IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

and

NORTHLAND INSURANCE

Respondent

AWARD

Heard: July 6, 2012

Counsel:

Daniel Strigberger for the applicant, Economical Mutual Insurance Company

Marie Hynes for the respondent, Northland Insurance

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is a loss transfer arbitration pursuant to section 275 of the *Insurance Act.* The facts are not in dispute. An accident occurred at the intersection of Bovaird Drive and Great Lakes Boulevard in Brampton, Ontario on June 15, 2007.

A truck insured by the respondent ("Northland") struck a vehicle insured by State Farm Insurance Company from the rear. As a result of this collision the State Farm vehicle was pushed forward and collided with the vehicle insured by the applicant ("Economical"). The Economical insured vehicle was pushed forward and collided with a vehicle insured by the Personal Insurance Company. Economical paid SABS to three claimants, and sought loss transfer indemnity against Northland.

Northland made some loss transfer indemnity payments totaling approximately $40,000.00 to Economical, and then stopped making payments. This has given rise to an issue as to whether Northland waived its rights to dispute its responsibility to indemnify Economical in loss transfer.

The parties agreed to defer resolution of the waiver issue, if necessary, until after my decision on the question of how the Fault Determination Rules ("FDR") apply to the case.

The parties have agreed that my decision may be appealed on a question of law, or a question of mixed fact and law.

The Issue

1. What is the proper application of the FDR to the facts of this case?

The Evidence

The matter proceeded before me based on facts agreed to by the parties and confirmed on the record at the beginning of the arbitration hearing as follows:

1. The Northland vehicle was a heavy commercial vehicle within the meaning of the loss transfer regulation.

2. The four vehicles involved in the incident were traveling in the same lane in the same direction.

3. The Northland vehicle came into collision only with the vehicle insured by State Farm.

4. The Northland vehicle was the only vehicle moving at the time of the incident. The other three vehicles were stopped.

5. FDR 9 (1), (2), and (4) apply to the circumstances of this incident.

Analysis

Economical's position is that the proper interpretation of FDR 9 permits it to recover loss transfer indemnity from Northland. In support of its position Economical

relies upon the decision of Justice Chapnik of the Ontario Superior Court in *Royal & SunAlliance Insurance Company of Canada v. AXA Insurance (Canada)*.[1] Justice Chapnik's decision upholds the decision of Arbitrator Robinson.[2] *Royal v. AXA* has been followed by Arbitrator Novick in *State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada*.[3]

Northland's position is that the proper interpretation of FDR 9 does not allow Economical to recover loss transfer indemnity. In support of its position Northland relies on the decision of Justice Pitt of the Ontario Superior Court in *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*[4]

The relevant parts of the statutory provisions which govern this case are set out below.[5]

Section 275 of the Insurance Act reads as follows:

> 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 statutory accident benefits arose**.
>
> 275 (2) **Indemnification** under subsection (1) **shall be made according to the respective degree of fault** of each insurer's insured as determined under the fault determination rules.

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[1] 2012 ONSC 3095 (CanLII), ("Royal v. AXA").
[2] *AXA Insurance (Canada) v. Royal & Sun Alliance Insurance Company*, July 27, 2011 ("*AXA v. Royal*").
[3] November 2, 2012, ("*State Farm v. Old Republic*").
[4] [1999] O.J. No. 4467, ("*GAN v. State Farm*").
[5] Highlighting and underlining is the Arbitrator's emphasis.

FDR 2 (1) of Regulation 668 reads as follows:

> 2 (1) An insurer shall determine the **degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile** in accordance with these rules.

FDR 9 of Regulation 668 reads as follows:

> 9 (1) This section applies with respect to **an incident involving three or more automobiles** that are traveling in the same direction and in the same lane (a "chain reaction").
>
> 9 (2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile.
>
> 9 (4) If only automobile "C"[6] is in motion **when the incident occurs**,
>
> (a) in the collision between automobiles "A" and "B", **neither driver is at fault for the incident**; and
>
> (b) in the collision between automobiles "B" and "C", the driver of automobile "B" is not at fault and the driver of automobile **"C" is 100% at fault for the incident**.

