IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, C. I.8, AND REGULATION 664 AS AMENDED

AND IN THE MATTER OF THE ARBITRATION ACT S.O. 1991,
CHAPTER 17, AS AMENDED

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ING INSURANCE COMPANY OF CANADA

Applicant

- and –

CHUBB INSURANCE COMPANY OF CANADA

Respondent

AWARD

COUNSEL

David Dinner
Counsel for the Applicant

George Kanellakos
Counsel for the Respondent

FACTS:

This matter arises out of a collision that occurred on May 28, 2002. Mr. James Brooks ("Brooks") was a passenger in a 1992 Buick Regal driven by Ms. Barbara Oliver ("Oliver") and insured with ING Insurance Company of Canada ("ING"). Oliver was traveling west on Esander Drive, in Toronto, when a street cleaner pulled over to the right of Esander Drive and turned left into the right side of Oliver's vehicle. The street cleaner

struck the front passenger door and continued on an angle crushing the back passenger door where Brooks was seated. Brooks sustained a fractured right elbow and a fractured right shoulder. As a result of the injuries sustained by Brooks, ING paid him statutory accident benefits.

Chubb Insurance Company of Canada ("Chubb") was the insurer of the street sweeper, pursuant to the provisions of a Commercial General Liability insurance policy, issued to Bruell Contracting Limited ("Bruell"). The named insured under the Chubb policy is "Bruell Contracting Limited." The street sweeper in question is not listed under the Chubb automobile policy and is not registered under the *Highway Traffic Act.* The street sweeper has no vehicle registration documents and it does not have a V.I.N. number. The street sweeper does not have license plates. [1]

ISSUES:

The issues to be decided in this Loss Transfer matter are:

1. Whether the street sweeper insured by Chubb, falls within the definition of "automobile", as that term is used in Section 275 of the *Insurance Act*?; and
2. If the answer to issue 1 is yes, whether the street sweeper insured by Chubb is a "heavy commercial vehicle" within the definition of Section 9 of Regulation 664/90 as amended?

EVIDENCE:

This Arbitration proceeded by way of the presentation of documentary evidence and written submissions. There was no oral evidence or oral submissions made to me.

[1] See Affidavit of Doug Goudreau, at paragraphs 3-4 and Affidavit of Alex Jordan, at paragraph 5.

ING'S POSITION:

ING argues that the street sweeper is an "automobile" and a "heavy commercial vehicle", as a result of which the Loss Transfer provisions in Section 275 of the *Insurance Act* apply to the facts in this case for the following reasons:

1. The street sweeper is a self-propelled vehicle and as such is considered to be both an automobile and a motor vehicle by definition, under the *Insurance Act* and the *Highway Traffic Act.* By virtue of being considered an automobile, Bruell has violated both the *Insurance Act* and the *Compulsory Automobile Insurance Act* by failing to insure the street sweeper pursuant to a contract of automobile insurance;

2. The street sweeper is required to be insured under a separate Motor Vehicle Liability Policy. Pursuant to the Commercial General Liability Policy, the street sweeper is considered an "auto". Bruell's failure to obtain a separate motor vehicle liability policy has violated the provisions contained in the *Insurance Act;*

3. The street sweeper is not considered a "road building machine" under the *Highway Traffic Act* since its main purpose is not related to the construction or maintenance of highways. The purpose of the street sweeper is in no way related to the building of highways, which was the legislature's intended meaning when it created a definition for "road building machine" in the *Highway Traffic Act.* The street sweeper is properly classified as a commercial vehicle, since its intended purpose is to transport goods and materials such as water, debris and garbage; and

4. The street sweeper qualifies as a heavy commercial vehicle and is not excluded from the Loss Transfer provisions contained in the *Insurance Act.*

CHUBB'S POSITION:

Chubb argues that the street sweeper is not an "automobile" or a "heavy commercial vehicle", as a result of which the Loss Transfer provisions in section 275 of the *Insurance Act* do not apply to the facts of this case for the following reasons:

1. The street sweeper insured by Chubb does not fall within the definition of "automobile" as that term is used in section 275 of the *Insurance Act;*

