

**IN THE MATTER OF SECTION 275 OF THE *INSURANCE ACT*, R.S.O. 1990,
AND *ONTARIO REGULATION 664***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECHELON GENERAL INSURANCE COMPANY

Applicant

- and -

ALLSTATE INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Jamie R. Pollack and Jason H. Goodman for the Applicant

Daniel Strigberger and Julianne Brimfield 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. Yes, the Loss Transfer provisions in section 275 apply. Echelon is entitled to pursue indemnification for benefits paid out from Allstate, subject to any arguments regarding fault for the accident.

BACKGROUND FACTS:

1. Darrell Smorhay was driving a Pontiac van owned by his parents, when that vehicle was struck from the rear by a vehicle insured by Allstate Insurance Company (“Allstate”) on September 18, 2013. He suffered injuries, and initially applied for accident benefits under the *Schedule* from the Alberta Motor Association, the insurer of the van that he was driving.

2. Mr. Smorhay owned a Harley Davidson motorcycle that was insured under a policy issued by Echelon General Insurance Company (“Echelon”) at the time. The motorcycle was the only vehicle described on that policy. Mr. Smorhay subsequently elected to claim accident benefits under the Echelon policy. Echelon contends that the driver of the vehicle insured by Allstate is at fault for the accident, and seeks indemnification from Allstate for the benefits it paid out under the Loss Transfer provisions in section 275 of the *Act*.

3. Allstate resists reimbursing Echelon for benefits. It argues that section 2.2.3 of the Ontario Automobile Policy (“OAP 1”) extends coverage to Mr. Smorhay under the Echelon policy when he drives “other automobiles”. Counsel contends that the precondition to applying “loss transfer” set out in section 9(2)(a)ii of *Regulation 664* that only motorcycles be insured under the policy is therefore not met, and that Echelon is consequently not entitled to indemnification.

4. The parties agreed that this issue would be determined as a preliminary matter, before questions regarding fault for the accident or the reasonableness of payments made are addressed.

EVIDENCE:

5. Counsel for the parties attended at a hearing and filed various documents with me, including copies of the relevant Certificates of Automobile Insurance and a transcript of the evidence provided by Mr. Smorhay at an Examination Under Oath. No *viva voce* evidence was presented at the hearing.

6. The underlying facts are not in dispute. Counsel agree that the named insured under the Echelon policy is Darrell Smorhay, that the policy was in effect on the date of loss, and that the only vehicle described on this policy is a Harley Davidson motorcycle. It is also agreed that the motorcycle covered under the policy was not involved in the accident in question, and that the Claimant was driving a Pontiac van belonging to his parents at the time.

7. The crux of the parties' arguments focus on the applicability of section 9(2)(a)ii of *Regulation 664* in these circumstances. I set out the language of this provision, as well as other relevant provisions, below.

RELEVANT PROVISIONS:

Insurance Act – 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.*

Regulation 664 - Indemnification for Statutory Accident Benefits

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;

“second party insurer” means an insurer required under section 275 of the Act to indemnify the first party insurer.

(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

OAP 1 – 2.2.3 Other Automobiles

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- *Liability,*
- *Accident Benefits,*
- *Uninsured Automobile, and*
- *Direct Compensation -Property Damage*

PARTIES' ARGUMENTS:

Allstate's submissions

8. Counsel submitted that the above provisions make clear that Echelon may only seek indemnification under section 275 of the *Act* if Mr. Smorhay is claiming accident benefits under a policy insuring a motorcycle, and either the motorcycle was involved in the accident, or the only types of vehicles insured under the Echelon policy are motorcycles or motorised snow vehicles. As the motorcycle described in the policy was not involved in the accident, the focus shifts to whether only motorcycles (there being no suggestion of a motorised snow vehicle being insured) were insured under the policy.

9. Counsel for Allstate pointed out that section 2.2 of the OAP 1 extends coverage to a vehicle that is not described in a policy, and that section 2.2.3 specifically provides that “automobiles, other than a described automobile, are also covered when driven by you...” He argued that this provision extends coverage under the Echelon policy to the Claimant when he is driving an “other automobile”, such as his parents’ Pontiac van. Counsel submitted that when this provision is considered, the Harley Davidson motorcycle described under the Echelon policy is not the “only type of vehicle insured under the policy”, and that the requirement in section 9(2)(a)(ii) of the Regulation is therefore not met.

