CITATION: Kingsway General Insurance Company v. Dominion of Canada General Insurance Company, 2017 ONSC 498
TORONTO COURT FILE NO.: CV-12-470181
DATE: 20170127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Kingsway General Insurance Company	)	
	)	Mark S. Wilson, for the Respondent/ Appellant
Respondent/Appellant	)	
	)	
– and –	)	
	)	
Dominion of Canada General Insurance Company	)	D'Arcy McGoey, for the Applicant/ Respondent
	)	
Applicant/Respondent	)	
	)	
	)	**HEARD:** January 17, 2017

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] On May 16, 2008 four vehicles were involved in a chain reaction collision on the Gardiner Expressway in Toronto. The first vehicle - a heavy commercial vehicle insured by the appellant Kingsway General Insurance Company (Kingsway) - struck a moving passenger automobile, which struck another moving passenger automobile that was insured by the respondent, Dominion of Canada General Insurance Company (Dominion). The Dominion insured vehicle then struck a stationary passenger automobile.

[2] Pursuant to Ontario's no-fault accident benefits system under the *Insurance Act*, R.S.O. 1990, c. I-8, Dominion paid statutory accident benefits (SABs) to the driver of the automobile it insured. The no-fault system provides a mechanism referred to as "loss transfer" that allows one insurer to obtain indemnification from another insurer for SAB payments paid to an insured. The rules relating to loss transfer are set out in the *Fault Determination Rules*, R.R.O. 1990, Reg. 668, at ss. 1-9, (*FDR*). Dominion sought a "loss transfer" from Kingsway as provided in the *FDR*.

[3] If only those three vehicles had been involved in the collision all parties agree that s. 9(3) of the *FDR* for automobiles travelling in the same direction and lane would preclude Dominion from obtaining any loss transfer from Kingsway, because the Kingsway commercial vehicle did not directly collide with the Dominion vehicle. The Ontario

Court of Appeal has confirmed that in these circumstances s. 9(3) of the *FDR* determines that fault is only to be apportioned between two vehicles if they directly collide: *State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Co of Canada*, 2015 ONCA 699 (CanLII). To put the conclusion in the vernacular of the insurance industry, the third vehicle insured by Dominion cannot "leapfrog" over the second vehicle and claim against the insurer of the first vehicle insured by Kingsway.

[4] This case is complicated by the fact that there was a fourth vehicle involved in the chain reaction collision. Had the fourth vehicle been moving at the time of the collision, all parties agree that s. 9(3) of the *FDR* would still preclude Dominion from obtaining any loss transfer from Kingsway. But the fourth vehicle was not in motion when the collision occurred.

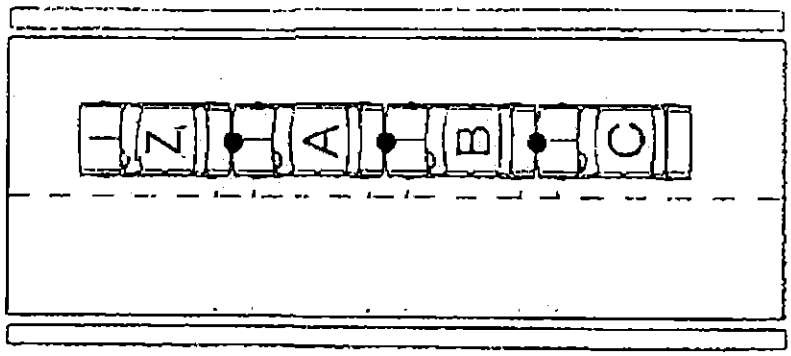
[5] Dominion argues that by virtue of the stationary fourth vehicle in the chain, s. 9(3) of the *FDR* has no application, and the apportionment of fault and indemnification should be based on the ordinary rules of tort law. As such, there is no rule that restricts apportionment and indemnification to vehicles that directly collide.

[6] The arbitrator who decided this case pursuant to an Arbitration Agreement accepted this argument and concluded that s. 9(3) did not apply. She held that she was therefore directed by s. 5 of the *FDR* to determine the degree of fault "in accordance with the ordinary rules of law". She concluded, based on the ordinary rules of tort law, that the commercial vehicle was 100 percent responsible for the collision and ordered Kingsway to indemnify Dominion for the SABs paid to the Dominion insured driver.

[7] Kingsway appeals the decision of the Arbitrator. Kingsway takes the position that s. 9(3) applies in this case, and therefore there can be no loss transfer between vehicles that do not directly collide. Kingsway argues that the Arbitrator based her decision on an analysis and decisions that were subsequently rejected by the Ontario Court of Appeal in the *State Farm* case.

Facts

[8] In order to explain the facts in such a way that they can be understood within the context of the *FDR*, it will be helpful to use a diagram that is similar to the diagram employed by the *FDR*, but with the addition of a fourth automobile labelled "Z".



[9] The loss transfer dispute in this case is between automobile A (insured by Dominion) and commercial vehicle C (insured by Kingsway). The accident occurred when commercial vehicle C drove into the rear of vehicle B. The force of that impact caused vehicle B to collide with the claimant's vehicle A. The claimant in turn struck another vehicle in front of him, vehicle Z. The arbitrator determined that vehicles C, B and A were all in motion at the time of the incident, but vehicle Z was stopped. The factual findings of the arbitrator are not disputed in this appeal.

[10] All four vehicles involved in the accident were travelling in the same direction, in the same lane, and the chain reaction collision was initiated by a heavy commercial vehicle (vehicle C).

[11] The owner of vehicle A applied to Dominion for payment of accident benefits under the *Statutory Accident Benefits Schedule – Accidents on Or After November 1, 1996*, O. Reg. 403/96. Dominion (referred to in s. 9(1) of R.R.O. 1990, Reg 664 as the "first party insurer") paid the benefits and sought indemnification under the Loss Transfer provisions of the *Insurance Act* against Kingsway (referred to as the "second party insurer"). Kingsway took the position that loss transfer was not available to Dominion because vehicle C did not directly collide with vehicle A.

Fault Determination Rules

[12] Before considering the arbitration decision under appeal, it will be helpful to set out the relevant statutory provisions. For this purpose I will adopt part of the summary set out by the Ontario Court of Appeal in its decision in the *State Farm* case at paras. 5-10:

> Section 275 of the [*Insurance*] *Act* and a related regulation provide that an automobile insurer that pays SABs is entitled, in certain circumstances, to indemnification from the insurer of a heavy commercial vehicle where a heavy commercial vehicle was "involved in the incident" from which the obligation to pay SABs arose.
>
> Under s. 275(2) of the *Act*, indemnification is made "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules."
>
> ...
>
> The FDRs are set out in R.R.O. 1990, Reg. 668...
>
> Section 9 of the FDRs "applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in the same lane (a 'chain reaction')": s. 9(1).
>
> Section 9(2) of the FDRs requires that "[t]he degree of fault for each collision between two automobiles involved in the chain

> reaction [be] determined without reference to any related collisions involving either of the automobiles and another automobile."

[13] As noted by the Ontario Court of Appeal at para. 24:

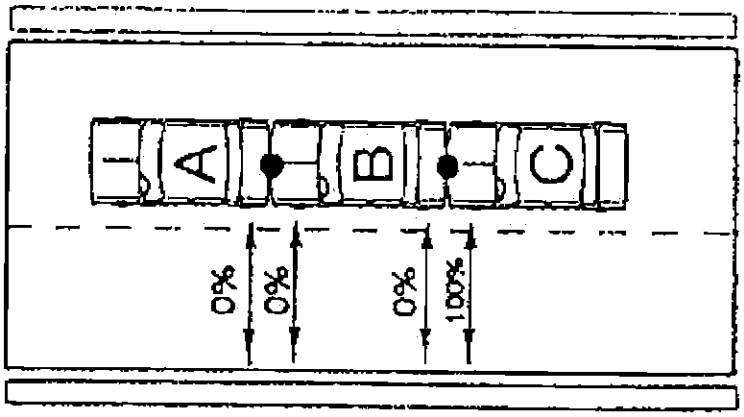
> [T]he SABs Loss Transfer provisions do not provide for indemnification for SABs payments based on fault for all accidents. Rather, they provide for indemnification between specified – and strictly limited – classes of vehicles in certain circumstances.

[14] The Court of Appeal explained that this limited indemnification "is intended to balance the costs of moving away from a tort-based system of compensation for people injured in motor vehicle accidents to a partial no-fault system of compensation between insurers of different classes of vehicles" (at para. 26).

[15] The *FDR* then sets out rules (accompanied by diagrams) to establish percentage fault in a number of scenarios in which two vehicles are involved in a collision or three or more vehicles are involved in a collision. Loss transfer is made "according to the respective degree of fault of each insurer's insured as determined under the FDRs" (*State Farm*, at para. 39).

[16] The *State Farm* case involved s. 9(4), which applies when three or more vehicles are involved in a collision and only the vehicle initiating the collision (labelled vehicle C in the regulation diagram, see below) is in motion when the incident occurs. All parties to the present appeal agree that s. 9(4) does not apply in our case because vehicles C, B and A were all in motion when the incident occurred.

Diagram

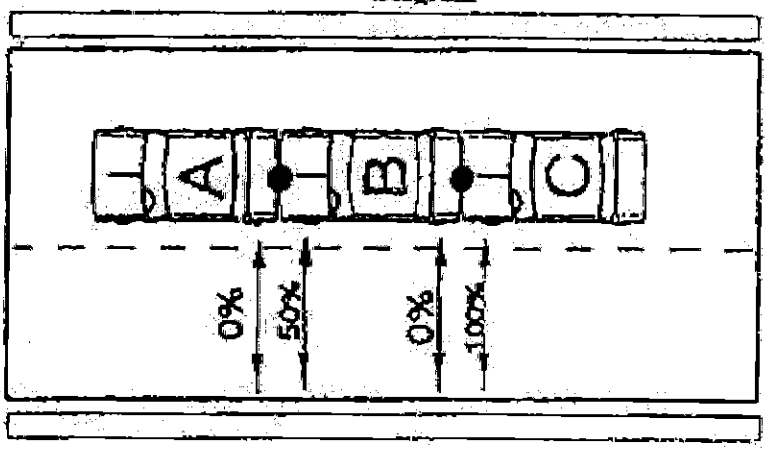


[17] The fact that *State Farm* was primarily concerned with s. 9(4) as opposed to 9(3) is not relevant to my analysis. The Court of Appeal's decision in *State Farm* makes clear that "Sections 9(3) and 9(4) are parallel provisions [that]… must be read consistently" (at para. 72).

[18] If any rule applies in our case, it is s. 9(3), which provides as follows:

> (3) If all automobiles involved in the incident are in motion and automobile "A" is the leading vehicle, automobile "B" is second and automobile "C" is the third vehicle,
>
> > (a) in the collision between automobiles "A" and "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 50 per cent at fault for the incident;
> >
> > (b) in the collision between automobiles "B" and "C", the driver of automobile "B" is not at fault and the driver of automobile "C" is 100 per cent at fault for the incident.

Diagram



[19] In addition to s. 9, the Court of Appeal indicates that the following provisions of the *FDR* address general matters that are also relevant to this analysis, at paras. 42 – 45:

> Section 2(1) requires that an insurer determine the degree of fault of its insured in accordance with the FDRs:
>
> > 2. (1) An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.
>
> Section 2(2) provides that "the diagrams in this Regulation are merely illustrative of the situations described in these rules."
>
> Section 3 stipulates that the degree of fault of an insured is determined without reference to road conditions and other factors:
>
> 3. 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 incident.

Section 5 requires that an insured's degree of fault be determined in accordance with the ordinary rules of law if an incident is not described in the FDRs or if there is insufficient information to determine the insured's degree of fault:

> 5. (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.
>
> (2) If there is insufficient information concerning an incident to determine the degree of fault of the insured, it shall be determined in accordance with the ordinary rules of law unless otherwise required by these rules.

[20] At paragraphs 49 and 50 of its decision, the Court of Appeal summarized the legislative policy underlying the loss transfer regime, indicating that the regime is meant to provide an "expedient and summary method" of reimbursement and that "the fault of the insured is to "be determined strictly in accordance with the FDRs". The Court explained 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".

Decision of the Arbitrator

[21] The arbitrator decided that s. 9(3) did not apply. Section 9(3) requires that "all automobiles involved in the incident are in motion", and that was not the case before her because the fourth car involved in the chain reaction (vehicle Z in my diagram at para. 8) was stopped. She rejected Kingsway's argument that the regulation had to be approached in clusters of three vehicles, stating, at p. 11:

> The fact that the drafters of the regulation included the specific directions above, but make no mention of approaching the analysis in clusters or groupings of three vehicles leads me to conclude that this was not their intention. I find nothing in the words of the section to suggest that the analysis to be conducted should only include groupings of three vehicles, and note particularly that Rule 9(3) specifies that it applies <u>if all automobiles involved in the incident are in motion</u>. (emphasis in original).

[22] Since the arbitrator found that s. 9(3) did not describe the circumstances in this case, and no other rule applied, she concluded that she was directed by s. 5 of the *FDR* to determine the degree of fault of the Kingsway insured (vehicle C) in accordance with the

ordinary rules of law. On the evidence, she concluded that vehicle C was 100 percent at fault for the collision, and was therefore responsible to indemnify Dominion for all of the SAB benefits it paid out to the driver of vehicle A.

[23] The arbitrator concluded that this finding was sufficient to end the matter, but she went on to address the question of whether she could have reached the same result even if s. 9(3) applied. This question required her to deal with conflicting case law on the issue of whether s. 9 would ever permit vehicle A to seek indemnification from vehicle C even though the automobiles did not directly collide with each other. In other words, does s. 9 permit leapfrogging?

[24] The debate between these two lines of cases is fully set out in the Ontario Court of Appeal's decision in *State Farm*, at paras. 51 to 65. At the end of the day, the Court of Appeal concluded that s. 9 does not permit determinations of liability to be made between vehicles involved in the same chain collision that do not directly collide. In other words, no leapfrogging. It rejected the line of cases that concluded that leapfrogging was permitted under s. 9.

[25] The arbitrator came down on the wrong side of this debate. At page 14 of her decision, she found (as she had in previous cases):

> Rule 9(2) does not preclude the insurer of the front vehicle [vehicle A in the regulation diagram]...in a chain reaction collision from claiming indemnification under the loss transfer provisions from the insurer of the heavy commercial vehicle that initiated the incident [vehicle C in the regulation diagram], even if there was no contact between the two vehicles.

[26] Accordingly, the arbitrator concluded at (p. 18) that even if s. 9(3) did apply, she would have reached the same conclusion and found vehicle C 100 percent at fault for the collision and order Kingsway to indemnify Dominion for all SAB benefits paid to the driver of vehicle A even though there was no direct collision between vehicle C and vehicle A.

[27] Dominion argues that the arbitrator's decision is correct and that the *State Farm* decision is irrelevant because the arbitrator first decided that s. 9(3) did not apply in this case. Section 9(3) applies only if all of the cars in the chain are moving, and the fourth vehicle (vehicle Z) was stopped when the collision occurred.

[28] Kingsway argues that if we examine the Court of Appeal's reasons for rejecting leapfrogging it is apparent that the arbitrator erred in her interpretation of s. 9 and her finding that s. 9(3) did not apply. Kingsway returns to its argument that the regulation only makes sense if we examine the incident three vehicles at a time. If there were no fourth automobile, all agree that *State Farm* decides that A could not claim against C. Given the purpose of the loss transfer regime in the legislation, does it make sense to alter that conclusion if somewhere down the chain a stationary automobile is also involved in the collision?

Standard of Appellate Review

[29] I adopt the statement on the standard of appellate review of an arbitrator's decision from Perell J. in the first level appeal in the *State Farm* case: 2014 ONSC 3887 (CanLII), at paras. 33 and 34:

> The standard of review from a private arbitration decision is that of correctness on issues of law and reasonableness on issues of mixed fact and law.
>
> When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker, and, if not, the court will substitute its own view and provide the correct answer. [Citations omitted.]

[30] As in the *State Farm* case, this appeal deals exclusively with the correct interpretation and application of s. 9. There are no factual issues in dispute. The applicable standard of review is correctness.

Analysis

[31] After considering the modern rule of statutory interpretation, the Ontario Court of Appeal concluded (at para. 70) that it had six reasons for concluding "that the word 'incident' as it appears in sub-clauses (a) and (b) of s. 9(4) can refer only to the collision identified in the particular sub-clause – and that it cannot reasonably refer to the entire chain reaction." As indicated above, the Court of Appeal's conclusion applies equally to sub-clauses (a) and (b) of s. 9(3) since "they are parallel provisions [that]… must be read consistently". The purpose of s. 9 is to determine the degree of fault for each direct collision in a chain reaction collision. The legislature has determined that where s. 9 applies, no determination of liability is to be made between vehicles that do not directly collide.

[32] Kingsway argues that the Court of Appeal decision makes clear that s. 9 should be interpreted to permit loss transfer recovery only where the first party and second party vehicles come into direct contact at the time of the accident. Kingsway argues that the interpretation of s. 9 adopted by the arbitrator is inconsistent with the Court of Appeal's conclusion because she considered the entire chain reaction rather than the collision identified by sub-clauses (a) or (b).

[33] The first three reasons advanced by the Court of Appeal for its conclusion are arguably most relevant to the present case. The first reason was that if s. 9 were interpreted as suggested by the arbitrator in that case, it could result in 150 percent indemnity to vehicle A. The Court of Appeal stated, at paras. 73 – 77:

> Section 9(3) addresses a chain reaction in which all automobiles are in motion; s. 9(4) addresses a chain reaction where only the rear automobile

> is in motion. Each provision includes two sub-clauses: the first sub-clause addresses the collision between the lead and middle vehicle; the second sub-clause addresses the collision between the middle and rear vehicle. In the case of each provision, the language used in each sub-clause is consistent with the language used in the same sub-clause of the parallel provision.
>
> Section 9(3) cannot reasonably be read as meaning that the rear automobile is 100 per cent at fault for the entire chain reaction. If that were the case, depending on the types of automobile involved in the accident, that would mean the first party insurer of the lead vehicle could be entitled to be indemnified for 150 per cent of the SABs payments it made.
>
> This is because the first party insurer of the lead vehicle would be entitled to be indemnified for 50 per cent of the SABs payments made by the second party insurer of the middle vehicle and for 100 per cent of the SABs payments made by the second party insurer of the rear vehicle.
>
> A similar result would ensue if both the middle and rear vehicles involved in the chain reaction were heavy commercial vehicles.
>
> In my view, the legislature cannot have intended that one insurer would be indemnified by other insurers for 150 per cent of SABs payments made. That would be an absurd result. [Emphasis added.]

[34] Kingsway points to the passage above that states that "Section 9(3) cannot reasonably be read as meaning that the rear automobile is 100 per cent at fault for the entire chain reaction." If the arbitrator is correct in this case, then the rear automobile could be 100 percent at fault for the entire chain reaction if there is even one stationary vehicle in the chain after vehicle A, a result that is inconsistent with the Court of Appeal's conclusion. That being said, the Court of Appeal's primary concern in the paragraphs quoted above – that the first party insurer of the lead vehicle (vehicle A) will be entitled to indemnification for 150 percent of the SAB payments it made – would not apply in our case because the arbitrator in our case found that s. 9(3) did not apply. She therefore concluded that the second party insurer of vehicle C was responsible for 100 percent, and that the insurer of vehicle B had 0 percent responsibility.

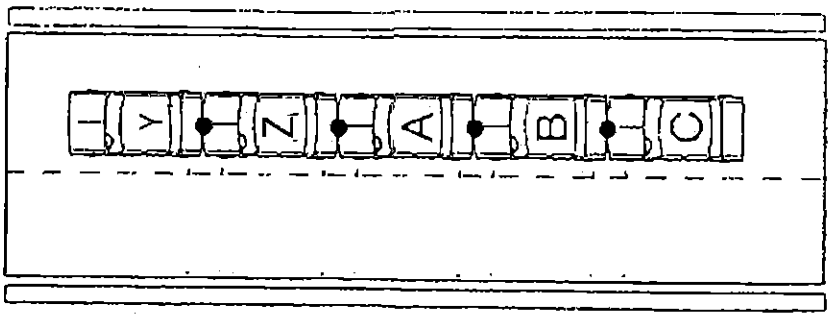
[35] The second reason given by the Court of Appeal relates to its interpretation of r. 9(2) of the *FDR*. The Court stated, at paras. 79 – 81:

> Second, s. 9(2) also supports the conclusion that "incident" as it appears in sub-clauses (a) and (b) of ss. 9(3) and (4) can refer only to the collision identified in the particular sub-clause.
>
> Section 9(2) requires that the "degree of fault for each collision between two automobiles involved in the chain reaction [be] determined without reference to any related collisions involving either of the automobiles and

> another automobile." Immediately following s. 9(2), ss. 9(3) and (4) address, in sub-clauses (a) and (b) of each provision, the responsibility of the drivers of two automobiles for the collision between their two automobiles.
>
> Considered in the light of the direction in s. 9(2) to determine "degree[s] of fault for each collision between two automobiles involved in a chain reaction... without reference to any related collisions", it makes no sense that when addressing a collision between two automobiles in each of sub-clauses (a) and (b), the legislature would also try to address the responsibility of a particular automobile for the entire chain reaction. [Emphasis added.]

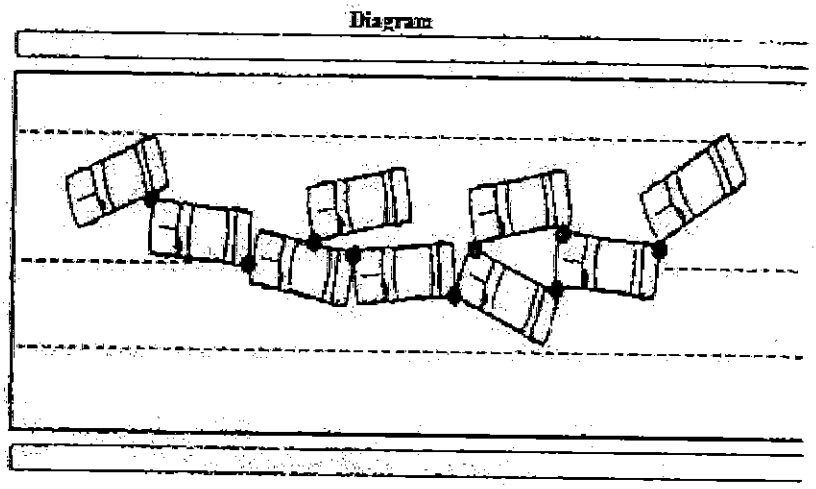
[36] These paragraphs present a more generalized conclusion that, in my view, supports Kingsway's position on this appeal. By looking beyond the three cars in the regulation diagram, the arbitrator tried to address the responsibility of a particular automobile for the entire chain reaction. Considered in light of the direction in s. 9(2) to determine "degree[s] of fault for each collision between two automobiles involved in a chain reaction... without reference to any related collisions", it would make no sense that the degree of fault between vehicle C and vehicle A would depend on whether vehicle Z was in motion when it was hit by vehicle A. It would make no sense to conclude that vehicle C was responsible for the entire chain reaction if vehicle Z – the fourth vehicle in the chain – was moving, but limit vehicle C's liability to vehicle B if vehicle Z was either stopped or not involved.

[37] The absurdity of this result is even more apparent if we add a fifth or sixth car to the chain (I will refer to the fifth vehicle as vehicle Y). For example, in the diagram below, assume that, as in our case, vehicles C, B and A were all in motion, and, unlike our case, vehicle Z was also in motion when it was hit by vehicle A. Assume that the force of impact caused vehicle Z to collide with vehicle Y in front. If the arbitrator's interpretation of s. 9 is correct, the application of s. 9 and the degree of fault of vehicle C to vehicle A will depend upon whether vehicle Y was in motion when it was hit by vehicle Z. It makes no sense to make the liability of vehicle C to vehicle A depend upon whether some vehicle further down the chain was in motion, and it is unlikely that the *FDR* were deliberately drafted to effect such a result. While this result could be the unintended consequence of the way the rules were drafted, it is a result that should be avoided if an alternative interpretation is available.



[38] That being said, I recognize, as stated by the Court of Appeal, that the *FDR* apportion liability "in a gross and somewhat arbitrary fashion", and so the fact that a conclusion might appear arbitrary is not necessarily determinative. Still, the modern approach to statutory interpretation (which also applies to regulations) requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*State Farm*, at para. 67). In my view, the interpretation proposed by Kingsway is consistent with that rule because it treats the loss transfer in this case harmoniously with the scheme of the Act as elucidated by the Ontario Court of Appeal. It is consistent with the context of the *FDR* and the purpose of the loss transfer rules.

[39] In its third reason for adopting its preferred interpretation, the Ontario Court of Appeal referenced s. 11 of the *FDR*, which applies to collisions involving three or more automobiles that are travelling in the same direction and in adjacent lanes (referred to as a "pile-up"). The following diagram appears as part of that regulation:



[40] Section 11(2) uses similar language to the language in clauses (a) and (b) of ss. 9(3) and (4). It states: "For each collision between two automobiles involved in the pile-up, the driver of each automobile is 50 per cent at fault for the incident." The Court of Appeal concluded (at para. 85) that since s. 11(2) refers to "each collision between two vehicles", "it does not refer to the entire pile-up".

[41] As with s. 9, s. 11 is intended to determine the degree of fault (and therefore loss transfer) for each direct collision, and no determination of liability (and loss transfer) is to be made between vehicles that do not directly collide. The interpretation of s. 9 advanced by Kingsway is consistent with that intention which the Court of Appeal identifies as a consistent principle of the *FDR*. The interpretation advanced by Dominion (and adopted by the arbitrator in her decision) is inconsistent with that legislative scheme.

Conclusion

[42] Based on the foregoing, I conclude that for the purpose of assessing fault and loss transfer between vehicles A, B and C, the phrase "all automobiles involved in the incident are in

motion" in s. 9(3) should be interpreted as referring to automobiles A, B, and C as depicted in the diagram, and not additional vehicles that may be farther down the chain. In my view, interpreting s. 9 in this manner is consistent with the conclusions reached by the Ontario Court of Appeal in *State Farm*.

[43] Since the arbitrator found that vehicles A, B and C were all in motion when the collision occurred, she erred in not applying s. 9(3) to the collision. There is no dispute after the Court of Appeal's decision in *State Farm* that if s. 9(3) applies there is no fault, and therefore no loss transfer recovery, between vehicle C and A since they did not directly collide.

[44] Based on the foregoing reasons, I would allow the appeal, set aside the arbitrator's order and substitute an order providing that Kingsway General Insurance Company is not required to indemnify Dominion of Canada General Insurance Company for SAB payments to the insured in automobile A.

[45] Costs of the appeal are to Kingsway on a partial indemnity scale fixed in the amount of $7,800 inclusive of HST and disbursements. This does not include the arbitrator's fees. Counsel advise that they will likely resolve the issue of the arbitrator's fees and that the issue of arbitrator's fees will go back before the arbitrator if it cannot be settled between the parties.

Justice R.E. Charney

Released: January 27, 2017

CITATION: Kingsway General Insurance Company v. Dominion of Canada General Insurance Company, 2017 ONSC 498

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Kingsway General Insurance Company

Respondent/Appellant

– and –

Dominion of Canada General Insurance Company

Applicant/Respondent

REASONS FOR DECISION

Justice R.E. Charney

Released: January 27, 2017