I will begin my analysis with a review of the case law. *GAN v. State Farm* was initially decided by Arbitrator Rudolph. The case arose out of a five vehicle collision on the Don Valley Parkway. A heavy commercial vehicle insured by GAN rear-ended a vehicle in front of it. That vehicle was pushed into a vehicle insured by State Farm. There were two more collisions caused involving the State Farm vehicle hitting the vehicle in front of it, and that vehicle striking the front vehicle. All of the vehicles were in

[6] The section contains a diagram not reproduced here. The diagram indicates that in a 3 vehicle "chain reaction", automobile "A" is the leading vehicle, automobile "B" is second, and automobile "C" is the third vehicle.

the same lane. All of vehicles were stopped except for the heavy commercial vehicle. State Farm paid SABS claims and sought loss transfer indemnity from GAN.

Although Arbitrator Rudolph thought that "*on the face of it*" FDR 9 applied to the facts of the case before him, he declined to apply FDR 9 because he concluded that it did not accurately describe the circumstances of the accident. He appears to have been influenced in his conclusion by accepting the argument advanced by GAN that FDR 9 (4) does not address whether a vehicle in the position of the heavy commercial vehicle insured by GAN is liable for a loss transfer to a vehicle in the position of the State Farm vehicle. In other words, Arbitrator Rudolph did not believe that FDR 9 (4) dealt with whether a vehicle could claim loss transfer from a heavy commercial vehicle where there was a vehicle in between them, and the heavy commercial vehicle collided only with the vehicle in between, not the vehicle seeking loss transfer.

Consequently, Arbitrator Rudolph applied the default FDR 5, and used the ordinary laws of negligence to conclude that the heavy commercial vehicle insured by GAN was 100% at fault for the incident. As a result he found that State Farm was entitled to loss transfer indemnity from GAN.

On appeal Justice Pitt held that the arbitrator wrongly concluded FDR 9 did not apply to the facts of the case because the arbitrator accepted GAN's submission that fault between car "A" (the leading vehicle) and "C" (the third vehicle) "*is not apportioned*". After stating that FDR 9 applied because "... *the incident of a three-car collision is in fact described in the rules*", Justice Pitt concludes as follows:[7]

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[7] At paragraphs 18 and 19.

> ... the (section 9 (2)) formula established for apportioning fault between the directly colliding cars has no application to cars which are involved in the same chain collision but did not collide with each other. In the result, as between car "C" and "A" which have not collided with each other, the Legislature has decided that no apportionment of liability is to be made as between these two cars... No transfer in liability from GAN to State Farm is required under the FDRs...

Arbitrator Robinson considered this issue in *AXA v. Royal*. The facts were that accident occurred on Highway 400 in the Barrie area involving as many as 200 vehicles. It appears that the accident was caused in large part because of fog. The relevant part of the accident giving rise to the SABS claims and loss transfer indemnity claim involved two passenger vehicles and a dump truck – a heavy commercial vehicle. Arbitrator Robinson found that the leading vehicle insured by AXA was stopped in the centre lane. Another vehicle stopped behind the AXA vehicle. Arbitrator Robinson found that the dump truck struck the vehicle stopped behind the AXA vehicle from behind, pushing it into the AXA vehicle. He found that the dump truck then moved into the left lane, colliding with the AXA vehicle as it was passing by. The dump truck went on to collide with another vehicle.

