

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, 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:

INTACT INSURANCE COMPANY

Applicant

and

**OLD REPUBLIC INSURANCE COMPANY OF CANADA and ROYAL & SUN ALLIANCE INSURANCE
COMPANY OF CANADA**

Respondents

AWARD

COUNSEL

Megan Murphy, counsel for the Applicant, Intact Insurance Company (hereinafter referred to as Intact).

Peter Yoo, counsel for the Respondent, Old Republic Insurance Company of Canada (hereinafter referred to as Old Republic).

Joseph Lin, counsel for Royal & Sun Alliance Insurance Company of Canada (hereinafter referred to as RSA).

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act* 1991 to arbitrate a dispute between insurers with respect to a claim for loss transfer pursuant to s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8 and its Regulation 664/90.

Specifically, this claim is with respect to a motor vehicle accident that occurred on December 5, 2020. On that day, there was a collision between a Honda CR-V insured by Intact and a Freightliner truck. The Freightliner truck was owned by Penske. It was leased to City Transfer. City Transfer was insured under an automobile policy with RSA. Penske was insured by Old Republic.

The driver of the Honda CR-V sustained injuries and presented a claim for statutory accident benefits to Intact.

Intact commenced this arbitration, seeking loss transfer reimbursement as against the Respondents, RSA and Old Republic. However, this is a preliminary issue dispute between RSA and Old Republic only.

There are two issues that arise in this preliminary dispute, which are set out below:

1. Does Old Republic's acceptance of loss transfer vis-à-vis Intact prevent it from seeking loss transfer and/or reimbursement in relation to the loss transfer from RSA?
2. Is Old Republic a "deemed named insured" under s. 3(7)(f) of the SABS with the result that RSA and Old Republic would bear a 50/50 share of any loss transfer liability?

PROCEEDINGS

The parties on consent requested that I act as an arbitrator with respect to this loss transfer dispute in accordance with Regulation 664/90. The parties filed an Arbitration Agreement dated September 15, 2025. While counsel for Intact was involved in the initial pre-hearings with respect to this preliminary issue, counsel for Intact took no position on the preliminary issues, written submissions, documentary disclosure and oral argument were made by only the two Respondents: Old Republic and RSA.

No witnesses called and other than the opportunity for some oral submissions, this arbitration proceeded in writing.

FACTS

On December 5, 2020 a collision occurred on County Road 17 involving the 2019 Penske Freightliner and the 2020 Honda CRV driven by the claimant.

The claimant's vehicle was insured under a policy of insurance with Intact.

The Penske truck was owned by Penske Truck & Leasing Canada and at the time of the accident was being leased to City Transfer & Storage Ltd. There is no dispute that the Penske truck met the requirements of loss transfer in that all parties agree it would qualify as a heavy commercial vehicle.

Penske Truck & Leasing Canada was insured under a policy of insurance with Old Republic. City Transfer & Storage Ltd. was insured under a policy of insurance with RSA.

The Penske truck was rented by City Transfer from November 1, 2020 to January 4, 2021. This was a period in total of 64 days but as of the date of loss, the truck had been rented for 34 days.

The claimant applied for statutory accident benefits to Intact on or around December 20, 2020. Intact paid various statutory accident benefits and has continued to adjust the file of the claimant.

By letter dated February 2, 2021 Intact put Old Republic on notice of this claim for loss transfer.

Intact took the position that rule 12(4) of the Fault Determination Rules applied.

On April 15, 2021 Mr. Rudy of Penske Truck advised Intact via email that Gallagher Bassett Services was handling the claim on behalf of Penske.

By email dated May 5, 2021 Ms. Brown from Gallagher Bassett sent emails to Intact asking for clarification with respect to the loss transfer claim.

On May 7, 2021 Ms. Brown emailed Intact advising that Gallagher Bassett was setting up the loss transfer file and would provide an update once completed.

By email dated June 7, 2021 Intact followed up with Old Republic to determine whether they were accepting loss transfer.

By email dated June 8, 2021, Ms. Brown confirmed by email to Intact that her file had been set up and "Our insured hit into your insured's vehicle. Loss transfer accepted."

Sometime after June 8, 2021 a new adjuster took over the file, a Ms. Willicombe and on September 10, 2021, she emailed Intact advising that the claim was still under investigation.

In a further email on October 7, 2021 Ms. Willicombe asked Intact if the file was still open and active so that she could make a payment.

By email dated November 5, 2021 Ms. Willicombe sent an email to Intact which stated, "This email is to confirm that Royal & Sun Alliance has accepted tender on the above noted loss. Please contact them regarding the loss transfer claim."