2. The street sweeper is not an automobile in ordinary parlance, nor was it required under any Act to be insured under a motor vehicle liability policy;

3. The street sweeper was purchased from MOBIL as one of several units in or around 1975. At the time of purchase, MOBIL and the Ontario Ministry of Transportation advised Bruell Contracting Limited that the street sweeper did not have to be registered under the *Highway Traffic Act* and that it could be operated unplated;

4. The street sweeper falls under the *Highway Traffic Act* definition of "road building machine" and is commonly used in the cleaning and maintenance of highways. Therefore, Chubb insured the street sweeper under a Commercial General Liability Policy;

5. The "street sweeper" is not required to be registered pursuant to the provisions of the *Highway Traffic Act* as the definition of "motor vehicle" thereunder specifically excludes any "road building machine";

6. The street sweeper is not a "heavy commercial vehicle" as defined in Section 9 of Ontario Regulation 664/90, as amended; and

7. The street sweeper is not properly classified as a "commercial vehicle" as defined by the Regulation because of the following:

    1. The street sweeper in question is not an "automobile" in ordinary parlance;
    2. A street sweeper is not used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation; and
    3. The sole purpose of the street sweeper is properly characterized as a "road-building machine" as it is used for the cleaning and maintenance of highways.

ANALYSIS:

To determine if a vehicle is an "automobile" for the purposes of Section 275 of the *Insurance Act,* one must begin with the *Insurance Act*[2], travel through the *Compulsory Automobile Insurance Act*[3], as amended, and proceed to the *Highway Traffic Act*[4], as amended.

Section 1 of the *Insurance Act* defines "automobile" as follows:

> "automobile" includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that run on rails, watercraft or aircraft;

Pursuant to Section 224(1) contained in Part IV of the *Insurance Act,* an "automobile" is defined as follows:

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[2] *Insurance Act*, R.S.O. 1990, Chapter I.8, Section 1.

[3] *Compulsory Automobile Insurance Act,* R.S.O. 1990, c. C.25.

[4] *Highway Traffic Act,* R.S.O. 1990, Chapter H.8, Section 1(1).

"automobile" includes,

(a) a motor vehicle required under any *Act* to be insured under a motor vehicle liability policy; and

(b) a vehicle prescribed by regulation to be an automobile.

The Ontario Court of Appeal in *Regele v. Sluszrezyk*[5], held that Section 224(1) is the statutory provision essential to the determination of the issues to be determined in this arbitration. A reasonable interpretation of the language in Section 224(1) leads me to the conclusion that a motor vehicle required under any Act to be insured under a "Motor Vehicle" (not automobile) Liability Policy is an "automobile". In other words, motor vehicles that are not, in ordinary parlance, "automobiles," are automobiles if they are motor vehicles required to be insured under a motor vehicle liability policy.

Section 1(1) of the *Compulsory Automobile Insurance Act*, defines "motor vehicle" to have the same meaning as in the *Highway Traffic Act*, and to include trailers, accessories and equipment of a "motor vehicle".

Subsection 1(1) of the *Highway Traffic Act*, defines "motor vehicle"' as:

> "motor vehicle" includes an automobile, motorcycle, motor assisted bicycle unless otherwise indicated in this *Act*, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car, or other motor vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self-propelled implement of husbandry or road-building machine within the meaning of this *Act*.

[5] *Regele v. Sluszrezyk et al.* [1997] O.J. No. 1849.

Subsection 1(1) of the *Highway Traffic Act*, defines "road-building machine" as:

> "road-building machine" means a self-propelled vehicle of a design commonly used in the construction or maintenance of highways, including but not limited to,
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> (a) asphalt spreaders, concrete paving or finishing machines, motor graders, rollers, tractor-dozers and motor scrapers,
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> (b) tracked and wheeled tractors of all kind while equipped with mowers, post-hole diggers, compactors, weed spraying equipment, snow blowers and snow plows, front-end loaders, back-hoes or rock drills, and
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> (c) power shovels on tracks and drag lines on tracks,
>
> but not including a commercial motor vehicle.