There was a debate in the evidence about whether the dump truck had collided with the AXA vehicle. Although arbitrator Robinson found that the dump truck did collide with the AXA vehicle, he considered whether AXA could seek loss transfer indemnity from Royal even if there had been no collision between the Royal dump truck and the AXA vehicle. On this issue he referred to and adopted the reasoning of Arbitrator Samis in *Dominion of Canada General Insurance Company v. Kingsway General Insurance*

Company[8], and Justice Sachs of the Ontario Superior Court who affirmed Arbitrator Samis' decision.[9]

In that case a heavy commercial vehicle was pulling out onto the highway from a service station. In doing so it essentially "cut off" a vehicle that was traveling on the main highway. This vehicle veered to the left to avoid a collision with the heavy commercial vehicle pulling out onto the highway. This vehicle successfully avoided a collision with the heavy commercial vehicle, but ended up colliding with another vehicle that was parked on the west shoulder of the highway. The insurer of the vehicle that veered to avoid the collision paid SABS and sought loss transfer indemnity against insurer of the heavy commercial vehicle that had been pulling out from the service station. The issue before Arbitrator Samis was whether the heavy commercial vehicle was "involved in the incident" so as to give rise to loss transfer indemnity entitlement pursuant to section 275 of the *Insurance Act*.

Arbitrator Samis considered a number of factors he thought relevant and concluded that a heavy commercial vehicle can be "involved in an incident" without there being a collision between the vehicle seeking loss transfer indemnity and the heavy commercial vehicle.

Justice Sachs affirmed the Arbitrator's decision, stating as follows:

> ...the arbitrator found that a vehicle could be involved in an incident without actually colliding with any other vehicles. He took into account factors such as the physical proximity of the heavy commercial vehicle to the vehicles which did collide; the time interval between the actions of the heavy commercial vehicle and

[8] August 23, 1999 ("Dominion v. Kingsway").
[9] Unreported, January 11, 2000, Sachs J.

> the vehicle that lost control; the possibility that the actions of the heavy commercial vehicle caused the action of the (vehicle avoiding the heavy commercial vehicle) and whether it was forseeable that the actions of the heavy commercial vehicle might cause harm or injury to another vehicle and its occupants. Applying these criteria he concluded that the heavy commercial vehicle was involved in the incident. In my view the arbitrator was correct...

Arbitrator Robinson then states that he was referred by Royal to Justice Pitt's decision in *GAN v. State Farm,* presumably for its holding that a collision between a heavy commercial vehicle and the loss transfer seeking vehicle is required before loss transfer indemnity is permitted. In concluding that he preferred the approach taken in *Dominion v. Kingsway*, he comments as follows:

> ...I find the facts of *Gan v. State Farm* distinguishable from the ones before me and also that the decision of Justice Sachs provides a more reasonable review of the law. Arbitrator Bialkowski in *Royal and SunAlliance Insurance Company v. State Farm Mutual Automobile Insurance Company*, dated January 2006, accepted the reasoning of Justice Sachs in *Dominion of Canada General Insurance Company v. Kingsway General Insurance Company* and chose not to follow the decision of Justice Pitt. I too accept the reasoning of Justice Sachs as applied to the facts before me... I find that the absence of contact between two vehicles is relevant in analyzing whether a loss transfer applies, but is only one factor among many.

Arbitrator Robinson went on to apply FDR 9 (4) to the facts of the case before him, concluding that the Royal dump truck was 100% at fault for the incident, and that AXA was entitled to pursue loss transfer indemnity against Royal. He declined to apply FDR 11, the "pile-up" rule. To do so he would have had to focus on the collision that he found took place between the Royal dump truck and the AXA vehicle while the dump truck was in the lane adjacent to the AXA vehicle. Instead, he focused on the initial

incident whereby the dump truck collided with the vehicle behind the AXA vehicle, pushing it into the AXA vehicle, and applied FDR 9.

