IN THE MATTER OF
The *Arbitration Act*, R.S.O. 1990, S.O. 1991, c.A.24

and

IN THE MATTER OF
THE *INSURANCE ACT*, R.S.O. 1990, c I.8, s.275 as amended and Regulation 668,

B E T W E E N:

AXA INSURANCE (CANADA)
Applicant

AND

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA
Respondent

AWARD

APPEARANCES:

Ms. Linda Matthews
For the Applicant

Mr. Peter D. Kazdan
For the Respondent

ISSUES:

1. Is Axa Insurance (Canada) entitled to reimbursement from Royal & SunAlliance Insurance Company of Canada for accident benefits paid to or on behalf of Cheryl Rigby arising out of a motor vehicle accident on March 17th, 2003.

2. Does Rule 11 or Rule 9 of the Fault Determination Rules apply in this case.

3. Was there a collision between the Royal & SunAlliance Insurance Company of Canada insured and the Axa Insurance (Canada) insured.

RESULT:

1. Axa Insurance (Canada) is entitled to reimbursement from Royal & SunAlliance Insurance Company of Canada for accident benefits paid to or on behalf of Cheryl Rigby arising out of a motor vehicle accident of March 17th, 2003.

2. Rule 9 of the *Fault Determination Rules* applies in this case.

3. There was a collision between the Royal & SunAlliance Insurance Company of Canada insured and the Axa Insurance (Canada) insured.

HEARING:

This matter came on before me, Bruce R. Robinson, Arbitrator, at the City of Toronto, in the Province of Ontario on June the 13, 14, 15 and 23, 2011.

BACKGROUND:

This loss transfer dispute arises out of one of the largest multi-vehicle car accidents in Ontario involving an estimated 200 motor vehicles. This accident occurred on a foggy morning on March 17, 2003 in the southbound lanes of Highway 400 in the area between the entrance and exit ramps of Molson Park Drive, renamed Mapleview Drive, near Barrie, Ontario.

The applicant, Axa Insurance Company (Canada) (hereafter 'Axa') was the insurer of Alan Rigby. At the time of the accident Mr. Rigby's 1993 blue four-door Ford Taurus, was being operated by his wife, Cheryl Rigby, southbound on Highway 400.

The Respondent, Royal & SunAlliance Insurance Company of Canada (hereinafter "Royal") was the insurer of Manuel Gaspar. Mr. Gaspar was operating a 2000 silver Sterling STE four axle straight truck equipped for carrying roll-on/roll-off containers. This vehicle bore licence plate 5231LP. This truck was carrying an open waste container. It is admitted between the parties that this truck was a "heavy commercial vehicle" as defined by the Insurance Act and the SABS.

It is Axa's position that their insured's vehicle (Rigby vehicle) had come to a full, safe and complete stop in the centre lane of Highway 400 and that the vehicle operated by Bronwen Jones had also come to a safe and complete stop behind the Rigby vehicle. Axa submits that the heavy commercial vehicle driven by Mr Gaspar caused a "chain reaction" collision as defined in section 9 of the Fault Determination Rules, R.R.O. 1990 Reg. 668. Pursuant to Rule 9(4) only the last vehicle that is in motion at the time of the collision, that being the Gaspar vehicle, is 100 percent at fault for the collision.

Royal takes the position that the Gaspar truck and the Rigby vehicle were not travelling within the same lane prior to the collision. Royal states that the Gaspar vehicle did not rear-end the Rigby vehicle or Jones' vehicle. It submits that another unknown and unidentified truck struck the Jones vehicle propelling it ahead into the Rigby vehicle thereafter leaving the scene of the accident. As such, Royal submits that Rule 11 is the more applicable Rule to be applied where there is a multi-vehicle pileup involving three or more vehicles that were travelling in the same direction and in "*adjacent lanes*".

EVIDENCE AND FINDINGS:

Both counsel are to be complimented on their marshalling of the evidence in this very complicated motor vehicle accident. Four of the drivers involved in this accident gave *viva voce* evidence as did two expert witnesses. The massive amount of investigation that was collected by the police included numerous photographs, a video, witness statements, and a thorough reconstruction report, all of which were presented in a very organized manner.

