IN THE MATTER OF the *Insurance Act*, R.S.O. 1990,
c.I.8, s.275, as amended

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WATERLOO INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Ashleigh Leon for the Applicant

Tamara Tomomitsu for the Respondent

Introduction

This matter has come before me for determination of the dispute between two automobile insurers with respect to a potential claim for "Loss Transfer" in respect of Statutory Accident Benefits paid to a person who sustained an injury arising out of the use or operation of an automobile.

The concept of "Loss Transfer" is a statutory creature, set up by section 275 of the *Insurance Act*. This authorizes a scheme of indemnity between insurers. It allows an insurer that has been required to pay Statutory Accident Benefits to seek reimbursement from the insurer of motorists involved in the incident giving rise to the injury. Similar to common law tort rights but procedurally very different, Loss Transfer operates between insurers directly rather than through the individuals who are actually participants in the incident.

The rules for having recourse to Loss Transfer are set out in statute and regulation. Only some cases give rise to Loss Transfer. Most commonly, Loss Transfer may possibly arise when a heavy commercial vehicle is involved, or when a person is an occupant of a motorcycle.

Background

In this particular case, it appears that the injured person was a pedestrian who was involved in an incident involving a vehicle which appears to have been a heavy commercial vehicle. At this juncture it is unnecessary and probably unhelpful to delve into the particulars of the underlying incident in the status of the involved parties. At this juncture I am asked to deal with the preliminary issue of alleged "waiver" in respect of the claim for Loss Transfer.

The evidentiary record in this matter is an Agreed Statement of Facts put forward by the parties. This document recites the various transactions and annexes relevant documents.

The underlying incident took place on January 21, 2014 when the claimant Frank C.[1], then age 55, was a pedestrian crossing the intersection of Finch Avenue West and Alness Street in Metropolitan Toronto. It is reported that a City of Toronto owned dump truck struck Frank C., causing him injury.

On February 24, 2014 an application for accident benefits was submitted to Waterloo Insurance Company, the applicant in these proceedings. That application document was submitted by legal counsel on behalf of the claimant. Evidently, Frank C. had a policy of insurance which would have been which had been issued to him by the applicant, policy number 812764, a policy which provided coverage on a personal passenger vehicle. In accordance with the scheme of benefits, it is to be expected that the individual would submit a claim for Statutory Accident Benefits to his personal automobile insurer, even though his automobile was not involved in the incident. Under the priority rules in the *Insurance Act*, the proper place for an individual to claim is their own insurance policy regardless of whether or not the vehicle described in that policy was involved in the incident giving rise to the loss.

However, as this incident involved a vehicle which appears to potentially be a heavy commercial vehicle, it seems that representatives appointed on behalf of Waterloo considered it appropriate to pursue a possible claim for "Loss Transfer" based on the specific provisions under section 275 of the *Insurance Act* and the regulations. On April 11, 2014 Waterloo's representative wrote to the insurer of the dump truck. That insurer was identified as the respondent ACE INA by an indication on the Motor Vehicle Accident Report in respect of the incident. That letter is found at tab 3 of the agreed record. It indicates transmission by courier and facsimile to the claims department of ACE INA. The communication is a letter which is attached to a Notification of Loss Transfer. The Notification is a preprinted form which provides the recipient with various fields of information that would appear reasonably sufficient to give information about the incident, and very general information about the nature of the underlying claim for benefits.

The letter also attached a copy of the police report which provides more specific identifying information about the involved individual driver, vehicles, accident location and so forth.

It appears that one set of these documents was transmitted by facsimile with the cover page and a covering letter. The cover page is addressed to the "Claims Department" and says "Please accept this Loss Transfer Notice regarding your policy number CAC 301537 – City of Toronto."

[1] In consideration of the privacy interests of non-parties who were required to provide information about their personal affairs, I have deleted reference to surnames.

The letter that was attached makes reference to the enclosures as noted and states: “Please confirm within 30 days if you accept Loss Transfer or contact me if you require more information.”

