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:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

and

ZÜRICH INSURANCE COMPANY

Respondent

AWARD

Heard: June 19, and June 20, 2012

Counsel:

David Silverstone and Patricia Hill for the Applicant

Brian Sunohara and Moussa Sabzehghabaeh for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This arbitration arises out of a motor vehicle accident occurring August 26, 2005. The accident occurred in the City of Montréal, in the Province of Québec. A vehicle operated by Sean Lisk was struck by a tractor[2] operated by Igor Kravets. One of the passengers in the Lisk vehicle, Alex Black was seriously injured. He applied for Statutory Accident Benefits ("SABS") to the Applicant ("Security"). At the time of the arbitration hearing Security had paid to or on behalf of Mr. Black approximately $1,328,980.00 in SABS.

Pursuant to section 275 of *the Insurance Act*, and Regulation 664 of the *Insurance Act,* Security has submitted Loss Transfer Requests for Indemnification ("LTRI") to the Respondent ("Zürich"), the insurer of the tractor operated by Mr. Kravets. Zürich declined to reimburse Security in response to the LTRI. As a result Security commenced arbitration against Zürich.

The parties agreed that this arbitration hearing would proceed on the issues concerning the entitlement of Security to loss transfer indemnification from Zürich. In the event it is necessary to deal with any issues concerning the proper quantum of loss transfer indemnification, the parties agreed to address those issues after the entitlement issues have been finally resolved.

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[1] The facts contained in this introduction are either agreed to or are not in dispute between the parties for the purposes of the issues to be dealt with in this arbitration.

[2] The kind of tractor used for towing trailers, so that the combination is commonly referred to as a tractor-trailer. There is no dispute that this was a heavy commercial vehicle.

There are no issues with respect to the timeliness of the commencement of the arbitration.

The Issues

1. Do the provisions of *Insurance Act* Regulation 668 – Fault Determination Rules ("FDR") apply to Security's claim for loss transfer indemnification?

2. If the FDR do apply, do either FDR – 6, or FDR – 17 apply to Security's claim for loss transfer indemnification, or must FDR – 5 be applied?

3. If FDR – 6, or FDR – 17 do not apply, and FDR – 5 applies, should the ordinary rules of law for Ontario or the ordinary rules of law for Québec be used to determine the degree of fault as required by FDR – 5?

The Evidence

Seven documentary exhibits were admitted into evidence, and *viva voce* evidence was received from seven witnesses. The particulars of the evidence are listed below:

Exhibit 1: Transcript of Examination under Oath of Brenda Lisk, March 29, 2011

Exhibit 2: Statement to Québec Police of Laighton McKay, August 26, 2005 (4 pages).

Exhibit 3: Transcript of Examination under Oath of Igor Kravets, February 28, 2011.

Exhibit 4: Transcript of Examination under Oath of Laighton Mckay, February 28, 2011.

Exhibit 5: 5 photographs (A – F) of location on highway where accident occurred, and surrounding area.

Exhibit 6: Rogers Partners LLP August 19, 2009 letter attaching a summary of a statement given by Igor Kravets concerning the accident (3 pages).

Exhibit 7: Commercial Truck Trader advertisement listing for a tractor similar to the tractor operated by Igor Kravets at the time of the accident (2 pages).

Witness: Brenda Lisk

Witness: Joshua Reynolds

Witness: Sean Lisk

Witness: Adam Lisk

Witness: Rosaria Ferla

Witness: Laighton McKay

Witness: Igor Kravets

Analysis

Do the FDR Apply to Security's Loss Transfer Claim?

Zürich accepts that section 275 of the *Insurance Act* applies because both Security and Zürich are insurers licensed to issue automobile policies in Ontario. Since the accident happened in Québec however, Zürich argues that the law of Québec should apply rather than the FDR. The basis of Zürich's argument is that the law of the jurisdiction where the accident occurred is the appropriate choice of law, according to the decision of the Supreme Court of Canada in *Tolofson v. Jensen*.[3]

The *Tolofson* case held that as far as torts committed in Canada are concerned, the tort law of the province where the tort took place, *i.e.* the *lex loci delicti,* as opposed to the law of the province in which the claim is made, *i.e.* the *lex fori*, should be used to decide the case. An exception to the general rule was stated in that as far as international torts were concerned, the court retained a discretion to apply Canadian law where an injustice might otherwise occur.[4]

Security submits that section 275 of the *Insurance Act* applies to a loss transfer matter between two Ontario licensed insurers not as a matter of tort law, but because the Ontario legislature has created a statutory cause of action permitting a first party insurer like Security to seek indemnity against a second party insurer like Zürich in circumstances set out in the legislation. Therefore, the claim is governed by the provisions set out in Ontario insurance law, not an interpretation of the common law tort rules that would be applicable in a tort claim.

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[3] [1994] 3 S.C.R. 1022 ("*Tofofson*").
[4] As described by Justice Newbould in *Royal & SunAlliance Insurance Co. v. Wawanesa Mutual Insurance Co.*, (2006) 84 O.R. (3d) 449, (Ont. Sup. Ct.), at para. [7] ("*Royal v. Wawanesa*").

I am of the opinion that Security's position is correct. In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*[5] the Supreme Court of Canada dealt with the situation where two Ontario residents were injured in an accident in British Columbia. They were operating a rented vehicle registered in British Columbia. The other vehicle involved in the accident was a tractor trailer registered in British Columbia. The Ontario residents were paid SABS under their Ontario insurance policy from their Ontario insurer, Unifund. They also recovered damages in a tort action commenced in British Columbia against the owner and operator of the tractor trailer.

Unifund sought loss transfer indemnity from ICBC under section 275 of the Ontario *Insurance Act.* ICBC argued that Ontario insurance legislation could not apply to it as it was not a licensed Ontario insurer.

In addressing the issue of the basis for Unifund's claim against ICBC, Justice Binnie, writing for the majority, stated as follows[6]:

> Unifund's problem is to find a cause of action. In this appeal, we are dealing only with Unifund's quite separate and distinct claim under section 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABS under the Ontario Act
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> It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

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[5] [2003] S.C.J. No 39 ("*Unifund v. ICBC*").
[6] At paragraphs 9 and 10.

Justice Binnie describes the difference between the ICBC insurance scheme and Ontario insurance law. He noted that ICBC as the government provider of all automobile insurance in British Columbia was responsible to pay both tort damages and SABS. Thus there is no need for a loss transfer scheme under the British Columbia legislation.

In Ontario however, a jurisdiction of "*numerous competing motor vehicle insurers*" the payor of tort damages and SABS is not always the same. Justice Binnie goes on to describe the Ontario loss transfer scheme where indemnification is made, "*...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 general principles of tort but by the rules set out in Ontario regulations... There is no doubt that if the appellant* (ICBC) *were an Ontario insurer, it would be required to arbitrate Unifund's claim."* [7]

Unifund v. ICBC was considered in *Royal v. Wawanesa*. That case involved an Ontario resident injured in a motor vehicle accident in Vermont. He was operating a tractor trailer licensed and registered in Ontario. The tractor trailer was insured by Royal under an Ontario insurance policy. The tractor trailer operator applied for SABS to Wawanesa. Wawanesa insured his personal automobile under an Ontario insurance policy. Wawanesa sought loss transfer indemnification under section 275 of the Ontario *Insurance Act* from Royal. Royal argued that the loss transfer provisions of section 275 should not apply because the accident happened in Vermont. Royal submitted that the *lex loci delicti* should apply and since Vermont did not have a loss transfer system then there was no basis for Wawanesa to seek loss transfer indemnity from Royal.

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[7] Paragraph 12, Arbitrator's emphasis.

At first instance the arbitrator who dealt with the claim applied the tort analysis of *Tolofson*. The arbitrator reasoned that there would be an injustice if Wawanesa was not permitted to advance a loss transfer indemnification claim given that it was required to pay SABS under Ontario law, and that there were two Ontario licensed insurers involved as well as an Ontario resident. He relied upon the exception for international cases to the general *lex loci deliciti* rule, and exercised his discretion to apply Ontario insurance law to the circumstances.

Justice Newbould agreed with the arbitrator's conclusion but found that it was not necessary to rely upon the "international injustice" exception in the *Tolofoson* decision to support the result. His analysis is important for this case. He stated:[8]

> In my view, the outcome of this case should not rest upon an analysis as to whether there would be an injustice using...(*Tolofson*)...for Wawanesa not to have a loss transfer claim against Royal. The...(*Tolofson*)...cases...involved actions between the parties to the accident in question. The issue in each case was whether the tort law of the forum in which the plaintiffs resided or the tort law in the place of the accident should govern the determination of the tort action...
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> ...That is not the issue that is alive between Wawanesa and Royal. It is not a tort claim. Rather, the claim by Wawanesa is a statutory claim under s. 275 of the Act that is a separate and distinct claim from any underlying tort claim that might be brought between the parties involved in the accident. <u>There would be no purpose served in this case by looking to the law of Vermont to settle a dispute between two Ontario insurers arising from a claim made under the Act, an Ontario statute</u>...
>
> This distinction was recognized in (*Unifund v. ICBC*)...Binnie J. for the majority...recognized the distinction between an underlying tort action between the parties to the accident and the statutory claim between two insurers. He made clear

[8] Paragraphs 12 – 19. Underlining arbitrator's emphasis.

that if ICBC were an Ontario insurer, the loss transfer provisions of s. 275 of the Act would apply.

