IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
Section 275 and Regulations 664 and 668 thereunder;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Benjamin Lee for the Applicant

Lindsay Thomson for the Respondent

Introduction

In this arbitration the two parties are insurers who are engaged in a dispute about obligations that may exist between them to indemnify for Statutory Accident Benefits payable as a result of an accident in the Province of Quebec. Security National asserts a right to that indemnity. Wawanesa resists that assertion. The issue submitted to me pursuant to the Arbitration Agreement amounts to: whether Wawanesa must indemnify Security National for such benefits paid by Security National under Section 275 of the *Insurance Act* as a result of an accident that occurred on or about August 6, 2012.

The Arbitration Agreement stipulates that this question includes determination of the jurisdiction of Section 275 over Wawanesa in the particular circumstances of this accident. The parties acknowledge that submission to this arbitration is not an admission or acknowledgment of the jurisdiction of Section 275 over Wawanesa.

The Factual Background

The underlying motor vehicle accident occurred in the Province of Quebec on August 6, 2012. At the time of the accident one Herve L.[1] had a policy of insurance with Wawanesa. That policy was issued in the Province of Quebec. The policy covered a 2000 Honda. The 2000 Honda was the vehicle involved in the accident. It appears from the police report that Wawanesa's insured was the operator of the automobile.

The other vehicle involved in this accident was a motorcycle being operated by Jordan H. It appears that Mr. H. had coverage with the applicant, Security National,

Security National had issued a policy of insurance to Jordan H., policy number 74032182 in respect of a 2009 Kawasaki Ninja motorcycle.

The policy documents establish that this was an Ontario automobile insurance contract issued by Security National in Ontario, to a customer in Ontario, for coverage on an Ontario registered automobile (motorcycle). The certificate issued by Security National expressly acknowledges that this is issuance of a contract of insurance "subject in all respects to the Ontario Automobile Policy".

The certificate of automobile insurance shows a premium being charged for liability coverage and a much more significant premium being charged for “accident benefits” -- the no fault benefits associated with Ontario motor vehicle liability policies.

Having issued an Ontario motor vehicle liability policy, Security National will be deemed to have provided the benefits set out in the Statutory Accident Benefits Schedule as defined under the Ontario *Insurance Act*. The Ontario contract provides a wide range of benefits. One particular section of the mandated provisions provides an extension of coverage with respect to accidents that occur in other jurisdictions. Section 59 of the benefits schedule provides as follows:

Accidents outside Ontario

59. (1) This section applies if,

(a) as a result of an accident in another province or territory of Canada or a jurisdiction in the United States of America, a person insured in that jurisdiction within the meaning of subsection (4) dies or sustains an impairment or incurs an expense described in section 15, 16 or 19; and

(b) no benefits are received under the law of the jurisdiction in which the accident occurred. O. Reg. 34/10, s. 59 (1).

(2) The person, or the person claiming benefits in respect of him or her, may elect to receive either of the following, but not both:

1. The benefits described in this Regulation, other than the benefits referred to in paragraph 2.

2. Benefits in the same amounts and subject to the same conditions as if the person was a resident of the jurisdiction in which the accident occurred and was entitled to payments under the law of that jurisdiction. O. Reg. 34/10, s. 59 (2).

(3) If an election is made under subsection (2), the insurer shall pay benefits in accordance with the election. O. Reg. 34/10, s. 59 (3).

[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.

(4) For the purpose of this section, a person is insured in the jurisdiction in which the accident occurred if, at the time of the accident,

(a) the person was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) the person met the criteria prescribed for recovery under the law of the jurisdiction in which the accident occurred;

(c) the person was not an owner, driver or occupant of an automobile registered in the jurisdiction in which the accident occurred; and

(d) the person,

(i) was an occupant of the insured automobile,

(ii) was the named insured, a person specified in the policy as a driver of the insured automobile, the spouse of the named insured or a dependant of the named insured or spouse and was an occupant of an automobile,

(iii) was the named insured, his or her spouse or a dependant of the named insured or spouse and was struck by an automobile while not an occupant of an automobile,

(iv) was struck by the insured automobile while not an occupant of an automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, was a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of the person or spouse and suffered an impairment while being the occupant of an automobile or suffered an impairment caused by an automobile of which he or she was not an occupant, or

(vi) was struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). O. Reg. 34/10, s. 59 (4).