The Ontario Court of Appeal in *Regele v. Slusarczyk*[6], established a two part test to be followed in determining what constitutes an "automobile" for the purposes of Part VI of the *Insurance Act.* The first step is to determine if the vehicle is something, which would be considered to be an "automobile" in ordinary parlance. If the answer to the inquiry is in the affirmative, then the Court does not have to go any further. However, if the answer is negative, then the Court has to go further and consider whether or not the vehicle in question is "a motor vehicle required under any Act to be insured under a motor vehicle policy."[7]

The Ontario Court of Appeal considered the question of whether certain vehicles were "automobiles" within the meaning of Section 224(1) of the *Insurance Act* in *Copley v. Kerr Farms Ltd.*[8], *Regele v. Slusarczyk*[9], *Morton v. Rabito*[10], *and Fortin v. Laplante*[11]. In

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[6] *Regele v. Sluszrezyk et al.* [1997] O.J. No. 1849.

[7] *Regele v. Slusarczyk,* [1997] O.J. No. 1849 at pp.2-3.

[8] *Copley v. Kerr Farms Ltd.,* [2002] O.J. No. 1644.

[9] *Regele v. Slusarczyk,* [1997] O.J. No. 1849.

[10] *Morton et al. v. Rabito et al.,* [1998] O.J. No. 5129.

[11] *Fortin v. Laplante,* [2000] O.J. No. 414.

these cases, the court determined that the following vehicles were not "automobiles": a flatbed trailer used to haul tomatoes ("tomato wagon"), a farm tractor, a backhoe, and a snowmobile. In all but the case dealing with the tomato wagon, the vehicles in question were expressly excluded in the definition of "motor vehicle" in the *Highway Traffic Act.*

In *Copley v. Kerr Farms Ltd.,* the Plaintiff was injured while attempting to connect a tomato wagon to a transport truck, in order to transport tomatoes from the field to a processing plant. The issue turned on whether or not the tomato wagon fell within the definition of "automobile" in the *Compulsory Automobile Insurance Act,* which includes "trailers and accessories and equipment of a motor vehicle". Although the Court concluded that the tomato wagon was indeed a "trailer", the Court determined that the phrase "of a motor vehicle" meant only trailers attached to and under the power of a motor vehicle could properly fit the definition. Because the tomato wagon was not attached to a motor vehicle when the accident occurred, the Court found that it was not a motor vehicle within that statute.

In *Regele v. Slusarczyk,* the Court held that a farm tractor was not an "automobile" within the meaning of Part VI of the *Insurance Act*, because Section 224(1) incorporates the *Highway Traffic Act* definition of motor vehicle which expressly excludes a farm tractor. The Court stated that when a word is not exhaustively defined, its usual meaning is conserved. The non-exhaustive definition merely clarifies or extends the ordinary meaning. The Court held that in order to determine if a vehicle is an automobile, Section 224(1) of the *Insurance Act* as well as the *Highway Traffic* Act and the *Compulsory Automobile Insurance Act* must be examined.[12]

In *Morton v. Rabito,* the Court, relying on *Regele,* held that a backhoe does not fall within the definition of "automobile" either in ordinary parlance or within some enlarged definition of that term found in the insurance policy. There was no relevant distinction between a farm tractor and a backhoe and, therefore, a backhoe was not an "automobile" within Section 224(1) of the *Insurance Act.*

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[12] *Regele v. Slusarczyk,* [1997] O.J. No. 1849.

In *Fortin v. Laplante,* the Court concluded that a snowmobile was not an "automobile" within Section 224(1) of the *Insurance Act*, because the *Highway Traffic Act* definition of "motor vehicle" expressly excludes a motorized snow vehicle.

Other Courts have also dealt with the scope of the definition of "automobile". In *Grummett v. Federation*[13], the Ontario Superior Court had to decide whether a racecar was an "automobile". The Plaintiff, a named insured under a standard motor vehicle liability policy, was injured while at a racetrack. A wheel came off of a racecar as a result of a collision. The Court found that the racecar was not, in ordinary parlance, an automobile, paying special attention to the differences between the function and purpose of a racecar compared to those of an automobile. As a result, the Court went on to conclude that there was nothing in Section 224(1) of the *Insurance Act* or the subject insurance policy that would be broad enough to include the racecar in the definition of "automobile".