> Counsel for Royal submits that...(Justice Binnie's comment that if ICBC were an Ontario insurer it would be required to arbitrate Unifund's claim) is obiter and therefore is not binding... While that last sentence may be obiter, it is the only conclusion that one could draw from the other principles enunciated by Justice Binnie, i.e. a claim under s. 275 of the Act is separate and distinct from the underlying tort action and the allocation between insurers under this section is not to be made by a consideration of general principles of tort law but by the rules set out in the Ontario regulations...
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> In the case at bar, the arbitrator was not dealing with a tort claim between the parties to the Vermont accident but rather was dealing with the second leg of the statutory accident benefits scheme under the Act requiring an allocation of the cost between two Ontario insurers. An analysis of underlying Vermont tort law is not of any assistance in determining that issue, nor is it of assistance to consider that under the Vermont accident benefits legislation there is not a loss transfer provision that allocates the cost of benefits paid under that Vermont legislation between insurers.

It is interesting to note that Justice Newbould goes on to conclude that even if it was appropriate to conduct the *Tolofson* tort analysis (which he concluded did not apply), an arbitrator has the jurisdiction to exercise the same discretion as a court to apply the *Tolofson* exception and hold that Ontario *Insurance Act* law governs the loss transfer claim.[9]

The approach taken by Justice Newbould in *Royal v. Wawanesa* was approved of and followed by Justice Cameron in *Primmum Insurance Co. v. Allstate Insurance Co.*[10] in that case Primmum was seeking to appoint an arbitrator to seek loss transfer

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[9] See paragraphs 23 and 25.
[10] [2010] O.J. No. 600

indemnification against Allstate. The SABS claimant, a Canadian resident, was injured while operating his motorcycle in an accident in North Carolina. He was insured by Primmum, an Ontario registered insurer. He applied to and received SABS from Primmum. Primmum sought loss transfer indemnity from Allstate who insured the American resident involved in the accident pursuant to a policy issued in North Carolina. Allstate took the position that in the circumstances it was not an Ontario insurer, and the accident did not occur in Ontario, so the Ontario loss transfer scheme should not apply.

Justice Cameron rejected that argument. He found that both Primmum and Allstate were Ontario licensed insurers carrying on business in Ontario, notwithstanding that this particular Allstate policy was issued in North Carolina. After quoting the passages previously referred to in this Award from Justice Binnie in *Unifund v. ICBC*, Justice Cameron stated as follows[11]:

> If both of the insurers are registered in and carry on business in Ontario, they may claim loss transfer, even if the accident occurred in a non-loss transfer jurisdiction such as Vermont: (*Royal v. Wawanesa*), per Newbould J. who followed Binnie J. in *Unifund*.
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> The same result followed in *CAA v. American Home* (Jones, January 7, 2007) as both CAA and American Home were Ontario insurers, notwithstanding the accident occurred in Nova Scotia.
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> Allstate argues here that this is limited to situations where the accident occurs in Ontario or both policies were issued in Ontario... Allstate argues that its policy was issued in North Carolina by a U.S. insurer with much lower maximum limits and without statutory benefits which result in much lower premiums. It ought not to be subject to Ontario law.

[11] Paragraphs 20 – 29.

> In the *Insurance Act*, Allstate is an "insurer" under s. 1 and issues "contracts" because it is licensed to sell insurance in Ontario under s. 224 (1) (a). The premiums it charges for the insurance or the limits of coverage in North Carolina are of no concern to Ontario.
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> On the authority of (*Royal v. Wawanesa*), Allstate can be made subject to the statutory cause of action in Ontario even though the accident occurred in North Carolina. This was not an impermissible extraterritorial exercise of Ontario jurisdiction. It was a case of enforced arbitration of the statutory cause of action between two Ontario insurers. If Allstate wishes to avoid such a result because North Carolina has a different insurance regime it should deregister as an Ontario insurance company or incorporate a subsidiary to sell insurance in North Carolina.

Finally, I would note that the same approach was taken by arbitrator Lee Samis in *Gore Mutual Insurance Company v. The Cooperators*.[12] In that case an Ontario resident was injured in an accident occurring in New York State. She was an occupant of a vehicle insured by Gore. She was also the named insured under a policy issued by Cooperators. Both Gore and Cooperators were Ontario licensed insurers and had issued policies in Ontario. The dispute in that case was classified by the arbitrator as a choice of law dispute. If New York law applied, then Gore would have been the priority insurer. If Ontario law applied, then Cooperators was the priority insurer.

After noting that the *Tolofson* cases deal with the resolution of conflict of law problems in tort claims, like other adjudicators, arbitrator Samis concludes that those principles do not apply to the Ontario statutory loss transfer scheme. He states that the obligations of Gore and Cooperators in the circumstances are created by contract and statute. They are not tort based.

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[12] August 28, 2006.

Arbitrator Samis analogizes the situation to the manner in which a question of contract interpretation of an Ontario insurance policy would be resolved. He states that section 123 of the Ontario *Insurance Act* clearly stipulates that such questions should be resolved in accordance with Ontario law. In the case of the obligation to pay SABS, arbitrator Samis notes that the obligation arises by statute. He concludes as follows:[13]

> ... In my view this is sufficiently close to being a contract provision that we should apply the same contract interpretation rule. The priority rules are clearly ancillary and necessary to determining the contractual obligations of insurers and the entitlements of policyholders. The fact that these obligations are set out by statute as contrasted with (*sic*) a set out by regulation incorporated into the contract, makes no material difference when addressing the conflict of law questions. For these purposes, it makes good sense to apply Ontario law in such circumstances.

In my opinion the facts of this case are not distinguishable in any material way from the facts of the cases that I have referred to, and in particular the facts of *Royal v. Wawanesa*. The only difference between the facts of that case and this one is that in this case the accident took place in Québec whereas in *Royal v. Wawanesa* the accident took place in Vermont. In my view that makes no difference to the reasoning to be applied as set forth by Justice Newbould.

Both Security and Zürich are Ontario licensed insurers. The policies of concern were issued in Ontario. The SABS claimant is an Ontario resident. The court and arbitral decisions clearly indicate that in these circumstances the law of Ontario – section 275 of the *Insurance Act* and Regulations, is the appropriate law to apply. To apply the law of Québec would be importing a tort concept into a situation that is

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[13] At page 8.

governed by a purely statutorily created cause of action with a statutorily mandated method of providing for SABS indemnification and dispute resolution.

Therefore, I find that the FDR are applicable to the circumstances of this case.

If FDR – 5 applies, then should the ordinary rules of law for Ontario or the ordinary rules of law for Québec be used to determine the degree of fault as required by FDR – 5?

Given my conclusion on the first issue I think it is appropriate that I deal next with the second choice of law issue that has been raised by Zürich. Zürich argues that if I conclude neither FDR – 6 nor FDR – 17 describe the incident giving rise to the loss transfer indemnity claim, and I must therefore apply FDR – 5, I should apply the ordinary rules of law for Québec. In that case, since Québec does not have any fault based compensation system Security would have no legal basis to seek indemnity from Zürich for the SABS it has paid.

The grounds for this argument are the same as those advanced by Zürich with respect to the first issue. For the same reasons I have given for rejecting this argument on the question of whether the FDR apply at all, I do not accept Zürich's argument that the ordinary rules of law for Québec should be applied in connection with FDR – 5, if it were found that FDR – 5 was the appropriate FDR to determine this case.

In my view this argument has less merit once a finding is made that the FDR apply to determining the issues between the parties. Security submits that once inside the section 275 Ontario insurance framework dealing with loss transfer indemnity between Ontario insurers, and the decision making process is undertaken using the FDR, it

makes little sense to then apply the law of a foreign jurisdiction that does not have a fault based scheme to decide the critical issue in the case.

I agree. If it would not be appropriate to apply the law of a foreign jurisdiction instead of the Ontario *Insurance Act* scheme to a loss transfer indemnity claim, I cannot see how it would be appropriate to import the laws of another jurisdiction into the methodology used to determine the issue once one is otherwise following the method prescribed by Ontario law.

Security's position is also more tenable from a statutory interpretation standpoint. Ontario Regulation 668 is a regulation made under the Ontario *Insurance Act*. Essentially it is a code created to facilitate the determination of fault in automobile accident cases where the enabling legislation determines that it is appropriate the code be used for that purpose. Section 275 (2) of the Ontario *Insurance Act* mandates that this code be used to determine issues of fault in loss transfer indemnity claims.

Applying the principles of statutory interpretation requiring an examination of context, and giving the words their plain and ordinary meaning, in my opinion the words in section 5 (1) of the FDR, "...*in accordance with the ordinary rules of law...*" can only be properly interpreted to mean the ordinary rules of law of Ontario.