10. Mr. Strigberger noted that the “other automobile” provisions in the OAP1 have been considered in priority disputes between insurers, and that arbitrators have determined that these provisions extend coverage for accident benefits to both occupants and non-occupants of a vehicle, (see *Economical Insurance Group v Minister of Finance (HMQ)*, *Security National Insurance & Kingsway General Insurance (January 30, 2009*,

Novick), *Certas Direct Insurance v. Zurich Insurance* (September 10, 2013, *Novick*), and that a vehicle may be insured under two policies at the same time.

11. When asked whether there could then ever be a “motorcycle only” policy that would engage the above provision, Mr. Strigberger suggested that indemnification under the Loss Transfer provisions would be available to Echelon if Mr. Smorhay had been a passenger in his parents’ vehicle, rather than the driver of it, or if he had been struck by a vehicle as a pedestrian, as the “other automobile” provision would not be engaged in these circumstances.

12. Counsel also submitted that accepting Echelon’s position would require me to read in the word “described” to the phrase “types of vehicle insured under the policy” in section 9(2)(a)ii of the regulations. He noted that in its decision in *State Farm Mutual Automobile Insurance v. Aviva Canada* (2015) 128 O.R. (3d) 321, the Court of Appeal expressly rejected the idea of reading a reference to “tort law” into the phrase in section 5 of *Regulation 664* that refers to the application of the “ordinary rules of law”, and urged me to similarly reject Echelon’s suggestion that a word that does not appear in the regulation should be read into it.

Echelon’s submissions

13. Counsel for Echelon noted that the courts have made clear that the purpose of section 275 of the *Act* is to provide an expedient and summary method of spreading the cost of accident benefits in a “gross and somewhat arbitrary fashion, which favours expediency and economy over finite exactitude” (*Jevco Insurance Company v. York Fire Casualty* (1996) 27 O.R. (3d) 483 (Ont. C.A.), recently restated by that court in *State Farm Mutual Insurance v. Aviva Canada*, *supra*, at para.56).

14. He also submitted that the right to indemnification in section 275 of the *Act* is guided by section 9(2)(a) of *Regulation 664*, which provides for two ways that an insurer providing coverage for a motorcycle may seek indemnification from another insurer, including the circumstance when a motorcycle is not involved in the incident but is the

only type of vehicle insured under the policy. Counsel contended that if Allstate's submissions are accepted, section 9(2)(a)ii of the regulation would be rendered meaningless, as all policies with the only described vehicle being a motorcycle would be deemed to include other vehicles that may be driven by the named insured. He submitted that if the phrase "vehicle insured under the policy" in section 9(2)(a) of the regulation is interpreted to include "other automobiles" referred to in section 2.2.3 of the OAP 1, there would be no such thing as a "motorcycle only" policy.

15. Counsel acknowledged that the "other automobile" provisions in the OAP 1 expand the list of people who may be entitled to claim accident benefits under a policy, but contended that this has no bearing on whether an insurer has the right to seek indemnification under the Loss Transfer provisions.

16. Mr. Pollack referred to the appeal ruling in *Jevco Insurance v Pilot Insurance* (2000) CarswellOnt 2072, in which Justice Nordheimer upheld an Arbitrator's decision denying Jevco, as the insurer of a motorcycle that the claimant owned, from claiming indemnification from Pilot, the insurer of his girlfriend's car that he had been driving when he was involved in a single-vehicle accident. While the decision turned on the fact that no other vehicle was involved and the claimant was clearly at fault for the accident, counsel noted that the court implicitly accepted that Jevco, the insurer of the motorcycle, was entitled to rely on the Loss Transfer provisions in section 275 of the *Act* to seek indemnification from another insurer when the claimant was driving someone else's car.

17. Counsel noted that the AMA policy insuring the Pontiac van that the Claimant was driving refers to the two vehicles covered under that policy as being "class 1" vehicles, whereas the Echelon policy contains a box titled "Class Description", in which "22 – Motorcycles – Other" appears. He pointed out that section 275(1) of the *Act* provides that an insurer may seek indemnification from insurers of certain "classes of automobiles" as provided in the regulations. He contended that the whole scheme is therefore based on insurers of certain vehicles being able to pursue Loss Transfer from

insurers of other “classes of vehicles”, and that the analysis that Allstate urges me to adopt ignores this essential point.

18. Finally, counsel contended that the courts have made it clear that when the words of an insurance policy conflict with or are inconsistent with the provisions of a law or regulation, the statutory or regulatory provisions must prevail.