On March 17, 2003, Cheryl Rigby left her home and proceeded to enter onto Highway 400 southbound from the Bayfield exit. Having lived in the Bayfield area for some time she was quite familiar with the roadway. It was her intention to proceed to Hamilton. Her evidence was consistent with the evidence of the other witnesses at the hearing in that it was a very foggy morning and the fog got progressively worse as she approached the Molson Park overpass.

As she proceeded southbound in the centre lane she decreased her speed due to the worsening of the fog. She became aware that the vehicles in front of her were stopped and she therefore brought her vehicle to a safe and complete stop in the centre lane. She saw people standing on the side of the road and was aware of stopped vehicles to her left and to her right. She stopped "*just seconds*" when she heard collisions in the background. She turned and saw "*the grill of a truck*" coming toward her from the rear. She was not aware of what had happened to the car that had stopped behind her when she felt a rear-end impact. She was rendered unconscious for a brief period and then she was helped out of her car. She smelled smoke but was not aware until the time of arbitration that a vehicle had caught fire as a result of the collision.

She is quite clear in her evidence that no large truck or dump truck passed her while she was stopped in the centre lane. She was not aware of seeing the truck after the accident. Due to her injuries she submitted a claim to Axa for Statutory Accident Benefits, and Axa have been paying those accident benefits.

Ms. Bronwen Jones resided in Barrie on March 17 in 2003. She is a speech language pathologist and on the date of the accident was operating a metallic blue Honda Civic. She had entered onto the southbound lanes of Highway 400 at the Duckworth entrance. She was familiar with Highway 400 having travelled it on a daily basis. Visibility was fair to poor when she set out from home but it got progressively worse as she approached the Molson Park exit. She indicated that visibility "*deteriorated quite quickly*" as she proceeded southbound. At the Essa exit, the last exit before the accident scene, visibility was down to one or two car lengths. As she passed the Essa exit, it was her intention to get off the highway as she was alarmed and concerned about the deteriorating driving conditions. It was her intention to leave Highway 400 at the Molson exit.

She brought her motor vehicle to a safe and controlled stop in the centre lane behind the Rigby vehicle. There was a vehicle stopped to her right in the curb lane and a vehicle stopped on her left both about one car length ahead. All three southbound lanes had come to a safe stop at this point.

She saw an SUV approaching in the centre lane behind her which moved over to the passing lane and missed striking her. She looked out the driver's window and saw the

SUV hit the median and a car in the left lane. At this time, her vehicle was rear-ended and she lost consciousness. The various photographs of the vehicle and the video by the police showed substantial damage to the rear of her vehicle and the fact that the vehicle had caught on fire.

Ms. Jones was told afterwards that she had been hit from behind, spun 80 degrees and that her vehicle had burst into flames. She did not recall being rescued from the flaming vehicle. At some point after the accident she was told that Mr. Nicolas Shelswell assisted in removing her from the burning vehicle. She contacted Mr. Shelswell by telephone to thank him. She learned that he was a volunteer fire fighter. She was advised by Mr. Shelswell that the vehicle that had struck her car had also struck his vehicle.

Nicholas Shelswell lives in Oro, Ontario and on the date of the accident was driving a GMC 1998 half-ton black pickup. He was proceeding southbound on Highway 400 on his way to work having entered Highway 400 at Highway 11. As he approached the Bayfield exit, visibility was steadily decreasing. "*It was dramatically decreasing at Molson Park Bridge*". He went on to state that visibility was "to the front of the hood". As he approached the Molson Park area, he was proceeding in the high speed lane. He was aware of cars braking ahead. He brought his vehicle to a controlled stop without hitting any other vehicles. He indicated that the cars that had stopped in front of him had all stopped without incident and without striking any other vehicles. There were cars stopped in all three lanes which prevented vehicles from proceeding further southbound on the highway. After the accident, the firemen had to walk southbound on the highway to get to the accident scene as they were unable to move their trucks in that direction.

After stopping he looked in his mirror and saw a truck. He said to himself, *"This is going to hurt"*. The truck, which he identified as the Gaspar vehicle, struck a car (Jones vehicle) in the centre lane beside him which caught fire, and then struck his truck. He described the striking vehicle as a 10 ton straight truck carrying a garbage container. After the Gaspar vehicle struck his truck on the side and continued past him, it "*went over the top of a blue car and crushed it*".