Jordan H. elected under Section 59 to make a claim for benefits in Ontario to Security National Insurance Company.

Security National took the necessary steps to alert Wawanesa of its intention to claim indemnity pursuant to Section 275 of the Ontario *Insurance Act*.

Ultimately, the controversy here is whether or not Security National is entitled to receive, and Wawanesa is obliged to pay, loss transfer indemnity under Section 275 of the Ontario *Insurance Act* as a result of an accident which occurred in the Province of Quebec where Wawanesa's involvement is as the insurer of an involved vehicle, under the Quebec legislative scheme.

The Licence Status of the Parties

Both the applicant and the respondent are licensed insurers in the Province of Ontario. As is common for insurers, I expect that they are licenced to carry on business in other provinces as well.

Having a licence in Ontario comes with certain conditions. Those conditions are set out in Section 45 of the Ontario *Insurance Act* as follows:

45. (1) A licence to carry on automobile insurance in Ontario is subject to the following conditions:

1. In any action in Ontario against the licensed insurer or its insured arising out of an automobile accident in Ontario, the insurer shall appear and shall not set up any defence to a claim under a contract made outside Ontario, including any defence as to the limit

or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in Ontario and such contract made outside Ontario shall be deemed to include the statutory accident benefits referred to in subsection 268 (1).

2. In any action in another province or territory of Canada, a jurisdiction in the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule against the licensed insurer, or its insured, arising out of an automobile accident in that jurisdiction, the insurer shall appear and shall not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in that jurisdiction.

Penalty for breach

(2) A licence may be cancelled when the holder commits a breach of condition as set out in subsection (1).

Clearly these licence conditions seek to ensure that licensed insurers are committed to a course of conduct that facilitates the inter-jurisdictional movement of vehicles, with concomitant adjustment of insurance obligations to match the conditions that apply in the place where an accident occurs.

Here Security asks to apply the Ontario process to a Quebec accident. It is the converse of what is contemplated.

Clause 1 does not apply because this accident did not occur in Ontario.

Clause 2 does not apply because this is not an “action in another province or territory”.

The legislature used section 45 to address interjurisdictional issues but took no steps to enlarge the licence conditions to include extra territorial loss transfer.

The Power of Attorney and Undertaking

The licence conditions in Ontario are not the only relevant rules confronted when an accident involves travel into other jurisdictions.

Automobile insurers commonly commit to a course of action by filing of form of “Power of Attorney and Undertaking”. This is a formal commitment made voluntarily by insurers. The impact of the insurer's Power of Attorney and Undertaking transactions has been the subject to many cases in insurance jurisprudence.

The purpose of the Power of Attorney and Undertaking is to facilitate inter-jurisdictional recognition of insurance protection with the benefit being that consumers can travel across many jurisdictions confident that the insurance they acquired in their home jurisdiction will satisfy local insurance laws along their travels. Insurers, by executing the Power of Attorney and Undertaking, are permitted to issue a document to their customers that confirms the appropriate insurance undertaking.

The essence of the undertaking is that the insurer, when dealing with a claim arising in another jurisdiction, will treat its coverage as being compliant with whatever local characteristics are mandated in that other jurisdiction.

The Power of Attorney and Undertaking predate the development of "no fault" insurance. It is clear that the scheme had its original intention to provide liability coverage that complies with local laws.

The exact wording of a Power of Attorney and Undertaking is variable. In this case the parties have identified the form of wording applicable to Wawanesa. That form is annexed to this award.