All of the above was over the signature of Mr. Kevin Shapcott, the claims representative. Mr. Shapcott gave his contact particulars and, of course, covering documents had the relevant addresses of the sender.

Only a few days later, on April 14, 2014 a letter was sent to Mr. Shapcott over the signature of Margaret Knebel a claims representative of Granite Claims Solutions and adjusting firm that identified itself as having been assigned by the City of Toronto to investigate the above noted incident. That letter made no admission of liability but promised further contact upon completion of investigation.

One day later another letter was sent by the same representative. That letter states “Granite Claims Solutions on behalf of the City of Toronto will accept the Notice of Loss Transfer.”

It seems that all parties understand this statement to be a communication indicating a willingness to make reimbursement to Waterloo Insurance Company for Loss Transfer. There is more than a little interpretation required to come to that conclusion. Firstly, the statement is made on behalf of the City of Toronto, not an insurer. Under section 275 of the *Insurance Act*, Loss Transfer is a responsibility only of an insurer. However, it seems likely that all of the parties understood that the insurance arrangements for the City were such that the City functionally operated as the insurer for such purposes. No issue has been made of this before me, nor would I expect there to be an issue.

The second aspect requiring some interpretation is potentially more significant. Granite did not indicate explicitly that they would agree to make any reimbursement. The agreement, if I can call it that, was that it “will accept Notice of Loss Transfer”. Bearing in mind that this statement was made a few days after receiving a fax transmission requesting “Please except this Loss Transfer Notice…”. It is theoretically possible that Granite was intending to simply acknowledge receipt of the notification, and not committing to ultimate payment.

Subsequent events illuminate.

On May 29, 2014, Mr. Shapcott wrote again, this time directly to Granite Claims Solutions. Evidently with the passage of time, Waterloo had incurred various expenses and was now enclosing its Interim Loss Transfer Request for Indemnification in the amount of $24,639.23. A form providing some details about the nature of the claims paid was annexed to that communication. According to the cover letter paid invoices were also enclosed. Mr. Shapcott requested that payment be forwarded for the indemnification.

On June 11, 2014, Ms. Knebel responded to the request for indemnification negatively. She said: “Unfortunately we are revoking our acceptance of the Loss Transfer Claim. It has come to our attention that this accident does not fall within the Loss Transfer Provisions. Your insured was a pedestrian. Loss Transfer only applies when two different classes of vehicle are involved in a motor vehicle accident. Granite Claims on behalf of the City of Toronto denies your Loss Transfer Request for Indemnification.”

Clearly this communication confirms that the April 15, 2014 letter was regarded as “acceptance of the Loss Transfer Claim” and not merely an acceptance of notice.

Subsequent to these communications, the parties engaged in various exchanges but were unable to resolve matters, ultimately leading to the proceedings now before me. For present purposes, this is being treated as a preliminary issue hearing to determine whether or not the respondent is committed to payment of Loss Transfer reimbursement to the applicant as a result of the above communications.

In essence Waterloo wants to hold ACE INA to the position that it has agreed to make reimbursement.

Analysis

Based on the evidence before me, I conclude that the communication of April 15, 2014 was intended to be a commitment to make reimbursement to Waterloo with respect to amounts that would be payable as "Loss Transfer". In effect, the statement communicated that the respondent might otherwise fight about reimbursement, would not fight about reimbursement.

The question before me is whether or not the respondent should be allowed to resile from that position.

This may be regarded as a case of promissory estoppel, or waiver. Aside from the possible ambiguities alluded to above, it is quite clear that the April 15, 2014 communication was made without any knowledge about the sums for which reimbursement would be claimed. At a minimum, the April 15, 2014 communication is an indication that reimbursement will be made for such sums which are properly payable. But it is not clear to me that the respondent would have been expressly precluded from raising issues about recoverability of certain payments, deductible, or liability in accordance with the applicable Fault Determination Rules. None of this is addressed expressly or implicitly.