On January 26, 2023 Intact served Old Republic and RSA with a Notice to Submit to Arbitration.

There is no dispute that both the RSA policy and the Old Republic policy were in full force and effect on the date of accident nor is there any dispute between the parties that City Transfer had leased the Penske truck for a period in excess of 30 days as of the date of loss.

It is also not in dispute that Old Republic accepted loss transfer vis-à-vis Intact on June 8, 2021.

I now turn to the contractual relationship between Penske and City Transfer which is at the heart of the first issue in this loss transfer dispute.

In or around October 22, 2007 Penske and City Transfer entered into a Vehicle Lease Service Agreement. Under this agreement, Penske undertook to lease commercial vehicles to City Transfer. This leasing agreement was still in full force and effect at the time of the December 5, 2020 accident.

The leasing agreement covered both long-term and short-term leasing arrangements. The Penske truck being leased by City Transfer at the time of the accident of December 5, 2020 would be a short-term lease.

According to the Vehicle Lease Service Agreement under s. 3, if the situation involved a short-term lease then City Transfer was required to execute a separate rental agreement.

The relevant part of s. 3 of the Vehicle Lease Agreement states:

"WHEN PENSKE TRUCK LEASING supplies an additional vehicle to CUSTOMER, CUSTOMER shall execute a PENSKE TRUCK LEASING TRUCK RENTAL AGREEMENT."

A copy of the rental agreement cover sheet and the rental agreement terms and conditions formed part of the documents submitted in this arbitration. Both the cover sheet and terms and conditions constitute the "rental agreement" between Penske and City Transfer. The relevant document confirmed that the short-term lease of the Penske truck involved in this accident would run from November 1, 2020 to January 25, 2021.

The Rental Agreement also confirmed that the short-term lease of the Penske truck was also "subject to the terms and conditions set forth in the leasing agreement". Therefore, when the Penske truck was leased by City Transfer, three agreements came into play: the rental agreement cover sheet, the rental agreement terms and conditions, and the leasing agreement.

The relevant portions of these agreements are set out below:

1. Leasing Agreement

- (a) Section 7 of the leasing agreement provides that City Transfer shall indemnify and hold harmless Penske from all claims arising out of the Penske truck being operated in a reckless manner or in violation of any applicable laws, ordinances, and rules.
- (b) Under the liability coverage, s. 7, it is provided that City Transfer shall at its sole cost provide liability coverage for City Transfer and Penske and that that coverage should be in accordance with the basic automobile liability insurance as required in the jurisdiction in which the vehicle is operated. Section 9 indicates that the coverage shall be primary and not excess or contributory. In addition, s. 9 requires that that automobile liability insurance coverage shall include Penske Truck Leasing as an additional insured and is to be in a form acceptable to Penske.
- (c) Section 10 of the leasing agreement which deals with indemnification provides that City Transfer "shall protect, defend, indemnify and hold harmless PENSKE TRUCK LEASING ... from any and all claims, suits, costs, losses, damages, expenses and liabilities arising from any failure of City Transfer to comply with the terms of the lease and/or the operation of the vehicle".
- (d) The leasing agreement at s. 14 gives Penske the right to bring a court action against City Transfer if City Transfer fails or refuses to perform any other terms of the lease. Section 14 states, "Penske may proceed by appropriate court action to enforce the terms of this lease or to recover damages for the breach of any of its terms."

2. Rental Agreement Cover Sheet

The cover sheet confirms that City Transfer is solely responsible for providing liability coverage/accident benefits coverage in relation to the leasing of the Penske truck. It states under optional protection plans: "LIABILITY COVERAGE/LIABILITY ACCIDENT INSURANCE. Customer provides."

3. Rental Agreement Terms and Conditions

Under s. V (Default and Remedies) the agreement provides that if the customer does not perform any terms of the rental agreement then the remedies to Penske include enforcing "the terms of this rental agreement and [recovering] any direct, incidental, consequential, punitive, statutory or other damages from Customer."

Under s. VI (Liability Protection and Insurance) there is a requirement that the customer must provide liability coverage for itself and Penske and that that coverage shall have Penske as an additional insured and be in a form acceptable to Penske.

In s. VII (Indemnification and Limitation of Liability) the agreement provides: "Customer shall protect, defend, indemnify and hold harmless Penske ... from any and all claims, suits, cost, losses, damages, expenses ... and liability [even if Penske is claimed to have been or is proven to be negligent] arising from the Customer's failure to comply with this rental agreement, or claims which arise out of the Customer's maintenance, use or operation of the vehicle." The agreement goes on to state:

"The parties agree that the indemnification provisions herein, and the scope thereof, shall not be modified, abridged, or otherwise reduced by any governing statute, law, decision or authority ... and shall be fully enforced without regard to any liability limits."