The first third of the form addresses service of proceedings. The Power of Attorney is for the purpose of authorizing insurance officials, “the Superintendents of Insurance” to accept service of legal proceedings on behalf of the signatory insurer. The language contemplates an action or proceeding arising out of a motor vehicle accident in any of the “respective Provinces or Territories”. I interpret “respective territories” to be a reference to the place where an accident has occurred, and where the acceptance of service will be by the regulator in that jurisdiction.

Some background of the process is found in the material from the website of the Canadian Council of Insurance Regulators, reproduced at Tab H of the Applicant’s brief. This confirms that the purpose of the Power of Attorney and Undertaking is to commit the insurer to providing coverage that complies with local laws when the vehicle is operated in a different jurisdiction. The summary explicitly states that Power of Attorney document is generally filed by insurers in the United States who issue motor vehicle liability policies outside of Canada. That aligns with paragraph D of the undertaking form where the insurer affirms that it will not issue the Non Resident Insurance Card to residents of Canada.

It is important to note that the undertaking makes no reference whatsoever to Statutory Accident Benefits, or “loss transfer”. The CCIR note references the desire to have local minimum liability limits met. The language of undertaking C is expressly limited to not setting up defences “under a motor vehicle liability insurance contract”. Loss transfer is not a liability that arises under a contract. There is no promise to pay loss transfer to be found in the words of the contract. Loss transfer is a statutory liability that arises as a result of having a contract, but it is not a liability under the contract.

In my view the Power of Attorney and Undertaking scheme does not apply to loss transfer. I note that Justice Binnie came to the same conclusion in the *ICBC v. Unifund* case:

> **Moreover, even if the PAU could be interpreted to require the appellant’s appearance to defend the claim in Ontario, I do not think the appellant would be precluded by the PAU in general or its third undertaking in particular from contesting the application of the Ontario Insurance Act to impose a civil obligation on an out-of-province insurer in respect of an out-of-province motor vehicle accident. Such a defence does not arise under its “motor vehicle liability insurance contract”.**

And, at paragraph 105:

> **In any event, as noted earlier, even if the PAU were interpreted (wrongly, in my view) to require the appellant to litigate Unifund’s claim in Ontario, there is nothing in the PAU that would prevent the appellant from contesting the purported extraterritorial assertion of s. 275 of the Ontario Insurance Act. For the reasons already discussed, such an objection would succeed. However one looks at this case, the respondent’s claim should be dismissed.**

The Loss Transfer Scheme -- Statutory and Regulation Background

As a result of the shift of automobile insurance injury compensation from a tort basis to a no fault system, the Ontario legislature reconfigured the nature and extent of no fault benefits. Effective in 1990, the legislature greatly enhanced the no fault benefits and concurrently reduced compensation based on tort principles. In effect, changes were introduced that took away tort compensation with respect to accident victims who had less serious injuries. On the "no fault" side, the legislature provided for extensive benefits, with high limits of coverage, for all accident victims without regard to traditional fault principles.

This shift in the approach to compensation has implications for certain segments of our society. Due to the nature of their transportation modes, the injuries that may be caused by certain groups of motorists and sustained by certain groups of motorists would result in those communities being disproportionately affected by the compensation system's alteration.

The impact is readily understood when one considers the change in loss exposure for insurers of motorcycles who, in a tort system, might expect losses caused by the insured person to be modest, whereas losses sustained by an insured person in the no fault environment would be large. Thus the shift in compensation approach would predictably cause an abrupt increase in insurance costs for those motorists.

Conversely, the loss exposure for operators of heavy commercial vehicles would be expected to decrease significantly as tort exposures for injury caused to others are reduced, but the risk of loss in respect of injury to occupants is modest in such vehicles.

Therefore, the legislature provided for a concept of "loss transfer" to redistribute no fault losses in limited circumstances. The effect of this reallocation of losses would be to dampen the impact of the compensation system changes.