Justice Chapnik upheld Arbitrator Robinson's decision. The relevant parts of her judgment read as follows:[10]

> Rule 9 governs "chain reaction" collisions between three or more automobiles traveling in the same direction and lane. Pursuant to subsection 9 (4), if only the last automobile was in motion when he change reaction incident occurred, the driver of that automobile is 100% at fault. In making the assessment, fault is determined without reference to related collisions involving either of the automobiles and another automobile.
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> ... Royal relies on the decision of Pitt J. in (*GAN v. State Farm*), in which the court found that the formula in Rules 9 (2) and 9 (4) does not apply to cars that are involved in the same chain collision but do not collide with each other; and further, that between the two cars that have not collided with each other, the legislature has placed no apportionment of liability between those cars.
>
> The arbitrator distinguished the facts in GAN and held that to the extent his decision was inconsistent with it, he preferred the reasoning of Sachs J. in (*Dominion v. Kingsway*).
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> In that case, the Court concluded that loss transfer of 100% fault applied in respect of a vehicle that did not physically strike the other vehicle while emphasizing that the absence of contact is only one factor in determining whether a loss transfer applies.
>
> The factual circumstances here support the application of Rule 9 (4), even if the subject automobiles did not collide with each other. It is common ground that all three subject automobiles were in the centre southbound lane at the time of the impact. Pursuant to rule 9 (4) if only the last vehicle is in motion at the impact, that vehicle is 100% at fault for the collision.

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[10] At pages 4 – 6.

In my view, the arbitrator applied Rule 9 (4) correctly.

Moreover, I agree with the submission of the respondent that to leave the insurer of a passenger vehicle without recourse to a loss transfer despite a finding that he heavy commercial vehicle is 100% at fault for the damages sustained by it, would be contrary to the legislation's intention.

... The Fault Determination Rules hold that the truck is 100% at fault for the collision involving the Jones and AXA automobile. In my view, the arbitrator was correct in finding that AXA is entitled to indemnification based on the apportionment of fault of the Royal truck for the collision.

Arbitrator Novick is the most recent adjudicator to my knowledge to consider this issue, in *State Farm v. Old Republic*. In that case the facts were that a heavy commercial vehicle insured by Old Republic rear-ended a Dodge vehicle which caused the Dodge vehicle to strike a SABS claimant's Nissan insured by State Farm. It was agreed that both the State Farm vehicle and the Dodge were stopped when the truck hit the middle vehicle – the Dodge. It was further agreed that there was no contact between the heavy commercial vehicle and the State Farm vehicle. State Farm sought loss transfer indemnity from Old Republic.

The issue before Arbitrator Novick was the proper application of FDR 9. Arbitrator Novick reviews the case law to which I have referred. She concluded that Justice Chapnik's decision in *Royal v. AXA*, "*differs substantially*" from the decision of Justice Pitt in *GAN v. State Farm*. In her view the decisions cannot be reconciled. She interprets Justice Chapnik's reasoning as follows:[11]

By stating that it would be contrary to the legislation's intention to leave AXA without recourse to a loss transfer claim when the RSA truck was completely at

[11] At page 11.

> fault for the damage it caused, she has explicitly rejected the view expressed in GAN that the combined effect of sections 9 (4) and 9 (2) results in no apportionment of liability between two vehicles that do not collide.

Arbitrator Novick determines that the essence of Justice Chapnik's judgment in *Royal v. AXA* is as follows:[12]

> ... Rule 9 (4) (b) can be read to mean that the rear vehicle in a chain reaction collision is 100% at fault for the incident <u>not only</u> between it and the vehicle it directly collides with, but the insurer of the next vehicle in the lineup, or the (AXA insured vehicle) in that case, can also seek indemnification on a 100% basis from the trucks insurer.

Arbitrator Novick concludes that the approach taken by Justice Chapnik is preferable, and it accords with the intended operation of the loss transfer legislation. She therefore concludes that the leading vehicle in her case insured by State Farm can seek loss transfer indemnity from the third vehicle, the heavy commercial vehicle insured by Old Republic.

In my opinion loss transfer indemnity is available to the insurer of a vehicle in the position of Economical's vehicle in this case, in a "chain reaction" collision where the heavy commercial vehicle – Northland's truck, strikes the vehicle behind Economical's vehicle pushing it into Economical's vehicle, but does not itself strike Economical's vehicle.

In other words, I agree with the approach and conclusions of Justice Chapnik in *Royal v. AXA*. I do not agree with the approach and conclusions of Justice Pitt in *GAN v. State Farm*. Given that there are competing Superior Court decisions I am not bound

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[12] At page 10.

to follow one of the other, although as I have indicated I am of the view that Justice Chapnik's decision correctly interprets the loss transfer legislation applicable to the case before me.

