IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

ECHELON INSURANCE COMPANY

Applicant

- and -

AIG INSURANCE COMPANY OF CANADA

Respondent

DECISION

Appearances:

Echelon Insurance Company (Applicant): Amanda Lennox

AIG Insurance Company of Canada (Respondent): Shelley Johnson

Background:

This is an arbitration pursuant to Section 275(1) of the *Insurance Act* to determine what the rate of indemnity is owed by the respondent, AIG Insurance Company of Canada (hereinafter called "AIG") if any to the applicant, Echelon Insurance Company (hereinafter called "Echelon"). On consent I have been appointed as an arbitrator pursuant to an Arbitration Agreement dated May 6, 2019.

This is therefore a loss transfer dispute essentially with respect to liability pursuant to Section 275 of the *Insurance Act* and the *Fault Determination Rules* as between Echelon and AIG. The dispute arises out of an accident that occurred on December 15, 2014 when Katherine Novosel was driving a Toyota Corolla insured by Echelon eastbound on Rutherford Road in Vaughan. At the same time Mr. Anand Parhar was operating a tractor trailer that he owned and operated also proceeding eastbound on Rutherford Road.

As a result of the incident that occurred Ms. Novosel sustained some injuries and pursued a claim for statutory accident benefits from her insurer Echelon. Those benefits were paid and ultimately the accident benefit file settled. Echelon now claims that pursuant to Section 275 of the *Insurance Act* that it should be reimbursed 100% by AIG based on Rule 10(4) of the *Fault Determination Rules* (Ontario Regulation 668/90). AIG takes the position that Rule 10(4) does

not apply. There is a dispute with respect to how the accident occurred and further AIG submits that Rule 5(1) of the *Fault Determination Rules* is applicable and no liability should attach to AIG.

Where the parties do agree is that the AIG vehicle does meet the definition of heavy commercial vehicle.

Issues in Dispute:

Pursuant to the Arbitration Agreement the issues in dispute that were agreed to be submitted to me are as follows:

1. Do any of the *Fault Determination Rules* apply? If so, which *Fault Determination Rule* applies and what is the rate of indemnity owed by the respondent to the applicant, if any?; and,

2. If none of the *Fault Determination Rules* apply, then what is the rate of indemnity to be paid by the respondent to the applicant pursuant to the ordinary rules of negligence, if any?

There are also questions with respect to quantum and interest but those are to be deferred until the question of liability has resolved.

Law With Respect to Loss Transfer:

In 1990 Section 275 of the *Insurance Act* was introduced in order to provide for a method of indemnity as between two insurers where there was an imbalance with respect to risk. It was accepted that heavy commercial vehicles and motorcycles inflicted an increased potential for no-fault liability on the insurers of other vehicles. Accordingly those two class of vehicles (heavy commercial vehicle, a defined term) and motorcycles were pursuant to Section 275 required to accept the transfer of the accident benefit payments in certain specific circumstances.

If the right of loss transfer exists, for example because there was a heavy commercial vehicle and a standard vehicle involved in an accident, then the insurers are to determine the respective degree of fault by reference to Regulation 668/90 known as the *Fault Determination Rules*. These *Rules* set out a series of scenarios where fault is allocated in terms of percentages. Generally these *Rules* provide a fairly arbitrary allocation of liability as between the two classes of insurers focussing on the most common situations. When the incident falls outside of any of the *Rules* then the insurers are directed to determine liability based on ordinary principles of law. The case law has determined that ordinary principles of law does not mean ordinary principles of tort law.

Section 275(1) of the *Insurance Act* provides as follows:

"The insurer responsible under Regulation 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 their responsibility to pay the statutory accident benefits arose."

Section 275(2) of the *Insurance Act* provides as follows:

"Indemnification under Section 1 shall be made according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules."

This then brings us to Regulation 664/90 which sets out the *Fault Determination Rules*. The relevant Rules for the purposes of this award are as follows:

"Section 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 of the insured's automobile on the point of contact with any other automobile involved in the incident.

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.

5(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.

10(1) This Section applies when automobile "A" collides with automobile "B" and both automobiles are travelling in the same direction in adjacent lanes.

10(4) If the incident occurs when automobile "B" is changing lanes, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100% at fault for the accident."