The legislature approached this by enacting section 275 of the *Insurance Act* as follows:

> **"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. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1."**

The legislature has defined the classes of insurance that would be subject to loss transfer processes in Ontario Regulation 664. Section 9 of that regulation provides as follows:

> **Indemnification for Statutory Accident Benefits (Section 275 of the Act)**
>
> **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;**
>
> **"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;**

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*;

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(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. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s. 9 (3); O. Reg. 780/93, s. 1.

This is the reallocation approach that is commonly referred to as "loss transfer".

It is contemplated that loss transfer will be effected between insurers but based on principles informed by the "fault"[2] of the insurers' respective policy holders. It is significant that both the entitlement as well as the liability for this indemnification has its roots in the insurers' contractual nexus to persons involved in the subject accident. Absent that contractual relationship, there is no loss transfer entitlement, or liability, for an insurer. But the loss transfer obligation is not mentioned in the contract terms.

At its core "loss transfer" is an arrangement designed to reduce market dislocation, an issue of concern within the Province and not elsewhere.

[2] The determination of "fault" is subject to prescribed "Fault Determination Rules" that approximate traditional tort allocation of responsibility.

The Territoriality Issue

There are two levels to this issue. Firstly, does Ontario have sufficient connection with Wawanesa to allow Ontario to regulate and mandate Wawanesa's obligations in respect of contracts and events outside of Ontario?

Secondly, has Ontario, by enacting section 275, taken the step of regulating and mandating Wawanesa's obligations arising out of its Quebec contract and the Quebec accident?

In terms of Ontario's connection with Wawanesa, it is known that Wawanesa is an insurer that does business in Ontario and that has a licence from Ontario regulators for that purpose. The CCIR listing of PAU insurers found at Tab F of Security's Arbitration Brief indicates a Manitoba address for Wawanesa. Ontario, by the device of imposing licence conditions on the Ontario licence, has indirectly impacted extra territorial behavior. But it is not clear to me that Ontario asserts, or could assert, jurisdiction to impose its will on Wawanesa with respect to contracts and events outside of Ontario.

I turn to this second question of whether or not Section 275 is to be read as having application to an accident that happens outside of Ontario. Section 275 is an Ontario statute that says nothing about its territorial scope. In my view, this provision ought to be interpreted with a presumption that it is intended to have application in the Province of Ontario and not elsewhere**.**

In *Sullivan on the Construction of Statutes*, at Section 26.6, the respected author has commented on the interpretative presumptions with respect to the territorial operation of statutory provisions. The following comment is found:

> **"These principals therefore operate in Anglo-Canadian law as presumptions of legislative intent.**
>
> **1. It is presumed that legislation is intended to apply to all persons, things and events within the boundaries of the enacting jurisdiction.**
>
> **2. It is presumed that legislation is not intended to apply extraterritoriality to persons, things or events outside the boundaries of the enacting jurisdiction."**

There is nothing in this legislative provision that implies any sort of intended extra-territorial impact. By way of contrast, I note the express extension of coverage to extra-territorial accidents found in Section 59 of the Statutory Accident Benefits Schedule, noted above. Similarly, I note the provisions of Section 45 of the Act dealing with the extra-territorial obligations of an insurer imposed as a condition of its licence. And of course, we have the power of attorney and undertaking which imports some extra-territorial obligations on an insurer. Each of these approaches expressly addresses the territorial limitations and extensions of indemnity obligations. None of these approaches has been used for Section 275 of the Act. There simply is no expression of a legislative intent that Section 275 is intended to apply to accidents that occur outside of Ontario. There is nothing to overcome any presumption of a territorial limitation.

Having regard to the policy reasons for establishing a regime of loss reallocation under Section 275, that is, to moderate the loss cost dislocation associated with reduced importance of tort and increased significance of no fault benefits, this policy goal is not in any way advanced by extension of this system outside of Ontario.