Counsel for Northland argues that *Royal v. AXA* is distinguishable on its facts because the Arbitrator made a finding, upheld by Justice Chapnik, that there was contact between the AXA vehicle and the Royal truck. While I accept this is true, it was not the basis for either the Arbitrator's conclusion or the foundation of Justice Chapnik's judgment. As I have pointed out, if the arbitrator had relied on the fact that there was a collision between the AXA vehicle and the Royal truck, given where that collision occurred he would not have been able to apply FDR 9, he would have had to apply a different FDR, perhaps FDR 11.

In my opinion Arbitrator Robinson's reasoning leaves no doubt, nor does Justice Chapnik's, that FDR 9 permits loss transfer indemnity to an insurer paying SABS as a result of the incident from a heavy commercial vehicle involved in the incident even though the heavy commercial vehicle did not collide with that insurer's vehicle.

Although I certainly agree that interpreting the legislation in the manner in which Justice Chapnik, and Arbitrators Robinson and Novick have reflects the Legislature's intention from a policy standpoint, it is my view that a plain reading of the loss transfer legislation – section 275 of the *Insurance Act*, and Regulation 668 – the FDR in accordance with principles of statutory interpretation requires this result.

To illustrate my point I begin with a reference to the decision of Justice Perell in *ING Insurance Co. of Canada v. Farmers' Mutual Insurance Company (Lindsay)*.[13]

In that case a Farmers' Mutual insured was traveling westbound on a two lane rural highway. A tractor-trailer (a heavy commercial vehicle) was parked (illegally as it was determined) on the side of the westbound lane such that it obstructed part of the lane. The Farmers' Mutual insured intended to pass the tractor trailer, and to do so he moved partially into the oncoming eastbound lane. He then became aware of an eastbound vehicle traveling lawfully in the eastbound lane. The Farmers' Mutual insured decided that he would not be able to safely pass the tractor trailer by continuing partially in the eastbound lane. He braked and turned his vehicle to the right colliding with the rear of the tractor trailer. His son was a front seat passenger and was injured. The son made a claim for SABS to Farmers' Mutual. Farmers' Mutual sought loss transfer indemnity from ING, the insurer of the tractor trailer.

Justice Perell was required to decide which FDR applied in the circumstances of the case.

The purpose for which I make reference to the case here is that in his judgment Justice Perell lays out a formula that an arbitrator should follow in dealing with a loss transfer – FDR case. He states:[14]

> (The arbitrator's first task is)... To determine the facts; namely,... To determine what was 'the incident' and second to determine if that incident was described in any of the rules... To determine if the rule 'applies with respect to the insured'... Third, if the incident...was described in any of the rules, then...to apply

[13] [2007] O.J. No. 2150 ("*ING v. Farmers*")
[14] Paragraph 33.

> that rule or rules, arbitrary and expedient as the application of the (FDR) might be. Fourth, if the incident was not described in any of the rules,...to determine the degree of fault of the insured in accordance with the ordinary rules of law.

In my view the formula is important because it assists the loss transfer adjudicator in taking the correct decision making approach. It is a route that follows the "incident pathway" starting with section 275 (1) of the *Insurance Act*, then on to 275 (2) which leads to the FDR in regulation 668, and then back to 275 (2) of the *Insurance Act* for the indemnification conclusion.

The focus is on "the incident" in determining whether loss transfer is available to an insurer under section 275 of the *Insurance Act*. An arbitrator must first determine what the incident was that potentially gives rise to an insurer's claim for loss transfer indemnity. Secondly, the arbitrator must be satisfied that a heavy commercial vehicle was "involved in the incident".