Therefore, I find that should FDR – 5 be the appropriate FDR to apply to determine the degree of fault in this case then it is the ordinary rules of law of Ontario that should be considered in applying FDR – 5.

Does FDR – 6, FDR – 17, or FDR – 5 apply to Security's claim for loss transfer indemnification?

Security submits that either FDR – 6, or FDR – 17 apply to the circumstances in this case, so it is not necessary to resort to FDR – 5. Zürich's position is that neither FDR – 6 nor FDR – 17 apply because a third vehicle operated by Laighton McKay was "involved in the incident". Consequently, I should apply FDR – 5. As I have previously indicated, Zürich's position was that in applying FDR – 5 I should apply the ordinary rules of law for Québec in which case Security's claim would be defeated. I have already ruled that should FDR – 5 apply, in my opinion it is the ordinary rules of law for Ontario that should govern.

Before I can embark upon a discussion of whether FDR – 6 or FDR – 17 describe the incident in the case before me, I think it is important to review the law on how an arbitrator should approach a section 275 loss transfer claim for indemnity where the application of the FDR is required.

In my opinion the proper approach is set out by Justice Perell in *ING Insurance Co. of Canada v. Farmers' Mutual Insurance Co. (Lindsay)*.[14] 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 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

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

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 describes the legislative intent behind the loss transfer scheme in the following way:[15]

> In Jevco Insurance Co. v. Canadian General Insurance Co. (1993) 14 O.R. (3d) 545 (C.A.) at p. 547 the Court Of Appeal described in the scheme of the (FDR) as follows:
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> > The scheme of the legislation under s. 275 of the Insurance Act and companion regulations is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the fault determination Rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tort feasor is irrelevant.
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> In Jevco Insurance Co. v. Halifax Insurance Co. [1994] O.J. No. 3024 (Gen. Div.), at para. 8, Matlow J. described the (FDR) as follows: 'They set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of particular incident in a manner that, in most cases, would probably but not necessarily correspond with actual fault.' In Jevco Insurance Co. v. York Fire & Casualty Co. (1996), 27. O.R. (3d) 483 (C.A.) at p. 486, Carthy J.A. stated that 'the purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude."
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> The (FDR) are to be liberally construed and applied and in accordance with their own factors and not those which would apply under the ordinary Rules of tort

[15] Paragraphs 25 – 27

law: Cooperators General Insurance Co. v. Canadian General Insurance Co. [1998] O.J. No. 2578 (Gen. Div.).

With this statement of the legislative intention of the loss transfer scheme as background, Justice Perell examined the arbitrator's analysis. The arbitrator ultimately had to decide whether FDR – 17 (2) applied. If it did not apply then he would have had to apply FDR – 5. The arbitrator concluded that FDR – 17 (2) applied. Justice Perell agreed with the arbitrator's conclusion but did not agree with the arbitrator's approach in reaching the conclusion.

According to Justice Perell, the error in the arbitrator's approach was in asking whether or not FDR – 17 ought to apply to the circumstances of the case. As Justice Perell puts it:[16]

> ... To say that the facts of the case do not fall within the interpretation of an (FDR) is an interpretive decision and not the same thing as saying that the facts ought not to fall within the Rule, which is a normative or legislative decision... I think it is incorrect to approach (FDR – 17) normatively by determining whether or not it should apply. Either the Rule applies or it does not apply, and asking whether the Rule ought to apply is to ask the wrong question.

Justice Perell felt that the arbitrator's reasoning had misinterpreted *Dominion of Canada General Insurance Company v. Kingsway Insurance Company*, an earlier decision of a private arbitrator, subsequently upheld by the Superior Court.[17] In that case a Dominion insured was traveling northbound approaching a truck stop. A heavy commercial vehicle insured by Kingsway exited the truck stop and created an obstruction for the approaching Dominion insured. The Dominion insured braked, lost

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[16] Paragraphs 45 – 47.
[17] Arbitrator, Samis, August 23, 1999; (S.C.J.), unreported, January 11, 2000, Sachs J. ("*Dominion v. Kingsway*").

control of his vehicle, and struck a vehicle that was parked on the side of the highway. Dominion sought loss transfer indemnity from Kingsway.

Justice Perell indicates in his decision in *ING v. Farmers'* that the arbitrator's first task in *Dominion v. Kingsway* was to determine whether section 275 loss transfer indemnity was available to Dominion from Kingsway at all. The section 275 criteria to be satisfied were that the Kingsway vehicle had to be a heavy commercial vehicle (it was), and the Kingsway Vehicle had to have been "involved in the incident". Since the Kingsway vehicle was not involved in any collision, it was not readily apparent that it was involved in the incident.

It was to address this threshold question of whether s. 275 loss transfer indemnity could apply that the arbitrator considered a variety of criteria for determining whether a vehicle is "involved in an incident". The arbitrator stated (and he was upheld by the court) that the relevant criteria are (a) whether there is contact between the vehicles; (b) the physical proximity of the vehicles; (c) the time interval between the relevant actions of the two vehicles; (d) the possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another; and (e) whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

The critical point to be made here however, is that the arbitrator in *Dominion v. Kingsway* was not considering these criteria to determine whether a particular FDR applied. As Justice Perell puts it, *"... It is important to note that this predicate issue was preliminary to the interpretation and application of the (FDR)."*

Where Justice Perell felt that the arbitrator in *ING v. Farmers* had pursued an incorrect line of reasoning is that the arbitrator appeared to have used the threshold analysis applicable to whether section 275 loss transfer indemnity is available at all, to address the question as to which FDR applied.

In *ING v. Farmers'*, Justice Perell states that applying the criteria outlined by the arbitrator in *Dominion v. Kingsway* is an incorrect approach to determining whether an incident is described in one of the FDR. Asking whether a vehicle is "involved in the incident" is only relevant to determining whether one insurer can seek loss transfer from another. It is a section 275 requirement, not an FDR requirement.

This point is well illustrated by his following comment:[18]

> ... In the case at bar, there is no doubt that the tractor trailer and (the Farmers' insured) vehicles were "involved in the incident" and there is no doubt that read literally the criteria of rule 17 (2) apply to these vehicles. It seems to me that asking whether the third vehicle, the eastbound vehicle, was "involved in the incident" is to ask the wrong question because no loss transfer claim is being made against the insurer of the third vehicle.

On the facts of *ING v. Farmers'*, a collision occurred between a heavy commercial vehicle (the ING insured tractor trailer) and the Farmers' insured vehicle that was seeking loss transfer from ING. The criteria to advance a loss transfer indemnity claim were clearly satisfied. The heavy commercial vehicle was without doubt involved in the incident.

This being the case, Justice Perell endorses the following approach to applying the FDR:[19]

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[18] Paragraph 58.

> My approach to the conclusion that rule 17 (2) applies is straightforward and consistent with the rough and ready nature of the (FDR), which favour expediency over accuracy in determining fault. My approach is that since it was found as a fact that the tractor trailer (automobile "A") was illegally parked when it was struck by (the Farmers' insured vehicle) (automobile "B") and since it was found as a fact that the accident occurred outside a city, town, or village, therefore the criteria for the application of rule 17 (2) were satisfied. There was no suggestion that the criteria for any other rule of the (FDR) were satisfied. Therefore, the correct conclusion is that rule 17 (2) applies.

Justice Perell appears to lay out a formula that an arbitrator should follow in dealing with a loss transfer – FDR case. He states:[20]

> (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 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.

Unfortunately, Justice Perell's decision does not give any guidance as to what factors should be considered in deciding whether a particular FDR describes an incident. It only states that an arbitrator should not apply the criteria that are outlined in *Dominion v. Kingsway* to deciding whether an FDR applies. They are appropriate only to the threshold inquiry as to whether a heavy commercial vehicle is "involved in an incident" to determine whether one insurer may seek loss transfer against another. It is only after one answers this question affirmatively that one embarks upon determining which FDR applies.

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[19] Paragraph 43.
[20] Paragraph 33.

On the issue of how one should determine which FDR applies to an incident, I agree with arbitrator Bruce Robinson who advocates a simple and straightforward approach. In *Royal & Sun Alliance Insurance Company v. AXA Insurance Company*[21] arbitrator Robinson quoted some of the same passages as did Justice Perell in *ING v. Farmers'*, concerning the intended operation of the loss transfer – FDR system. Then he concluded[22], "A *common sense approach is to be used when considering the (FDR) and the diagrams in the regulation.*"

Counsel for Zürich referred me to two court decisions that, in the absence of careful analysis, might be construed to conflict with Justice Perell's analysis in *ING v. Farmers'*. Both of these decisions were released after *ING v. Farmers'*. I note however, that neither these cases appear to have considered *ING v. Farmers'*.