To the contrary, by creating loss transfer for extra provincial contracts, the government would be creating dislocation in other jurisdictions.

There are material differences between the compensation approaches used in Ontario and those used in the province of Quebec with respect to compensation for injury arising out of motor vehicle accidents. Where Ontario uses a privately delivered system that combines compensation for tort liability and available no-fault benefits, Quebec delivers a “no tort” benefit scheme and uses a government mechanism for delivery of benefits.

In this case, Wawanesa, an insurer that issued a policy in the Province of Quebec, where all injury claims are dealt with by a government agency and not by the insurer, would be faced with payment, via loss transfer, of an injury claim. A policy in Quebec not expressed to provide any such indemnity, would be transmogrified into an injury compensation policy, and that conversion will have been achieved by legislative action in another province, Ontario. I find this interpretation difficult to support in the absence of very clear language.

In effect, the application by Security National here is to saddle Wawanesa with a significant loss for compensation for bodily injury. That is not part of the Quebec insurance contractual undertaking of an insurer.

Extending Ontario's Section 275 to contracts made in other jurisdictions whenever those insurers also have licenses in Ontario for other business and other insureds, would put those insurers in a disadvantaged position in those other competitive markets. For example, Wawanesa, if it is obliged to pay loss transfer claims of this nature as a result of having an Ontario licence, will have an increased risk exposure and would have to command a larger premium than its Quebec competitors that do not have Ontario licences. I am reluctant to apply an interpretation to Section 275 of the Ontario *Insurance Act* that would intrude so far into marketplace interference in another jurisdiction.

Again, I would expect to see very clear language to import such a conclusion.

I have noted the comments of Justice Cameron in the case of *Primmum Insurance Co. v. Allstate Insurance Co*[3]. Justice Cameron has concluded that an insurer could avoid this extended impact of extra-territorial loss transfer by either not doing business in Ontario, or by having its company in other jurisdictions separately incorporated. This observation highlights the extraordinary impact of an interpretation that Section 275 has extra-territorial application. It's difficult to conceive that the Ontario legislature intended that provisions of its *Insurance Act* would have the effect of either causing insurers to withdraw from the Ontario market, or requiring insurers to restructure all of their non-Ontario organizations. Again, this is an outcome which seems unfounded on the wording of Section 275 and contrary to the legislative intention to not disrupt the insurance marketplace.

In my view it is troubling that an Ontario statute would purport to deal with something that is "neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it".[4]

[3] [2010] O.J. No. 600

[4] Quoting Viscount Haldane in *Royal Bank v. The King* [1913] A.C..283 [PC] at page 288.

The Impact of Section 226(2) of the *Insurance Act*

The answer to the assertion that Section 275 has application to accidents in other jurisdictions might be found in Section 226(2) of the Ontario *Insurance Act*. Section 224 addresses the scope of application of Part VI of the *Insurance Act*. Part VI of the *Insurance Act* deals with a variety of matters associated with automobile insurance. Section 275 is found in Part VI of the *Insurance Act*. Section 226 provides as follows:

> **Application of Part**
>
> **226. (1) This Part does not apply to contracts insuring only against,**
>
> **(a) loss of or damage to an automobile while in or on described premises;**
>
> **(b) loss of or damage to property carried in or upon an automobile; or**
>
> **(c) liability for loss of or damage to property carried in or upon an automobile.**
>
> **Idem**
>
> **(2) This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the Highway Traffic Act unless it is insured under a contract evidenced by a form of policy approved under this Part.**
>
> **Idem**
>
> **(3) This Part does not apply to a contract insuring solely the interest of a person who has a lien upon, or has as security legal title to, an automobile and who does not have possession of the automobile. R.S.O. 1990, c. I.8, s. 226.**

The statutory provision circumscribes the scope of Part VI and limits that scope to contracts that insure vehicles that are required to be registered under the Ontario *Highway Traffic Act*.

