CITATION: Aviva Insurance Company v. Echelon Insurance, 2024 ONSC 5921
COURT FILE NO.: CV-24-00717316-0000
DATE: 20241025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
AVIVA INSURANCE COMPANY OF CANADA	)	Andy Smith and Moire Jeganathan, for the Applicant
	)	
Applicant	)	
– and –	)	
	)	
ECHELON INSURANCE	)	Daniel Strigberger and Irene Tsui, for the Respondent
Respondent	)	
	)	
	)	
	)	**HEARD:** October 9, 2024

PAPAGEORGIOU J.

Overview

[1] This case involves the loss transfer provisions in the *Ontario Insurance Act*, RSO 1990, c. I.8 and whether the application of such provisions in this case is an impermissible extra-territorial reach; i.e., legislation being applied beyond the territorial jurisdiction of the province.

[2] The Applicant, Aviva Insurance Company of Canada ("Aviva"), is a federally incorporated Canadian business that is licensed to carry on automobile insurance in the provinces of Ontario and Alberta. Aviva provided insurance for Reinhart Developments Ltd.'s 2001 Chevrolet Silverado in Alberta in accordance with Alberta legislation.

[3] The Respondent, Echelon Insurance ("Echelon"), is an insurer licensed to carry on business in the province of Ontario. Echelon provided insurance to Mr. Jospeh Thoo, an Ontario resident, under a policy of insurance made in Ontario.

[4] On September 3, 2021, Mr. Thoo was riding his motorcycle in Alberta and was struck by Reinhart's Chevrolet, while being operated by Reeta Ali. Reinhart's car was at fault.

[5] Mr. Thoo applied for and obtained Ontario statutory accident benefits from Echelon in accordance with his Ontario policy and Echelon made various payments.

[6] Echelon later sought indemnity from Aviva based upon Ontario's loss transfer provisions set out in s. 275 of the *Ontario Insurance Act*. In seeking a loss transfer, Echelon relied upon the decision of the Ontario Court of Appeal in *Primmum Insurance Company v. Allstate Insurance Company*, 2010 ONCA 756.

[7] Aviva refused to indemnify Echelon, and the matter proceeded to arbitration.

[8] The parties entered into an arbitration agreement that provided that they reserved the right to appeal any award of the Arbitrator pursuant to ss. 45(2) and (3) of the *Ontario Insurance Act*.

[9] On March 8, 2024, Arbitrator Philippa Samworth (the "Arbitrator") released her decision where she found that she was bound by the decision of *Primmum v. Allstate* and as such, Ontario's loss transfer scheme applies to Aviva in the circumstances such that Aviva was bound to indemnify Echelon pursuant to s. 275 of the *Insurance Act.*

[10] Aviva appeals this decision pursuant to s. 45 of the *Arbitration Act*, 1991, SO 1991. It argues that Primmum was effectively overturned by a later decision of the Court of Appeal in *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382.

Decision

[11] For the reasons that follow I am dismissing this appeal. The Arbitrator followed the decision of the Court of Appeal in in *Primmum Insurance Company v. Allstate Insurance Company*, 2010 ONCA 756, which is a binding precedent on both the Arbitrator and this Court with respect to the loss transfer provisions in s. 275 of the *Insurance Act*.

[12] Although Court in *Travelers* expressed concern about the *Primmum* decision, *Travelers* addressed a different section of the *Ontario Insurance Act*, the priority provisions set out in s. 268 of the *Insurance Act*. The Court in *Travelers* did not overturn *Primmum*. As a matter of fact, *Primmum* is indistinguishable from this case. As such, it is still the directly applicable binding precedent on the issue of the extraterritorial application of the loss transfer provisions to an insurer, which like Aviva, is licensed to carry on automobile insurance in the province of Ontario.

Issues

- Issue 1: What is the standard of review?
- Issue 2: Did the Arbitrator err in law by relying upon the *Primmum* decision?

Analysis

Issue 1: What is the standard of review?

[13] I agree with the parties' joint submission that this appeal should proceed on the standard of review of correctness on issues of law and palpable and overriding error on issues of fact: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[14] There were no facts in dispute at the hearing before the Arbitrator. Therefore, the only issue is whether she erred in law in concluding that *Primmum* was binding authority on the issue before her.

Issue 2: Did the Arbitrator err in law by relying upon the *Primmum* decision?