Nonetheless, I do find that the communication was an indication of the respondent's choice, its decision to accept claims and make reimbursement for Loss Transfer subject to the well understood rules for calculating the precise reimbursement due.

The respondent argues that the communication made will not support the characterization of "waiver" because the respondent did not undertake an "unequivocal course of action" demonstrating that Loss Transfer had been accepted. While there may be some question about whether or not the law requires such "unequivocal course of action", I am satisfied that the April 15, 2014 letter was unequivocal as communicated and understood at the time. The author of the correspondence was very clear in subsequent communications that the April 15 communication would need to be "retracted" for the respondent to resist Loss Transfer.

In describing waiver, the Supreme Court stated that:[2]

> **Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party.**
>
> **...**

[2] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 SCR 490, 1994 CanLII 100 (SCC), p 499.

> **Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.**

As far as it goes, the April 15 communication has the characteristics of a waiver. The respondent knew all of the relevant circumstances. They were provided with the documentation that pointed out that the claimant was a pedestrian. It may not have occurred to anyone that there was a potential legal argument arising from those facts, but nonetheless the communication was made to abandon the right to resist the Loss Transfer.

In the priority dispute case of *Motors Insurance Company v. Co-operators insurance Company*, a decision of arbitrator Guy Jones, there was some discussion of a "settlement". While priority disputes are somewhat different than Loss Transfer disputes, there are some common characteristics. Both types of disputes are disputes between insurers with respect to the ultimate liability with respect to payment of Statutory Accident Benefits. In the ordinary course, such disputes have the same kind of initial activity wherein one insurer is communicating with another insurer about potential reimbursement. It is perhaps significant that in priority disputes the insurer that offloads priority to another insurer steps back from the entire process, whereas with respect to Loss Transfer disputes, the insurer handling the claim continues to handle a claim throughout its life seeking periodic reimbursement in the background.

It is also germane that priority disputes are subject to more detailed procedural provisions that are set out in Ontario Regulation 283/95. These regulation provisions set out timelines, specific notice provisions, and other characteristics of the proceedings. No such regulation applies with respect to Loss Transfer disputes. In the *Motors* case, a formal Notice of Dispute between insurers was issued pursuant to Ontario Regulation 283/95. Co-operators, the applicant in that case, was urging appointment of an arbitrator on consent to resolve a priority dispute. They didn't get that consent and therefore launched an application to the court and served a Notice of Application on Motors. The application was returnable April 1, 2003. On March 31, 2003, a representative of Motors wrote saying "please be advised that we accept priority of Mr. Robert Martin Jr's accident benefits claim. Please have the up-to-date file forwarded to my attention at your earliest convenience". Subsequently, Motors received additional information and attempted to resile from its position communicating: "Please be advised that we are withdrawing our acceptance of priority on this claim and ask that you reconsider your position".

Arbitrator Jones made the following observations:

> **"While this decision involved an interpretation of the section 3 notice provisions of regulation 283/95, I am of the opinion that the same principles apply to the matter that we are dealing with at this time. The parties have entered into an agreement as to who is to pay the accident benefits. While I accept that in the proper circumstances, an arbitrator can exercise his equitable powers to intervene and allow a party to withdraw from an agreement, this should only occur in the most extreme cases. In a scheme where certainty, simplicity and efficiency are important, allowing one party to revoke a previous agreement simply because they may later become aware of new facts is not desirable. To allow such an approach would be to encourage parties to change their positions each time they obtained new facts, something which is clearly contrary to the intent of the Regulation."**

In that case there was a factual issue about whether or not Co-operators withheld relevant information. Mr. Jones dealt with that in favour of Co-operators. He ultimately held:

> **"I am prepared to accept that I do have the equitable power to allow Motors to withdraw the acceptance of priority, if Co-operators had acted in bad faith. I do not, however, accept that Co-operators acted in such a manner in this case. Indeed, I find that Ms. Hicks did advise Ms. Termini of the existence of the statements. Had she denied their existence or misstated what they said, I would be prepared to allow for the withdrawal of the acceptance of priority, however that is not the case.**
>
> **"In light of the above, I find that there was a binding agreement between Motors and Co-operators whereby Motors agreed to take over the accident benefit file and accordingly the arbitration cannot proceed. Motors Insurance is therefore responsible to pay accident benefits to or on behalf of Robert Martin Jr."**