How then does this section apply to the Wawanesa contract that creates its alleged liability under Section 275? That is a contract between Wawanesa and Herve L with respect to a Quebec motorcycle being operated in the province of Quebec. Clearly one would not expect Ontario law to have any application to that vehicle or to any contract of insurance on that vehicle.

The obligations and entitlements created by Section 275 are derivative of the insurance contracts that each of the insurers is a party to. Wawanesa's contract, on a vehicle not required to be registered under the *Highway Traffic Act,* is not within the application of Part VI of the Ontario *Insurance Act*. Accordingly, Section 275 does not create liability for Wawanesa arising out of its contract in Quebec.

The Comments of Justice Binnie in the *ICBC* V. *Unifund* Case

The *ICBC* and *Unifund* case is a leading decision in Canadian jurisprudence dealing with loss transfer arising out of an extraterritorial accident. That case dealt with an accident which happened in the Province of British Columbia. ICBC was the insurer of one of the motorists, in the Province of British Columbia. ICBC disclaimed any licence status or other substantial connection with the Province of Ontario. Unifund, an insurer under an Ontario contract paid

Statutory Accident Benefits and was seeking to assert rights under Section 275 against ICBC. Unifund's position was quite analogous to Security National's position here. Ultimately the Supreme Court of Canada concluded the Ontario regulatory scheme did not apply to the out-of-province ICBC on the facts of that case. The court found that Ontario's legislative reach did not extend to ICBC, an insurer not licenced in the Province of Ontario.

At Paragraph 12 of the judgment, while describing the statutory cause of action, Justice Binnie made the following observations.

> **The Ontario insurance scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated "without regard to" SABs (s. 267.1(8)2(i). However, the payor of the SABs (usually the victim's insurer) is entitled by statute to indemnification from the insurer of any "heavy commercial vehicle" (*Automobile Insurance Regulations*, R.R.O. 1990, Reg. 664, s. 9) involved in the motor vehicle accident in question, "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules" (s. 275(2)), i.e., allocated not by the general principles of tort but by the rules set out in Ontario regulations. Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to Ontario Arbitration Act, 1991, S.O. 1991 c. 17. <u>There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund's claim.</u> [underscore added]**

The hypothetical determination that ICBC would be required to arbitrate Unifund's claim if it were "an Ontario insurer" is germane to the issue I have to decide.

This appears to be a conclusion that being "an Ontario insurer" is sufficient connection to Ontario jurisdiction to require the insurer to participate in the arbitration. By extension, this would seem to imply that the potential liability for indemnification would also extend. This finding, unnecessary as it was to the outcome in the case, is not explored in any detail. It's not clear what is meant by "an Ontario insurer" in the sentence. Does this mean an insurer licensed in Ontario when that insurer is licensed in many jurisdictions? Or does it mean an insurer that has its head office in Ontario? Or perhaps it means any insurer that carries on business whether licensed or unlicensed in the Province.

This observation by Justice Binnie has been adopted as determinative of the extraterritorial impact of Section 275 of the *Insurance Act*, in a number of cases.

Whether that was a finding that is expressly binding is perhaps debatable. Interestingly, the question of whether or not "obiter" comments should be received as authoritative was the subject of consideration by Justice Binnie in the case of *R. v. Henry*[5].

> **The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the ratio decidendi which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in Sellars or as broad as the Oakes test. All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the Sellars principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this**

[5] [2005] 3 SCR 609

Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

As there are aspects of the *Unifund* comment that are troubling, extending Section 275 to accidents in other jurisdictions, and since the court had no occasion to explore those issues or discuss the connections which might or might not be present in other cases, I would be cautious about treating the *Unifund* comments "as if enacted in a statute." Indeed it is not apparent that the *Unifund* "no doubt" comment was even expressed with the intention to be helpful or to provide guidance in other cases.