Evidence:

This arbitration proceeded in a written format. The evidence before me consisted of the following:

1. Written submissions of the applicant which included:

    - A Motor Vehicle Accident Report;
    - Google map of Rutherford Road and Huntington Road;
    - Transcripts of Examination Under Oath of Katherine Novosel, dated July 6, 2018;
    - Examination for Discovery of Katherine Novosel in the tort action dated November 27, 2017;
    - Examination for Discovery of Anand Parhar in the tort action dated January 30, 2019;
    - Letter of Lloyd Burns to Laxton Glass dated October 4, 2017 summarizing a statement of Mr. Parhar dated January 12, 2016;
    - Disability Certificate dated March 21, 2017;
    - Section 44 physiatry assessment of Dr. Czok dated April 7, 2016;
    - Medical-Legal report of Dr. Sharma dated March 18, 2018;
    - Property damage estimates for the Echelon vehicle;
    - A series of photographs of the damage to the Novosel vehicle;
    - Various photographs taken at the scene of the accident after the incident;
    - MTO Driver Record of Novosel;
    - Arbitration Agreement dated May 6, 2019;
    - Written submission of the respondent;
    - Reply submissions of the applicant;
    - Various case law submitted by both counsel.

I did not have the benefit of seeing or hearing from Ms. Novosel or Mr. Parhar but I carefully reviewed the transcripts and other collateral information that they had provided and both counsel made submissions with respect to inconsistencies and what I could draw in terms of credibility from the written record.

Both counsel did agree that the police report that had been prepared was inaccurate as it incorrectly identified this accident occurring on Huntington Road. In fact, it is common evidence that the accident occurred as both parties were proceeding eastbound on Rutherford Road. Huntington intersects with Rutherford Road in the area of the accident and the tractor trailer driver was intending to make a wide right turn onto Huntington Road.

Ms. Novosel testified twice under oath with respect to how this accident occurred. Once during her EUO on July 6, 2018 and previously on her discovery in the tort action on November 27, 2017. Ms. Novosel was approximately 27 years old when this accident occurred. She was

employed, married and the mother of a child. She was on her way to work. She was familiar with this route. On the date of the accident Novosel had a G1 licence.

It is accepted by both parties that Rutherford Road in the area of this accident is three lanes. There is a left turn lane, a left through lane and a right through lane.

Ms. Novosel testified that she was travelling in the right-hand lane. She was travelling at approximately 70 kph. Just before the accident occurred the tractor trailer was travelling in front of her in the right lane. She had been following the truck since the previous intersection at Rutherford and Hwy 50.

There were no vehicles immediately to her left in the left through lane. There were some well behind her. She also testifies that there was nobody immediately behind her car in the right lane.

Ms. Novosel's evidence was that she intended to go straight through the intersection at Rutherford and Huntington. As she was proceeding towards the intersection she observed the tractor trailer put on his left turn indicator. Her evidence is that he then moved into the left lane. She was aware that there was a left turn lane only at Huntington and Rutherford and she assumed that as he kept his left turn indicator on that he was going to go into the left lane. She was aware that there was a cargo place where the train brings freight and trucks go in to pick up the deliveries. This was located to the left and would require the truck to make a left-hand turn on Huntington to enter into the cargo place. Ms. Novosel says she assumed that the truck was going to move to the left lane to make a left-hand turn onto Huntington Road and enter that cargo area.

Ms. Novosel says then that at this point the truck was fully established both truck and trailer in the left lane. She was about four or five car lengths to the back of the truck still in the right lane. The tractor trailer then cut in front of both lanes to make a wide right turn onto Huntington. She says that part of his vehicle was in the left lane and part was in the right lane. The front of his truck was in the right lane in front of her and the back, or trailer, was still in the left lane. Ms. Novosel also testified that the right turn indicator was not put on and the left one was still on.

She slammed on her brakes and tried to go to the right to avoid the truck but there was a curb and she didn't want to go over the curb into the grass. There was then an impact with the back right passenger side of the tractor trailer with the driver's side of the Novosel vehicle. Her evidence both times she gave it was that her vehicle did not rear-end the trailer but that the impact occurred to the side of the trailer and the side and front end of her vehicle on the driver's side. It looked to her as if the truck was not aware that the accident had happened as he continued driving and making his turn. Her car was attached to the trailer as a piece of the trailer had entered the rear window of her vehicle and her car was dragged around the corner onto Huntington where both vehicles then came to a stop. The vehicles were not moved prior to the police arriving.

