

53. Mr. Frost submitted that the fact that Zurich markets itself as a global brand should not lead to the conclusion that its Illinois-based company, which is a distinct corporate entity from Zurich Insurance Company, should be deemed to operate in Ontario, as suggested by counsel for the Personal. He submitted that accepting The Personal's argument on this point would essentially require a piercing of the "corporate veil", and that the case law is clear that absent evidence that a parent corporation is doing business through a subsidiary for fraudulent purposes, this should not occur (*Yaiguaje v. Chevron Corporation (2017) ONSC 135*).

ANALYSIS & REASONS:

54. Before turning to the merits of this matter, I will address the manner in which this issue was brought before me. The accident from which these claims arise took place in late 2009. A Notice to Submit to Arbitration was served on the Respondent in late 2013, and when no response was received, The Personal brought an Application to Superior Court in 2015 to have me appointed to arbitrate this matter. The Order was made in July 2015, and our first pre-hearing convened later that year, with counsel participating on behalf of both parties.

55. Yet, it was not until August 2017, shortly before factums were due outlining the parties' positions on liability for the accident, that counsel for Zurich American first raised the argument that the Loss Transfer provisions would not apply in these circumstances. The reason for the late "flagging" of this issue was never explained. The result of this late breaking, new jurisdictional issue being raised was that much time was likely spent by both parties, but certainly by counsel for the Applicant, on matters that turned out to be completely irrelevant. While I appreciate that counsel who receives a file once the Arbitration process has been initiated may not know all of the facts at the outset, and may not turn his or her mind to all of the potential arguments in the early stages of

the dispute, the system cannot operate in the efficient manner that it is intended to if the Respondent's position is a 'moving target'.

56. Counsel for the Applicant noted that the Respondent did not object to being named "Zurich Insurance Company also known as Zurich American Insurance Company" in the Order issued by the court appointing me to arbitrate this matter. Counsel for the Respondent submitted that the incorrect naming of his client in the title of proceedings cannot determine the result. That is correct. Given the flexibility inherent in an arbitration under section 275 of the *Act,* relative to a court proceeding, I will consider the arguments put forward by the Respondent on this issue, but I will consider this factor when assessing the costs payable in this matter.

57. I now turn to the merits of the Respondent's argument. The starting point for the analysis must be the Supreme Court of Canada's decision in the *ICBC v. Unifund, supra,* case. The Court was asked to address the applicability of the Loss Transfer provisions in the *Insurance Act* when two Ontario residents made accident benefits claims to their insurer pursuant to a policy issued in Ontario, as a result of sustaining injuries in an accident in British Columbia. The truck that caused the accident was registered in BC, and the insurer of the truck was the provincial insurer ICBC, an entity that is not licensed to sell insurance in Ontario. The court found that the indemnity provisions in section 275 of the *Act* did not apply to ICBC, as its application in these circumstances "would not accord with territorial limits on provincial jurisdiction."

58. Justice Binnie discussed the effect of an out-of-province insurer filing a PAU in Ontario, at length. He made it clear that the existence of such a document does not lead to the conclusion that the filing insurer becomes subject to the Loss Transfer provisions of the Ontario Act, when an accident takes place outside Ontario. As excerpted above, he stressed that the PAU is about enforcement of insurance policies, rather than about "helping insurance companies ...to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction". It is clear from that finding, as well as from the language

of the standard PAU form itself, and the Canadian Council of Insurance Regulators excerpt set out above, that the fact that a PAU has been filed by an out-of-province insurer has no bearing on a claim arising from an accident that occurs outside Ontario.

59. Justice Binnie also stated that the Protected Defendant Undertaking referred to in section 226.1 of the *Act* relates to defending claims made under insurance policies rather than "defending a claim under the Ontario Act to reallocate the cost of payments required by the Ontario Act amongst insurance companies subject to the Ontario Act" (at para. 101).

60. Perhaps most importantly, the Court also stated that "there is no doubt that if the appellant (ICBC) were an Ontario insurer, it would be required to arbitrate Unifund's claim". As set out above, this statement has been referred to in all of the other cases (with the exception of *Economical v. Liberty Mutual, supra,* discussed below) that have followed, either involving accidents occurring outside Ontario or accidents within Ontario involving out-of-province insurers. As a result, the test set out by the Supreme Court of Canada for whether section 275 of the *Act* should apply when an accident takes place outside Ontario can be simply summed up as being whether or not the insurer from whom indemnification is sought ' is an "Ontario insurer".

61. While Justice Binnie did not spell out what determines whether an insurer is an "Ontario insurer", he referred to the fact that ICBC is not "authorized to sell insurance in Ontario,…(and) it does not in fact do so", and that "its insured vehicles in this case did not venture into Ontario." (at para.82) I take this to be a clear direction from the Court on what criteria to apply in determining whether the 'target insurer' in a claim for indemnity under section 275 is an "Ontario insurer".