The *Regele, Morton and Fortin* cases from the Ontario Court of Appeal make it clear that vehicles which are expressly excluded from the definition of "motor vehicle" in the *Highway Traffic Act* are not "automobiles" within the *Insurance Act.* Where not expressly excluded, the Court in *Copley* suggests that a non-motorized vehicle such as a trailer in that case could only be considered a motor vehicle requiring insurance when attached to a motorized vehicle and furthermore the location of the accident may be important. The *Grummett* case suggests that the design, function and purpose of the vehicle are essential to the determination of whether a vehicle is an "automobile".

I am persuaded that in accordance with the evidence presented, that a street sweeper is not a motor vehicle under the *Highway Traffic Act* as it is a "self-propelled vehicle of a design commonly used in the ... maintenance of highways", and it falls within the definition of road-building machine. Since a road-building machine is not a "motor

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[13] *Grummett et al. v. Federation et al.,* [1999] O.J. No. 4854.

vehicle", it is not required to be insured under Section 224(1) of the *Insurance Act* and is not an automobile.

In addition, I find that the contract of insurance under which the street sweeper was insured by Chubb, was not a motor vehicle liability policy. As a result, Part IV of the *Insurance Act* does not apply, as it only applies to motor vehicle liability policies (see Section 226(2) of the *Insurance Act.*) Since Part IV of the *Insurance Act* does not apply to the Chubb policy, as it is not a motor vehicle liability policy, Chubb has no obligation under Section 275 of the *Insurance Act* to indemnify ING for the payment of statutory accident benefits to its insured. This finding is supported by the Court of Appeal decision in *Jevco Insurance Co. v. Commercial Union Assurance*[14]. I am in agreement with the following conclusions reached by Catzman J.A. at page 9, where he states:

> There is a second reason why the Jevco appeal cannot succeed. Assuming, for the purpose of argument, that a backhoe is a class of automobile contemplated by s. 275. I agree with Hoilett J. that the operation of that section is excluded by s. 226(2) of the *Insurance Act.* That subsection makes Part VI inapplicable 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". A backhoe is not required to be registered under the *Highway Traffic Act.* The definitions sections of that Act specifically excludes from the definition of "motor vehicle" any "road building machine", and the definition of "road-building machine" in the same section specifically includes backhoes. The backhoe is not insured under a contract evidenced by a form of policy approved under Part VI.

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[14] *Jevco Insurance Co. v. Commercial Union Assurance,* [1998] O.J. No. 5129.

> I therefore conclude that, both because a backhoe is not an automobile for the purposes of Part VI of the *Insurance Act* and because, even if it is the application of Part VI is specifically excluded by s. 226(2), Hoilett J. was correct in declaring that Commercial Union was not a "second party insurer" within the meaning of s. 275.

In summary, my decision is as follows:

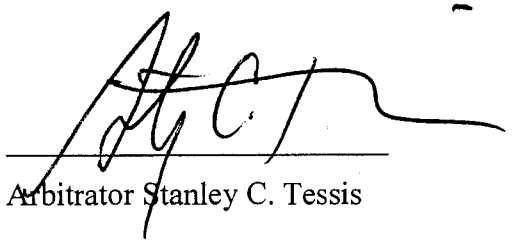
1. The street sweeper is not an "automobile" under Section 224(1) of the *Insurance Act*;

2. Chubb has no obligation under Section 275 of the *Insurance Act*, as it did not insure the street sweeper under a motor vehicle liability policy; and

As a result of my decision, ING has no right of indemnity from Chubb under Section 275 of the *Insurance Act,* and therefore, I will not address the second issue of whether the street sweeper insured by Chubb is a "heavy commercial vehicle" within the definition of Section 9 of Regulation 664/90, as amended.

In the event that the parties are unable to agree on the issue of costs I may be spoken to.

Date: May 7, 2007



Arbitrator Stanley C. Tessis