ANALYSIS & REASONS:

19. The statutory and regulatory framework set out above makes clear that the Loss Transfer provisions are only to be applied in limited and specified circumstances. When those circumstances apply, courts have emphasized that these provisions are designed to provide “an expedient and summary method of spreading the cost of accident benefits among insurers in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude”. The question here is how this approach should be applied when interpreting the phrase “the only types of vehicle insured under the policy” in section 9(2)(a)ii of *Regulation 664*.

20. Allstate contends that motorcycles are not the only type of vehicle insured under the Echelon policy, given the coverage provided to Mr. Smorhay under section 2.2.3 of the OAP 1. Echelon argues that the OAP provisions do not change the fact that its policy only insured the Claimant’s motorcycle, and that section 275 of the *Act* provides a right of indemnification to insurers who pay benefits under section 268(2) from insurers of “such class or classes of automobiles as may be named in the regulations”.

21. The required analysis calls for a close reading of the relevant provisions, as well as a consideration of the overall context and purpose of the Loss Transfer “scheme”. As a starting point, I cite the well-known quote from Sullivan in *Dreidger on the Construction of Statutes* (Butterworths, 3rd edition, 1994, at p.131) that outlines the principles to consider when interpreting statutory provisions -

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose, and (c) its acceptability, that is, the outcome is reasonable and just.

22. The rules governing statutory interpretation also apply to interpreting regulations. A regulation must be read in the context of its enabling Act, having regard to the purpose of the enabling provisions (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533 (SCC) at paras.37-38).

23. The above quote requires decision makers to consider any relevant indicators of legislative meaning. In *Jevco Insurance v. AXA Insurance (November 5, 2001)* Arbitrator Robinson referred to the Ontario Insurance Commission bulletin 11/94, issued by Commissioner Blair Tully, to assist with the question he was asked to determine. He noted that Justice Spiegel cited a portion of that bulletin in her appeal decision in *Jevco Insurance v. Wawanesa Insurance* 42 O.R. (3d) 276. The relevant portion reads as follows:

Loss transfer was introduced in June, 1990, in order to address the cost implication of moving away from tort-based compensation and to a first party accident benefits provided on a no-fault basis.

*Since June, 1990, insureds look to their own insurers for accident benefits instead of seeking compensation from third parties. Certain types of vehicles that might have been less likely to experience bodily injury claims under a tort-based compensation system are more likely to require accident benefits payments for such claims under a no-fault system. **Loss transfer balances the cost of providing compensation on a first party basis between these specified classes of vehicles.***

(emphasis added)

24. It is clear from the above bulletin that the purpose of the provisions is to balance the differing cost exposure faced by insurers who provide accident benefits coverage to different “classes of vehicles”. I agree with counsel for Echelon that the reference to “specified classes of vehicles” refers to the type of vehicle that is listed on a policy, and can include a regular automobile, motorcycle, motorised snow vehicle or heavy commercial vehicle.

25. The above bulletin and the wording of section 275(1) of the *Act* make clear that the provisions are only to be applied in instances involving an accident between either an automobile (class 1), and a heavy commercial vehicle, or an automobile and someone insured under a policy insuring a motorcycle or motorised snow vehicle. If the policy covering the automobile also covers either a heavy commercial vehicle (in the first example), or a motorcycle or snow vehicle (in the second), that insurer cannot seek indemnification. In that sense, it is the type or class of vehicle insured, rather than the individual circumstances of the claimant or the accident, that dictates whether the Loss Transfer provisions apply.

26. Section 9(2)(a) provides an insurer who receives a claim for benefits and insures a motorcycle that was involved in an incident with the right to seek indemnification. That accords with the expectation noted above that claimants involved in motorcycle accidents are more likely to suffer greater injuries and require a higher level of benefits than the driver of a car. However, subsection (ii) of the provision provides the right to indemnification to the insurer of a motorcycle in a case where the motorcycle was not involved in the accident. This can only be interpreted as a clear attempt to cloak insurers who issue policies covering motorcycles with the right to seek reimbursement from another insurer (assuming its driver bears some fault), regardless of whether the motorcycle described in the policy was involved. This right to potential indemnification results from that insurer having issued a “motorcycle only” policy, rather than the fact that their insured was injured while driving a motorcycle.

