COURT FILE NO.: 06-CV-323236PD1
DATE: May 31, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF s. 275 of the *Insurance Act,* R.S.O. 1990, c. I.18;

AND IN THE MATTER OF s. 9 of Ontario Regulation 664/90, as amended, made pursuant to the *Insurance Act;*

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

FARMERS' MUTUAL INSURANCE COMPANY (LINDSAY)

Respondent

COUNSEL:

Chris Blom for the Applicant
Harry P. Brown and Jillian Van Allen for the Respondent

HEARING DATE: May 14, 2007

REASONS FOR DECISION

PERELL, J.

Introduction, Standard of Review, and Overview

[1] Pursuant to s. 45 (3) of the *Arbitration Act, 1991,* S.O. 1991, c. 17 this is an application for appellate review of the decision of Mr. Guy Jones, a private arbitrator. The application is about the operation of the loss transfer provisions of the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] Under the *Insurance Act*, automobile insurers pay accident benefits to insured persons who are injured in motor vehicle accidents. Under the Act and its regulations, in

certain circumstances, the "first party insurer," the insurer responsible for the payment of the statutory accident benefits, is entitled to be indemnified by another insurer, known as the "second party insurer". This entitlement to indemnification is known as a "loss transfer." The amount of loss transfer is determined by the Fault Determination Rules, which are enacted by regulation.

[3] The Applicant, ING Insurance Company of Canada ("ING"), submits that Arbitrator Jones made a reviewable error when he concluded that Rule 17 (2) of the Fault Determination Rules, R.R.O. 1990, Reg. 668, applied in the circumstances of an incident involving a tractor-trailer insured by ING.

[4] The outcome of Arbitrator Jones' decision is that there was a 100% loss transfer and ING is obliged to indemnity the Respondent, Farmers' Mutual Insurance Company (Lindsay) ("Farmers' Mutual"), the first party insurer of a vehicle involved in the incident. ING submits that the correct ruling was that Rule 5 (1) of the Fault Determination Rules applies, with the result that ING, the second party insurer, would be responsible for only 10% of the statutory accident benefits paid by Farmers' Mutual.

[5] ING appeals the decision of Arbitrator Jones. The arbitration agreement between the parties provides for an appeal on issues of law and on issues of mixed fact and law.

[6] On this appeal, ING's position is that: (a) however the issue on the appeal may be characterized, the standard of review of the arbitrator's decision is correctness; and (b) Arbitrator Jones was incorrect.

[7] On this appeal, Farmers' Mutual's position is that: (a) the issue for the appeal is an issue of mixed fact and law and the standard of review is that the arbitrator should not be reversed unless he made a palpable and overriding error; but (b) in any event, Arbitrator Jones was correct.

[8] In my opinion, the appropriate standard of review to apply for this appeal is the standard of correctness. I come to this conclusion for three reasons.

[9] First, in 2002, the Supreme Court of Canada decided *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and the Court examined the various standards of appellate review. The Court held that the standard of appellate review for issues of law is that of correctness. In my view, the issue in the immediate appeal involves an analysis and interpretation of the Fault Determination Rules, which is a legal analysis, and the decision of the Arbitrator should be reviewed against a standard of correctness. See also: *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 4467 (S.C.J.); *Wawanesa Mutual Insurance Co. v. Co-operators*, [2004] O.J. No. 4588 (S.C.J.).

[10] Second, if the issue in the immediate case is an issue of mixed fact and law, it still should be reviewed against a standard of correctness. The Court of Appeal in *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, [2006] O.J. No. 4518 (Ont. C.A.) recently considered an appeal from an arbitrator's decision of an issue of mixed fact and law. The Court held that the standard of review in that case was

palpable overriding error. However, the issue in the *Oxford Mutual Insurance* appeal was an issue of mixed fact and law where the arbitrator had considered the appropriate law and recognized that the case should be determined on its own particular facts keeping in mind all relevant factors. Thus, the issue of mixed fact and law in the *Oxford Mutual Insurance Company* appeal approached an issue of fact for which deference should be showed the arbitrator's decision. In my opinion, the determination of the immediate case is more legal than factual, and, accordingly, the standard of review should be correctness.