I note that this version of events as given by Ms. Novosel were consistent over both her EUO, Examination for Discovery and what she reported to various assessors as disclosed by the medical reports of Dr. Czok and Dr. Sharma. It is also consistent with the description of the accident set out in Part 3 of her Disability Certificate.

Ms. Novosel's evidence is that she was not at the scene of the accident when the police arrived. She had called an ambulance and had been taken to the hospital. The police did come to the hospital. Her description of that event is that the policeman came and just handed her a ticket and said "Well in this situation I have to charge someone". He then handed her the ticket. When asked whether she ever had an opportunity to tell the police her version of what happened Ms. Novosel's evidence was that she tried telling the policeman in the hospital but he did not seem to be interested.

Ms. Novosel was charged with careless driving. She retained a paralegal to defend the claim. She reports that the paralegal that represented her gave her an ultimatum that he couldn't fight her case and that she would have to plead guilty or take a lesser charge. Due to this advice she claims that she pleaded to the lesser charge. She did choose not to attend the trial. The lesser charge was "unsafe move". Her evidence on her EUO is that she would have done that differently having had time to think about it.

Anand Parhar gave a statement on January 12, 2016 of which a summary was provided by counsel for AIG in a letter of October 4, 2017. He was also examined for discovery in the tort matter on January 30, 2019.

In his statement and on discovery he reports that he is approximately 45 years old. He has been driving a truck since 1999. He was the owner of a 1994 Freightliner truck that he was driving at the time of the accident. He had dropped a load at a customer's yard and was returning to his company's yard with an empty trailer. He confirmed he had a valid licence to drive a tractor trailer with no restrictions.

Of note in his statement is the following:

1. He says the intersection at Rutherford Road and Huntington is controlled by a stop sign. That is inaccurate;

2. He says Rutherford Road is two lanes but Huntington Road is only a single lane. That is inaccurate and Rutherford Road is in fact three lanes;

3. In his statement he says prior to commencing his turn he checked his rear mirrors and saw a vehicle (presumably the plaintiff's) driving behind him in the right lane. This is inconsistent with his evidence at discovery which is summarized below.

Before discussing the discovery of Mr. Parhar it is important to comment on the very poor quality of the evidence given. Clearly Mr. Parhar has difficulties with English. He is a relatively recent immigrant to this country and his first language was clearly not English. A review of his transcripts indicate that many times his answers to questions were non-responsive as if he did not understand the questions. On other occasions he would give an answer that made absolutely no sense whatsoever. He also would give different answers to the same questions. This possibly is due to a language barrier but as I am being asked to assess the quality of the evidence where there are some differing stories being provided without an opportunity to meet Mr. Parhar and hear his evidence in person I am left with a conclusion that his evidence may not be reliable because of the language barrier. I also note that a number of times during the course of the discovery counsel for the plaintiff indicated her concern with respect to Mr. Parhar's ability to understand the questions but was reassured by his counsel that she felt it was alright to proceed.

As to his evidence on his discovery Mr. Parhar says that his plan at the time of the accident was to proceed eastbound on Rutherford Road and make a right turn onto Huntington. This would take him on the route where he would be required to go to finish his day with a drop-off at the yard where he had left his vehicle early in the morning prior to taking his trip to Windsor that day. On discovery Mr. Parhar agrees that there are two through lanes on Rutherford Road near the intersection with Huntington and one left turn lane. He also agrees that there is no traffic controlling signal.

Just prior to the incident occur Mr. Parhar says that he was travelling in the right turn lane. He says he then was planning to make a wide right turn to go onto Huntington and to start that process he looked in his left mirror, put on his left turn signal and began to move into the left lane. He specifically denies any intention of making a left hand turn. He claims that he is only partially in the left lane when he then decides to drive to make his wide right turn. He claims he turned off the left indicator and put on the right indicator. He now looks over to his right to see if there were any other vehicles to the right. He does this by looking in his mirror. He acknowledges that Rutherford Road is a flat road in this area and he could see as far back as possible. He says **he did not see a car**. He says, and I quote, in response to Question 249:

> "At that time there was no car. I don't see in my mirror. Maybe she on the other side but I don't know."

