IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, Section 275 and Regulations 664 and 668 thereunder;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TD HOME AND AUTO INSURANCE COMPANY

Applicant

\- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Christopher Whibbs for the Applicant

Lisa Hamilton for the Respondent

Introduction

This arbitration has been put before me to deal with a loss transfer issue that arises between the Applicant and the Respondent.

Both of these parties are automobile insurers carrying on business in the Province of Ontario. They have become involved in a dispute with respect to loss transfer as that concept is implemented by Section 275 of the *Insurance Act*.

The parties have entered into an Arbitration Agreement and have submitted their dispute to me for determination.

At the outset of the dispute, the parties have determined that there is a preliminary issue that is critical to the method in which this dispute can proceed further. The parties and I have agreed to deal with this issue as a preliminary matter in advance of other pending issues.

Overview

The underlying accident benefits claims arises with respect to injuries sustained by Mr. James N.[1] in an accident which occurred on December 20, 2009. Evidently the accident involved a snowmobile being operated by James N. and a truck being operated by Daniel L. The exact sequence of events in the accident may well be subject to further testimony, particularly in relation to questions of timing, perception, and speed. For present purposes, it will suffice to explain that this accident occurred when James N. was operating, and ejected from, a snowmobile traveling more or less southbound on a designated trail in Simcoe County, Ramara Township. The directional references about the location of the accident are a bit confusing. The police report, which is found at Tab A1 of Exhibit 3, indicates that James N. was operating the snowmobile in a southerly direction. Other documentation, such as the aerial photograph annexed to the Bigelow report of April 14, 2016 (found at Tab C4 of the Joint Document Brief), shows that the trail is not exactly aligned with north-south directions and is somewhat closer to an east-west direction.

At the place of this occurrence, there is an "access road" which crosses the path of the snowmobile trail. On the police report, this is described as a private driveway. The character of this access trail is very much the subject matter of this part of the arbitration proceeding. It appears likely that the injuries sustained by James N. arise out of the actions taken by the two vehicle operators as they found themselves at a point of imminent collision where the access road crossed the snowmobile trail.

Statutory and Regulatory Context of this Dispute

As a result of the shift of automobile insurance injury compensation from a tort basis to a no-fault system, the legislature reconfigured the nature and extent of no-fault benefits. Effective in 1990, the legislature greatly enhanced no-fault benefits and concurrently reduced compensation based on tort principles. In effect, changes were introduced that took away tort compensation with respect to accident victims who had less serious injuries. On the no-fault side, the legislature provided for extensive benefits, with high limits of coverage, for all accident victims without regard to traditional fault principles.

This shift in the approach to compensation has implications for certain segments of our society.Due to the nature of their transportation modes, the injuries that may be caused by certain groups of motorists and sustained by certain groups of motorists would result in those communities being disproportionately affected by the compensation systems alteration.Therefore, the legislature provided for a concept of “loss transfer” to redistribute no-fault losses in limited circumstances.

Section 275 of the *Insurance Act* provides as follows:

> **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**

[1] In consideration of the privacy interests of non-parties who were required to provide information about their personal affairs, I have deleted references to surnames.

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.

The legislature has defined the classes of insurance that would be subject to loss transfer processes in Ontario Regulation 664. Section 9 of that regulation provides:

Indemnification for Statutory Accident Benefits (Section 275 of the Act)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*;

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer. R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy. R.R.O. 1990, Reg. 664, s. 9 (2); O. Reg. 780/93, s. 1.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s. 9 (3); O. Reg. 780/93, s. 1.

If loss transfer is applicable, then the insurers are required to determine their respective liabilities by application of the "Fault Determination Rules" which are applicable to these disputes.

The Fault Determination Rules are prescribed by regulation and set out various circumstances for making a determination of the respective degrees of responsibility of insurers in loss transfer circumstances. Broadly speaking, this is done by categorizing the accident circumstances in accordance with prescribed rules in the regulation. To the extent that an accident circumstance comes within the scope of one of the prescribed rules, that rule will dictate the attribution of liability for reimbursement. This process necessarily involves a certain degree of "rough justice" which is a policy tradeoff for achieving expeditious resolution of cases with minimal cost. The regulations, however, do provide that the degree of fault shall be determined in accordance with the ordinary rules of law if an incident is not described in any of the prescribed scenarios found in the rules.

In this particular case, the issue is whether or not this incident is described in Rule 13 of the Fault Determination Rules. If it is not, then the parties will revert to consideration of the ordinary rule of law and that issue will require a further hearing process.

Rule 13 provides:

> **13. (1) This section applies with respect to an incident that occurs at an intersection that does not have traffic signals or traffic signs. R.R.O. 1990, Reg. 668, s. 13 (1).**
>
> **(2) If automobile "A" enters the intersection before automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 13 (2).**
>
> **(3) If automobiles "A" and "B" enter the intersection at the same time and automobile "A" is to the right of automobile "B" when in the intersection, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 13 (3).**
>
> **(4) If it cannot be established whether automobile "A" or "B" entered the intersection first, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident. R.R.O. 1990, Reg. 668, s. 13 (4).**

The Legal Issue

The very narrow legal issue is whether or not Rule 13 applies to these accident circumstances. That rule only applies if the accident "occurs at an intersection". If the accident has occurred at an intersection, then rules setting out liability assessment are mandated that are determined by whether one vehicle "enters the intersection" first or both enter at the same time. The notion of whether or not this accident occurred "at an intersection" is at the heart of the preliminary dispute between these two insurers.

The Circumstances

This matter has proceeded before me entirely on an agreed upon record. The record consists of an Arbitration Agreement, which was marked as Exhibit 1 to the proceedings, an Agreed Statement of Fact, which was marked as Exhibit 2 to the proceedings, and a two volume Agreed Document Brief, which was marked as Exhibit 3 to the proceedings.

The Agreed Statement of Fact indicates that James N. was operating his snowmobile on Trail 207, otherwise known as Ramara Trail, at Lagoon City and was proceeding "southbound along the trail". The snowmobile was owned by James N. and insured by the Applicant TD General Insurance Company. Trail 207 runs parallel to Rama Road and Creighton Road North. It is indicated that Trail 207 can be used for hiking, walking, cycling and snowmobiling. It has a gravel surface. I was told that it is not used by cars.

The other person involved in the accident, Daniel L., resides at 4904 Creighton Road North. His property backs onto Trail 207. I understand that on the other side of Trail 207 is a business property also owned by Daniel L.

There is a township road allowance which is adjacent to Daniel L.'s residential property. The road allowance is to the southwest of Daniel L.'s property. Except for the "access" road under discussion, there does not appear to be any functional use made of the township road allowance in that vicinity. The access road seems to have the sole function of connecting Daniel L.'s residence on Creighton Road with his business property, an RV park, which is behind his residence but on the other side of the snowmobile trail. A very useful reference document is the photograph annexed to the Bigelow report, which shows the trail marked "snowmobile trail".

Below that trail, in the photograph, is an irregular lot which represents the residential property fronting on the road allowance for Creighton Street North. To the left of that lot, in the photograph, is the depiction of the township road allowance going roughly north from Creighton Street. At the top of the photograph, there is an indication of a gate and one can see the access road curving to the north or northeast and going into the private property on the other side of the snowmobile trail. In effect, this access road, to the extent that it is visible in the aerial photograph, goes from Daniel L.'s residential property to Daniel L.'s business property.

A higher-view picture can be found at Figure 1 of the report of Giffin Koerth dated September 2, 2015 and found at Tab C1 of the Amended Joint Document Brief. Again, that photograph depicts the proximity of the "access road" and the residence on Creighton Street North but also shows the ultimate end of the access road in the Hammock Harbour RV Park. As can be seen from the Bigelow photograph, the traveled portion of the access road crosses over into the township road allowance and then leaves again north of the snowmobile Trail 207. The location of the accident, as indicated by the various photographs, is near the place where the access road crosses the snowmobile trail and that, of course, is consistent with the indications of how this injury occurred.

It seems clear that the place where the access road crosses the snowmobile trail is on the township road allowance. There is, however, no suggestion here that the township ever constructed a road on this allowance or did anything else to formally assume usage of this property.

In fact, Daniel L., in his testimony at Tab B1 of Exhibit 3, Question 185, describes that he did some work himself to make this into a "navigable roadway". Daniel L. testified that he allowed certain individuals to use this "roadway". At the hearing, I was told that this was a roadway that was not used by the public and was not available for use by the public. That seems to be consistent with the photographic representations which show that the "roadway" where it crosses the snowmobile trail, is only connecting between different parts of the Daniel L. properties. In other words, for someone to travel along the "roadway" to the point of crossing the snowmobile trail, they would have to start on one of the Daniel L.'s properties.

Theoretically, it would be possible for someone to go from Creighton Road, northerly up the township road allowance, through the brush, and join up with the "access roadway" at the point of crossing the snowmobile trail all without entering onto Daniel L.'s property. There is no evidence whatsoever to show that anyone ever did this or that this was in any way accessible. In fact, the indications are to the contrary.

The totality of the evidence before me suggests that the place where this "access" road crosses the snowmobile trail is completely unsigned and unmarked. Moreover, the access trail itself is not accessible by vehicle by anyone other than someone coming from Daniel L.'s property presumably with his permission. The access trail is very much a convenience for Daniel L. and nothing other than that. At the point of the incident, the access trail is physically located on a township road allowance, but nothing in the evidence suggests that this resembles a township road in any way, shape or form.

In the evidentiary record, each of the parties has submitted expert evidence in the form of reports addressing the character of this accident location. The experts' photographs are helpful in understanding what we are looking at and they have been able to refine an accumulation of evidence into a summary form but beyond that, I do not find the expert reports to be determinative of what is essentially a legal question to be addressed in this arbitration.

The "Intersection" Question

It is the position of the Applicant that this accident did not occur at an intersection and therefore Rule 13 does not apply.

The Respondent submits that Rule 13 applies.

It is common ground that the location of the accident had no traffic signals or signs.

Rule 13 of the Fault Determination Rules therefore directs us to the question of whether or not this incident occurred at an intersection. The term "intersection" is not defined in the Fault Determination Rules nor is it defined in the *Insurance Act*. The case law seems to be unhelpful as well. Counsel have referred to one decision in *TD General Insurance Company and Pafco Insurance Company*, unreported, Arbitrator Fidler, September 17, 2011[2], that involved a collision taking place at the crossing of a trail and a provincial highway. Arbitrator Fidler came to the finding that this was an intersection, but there was no explanation of the analysis followed by the arbitrator in that circumstance and I am unable to extrapolate that his analysis would necessarily apply to this fact pattern.

I believe that our primary source of guidance on this issue should come from the fault determination regulation itself. Though that regulation has no definition of the term "intersection," it is a term that is used repeatedly particularly in Sections 13, 14, and 15. Those provisions provide some hint as to the drafters' concept of what constitutes an "intersection".

In Subsection (1) of Rule 13, there is reference to "an intersection that does not have traffic signals or traffic signs". This language does suggest a location that might include traffic signals or traffic signs for the regulation of traffic flow and one surmises that this would be with the intention of controlling traffic flow that might conflict and create a hazard.

[2] An appeal of this decision did not offer any elaboration on the “intersection” question.

Subsection (2) of Section 13 ascribes fault in relation to when a vehicle "enters the intersection". This provides some context that suggests a location where there is some certainty about "entry" which implies some relatively clear demarcation of the extent of the "intersection". Other provisions of Section 14 address intersections with stop signs or being an “all way” stop intersection. Section 15 addresses locations where there is an intersection with traffic signals. Other provisions the Fault Determination Rules address collisions that are associated with vehicles entering from a parking place, private road, driveway, or controlled access road. This context conjures up visions of urban roadways and organized vehicular traffic patterns.

The Applicant suggests that we should look towards highway traffic law to understand the appropriate meaning of an "intersection".

The Respondent does not agree with this approach. It is the Respondent's position that we should not look at a separate statute unless that definition from the other statute is specifically incorporated by reference by the insurance regulation or statute under which we are operating.

I certainly agree that specific incorporation would make it appropriate and indeed mandatory for us to look towards the defining provisions of another statutory scheme. I am less certain that it is inappropriate for us to look at *Highway Traffic Act* concepts of intersection for the purpose of informing our understanding of a reasonable meaning to be ascribed to that term.

In particular, I am mindful of the fact that the Fault Determination Rules are in effect a program of "rules of the road" for inter-insurer indemnity provisions whereas the *Highway Traffic Act* sets out the "rules of the road" for motor vehicle operators. It is the *Highway Traffic Act* that determines the legal obligations with respect to right of way and other behavior on the roadways. Under the *Insurance Act*, the Fault Determination Rules ascribe liability in the context of those behaviors. In particular, liability is assigned based on standards that are set out in the *Highway Traffic Act* legislation.

In my mind, it is not at all unreasonable to look towards the *Highway Traffic Act* concept of "intersection" as a source of definition for the use of that term in the *Insurance Act* regulations.

At a minimum, it is my view that we should look at *Highway Traffic Act* definitions of "intersection" to understand the ordinary parlance meaning of that word. After all, it is in the context of the application of the *Highway Traffic Act* that we will most encounter a need to understand the term "intersection". Furthermore, it would be extremely inefficient to adopt a rule of interpretation under the *Insurance Act* which is at odds with the rule of interpretation under the *Highway Traffic Act* when the both of those statutes address the consequences of the same behavior of the same vehicles in the same places.

For these reasons, I do find it useful to refer to the *Highway Traffic Act* definition at least to the extent that it is not somehow inconsistent with the purposes for which it is sought to be applied in Fault Determination Rules cases.

This approach is appropriate, notwithstanding that the legislature has not expressly referenced the definitions contained in the *Highway Traffic Act*. Driedger on the Construction of Statutes gives broad approval to the practice of looking to other legislation for meaning of terms. The following passages highlight the discussion from that work:

At pages 285 and 286:

> **Introduction**
>
> **The context of a legislative provision includes not only the immediate context and the rest of the Act in which the provision appears but also any other legislation that may cast light on the meaning or effect of the words. Traditionally, the category of related legislation is said to consist of statutes *in pari materia,* that is, statutes enacted by the same legislature and relating to the same subject. In practice, however, the courts do not limit themselves in this way. They look to the whole of the statute book produced by the enacting legislature and to legislation enacted by other jurisdictions as well. They determine on a case-by-case basis what relations exist between the words to be interpreted and the words of other legislative texts, what inferences may be drawn from these relations and what weight should attach to these inferences.**
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> **Statutes on the Same Subject**
>
> **Governing principle. Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by *Lord Mansfield in R. v. Loxdale*:**
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> > **Where there are different statutes *in pari materia* through made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.**
>
> **In effect, the several statutes are construed together as if they constituted a single Act and the presumptions of coherence and consistent expression apply to these statutes as I they were part of a single Act.**
>
> **In referring to two or more statutes on the same subject the courts rarely inquire which statute was enacted first. When the issue does arise, however, it sometimes causes confusion. The correct view is that subsequently enacted legislation may be considered and relied on in the same manner and to the same degree as previously enacted legislation.**

At pages 286 and 287:

> **Acts take consistent approach. Often two or more statutes enacted by a legislature touch on the same subject without actually constituting a single integrated scheme. Such statutes are presumed to operate together harmoniously and to reflect a consistent view of the subject in question.**

At page 288:

> **Statute Book as a Whole**
>
> **Governing principle. The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation.**

In the decision of the Ontario Court of Appeal in *Matheson v. Lewis*, 2014 ONCA 542 (CanLII) the court was striving to interpret provisions about off-road vehicles and self-propelled implements of husbandry. Justice Juriansz observed:

> **[25] The *Highway Traffic Act*, the *Off-Road Vehicles Act*, the parts of the *Insurance Act* dealing with motor vehicle insurance, and the *Compulsory Automobile Insurance Act* are all**

> **components of one comprehensive scheme. As a principle of statutory interpretation, there is a presumption of harmony, coherence and consistency between statutes dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867, at para. 52; Ruth Sullivan, Statutory Interpretation, 2nd ed. (Toronto: Irwin, 2007), at pp. 149-151.**

I conclude that it is appropriate to look at the *Highway Traffic Act*'s definition of intersection to determine the possible application of Rule 13.

The *Highway Traffic Act* defines intersection as follows:

> **"'Intersection' means the area embraced within the prolongation or connection of the lateral curb lines or, if none, then of the lateral boundary lines of two or more highways that join one another at an angle, whether or not one highway crosses the other."**

The same Act defines "highway" as follows:

> **"'Highway' includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;"**

Clearly for there to be an intersection there must be a highway. For there to be a highway, there must be an intention for use by the general public or use by the general public for the passage of vehicles. Furthermore, the definition stipulates that there must be "two or more highways."

Based on the record before me, I am unable to find that both of the "Trail 207" and the "access road" are highways and therefore that the place where they cross constitutes a "intersection" as defined under the *Highway Traffic Act*. With respect to the access road, there simply is no such intention of, or use by, the general public. The status of the trail is less clear to me, and Arbitrator Fidler may have implicitly considered that a snowmobile trail was a "highway". Having found that the access road is not a highway, the status of the Trail is irrelevant to this present proceeding.

Thus, in the ordinary parlance used for the regulation of traffic and behavior of operators of motor vehicles and in accordance with the definitions in the *Highway Traffic Act*, I do not consider that this incident occurred at an "intersection" as contemplated by Rule 13 of the Fault Determination Rules.

In addition, I think it would be a surprising development in the minds of the public if they thought that crossing points of pathways in remote areas were subject to rules that applied to "intersections" in urban areas. For many this would perhaps be an absurd result.

None of this suggests in any way that the duty of operators of vehicles at such locations are any different than they would be at any other place where foreseeable harm may flow from want of care. Indeed, I believe that the interpretation which I apply to the term "intersection" is consistent with ascribing responsibility that is consistent with reasonable obligations to take care.

Order

I conclude that Rule 13 of the Fault Determination Rules does not apply to the circumstances of this accident.

If either party wishes to make submissions with respect to costs I will be pleased to hear those submissions within 30 days.

Dated at Toronto this 3rd day of June, 2016.

LEE SAMIS
Arbitrator