[11] Third, and these decisions may need to be reconsidered in the light of *Housen v. Nikolaisen*, *supra*, there is a line of authorities that support the proposition that where the arbitration agreement provides for a right of appeal, the standard of review of the decision of a private arbitrator is that of correctness: *Petrolon Distributors Inc. v. Petro-Lon Canada Ltd.*, [1995] O.J. No. 1142 (Gen. Div); *Liberty Mutual Insurance Co. v. Commerce Insurance Co.*, [2001] O.J. No. 5479 (S.C.J); *Lombard Canada Inc. v. Saskatchewan Government Insurance*, [2002] O.J. No. 4257 (S.C.J.); *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. No. 1477 (S.C.J.).

[12] I, therefore, will apply a standard of correctness in my review of the decision of Arbitrator Jones.

[13] Applying that standard, for the reasons that follow, although I disagree with Arbitrator Jones' approach or line of argument, I conclude that his conclusion; namely, that Rule 17 (2) of the Fault Determination Rules applied, was correct. Accordingly, this application should be dismissed.

Background Facts

[14] Mount Joy Road is an unmarked, 2-lane roadway in the municipality of Scugog, in the County of Durham, Ontario with a tar-covered, gravel type surface. At approximately 5:45 p.m., on Sunday, September 26, 1999, a serious motor vehicle accident occurred on Mount Joy Road.

[15] Just before the accident, Mr. William Churchill was driving a small compact Chevrolet automobile, which he owned, and which was insured by Farmers' Mutual. Mr. Churchill was driving westbound on Mount Joy Road. In the passenger seat was his son Lee, and in the rear seat was his wife Gail. They were going out for dinner at a restaurant.

[16] Just before the accident, there was parked on the north side of Mount Joy Road a tractor-trailer unit, which was insured by ING. The tractor was owned by Richard Geisberger. The trailer was owned by Ronald Geisberger. For reasons that will become apparent later, when I discuss the Fault Determination Rules, it is important to note that the tractor-trailer was illegally parked on the westbound lane of Mount Joy Road and that this road is located outside a city, town, or village.

[17] A tractor-trailer is a heavy commercial vehicle. Just before the accident, Mr. Richard Geisberger and some others were harvesting soybeans that were being grown in two fields adjacent to Mount Joy Road. The farmers' plan was to move the tractor-trailer from the roadway and to use it in harvesting the soybean crop.

[18] Mr. Churchill, as he proceeded westbound, saw, in the distance, the tractor-trailer. It was parked in a way that obstructed the lane in which Mr. Churchill's car was traveling. Actually, Mr. Churchill did not know whether the tractor-trailer was stopped or moving, but he was gaining on it, and he would have to maneuver around it.

[19] Mr. Churchill's plan was to pass the tractor-trailer on the driver's side. However, as he came closer and looked past the trailer, he observed an eastbound vehicle in the other lane. The eastbound vehicle was traveling lawfully in its lane on the roadway. Mr. Churchill concluded that the eastbound vehicle was not going to yield its lane. Mr. Churchill braked and turned his vehicle to the right, and the right front side of his automobile struck the left rear side of the trailer. Sadly, his son Lee was very seriously injured in the accident.

[20] Farmers' Mutual was the first party insurer of the Churchill vehicle, and it paid statutory accident benefits for Lee Churchill. Farmers' Mutual sought to be indemnified for these payments from ING, the second party insurer. The parties could not agree about the loss transfer and their dispute was submitted to be arbitrated by Arbitrator Jones.

Statutory Background

[21] Before discussing the Reasons for Decision of Arbitrator Jones, it is necessary to describe and set out the statutory background that framed the dispute that was before him and that directed how he should resolve that dispute.