He then proceeds to make his turn. He hears a noise that something hit his truck. He then stops, goes outside and sees the car. Mr. Parhar's belief is that the Novosel vehicle struck his vehicle in the rear. He also states at discovery that he believes she must have come up in his blind spot and that she was too close.

He was asked two or three times as to what he saw in his mirror before he began his right-hand turn. He acknowledged each time that he did not see any vehicle in the right lane prior to the accident. Lastly he says at the time he started his right turn and at about the time he heard the noise that both his tractor and trailer were in the right lane. (See Question 464.)

A review of the transcripts of Mr. Parhar do suggest some inconsistencies as to where the impact was and where his vehicle was at the time of impact. On one occasion he will deny that he was blocking the right lane and left lane of Rutherford Road when he came to a stop. On other occasions when shown the photographs he acknowledges that he is blocking both lanes. He testifies that Ms. Novosel struck him on the back of his vehicle and then later he testifies that she hit him in the middle of his vehicle.

I have also reviewed the photographs of the Novosel vehicle and the photographs that were taken of the two vehicles after the collision occurred and before they were moved. The photographs show significant damage to the left driver's front of the Novosel vehicle as well as damage through the driver's side all the way to the back. There is also a photograph that shows that the rear windscreen was taken out and it appears as if some portion of the beam from the trailer actually entered through the left driver's side rear windscreen.

The photographs of the two vehicles show the Novosel vehicle essentially stuck between the back of the tractor portion and the side of the tractor trailer. The position of the vehicles is partially onto Huntington where both witnesses indicate that the cars had ended up with the Novosel vehicle being dragged there by the continued movement of the tractor trailer. The photos also show looking back to Rutherford Road that the Novosel vehicle appears to be lined up with the right-hand lane but that the tractor portion of the vehicle which is beside her appears to be coming from a trajectory which would be in the left through lane. The tractor trailer appears to have been partially in both lanes.

Submissions of the Parties:

It is Echelon's position that the evidence of Mr. Parhar cannot be accepted as it is inconsistent, lacks credibility and does not match up with some physical information we have with respect to the accident itself. Echelon submits that I should accept Ms. Novosel's evidence as to how this accident occurred. If I do that Echelon submits that I should then accept the following facts:

1. The tractor trailer and the Novosel vehicle were travelling in the same direction and in adjacent lanes;

2. The tractor trailer changed lanes when the incident occurred; and,

3. The tractor trailer made contact with the Novosel vehicle.

Echelon submits that if I accept those facts that the criteria under Section 10(1) and (4) of the *Fault Determination Rules* are met. In support of this position Echelon points to Ms. Novosel's consistent evidence that her car was always travelling in the right hand lane to the right of the tractor trailer on Rutherford Road immediately prior to the accident. She has also consistently reported that the tractor trailer moved into the left lane before unexpectedly executing the wide right turn.

Echelon also submits that the property damage documents and photographs show that the damage to the Novosel vehicle was entirely on the driver's side which supports their argument that both vehicles were travelling in the same direction and in adjacent lanes at the time of the accident. Echelon submits that damage such as that could not have occurred if the Novosel vehicle was travelling in the same lane as the tractor trailer (as suggested by Mr. Parhar) as in that case a rear-end collision would have occurred.

Echelon also points to the Motor Vehicle Accident Report diagram in which the picture shows just the scenario described above. It shows the Novosel vehicle moving in the right lane, it shows the tractor trailer in the left lane and making a wide right turn in front of the Novosel car.

With respect to Mr. Parhar's evidence Echelon submits that I should look at some of the inconsistencies in that evidence and as well the fact that Mr. Parhar clearly testified that he did not see the Novosel vehicle at any time prior to the collision. As a result his evidence as to where the Novosel vehicle was when the accident occurred cannot be accepted or must be discarded. If he didn't see the car he couldn't know where it was.

Echelon also submits that Mr. Parhar's evidence was inconsistent in a number of areas. He testified that when he heard the noise or bump which he later realized was a collision that his entire vehicle was at that point fully established in the right-hand curb lane of Rutherford Road. He later testified that at the time of the bump his vehicle was fully established in the right-hand lane of Huntington Road. He then later changed his testimony to say that his vehicle was partially in the right-hand lanes of both Rutherford Road and Huntington Road at the time of the accident. Echelon submits that this evidence is internally inconsistent with all the other evidence available which suggests that the tractor trailer was in fact in the left through lane of Rutherford Road immediately prior to the accident.