In that decision, Mr. Jones has found that there was a binding agreement entered into by the protagonists about the disposition of the ultimate issue. One gathers from the chronology, with the acceptance of priority coming on the eve of a hearing in the Superior Court that this admission on behalf of Motors, was clearly in consideration of not having to respond to the application. On the facts in that case, there seems to be some evidence to support the conclusion that the parties had entered into a "binding agreement" with the effect that Co-operators had kept its promise and now could hold Motors to its position.

In this case before me, the record does not show that there was any such exchange of promises. The record is entirely reduced to writing. There are no promises. At best one might speculate that Waterloo might proceed further and possibly commence formal proceedings but this is far from establishing the essential elements of an agreement that would be a binding agreement. I conclude that the communications in this case do not amount to an enforceable, binding, agreement.

Accordingly, I turn to the question of waiver.

Any discussion about the legal principles associated with waiver must take into account the leading decision of *Maritime Life Assurance Company v. Saskatchewan River Bungalows*[3]. This is a 1994 decision of the Supreme Court of Canada.

The underlying facts, coincidentally, have to do with insurance coverage. The life insurer involved had a contractual provision which allowed coverage to continue even though payment was late, provided that payment was submitted within a specific grace period. But after expiry of the grace period, the insurer sent a letter to the policyholder agreeing to accept payment by a specified later date. The policyholder did not act on that initial extension. Subsequently the insurer sent another notification describing the policy as "technically out of force" but indicating the amount of payment that would be required to pay the current premium. Thereafter the insurer sent a notice of lapse of policy. Ultimately the policyholder did not send a premium cheque to the insurer until it was almost a year past its initial due date. By that time person who was the subject of the life insurance was terminally ill and uninsurable.

Clearly on these facts there was more than one occasion where communications could be construed as a waiver.

The court embarked upon a careful consideration of the legal issues associated with waiver. At the outset it was observed that waiver is closely related to the concept of "promissory estoppel". Importantly the court observed:

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[3] [1994] 2 S.C.R. 490

> **"The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so."**

The overarching characterization of the court was:

> **"Waiver occurs where one party to a contract or to proceedings takes steps which amount to forgoing reliance on some known right or defect in the performance of the other party."**

Further:

> **"Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour of waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration."**

While the court didn't find it necessary to compare and contrast the doctrines of waiver and promissory estoppel, it can be seen that the foregoing language draws a clear distinction between waiver and formation of a contractual obligation. Clearly, waiver is something contemplated to be binding without consideration. Hence we should take care to distinguish waiver cases from cases where there is an agreement based on mutual promises to engage in a course of action or to refrain from engaging in a course of action.

Without doubt, where a party has a potential cause of action against another individual, and agrees to forgo that cause of action or the enforcement of it, that is potentially valuable consideration to be given in exchange for promised behaviour. When that occurs, the forbearance as consideration makes the "waiver" a binding obligation. Probably we should avoid using the word "waiver" in these circumstances but it is obvious that the very same words might be a waiver in some cases and a contractual obligation in other cases.

The unfairness ingredient in waiver analysis is another matter. Indeed Professor Waddams' references the unfairness criteria are not in relation to the creation of the waiver or estoppel, but in relation to retraction. But if the communications are such that the parties have contractually agreed to a course of action, then these mutual promises become enforceable and a more nuanced consideration of the fairness of the bargain might be appropriate.

Retraction of a waiver is highly relevant to the case before me. The Court in *Saskatchewan River Bungalows v. Maritime* has expressly endorsed the idea that waiver can be retracted "if reasonable notice is given to the party in whose favour it operates"[4].