In addition, under part VII the following is provided:

"To the extent there is any law that would provide immunity to the customer for any damages arising from its use of the vehicle, such protections are hereby waived and customer represents that it had full authority to indemnify Penske."

Finally, s. VII also provides:

"Customer and its carrier specifically waive any right, claim or issue challenging such enforcement."

As required by the contractual agreements outlined above, a Certificate of Insurance was produced dated June 4, 2020 which confirms that RSA provided automobile coverage to its insured, City Transfer from May 1, 2020 to May 1, 2021. The certificate confirms the coverage was extended to leased vehicles under an OPCF-5 endorsement. The certificate also confirms that Penske was added as an "additional insured and loss payee with respect to vehicles leased

to City Transfer in excess of 30 days."

ISSUE 1: DOES OLD REPUBLIC'S ACCEPTANCE OF LOSS TRANSFER VIS-À-VIS INTACT PREVENT OLD REPUBLIC FROM SEEKING LOSS TRANSFER OR REIMBURSEMENT IN RELATION TO THE LOSS TRANSFER FROM RSA?

Relevant Legislation

Section 275(1) of the *Insurance Act* sets out the loss transfer scheme and is set out below:

"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."

275(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."

Jurisdiction

Both parties in both oral and written submissions addressed the question as to whether an arbitrator has jurisdiction under s. 275 of the *Insurance Act* and the *Arbitration Act* to decide and/or order that RSA indemnify or reimburse Old Republic for any loss transfer payments made to Intact.

Both parties agreed that the arbitrator has such jurisdiction despite the wording in the leasing contract between Penske and City Transfer that referenced the right of Penske to "proceed by appropriate court action to enforce the terms of this lease or to recover damages for the breach of any of its terms".

I specifically note s. 275(4) of the *Insurance Act* which provides:

"If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitration Act* 1991."

I agree with counsel that with respect to the dispute as between RSA and Old Republic, that s. 275(4) and the provisions of the *Arbitration Act* s. 17(1) and s. 8(2) provide me with the requisite jurisdiction and authority to address the issues as between RSA and Old Republic.

Submissions of the Parties on Issue 1

A. Old Republic

Old Republic submits that s. 275 of the *Insurance Act* does not limit the first party insurer's claim for loss transfer indemnification to a single insurer. Rather, the word "insurers ... involved in the incident" is noted in s. 275(1) and accordingly allows claims for loss transfer indemnification from multiple insurers.

Old Republic notes that in the broader context of this arbitration dispute, Intact is seeking indemnification from either Old Republic or RSA as both qualify as insurers under s. 275(1) as they were insurers of the automobile involved in the incident. Therefore, both RSA and Old Republic are what are referred to as second party insurers.

Old Republic submits that based on prior case law there is no doubt that s. 275 represents a complete code with respect to the loss transfer process and is designed to address all legal claims for loss transfer, indemnity and reimbursement that arise between a first party insurer and a second party insurer. Old Republic goes further and also submits that s. 275 is broad enough to include legal claims for indemnity or reimbursement between two second party insurers as long as the first party insurer has paid out statutory accident benefits and as long as the second party insurers otherwise meet the qualifications of the loss transfer scheme, which in this case they do.

Old Republic submits that just because s. 275 does not provide a specific mechanism or process in order to deal with the contractual-based claim for indemnification between two second party insurers that they advance here does not mean that such a claim cannot be made and that it cannot be addressed in this arbitration proceeding.

Old Republic therefore submits that the relevant leasing agreement and rental agreement as between City Transfer and Penske establish a contractual obligation for City Transfer to reimburse Penske for loss transfer payments owing to Intact. However, Old Republic goes further and alleges that that contractual obligation becomes RSA's obligation to indemnify or reimburse Old Republic.

Old Republic specifically points to the section of the rental agreement terms and conditions where it provides that "customer and its carrier specifically waive any right, claim or issue challenging such enforcement".

Old Republic submits that City Transfer undertook to provide indemnification and to hold Penske harmless with respect to any claims that would arise out of the operation of the Penske truck being operated in a reckless manner and that this wording would include a loss transfer claim and that this obligation extended to City Transfer's carrier, RSA.

Old Republic also points to the following terms and conditions from the relevant documents:

1. City Transfer is noted to be solely responsible for providing liability coverage/liability accident insurance and was obliged to ensure that whatever insurance they took out

included Penske as an additional named insured which the Certificate of Insurance confirms was done.