Finally, Echelon also submits that Mr. Parhar's evidence may lack credibility not because he himself lacks credibility but because he had significant difficulties in understanding the questions posed to him at his examination and seemed to suffer from an inability to express himself clearly in English.

Echelon also submits that whether the Parhar tractor trailer was partially or fully in the left lane at the time of the accident isn't relevant. Echelon submits that every accident which occurs as a result of a lane change will require at least one of the vehicles to be partially in one lane and partially in another at the time of the accident. Rather they submit that the question is were the vehicles in adjacent lanes and was one of the vehicles changing lanes when the incident occurred?

In the alternative Echelon submits that if I find that Subsection 10.4 of the *Fault Determination Rules* is not applicable and I agree with AIG that I should apply Section 5(1) and 5(2) that in the circumstances it would still result in a finding of 100% responsibility on the part of the tractor

trailer. Echelon argues that recourse should be had to Rule 5 only in the event that I find that there is insufficient evidence to conclude that the tractor trailer and the Novosel vehicle were in adjacent lanes at the time of the accident. In that case Echelon argues that I must not only look at Rule 5 but I must also look at Rule 3. They argue based on Rule 3 I am not to look at the road conditions, the visibility, actions of pedestrians, locations of the insured's automobile or the point of the contact with any other automobile involved in the accident. Echelon argues that Rule 5 that directs me to determine the fault of the insured based on the ordinary rules of law can only be resorted to if I am satisfied that there is no other rule. Further they submit that the ordinary rules of law do not mean the ordinary rules of tort law. In that case Echelon submits that Mr. Parhar was 100% at fault for the accident as he was in the process of making a wide right turn at the time of the accident. His duty was to execute the turn when it was safe to do so. He did not see Novosel's vehicle prior to the accident despite the fact that arguably it was there to be seen. Mr. Parhar said he checked his side and rear mirrors prior to changing lanes and saw no vehicles yet the evidence would suggest that Ms. Novosol would have had to have been travelling in the lane beside him when he started to make his wide right. Echelon submits that Ms. Novosel was driving in a safe and appropriate manner in her lane of travel planning to proceed straight through the intersection when Parhar, without looking to ensure that his turn could be made in safety, executed a wide right turn.

With respect to Novosel's guilty plea to an unsafe move, Echelon submits that that is not something that should be taken into consideration based on Rule 3 of the *Fault Determination Rules*. Echelon submits that when one looks at Rule 3 and the decision of the Ontario Court of Appeal in *State Farm v. Aviva*, 2015 ONCA 920 that consideration such as criminal convictions or the ordinary rules of tort law seem to be purposely excluded from the consideration by Rule 3. In that case the Court of Appeal noted that resort to pure tort law for the determination of fault in a loss transfer case would run contrary to the purpose of the loss transfer scheme which is to provide a summary way of resolving these types of indemnification claims.

Therefore Echelon submits whichever way you toss the ball in the air the result is the same, AIG's insured is 100% responsible.

AIG understandably takes a quite different position. AIG's position is that Rule 10(1) and (4) are not applicable to the circumstances of this case as they say the evidence suggests that the tractor trailer and the Novosel vehicle were not travelling in adjacent lanes at the time of the accident. They point to Mr. Parhar's evidence and say his evidence is more reliable and further that he had been driving a transport truck for nearly 14 years, was an experienced driver familiar with the area and knew the route he was planning to take. That day he was planning to go back to his company's yard and there is no doubt the only way to do that would be to turn right onto Huntington Road from Rutherford.

AIG relies on Mr. Parhar's testimony that he did not put his left-turn signal on as he approached the intersection but in fact put a right-turn signal on while at the same time partially moving his tractor into the left lane in order to execute the wide right turn. AIG submits that this is in accordance with the training and proper execution of a wide right turn for tractor trailer drivers

and in accordance with the provisions of the *Highway Traffic Act*, Sections 141(2) and 141(9), R.S.O. 1990 H.8, as amended.