In some cases one or the other or both of these matters may not be clear on the facts and an analysis must be undertaken. For example, in *Dominion v. Kingsway*, the first issue that Arbitrator Samis had to determine before he could progress to applying the FDR, was whether a heavy commercial vehicle was "involved in the incident". Arbitrator Samis decided that a collision between the heavy commercial vehicle and the vehicle the insurer of which was claiming loss transfer was not necessary to conclude that the heavy commercial vehicle was involved in the incident.

In other cases the nature of the "incident" itself must be determined before the FDR can be applied. For example, in *Markel Insurance Company of Canada v. Certas*

Direct Insurance Company[15] snow was blowing off the top of a Markel insured tractor trailer being operated on a highway. Shortly after this ice was dislodged from the top of the tractor trailer striking the windshield of a car behind. The ice penetrated the windshield and injured a passenger who made a claim for SABS to Certas. Certas sought loss transfer indemnity against Markel. Markel argued that FDR 10 (4) applied which would have defeated the Certas claim. FDR 10 applies in cases where vehicles collide while traveling in the same direction in adjacent lanes. FDR 10 (4) makes the driver of automobile "B", a driver changing lanes, 100% at fault, while the driver of automobile "A" not changing lanes is not at fault. Markel argued that the incident started when the vehicle behind the tractor trailer began changing lanes to avoid the blowing snow, and that it was struck by the ice in the process of changing lanes.

The court rejected the argument, finding that the vehicle behind the tractor trailer was not changing lanes, but was fully within the adjacent lane when struck by the ice coming from the top of the trailer. As such, FDR 10 (4) did not apply. Since no other FDR described the incident, FDR 5 was applied and the issue was decided in accordance with the ordinary rules of law. The operator of the tractor trailer was found 100% at fault for failing to take proper steps to clear the top of the trailer of ice which he knew or ought to have known could be dislodged during the operation of the tractor trailer and become hazardous to other users of the highway.

The important part of the decision for the point I am making here is that the court upheld the arbitrator's finding that the "incident" did not begin with snow blowing from the roof of the trailer resulting in the following vehicle's operator deciding to change

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[15] 2011 CarswellOnt 10717 (Ont. Sup. Ct.) ("*Markel v. Certas*").

lanes, ending when the lane change was completed and the ice had struck the windshield. Instead, the court agreed with the arbitrator's finding that the "incident" was limited to the ice striking the following vehicle's windshield. Justice Hoy stated[16]:

> In my view, the arbitrator was correct. "Incident"... Is the event or occurrence leading to the claim for indemnification. Had snow simply blown off the roof of the tractor trailer, no claim for indemnification would have arisen.

In this case, and in the other FDR 9 cases that I have referred to, there is no difficulty in concluding what the incident was giving rise to the loss transfer claim for indemnity, or that a heavy commercial vehicle was involved in the incident.

In this case, as in all of the other FDR 9 cases that I have discussed, the incident giving rise to the claim for indemnity involved a heavy commercial vehicle striking a vehicle ahead of it, causing that vehicle and other vehicles to collide with each other in a chain reaction. Applying the law as it has been stated in the cases I have reviewed, there is no doubt that the Northland truck in this case, like the heavy commercial vehicles in the other cases, was involved in the incident.

Those findings satisfy the criteria in section 275 (1) of the *Insurance Act*. Following the formula laid out by Justice Perell in *ING v. Farmers'*, as directed by 275 (2), I would then determine which of the FDR apply to the facts of the case before me. In this case, there is no need for me to conduct any analysis to reach a conclusion since the parties have stipulated that FDR 9 (1), (2), and (4) apply to the facts of this case. I think that conclusion is appropriate since the parties agree the vehicles involved in the

[16] At paragraph 12.

incident were in the same lane, traveling in the same direction, and that all vehicles were stopped except for the Northland truck. The criteria for applying FDR 9 are met on the facts of the case.

Now FDR 9 must be applied. The first point to note is that FDR 9 (1) stipulates that it applies to "an incident" described as a "chain reaction" involving three or more automobiles. Secondly, FDR 9 (2) sets out a general formula for determining the fault of each automobile involved in the chain reaction. That formula requires that the degree of fault of each automobile be determined by examining the circumstances of the collision between two automobiles that have collided, without reference to any related collisions involving other automobiles.