[15] Before addressing this issue, it is important to set out some of the background to the legislative scheme, followed by a brief description of the relevant provisions and caselaw that lead to the *Primmum* decision.

The No-Fault Scheme

[16] In or around 1990, Ontario's tort system for addressing automotive accident claims was replaced by a no-fault scheme for statutory accident benefits. The overall goal of the new system was to ensure that drivers involved in accidents would be able to obtain accident benefits quickly so that they could obtain treatment quickly and thus recover instead of waiting until the outcome of a tort action to obtain funds which could be used for treatment.

[17] Section 268 of the *Insurance Act* compels insurance companies to pay accident benefits to insured parties.

> Statutory accident benefits
>
> **268** (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26 (1).

[18] To be entitled to coverage, a person must be an insured person under an insurance policy. There is a statutory accident benefits schedule that includes definitions used to determine who is an insured person. The term insured person in a policy covers the spouse of a named insured, the dependent of any named insured and someone who is listed as a driver or a secondary driver.

Priority of Coverage

[19] It is sometimes the case that an individual is an insured person under more than one policy. For example, an injured person could be the driver of the vehicle involved in the accident and have his own insurance in which case he is the named insured. Or the injured party could be an occupant

of the vehicle which was involved in the accident and also have their own insurance. In that case, the injured party would be able to make a claim under the driver's policy as well as their own.

[20] Thus, there is a priority issue when an injured party has recourse to more than insurer.

[21] Section 268(2) addresses the priority of insurers.

> Liability to pay
>
> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> 2. In respect of non-occupants,
>
> i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

[22] In general, these provisions mean that there is an order whereby an injured party should make a claim to his own insurer first, which has the highest priority. Then, pursuant to the priority scheme of the act, in defined circumstances, the first insurer may be able to claim an indemnity, i.e., a loss transfer from another insurer.

[23] The fact that priorities are specifically set out, however, does not mean that the issue is always clear cut. Sometimes, injured parties make an application for benefits to the wrong insurer, or insurers take issue with whether or not an individual has coverage or whether or not the circumstances of a loss transfer are satisfied And so, the legislature created a priority dispute resolution scheme in *Regulation* 283-95 whereby the first insurance company that receives the claim pays it and then disputes among insurers are adjudicated usually without the participation of the injured party. In that way, the injured party receives their benefits in a timely manner and it is the responsibility of the insurance company to pursue a priority claim.

[24] Priority dispute essentially involves coverage issues and who is an insured party based upon the insurance contracts at issue and the relationship between the insurance company and the insured.

Loss Transfer

[25] As noted, under the old system, the insurer collecting the premiums would not have to pay any significant accident benefits unless the driver they insured was at fault, but under the new system the insurer would have to pay accident benefits regardless of who was at fault.

[26] At the same time, the legislature considered the impact that a no-fault scheme could have on insurance companies that insured more vulnerable drivers like those who drive motorcycles or snow mobiles. In that regard, where such a vehicle is involved in an accident with a larger vehicle, the driver of such vehicles would often suffer greater injuries. Under the old system, the driver of such vehicle would sue the at fault driver who would then be responsible if liability was found.

[27] There was concern that under the no-fault system, the insurer of a such a driver who was not at fault, would then potentially have to pay catastrophic benefits under a no-fault scheme which could result in the skyrocketing of insurance premiums for such vehicles.

[28] And so, the legislature developed the concept of "loss transfer" where the cost of paying the accident benefits would be transferred from the insurer for a more vulnerable driver, like a motorcycle driver or snowmobile, to the at fault driver of the other vehicle. This is set out in s. 275:

> Indemnification in certain cases
>
> **275** (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions

> and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1.
>
> Idem
>
> (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. R.S.O. 1990, c. I.8, s. 275 (2).
>
> Deductible
>
> (3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (3); 1993, c. 10, s. 1.
>
> Arbitration
>
> (4) 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*. R.S.O. 1990, c. I.8, s. 275 (4); 2015, c. 20, Sched. 17, s. 5.

[29] The loss transfer occurs in the following types of situations: where a motorcycle or snowmobile is involved in an accident with a regular vehicle or where a heavy commercial vehicle is involved in an accident with a non-heavy commercial vehicle.