AIG submits that Novosel was about four to five car lengths behind Parhar's vehicle when he started to make his right turn. They rely on Novosel's evidence in that regard. Mr. Parhar then started to move to the left and had commenced his right turn when his tractor trailer was then struck by the Novosel vehicle.

AIG submits that these facts do not fall within 10(1) and 10(4) and they do not apply as the key criteria as set out in 10(1) does not exist and that is that the vehicles were not in adjacent lanes at the time of the accident. As I understand it, AIG's position is that the tractor trailer was in the right lane or was mostly in the right lane and slightly in the left in order to make the right-hand turn and that Novosel was also in the right-hand and accordingly it cannot be found that they were in adjacent lanes.

In reliance of their position that Rule 10(1) and 10(4) are not applicable, AIG relies on the decision of Arbitrator Novick in the case of *Personal Insurance Company of Canada* & *Zurich*, 2012 Carswell ONT, 17695. In that case the Motor Vehicle Accident Report indicated that a truck was turning out to commence a wide right turn and while in the process of doing so the trailer caught the second vehicle which was westbound (same direction) and stopped to allow the truck to turn. In that case Arbitrator Novick reviewed the *Fault Determination Rules* and determined that none of them applied. Arbitrator Novick held, and I quote:

> "As the evidence before me indicates that the two vehicles were initially in the same lane (i.e. the curb lane of Dixon Road) and that the tractor trailer then turned out wide in order to make the turn, it is not entirely accurate to say that the vehicles were in adjacent lanes and the incident occurred when the truck was changing lanes. In actual fact the collision occurred because the truck did not turn widely enough or enter the middle lane fully in order to avoid its trailer striking the other vehicle."

If 10(1) and 10(4) do not apply then AIG submits that none of the other *Fault Determination Rules* are applicable and therefore Section 5 of Regulation 668 is applicable which then would direct the arbitrator to determine the degree of fault in accordance with ordinary rules of law. With respect to that AIG relies on the police report which indicates that Novosel's driving actions were improper while Mr. Parhar was noted to be driving properly. In addition, AIG submits that Mr. Parhar's manoeuvre was proper given the size of his vehicle. AIG asks me to find that Mr. Parhar put on his right turn signal, partially moved into the left lane to execute his right-hand turn and that that was a proper manoeuvre for a large vehicle to make a wide right. AIG submits that Ms. Novosel misinterpreted Mr. Parhar's movement into the left lane as an intention on his part to turn left onto Huntington and therefore she moved forward in the right-hand lane as if to pass Mr. Parhar which resulted in the collision.

In addition AIG submits that I should consider the guilty plea of Ms. Novosel pursuant to the *Highway Traffic Act* as an indication that she recognizes that she was at fault. In these circumstances AIG submits that Ms. Novosel should be found 100% at fault. In support of their position AIG relies on a number of court cases where liability was in dispute in a tort matter and the court had held that where an individual pleads guilty and is convicted of an offence that it is not open for that individual to lead evidence that would effectively re-litigate the essential elements of that offence or to suggest that that individual had exercised reasonable care. (See *Mehlenbacher v. Cooper*, 2017 ONSC, 3434 and *Caci v. MacArthur*, 2008 ONCA, 750.) In the latter case the court held that where an individual was charged with careless driving and pled guilty to and was convicted of an unsafe move that that conviction itself was evidence of negligence.

Analysis and Result:

It is my finding that the accident occurred in the manner described by Ms. Novosel. Although I did not have an opportunity of seeing either Ms. Novosel or Mr. Parhar, I prefer the evidence of Ms. Novosel which is largely supported by the photographs, the diagram in the police report and by the property damage documentation. In addition, Ms. Novosel's evidence has been consistent throughout both in an Examination Under Oath and an Examination for Discovery: Both sworn testimony. Unfortunately Mr. Parhar's evidence has not been consistent. Whether it is because he doesn't recall how the accident happened or speaks English poorly or is not telling the truth as to how the accident happened is unclear. I agree with Echelon's submissions that Mr. Parhar's version of events seems to be impossible based on the law of physics. I have trouble in understanding how Ms. Novosel's vehicle could be travelling in the same lane as Mr. Parhar's tractor trailer and at the same time strike the Parhar vehicle on the side. In order for that to have occurred, and clearly that is what did occur, Mr. Parhar's tractor and trailer must have entered the left lane in order for there to be sufficient room for Ms. Novosel's vehicle to end up adjacent to Mr. Parhar's tractor trailer at the point of impact as shown by the photographs and the police diagram.