The first case I will deal with is *Aviva Insurance Company of Canada v. Royal & Sun Alliance Insurance Company*.[23] The facts were that the SABS claimant worked at a gas station. A fuel truck insured by Royal (a heavy commercial vehicle) had just completed a fuel delivery. The driver requested assistance from the SABS claimant to direct him out of the gas station onto the highway. In directing the fuel truck the SABS claimant ended up on the highway where he was struck by two vehicles. He applied for SABS to his own insurer Aviva. Aviva sought loss transfer indemnity from Royal.

At first instance the arbitrator held that the Royal insured fuel truck was a vehicle involved in the incident, and that none of the FDR described the incident, so he applied FDR – 5 and determined fault in accordance with the ordinary rules of law. He

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[21] Private arbitration November 21, 2003.
[22] At page 10.
[23] 2008 CarswellOnt 4894, (Ont. Sup. Ct.) ("*Aviva v. Royal*").

apportioned liability 30% to Royal, 50% to the SABS claimant, and 20% to the gas station owner (employer of the SABS claimant). He did not apportion any liability to the two drivers who had struck the SABS claimant after the got onto the road. Therefore, the arbitrator found that Aviva was entitled to recover 30% in loss transfer indemnity from Royal.

The decision was appealed on two grounds. Royal appealed on the argument that the fuel truck was not "involved in the incident". Aviva appealed arguing that the arbitrator could not assess fault under FDR – 5 against any party other than parties insured under policies of motor vehicle insurance. Specifically, Aviva argued that there should have been no liability assessed against the gas station since it was not insured under a motor vehicle insurance policy.

The court rejected both these grounds of appeal. With respect to the "involved in the incident" argument, the court approved of the arbitrator's application of the *Dominion v. Kingsway* criteria for determining this issue. I pause to note here that the situation was the same in the *Aviva v. Royal* case as it was in *Dominion v. Kingsway*. Loss transfer indemnity was being sought against a heavy commercial vehicle where the heavy commercial vehicle had not been involved in a collision so it was appropriate to inquire whether the section 275 "involved in the incident" test was satisfied to permit the pursuit of loss transfer indemnity.

On the second ground of appeal the court agreed with the arbitrator that he could take into account the fault of vehicles not covered by loss transfer when allocating the overall fault for the accident using FDR – 5. There was nothing in section 275 of the

Insurance Act or FDR – 5 that precluded such a determination. The court also agreed with the arbitrator that loss transfer only permitted recovery in accordance with the percentage fault of those vehicles covered by loss transfer. In other words, Aviva could only be reimbursed by Royal to the extent that Royal's insured fuel truck was at fault in the incident.

The important fact to note with respect to the court's holding on the second ground of appeal is that the arbitrator had found that none of the FDR applied, so he had to apply the ordinary rules of law to determine fault, as stipulated by FDR – 5. In fact, the parties themselves had agreed that FDR – 5 was the appropriate rule for the case. The arbitrator essentially accepted that agreement and the court found it was correct in the circumstances.

In my opinion this decision does not conflict in any way with Justice Perell's decision in *ING v. Farmers'*. The threshold question was answered that Aviva was entitled to seek loss transfer indemnity from Royal because Royal's fuel truck was determined to have been "involved in the incident". Unlike *ING v. Farmers'*, there was no issue in *Aviva v. Royal* about whether an FDR applied other than FDR – 5. The parties agreed and the arbitrator found that FDR – 5 had to apply to the facts of the case, so then the analysis was restricted to how to apportion fault in accordance with the ordinary rules of law. The only question became whether fault could be apportioned to non-automobile insured parties. The court found that such an apportionment could be made in the application of FDR – 5.

The second case is *Motors Insurance Corporation v. Old Republic Insurance Company*.[24] In that case a Pepsi truck (a heavy commercial vehicle) insured by Old Republic was traveling westbound on Highway 407. A United Parcel Service Truck (UPS) insured by Liberty Mutual Insurance Company was also traveling westbound when it struck the rear side of the Pepsi truck. The Pepsi truck lost control, crossed the center median dividing westbound from eastbound traffic, and struck an eastbound vehicle driven by the SABS claimant, insured by Motors.

Motors sought loss transfer indemnity from Old Republic. The case involved a preliminary issue as to whether Old Republic had waived or was estopped from disputing its obligation to indemnify Motors in loss transfer because of its conduct after having been presented with the loss transfer indemnity claim. On this issue the arbitrator held that Old Republic had both waived its rights and was estopped from disputing loss transfer. On appeal the court upheld the arbitrator on the waiver issue, but did not find that the requirements of estoppel had been satisfied. Nevertheless, technically this finding on waiver was the end of the matter both at arbitration and on appeal to the court.

The arbitrator went on to consider however, which FDR applied and he made findings in that respect apportioning liability amongst the vehicles involved in the accident. Although it was not necessary for the decision, the court considered the arbitrator's findings on apportionment of fault. The court upheld the arbitrator with respect to his apportionment of fault.

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[24] Arbitrator Jones, November 24, 2008; 2009 CarswellOnt 4163 (Ont. Sup. Ct.) *("Motors v. Old Republic")*.

Since both the arbitrator's and the court's comments with respect to everything after the decision on waiver were *obiter dicta*, the *ratio* of the case is limited to that ground alone. The subsequent analysis should nevertheless be considered.

The arbitrator does seem to apply the same approach that he did in *ING v. Farmers'* to deciding whether FDR – 12 (4) applied. He focuses on whether the UPS truck, a vehicle against which loss transfer was not being sought, was "involved in the incident". This was the same approach that was criticized by Justice Perell on appeal in *ING v. Farmers'*. He came to the conclusion that the UPS truck was involved in the incident and therefore FDR – 12 (4) could not apply. Unfortunately, I think this analysis contravenes the principles enunciated by Justice Perell.

In my opinion, the arbitrator had grounds to come to the same conclusion without mixing the factors to be used in the section 275 threshold analysis with the consideration of whether a particular FDR described the incident. I note that one of his findings was that the UPS truck collided with the Pepsi truck and stayed in contact with it right up to the subsequent collision with the SABS claimant's vehicle.[25] Using the FDR language, on this basis the arbitrator might have concluded that rule 12 (4) did not describe the incident because it contemplated an incident involving two vehicles, when three vehicles were an inseparable part of the incident before him. He then could have proceeded as he did to apply FDR – 5 and the ordinary rules of law without contravening Justice Perell's formula as set out in *ING v. Farmers'*.

[25] See page 7 of the arbitration award.

In any event, on appeal the court does not appear to have had to consider the issue beyond being asked to determine whether the arbitrator's conclusion on FDR – 5 apportionment of fault was correct. The court did not have to address the correctness of the arbitrator's conclusion that FDR 12 (4) did not apply, or his methodology in coming to that conclusion because it was not challenged by the parties.

For these reasons I do not find anything in the court's decision in *Motors v. Old Republic* that conflicts with the approach to these cases set out by Justice Perell in *ING v. Farmers'*.

With this statement of the law as I perceive it to be as background, I will now address the question of which FDR describes the incident giving rise to the SABS claim in this case. Before doing so I will note that the preliminary question of whether section 275 loss transfer indemnity is appropriate in this case has been satisfied. There is no dispute that the Zürich insured heavy commercial vehicle from which loss transfer indemnity is being sought collided with the Security insured vehicle. Therefore, the heavy commercial vehicle was involved in the incident.

Following Justice Perell's statement of the proper approach to considering the FDR, I must now determine the facts – *i.e.* what was the incident. To do so I will review the portions of the evidence of those witnesses who testified at the arbitration hearing that I consider relevant to the interpretation of the FDR.

Brenda Lisk testified that she was the owner of the Chevrolet Lumina insured by Security that was struck by the Zürich insured tractor. Her son Sean Lisk was the primary driver of the vehicle for about two years before the August 26, 2005 accident.

Both she and her husband maintained the vehicle. Her role in this maintenance essentially consisted of telling her husband if anything had to be done and he would take care of it. Maintenance consisted of spring, and fall garage attendances for tire changes, as well as oil changes from time to time. It was her evidence that as far as she knew there were no mechanical problems with the vehicle in the weeks before the August 2005 accident.

On cross-examination she conceded that at the time of the accident she knew that there were approximately 235,000 kilometres on the vehicle and that it was 10 years old. After a significant storm in which the vehicle had subjected to water there was a "whistling sound" for a while when the vehicle was being operated but then it went away. She acknowledged that she knew the Québec police had impounded the vehicle after the accident and it was determined that the battery and perhaps the alternator were defective.

Joshua Reynolds was one of the five passengers in the Lisk vehicle. He was seated in the rear left of the vehicle. He had been an occupant of the Lisk vehicle many times before August 26, 2005 and did not recall any problems with the vehicle. On the day of the accident the group left for Montréal between 8:30 a.m. and 9:00 a.m. The incident occurred as they were approaching the City of Montréal on Highway 40. Up until that point in the trip they had not experienced any difficulties with the vehicle.