2. Section 9 of the leasing agreement mandates that the insurance coverage obtained by City Transfer was "primary and not excess or contributory".
3. The wording of the leasing agreement (s. 7) supports a claim for loss transfer indemnification as it requires that City Transfer "shall indemnify and hold harmless" Penske from "all claims" arising out of the Penske truck being operated in a reckless manner or in violation of any applicable laws or rules.

Old Republic submits that this requires RSA to indemnify Old Republic for a loss transfer claim which arises out of the Penske truck involved in the accident of December 5, 2020 being operated in a reckless manner. Old Republic submits that a claim for loss transfer clearly falls under such a requirement for indemnification of all claims.

Old Republic also references s. 10 of the leasing agreement. This is entitled Indemnification and provides City Transfer shall "protect, defend, indemnify and hold harmless Penske Truck Leasing ... from any and all claims, suits, cost, losses, damages, expenses and liabilities arising from City Transfer's operation of the vehicle".

Old Republic submits that this provision extends to RSA which insures City Transfer and as its carrier it has undertaken to indemnify Penske (Old Republic) for all claims arising from the operation of the vehicle. As loss transfer is a fault-based scheme and as Old Republic is required to indemnify Intact, therefore this agreement operates to require RSA to indemnify Old Republic for any payments made to Intact.

Old Republic also submits that City Transfer's contractual obligation to indemnify Penske is set out in absolute terms in the rental agreement which states that Penske's right to indemnification from City Transfer "shall not be modified, abridged or otherwise reduced by any governing statute, law, decision, or authority".

Old Republic submits that therefore RSA cannot rely on any alleged limitations under s. 275 of the *Insurance Act* to prevent Old Republic applying for indemnification from RSA. This is supported by an additional provision in the rental agreement where City Transfer represents that it has full authority to indemnify Penske and that "customer and its carrier specifically waive any right, claim, or issue challenging such enforcement". Therefore, Old Republic submits that that provision specifically prevents RSA from arguing against the application of the contractual wording of the rental agreement in this arbitration.

Old Republic acknowledges that it did accept loss transfer vis-à-vis Intact but submits that in no way alters City Transfer's contractual obligation to indemnify or reimburse Penske/Old Republic for loss transfer payments that it has made to Intact.

Old Republic submits that this approach is consistent with past case law which establishes that

the insurer of the operator of the vehicle should stand in higher priority for loss transfer purposes to the insurer of the owner of the vehicle. As RSA insures City Transfer/the driver of the heavy commercial vehicle, it would therefore stand in priority for loss transfer over Old Republic which insured the owner of the vehicle and not the operator. (See *Co-operators General Insurance Company of Canada and Unifund Insurance Company*, Arbitrator Novick, May 16, 2025, and *Jevco Insurance Company and Economical Insurance Company and Kent & Essex Mutual Insurance*, Arbitrator Novick, March 2009).

Old Republic also made it clear in its submissions that it is not taking the position that it is attempting to resile from its acceptance of loss transfer vis-à-vis Intact. It acknowledges that it has accepted loss transfer vis-à-vis Intact and confirms it is not seeking any form of equitable relief. Rather, the legal basis for Old Republic's claim for loss transfer is a contractual one and only with respect to RSA.

Old Republic also references cases such as *Commonwell v. Economical and Intact* (Arbitrator Samworth, April 14, 2025) which references longstanding principles of expediency and efficiency that underlie the loss transfer regime. Old Republic submits that those principles cannot be used to override its contractual right as between Penske and City Transfer and the clearly documented expectations of the parties in relationship to loss transfer indemnity or reimbursement.

B. RSA

RSA submits that Old Republic has no right to seek reimbursement from it under s. 275 of the *Insurance Act*. RSA submits that the right to reimbursement or indemnification is limited to a claim between the first party insurer (in this case Intact) and the second party insurer. There is no right between two second party insurers.

RSA submits that Old Republic accepted loss transfer vis-à-vis Intact and should be the end of the story. Having accepted loss transfer, RSA is now obligated to indemnify Intact with no right to, in essence, crossclaim for indemnification against RSA.

RSA submits that Old Republic cannot accept liability on behalf of RSA with respect to loss transfer either in terms of the obligation to indemnify or with respect to fault. RSA submits that if I accept Old Republic's position in this matter, it would allow other insurers with similar contracts to simply accept loss transfer, fault and indemnification in terms of the first party insurer and then simply seek the right to indemnification against another second party insurer without ever allowing that second party insurer to participate in decisions with respect to quantum of indemnification, the applicability of the fault chart or even coverage.

RSA also submits that irrespective of the above, the wording of the contract between Penske and City Transfer does not encompass claims for loss transfer. There is nothing in the contract that makes specific reference to s. 275 of the *Insurance Act*. There is nothing in the contract that makes any reference to loss transfer reimbursement or indemnification. RSA submits that words such as "indemnify and hold harmless" or "claims, suits, costs, losses, damages, expenses and liabilities" do not encompass indemnification under s. 275 of the *Insurance Act*. Such claims do not meet the requirements. The wording does not encompass the types of claims set out under

s. 275 which is a claim for indemnification between a first party insurer as defined under s. 275 and a second party insurer as defined under the regulations.

RSA also submits that s. 7 of the leasing agreement, which provides that City Transfer will hold Penske harmless when the Penske truck is being operated in a reckless manner, also would not be covered under s. 275 of the *Insurance Act*. Fault under s. 275 is based on the fault chart, not whether vehicles are being operated in a reckless manner.

RSA submits that Old Republic is not the "insurer responsible under subsection 268(2) for the payment of statutory accident benefits" as set out under s. 275 and therefore no right of indemnification arises as RSA is a second party insurer and not the insurer paying benefits. The right to claim loss transfer is limited to the insurer paying benefits.

RSA's position is that Old Republic accepted loss transfer vis-à-vis Intact by way of the email on June 8, 2021 and that ended the matter in terms of s. 275 of the *Insurance Act*. Old Republic, having accepted loss transfer, is responsible for reimbursement or indemnification to Intact and has no further recourse against RSA.

In support of its position, RSA relies on the decision of Arbitrator Scott Densem in *St. Paul Fire and Marine Insurance Company v. Intact Insurance Company of Canada* (April 11, 2013).

C. Reply: Old Republic

Old Republic in reply submits that a second party insurer can claim reimbursement under s. 275 of the *Insurance Act* if that claim is based on a contractual obligation as opposed to the specific provisions under s. 275. Old Republic submits that all aspects of a claim for loss transfer both under s. 275 and under a contractual claim such as being claimed here should be dealt with in one forum which, in accordance with s. 275(2), would be a private arbitrator pursuant to the *Arbitration Act*.

Old Republic submits that the words "right to reimbursement" found under s. 275 of the *Insurance Act* are no different to the claim for indemnity under its contract and simply because there is no specific wording under s. 275 to permit a process as between two second party insurers, does not mean such a process is not contemplated or would not be available under the legislation.

RSA submits that if I find that the indemnification provisions of the contract do not apply then essentially I will be making that contract null and void which is against the express intention of the two parties. Old Republic submits there is no case that says that such a contract is nullified by s. 275 of the *Insurance Act*.

Old Republic submits that legislation should be looked at as a living tree and that this provision should be interpreted broadly to cover all aspects of potential loss transfer claims, including those between two second party insurers. While the legislature may not have anticipated this rare situation, it does not mean that it does not fall within the loss transfer scheme.

DECISION AND ANALYSIS ON ISSUE 1

The loss transfer scheme was introduced in Ontario in June of 1990 with the purpose of achieving an appropriate balance between insurers of various classes of commercial vehicles (heavy commercial vehicles as well as motorcycles) to meet the costs of providing statutory accident benefits to injured motorists. An individual on a motorcycle struck by a car or someone operating a heavy commercial vehicle striking another vehicle is more likely to be injured or to have greater injury caused than individuals involved in accidents who are operating regular motor vehicles. The loss transfer scheme is designed to provide a redistribution of risk between insurers of heavy commercial vehicles and/or motorcycles based on liability determined by the fault chart.

The Court of Appeal in *Jevco Insurance Company v. York Fire* 27 O.R. (3d) 483 made it clear that the loss transfer scheme is one that provides a summary method of reimbursements between a first party insurer and second party insurers. The court noted that the scheme does not do so with any exactitude. It is one that spreads the load in a "gross and somewhat arbitrary fashion". Therefore, while the process is to be quick and effective, it should not necessarily be approached with "finite exactitude".

Arbitrators and the courts have held consistently that s. 275(1) of the *Insurance Act* is a statutory cause of action only. Section 275 and its regulations are a complete code that govern loss transfer between insurers that fall within its provisions.

As I conduct my analysis of this case, I keep the above principles in mind.

There is no question that Old Republic is not a first party insurer paying statutory accident benefits under s. 368 of the *Insurance Act*. Old Republic and RSA both qualify as second party insurers, being the insurer of the owner of a heavy commercial vehicle and the insurer of a leasing company whose driver was operating the heavy commercial vehicle. I am not being asked to decide as between these two insurers who ranks first in priority or who should indemnify Intact in the circumstances of this case. Rather, I am being asked whether a contract extraneous to these two insurers and entered into by their insureds, Penske and City Transfer, can establish a right for indemnification under s. 275 of the *Insurance Act* between two second party insurers.

For reasons that I set out below, it is my decision that the contract between City Transfer and Penske cannot be relied on to claim indemnification under s. 275 of the *Insurance Act* between Old Republic and RSA, two second party insurers, neither of whom were party to the contract.

Section 275(1) in my view makes it clear that the right of indemnification only flows between the insurer responsible under subs. 268(2) for the payment of statutory accident benefits and an insurer or insurers of the class of automobiles that may be named in the regulation (motorcycle or heavy commercial vehicle) that were involved in the incident.

In this case, Old Republic is not the insurer responsible for paying statutory accident benefits to the claimant as a result of the accident of December 5, 2020. That insurer is Intact. I find that only Intact has the right to claim indemnification under s. 275 against either Old Republic or RSA or both.

I do not read s. 275 as extending the right to claim indemnification to claims between two second party insurers. If that had been the legislative intent, that would have been set out in the *Insurance Act* and a process provided for that either under the Act or its accompanying Regulation 664/90.

In my view, to read into the legislation the right of indemnification between two second party insurers would result in a loss transfer scheme that is not an expedient and summary method of reimbursements between a first party insurer and a second party insurer. It would provide a layer of complication that was not intended in the loss transfer scheme and is simply not provided for.

I also find that the interpretation suggested by Old Republic is not consistent with the legislative scheme. How can one second party insurer accept liability for loss transfer (amount of indemnification and liability) essentially on behalf of a second party insurer who may or may not be involved in that decision and then choose to make a claim for indemnification against that second party insurer? Surely that second party insurer (in this case RSA) would have the right to dispute the amounts paid by Old Republic to Intact on the basis that they may not meet the loss transfer indemnification requirements. Surely RSA would have the right to make arguments vis-à-vis Old Republic's position that they do not accept 100% liability. In that case, there would then be an arbitration between two second party insurers with respect to what the first party insurer paid and whether those payments and the acceptance of those payments were reasonable and/or issues with respect to liability. Such an interpretation makes the scheme far too complex than it was intended.

I conclude that the only right of indemnification set up under s. 275 is that between the insurer paying statutory accident benefits and the second party insurer whose automobile was involved in the accident and against whom some liability has been assessed under the fault chart.

I also conclude that the contract between Penske and City Transfer does not apply to Old Republic and RSA. If City Transfer and Penske want to bring an application in court (as an example) to enforce the terms of the contract, then that would seem to be an avenue available to Penske and City Transfer based on the contractual provisions as set out in the leasing agreement and the rental agreement. However, neither RSA nor Old Republic are signatories to that contract. I struggle to see how obligations for indemnification as between City Transfer and Penske can be adapted and relied upon by two separate entities, RSA and Old Republic. This is the case irrespective of whether they insured those particular entities.

I am unable to conclude that RSA would be bound by a contract entered into by City Transfer even if the contract makes reference to "customer and carrier." There was no evidence before me that RSA played any role in this contractual arrangement. While RSA did have Penske as an additional insured under the automobile policy issued by RSA to City Transfer, that was as a result of an agreement between RSA and its insured, City Transfer. That agreement was completely separate from any agreement between City Transfer and Penske. While it may have implemented one of the terms of the agreement between City Transfer and Penske, that does not, in my view, result in RSA somehow or other being bound by the terms and conditions of an indemnification agreement between City Transfer and Penske.

Therefore, I conclude that the contract relied upon by Old Republic to support its claim for indemnification under s. 275 of the *Insurance Act* cannot be relied upon as the parties to the contract are different than the parties before me in the loss transfer claim. In light of that, I make no finding on whether the terms and conditions of the contract are ones that would attract a loss transfer indemnification claim as being available between City Transfer and Penske pursuant to the terms of the contract between them. My ruling is only with respect to a claim for loss transfer indemnification between Old Republic and RSA.

To some extent in reaching this decision I have relied upon the *St. Paul Fire and Marine v. Intact* case of Arbitrator Scott Densem (*supra*) upheld on appeal by Justice Whitaker 2014 ONSC 6461 CanLII and my decision in *Wawanesa Mutual Insurance Company v. ACE INA Insurance Company* (Arbitrator Samworth, December 22, 2016 upheld by His Honour Justice Monahan, Superior Court, (unreported) decision, February 14, 2018). I do acknowledge that there are some differences in this case but some of the principles set out in those cases apply here.