[22] Section 275 of the *Insurance Act* creates a scheme for loss transfer payments where an insurer who pays statutory accident benefits may be repaid, i.e. indemnified by another insurer. For present purposes, the following subsections of s. 275 are relevant:

> 275 (1) *Indemnification in certain cases* – The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of person as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.
>
> (2) *Idem* – Indemnification under subsection (1) shall be made to the respective degree of fault of each insured as determined under the *Fault Determination Rules*.
>
> (4) *Arbitration* – If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

[23] Subsection 9 (3) of Ont. Reg. 664/90 under the *Insurance Act* provides a first party insurer with a right to claim indemnification from a second party insurer under a policy insuring a heavy commercial vehicle. The subsection states:

> 9 (3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

[24] Indemnification is determined in accordance with the Fault Determination Rules, which are Ont. Reg. 668/90. Section 2 or Rule 2 of this regulation provides that an insurer shall determine the degree of fault of its insured for loss or damage arising directly from the use or operation of an automobile in accordance with the Fault Determination Rules. Thus, the extent to which the first party insurer can claim indemnity from the insurer of the heavy commercial vehicle is governed by the Fault Determination Rules.

[25] 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 the scheme of the Fault Determination Rules as follows:

> 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 tortfeasor is irrelevant.

[26] In *Jevco Insurance Co. v. Halifax Insurance Co.*, [1994] O.J. No. 3024 (Gen. Div.), at para. 8, Matlow, J. described the Fault Determination Rules 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 a particular accident 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."

[27] The Fault Determination Rules 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 law: *Co-operator's General Insurance Co. v. Canadian General Insurance Co.*, [1998] O.J. No. 2578 (Gen. Div.).

[28] Section 3 or Rule 3 of Ont. Reg. 668/90 (Fault Determination Rules) provides:

> The degree of fault of an insured is determined without reference to
>
> (a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or

(b) the location on the insured's automobile of the point of contact with any other automobile involved in the accident.

[29] In the case before Arbitrator Jones, the only Rules of the Fault Determination Rules that could apply were Rule 17 (2) and Rule 5 (1), which, in effect, is a default Rule.

[30] Rule 17 (2) of the Fault Determination Rules provides as follows:

> 17 (2) If automobile "A" is illegally parked, stopped or standing when it is stuck by automobile "B" and if the accident occurs outside a city, town, or village, the driver of automobile "A" is 100 per cent at fault and the driver of automobile "B" is not at fault for the incident.

[31] Rule 5 (1) of the *Fault Determination Rules* is a default Rule. It applies if an incident is not described in any of the other Rules. Rule 5 (1) states:

> Rule 5: The Ordinary Rules of Law
>
> (1) If an incident is not described in any of these Rules, the degree of fault of the insured shall be determined in accordance with the ordinary Rules of law.

[32] For the discussion that follows, it is also helpful to note Rule 4, which applies when more than one Rule applies. This Rule states:

> (1) If more than one Rule applies with respect to the insured, the Rule that attributes the least degree of fault to the insured shall be deemed to be the only Rule that applies in the circumstances.
>
> (2) Despite subsection (1), if two Rules apply with respect to an incident involving two automobiles and if under one Rule the insured is 100 per cent at fault and under the other the insured is not at fault for the incident, the insured shall be deemed to be 50 per cent at fault for the incident.

[33] With this statutory background, the task for Arbitrator Jones was first to determine the facts; namely, his task was to determine what was "the incident" and second to determine if that incident was described in any of the rules. He was to determine if the rule "applies with respect to the insured." Third, if the incident, as he found it to be, was described in any of the rules, then his task was to apply that rule or rules, arbitrary and expedient as the application of the Fault Determination Rules might be. Fourth, if the incident was not described in any of the rules, then his task was to determine the degree of fault of the insured in accordance with the ordinary rules of law.

The Decision of Arbitrator Jones

[34] Arbitrator Jones made findings of fact with respect to the incident on Mount Joy Road. In his Reasons for Decision, he stated:

> Mr. Churchill testified that he had pulled out to pass the transport trailer, but that there was an oncoming eastbound car. As the transport trailer covered a large portion of the westbound lane, Mr. Churchill was unable to pass the transport trailer. Instead he braked and veered to the right, striking the left rear of the transport trailer. On the evidence, it is clear that the westbound car could not pass the transport trailer without going into the eastbound lane of traffic.