Mr. Shelswell was extremely clear in his evidence. He stated there were no other big trucks involved in this accident. There was no way any other vehicle of that size could have been involved in the accident and could have left the scene without being seen by himself, the police or any of the other drivers.

While he was stopped, he could hear the air brakes on the Gaspar vehicle "chirping" indicating the brakes had been applied in a full fashion and that they were fully employed when he was struck.

As he was a volunteer fireman, he had his bunker gear in his vehicle. He immediately got into his gear and assisted in rescuing the lady from the burning vehicle.

Mr. Cephas Kotei works as a high school custodial lead hand. On the day of the accident he was driving his Dodge Caravan southbound in the centre lane on Highway 400 in what he described as "*very poor visibility*". It was his evidence that he was creeping before coming to a complete stop. He heard a "*loud rumbling noise*" coming from a big truck before he was rear-ended. He saw a big truck in the fast lane. He was hit very hard by a car behind him. He thought he saw a collision between the big truck and a white car. He got out of his car, wrote down the license plate of the vehicle behind him in the centre lane but never spoke to the driver. He stayed at the scene

between five to twenty minutes after which time he was asked by the officer to move his vehicle to make way for the ambulance. He indicated, "*the car under the big truck was on fire.*" The property damage to his vehicle was across the entire rear bumper and it was pushed in. He did not hit any other vehicle on the highway.

He confirmed that just before the accident there was "*very poor visibility*" and that cars were blocking all the southbound lanes ahead of him. He further indicated that no cars or trucks passed him while he was stopped.

Mr. Bennett resides in Midland, Ontario and is golf professional. On March 17, 2003 he was proceeding southbound in the fast lane on Highway 400 and operating a 1999 Saturn. He was able to bring his vehicle to a full, complete and safe stop without striking anyone. He stopped his vehicle on the east shoulder when the other vehicles stopped ahead of him.

While stopped, his vehicle was struck in the rear by a Ford pickup truck driven by Mr. Cook. He got out of his vehicle and walked back, in a northerly direction. Mr. Wilding, another driver in this area, told him that it was the Cook vehicle that had rear-ended him (Bennett).

He walked north towards the Cook vehicle and it is his impression that he saw two separate collisions. While there was much confusion at the accident scene, Mr. Bennett felt that there were two trucks involved in the accident. I find that this is inconsistent with the evidence of the other drivers and with the police investigation.

The police investigation was extremely thorough and photographic evidence of the scene coupled with the evidence and the statements of the drivers indicate that the entire three southbound lanes of Highway 400 were fully blocked at this point. The

accident scene itself was in such a location that any vehicle involved in the collision would have been unable to manoeuvre between all the vehicles to leave the scene.

Mr. Bennett does describe the fog in the area indicating that he could "*barely see*". Because of the fog, only allowing him to see a distance of one car length ahead of him, he had to stop his vehicle. He further indicated that the three southbound lanes and both shoulders had come to a complete stop ahead of him. He was rear-ended and was pushed into another vehicle. It is his impression that a dump truck had struck a Toyota.

I find that Mr. Bennett's evidence is inconsistent with the physical evidence of damage to the other vehicles, the police investigation, and the evidence of the other drivers. Mr. Bennett himself indicated that he could hear more than he could see and in fact, doubted his own evidence. He stated that he could have been mistaken about the second truck. He stated: "*It would have had to stay there or otherwise I'm mistaken about a dump truck, yes.*" He further agreed that "*absolutely*" it would have been impossible for any vehicle to proceed south on the blocked highway and leave the accident scene.

Where here there is a discrepancy between the evidence of Mr. Bennett and the other witnesses, I choose the evidence given by the other witnesses at the arbitration. I find on the evidence, that there was only one truck involved in this particular accident, namely the Gaspar truck.

Mr. Gaspar gave evidence at an Examination for Discovery on June 29, 2007. He had entered Highway 400 at Dunlop Street in Barrie. He proceeded to travel in the right lane

at 100 kilometres per hour before he "*hit the wall of fog*". When he saw tail lights stopped ahead, he knew that he "*was too close*". He stated that he "*slammed on the brakes and swerved to the left and I recall I think I either hit two or three vehicles.*"

Mr. Alan Billing, a Professional Engineer with Arcon Engineering Consultants Limited, was first retained by Royal in September of 2009 to investigate the simple question, "*Did the Gaspar vehicle rear end the Rigby vehicle?*" It was his conclusion that the Gaspar dump truck had not caused the damage to the rear of the Rigby vehicle. He was again retained by Royal in anticipation of the arbitration and he prepared two reports dated April 8, 2011 and May 31st, 2011. His assignment was to look at the expert report prepared by Jamie Catania of Giffen Koerth Forensic Engineering for Axa. He was asked to comment on and assess it.