In the *St. Paul* decision there was a bus owned by the City of Mississauga that struck a cube van. The van was insured by Intact and the City of Mississauga was insured by St. Paul.

Eight people were injured on the bus and they pursued a claim for statutory accident benefits. All parties agreed that the cube van insured by Intact was a heavy commercial vehicle.

The City of Mississauga owned the bus and had an agreement with St. Paul. This side agreement provided that the City of Mississauga was responsible for paying statutory accident benefits if they fell within a specific deductible. St. Paul initiated a claim for loss transfer against Intact. Intact argued that St. Paul had not paid the benefits but the City of Mississauga had and therefore St. Paul did not fall within the wording of s. 275 of the *Insurance Act*. Arbitrator Densem concluded St. Paul had not paid the benefits so it did not fall within s. 275(1) and this decision was upheld by Justice Whitaker.

The *St. Paul* case, while certainly different in terms of the nature of the side contract, still stands for the proposition that unless you are the insurer paying the statutory accident benefits, then you have no right to make a claim for loss transfer under s. 275(1) of the *Insurance Act*. Again in this case Old Republic is not the insurer responsible for paying statutory accident benefits and therefore does not fall entitled to the indemnification under s. 275.

In the *Wawanesa v. ACE* decision (*supra*), an accident occurred when a tractor-trailer owned by the City of Toronto collided with a Ford Explorer insured by Wawanesa. It was agreed that the City of Toronto vehicle was a heavy commercial vehicle. However, the City of Toronto had a policy of automobile insurance with ACE. It also however had an agreement with ACE that provided for a \$5 million dollar deductible which was applicable to statutory accident benefits. Therefore, all expenses relating to claims would be paid for by the City of Toronto and not ACE.

The issue before me was essentially the reverse of what was in the *St. Paul* case. Wawanesa made a claim for loss transfer as against ACE for statutory accident benefits. The question was whether the side agreement between the City of Toronto and ACE prevented Wawanesa from being able to pursue a claim from ACE. I concluded that it did not and that was upheld by Justice Monahan.

In that decision, I noted that whatever agreement there was with the City of Toronto and ACE, it could not affect the rights of Wawanesa to pursue a proper claim for loss transfer and indemnification as long as it was against an "insurer of such class or classes or automobiles as may be named in the regulation involved in the incident from which the responsibility to pay the statutory accident benefits arose".

As ACE was the insurer of the heavy commercial vehicle, it therefore fell under s. 275 and ACE had responsibilities to Wawanesa to respond to the loss transfer claim.

I stated in that case:

"I am further of the view that the result herein is a just and reasonable one that promotes the application of the loss transfer provisions and advances its purpose and avoids a foolish and pointless result. Indeed, to find as ACE has submitted would in my view result in a foolish and pointless result as it would allow an insurer to, by way of a side agreement, opt out of a proper reimbursement of loss transfer under section 275 of the Insurance Act. That cannot be a result that was intended by the legislature."

In his decision upholding the arbitrator's decision, Justice Monahan made the following comment:

"I am not entitled to rewrite the legislative scheme which is clearly worded and well understood with a different regime, the real impact of which is simply unknown as some undefined standard of 'fairness' to ACE and/or the city."

Justice Monahan goes on to comment on ACE's argument that a claim against a second party insurer should not be permitted if that second party insurer has a contract with a third party whereby the third party would indemnify the second party for any loss transfer. Justice Monahan states:

"Why this proviso or restriction on loss transfer would be appropriate generally and the impact such a qualification would have on the loss transfer regime was not explained. It is plainly inconsistent with the terms of the scheme which do not reference any such indemnification proviso ... Arbitrator Samworth considered this interpretation proposal by ACE and the City and rightly described it as 'foolish and pointless'."

Justice Monahan goes on to comment that the agreement between ACE and the city is not a matter on which he chooses to express an opinion. He states:

"The loss transfer provisions apply as between insurers not insureds ... It falls to the parties to that contract to address any such alleged unfairness through their contract rather than turning the loss transfer provisions on their head, as it were, thereby producing confusion and ultimately higher insurance costs for insurers and insureds across Ontario."

Even though Justice Monahan's comments were arising out of a slightly different set of circumstances, I find that they are binding on me and equally as applicable to the circumstances before me. It falls to the parties to the contract (Penske and City Transfer) to address the terms and conditions of their contract and not to seek a determination of those terms through the loss transfer process which applies to insurers, not the insureds.