Unifund Assurance Co v. Insurance Corp

[30] Before turning to the Arbitrator's decision, it is also important to understand *Unifund Assurance Co. v. Insurance Corp of British Columbia*, 2003 SCC 40, a Supreme Court of Canada decision on loss transfer. *Unifund* is central to the Court's analysis in both *Primmum* and *Travelers*, which have opposite outcomes. Here it is helpful to recall that Aviva submits that *Travelers* overturned *Primmum.*

[31] In *Unifund*, Ontario residents had a serious accident in British Columbia when their car was struck by a tractor trailer. They sued the driver in tort in British Columbia. They also had a policy in Ontario and were entitled to accident benefits which they collected from their Ontario insurer. They ultimately won their tort claim in British Columbia, with the outcome that the accident benefits they had been paid by the Ontario insurer were deducted from the tort claim paid by the British Columbia insurer. This was pursuant to British Columbia law.

[32] The Ontario insurer made a claim for loss transfer pursuant to s. 275 of the *Ontario Insurance Act*. The British Columbia insurer had no presence in Ontario and was not licensed to sell insurance in Ontario. It took the position that the Ontario insurer could not avail itself of the loss transfer provisions. The Ontario insurer made an application to the Ontario Superior Court for the appointment of an arbitrator and the British Columbia insurer sought to stay the proceeding on the basis that the Ontario regulatory scheme could not constitutionally apply to it on the facts of the case. Although the stay motion was granted at first instance the Court of Appeal reversed that decision and found that the motions judge should have appointed the arbitrator to deal with jurisdictional and constitutional issues.

[33] In *Unifund*, on further appeal, the Supreme Court of Canada held that s. 275 of the *Ontario Insurance Act* was constitutionally inapplicable to the British Columbia insurer because its application in the circumstances of this case would not respect territorial limits on provincial jurisdiction; territorial restriction being fundamental to our system of federalism in which each province must respect the sovereignty of other provinces within their respective legislative spheres expecting the same in return.

[34] In *Unifund*, Binnie J. began the analysis by noting that the Ontario insurer's problem was that it did not have a valid cause of action. In that regard, it made a claim under s. 275 of the *Ontario Insurance Act* which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of payment of the statutory accident benefits pursuant to the *Ontario Insurance Act.* He stated (para. 10) that the Ontario insurer had no common law or equitable claim; rather it relied upon a statutory cause of action set out in s. 275.

[35] Binnie, J. noted (para. 9) that s. 275 provides a statutory mechanism for transferring losses between Ontario insurance companies that arise out of paying statutory accident benefits.

[36] He further noted (para. 23) that automobile insurance within a province is something within provincial legislative competence and that (para 50) it is well established that a province cannot legislate extra-jurisdictionally.

[37] Binnie, J. noted that because the Ontario insurer had only a statutory cause of action, the arbitrator could only be appointed if the loss transfer scheme of the *Ontario Insurance Act* applied.

[38] He noted that different provinces may have different statutory schemes and that in British Columbia, there were no loss transfer provisions that permitted indemnification.

[39] He rejected the Ontario insurer's argument that it could enforce the civil statutory cause of action in Ontario (the right to indemnification pursuant to s. 275) because there was no real and substantial connection between the British Columbia insurer and Ontario. In doing so (para. 63), he reviewed case law on the territorial limits of a province's ability to legislate with respect to matters not sufficiently connected to it as well as later formulations of extraterritoriality which began to focus less on "the idea of actual physical presence and more on the relationships among

the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation."

[40] Binnie, J. took into account (para. 82) the relationship between Ontario and the British Columbia insurer who was not authorized to sell insurance in Ontario and did not. Its insured vehicle in that case did not enter Ontario and the accident did not take place in Ontario.

[41] He concluded that "the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of "elsewhere". He emphasized that the British Columbia insurer "was not in the Ontario marketplace and, in [his] view, (para. 84) it was not required to "comply with the rules of the [Ontario] game."

[42] In an earlier paragraph in the decision, Binnie J also stated that "There is no doubt that if the [British Columbia insurer] was an Ontario insurer, it would be required to arbitrate [the Ontario insurer's] claim.

[43] As appears, a critical fact in the *Unifund* case was that the British Columbia insurer was not in the Ontario marketplace and was not an Ontario insurer.