He was aware that Mr. Catania had used "P.C. Crash" simulation software for accident reconstruction. While he feels that this is a very valid program it did have some limitations. He felt that it was used only for simple models. There were various things that this program could and could not do. He further indicated that it was only as good as the data that was input into the system.

He viewed the three simulations that had been presented by Mr. Catania in his report showing only one dump truck, the Gaspar truck.

It is to be noted that Mr. Billing did have available to him the police investigation and photographs. He was aware that the police did not identify or name a second truck as being involved in this collision. His sole basis for using a second truck in his simulation was based on the comments of Jason Bennett. Mr. Billing agreed that Mr. Bennett was the only person to mention any second truck. Mr. Billing was unable to give any

explanation as to how this second unknown and unidentified truck could have left the scene or where it went. He confirmed that he had no evidence to identify any second truck. He did not prepare any simulations using only one dump truck. He chose to use two trucks in his simulations.

I found the evidence of Mr. Billing to be most indefinite which may well be the result of the question which was posed to him by Royal. When asked as to which vehicle had hit Rigby he indicated that "*it is a good possibility that it was the Jones vehicle*". When asked to comment upon the investigation conducted by the police he stated that he knew nothing about the basis on which the police had arrived at their conclusions. He did not speak to a single witness or to the police when he prepared his reports. He indicated that his evaluation was, "*simply what is physically possible*". When asked whether or not the Gaspar truck was the only identifiable vehicle at the scene which could have caused the damage, he stated, "*I don't disagree, it is probable*".

He indicated that he generally had a great deal of uncertainty when dealing directly with the witnesses. In spite of this, he chose to prepare a report that dealt with a second truck based solely on Mr. Bennett's comments. When asked whether or not an unknown truck could have been able to leave the scene when the highway lanes were blocked, he stated, "*I don't know if such a vehicle exists but it might have*".

I found Mr. Billings evidence to be of little assistance when taken into context with the evidence of the other witnesses and the various detailed exhibits which were filed at the Hearing. His did comment that the Gaspar vehicle was a "*candidate*" in terms of the damage pattern on the truck. This comment was as far as he was prepared to go.

Jamie Catania, a Professional Engineer with Giffin Koerth Forensic Engineering, was originally retained by Axa to ascertain if there had been an impact, directly or indirectly, between the Rigby and Gaspar vehicles. He conducted a review of the massive amounts of materials from the police including reports, still photographs, and a video tape of the scene of the accident. He stated that his aim was to deal with the local grouping of vehicles which were directly involved in the accident in question.

He found that the Rigby vehicle had its rear end pushed forward more on the left than on the right rear. It was his opinion that the Jones' vehicle had been struck in the rear by the Gaspar vehicle pushing the Jones vehicle ahead into the rear of the Rigby vehicle. At this point, all three vehicles were in the centre lane southbound and only the Gaspar truck was in motion. Then the Gaspar truck moved to the left, into the high speed lane, passing the initial point of impact of the collision with Jones. There were scuff marks on the Gaspar tires which meant that it had hit something with its left side. There was rear damage to the Jones vehicle, which had pushed the trunk forward and up into the roof. Mr. Catania found this to be consistent with the height of the bumper on the Gaspar truck.

Following the initial contact with the Jones vehicle, the Gaspar vehicle then moved into the high speed lane where it struck the Shelswell vehicle.

His main objective was "*who hit who and when*". He spent extensive time reviewing the physical evidence, the damage to the vehicles, the pictures of the vehicles, the position of the vehicles upon the roadway, the police investigation and, of course, the evidence of the witnesses both through statements and examinations for discovery. I find that this

balanced scientific approach was the correct one to be utilized. It was very helpful in understanding this complex accident.