[35] Arbitrator Jones interpreted the application of the Fault Determination Rules to be qualified or subject to exceptions. His approach is revealed by the following passage from his Reasons for Decision:

> The loss transfer Rules were established as a relatively quick and inexpensive way of determining loss transfer in accident benefit cases. They have been recognized by arbitrators and by courts as such and, in some cases as dispensing "rough justice". To the extent that the Rules generally apply to the fact situation they ought to be applied. Only when the fact situation is so fundamentally different than contemplated by the Rules, should the fault determination Rules not be applied. To do otherwise would minimize the applicability of the Fault Determination Rules. [emphasis added]

[36] Arbitrator Jones developed the qualification that the Fault Determination Rules should apply unless the fact situation is fundamentally different than contemplated by the rules. Arbitrator Jones gathered support for this approach to the application of the Fault Determination Rules from the decision of Arbitrator Lee Samis in *Dominion of Canada General Insurance Company and Kingsway Insurance Company* (August 23, 1999) and from Arbitrator Jones's own decision in *Primmum Insurance Company and Allstate Insurance Company of Canada* (September 15, 2004).

[37] The *Dominion Insurance* and the *Primmum Insurance* arbitration decisions are both examples where an arbitrator concluded that Rule 17 did not apply to the incident. In both of the decisions, the arbitrators concluded that Rule 17 did not apply because of the role played by a third vehicle. Arbitrator Jones stated:

> I am in general agreement with Arbitrator Samis' comments in that case, although I would not suggest that the list of considerations set out in section 3 (a) are necessarily the only matters to be taken into consideration. However, when the other considerations are so fundamental to the happening of the incident, to the point where the Rule no longer properly describes the incident, then the Rule is not applicable as it no longer accurately describes the fact situation.

[38] Arbitrator Jones concluded that the fact situation before him was not fundamentally different than contemplated by Rule 17 (2) and accordingly he applied the rule. In his Reasons for Decision, he stated: "While the oncoming car did play some role

in the accident, it did not change the situation so fundamentally such that the Rule ought not to apply."

[39] As a matter of developing jurisprudence, Arbitrator Jones distinguished the *Dominion Insurance* arbitration decision and his own *Primmum Insurance* arbitration decision. Arbitrator Jones stated:

> The fact situation in this case is somewhat different. Here Mr. Churchill simply pulled out to pass the transport trailer and saw another oncoming vehicle traveling legally in the eastbound lane. Mr. Churchill then braked and veered to the right and struck the parked transport trailer. While the oncoming car did play some role in the accident, it did not change the situation so fundamentally such that the Rule ought not to apply. .... While I accept that it may be difficult, in some situations, to determine if the fact situation is so fundamentally different than the Rule, in this case I am of the view that it is not and Rule 17 (2) applies.

[40] I foreshadow here to say that I agree with Arbitrator Jones's conclusion that Rule 17 (2) applies. I disagree, however, with his analysis of the *Dominion Insurance* case and with his own decision in the *Primmum Insurance* case.

Discussion

[41] As I have already noted, after making his findings of fact, Arbitrator Jones' approach was to apply the Fault Determination Rules unless the fact situation was fundamentally different than contemplated by the Rules. In the arbitration before him, he concluded that Rule 17 (2) applied to the fact situation and that the fact situation was not fundamentally different than contemplated by Rule 17 (2). Accordingly, he applied Rule 17 (2).

[42] In my opinion, Arbitrator Jones was correct in applying Rule 17 (2), although I disagree with his approach or line of argument, and I disagree with the qualification that he has imported to the application of the Fault Determination Rules.

[43] My approach to the conclusion that Rule 17 (2) applies is straightforward and consistent with the rough and ready nature of the Fault Determination Rules, 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 stuck by Mr. Churchill's 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 Fault Determination Rules were satisfied. Therefore, the correct conclusion is that Rule 17 (2) applies. That Rule 17 (2) applies was Arbitrator Jones ultimate conclusion, and thus the appeal from the decision should be dismissed.

[44] Arbitrator Jones' approach was more complex and, with respect, on the facts of this case and having regard to the insurers that were before him, his approach was wrong, although it ultimately led to the correct result.

[45] In my criticism of Arbitrator Jones' approach although not his conclusion, there is a subtle semantic problem that needs to be noted. To say that the facts of a case do not fall within the interpretation of a Fault Determination Rule is an interpretative 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 take Arbitrator Jones in describing his approach to the application of the Fault Determination Rules to mean that he was determining what circumstance ought to fall within Rule 17 (2). However, whether he was interpreting the law or making it, in my opinion, he would have made an error if he had concluded that Rule 17 (2) did not apply or that it ought not to apply to the facts of this case.

[46] At first blush, ING's success on this appeal does not depend on accepting Arbitrator Jones' approach that Rule 17 (2) should apply unless the fact situation is fundamentally different than contemplated by the Rule. Indeed, it would appear that ING agrees with my criticism of that approach. ING states in paragraph 46 of its factum:

> 46. Section 275 (2) of the *Insurance Act* calls for the degree of fault to be determined under the fault determination Rules. The statute does not call for the application of the Rules, unless there is a "fundamental" difference between the set of facts and the Rule. Quite simply, if a specific Rule applies to the facts, the dispute is to be resolved in accordance with the Rule. If a specific Rule does not apply, the issue is to be determined in accordance with the ordinary rules of law, under Rule 5.

[47] In paragraph 48 of its factum, ING states that "fault is to be determined strictly in accordance with the Fault Determination Rules." ING's argument is that Rule 5 applies because Rule 17 does not apply. Paragraph 49 of the factum states, with my emphasis added:

> 49. Rule 17 contemplates a two-vehicle collision. Where another vehicle plays a role in the circumstances, the Rule ought not to be applied.

[48] Although disavowing the approach of Arbitrator Jones, it seems to me that ING is actually adopting his approach as a necessary element of its argument on the appeal. As I have already said, I think it is incorrect to approach Rule 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.

[49] As noted earlier, Arbitrator Jones' professed approach can be traced to the decision of Mr. Lee Samis, arbitrator, in *Dominion of Canada General Insurance Company and Kingsway Insurance Company*, www.fsco.gov.on.ca/english/hearings/privatearb/1999-08-23.asp, (August 23, 1999), whose decision was upheld by Sachs, J. in *Kingsway Insurance Company v. Dominion of Canada General Insurance Company*, (S.C.J.), unreported January 11, 2000 (Court file No. 99-CV-176780).

[50] The *Dominion Insurance* case concerned a traffic accident on Highway 11. The facts were that Mr. Rousseau was in a car driving northbound when a heavy commercial

vehicle driven by Mr. Tremblay exited a truck stop on the east side of the highway. Because of the obstruction of the Tremblay truck, Mr. Rousseau braked his car, unfortunately, the car went out of control, and it struck a parked pickup truck, the Veinott vehicle, which was at the side of the highway. Rousseau's insurer, Dominion of Canada, claimed a loss transfer from Tremblay's insurer, Kingsway Insurance.

[51] The first issue that Arbitrator Samis had to address was whether Tremblay's vehicle, which itself was not struck in any way, was an automobile "involved in the incident." Thus, the arbitrator was called on to interpret s. 275 of the *Insurance Act* and determine whether Dominion Insurance, the insurer responsible for the payment of statutory accident benefits, was entitled to indemnification from the insurers of an automobile (of a class named in the regulations) "involved in the incident." It is important to note that this predicate issue was preliminary to the interpretation and application of the Fault Determination Rules.

[52] It was in the context of interpreting the words "involved in the incident" that Arbitrator Samis set out a variety of criteria; namely: (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. Arbitrator Samis concluded that the Tremblay vehicle was "involved in the incident."

[53] The conclusion that the Tremblay vehicle was involved in the incident, in turn, exposed Tremblay's insurer to a loss transfer to be determined in accordance with the Fault Determination Rules. Excluding the default Rule, Arbitrator Samis concluded that none of the Fault Determination Rules applied to the Tremblay vehicle. With respect to Rule 17 (2) this conclusion was undoubtedly true, because the Tremblay vehicle was not automobile "A", an illegally parked, stopped or standing vehicle nor was it automobile "B," the vehicle striking the illegally parked, or standing vehicle.

[54] It was in the context of determining which of the Fault Determination Rules might apply to the Tremblay vehicle that Arbitrator Samis stated:

> In my view it is not appropriate to characterize this accident as a 2 vehicle accident, as contemplated by Rule 17. Having concluded that the Tremblay vehicle is involved, that involvement can not be ignored by blind application of a Rule that deals with another kind of collision. I note that the Fault Determination Rules do deal with some multiple vehicle accident cases under Rule 9. However, no Rule addresses the facts of the case at hand.

[55] Earlier in his decision, Arbitrator Samis referred to Rule 3, which states that "the degree of fault of an insured is determined without reference to the circumstances in which the incident occurs," and stated:

> I interpret section 3 to exclude references to ambient conditions and the actions of pedestrians. Section 3 does not require me to exclude the actions of the Tremblay vehicle in this case, and to do so would be to ignore one of the main events leading to these injuries. Section 3 of the Fault Determination Rules does not require me to disregard the involvement of the Tremblay vehicle.

[56] I do not read Arbitrator Samis' reasons as supporting the approach that the Fault Determination Rules apply unless the fact situation is fundamentally different than contemplated by the Rules. He rather held that excepting the default Rule, none of the Fault Determination Rules were applicable to a vehicle involved in the incident against whom a loss transfer was being made. This approach is consistent with Rules 3, 4, and 5 of the Fault Determination Rules. He rejected an approach where an insurer exposed to a loss transfer claim could place itself in a position where none of the Fault Determination Rules - not even the default Rule - could be applied to it.

[57] Justice Sachs appreciated the dynamics of the case when she upheld the arbitration decision. She appreciated that Tremblay's insurer was attempting to have Rule 17 apply to exculpate itself from liability by having it apply to others and thus oust the default Rule that might inculpate the Tremblay vehicle. Sachs, J. stated in paragraph 12 of her Reasons:

> Using Rule 17 (1) in this case would be to make a determination of fault as between two vehicles, neither of which was a heavy commercial vehicle [like the Tremblay vehicle]. The effect would be to apply the Fault Determination Rules because a heavy commercial vehicle was involved in the incident, but then to ignore the presence of the heavy commercial vehicle in determining fault. Since the purpose of the Fault Determination Rules is to determine the degree of fault of the driver of the heavy commercial vehicle it makes no sense to apply a Rule which makes no mention of the role of the heavy commercial vehicle in its description of the accident.

[58] In any event, the *Dominion Insurance* case is not a good analogy to the problems of the immediate case. An analogy is only as good as the similar elements are genuinely similar and the dissimilar elements are not misleading. In the case at bar, there is no doubt that the tractor-trailer and Mr. Churchill's vehicles were "involved in the incident" and there is no doubt that read literally the criteria of Rule 17 (2) applied 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.

[59] My analysis of the *Dominion Insurance* case is not disturbed and is rather supported by Newbould, J.'s judgment in *Lombard Canada Co. v. Axa Insurance Inc.*, [2007] O.J. No. 601 (S.C.J.). This is another case involving three vehicles. However, all were insured vehicles found by the arbitrator to be "involved in the incident." One of the insurers, Lombard, submitted that a Fault Determination Rule, in that case Rule 12, was

the only rule that applied. Not surprisingly, Rule 12, which was a rule for two vehicles, did not impose any fault on Lombard's insured who did not fall within the criteria of the rule. The arbitrator rejected Lombard's submission, and on its appeal, Newbould, J. agreed with the arbitrator. In paragraph 23 of his Reasons for Decision, Newbould, J. stated: "It was open to the arbitrator to conclude that Rule 12 did not apply to the incident which involved three vehicles. It is hard to understand how the arbitrator could have come to any different conclusion. Rule 12, by its terms, applies to an incident involving only two vehicles."

[60] As I read the judgment in the *Lombard* case, the arbitrator's approach was to make finding of fact and then to determine what Fault Determination Rules were applicable in a case where fault had to be allocated between three insured vehicles. In *Lombard*, none of the rules that described types of incident were applicable to the facts, and thus the default rule applied. In contrast, in the case at bar, the arbitrator made findings of fact and then identified a rule that could be applied to allocate fault. In my opinion, the arbitrator was correct in applying the rule.

[61] Finally, this brings the discussion to Arbitrator Jones' own decision in the *Primmum Insurance* case, which he distinguished in order to apply Rule 17 (2). The facts of this case were that a motorcyclist, Mr. Bautista, and a driver of a van, Ms. Brown, were both proceeding northbound on Highway 27. In order to avoid an unidentified motor vehicle that had entered an intersection against a red light, Ms. Brown swerved her vehicle and it came into contact and injured Mr. Bautista. The unidentified vehicle left the scene and was not apprehended. Mr. Bautista's insurer, Primmum Insurance, claimed a loss transfer from Ms. Brown's insurer, Allstate Insurance.

[62] Primmum Insurance submitted that Rule 10 (4), which applied when the incident involved two vehicles and a lane change, was the applicable rule. Allstate, however, argued that Rule 10 (4) did not apply because the actions of the third vehicle should not be ignored and its involvement ousted the rule. Primmum countered that: Rule 3 applied; the actions of the third vehicle should be ignored; and Rule 10 (4) should be applied. Relying on Arbitrator Samis's decision in *Dominion Insurance,* Arbitrator Jones concluded that Rule 3 did not stand in the way of concluding that Rule 10 (4) did not apply and the third vehicle was at fault; he stated:

> I am in general agreement with Arbitrator Samis' comments in that case, although I would not suggest that the list of considerations set out in section 3 (a) are necessarily the only matters to be taken into consideration. However, when the other considerations are so fundamental to the happening of the incident, to the point where the Rule no longer properly describes the incident, then the Rule is not applicable as it no longer accurately describes the situation.
>
> This interpretation is I believe, consistent with section 5 (1) of the regulation, which states: If an incident is not described in any of these Rules, the degree of fault of the insured shall be determined in accordance with the ordinary rules of law.

> Section 10 (4) refers to a "collision"; whereas section 5 refers to an "incident". There is a difference between the two terms. Arbitrator Samis in *Dominion of Canada General Insurance v. Kingsway Insurance Company*, cited above, noted the distinction between collisions and incidents. An incident does not necessarily involve a collision. Section 10 (4) requires there to be a collision, however, that section does not properly reflect the entire incident, and since the incident is not described in section 10 (4), then Rule 5 (1) suggests you do not apply that section. Section 10 (4) would apply to a simple two-vehicle collision.

[63] With respect, I believe that Arbitrator Jones has misread Arbitrator Samis' decision in the *Dominion Insurance* case. It is to be recalled that in that case, the insurer against whom a loss transfer claim had been made was attempting to have its own involvement in the incident ignored and Arbitrator Samis concluded that Rule 17, which by its terms was never applicable to that insurer, did not apply in those circumstances to the other insurers who were caught by the express terms of a Fault Determination Rule. In contrast, in the *Primmum Insurance* case, an insurer who was caught by the terms of a particular Fault Determination Rule was attempting, (successfully, as it turned out) to escape that rule by pointing to the involvement of another vehicle, whose insurer, if any, was not exposed to any claim for a loss transfer. In my opinion, Arbitrator Jones' approach in *Premmun Insurance* offended Rule 3 and he did not determine what rules were applicable to the insured as opposed to parties not before the tribunal. In contrast, Arbitrator Samis' approach was to determine an insured's fault by determining what Fault Determination Rules, including the default Rule, applied to an incident that included the involvement of the insured.

[64] In any event, for the purposes of the immediate appeal, it ultimately does not matter whether Arbitator Jones was right or wrong in interpreting the *Dominion Insurance* case or in coming to his own decision in *Primmun Insurance* because he ultimately concluded that neither case applied to exclude the application of Rule 17 (2). Thus, in my opinion, he came to the correct conclusion that Rule 17 (2) applied.

Conclusion

[65] Thus, although I disagree with Arbitrator Jones' approach or line of argument, I conclude that his conclusion; namely, that Rule 17 (2) of the Fault Determination Rules applied, was correct. Accordingly, this application should be dismissed.

[66] If the parties cannot agree as to the matter of costs, then they may make brief submissions in writing. Farmer's Mutual may make submissions within 20 days of the release of these Reasons and then ING will have 20 days to reply.

Perell, J.

Released: May 31, 2007

COURT FILE NO.: 06-CV-323236PD1
DATE: May 31, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF s. 275 of the *Insurance Act,* R.S.O. 1990, c. I.18;

AND IN THE MATTER OF s. 9 of Ontario Regulation 664/90, as amended, made pursuant to the *Insurance Act;*

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

FARMERS' MUTUAL INSURANCE COMPANY (LINDSAY)

Respondent

REASONS FOR DECISION

Perell, J.

Released: May 31, 2007