27. This is supported by Justice Simmons' comments in the Court of Appeal's decision in *State Farm Mutual Insurance v Old Republic Insurance* (2015) 127 O.R. (3d) 465 –

Thus, the Loss Transfer provisions shift the financial burden of first party SABS payments to insurers of heavy commercial vehicles from other classes of automobiles in certain circumstances where one or more heavy commercial vehicles is involved in an incident. In certain circumstances, they also shift the financial burden of first party SABS payments from insurers insuring motorcycles, off-road vehicles and motorized snow vehicles to insurers of other classes of automobiles.

(emphasis added)

28. I conclude from all of the above that the analysis must focus on the “class” of vehicle that is insured under the policy through which the claim is being made, rather than the question of whether a claimant was driving any particular vehicle at the time of the accident.

29. Allstate contends that the “other automobile” provisions in the OAP 1 extend coverage to a named insured such as Mr. Smorhay when he drives vehicles other than the motorcycle listed on the Echelon policy. I do not disagree with this, as noted in my decisions cited above. However, as I stated in *Certas v. Zurich, supra*, the intention to ensure broad coverage for accident benefits as expressed either in the SABS or the OAP1 does not change the analysis when considering whether an insurer can seek indemnification under section 275 of the Act.

30. Allstate's position essentially rests on the argument that the OAP1 provisions should modify or inform the interpretation of the phrase “the only types of vehicle insured under the policy” appearing in section 9(2)(a) of the regulations. I do not agree. Firstly, I note that section 227(5) of the *Act* allows the Superintendent of Insurance to approve standard form policies for use by insurers as long as the provisions are in conformity with Part VI of the *Act*. This, in my view, clearly signals that the legislation is paramount, and that the terms of the standard form OAP 1 policy cannot and should not modify the Act's provisions.

31. I also note the Court of Appeal's statement in *Ortiz v. Dominion of Canada General Insurance* (2001) 52 O.R. (3d) 130 that the terms of a legislative enactment must prevail over the terms of a policy (at para.9).

32. Echelon argues that Allstate's argument would effectively render subsection 9(2)(a)ii of *Regulation 664* meaningless. Mr. Strigberger disputes this and contends that if Mr. Smorhay was not *driving* the vehicle, but was rather a passenger in his parents' van or a pedestrian struck by it, Echelon would be entitled to seek reimbursement from Allstate, because the precondition to the application of OAP 1 section 2.2.3 – namely that an automobile is covered under the named insured's policy if driven by him or a spouse – would not be met. In my view, this result is arbitrary and is not consistent with any general policy objective. It also runs contrary to the view, expressed repeatedly by the courts, that the Loss Transfer provisions should be applied in an expedient and summary way, rather than with finite exactitude.

33. I find that Allstate's interpretation would also not give effect to the clearly stated purpose of the Loss Transfer provisions, part of which is to reallocate the costs of providing accident benefits coverage to insurers of motorcycles. Referring back to the quote excerpted earlier from *Dreidger*, it would not promote compliance with the legislative text or promote the legislative purpose.

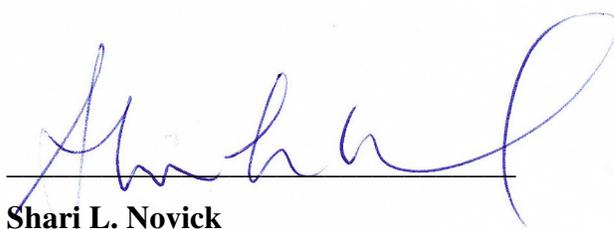
34. I therefore find that the Echelon policy in question only insured Mr. Smorhay's motorcycle at the time of the accident, and that subsection 9(2)(a)ii of *Regulation 664* is applicable in these circumstances. Echelon may accordingly seek indemnification from Allstate for the benefits it has paid out, and that it will be required to pay to Mr. Smorhay if his claim has not been resolved, pursuant to section 275 of the *Act*.

ORDER & COSTS:

35. Allstate's preliminary objection to this matter proceeding is hereby dismissed. Echelon is entitled to its costs of the proceeding from Allstate, on a partial indemnity basis. If the parties cannot agree on the quantum of costs payable, they may contact me and a timetable will be established for exchanging submissions on the issue.

36. My office will be in contact with the parties shortly to make arrangements for a further pre-hearing teleconference, so that this matter can proceed to the next stage.

DATED at TORONTO, ONTARIO this ___17th ___DAY OF SEPTEMBER, 2018.



Shari L. Novick

Arbitrator