To determine the degree of fault of each vehicle for the incident, one must then apply the specific subsections of FDR 9 that apply to the facts of the case. On the facts before me, as the parties have agreed, FDR 9 (4) applies. Applying FDR 9 (4) (a) with reference to the diagram addresses the situation of the leading vehicle "A", the Economical vehicle, and the vehicle behind it, "B", that was in between the Economical vehicle, and the Northland truck when the incident occurred.

The wording of FDR 9 (4) (a) requires one to examine the collision between the Economical vehicle and the vehicle behind It to determine the degree of fault for each of those vehicles "*for the incident*". I pause here to say that applying principles of statutory interpretation, in my opinion the word "incident" wherever it is used in FDR 9 should be given the same meaning as in section 275 of the *Insurance Act,* since it is in a Regulation made pursuant to the Act, and the Regulation does not specify a different

definition. I have previously discussed how following the proper steps to analyze a loss transfer claim the arbitrator must define what the incident is and then determine which of the FDR describe the incident. Having already determined for the purposes of section 275 and FDR 9 (1) that the incident means the chain reaction collision involving four vehicles in this case, one should interpret the word "incident" the same way when applying FDR 9 (4) (a).

Applying this approach to interpreting FDR 9 (4) (a), neither the Economical vehicle nor the vehicle in between the Economical vehicle and the Northland truck has any fault for the incident – the chain reaction collision involving all of the vehicles.

Obviously I would advocate the same approach be applied to interpreting FDR 9 (4) (b). It is similarly worded. In determining fault "*for the incident*" by examining the collision between the Northland truck, vehicle "C", and the vehicle in between the Northland truck in the Economical vehicle, vehicle "B", the conclusion is that the Northland truck is 100% at fault for the incident – the chain reaction collision involving all of the vehicles.

In my respectful view, this is the point at which some adjudicators may have been led astray in their analysis. Insurers resisting loss transfer claims have argued that FDR 9 (4) does not provide for the allocation of fault between vehicles that have not collided, for example, in reference to the diagram, vehicle "A", and vehicle "C" did not collide, so vehicle "A" cannot claim loss transfer indemnity from vehicle "C". In my opinion this is a misinterpretation of the FDR, and section 275 of the Insurance Act. FDR 9 (4) (a) and (b) clearly set out that the degree of fault for the incident of any one

vehicle is determined by examining the collision that vehicle has collided with. The FDR does not say that a vehicle must collide with another vehicle before a determination of fault against it can be made. Once it has been determined that vehicle "A" has zero fault for the incident and vehicle "C" is 100% at fault for the incident, then loss transfer indemnity may proceed in accordance with that degree of fault determination.

Having made determinations of fault by applying the FDR, the arbitrator must then go back to section 275 (2) of the Insurance Act to complete the analysis. It is section 275 (2) that is the enabling section providing for loss transfer indemnification in accordance with the degree of fault for the incident as determined under the FDR. In this case, once FDR 9 (4) (a) and (b) have been properly applied, the degree of fault for the chain reaction collision – "the incident", is 100% on the Northland truck. By operation of section 275 (1), and (2), Economical is entitled to loss transfer indemnification from Northland in accordance with the degree of fault assessed against Northland, or in other words, on the basis of 100% indemnification.

Conclusion

1. Subject to any reasonableness of quantum issues, Economical is entitled to 100% loss transfer indemnification from Northland by operation of section 275 of the *Insurance Act*, and FDR 9.

2. Should counsel wish to introduce evidence and make submissions on the issue of waiver, please contact my Coordinator to make arrangements for a telephone conference to discuss the matter.

3. Regulation 283/95, Section 9, states that unless otherwise ordered by the arbitrator, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful party or parties to the arbitration. Should the parties wish to make submissions concerning costs I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for costs submissions.

Dated at Toronto, July 2, 2013.

Scott W. Densem

Scott W. Densem, Arbitrator