I therefore find that this accident occurred when Mr. Parhar was travelling initially in the right lane with the Novosel vehicle behind him. Mr. Parhar put on his left turn signal and began to move into the left through lane. At some point both the tractor and trailer were at least partially in that left through lane. In the meantime Ms. Novosel continued in the right lane with the intention of proceeding through the intersection of Rutherford and Huntington. I find that Mr. Parhar then began to move his vehicle back into the right lane starting to commence his wide right turn leaving no room for Ms. Novosel's vehicle to go thus resulting in the impact between the trailer and Ms. Novosel's vehicle. I find that this is consistent with the evidence as presented both in terms of the most credible scenario and in particular most consistent with the photographs of the vehicles immediately after impact.

In reaching this conclusion I am mindful of the basic principles of loss transfer that evolved over the course of the years. Those key principles I outline below:

1. The *Fault Determination Rules* are to be liberally construed and applied. Fault under the *Fault Determination Rules* does not take into consideration factors that would apply under the ordinary rules of tort law (*Co-operators General Insurance Company v. Canadian General Insurance Company* [1999] O.J. #2578);

2. The *Fault Determination Rules* set out a series of general type of accidents; and, to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of particular accident in a manner that in most cases would probably but not necessarily correspond with actual fault (*Jevco Insurance Company v. Halifax Insurance Company* (1994) 27 C.C.L.(i)(2d) 64 (Matlow, J.);

3. The purpose of the legislation is to spread the load amongst insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude (*Jevco Insurance Company & York Fire and Casualty Company*, 27 O.R. (3d) 486 (Court of Appeal) and *Co-operators General Insurance Company v. Canadian General Insurance Company* [1998] O.J. #258 (Justice Lax);

4. A common sense approach is to be used when considering the *Fault Determination Rules* and the diagrams in the Regulation (*Royal & Sunalliance Insurance Company v. AXA Insurance Company*, Arbitrator Bruce Robinson, November 21, 2003);

5. The purpose of the legislated scheme under Section 275 of the *Insurance Act* and Regulation 668 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 an accident. The fault of the insured is to be determined strictly in accordance with the *Fault Determination Rules* prescribed by Regulation 668 (*Jevco Insurance Company v. York Fire and Casualty* [1996] O.J. #646); and,

6. Based on these principles and keeping in mind 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 cannot help but find that Rule 10(4) of the *Fault Determination Rules* applies to this situation given my characterization of this as a "lane change" situation as contemplated by Rule 10(4) of the *Fault Determination Rules* (*Economical Insurance Group v. Markel Insurance Company of Canada*, (2015) Carswell ONT., 18105, Arbitrator Bialkowski, January, 2011).

I also found the decision of Arbitrator Bialkowski (supra) in *Economical & Markel* to be helpful. In that particular case a driver was executing what he described as a "race car manoeuvre". He was driving at a high rate of speed and disregarded the left turn signal of the at-fault driver. However, the facts suggested that the two drivers were in adjacent lanes and one driver was making a lane change. Arbitrator Bialkowski found that the characterization of the accident

overall was one of a lane change which fell within Rule 10(4) and that Rule being applicable he was required to apply the *Fault Determination Rule* and find that the driver changing lanes was 100% at fault despite the fact that the driver changing lanes was not the individual who was conducting the race car manoeuvre. Arbitrator Bialkowski noted that a different result could arise if the ordinary rules of tort negligence had applied.

I also find that the guilty plea of Ms. Novosel is not relevant. I agree with the submissions of Echelon that that would be considered to be an extraneous factor which arbitrators are directed not to consider under the *Fault Determination Rules*. Arbitrator Novick in the case of *Dominion of Canada General Insurance Company* & *Royal and Sunalliance Insurance Company* (January 19, 2017) stated in the context of an analysis as to whether Rules 10(4) of the *Fault Determination Rules* applied that:

> "No other factors such as road conditions or whether or not charges had been laid under the *Highway Traffic Act* may enter into the analysis."