Primmum

[44] In *Primmum*, a motorcycle driver was insured by Primmum Insurance Company, an Ontario insurance company. He was driving his motorcycle in North Carolina and struck by an at fault driver who was insured by Allstate Insurance Company, an insurance company that also did business in Ontario. However, the Allstate policy was issued in North Carolina. Primmum served Allstate with a notice to participate and submit to arbitration. Allstate refused on the basis that it was not an Ontario insurer and the accident did not occur in Ontario.

[45] The application judge in *Primmum* considered the following provisions in the *Insurance Act:*

1. "Insurer" means the person who undertakes or agrees or offers to undertake a contract.

2. Section 22(1): In this part, "contract" means a contract of automobile insurance that,

   (a) Is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or

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

[46] The application judge in *Primmum* concluded that Allstate was an "insurer" under the definition provision of the *Insurance Act* because it was licensed to sell insurance in Ontario, and

that it had issued ‘contracts’ because it was licensed to sell insurance in Ontario under s. 224(1)(a) of the Insurance Act.

[47] The application judge concluded that this was not an impermissible extraterritorial exercise of Ontario jurisdiction, but a case of an enforced arbitration of a statutory cause of action between two Ontario insurers over which Ontario had jurisdiction because they both did business in Ontario.

[48] The Court of Appeal upheld the application judge and concluded:

> [6] …We agree with the application judge that the issue here is resolved by the decision of the Supreme Court of Canada in *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63 where Binnie J. said:
>
> > Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to the *Ontario Arbitrations Act*, 1991, S.O. 1991, c. 17. There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund’s claim.
>
> [7] Allstate is an Ontario insurer. Accordingly, it must arbitrate Primmum’s claim.

The case at bar

[49] In my opinion, the Arbitrator in the case at bar correctly noted that this case is on all fours with *Primmum* and that it was a binding precedent on her. In that regard, as noted, although the accident occurred in Alberta, Aviva was licensed to sell and did business in Ontario. Therefore, pursuant to *ratio of Primmum* and the considered *obiter* of the *Unifund* case, the loss transfer provisions applied to Aviva.

[50] The Arbitrator also correctly noted that other courts had come to the same conclusion about the territorial reach of the loss transfer provisions; see *Royal & Sun Alliance Insurance v. Wawanesa Mutual Insurance* (2006), 88 O.R. (3d) and *CAA v. American Home*, 2007 CarswellOnt 11762.

The *Travelers* decision

[51] Notwithstanding the above directly applicable precedents, the Arbitrator still proceeded to consider Aviva’s argument that the Court of Appeal in *Travelers*, had overturned Primmum In my opinion, the Arbitrator correctly rejected Aviva’s argument.

[52] In the case at bar, the Arbitrator reviewed the facts of *Travelers* which involved a priority dispute involving an Ontario resident temporarily employed in Nunavut who, while driving a Nunavut plated vehicle, owned by the government of Nunavut and covered under a Nunavut insurance policy issued by Travelers Insurance Company, had a car accident. Under the Nunavut policy, she was entitled to Nunavut statutory accident benefits, but she also owned a car in Ontario

insured by CAA. She applied for statutory benefits to CAA and CAA took the position that Travelers Insurance Company was the priority insurer.

[53] The Court of Appeal in *Travelers* applied the decision in *Unifund* and concluded that CAA was not an Ontario insurer for the purposes of the priority provisions of the *Ontario Insurance Act*.

[54] At paragraph 25 of its *Travelers* decision, the Court of Appeal concluded that the mere licensing or the presence of an office does not convert insurers who operate in multiple jurisdictions into Ontario insurers for all purposes, nor does it make the *Ontario insurance Act* the governing legislation for all of the automobile insurance policies they underwrite. Treating mere Ontario licensing as the sole reason to constitute an insurer as an "Ontario insurer" would give Ontario insurance legislative extraterritorial effect, which would be contrary to the essential holding in *Unifund*.

[55] The Arbitrator then considered Aviva's argument that the following comments by the Court of Appeal in *Travelers* meant that *Primmum* did not apply in this case due to the omission of the Court in *Primmum* or *Unifund* to examine what was meant by an Ontario insurer. The Court of Appeal in *Travelers* stated:

> "Moreover, neither the Primmum application judge nor this court explored what Binnie J. meant by "Ontario insurer", which, as noted earlier, is not a defined term. That exploration remains open to the court and has been undertaken in this case."