He stated, that based on the evidence of the various witnesses, there was no doubt that fog was the genesis of this event and it was "*a big time problem*". It was described in various manners such as "*pea soup*". All the witnesses were consistent in that they stated that all the southbound lanes were blocked ahead of this accident scene. This particular accident took place near Molson Park Bridge and there was consistency of the evidence of both Jones and Shelswell with regard to the fog and their ability to stop without incident.

He found Mr. Bennett's statement to be inconsistent with all the others at the scene and therefore of little use in his investigation. He could find no independent evidence to establish a second truck, of the size and nature of the Gaspar truck, in the area, either through the statements of the witnesses, examinations for discovery or the police investigation. As such, a second truck was not used in his accident reconstruction scenario.

His reconstruction scenario shows the Gaspar truck approaching the accident scene in the curb lane and then moving into the centre lane. It strikes the rear of the Jones vehicle, which was at a full stop, and then pushes the Jones vehicle into the Rigby vehicle which had also been at a full stop. The Gaspar vehicle then changes into the high speed lane and hits the Shelswell vehicle and in the process makes contact with the Rigby vehicle moving it in a clockwise manner.

I find Mr. Catania has presented a reasonable and probable explanation for the damage to the Gaspar, Jones, Shelswell, and Rigby vehicles. The Gaspar truck pushed all the

other vehicles out of the way before it came to a stop position on the highway where it remained for the police. I find that there were no impacts on this particular stretch of Highway 400 before the Gaspar truck arrived at the scene.

There was damage to the front left bumper of the Rigby vehicle which I find was caused by the Gaspar truck as it passed by on its left side.

I find that Mr. Catania's report and his reconstruction theory takes into consideration all the physical evidence, the evidence from the witnesses, and the investigation from the police at the scene. I find that everything can be reasonably explained by the movement of the Gaspar truck.

LAW:

For ease of reference, I have attached Rules 9 and 11, *Fault Determination Rules*, R.R.O., 1990 Regulation 668 in **Schedule A.**

Section 275 of the *Insurance Act* is also attached as **Schedule B**.

Section 275 of the *Insurance Act* creates a scheme for loss transfer payments. It enables insurers who pay statutory accident benefits to seek indemnity from another insurer under specified circumstances. In this case, it was agreed that the Gaspar vehicle was "a heavy commercial vehicle" and as such the first party insurer (Axa) had the right to claim indemnification from the second party insurer (Royal).

This indemnification is to be made with respect to the respective degree of fault of each insured as determined under the *Fault Determination Rules* pursuant to section 275(2) of the *Insurance Act*.

The scheme under section 275 of the *Insurance Act* and related 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. The degree of fault is to be determined strictly in accordance with the *Fault Determination Rules*. Rule 3 expressly provides that no reference is to be made to, a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; b) the location of the insured's automobile, the point of contact with any other automobile involved in the accident.

The Court of Appeal in *Jevco Insurance Company* v. *Canadian General Insurance Company* (1993), 14 O.R. (3d) 545 at p. 547 stated:

> *"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."*

This passage was referred to by Justice McCarthy in *Jevco Insurance Company* v. *York Fire and Casualty* Company [1996] O.J. No. 646. paragraph 9:

> *"What I take from this excerpt is 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."*

I have previously stated in *Royal and SunAlliance Insurance Co.* v. *Axa Insurance Company*, November 21, 2003, page 10:

> *"A common sense approach is to be used when considering Fault Determination Rules and the diagrams in the regulation."*

Arbitrator Samis in *Dominion of Canada General Insurance Company v. Kingsway General Insurance Company*, August 23, 1999, stated at page 5:

> *"The parties did not submit any authorities that considered the scope of being 'involved' in an incident. In my view, the term 'involved' is broader than 'in collusion with' or other language which requires contact between vehicles. The absence of contact with the Tremblay vehicle is a relative consideration, but only one of many. I consider the following criteria to be useful;*
>
> *a) Whether there is contact between the vehicles;*
>
> *b) The physical proximity of the vehicles;*
>
> *c) The time interval between the relevant actions between 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.*

This decision was affirmed by Madam Justice Sachs in an as yet unreported decision released January 11, 2000. In her review of the phrase "involved in an accident" she stated at paragraph 10,