They were in "stop and go" traffic for 5 to 10 minutes and then the car stalled. He was asked whether he recalled there being any warning that the car might stall, and he replied, "*not that I recall.*" They were in the centre lane when this occurred. He said that

the immediate reaction of Sean Lisk, the driver, was to put the gearshift into "park", and attempt to restart the engine. He did not recall Sean Lisk engaging the four-way hazard flashers. He recalls a discussion amongst the group as to what they should do. They realized that they were "*sitting ducks*" in the position where the vehicle had stalled. They also realized however, that attempting to exit the vehicle in the heavy traffic might not be a good idea. He recalled that one of their group telephoned the emergency 911 number. Mr. Reynolds called CAA. It was just after that Mr. Reynolds said that the vehicle was struck by the Zürich tractor.

Mr. Reynolds stated that it was difficult to accurately estimate the time, but he put it at between 2 minutes and 4 minutes from the time the vehicle stalled until the collision occurred.

On cross-examination he stated that he did not recall any prior problem with the vehicle involving a "whistling noise". He confirmed his evidence that he was not aware of any problem with the vehicle leading up to the trip to Montréal. In summary, his evidence on this point was, "*if I did not trust the vehicle I probably would not have gone in it.*"

He cannot recall any conversations amongst the group in the car leading up to the vehicle stalling. He was not aware of any dashboard warning lights coming on before the vehicle stalled. He stated that he called CAA within the minute or so before the tractor struck their vehicle. He testified that he had no specific recollection of whether they could have exited the highway before the vehicle stalled. He had no recall

of Sean Lisk indicating there was a problem in the several minutes leading up to the vehicle stalling.

He recalls a vehicle approaching theirs from the rear and then swerving out of the way, avoiding a collision. This vehicle veered around them in one motion. This vehicle (which he could not identify) came "*fairly close to ours*". In his opinion it was not a gradual lane change. He cannot recall whether more than one vehicle did this. After that, in a time interval he could not estimate, he recalled seeing the tractor approaching the rear of the vehicle and bracing as he knew it was going to hit them. He does not know if the truck slowed down before it hit them.

Sean Lisk was the operator of the vehicle when the accident occurred. He confirmed his mother's evidence that his parents were in charge of the vehicle's maintenance for at least a year before the accident occurred. He was asked specifically about the "electrical condition" of the vehicle in the weeks leading up to the accident and he stated, "*there were no problems as far as I could tell*".

He testified that his first indication something might be wrong with the vehicle was that the radio did not seem to be working. This happened a few minutes before they entered into the stop and go traffic. Following one of the times he stopped the vehicle because of the heavy traffic, when he attempted to move again the engine stalled. He said that he engaged the four-way flashers. He recalls Josh (Mr. Reynolds) and Alex[26] calling CAA and 911. He recalls discussing with the group whether they should exit the vehicle.

[26] Not Alex Black the SABS claimant, but Alex Pollack who tragically was killed in the accident.

His evidence was that "many vehicles avoided hitting them". He saw the tractor approaching and knew that it was going to hit them. It did not appear to be slowing down enough to avoid them. It seemed to be coming at "full speed".

He was asked about the "whistling" noise the vehicle made following it having been out in a storm. His evidence was that it went away after about a day, and this was 5 to 7 days before their trip to Montréal.

On cross-examination he acknowledged that the vehicle was 10 years old. He admitted to taking it for a ride shortly before the accident to ensure it was working well enough to make the trip. He denied telling the Québec police that he was having problems with the vehicle before the trip or that he had difficulty accelerating just before the vehicle stalled. He was shown the statement he had given to the Québec police which contains this information. He identified his signature on the statement, but explained that the officer was "*putting words in my mouth*". A number of other parts of the statement were put to him and he denied having a recollection of telling the police what they had reported being told by him.

He estimated that about 5 minutes elapsed from the first sign of any trouble with the car until the accident occurred. He did not recall seeing an exit from the highway in that time. He stated that the shoulders on the highway were "minimal". The photographs in Exhibit 5 were put to him. These photographs show a narrow left shoulder but a wider right shoulder. He could not recall if the photographs depicted what the area looked like at the time of the accident. He confirmed that the vehicle stalled in the centre lane of Highway 40. After being pressed further he conceded that it was "possible" that they

could have pulled over before the vehicle stalled. He had no specific recollection of a vehicle avoiding theirs just before the tractor hit them.

The next witness was Adam Lisk. He was a passenger in the vehicle driven by his brother Sean Lisk. Of the witnesses who were occupants of the Lisk vehicle, I found Adam Lisk's testimony to be the most forthcoming concerning the events leading up to the accident. I say this not because I thought the other occupants of the vehicle who testified were untruthful, but because I had the impression their testimony was coloured with an animus towards the operator of the tractor. Perhaps on a human level that is understandable since one of their friends was killed and another badly injured in the accident. Nevertheless, on cross-examination I found that they were rather defensive in responding to many of the questions asked by Zürich's counsel. I did not sense the same animus on the part of Adam Lisk in his testimony.

Adam Lisk testified that he was not aware of any problems with the vehicle in the year or so leading up to the accident. On the day of the accident it was less than five minutes from the time any problem was noticed with the vehicle until the accident occurred. They were on Highway 40 just on the outskirts of Montréal. They were in the centre lane of Highway 40. The traffic was "stop and go". He noticed that the radio, power windows, and acceleration of the vehicle seemed problematic. At one point when they had stopped in the heavy traffic and other traffic was stopped around them, the vehicle stalled. His brother tried to restart the vehicle but was not able to do so. He remembered calls being made by some of the occupants to 911 and CAA. When the traffic started to move again and they could not, they elected to stay in the vehicle rather than exiting and "dodging traffic" to get to the side of the highway.

He recalled cars merging to the lanes beside them about 30 to 40 metres behind them as they recognized that the Lisk vehicle was stalled. His recollection is that most cars were able to move around them at a safe distance until the tractor hit them. He saw it coming and it was clear to him from its speed that it was going to hit them.

On cross-examination he acknowledged that he was aware the lights on the dashboard had gone off prior to the accident. This was less than five minutes before the accident. He described the acceleration problem he referred to in his direct examination as the vehicle having difficulty picking up speed. He said the radio went out before the dash lights went out.

Adam Lisk was also examined on his statement to the Québec police. He told the police that it was about five minutes before the accident occurred that they were aware of problems with the vehicle. Although he said he was not sure the 5 minute estimate was accurate, he admitted during his testimony at the arbitration hearing that this would be his best recollection since it was given much sooner after the accident. He then told Zürich's counsel that he thought he noticed acceleration problems about 10 minutes before the accident occurred.

Adam Lisk estimated that it was between 3 minutes and 5 minutes from the time they stalled in the centre lane of Highway 40 until the tractor hit them. He believed that any highway exit was some distance away from where they stalled. He also stated that they did not exit the highway while in the stop and go traffic and when the problems were occurring because the traffic was too heavy for them to move from the centre lane to an exit.

In some important evidence he stated that he saw both the vehicle that managed to avoid colliding with them, which he described, "*just missed us*", and the tractor behind that vehicle. He formed the opinion that the tractor was not going to stop because it was getting close and not moving to the left or right.

Rosaria Ferla was a passenger in the vehicle operated by Laighton McKay. She was getting a ride with Mr. McKay to the Metro Station. It was a hot, sunny day. They were traveling in the centre lane of Highway 40. She observed a car ahead of theirs signal to move to the left lane. She was talking with Mr. McKay and it was only when they got up close behind the Lisk vehicle that she yelled, "*Laighton, the car is not moving*". Ms. Ferla testified that Mr. McKay moved to the left lane around the Lisk vehicle. After that she saw Mr. McKay turn and he said, "*the truck is going to hit the car.*" She looked back and saw the collision between the tractor and the Lisk vehicle in the centre lane of Highway 40. Mr. McKay backed his vehicle a short distance and parked on the shoulder of Highway 40. Then he and Ms. Ferla went back to the accident scene to see if they could help.

On cross-examination she testified that the traffic in the area of the accident was heavy but it was moving. Mr. McKay was not speeding as far she was concerned but she does not know his speed. She was shown the Exhibit 5 photos but was unable to specifically identify them as the area where the accident occurred. She was not sure if Mr. McKay saw the Lisk vehicle when she did but while she was yelling to him he was already swerving to the left. She would not describe Mr. McKay's move to the left lane as a "hard swerve", but it was not a "gradual lane change" either. She recalled that they

were 1 to 2 car lengths behind the Lisk vehicle when she yelled and Mr. McKay swerved.

Ms. Ferla stated that her attention was drawn to a flashing light on the rear left side of the vehicle that was not moving. She testified that her attention was drawn to this flashing light "*from a distance*". This was further clarified to mean a distance of about 6 to 10 car lengths.

Laighton McKay was driving a silver Honda Civic. He was traveling eastbound on Highway 40. He confirmed that Ms. Ferla was his front seat passenger. He was driving her part way home. He described the circumstances as a "*normal day*", with "*normal traffic*". He recalled coming up behind a car that he did not realize was stopped until he got close to it. He remembered Ms. Ferla saying, "*car not moving*". He changed from the centre lane to the left lane. He could not recall if he had signaled his intention to move to the left lane. He estimated that they had traveled between 10 and 20 car lengths in the left lane when he heard a "*bang*". In this connection he was asked to estimate the distance of a car length of a vehicle similar to his to which he replied, "*about 6 feet*". He looked in his mirror and saw debris from the collision between the stopped vehicle and the tractor in the centre lane of Highway 40. He stopped his vehicle, reversed to the area where the accident occurred. Then he and Ms. Ferla attempted to help.