[56] Returning to the case at bar, the Arbitrator indicated that "while Binnie J. may not have specifically explained what he meant by Ontario insurer, it seems to be implicit when reviewing the decision that an Ontario insurer would be one that was authorized to sell insurance in Ontario and sold insurance in Ontario."

[57] I agree with the Arbitrator's conclusion that this is implicitly what Binnie J. meant within the context of all the facts of that case where like Aviva in the case at bar, the insurer was authorized to sell insurance in Ontario and did sell insurance in Ontario. It is unclear what else Binnie, J. would have meant.

[58] Moreover in *Travelers* at footnote 4, the Court pointed out that Travelers Insurance Company did not argue that *Primmum* was wrongly decided. The Court specifically stated, "I leave open the question of whether *Primmum* was correctly decided for another day." The Court of Appeal clearly did not overturn *Primmum* when it decided *Travelers.*

[59] The Arbitrator correctly concluded that the Court in *Travelers* did not overturn the result in *Primmum* which is on all fours with this matter and which is the directly applicable binding authority.

[60] The Arbitrator also did her own analysis of the statutory provisions which lead her to the exact same conclusion as *Primmum*.

[61] The Arbitrator correctly noted that loss transfer is a creature of statute, is not available at common law and that there are differences between a priority claim and a loss transfer claim.

[62] She correctly noted that while a priority dispute considers the contract between the insured and the insurer, to determine which of the two contracts stand in priority under s. 268 of the *Insurance Act*, loss transfer is merely a statutory scheme to transfer risk between two insurers taking into consideration the risk associated with driving motorcycles or heavy commercial vehicles.

[63] She also correctly noted that s. 275 does not make reference to an "Ontario insurer". Rather, it requires that the insurer seeking to activate the loss transfer must be responsible under s. 268(2).

[64] She also correctly noted that while s. 275 specifically states that the insurer who may make a loss transfer claim must be liable to make a payment under s. 268(2), s. 275 does not contain the same language with respect to the insurer who is liable to pay a loss transfer. The recipient insurer is defined in s. 275 as "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." She considered this difference to be material to the interpretation of the matter.

[65] My only criticism of the Arbitrator is with respect to her own analysis of the issue. She did not engage with the underlying issue raised by Aviva and referenced in *Travelers* with respect to whether the application of the loss transfer provision in this kind of case is an impermissible extra-territorial reach. She primarily engaged in a statutory interpretation issue as to what the *Ontario Insurance Act* meant. This type of analysis does not solve or address the issue of whether or not the application of the loss transfer provisions in a case like this is constitutionally sound or an impermissible extra-territorial reach. In that regard, just because a province drafts legislation that properly interpreted gives it jurisdiction over what is alleged to be an out of province matter, that does not mean that that it is constitutionally permitted or not an impermissible extra-territorial reach.

[66] Nevertheless, given the binding precedent of *Primmum*, which was on all fours with this case, the Arbitrator made no error in arriving at the result that all that is required for loss transfer is that "the insurer" insured the specified class of vehicle that was involved in the accident and that such insurance company was licensed to sell insurance in Ontario, regardless of what territory it sold the applicable insurance in.

[67] I do not overturn the result as I am also bound by the same authorities that expressly direct this outcome in this case, even if there are some *obiter* comments in other cases that raise concerns.

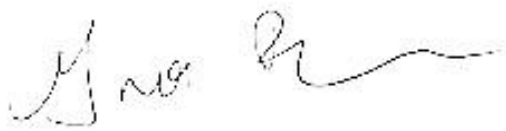
Conclusion

[68] While the Court of Appeal expressed concerns with the decision in *Primmum* and whether it was correctly decided in *Travelers*, it left that issue for another day.

[69] As ultimately conceded by both parties in argument, resolving some of the conflicting case law is a matter for the appellate courts.

[70] Therefore, I dismiss the appeal.

[71] In my view there are good arguments that there should be no costs of this appeal. If the parties do not resolve the issue of costs they may make submissions as follows: Aviva within 5 days and Echelon within 5 days thereafter.



Papageorgiou J.

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AVIVA INSURANCE COMPANY OF CANADA

Applicant

– and –

ECHELON INSURANCE

Respondent

REASONS FOR JUDGMENT

Papageorgiou J.

Released: October 25, 2024