> *"In considering this question the arbitrator found that a vehicle could be involved in an incident without actually colliding with any other vehicles. He also took into account factors such as the physical proximity of the heavy commercial vehicle to the vehicles which did collide; the time interval between the actions of the heavy commercial vehicle and the vehicle that lost control: the possibility that the actions of the heavy commercial vehicle caused the action of the Rousseau vehicle; and whether it was foreseeable that the actions of the heavy commercial vehicle might cause harm or injury to another vehicle and its occupants. Applying these criteria he concluded that the heavy commercial vehicle was involved in the incident. In my view the arbitrator was correct both in his finding and his analysis."*

Arbitrator Novick in the *Personal Insurance Company v. Kingsway General Insurance* Company, dated November 2008, followed the findings of Arbitrator Samis and Justice Sachs and applied the appropriate Fault Determination Rule on the specific facts of that particular case.

Royal referred me to the Decision of Justice Pitt in *Gan General Insurance Company v. State Farm Mutual Automobile Insurance Company,* [1999] O.J. No. 4467. I find the facts of the *Gan v. State Farm* case are distinguishable from the ones before me and also that the Decision of Justice Sachs provides a more reasonable review of the law.

Arbitrator Bialkowski in *Royal and SunAlliance Insurance Company* v. *State Farm Mutual Automobile Insurance Company,* dated January 2006, accepted the reasoning of Justice Sachs in *Dominion of Canada General Insurance Company* v. *Kingsway General Insurance Company* case and chose not to follow the decision of Justice Pitt. I too accept the reasoning of Justice Sachs as applied to the facts before me.

The Fault Determination Rules are to be construed and applied in accordance with their own factors, and not those which would apply under the ordinary rules of tort law.

I find that the absence of contact between two vehicles is relevant in analysing whether a loss transfer applies, but is only one factor among many.

The loss transfer Regulation contemplates the spreading of loss among insurers in a manner that favours expedition and economy over exactitude as set out in *Jevco Insurance* v. *York Fire & Casualty Company* [1996] 646 (C.A.).

It is my finding that on a balance of probability, based on the evidence of Ms. Jones, Ms. Rigby, Mr. Shelswell, the extremely thorough police investigation and the evidence applied by Mr. Catania, there was only one truck involved in this collision, namely the Gaspar truck. Mr. Gaspar's truck was the only identified motor vehicle in the ambit of the immediate accident scene. I find it highly improbable that there was a second dump truck exactly the same size, weight and speed in the area which had caused any part of this accident or that it escaped without being identified by anyone.

The evidence of Mr. Gaspar was presented through the use of his statements and his examination for discovery transcript. He was not called as a witness. I find no adverse inference to be drawn from the failure of Royal Insurance Company to call the driver of their insured motor vehicle. The evidence entered before me is sufficient to allow me to make a determination of the issues in dispute.

I find that Rule 11 is not applicable on the evidence in this case. Both the Rigby and the Jones vehicle had safely come to a complete stop on the highway due to blockages ahead of them. They were situated safely in the centre lane facing southbound. While the Gaspar truck was initially proceeding southbound in the curb lane, it is evident from the evidence that it moved into the centre lane where it travelled and proceeded to strike the Jones vehicle. This impact propelled the Jones vehicle into the rear of the Rigby vehicle while all these vehicles were in the centre lane.

I find that Rule 9 is the appropriate Rule to apply in this case as all three vehicles were in the same centre lane at the time of impact. At the moment of impact, Jones and

Rigby were fully and safely stopped in the centre lane. Pursuant to Rule 9(4), neither Jones nor Rigby were at fault. The fault for the accident is 100 percent on the Gaspar truck as it is the only moving vehicle in the centre lane. The Gaspar vehicle also continued on past the initial accident scene striking the Rigby vehicle again on the left front bumper and moving it to the side.

Based on the evidence before me, I find that Rule 9(4) is the appropriate Rule to apply in this case. As such, Axa Insurance Company of Canada is entitled to seek and recover all statutory accident benefit payments made to or on behalf of Cheryl Rigby arising out of the accident of March 17, 2003 from Royal & SunAlliance Insurance Company of Canada together with interest thereon.

QUANTUM:

The parties chose to leave this issue to be argued at a later date.

COSTS:

The parties have agreed that the costs in this matter will follow the event. As such, Axa Insurance (Canada) will recover its costs of this arbitration and the cancellation of the first arbitration dates of April 19, 20 and 21, 2010 from Royal & SunAlliance Insurance Company of Canada.