On cross-examination he testified that the tractor that was involved in the accident had been following his vehicle for a few minutes. He was not concerned that the tractor was following him too closely. He had no memory of what vehicles were in front of his as he approached the stopped Lisk vehicle. He did not notice vehicles

changing lanes ahead of him. He denied swerving to go around the Lisk vehicle. He said, "*I did not swerve, I just changed lanes*". He also stated that he checked over his shoulder to his left before changing lanes.

Counsel for Zürich then impeached Mr. McKay's testimony by putting excerpts from his examination under oath to him as well as his statement to the Québec police. It is not necessary to repeat all of that evidence here. Suffice it to say that Mr. McKay's examination under oath evidence clearly indicated that he had made a sharp swerve to the left at the last moment before colliding with the Lisk vehicle. He was at the minimum possible distance he needed to swerve without colliding with the Lisk vehicle. He had no time to spare and it was "very close". Mr. McKay had told the Québec police that he recalled seeing brake lights on the Lisk vehicle, but on his examination under oath and in his arbitration testimony he stated that he did not see any lights on the Lisk vehicle.

He testified that the truck driver was not tailgating him when he swerved to avoid the Lisk vehicle. As he put it, the truck was "*a good distance behind me*". Mr. McKay summed up his actions in avoiding the Lisk vehicle this way: "*I had enough time to do what I had to do.*"

Igor Kravets was the Zürich insured tractor operator. He had been driving tractor trailers for two years at the time of this accident. On the day of the accident he was driving a 2003 International Tractor. In the driver's seat of the tractor he was approximately 2 to 2 ½ metres above the road. He was traveling eastbound on Highway 40. In the area of the accident there are three eastbound lanes. He identified the photographs in Exhibit 2 as fairly depicting the area where the accident occurred. He

was traveling in the centre lane at approximately 100 km/h. It was a clear, sunny day. The road surface was dry. Visibility was normal. He estimated the speed of the traffic in the lane to his right to be approximately 95 to 100 km/h. In the lane to his left the traffic was traveling "*a little faster*". The three lanes were "*full of cars*".

He was traveling behind the Honda Civic operated by Mr. McKay. He had been following Mr. McKay's vehicle for a couple of minutes. Their speed had been consistent at around 95 to 100 km/h. He estimated that he was traveling at a distance of approximately 75 to 100 metres behind Mr. McKay's vehicle, which he estimated was a traveling time distance of about 5 to 6 seconds.

Mr. Kravets described some standard driving checks that he was doing just before the accident occurred. He explained that he was looking in his mirrors to the left and right to confirm the position of vehicles around his tractor. It was when he looked ahead again after making these checks that he "*figured out something was wrong*". He noticed to two or three cars up ahead "*jumping*" from the centre lane to the left lane. The vehicles appeared to be doing this very urgently. He removed his foot from the accelerator. A moment later he saw Mr. McKay's vehicle "*jump very fast*" from the centre lane in front of him into the left lane. At that point he could clearly see the Lisk vehicle in front of him in the centre lane. He saw the brake lights on the Lisk vehicle go on and off twice. He applied his brakes as soon as he saw the brake lights on the Lisk vehicle come on for the first time. He could not stop in time and collided with the Lisk vehicle.

He testified that if he had braked earlier then perhaps he might not have hit the Lisk vehicle. He also pointed out that with a big tractor and cars to his left and right, it was hard to manoeuvre. He stated that when the cars first started jumping from the centre lane to the left lane he focused on the McKay vehicle ahead of him. He did not move to the left or right because there were cars in both lanes. "*It was like a tunnel for me*".

On cross-examination Mr. Kravets confirmed that the tractor depicted in the photograph Exhibit 7 was similar to the tractor he was operating on the day of the accident. He agreed that the tractor was equipped with an engine brake that he could have used in conjunction with the regular tractor brakes. He did not use it in this case. He did not down shift gears before the accident.

He agreed that from his position in the driver's seat of the tractor he could see further ahead than a driver in a regular automobile. He estimated that on average he would be able to see at least 10 to 15 car lengths ahead. He confirmed on the day of this accident the sun was not in his eyes. There were no larger obstructions to his view in front such as other trucks. He confirmed that it is proper driving practice for the operator of the tractor to maintain a 5 to 6 second distance from the vehicle in front. It was put to him that he had testified on his examination under oath that the proper practice was to keep a 7 second driving distance from the vehicle in front. He explained that was the case if the tractor was towing a trailer but on the day of the accident he was not towing a trailer.

He testified that the vehicles in front of Mr. McKay's Honda were spaced approximately 2 to 3 car lengths apart. Here he referred to Exhibit 5 – A, and said the vehicles were apart approximately the same distance as the vehicles shown in that photograph in the centre lane. He confirmed that he was about 5 to 6 seconds driving distance away from Mr. McKay when the vehicles ahead of Mr. McKay's Honda started jumping from the centre lane to the left lane. He commented that maybe he might not have struck the Lisk vehicle if he had a couple of extra seconds. That additional time would probably have helped him avoid a collision.

Since my first task is to determine what was "the incident", I will make findings of fact in that respect. Based on the evidence from the witnesses and in the exhibits, I conclude that the Lisk vehicle was eastbound in the centre lane of Highway 40 within the city limits of Montréal. It developed operational difficulties, the extent of which were not clear, that were present for between 5 and 10 minutes before the engine stalled and the vehicle could not be restarted. Between 2 and 5 minutes after the Lisk vehicle stalled in the centre lane of Highway 40 it was struck from behind by the tractor operated in the centre lane of Highway 40 by Igor Kravets. The driver and other occupants of the Lisk vehicle were still in their same positions in the vehicle when this collision occurred. The collision caused the death of one of the occupants and serious injuries to Alex Black resulting in his claim for SABS, and the subsequent loss transfer indemnity claim by Security against Zürich.

Based on these findings of fact I will next consider whether FDR – 17, or FDR – 6 describe the incident.[27] Security submits that FDR – 17 (1) describes the incident giving rise to Mr. Black's SABS claim. FDR – 17 (1) reads as follows:

> If automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the incident.

There is no doubt that the Security insured vehicle, automobile "A" according to the FDR, was struck by the Zürich insured heavy commercial vehicle, automobile "B", according to the FDR. I must determine whether the Security insured vehicle was "parked" when it was struck by the Zürich vehicle, to give further consideration as to whether FDR – 17 (1) applies.

In *Liberty Mutual Insurance Company v. Zürich Insurance Company*[28] Arbitrator Jones had to consider whether some motor scooters were "parked" when they were struck by an automobile. A group of five scooters had pulled over onto the shoulder of a rural highway to check a map. They had completed checking the map and were waiting to turn around and go the opposite direction on the highway. Three of the scooters had turned around and were on the opposite shoulder of the highway. A vehicle came over a rise in the road and ended up striking two of the scooters that were still on the shoulder of the road where they had pulled over.

The arbitrator noted that the term "parked" is not defined in the FDR, or in the *Insurance Act*. He refers to definitions of "parked", "parking", "standing", "stand",

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[27] FDR – 17 (2) does not apply because the incident occurred within the City limits of Montréal. To consider whether FDR – 17 (2) describes the incident, the incident must have taken place outside city limits.

[28] Private arbitration, August, 2005 ("*Liberty v. Zurich*").

"stopped", and "stopping" in the *Highway Traffic Act.* Although the definitions are helpful in that they differentiate between parking and stopping by indicating that stopping is a more temporary event, I am not certain that the *Highway Traffic Act* definitions are necessarily suitable to be directly imported into an interpretation of what "parked" means in FDR – 17 (1). It must be kept in mind that the purpose behind the definitions in the *Highway Traffic Act* is to set out what is permissible in terms of the lawful operation of a vehicle. At the risk of oversimplifying it, the *Highway Traffic Act* definitions were designed specifically as a statement of what the operator of a vehicle may or may not do as far as compliance with the rules of the road are concerned. They are not intended to be comprehensive definitions of the terms for general purposes.

The arbitrator made reference to the Ontario Court of Appeal's decision in *Speer v. Griffin.*[29] I think this case gives some more helpful guidance as to what the term "parked" may mean for the purposes of FDR 17 (1).

In *Speer v. Griffin* the driver of a truck drove his vehicle off private property and through an open gate. He stopped the truck partially on the highway to allow a passenger to exit the truck and close the gate behind them. The passenger had completed closing the gate and was returning to the truck when the truck was struck by a vehicle traveling on the highway.

The issue was whether the truck was "parked" when the collision occurred. The court concluded that the truck was not "parked". Parking involves more than a

[29] [1939] O.R. 552.

momentary stop. They also focused on the fact that the driver remained in his place and it was his intention to proceed again after the gate had been closed.

The arbitrator concluded[30]:

> From the case law and the definitions above, I think that one must look at the duration of the stopping, the method of stopping and the intent of the person, when determining if the person was parked or stopped.

In *Liberty v. Zürich* the arbitrator noted that the evidence varied as to how long the scooters were on the shoulder of the road. Estimates varied between 2 to 3 minutes and 10 minutes. He found that the scooters were running and their lights were on. One of the scooter operators descended from his scooter and went to another scooter to look at the map in its headlight. The arbitrator concluded that although it was impossible to be precise as to how long the scooters were stopped prior to the collision, he found that they were likely stopped "... *for a shorter rather than a longer period of time.*"[31] He felt that the situation was similar enough to the *Speers* case that the principles were the same. He concluded that the scooters were not "parked" at the time of the collision.

Private arbitrator Bialkowski applied the same principles to an FDR – 17 (1) issue in *Aviva Insurance Company of Canada v. Royal & Sun Alliance Insurance Company of Canada.*[32] The case proceeded on an agreed statement of facts. At about 4:00 p.m., a heavy commercial vehicle (a dump truck) encountered mechanical problems and pulled off to the shoulder of a road. Part of the truck was on the shoulder and part of it obstructed a live lane of traffic. The driver exited the truck and while investigating the

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[30] At page 6.
[31] At page 7.
[32] Private arbitration February 19, 2009 ("*Aviva v. Royal*").

problem he ended up completely disabling the truck. The driver contacted his employer to arrange for a tow truck. He was waiting for the tow truck when the collision occurred. At about 6:00 p.m., some two hours later, a vehicle came along and struck the part of the dump truck that was obstructing the live lane of traffic.

Arbitrator Bialkowski applied the principles enunciated by Arbitrator Jones in *Liberty v. Zurich*, and found that on the facts before him the truck was "parked" within the meaning of FDR – 17 (1). He concluded[33]:

> Although it may have been the intention of the driver initially only to come to *a* momentary stop to check out his vehicle, the damage determined clearly demonstrated that the vehicle was completely disabled and that the stopping would not be momentary. The operator of the RSA truck is best characterized as being "parked".

I will now examine the evidence in this case to determine whether the facts are such that FDR – 17 (1) describes the incident. This case has features common to both *Liberty* v. *Zürich*, and *Aviva v. Royal*. As in *Liberty v. Zürich*, the Lisk vehicle had been stopped only a few minutes when the accident occurred. As in *Aviva v. Royal* the Lisk vehicle stopped due to operational problems. In looking at the applicable principles, the duration of the stopping in this case does not suggest a "parked" vehicle. The same is true of the factors relating to the method of the stopping and the intent of the driver and occupants of the Lisk vehicle. Neither Sean Lisk nor his passengers had any intention of stopping their vehicle for an extended period of time in the centre lane of a major Montréal highway. They did not even intend to stop at all. The stop happened as Mr.

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[33] At page 5

Lisk was attempting to accelerate the vehicle, and it was beyond Mr. Lisk's control as a result of operational problems with the vehicle.

I think there are two significant points of distinction between the facts of this case and *Aviva v. Royal*. First, after the truck in the *Aviva v. Royal* case became disabled, two hours elapsed before the second vehicle came along and collided with the truck. There is no doubt by that point the situation was clear. The truck could no longer be said to have been momentarily stopped. Secondly, it was abundantly clear from the facts in *Aviva v. Royal* that the truck was completely disabled and was not going anywhere except on a tow truck. Although in this case, an unsuccessful attempt had been made to restart the Lisk vehicle, in my view such a short time had elapsed that a sufficient determination of the operational problems had not been made to warrant the conclusion the vehicle was completely disabled.

Therefore, I conclude that FDR – 17 (1) does not describe the incident in this case because the Lisk vehicle, automobile "A", was not parked when it was struck by the Kravets tractor, automobile "B".

I will deal next with whether FDR – 6 describes the incident in this case. First, I must determine whether FDR – 6 (1) describes the incident. I am of the opinion that it does. The Lisk vehicle, automobile "A", was struck from the rear by the Kravets tractor, automobile "B". Both vehicles were traveling in the same direction, in the same lane – eastbound in the centre lane of Highway 40.

Next I must determine whether FDR – 6 (2) describes the incident. Once again I am of the opinion that it does. The evidence before me confirms that the Lisk vehicle

was stopped when it was struck by the Kravets tractor. All the incident witnesses who testified, including the occupants of the vehicle, Ms. Ferla, Mr. McKay, and Mr. Kravets, describe the Lisk vehicle as being stopped when struck by the Kravets tractor. Sean Lisk stated that he was trying to accelerate the vehicle forward when the engine stalled. Even if the Lisk vehicle had been moving forward when struck by the Kravets tractor, those facts still come within the description of the incident is set out in FDR 6 (2).

Zürich argues that FDR – 6 (2) does not describe the incident because Laighton McKay's vehicle was "involved in the incident". I have already partially dealt with this argument by concluding that it is wrong in law to ask whether a vehicle other than a heavy commercial vehicle from which loss transfer indemnity is sought, is "involved in the incident", when determining whether a particular FDR describes the incident. The "involved in the incident" criteria are to be used solely for the purpose of deciding whether section 275 loss transfer indemnity can be claimed in a particular case.

To decide whether a particular FDR applies the adjudicator must consider the wording of the FDR, any accompanying diagram, and use a common sense approach to decide if the facts of the incident are described by the FDR.

The description of the incident in FDR 6 (2) describes a two vehicle incident where a vehicle in front is struck by a vehicle from behind. That is the case here. The rule applies as long as the vehicles are traveling in the same direction in the same lane. Again, that is the case here. Once these facts are found, then as Justice Perell states in *ING v. Farmers'* the FDR must be applied arbitrary though it may be. The courts have made it clear that this is the intent of the loss transfer scheme.

The only possible basis that I could see to try to take this case outside of FDR 6 (2) would be to characterize this incident as a 3 (or more) vehicle incident, and not a 2 vehicle incident. I see no basis for doing so. In my opinion the facts of this case are virtually the same as those in *ING. v. Farmers'* for the purposes of the FDR analysis.

Before I leave this part of my decision I will mention one more case that I believe supports my analysis. In *Markel Insurance Company of Canada v. Certas Direct Insurance Company*[34] ice came off the top of the Markel insured tractor trailer being operated on a highway 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 FDR 10 (4) described the incident because the driver of the vehicle behind the tractor trailer observed snow blowing from the top of the trailer and decided to change lanes to the left to avoid the snow. Markel argued that the ice which penetrated the following vehicle's windshield did so as the vehicle was changing lanes and so the "collision" occurred while the vehicle was 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,

[34] 2011 CarswellOnt 10717 (Ont. Sup. Ct.) ("*Markel v. Certas*").

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 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[35]:

> 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.

I would apply the same reasoning to the facts of this case. The incident here did not begin with vehicles in front of the Kravets tractor, including Mr. McKay's vehicle, changing from the centre lane to the left lane, and end with the Kravets tractor striking the rear of the Lisk vehicle. For the purposes of FDR 6 (2), the incident giving rise to the claim for indemnification was the Kravets tractor striking the rear of the Lisk vehicle. Had the vehicles in front of the Kravets tractor simply changed lanes, and the Kravets tractor not struck the Lisk vehicle from the rear, no claim for indemnification would have arisen.

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[35] At paragraph 12.

Should I be found to be incorrect in my application of the law concerning the proper method to interpret the FDR, or in my conclusion that FDR 6 describes the incident in this case, I will make findings of fault in accordance with the ordinary rules of law of Ontario as if FDR – 5 applied. This means the common law of negligence.

In my view the result would be the same if FDR – 5 applied. Mr. Kravets would be 100% at fault for the accident. In coming to that conclusion I accept that all drivers have a duty to operate their vehicles in a safe and reasonable way so that they do not cause harm to others. Put in a more legalistic fashion, a driver should take such care in the circumstances not to operate his vehicle in a manner that he could reasonably foresee may cause harm to others whom he could reasonably foresee may be affected by his actions.

In this case Zürich argues that Mr. McKay was at least partially at fault for the incident whereby the Kravets tractor struck the rear of the Lisk vehicle. In support of the argument Zürich submits that the evidence shows Mr. McKay made a sudden, sharp swerve from the centre lane to the left lane, barely avoiding a collision with the Lisk vehicle.

I agree with Zürich's characterization of this evidence. Despite Mr. McKay's testimony at the arbitration hearing, in my opinion the preponderance of the evidence, especially the evidence of Ms. Ferla, Adam Lisk, and Mr. McKay's own examination under oath evidence, confirms that he made a last moment swerve to the left, and not a gradual lane change when confronted by the stopped Lisk vehicle.

I must say however, I struggle with the argument that in responding to encountering the Lisk vehicle stopped in the centre lane of Highway 40 in a manner several other drivers similarly responded, Mr. McKay somehow breached a duty to Mr. Kravets behind him. Although it is not unheard of that a vehicle might be stopped for no apparent reason in the centre lane of a major highway permitting speeds up to 100 km/h, I do think coming upon such a vehicle with traffic otherwise moving at or near the speed limit could well be described as unexpected, and create the need for an emergency response, even for a driver operating his vehicle with the appropriate care and attention. Considered thusly, I am not convinced that Mr. McKay's actions were negligent, or breached any duty of care to a driver in Mr. Kravets' position.

Even if Mr. McKay's driving could be characterized as somehow falling below the standard of care of a reasonable driver, he avoided a collision with the Lisk vehicle, so he did not cause any damages in so far as the occupants of the Lisk vehicle are concerned. Therefore, there is no actionable wrong in that respect.

The only way Zürich's position could succeed would be if it was proven on a balance of probabilities that Mr. McKay's driving actions prevented or reduced Mr. Kravets' ability to avoid colliding with the rear of the Lisk vehicle. In my opinion the evidence is insufficient to warrant that conclusion.

The evidence indicates that this accident was caused solely as a result of Mr. Kravets not being attentive enough to events ahead of him on the highway that he could have seen and could have taken action to avoid, regardless of the actions of the McKay vehicle, or any other vehicle.

I consider it important that I heard no evidence, including no evidence from Mr. Kravets himself, directly connecting Mr. Kravets' failure to avoid a collision with the rear of the Lisk vehicle and any actions by Mr. McKay.

To the contrary, I heard evidence that Mr. Kravets is a professional driver with a special class of license who sits higher than other ordinary vehicle drivers when operating his tractor. His own evidence was that he could see ahead for up to 15 car lengths given his position in the cab of the tractor. He stated that he maintained his normal time-distance of 5 to 6 seconds behind Mr. McKay's vehicle right up until the time McKay changed lanes.

The day of the accident was a clear, sunny day and the roads were dry. Mr. Kravets stated that although he had checked his surroundings he was looking ahead and focusing on the McKay vehicle traveling at his time-distance behind it of 5 to 6 seconds when the vehicles ahead of McKay began quickly changing lanes. These vehicles, it should be noted, were even further ahead of him than Mr. McKay. He estimated that they were 2 to 3 car lengths apart.

There was evidence from Ms. Ferla, the passenger in the McKay vehicle, that there was at least one flashing light on the rear of the Lisk vehicle that drew her attention some 6 to 10 car lengths away. There was evidence from Adam Lisk that from his position in the Lisk vehicle he could see the tractor approaching at speed behind what was in all probability the McKay vehicle. This suggests to me that Mr. Kravets' view of the Lisk vehicle would not have been blocked by the McKay vehicle which was much smaller and lower down to the road than the Kravets tractor.

I thought Mr. Kravets was quite straightforward and honest in giving his evidence. As I have noted, he never specifically connected any actions by Mr. McKay with his inability to react in time to avoid an accident with the Lisk vehicle. The fact that he did not blame Mr. McKay for what happened, although it would not have determined legal causation one way or the other, is indicative of the fact that Mr. McKay's driving actions did not have any effect on Mr. Kravets' driving actions.

Mr. McKay's evidence as far as the Kravets tractor was concerned was that it seemed to be following him at a safe distance and he had no concerns about it being too close. He testified that he had traveled least 10 to 20 car lengths past the Lisk vehicle before he heard the collision between the Kravets tractor and the Lisk vehicle. Ms. Ferlan similarly testified that she observed Mr. McKay had time to turn around after moving into the left lane and then comment that the tractor was going to hit the Lisk vehicle before the collision happened. This evidence suggests to me that the Kravets tractor was not so close behind the McKay vehicle that Mr. Kravets would not have had ample opportunity to see what was unfolding in front of him and react appropriately had he been paying proper attention.

In my opinion Mr. Kravets, being higher up in his tractor, had a better chance of seeing the stopped Lisk vehicle in time to avoid colliding with it than any of the drivers, including Mr. McKay, who did manage to avoid it. I do not accept that somehow Mr. McKay's actions of swerving to the left to avoid a collision with the Lisk vehicle prevented or reduced Mr. Kravets' ability to see what he had a better opportunity than anyone else to see, and react in time to avoid a collision. In fact, I doubt that Mr.

McKay's driving actions had any influence on Mr. Kravets' operation of his tractor in the circumstances.

Certainly from a legal causation standpoint, I am unable to connect any of Mr. McKay's driving actions to Mr. Kravets' failure to avoid a collision with the rear of the Lisk vehicle. On the evidence before me, it cannot be said that but for Mr. McKay's driving actions, Mr. Kravets would have been able to avoid colliding with the rear of the Lisk vehicle.

A second argument advanced by Zürich is that the Lisk vehicle should be allocated fault on the basis that at least Sean Lisk, and possibly other vehicle occupants knew or ought to have known the vehicle was not in satisfactory condition to be operated on a lengthy trip such as a several hour highway drive to Montréal. Zürich argues further that Sean Lisk had sufficient warning of operational problems with the vehicle that he should have elected to either pull over to the side of the road or exit Highway 40 before the vehicle eventually stalled in the middle of a live traffic lane. I did not hear any argument that fault should be apportioned to the Lisk vehicle because of any actions the operator and occupants took or failed to take after the vehicle stalled. I think that was sensible. In my view so little time passed between the vehicle stalling and the Kravets tractor striking it that they could hardly be criticized for not immediately having exited the vehicle when it was stopped in the middle of a heavily traveled, three lane major highway, or for not having been able to move the car to the side of the road after it had stalled.

I do not regard the evidence as being sufficient to make any apportionment of fault to the Lisk vehicle because those using it knew or should have known it was not in satisfactory condition to make the trip. Apart from the fact that the vehicle was 10 years old and was a high mileage vehicle, there is no evidence upon which I could rely that the users of the vehicle were aware or should have been aware of a problem significant enough that it could cause the vehicle to cease to operate. There was some vague evidence about a transient whistling noise that was heard briefly after vehicle had sustained some kind of water exposure. To make any findings that this was sufficient to create awareness that the vehicle was inadequate for the trip would be sheer speculation. There is no evidence before me that would connect the whistling noise with the kinds of problems the users of the vehicle experienced just before it stalled and the accident occurred.

As for the argument that Sean Lisk should have pulled to the side of Highway 40 earlier than he did or exited the highway, I am of the opinion that the evidence is also insufficient to apportion fault to the Lisk vehicle on this basis. The one common point in the evidence of the vehicle occupants (with the exception of Joshua Reynolds) who testified was that they noticed some difficulty with the radio in the minutes before the vehicle stalled. Adam Lisk, a rear seat passenger, recalled some difficulty with the power windows and gave some evidence about the dashboard lights going out, but it was not clear to me that this was a sufficient concern, or that it occurred in sufficient time for a decision to be taken that they should immediately pull off the road or exit the highway. It is also questionable in my view whether one would conclude that these

complaints would be sufficient to require the vehicle to be immediately pulled over or removed from the highway.

I suppose the one problem Adam Lisk mentioned (Sean Lisk also spoke of it in his statement to the Québec police) that went more directly to the operation of the vehicle was the vehicle's sluggish acceleration. Again, I did not get the impression that this was so significant that any of them had come to the conclusion they should immediately exit the highway, and that if they failed to do so they would be putting themselves in peril.

One must be careful not to apply the perfection of hindsight to the circumstances that existed on August 26, 2005 as the group was approaching the end of their journey to Montréal. It should be remembered that whatever problems they experienced had been occurring only intermittently for minutes, not throughout the several hours of the trip. One could argue that out of an abundance of caution as soon as any kind of problem surfaced with the vehicle they should have immediately pulled off the road to investigate. On the other hand, I do not think it makes them negligent for not doing so. To find them negligent would, in my opinion, require better evidence of problems significantly affecting the operation of the vehicle for a longer period of time than occurred here before the vehicle actually stalled. I do not think the evidence is sufficient in this case to apportion fault to the Lisk vehicle on the basis of this argument.

Therefore, even if I were to determine the degree of fault in this case in accordance with the ordinary rules of law, as FDR – 5 requires, I would still find the Kravets tractor 100% at fault, and I would not apportion any fault to either the McKay vehicle or the Lisk vehicle.

Conclusion

1. The FDR, as interpreted in accordance with Ontario law, apply to Security's claim for loss transfer indemnification from Zürich.

2. FDR – 6 describes the incident giving rise to Security's claim for loss transfer indemnification from Zürich. Fault for the incident is allocated 100% to the Zürich insured tractor.

3. In the alternative, if FDR – 5 should be used to determine fault in accordance with the ordinary rules of law for Ontario, I find on the evidence that fault for the incident should be allocated 100% to the Zürich insured tractor.

4. Therefore, whether FDR – 6, or FDR – 5 is used to determine fault for the incident, Security is entitled to 100% loss transfer indemnification from Zürich for SABS paid by it to or on behalf of John Alexander Black.

5. 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, May 31, 2013

Scott W. Densem, Arbitrator