I therefore find that Old Republic does not have a right to claim indemnification under s. 275 of the *Insurance Act* as against RSA.

ISSUE 2: IS OLD REPUBLIC A "DEEMED NAMED INSURED" UNDER S. 3(7)(F) OF THE SABS WITH THE RESULT THAT RSA AND OLD REPUBLIC WOULD EACH BEAR A 50% SHARE OF LOSS TRANSFER LIABILITY?

RELEVANT LEGISLATION

The relevant legislation with respect to this issue is s. 3(7) of the Statutory Accident Benefits Schedule which provides as follows:

"3(7) For the purpose of this Regulation,

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or

(ii) the insured automobile is being rented by the individual for a period of more than 30 days."

SUBMISSIONS OF THE PARTIES ON ISSUE 2

A. RSA

RSA submits that City Transfer is a deemed named insured under the Old Republic policy as at the time of the accident the truck was rented for more than 30 days under s. 3(7)(f) of the Statutory Accident Benefits Schedule.

RSA submits that although the rental contract clearly identifies the lessor as a corporation, in the circumstances of this case the deemed named insured provision should still be applicable.

RSA submits that the term "individual" is not specifically defined in the SABS. RSA submits that the driver of the truck qualifies as an insured person under the SABS as the vehicle was being made regularly available to him. (See s. 2(b) of the SABS which identifies an insured person as someone eligible for statutory accident benefits.)

RSA submits that if one accepts the argument that Penske is a deemed named insured under the Old Republic policy, then there would be a 50/50 split with respect to the responsibility to pay any loss transfer indemnification.

B. Old Republic

Old Republic submits that s. 3(7)(f) of the SABS has no application to this dispute. While Old Republic agrees that there is no definition of "individual" in s. 3 of the SABS, it notes that Ontario's *Legislation Act, 2006*, S.O. 2006, c. 21 does provide a definition of an individual. An individual is a "natural person". Section 87 of the *Legislation Act* sets out that that definition applies to every Act and Regulation. By way of contrast it is noted that a "person" is defined under the *Legislation Act* as including a corporation. Therefore, Old Republic submits that the *Legislation Act* draws a clear distinction between an individual/natural person and a corporation/legal person.

Section 3 only makes reference to an individual living and ordinarily present in Ontario and also makes reference in terms of the rental that the insured automobile is rented by "the individual" for a period of more than 30 days. While Old Republic acknowledges that the Penske truck was rented by City Transfer for more than 30 days, it submits City Transfer is not an individual and therefore does not qualify under s. 3(7)(f) of the SABS.

ANALYSIS AND DECISION

On this issue, I agree with Old Republic. City Transfer is not an individual. No case law was presented to me from an arbitrator or court suggesting that the word "individual" should apply to a corporation such as City Transfer.

It is my conclusion that the purpose of s. 3(7) is to expand the definition of an insured person in terms of who has the right to receive statutory accident benefits. Clearly, a corporation will not receive SABS; only an individual will. Therefore, I conclude that for the deemed named insured provisions to apply under s. 3(7)(f)(ii), the insured automobile must be rented by an individual, not a corporation, for a period in excess of 30 days. Therefore, in this case, as City Transfer, a corporation and not an individual, rented the vehicle, it does not fall within the deemed named insured provisions.

AWARD

Issue 1

Old Republic's acceptance of loss transfer vis-à-vis Intact prevents it from seeking loss transfer or reimbursement from RSA.

Issue 2

Old Republic is not a "deemed named insured" under s. 3(7)(f) of the SABS.

COSTS

According to the Arbitration Agreement, the expenses of the arbitrator and the expenses of the arbitration are to be apportioned as determined by the arbitrator taking into account the success of the parties, any offers to settle, the conduct of the proceedings and principles generally applied in litigation. The same is true with respect to legal costs.

While RSA was not successful on the second issue, it was entirely successful on the key issue in this case which was with respect to the effect under loss transfer of the contractual agreement between Penske and City Transfer. However, some portion of the time in terms of both written submissions and oral submissions did involve the second issue on which RSA was not successful.

Therefore, I am awarding costs to RSA payable by Old Republic. Old Republic will be responsible for the expenses of the arbitrator, the expenses of the arbitration and the legal fees of RSA but only with respect to 75% of those costs. RSA will be responsible for 25% of its own legal fees and will pay 25% of the arbitration expenses.

I have not quantified costs. If the parties cannot reach agreement, we can schedule a further pre-hearing.

DATED THIS 3rd day of March, 2026 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors

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