I may be spoken to at a later date with regard to assessment of those costs if it is required.

DATED at Toronto this 27 day of July, 2011

Bruce R. Robinson, Arbitrator

SCHEDULE A

R.R.O. 1990, REGULATION 668

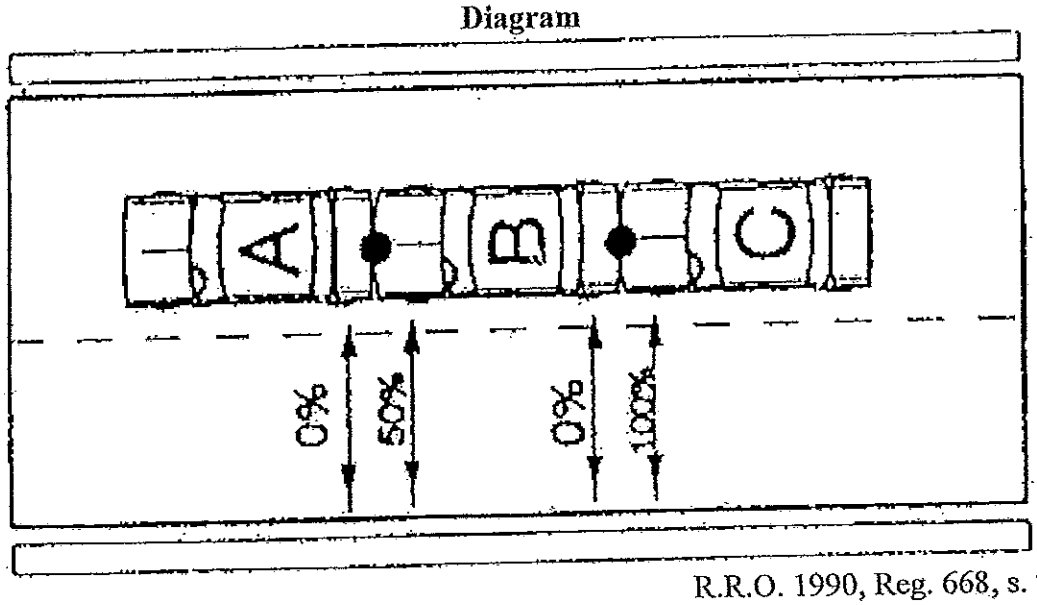
FAULT DETERMINATION RULES

9. (1) This section 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"). R.R.O. 1990, Reg. 668, s. 9 (1).

(2) The degree of fault for each collision between two automobiles involved in the chain reaction is determined without reference to any related collisions involving either of the automobiles and another automobile. R.R.O. 1990, Reg. 668, s. 9 (2).

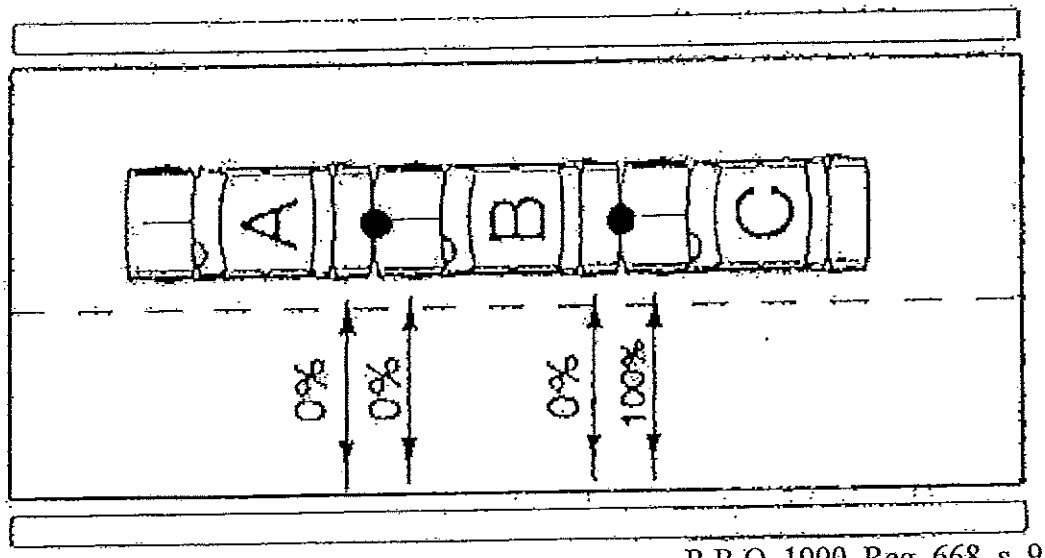
(3) If all automobiles involved in the incident are in motion and automobile "A" is the leading vehicle, automobile "B" is second and automobile "C" is the third vehicle,
(a) in the collision between automobiles "A" and "B", the driver of automobile "A" is not at fault and the driver of automobile "B" 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



R.R.O. 1990, Reg. 668, s. 9 (3).

(4) If only automobile "C" is in motion when the incident occurs,
(a) in the collision between automobiles "A" and "B", neither driver is at fault for the incident; and
(b) in the collision between automobiles "B" and "C", the driver of automobile "B" is not at fault and the driver of automobile "C" is 100 per cent at fault for the incident.



R.R.O. 1990, Reg. 668, s. 9 (4).

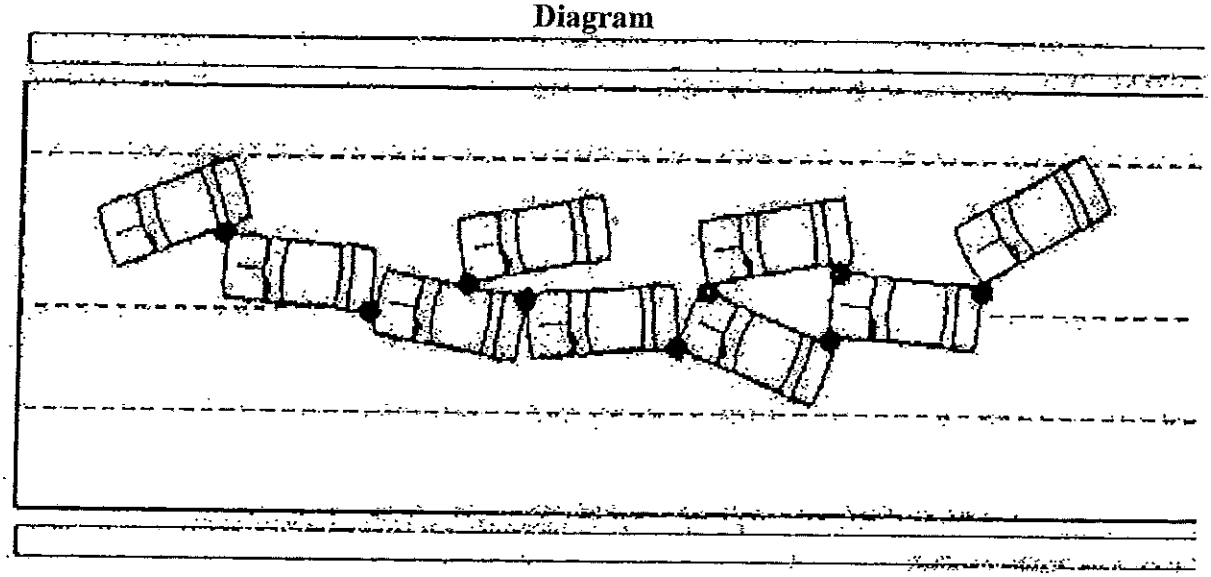
R.R.O. 1990, REGULATION 668

FAULT DETERMINATION RULES

11. (1) This section applies with respect to an incident involving three or more automobiles that are travelling in the same direction and in adjacent lanes (a "pile-up"). R.R.O. 1990, Reg. 668, s. 11 (1).

(2) 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.

Diagram



R.R.O. 1990, Reg. 668, s. 11 (2).

SCHEDULE B

Insurance Act

R.S.O. 1990, CHAPTER I.8

Indemnification in certain cases

275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1.

Idem

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules. R.S.O. 1990, c. I.8, s. 275 (2).

Deductible

(3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (3); 1993, c. 10, s. 1.

Arbitration

(4) 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*. R.S.O. 1990, c. I.8, s. 275 (4).

Stay of arbitration

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits. 1993, c. 10, s. 31.