In a reply factum, Waterloo argues that retraction of waiver cannot be applied here because it is a doctrine which has developed from contract law, and that Loss Transfer does not have the same characteristics as contract law. No authority is cited to support the argument that retraction is confined to waivers in relation to contractual obligations. Indeed, the court in *Saskatchewan River Bungalows v. Maritime* explicitly described waiver much more broadly as encompassing more:

> "**Waiver occurs where one party to a contract <u>or to proceedings</u> takes steps which amount to forgoing reliance on some known right or defect in the performance of the other party."**

[4] [1994] 2 S.C.R. 502, where several authorities are cited.

I reject the argument that retraction doctrine is unavailable to analysis of waiver situations in a Loss Transfer proceeding. In appropriate cases it is available.

Reading this in conjunction with the above quoted passage from Professor Waddams, retraction must also not be unfair to the opposite party. One aspect of unfairness would be detrimental reliance.

Thus, in a case where a person seeks to be excused from an alleged waiver, we must consider:

1. Did the person have full knowledge of their rights?

2. Does the evidence demonstrate an unequivocal and conscious intent to abandon the rights?

3. Has the waiver been retracted on reasonable notice?

4. Would it be unfair to allow the retraction of the waiver?

In this case, I am satisfied that the respondent had full knowledge of their rights. Insurers in Ontario deal with Loss Transfer disputes with great regularity. No insurer's representative can be heard to suggest that they did not understand their right to dispute asserted Loss Transfer claims. In respect of the facts known, I observe that the respondent had whatever facts it chose to have and found to be sufficient in order to makes its decision. The respondent was under no compulsion to take a position when it did. It was free to ask more questions, investigate different avenues. I find that the respondent had full knowledge of its rights.

The statement made by the respondent's representative to "accept the Notice of Loss Transfer" might seem ambiguous to an outsider. But within the claims community it seems that this language would be understood to be a commitment to reimbursement on some basis. The author of those words has essentially confirmed that by subsequent correspondence. Therefore, in accordance with the usage in the trade, and here, I find that the April 16, 2014 letter is evidence of an unequivocal and conscious intent to abandon rights[5].

The respondent first purported to revoke its acceptance of the Loss Transfer claim by its correspondence dated June 11, 2014. That communication was less than two weeks after receiving a request for reimbursement with supporting documentation asking for payment in the amount of $24,639.23. The communication was less than two months after the communication with the acceptance of the Notice of Loss Transfer. As to timeliness, I find this communication to be a reasonable one. As contrasted with the turnaround time for many claims investigations, the respondent has made a determination within a reasonably prompt timeframe. In all other respects the notice of retraction appears to be appropriate in that its meaning is clear, and that it has been transmitted to the appropriate individual.

Finally, I turn my attention to the question of whether or not it would be unfair to allow retraction of the acceptance of the claim. In particular, I am considering whether this is in some way unfair to Waterloo. There is no evidence before me of any actual prejudice to Waterloo. On my

[5] I did note that the April 16, 2014 letter was marked "Without Prejudice". I am not convinced that applying this label has the effect of negating a firm commitment contained in the body of a letter. This is language to indicate that the content of the letter is part of a settlement negotiation and as such cannot be offered as an admission. The content of the letter doesn't have the characteristics of a negotiation.

consideration of the circumstances here I don't see any basis to presume that there is some prejudice. If the respondent is correct that the applicant should not be entitled to advance a Loss Transfer claim, then the applicant has lost a windfall. If the respondent is incorrect in this position then the applicant will have an opportunity to pursue its rights, no notification time has been missed nor has any limitation expired. The relevant evidence, in respect to pedestrian status, is not of a nature that is subject to being lost with the passage of time. This cannot be characterized as "unfair" to Waterloo.