But a series of Ontario cases have treated the *Unifund* comment as dispositive in a binding way. In addition to my concerns about interpreting Section 275 to have application to extra-provincial accidents, and my concerns about whether this serves or defeats the legislative intention of avoiding loss cost dislocation, I note that these other cases considering this issue have not addressed the impact of Section 226(2) of the Act.

Overall, there are compelling reasons to conclude that the territorial ambit of Section 275 is worthy of specific deliberation.

But the precedents that I must look to are directed not only at the comments in the Unifund case, but also are cases that have, in themselves, treated the *Unifund* comments as determinative and authoritative.

In *Primmum v. Allstate*, Allstate Insurance Company was found to be subject to Ontario's section 275 as a result of having a North Carolina policy on vehicle involved in an accident in North Carolina[6]. The Ontario Court of Appeal expressly considered the issue to be resolved by the words of Justice Binnie in *Unifund* and dismissed an appeal.[7] Leave to the Supreme Court of Canada was refused.[8]

In *Royal Sun Alliance v. Wawanesa*, both insurers had issued Ontario policies. One was issued to the injured person and the other was issued in respect of the vehicle that he was operating. The accident occurred in Vermont. Section 275 was held to be applicable.[9] Justice Newbould considered that "the statements of Justice Binnie in *Unifund v. ICBC* govern the result of the case at bar and Royal is bound by the provisions of section 275 of the Act.

Summary and Conclusions

In this case the applicant asks that Section 275 of the Ontario statute be interpreted to apply to an accident outside of Ontario, with the effect of increasing the liability of an insurer under a contract made outside of Ontario. The sole, but important nexus to Ontario is that in other business with other policy holders the respondent Wawanesa is licensed in Ontario and issues contracts in Ontario.

I do not interpret Section 275 as extending to an event that otherwise has no connection with Ontario:

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[6] [2010] O.J. 600
[7] [2010] O.J. 4748 at para 6.
[8] [2011] S.C.C.A. No. 13
[9] (2006) CanLII 42663 (ON S.C.)

1. Section 45 does not apply s. 275 to this loss.
2. The Power of Attorney and Undertaking does not apply s. 275 to this loss.
3. The presumption against extra territoriality is not overcome by express language.
4. The policy rationale behind section 275 does not have extra territorial significance, and an extraterritorial application of section 275 would cause dislocation of loss costs in other jurisdictions.
5. Subsection 226(2) limits section 275 to contracts on automobiles required to be registered under the *Ontario Highway Traffic Act*, which does not include the vehicle insured by Wawanesa.

As I doubt the correctness of the supposition that Section 275 applies to accidents outside of Ontario that involve insurance contracts made outside of Ontario, I would be disinclined to give effect to Security National's request to advance its loss transfer arbitration in this case.

However, I feel that I am constrained by the cases decided previously that have looked into similar issues, and have elected to adopt the *Unifund* obiter as a controlling statement of the law. Although I am inclined to the view that the *Unifund* statement is not a binding and authoritative determination of the issue framed, that has not been the attitude of the courts that have previously confronted this problem.

Notwithstanding my reservations about whether there are sufficient connections between Wawanesa, in this circumstance, and Ontario, and the role of Subsection 226(2) of the Ontario *Insurance Act*, and the interpretation of Section 275 with respect to its territorial application, I believe I am constrained to follow the outcome in the *Primmum v. Allstate*, and *Royal Sun Alliance v. Wawanesa* cases. Each of these cases has confronted analogous facts and has come to the conclusion that loss transfer applies.

Accordingly, I conclude that Wawanesa must submit to arbitration and loss transfer in accordance with section 275 of the *Insurance Act* and the regulations thereunder.

If either party wishes to make submissions with respect to costs I will be pleased to hear those submissions within 30 days.

Dated at Toronto this 10th day of March, 2017.

LEE SAMIS
Arbitrator