62. The question of whether the 'target insurer' was an "Ontario insurer" was the focus of the analysis in Justice Cameron's decision in *Primmum v Allstate, supra.* As outlined above, Allstate argued that it should not be required to indemnify Primmum for benefits it paid to an Ontario-based motorcycle driver, given that the accident occurred in

North Carolina and the policy covering its vehicle was issued in that state. The court found that Allstate was licensed to sell insurance in Ontario and was therefore an "Ontario insurer", and ruled that it was required to indemnify Primmum pursuant to section 275.

63. The Court of Appeal did not add much to the analysis. It did, however, endorse Justice Cameron's reliance on the finding in *Unifund v. ICBC, supra,* that if the target insurer is an "Ontario insurer", it is subject to the Loss Transfer provisions.

64. It would have been helpful if Justice Cameron had set out in more detail the documentary or other evidence that he relied on to reach his conclusion that Allstate was an "Ontario insurer". As noted by Ms. Tatla, the decision states that Allstate was an Ontario Licensed Insurer as of January 2010. The accident, however, occurred in 2006, which raises the question of whether it was so registered at the time of the accident. Justice Cameron did, however, state clearly that if Allstate wanted to avoid the application of section 275 of the *Act,* it had two options – it could "deregister as an Ontario insurance company", or incorporate a subsidiary to sell insurance in North Carolina. The clear implication from that statement is that if Allstate had done either of those things, he would have determined that it was not subject to the provisions in section 275.

65. In contrast, the facts presented here relating to Zurich American do fit within these categories. That company was not registered or licensed to undertake insurance in Ontario, so was not required to "de-register" in order to avoid the reach of section 275 of the Act. And based on the documents filed by the parties, Zurich American is a subsidiary of the Zurich Insurance Company Ltd. It clearly does issue insurance policies in Illinois, where the accident took place. This, in my view, places Zurich American squarely within the "exceptions" referred to by Justice Cameron in the *Primmum v. Allstate* case. I find that I am therefore bound by the court's ruling and that the Respondent in this case is not an "Ontario insurer." The conclusion that follows is that section 275 of the *Act* is not applicable in these circumstances.

The Personal argues that the Canadian branch office of Zurich Insurance Company is a registered Ontario insurer and that the parent company of Zurich American and its member affiliates "are closely related and all promote the Zurich brand". She contends that this should result in a finding that Zurich American is also subject to the Loss Transfer provisions. While it is not clear what the exact relationship is between the Zurich Insurance Company shown on the Organisational chart filed (which owns Zurich American through a holding company), and the Canadian branch of the company with same name, it is clear there are two separate entities in North America, Zurich American Insurance Company in the United States, and the Canadian branch of Zurich Insurance Company with a head office in Toronto. Zurich American is clearly a separate company, operating only in the United States. The fact that it is wholly owned by the parent company, that also has a Canadian branch, does not result in a finding that they are an "Ontario insurer".

Finally, I find that the decision in *Economical Mutual v. Liberty Mutual, supra,* relied on by The Personal does not change the above analysis or result. The fact that the accident in that case occurred in Ontario (this fact is not referenced in the decision itself, but noted by Justice Hoy in *Gore Mutual v. Sentry Insurance, supra*) distinguishes it from this case. As well, and as mentioned above, I find it notable that Justice Low did not refer to the Supreme Court of Canada's decision in *Unifund v ICBC,* and agree with Arbitrator Densem's comments in *Wawanesa v. AXA Insurance, supra*, that her finding regarding the section 1 definition of "insurer" is inconsistent with the law in the area.

In conclusion, on the basis of the Supreme Court of Canada's decision in *Unifund v. ICBC, supra,* and the applicability of the "exceptions" to what would be an Ontario insurer expressed by Justice Cameron in the *Primmum v. Allstate* case, I find that Zurich American is not subject to the Loss Transfer provisions in section 275 of the *Act*, given that the accident occurred in the state of Illinois, and it is not an "Ontario insurer".

ORDER:

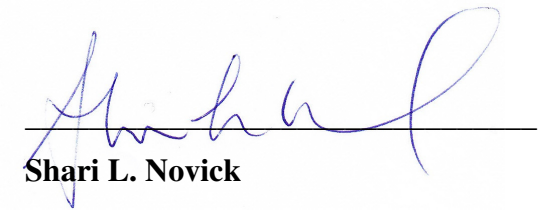
For the reasons set out above, the Respondent's preliminary objection is sustained, and the Application for Arbitration is hereby dismissed.

COSTS:

In keeping with my comments above, despite its success on this issue, Zurich American should not be entitled to its full costs as a result of having raised this jurisdictional issue at a very late stage of the proceeding. The parties' Arbitration Agreement provides me with the discretion to determine the issue of costs payable, taking into account "the conduct of the proceedings" among other factors. In the normal course, I would have found that Zurich American was entitled to its legal costs on a partial indemnity basis. As a result of the late stage at which this issue was raised, I find that they are entitled to two-thirds of their partial indemnity costs. I leave it to the parties to determine the exact amounts payable to Zurich American, and remain seised of the matter if they are unable to do so.

I will also divide my account in the same proportions – namely, one-third payable by Zurich American and two-thirds payable by The Personal.

DATED at TORONTO, ONTARIO this __25th__DAY OF JUNE, 2018.



Shari L. Novick
Arbitrator