At this juncture, I make note of the comments of Arbitrator Jones in the decision *of Enterprise Rent a Car v ING Insurance Company of Canada*[6]. In that case, he was dealing with a priority dispute and where the parties had discussed whether ING should take over handling of a claim resulting in ING communicating first that it would accept priority and secondly that it had reviewed coverage and could not accept the claim. It is not clear whether Arbitrator Jones would have accepted that case as being in the nature of a contractual agreement to accept priority. There are insufficient facts in the record and Arbitrator Jones did not find it necessary to decide that issue. Indeed the litigants disagreed. Enterprise argued that the transaction was a settlement agreement. ING argued that it was not a settlement agreement. But Arbitrator Jones did not find it necessary to make that determination. He highlighted that priority disputes under regulation 283/95 is a system that is designed to be quick, efficient and effective. Therefore, on policy grounds, Arbitrator Jones held:

> **"Once a company has agreed to take over priority, it is only in unusual and extreme circumstances that the company should be allowed to withdraw that acceptance. To allow otherwise would be to encourage the uncertainty that the regulation is attempting to avoid. I am not prepared to allow ING to resile from that acceptance in this case "**

While the language used by Arbitrator Jones does tend to suggest he had found there to be an agreement between the parties, he raises an important policy question. Recognizing the priority dispute regulation calls for rapid disputes with early notice, generally within 90 days, and arbitrations that are concluded within two years, Mr. Jones is right that the regulation gives importance to quick proceedings. Applying that policy value, and the desire for certainty, fueled Mr. Jones' reluctance to allow withdrawal of acceptance except in unusual and extreme circumstances.

As this is a Loss Transfer dispute, the quoted regulation, Ontario regulation 283/95 is inapplicable. Indeed, in Loss Transfer disputes the legislature has shown no interest in how these disputes are handled. Unlike priority disputes, where there have been repeated regulation reforms to streamline or otherwise alter the handling of these disputes, the legislature has done nothing with respect to Loss Transfer. There is no early notice requirement. There is no timeline for having a hearing. Those markers of the legislative intent in respect of priority disputes are absent with respect to Loss Transfer disputes. In *Motors v Old Republic*[7], Justice Herman heard an appeal from a Loss Transfer case decided by Arbitrator Jones that also discussed estoppel and waiver issues. Justice Herman found that the arbitrator's finding of waiver was both reasonable and correct. He found that Old Republic made a decision to pay in order to avoid the costs of arbitration, in effect a finding of consideration flowing by forbearance.

I have considered that allowing retraction of a waiver creates uncertainty and may run counter to expeditious proceedings. In Loss Transfer, the proceedings are invisible to the claimant. The claimant is never affected by the Loss Transfer. The claimant never has to deal with anyone

[6] Enterprise Rend A Car v. ING Insurance Company of Canada, Arbitrator Guy Jones, November 2006.
[7] 2009 CanLII 37707 (ON SC).

other than their own insurer. The fact that it takes some time to get closure on the issue of indemnification in the background is of no consequence whatsoever to the claimant. But if it did matter, I would be concerned that a rule that limits retractions is actually more likely to delay and complicate matters. In an environment where retraction is possible, it is easier for an insurer to act quickly. In an environment where an ill advised communication by persons in low authority levels might have major uncorrectable consequences, insurers will be incented to act more slowly. That approach will require that insurers move with great deliberation.

The parties here have referred to a number of earlier priority disputes and Loss Transfer cases. It is important to recognize that the case before me, unlike many others, has directly raised the subject of retraction. Other cases have looked at waiver and estoppel only. Retraction is not the focus of those cases. That concept comes from the case law at the very highest level.

If the decision by the respondent to accept the claim is characterized as a waiver, as opposed to a contractually enforceable agreement, it is my view that the common law principles with respect to waiver and retraction must be applied in the absence of some legislative direction.

Therefore, I conclude that the respondent's retraction is effective.

Conclusion

I conclude that the communications between the parties does not amount to a contractual agreement to not dispute Loss Transfer indemnity. On a waiver analysis, I find that the respondent effectively retracted its commitment.

If the parties wish to make submissions about costs or any other matter, please let me know within 30 days.

Dated at Toronto this 19th day of April, 2018.

LEE SAMIS
Arbitrator