I agree with Arbitrator Novick. In any event I find that the circumstances of the charges being laid by the police officer without having had an opportunity of speaking to Ms. Novosel, and his reluctance to hear her when he visited her in the hospital, having had the ticket already prepared for her, as well as the testimony of Ms. Novosel with respect to the paralegal and his lack of effort on her behalf suggest that the guilty plea was a convenience as opposed to an actual recognition of any negligent behaviour.

I also considered the decision submitted by AIG of Arbitrator Novick in *The Personal Insurance Company of Canada* & *Zurich Insurance Company* (November 19, 2012). AIG submitted this case in support of their proposition that Rule 10(1) and 10(4) did not apply to the situation of a wide right turn being made. In that case the report of the decision indicates that a representative of the applicant, The Personal Insurance Company, appeared before Arbitrator Novick, but no representative appeared for the Zurich Insurance Company. Therefore there was no counter-argument advanced. It appears the only evidence that was submitted before Arbitrator Novick was the motor vehicle accident report and the application for accident benefits. The motor vehicle accident report indicated that a tractor trailer was turning out wide to commence a right turn to travel northbound on Road 2 and the trailer caught the claimant's vehicle which was westbound in lane 3 and had stopped to allow the truck to turn. The police report in that case indicated that the truck driver made an improper turn and that the claimant was driving properly. On the application for accident benefits the claimant indicated that she was "struck by the tail of a truck while making a right turn".

Counsel for The Personal argued that either 10(1) and 10(4) are applicable, or Rule 18(c). Arbitrator Novick found that Rule 10(4) was not applicable. She found that the two vehicles were initially in the same lane and that the tractor trailer then turned out wide to make a turn. She felt that description was not sufficient in order for her to find that the vehicles were in adjacent lanes and that the incident occurred when the truck was changing lanes.

However, Arbitrator Novick went on to find that under Rule 5 that the tractor trailer was 100% at fault based on ordinary rules of law as it had made an improper turn.

I am unable to find clearly that the facts of the case before Arbitrator Novick are the same as the facts before me. There was none of the detailed evidence led in this case with respect to the movement of the tractor trailer and the lane changes that it did make and the photographic evidence and evidence under oath of Ms. Novosel as to the fact that they were in adjacent lanes when the collision occurred. Accordingly I find that the factual situation before me is different than that before Arbitrator Novick. I find that Rule 10(1) and 10(4) are applicable to the circumstances of this case.

In the event that I am wrong and the vehicles were not travelling in the same direction, in adjacent lanes and that the incident occurred when the tractor trailer changed lanes, then I do agree with AIG that Rule 5 would be applicable. However, like Arbitrator Novick, if I were to apply Rule 5 I would find that the tractor trailer made an improper right turn. I would find that Mr. Parhar failed to see the Novosel vehicle when it was there to be seen as he started his wide right turn. In those circumstances if I were to apply Rule 5 I would find Mr. Parhar 100% responsible for this accident.

Therefore in either set of circumstances my conclusion is that AIG Insurance Company of Canada is responsible for reimbursing Echelon Insurance Company based on 100% fault with respect to the incident of December 15, 2014.

Order:

I therefore find that with respect to the issues that have been placed before me for determination the following:

1. I find that *Fault Determination Rules* 10(1) and 10(4) apply and accordingly the respondent, AIG Insurance Company of Canada is to indemnify Echelon Insurance Company based on 100% indemnity;

2. If none of the *Fault Determination Rules* apply then pursuant to the ordinary rules of negligence I conclude that the respondent, AIG Insurance Company of Canada is still to indemnify Echelon Insurance Company based on 100% responsibility pursuant to Rule 5.

If there is any issue with respect to the quantum of loss transfer as set out in Questions 1(c) and 1(d) then a further pre-hearing can be scheduled to set up a date for a hearing on that issue.

Costs:

The Arbitration Agreement provides that the unsuccessful party shall pay the successful party its costs of the arbitration and that the quantum of such costs is to be fixed by the arbitrator. As Echelon was wholly successful in this arbitration I find that the legal costs and the costs of

the arbitrator are to be payable by AIG. If the quantum of those costs cannot be agreed upon then counsel are to contact me so we can schedule a costs pre-hearing for the purposes of submissions so that I can fix costs pursuant to the Arbitration Agreement.

DATED THIS 10th day of September, 2019 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP