2017 CarswellOnt 7581
Ontario Arbitration (Insurance Act)

Wawanesa Mutual Insurance Co. and Continental Casualty Co., Re

2017 CarswellOnt 7581, 67 C.C.L.I. (5th) 299

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, Section 275 AND REGULATION 668 THEREUNDER

IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c.17

WAWANESA MUTUAL INSURANCE COMPANY (Applicant)
and CONTINENTAL CASUALTY COMPANY (Respondent)

Kenneth J. Bialkowski Member

Judgment: April 30, 2017
Docket: None given.

Counsel: Catherine Korte, Anthony Gatensby, for Applicant, Wawanesa Mutual Insurance Company
Dana Spadafina, for Respondent, Continental Casualty Company

Headnote

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — General principles

Section 275 of Insurance Act creates scheme for loss transfer indemnity where any insurer who paid statutory accident benefits may be repaid in certain circumstances by another insurer, particularly accidents involving heavy commercial vehicles and motorcycles — Claimant was passenger in vehicle insured by insurer when it was involved in chain reaction type of collision — Chain was set off by commercial vehicle insured by respondent but there was no contact between commercial vehicle and claimant's vehicle — Claimant brought claim for no-fault statutory accident benefits from insurer — Insurer sent notification of loss transfer to respondent requesting $23,010.80 for reimbursement based on 100% liability and respondent made number payments — Dispute arose as to loss transfer indemnity — Insurer commenced arbitration seeking declaration that respondent waived its right to dispute applicable rule and proportion of fault under Fault Determination Rules — Respondent as sophisticated insurer made conscious decision to accept liability evidence by its payments of multiple indemnity requests on 100% fault basis — Respondent waived its rights to dispute loss transfer — Respondent communicated clear intention to waive right to dispute liability by paying indemnity requests on 100% fault basis for some two years — Detrimental reliance was not established to make estoppel applicable as there was no evidence adduced to suggest that further liability investigation may have changed facts giving rise to dispute.

Insurance --- Actions on policies — Practice and procedure — Limitation of actions

Section 275 of Insurance Act creates scheme for loss transfer indemnity where any insurer who paid statutory accident benefits may be repaid in certain circumstances by another insurer, particularly accidents involving heavy commercial vehicles and motorcycles — Claimant was passenger in vehicle insured by insurer when it was involved in chain reaction type of collision — Chain was set off by commercial vehicle insured by respondent but there was no contact between commercial vehicle and claimant's vehicle — Claimant brought claim for no-fault statutory accident benefits from insurer — Insurer sent notification of loss transfer to respondent requesting $23,010.80 for reimbursement based on 100% liability and respondent made number payments — Dispute arose as to loss transfer indemnity — Insurer commenced arbitration seeking declaration that respondent waived its right to dispute applicable rule and proportion of fault under Fault Determination Rules — New and separate cause of action was not created with each indemnity request and that respondent waived its right in all circumstances — To say that new arbitration could be commenced would be seriously detrimental to State Farm v. Zurich, as with passage of four years insurer

may not have been in position to complete thorough liability investigation — Acceptance of respondent's position would render nugatory doctrines of estoppel and waiver if one request for indemnity would be considered completely divorced from another.
Insurance --- Actions on policies — Practice and procedure — Miscellaneous
Section 275 of Insurance Act creates scheme for loss transfer indemnity where any insurer who paid statutory accident benefits may be repaid in certain circumstances by another insurer, particularly accidents involving heavy commercial vehicles and motorcycles — Claimant was passenger in vehicle insured by insurer when it was involved in chain reaction type of collision — Chain was set off by commercial vehicle insured by respondent but there was no contact between commercial vehicle and claimant's vehicle — Claimant brought claim for no-fault statutory accident benefits from insurer — Insurer sent notification of loss transfer to respondent requesting $23,010.80 for reimbursement based on 100% liability and respondent made number payments — Dispute arose as to loss transfer indemnity — Insurer commenced arbitration seeking declaration that respondent waived its right to dispute applicable rule and proportion of fault under Fault Determination Rule — Respondent as sophisticated insurer made conscious decision to accept liability evidence by its payments of multiple indemnity requests on 100% fault basis — Respondent waived its rights to dispute loss transfer — Respondent communicated clear intention to waive right to dispute liability by paying indemnity requests on 100% fault basis for some two years — Detrimental reliance was not established to make estoppel applicable as there was no evidence adduced to suggest that further liability investigation may have changed facts giving rise to dispute.

***Kenneth J. Bialkowski Member*:**

ISSUES

1 In the context of a loss transfer dispute pursuant to s. 275 of the *Insurance Act*, R.S.O. 1990, c.I.8, the issues before me are those of waiver and estoppel, as well as whether a rolling limitation period protects the Respondent Continental so as to re-open and dispute its liability for loss transfer after indemnifying Wawanesa Mutual Insurance Company for over two years of benefits.

2 Has Continental waived its right to dispute the applicable Rule and proportion of fault under the Fault Determination Rules in the circumstances of this case?

PROCEEDINGS

3 The arbitration herein proceeded on the basis of Factums, Document Briefs and Books of Authority.

LOSS TRANSFER

4 Section 275 of the *Insurance Act*, R.S.O. 1990, c.I.8 ("*Insurance Act*"), creates a scheme for loss transfer indemnity where any insurer who paid statutory accident benefits may be repaid in certain circumstances by another insurer, particularly accidents involving heavy commercial vehicles and motorcycles.

5 Section 9(2) of Ontario Regulation 664 ("O. Reg. 664") under the *Insurance Act* provides a first party insurer who insures an automobile with the right, in certain circumstances, to claim indemnification from a second party insurer who insures a heavy commercial vehicle, as is the case here.

6 If the insurers are unable to agree with respect to indemnification under s.275 of the *Insurance Act*, the dispute shall be resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, c.17.

7 Indemnification under subsection 275(1) of the *Insurance Act* shall be made according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules as set out in Ontario Regulation 668/90 under the *Insurance Act* ("Fault Determination Rules").

FACTS

8 The claimant Pooja Ravisankar was a passenger in a vehicle (hereinafter referred to as the "Ravisankar vehicle") insured by Wawanesa, travelling westbound on the QEW on September 2, 2009, when involved in a "chain reaction" type of collision.

To the rear of the vehicle in which the claimant was a passenger was a vehicle operated by Pavel Timoshenko (hereinafter referred to as the "Timoshenko vehicle"). The Shred-It Canada heavy commercial vehicle (insured by Continental) rear-ended the Timoshenko vehicle, which in turn was pushed forward into Ms. Ravisankar's vehicle. Ms. Ravisankar's vehicle then in turn rear-ended the vehicle ahead of her. With the exception of the Shred-It Canada vehicle, all vehicles involved in the incident were private passenger vehicles. Importantly, there was no contact between the Shred-It vehicle (Continental) and the Ravisankar vehicle (Wawanesa).

9 Ms. Ravisankar pursued a claim for no-fault statutory accident benefits from the Applicant Wawanesa, being the insurer of the vehicle in which she was an occupant.

10 On March 18, 2010, Claimspro, on behalf of the Applicant Wawanesa, sent a Notification of Loss Transfer to the Respondent. The covering correspondence indicated the following:

> We are attaching a Notification of Loss Transfer document for your file. As per the loss details obtained by our insured it appears that your insured, transport truck vehicle, rear ended a vehicle, which was pushed into our insured vehicle. It appears that your vehicle is 100% at fault for this loss in accordance to 6(2) of the Ontario Fault Determination Rules. Please note that Loss Transfer Request for Indemnification forms are to follow shortly.

11 The first Loss Transfer Request for Indemnification ("LTRI") was sent by Claimspro dated February 24, 2011. The LTRI requested $23,010.80 (being $25,010.80, less the $2,000 deductible) for reimbursement, and this was based (similar to the correspondence dated March 18, 2010) on 100% liability under R.6(2) of the *Fault Determination Rules*, R.R.O. 1990, Reg. 668.

12 Rule 6(2) of the *Fault Determination Rules* is the rule involving rear end collisions involving two vehicles.

13 Crawford & Company replied, as independent adjusters on behalf of the Respondent Continental, by way of correspondence dated September 16, 2011, that it was investigating the issue of loss transfer and would need to complete said investigation before accepting liability for loss transfer payments. Specifically the correspondence stated:

> We are independent accident benefit adjusters assigned to handle the above noted accident benefits claim on behalf of CNA Insurance Company to handle the loss transfer file regarding our insured, Shred-It Canada.
>
> We are in receipt of your request dated January 24, 2011 regarding reimbursement under the loss transfer portion of the accident benefits file and we thank you for same.
>
> At this time we were completing our investigation prior to making a determination on payments to be made.
>
> Once we have our investigation completed we will advise you further.

14 Crawford on behalf of Continental wrote again on November 28, 2011 and requested further information as a part of the aforementioned investigation:

> ... a copy of your driver's signed statement regarding details of the accident so that we may complete our investigation regarding loss transfer.

15 A second LTRI was sent by the Applicant Wawanesa to the Respondent on December 21, 2011, covering the period of February 25, 2011 to December 21, 2011, and requested the amount of $12,404.63 for reimbursement. Again, the request was based on the Respondent's 100% liability under R.6(2).

16 On December 22, 2011, Claimspro, on behalf of Wawanesa, provided a copy of the Loss Transfer file, as well as a payment summary to Crawford.

17 By way of correspondence dated January 30, 2012, Crawford denied that Continental was responsible for $3,048.79 of the second LTRI, on the basis that this amount claimed represented adjusting fees by Claimspro which were non-recoverable. This reduced the overall amount to $9,355.84.

18 On February 13, 2012, Crawford & Company, as independent adjusters Continental Casualty Company, satisfied the remaining indemnity request. A cheque was included for $9,355.84, being the amount referred to above for the second LTRI less the adjusting fees, in satisfaction of the same:

> **We are independent accident benefit adjusters** assigned to handle the above noted accident benefits claim on behalf of CNA Insurance Company **to handle the loss transfer file** regarding our insured, Shred-It Canada.
>
> **Please find enclosed payment in the sum of $9,355.84 for Loss Transfer transactions for the period of February 28, 2011 to December 21, 2011.**

19 Under correspondence dated March 27, 2012, Crawford & Company, as independent adjusters for Continental Casualty Company, issued the payment of $15,482.00 to Claimspro for the first LTRI. This amount covered the $23,010.80 requested on February 24, 2011 (less Claimspro's invoices for adjusting).

> We are the independent accident benefit adjusters assigned to handle the above noted accident benefits claim on behalf of CNA Insurance Company to handle the loss transfer file regarding out insured, Shred-It Canada.
>
> Please find enclosed payment in the sum of $15,482.00 for Loss Transfer transactions for the period of September 2, 2009 [...] to February 24, 2011.

20 As per the above, the Respondent indemnified the Applicant for over two years' worth of accident benefits paid to Ms. Ravisankar, from September 2, 2009 to December 21, 2011.

21 A third LTRI was sent by Claimspro on July 26, 2012 covering the period of December 22, 2011 to July 31, 2012, and requested the amount of $5,846.85. A fourth LTRI was sent by the Applicant on March 13, 2015, and requested the amount of $86,099.54 in income replacement benefits between September 10, 2009 (being the date of loss, less the 7 day deductible) and March 8, 2015. Neither of these LTRIs were satisfied.

22 All four LTRIs indicate that loss transfer was being sought on the basis of R.6(2) of the *Fault Determination Rules*, which placed 100% fault on the Respondent. There was no mention of Rule 9 which eventually came into play.

23 On December 31, 2015, the Respondent resiled from its position that it was responsible for indemnifying the Applicant vis-à-vis loss transfer due to the decision of the Court of Appeal for Ontario in *State Farm Mutual Automobile Insurance Co. v. Old Republic Insurance Co. of Canada*, 2015 ONCA 699 (Ont. C.A.), released in October 2015.

24 In *State Farm Mutual Automobile Insurance Co.*, the Court clarified how R.9(3) and (4) of the *Fault Determination Rules* operate. As detailed below, the *Fault Determination Rules* dictate the split of liability between insurers in loss transfer matters. All indemnification requests in the case before me were made on the basis of Rule 6(2) although it is now clear that Rule 9(3) or (4) may have been the more appropriate rule to apply.

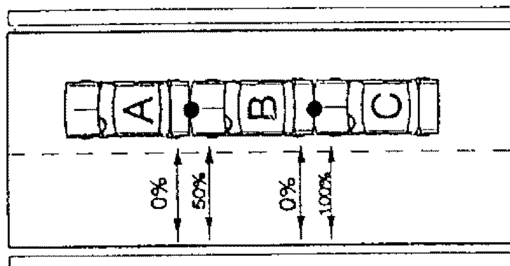
25 The central finding in the decision was that loss transfer could only operate between two vehicles that were involved in an "incident", and an "incident" required a physical collision between the two vehicles. In the below example, Vehicle C (the position of the Continental vehicle) did not collide with Vehicle A (the position of the Wawanesa vehicle) and therefore the two vehicles were not involved in an "incident":

> ***Fault Determination Rules*, R.R.O. 1990, Reg. 668**

9(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.



Graphic 1

26 The Court stated:

78 This leads to the conclusion that "incident" as it appears in sub-clauses (a) and (b) of s. 9(3) can refer only to the collision identified in the particular sub-clause. Because of the parallel nature of ss. 9(3) and (4), this supports the conclusion that "incident" as it appears in sub-clauses (a) and (b) of s. 9(4) can refer only to the collision identified in the particular sub-clause.

27 The Court concluded that each impact must be looked at separately as a separate "incident" and since there was no contact between A and C, then C bore no fault with respect to automobile A. This decision was released on October 20, 2015 and it was shortly thereafter that the adjuster for Continental forwarded it's letter of December 31, 2015 indicating that only insurers of vehicles directly struck by heavy commercial vehicles will be entitled to indemnification and as a result no further indemnity requests would be accepted.

ANALYSIS AND FINDINGS

Waiver and Estoppel

28 In this arbitration, Wawanesa seeks a declaration that Continental waived its right to dispute the applicable Rule and proportion of fault under the Fault Determination Rule and is now estopped from denying liability and the obligation to indemnify Wawanesa.

29 A review of the jurisprudence reveals that waiver and estoppel are interrelated yet distinct doctrines, yet underlying these doctrines is the simple premise as set out in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), where at paragraph 18 it is noted:

a party should not be allowed to go back on a choice when it would be unfair to the other party to do so

30 The doctrine of waiver was explored by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd.* were further explored and summarized by the Ontario Court of Appeal in *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 (Ont. C.A.) where at paragraph 63 the Court stated with respect to waiver:

63 The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.). In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known

right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and **it may be inferred from conduct**. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[emphasis mine]

31 The doctrine of estoppel — specifically *estoppel by convention* — is similar to the doctrine waiver, but as indicated in *Ryan v. Moore*, [2005] 2 S.C.R. 53 (S.C.C.), requires the additional criterion of detrimental reliance to take effect:

4. Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

32 As set out in *Ryan*, the criteria to apply the doctrine of estoppel by convention is therefore as follows:

(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).

(2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

33 The jurisprudence also reveals that both waiver and estoppel have been applied to loss transfer proceedings.

34 The arbitral decision of *Kingsway General Insurance Co. and Personal Insurance Co., Re*, 2006 CarswellOnt 11717 (Ont. Arb. (Ins. Act)), is instructive to the application of estoppel by convention in loss transfer proceedings. Arbitrator Jones was faced with a situation similar to the one giving rise to this arbitration. After a motor vehicle collision, Kingsway General wrote to the Personal and advised that it would be seeking indemnification pursuant to loss transfer. This was on the basis that Kingsway General insured a motorcycle and the Personal insured an ordinary passenger vehicle. By reply correspondence, the Personal accepted the loss transfer claim "based on Fault Determination Rule 12(5)" and requested the submission of loss transfer invoices on a periodic basis. The Personal later took the position some six years later, after counsel had been appointed, that it was not Rule 12(5) that applied, but actually Rule 13. Kingsway moved for a declaration that the Personal was estopped from resiling from its agreement to indemnify based on its prior payments.

35 In *Kingsway General Insurance Co.*, as in the case before me, an independent adjuster originally agreed to pay Loss Transfer. The Personal made Loss Transfer payments to Kingsway but ultimately began demanding medical documentation. When Kingsway advised that they could not do so without a Release from their insured or an Order from an Arbitrator, arbitration was commenced for that reason. When the claim found its way into the hands of counsel, the Respondent sought to reverse its prior position on liability. As was the case here, the Applicant insurer did not conduct liability investigations. Arbitrator Jones found that the inability to conduct a proper and thorough investigation of liability as a result of the passage of time, was conclusive evidence of a detriment to the Applicant. This is somewhat different than the case before me where further liability investigation may not have been required as the facts as to how this accident happened were straightforward and have not changed. What has changed is the view of Continental as to the proper Rule to apply and the surprising interpretation of that

Rule by the Ontario Court of Appeal in *State Farm Mutual Automobile Insurance Co.* outlined earlier. There was no mistake of fact. If anything, there was a mistake as to the applicable rule and the interpretation as to the effect of that rule.

36 Returning to the decision of Arbitrator Jones in Kingsway and with respect to the issue of a shared assumption of fact and law, Arbitrator Jones found the following:

> 21 The Personal concedes, for the purposes of this arbitration, that its letter of October 20, 1999, was an admission that it accepted loss transfer on a 100% basis due to the application of Rule 12 (5) of the fault determination Rules. The Personal simply maintains that this was the wrong Rule and section 13 should really apply.
>
> 22 I note that Kingsway, in its initial letter, did not specify which fault determination Rule applied, but simply that based on its investigation, fault lay with the Personal's insured. It was the Personal, in its response, that specified that it was responsible pursuant to Rule 12 (5).
>
> 23 **I have no hesitation in finding, based on the letters of September 27 [being the letter from Kingsway to the Personal] and October 20, 1999 [being the response from the Personal to Kingsway], as well as the subsequent payments made by the Personal, that the requirements of the first criteria have been met.** There is no doubt but that the parties dealings were an on a shared assumption of fact or law. The parties clearly agreed that Rule 12 (5) applied and that as a result the Personal would honour the loss transfer claims.

37 After referring to the Supreme Court's analysis in *Ryan*, Arbitrator Jones highlighted what was analytically important:

> The parties had, in essence, agreed that liability was no longer in dispute.

38 Arbitrator Jones concluded that the Personal was estopped from arguing liability.

39 In *Motors Insurance Corp. v. Old Republic Insurance Co.*, [2009] O.J. No. 3005 (Ont. S.C.J.), Justice Herman, sitting in appeal of another decision of Arbitrator Jones, observed where the evidence suggests that where express words and an unequivocal course of action demonstrate that Loss Transfer has been accepted, the Respondent waives its right to dispute liability. The doctrine of waiver does not require a consideration of detrimental reliance. Justice Herman specifically referred with approval to Arbitrator Jones' consideration of the context of Loss Transfer. Old Republic wrote to Motors accepting the Loss Transfer Indemnity Request and sent one Loss Transfer payment to Motors and then, only a month after making the payment, wrote to Motors advising they would make no further payment. Arbitrator Jones held that Old Republic had waived its right to dispute liability, Justice Herman agreed and stated at paragraph 38:

> ... are part of a statutory scheme to allow for the relatively quick and efficient transfer of risk between insurers. There is a premium on speed and efficient resolution. The users are sophisticated. The arbitrator noted that, in such a system, **it is desirable that parties' agreements be enforced, except in the most extreme circumstances**.

40 On the facts before him, Justice Herman concluded that Old Republic had waived its rights to dispute loss transfer. It is important to note the Justice Herman was not prepared to accept that estoppel would apply as he was not satisfied that there was detrimental reliance. Only a month had passed from the first indemnity payment until the denial of liability.

41 These issues were also considered in *State Farm Automobile Insurance Company v Zurich Insurance Company* (Arbitrator Bialkowski — July 10, 2013). In that loss transfer dispute, Zurich made one loss transfer payment to State Farm. At the time payment was made, the adjuster had available to him a police report which essentially showed that the accident occurred when a taxi insured by Zurich made a U-turn in front of a motorcycle. Years later in the course of the tort claim, a statement was obtained from the driver of the taxi providing a different version of events. He claimed that his vehicle was stopped for about one or two minutes, angled somewhat and waiting to commence a U-turn. He claimed that his stopped taxi was then struck by the motorcycle. On the basis of this new information, Zurich denied further loss transfer payments and an arbitration proceeded to determine whether Zurich was estopped from now disputing liability. State Farm was only told about four years after the collision that liability was in issue. The arbitrator held that given the passage of time, State Farm had no opportunity to complete

a full liability investigation. It was held that Zurich was estopped from contesting liability and had waived its rights to dispute loss transfer. It should be noted though as in *Kingsway General Insurance Co.*, the ability to complete a thorough liability investigation was compromised by reliance on the Personal's initial acceptance of liability.

42 In the case before me, we have a situation where the accident occurred on September 2, 2009. The first request for loss transfer indemnification was made on February 24, 2011, citing Rule 6(2) of the *Fault Determination Rules* and seeking indemnity on a 100% basis. On February 13, 2012, Continental made its first indemnity payment on a 100% basis and over time, indemnified Wawanesa for over two years of benefits it had paid to or on behalf of the claimant. Then on December 1, 2015, Continental denied further payments on the basis of the Ontario Court of Appeal decision interpreting Rule 9 of the Fault Determination Rules, that if applied to the present facts, might give rise to no liability for indemnity on the part of Continental.

43 Continental takes the position that the principles of estoppel and waiver do not apply on the facts here and that none of the cases relied upon by Wawanesa involve situations where an error of law is involved, as is the case here. Furthermore, the Respondent Continental takes the position that each request for indemnification creates a new cause of action with a rolling limitation period. Since indemnification payments made by it were on the basis of an error of law, Continental now seeks reimbursement for the payments they have made.

44 Firstly dealing with the issue of estoppel, Continental claims that not all of the conditions set out in the 2005 Supreme Court of Canada have been met. These conditions are set out in the discussion of the *Ryan* case at page 8 of this decision. Continental claims that there was no shared of assumption of fact or law. They were relying on Rule 9, where all along Wawanesa was relying on Rule 6(2). I have difficulty accepting this proposition as they accepted liability without reference to what Rule they considered appropriate. They may well have felt Rule 9 was the applicable rule, but like most at that time, figured it would still result in a 100% finding of fault until the Ontario Court of Appeal in 2015 in *State Farm Mutual Automobile Insurance Co.* (supra) thought otherwise. I find more persuasive their submission that there may not have been "detrimental reliance", as the facts were well established at the outset. Further liability investigation may have done nothing to further the interests of Wawanesa. It was the change in the interpretation of Rule 9 that changed things. I, like Justice Herman in *Motors Insurance Corp.*, am not satisfied that detrimental reliance has been established so as to make "estoppel" applicable. No evidence was adduced to suggest that a further liability investigation may have changed the facts giving rise to this dispute.

45 I must now look as to whether the legal doctrine of waiver applies as it does not require there to be detrimental reliance. Continental claims that despite the Applicant's submissions that the Respondent both explicitly and implicitly made the conscious decision to reimburse the Applicant thereupon waiving its rights to dispute those payments later on, the Respondent submits that waiver is not applicable in this case. To summarize, waiver is an intentional relinquishment of a known right. The Respondent submitted that while it made payments on certain loss transfer requests for reimbursement, it has never indicated an unequivocal and conscious intention to abandon its rights to dispute future loss transfer requests for reimbursement.

46 The Respondent submitted that by its conduct, it has demonstrated an intention to review each loss transfer request for reimbursement form independently and to make a determination on same as submitted by the Applicant. This is evidenced by the individual responses made to each request for loss transfer reimbursement submitted by the Applicant. Each request encompassed a thorough review and subsequent denial of any adjusting fees that were claimed by the Applicant. Each request was scrutinized and appropriate deductions were made by the Crawford adjuster on behalf of the Respondent.

47 I do not accept these arguments advanced by Continental. Accepting liability and responsibility for loss transfer indemnification is far different than being able to contest each indemnity request to determine whether that claimed is appropriate for indemnification. For example, reasonable accident benefits paid to or on behalf of the claimant are subject to indemnification while the jurisprudence has confirmed that payment of adjusting fees and loss control measures, such as defence medicals and surveillance, are not.

48 I feel obligated to deal with the case referred to me by Continental which it feels both entitles it to reverse from its position on liability and, in fact, entitles it to be reimbursed for the payments it has made. *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 4467 (Ont. S.C.J.), was an appeal of the decision of an arbitrator dealing

with whether an insurer paying indemnity under a mistake of law would be entitled to reimbursement. The facts of the collision are similar to those in the case before me. The GAN heavy commercial vehicle struck a stationary vehicle which was pushed forward into the State Farm vehicle. State Farm sought loss transfer and GAN paid indemnity to the extent of about $11,000. GAN then took the position that Rule 5 (ordinary rules of negligence) was not the appropriate rule and that Rule 9 ought to apply where no responsibility would rest on GAN. GAN sought reimbursement and commenced an arbitration. The arbitrator held that Rule 5 was the appropriate rule as Rule 9 did not apportion liability between vehicles A and C. On appeal, Justice Pitt held that payments by GAN were made by mistake of law and that GAN ought be reimbursed. In other words, GAN's mistaken assumption as to the applicable Fault Determination Rule entitled GAN to reimbursement of indemnification paid, which is exactly what Continental is seeking here.

49 Justice Pitt's approach seems to stand alone among the cases to which I have earlier referred. I am unable to accept the principles set out in that case and feel that the more proper approach is outlined in the cases which followed GAN.

50 Justice Pitt's decision pre-dates the Supreme Court of Canada's decision in *Ryan*, which was released six years later in 2005. In light of the same, the reasoning can no longer stand. As evidence of that, Arbitrator Guy Jones in the 2006 decision in *Kingsway General Insurance Co. and Personal Insurance Co., Re*, 2006 CarswellOnt 11717 (Ont. Arb. (Ins. Act)), held that estoppel by convention was available and referred to Justice Pitt's decision:

> 35 The Personal submits that this is not a case of estoppel but a simple mistake of fact that requires "in fairness and in equity that the respondent not be held to the mistake". The Personal takes the position that I am bound by the decision of Justice Pitt in *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No. 4467 (Ont. S.C.J.). It argues that I should first determine if a mistake were made and if so, find that the previous agreement made by the Personal was invalid. **With the greatest of respect, I do not take Mr. Justice Pitt's comments to be as all-encompassing as suggested by counsel for the Personal. To give that wide an interpretation would be to limit the doctrine of estoppel far beyond what was set for by the Supreme Court of Canada in both the *Ryan* and the *Maracle* decisions. For the reasons set out above, I am of opinion that the doctrine of estoppel is applicable in this case.**

51 Furthermore, Justice Herman in the 2009 decision of *Motors Insurance Corp. v. Old Republic Insurance Co.*, further distinguished the applicability of *GAN General Insurance Co.*:

> 49 Old Republic relied on the decision in *GAN General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, [1999] O.J. No.4467 (Ont. S.C.J.). In that case, the vehicle insured by GAN hit several vehicles, one of which was insured by State Farm. State Farm paid out benefits and sought loss transfer against GAN. GAN paid State Farm approximately $11,000 for loss transfer claims. GAN later requested repayment from State Farm saying it had incorrectly applied the fault determination rules and did not owe the money. Pitt J. concluded that the money had been paid in error and should be repaid.
>
> 50 Pitt J. cited *Moore (Township) v. Guarantee Co. of North America* (1991), 2 O.R. (3d) 370 (Ont. Gen. Div.), at 378, in which Eberle J. said that money paid because of a mistake of law or fact may be recovered subject to equitable defences, such as, where the payee has changed his position or where the payment was made in settlement of a claim.
>
> **51 The arbitrator distinguished *Gan* from the facts before him because he concluded that Old Republic had made a conscious decision to pay, after an investigation and receiving a legal opinion, and in order to avoid arbitration expenses.**
>
> **52 In my opinion, the arbitrator applied the correct legal principles. He considered the broader context of loss transfer claims. His finding that Sedgwick did not make a payment by mistake, but rather, made a conscious decision to pay in order to avoid the costs of arbitration was reasonable given the evidence before him and is entitled to deference.** So too, was his conclusion that Old Republic had therefore waived its right to dispute Motors' loss transfer claim. His conclusion was also, in my opinion, correct.

52 In my view, to give effect to Justice Pitt's reasoning would be to render nugatory both the holding of the Supreme Court of Canada in *Ryan* and the doctrine of estoppel in loss transfer matters as set out in the jurisprudence to which I have referred.

Furthermore, the legal doctrine of waiver was never considered in GAN while considered and accepted by Justice Herman in *Motors Insurance Corp.*. Here, Continental as a sophisticated insurer made a conscious decision to accept liability evidence by its payments of multiple indemnity requests on a 100% fault basis. There is no evidence before me whether they thought Rule 6(2) was the proper rule to apply and their insured would bear 100% fault, or whether they thought Rule 9 was the appropriate rule but nevertheless felt that it too would assign 100% responsibility to their insured, until the Ontario Court of Appeal came up with a different interpretation in the 2015 decision in *State Farm Mutual Automobile Insurance Co.*. They may even have thought that the rear-ending truck would have to be fully at fault rather than the blameless drivers of the safely stopped vehicles ahead. Regardless, the fact of the matter is that Continental made a conscious decision to accept liability as evidenced by its conduct in making indemnity payments for some two years.

53 The case most similar to the one before me is *Motors Insurance Corp.*. In *Motors Insurance Corp.*, the responding insurer Old Republic received the first indemnity request and paid it. Only a month later, a second indemnity request was made. By that time a new adjuster had assumed carriage of the file and thought that a different fault determination rule applied and denied further payments. Justice Herman held that Old Republic had waived its rights to dispute loss transfer in the absence of evidence of detrimental reliance. On the legal doctrine of waiver, I find that Continental has waived its rights to dispute loss transfer on the facts before me. The Supreme Court of Canada made it clear when discussing the legal doctrine of waiver in *Saskatchewan River Bungalows Ltd.* (supra) that:

> The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

54 In my view, Continental communicated a clear intention to waive a right to dispute liability by paying indemnity requests on a 100% fault basis for some two years. The legal doctrine of waiver applies here subject to Continental's arguments with respect to a "rolling limitation".

Rolling Limitation

55 Continental has advanced the argument that each request for loss transfer creates a new cause of action with its own two year limitation period. Continental claims it can therefore take a different position to each loss transfer request for indemnification. In support of its position, Continental relies on the decision of *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.* (2005), 79 O.R. (3d) 78 (Ont. C.A.).

56 In that case, the first accident benefits payment was made on May 4, 1992. The loss transfer arbitration was not commenced until more than six years later. The limitation period at that time was six years. The Court held that indemnification would be alive for all payments made within six years of the commencement of arbitration but the claims otherwise were not time barred. The decision was based on the acceptance that there was a rolling limitation period.

57 I have no difficulty with the approach taken in *State Farm Mutual Automobile Insurance Co.* with respect to when an arbitration can be commenced and the benefits it might capture. However, it does not deal with a situation where the arbitration has been commenced as is the case before me. In the case before me, the arbitration was commenced within the two year limitation applicable at the time. I am of the view that the commencement of a loss transfer dispute captures all indemnity requests made within the two years proceeding and any subsequent requests made with respect to the claimant arising out of the same motor vehicle accident. It is quite common that accident benefits claims remain active and that indemnity requests are made after arbitration has been commenced. To say that any of those subsequent requests made without the commencement of a separate arbitration are time barred after two years would be fatal to hundreds upon hundreds of loss transfer claims presently in arbitration and cause havoc throughout the industry.

58 This issue was dealt with in *State Farm Insurance Co. and Manitoba Public Insurance Co., Re* [2014 CarswellOnt 1802 (Ont. Arb. (Ins. Act))] (Arbitrator Bialkowski — February 4, 2014). In that case, loss transfer arbitration was commenced within the two year limitation period. The accident benefits claim itself was ongoing. More than two years after the commencement of the loss transfer arbitration, State Farm settled the accident benefits claim on a full and final basis for $1,305,020.70. Two

years passed without a separate arbitration having been commenced. Manitoba Public denied indemnity on the basis that the two year limitation had expired. The arbitrator held that a separate arbitration was not required and that State Farm's claim of $1,305,020.70 was not time barred. The decision was based on the impact of the Supreme Court of Canada in *Cahoon v. Franks*, [1967] S.C.R. 455 (S.C.C.), the impact of s.24 of the *Arbitration Act* and the impact of s.11 of the *Limitations Act* as outlined in the following passages:

> Although the *Arbitration Act 2002* dictates when an arbitration is to be commenced it is the *Insurance Act* and *Arbitration Act* which govern the implications of having commenced an arbitration. In *Cahoon v. Franks* (1967) S.C.R. 455, the Supreme Court of Canada determined that seeking to add additional claims arising from a single tort did not establish a new cause of action which is subject to a limitation period. The Supreme Court of Canada quoted from Johnson, J.A. of the Court of Appeal and stated "'The factual situation'" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action". State Farm submitted that the service of additional Requests for Indemnification following the commencement of arbitration is akin to adding additional claims to the initial cause of action and does not result in new and separate causes of action subject to a limitation period as alleged by MPI. I accept the legal principles outlined in *Cahoon* (supra). The situation is similar to a personal injury claim where additional claims for losses can be added where the action was originally commenced in a timely fashion. By way of simple example, it is akin to an injured bodily injury claimant requiring home modifications long after his or her lawsuit had been commenced. It would not be necessary for the claimant to start a separate lawsuit for the expenses incurred in the home modifications but the claim would simply be dealt with in the context of the existing lawsuit provided the pleadings were broad enough to incorporate such claims and, if not, a motion could simply be brought to expand the already existing claim for damages.
>
> In my view to require a separate arbitration for each unsatisfied Request for Indemnification makes no sense. It would result in an unnecessary multiplicity of legal proceedings with potential conflicting legal findings. There is no guarantee that the same arbitrator would be chosen for each of the arbitrations. As a result there could be conflicting production orders and conflicting liability findings. In many loss transfer disputes liability for a collision must be determined by the arbitrator either by application of the Fault Determination Rules or in some cases by application of the ordinary rules of negligence. I find that once a loss transfer arbitration is commenced it governs the claims outlined in Requests of Indemnification served within two years of the commencement of the arbitration and any Requests made subsequent to the commencement of arbitration so long as the arbitration is still active and has not been finalized. I have reviewed the decisions of *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.*, 2005 CarswellOnt 7427and *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218. I do not believe either case supports the proposition that each Request gives rise to a separate limitation period and requires the commencement of a separate arbitration. They simply do not deal with a situation whereby an arbitration has been commenced in a loss transfer dispute with subsequent service of further Requests for Indemnification.
>
> I accept that once a Notice to Participate has been served pursuant to the *Arbitration Act*, a retrospective limitation is placed on those Requests for Indemnification which will be governed by the Notice to Participate (i.e., the Requests for Indemnification must have been delivered within two years of the date that the Notice to Participate was delivered). I accept that once a Notice to Participate has been delivered pursuant to the *Arbitration Act*, the limitation period for which to commence arbitration has been satisfied. State Farm submitted that once the *Limitations Act* has been satisfied, the *Arbitration Act* governs what issues may be disputed at arbitration. I am satisfied that such interpretation is consistent with the general objectives of a limitation period (as set out in *Mazzuca v. Silvercreek Pharmacy Limited*, 2001 CarswellOnt 4133SCC) which is to ensure that litigation is commenced in a timely manner and to protect defendants from being blindsided by a claim that arose from events that took place many years previously. This not a case where MPI has been blindsided or prejudiced in any way. The exchange of correspondence between counsel after arbitration was commenced clearly identified the ongoing payments to State Farm's insured and the ultimate settlement of the accident benefits claim giving rise to the final Request for Indemnification dated November 12, 2009 in the amount of $1,305,020.70.

I also accept that such an interpretation (that once an arbitration is commenced it is the *Arbitration Act* which governs what issues may be disputed) is consistent with the principles of loss transfer. State Farm submitted that the *Insurance Act*, and the loss transfer framework in particular, was designed to create a simple system between sophisticated litigants (i.e., insurers) whereby disputes are governed by a specialized procedure pursuant to the *Arbitration Act*. It is commonly accepted that the loss transfer framework is meant to provide an expedient and summary method of reimbursement between insurers (see: *Jevco Insurance Co. v. York Fire Casualty Co 133 D.L.R. (4th) 592 OCA*.). The implication that an initial Notice to Participate governs all future Requests for Indemnification while the two sophisticated parties are engaged in the dispute resolution process is in keeping with the principle that loss transfer is to be an expedient, summary method of settling disputes. I find that requiring the primary insurer to serve additional Notices to Participate with every subsequent Request for Indemnification served after the delivery of the initial Notice to Participate would add additional, unnecessary steps to a framework designed to be swift and efficient.

Simply stated, I believe that the *Limitations Act* prescribes "when" an arbitration must be commenced and the *Arbitration Act* governs "how" the arbitration is to be commenced and "what" issues may be disputed within the loss transfer arbitration. The Notice to Participate makes the claim for loss transfer indemnity and it is then up to the arbitrator to determine the amount of indemnity. In the case of an open accident benefits claim the amount of indemnity or damages is an increasing one that will be dealt with by the arbitrator.

Pursuant to section 24 of the *Arbitration Act*, "a notice that commences an arbitration without identifying the dispute **shall** be deemed to refer to arbitration **all** disputes that the arbitration agreement entitles the party giving the notice to refer" (i.e., "what" disputes may be referred to arbitration). Subsection 275(1) of the *Insurance Act* states that an insurer is entitled to "indemnification in relation to such benefits paid by it" from an insurer "of such class or classes of automobiles...involved in the incident from which the responsibility to pay the statutory accident benefits arose". I am satisfied that the Notice to Participate served on MPI was broadly worded and did not specifically place any limitations on the amount of indemnification disputed and/or being referred to arbitration. I am satisfied that as the subject Notice to Participate did not identify the specific Requests for Indemnification to be arbitrated between the parties, pursuant to section 24 of the *Arbitration Act*, the Notice to Participate is deemed to refer all disputes to arbitration. I find that "all" includes Requests for Indemnification delivered within two years of the Notice to Participate and all subsequent Requests for Indemnification while the dispute remains in arbitration.

Regardless of my findings aforesaid, I believe that the State Farm's alternative argument involving s. 11 of the *Limitations Act* also has merit. Section 11 of the *Limitations Act* provides that where the parties to a dispute have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation period established by the *Limitations Act* does not run from the date of the agreement until the date the claim is resolved, the date the attempted resolution process is terminated, or the date a party terminates or withdraws from the agreement. I accept that the Notice to Participate in Arbitration on October 24, 2008 intended to arbitrate all issues arising from the loss transfer claim. The Notice did not restrict the dispute to past Requests for Indemnification. Furthermore, correspondence between the parties made it clear that all claims were to be resolved through the arbitration process. It ought to have been clear to MPI that State Farm was seeking reimbursement for all Requests served upon MPI including those payments made to it's insured after the commencement of arbitration on October 24, 2008. Once served with the Notice to Participate on October 24, 2008 MPI was statutorily obligated by reason of s. 275 of the *Insurance Act* to participate in the arbitration of the loss transfer dispute. This statutorily required involvement of a third party had the effect of suspending any limitation with respect to any subsequent Requests for Indemnification as long as the loss transfer arbitration was still active and yet finalized.

In my view it only makes sense for a loss transfer arbitration, once commenced, to involve Requests for Indemnification made in the two year period predating the commencement of the arbitration and those subsequent Requests for Indemnification made while the arbitration continues. This avoids a multiplicity of proceedings and possible contradictory findings. It is consistent with the commonly accepted principle that the loss transfer legislative framework was meant to provide an expedient and summary of reimbursement between insurers.

59 In my view, the findings in *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.* (supra) are confined to the issue as to whether an arbitration has been commenced within the prescribed limitation period and not with respect to cases where an arbitration has been commenced in a timely fashion and the impact of *Cahoon v. Franks*, [1967] S.C.R. 455 (S.C.C.), the impact of s.24 of the *Arbitration Act* and the impact of s.11 of the *Limitations Act* are considered.

60 Furthermore, I am of the view that acceptance of Continental's position would render nugatory the doctrines of estoppel and waiver if one request for indemnity would be considered completely divorced from another. Imagine a fact situation such as that in *State Farm v Zurich* (supra) where liability was accepted by the responding insurer at the outset of the loss transfer indemnity request and only four years later after information emerged from a companion tort proceeding did Zurich change its position on liability. To say that a new arbitration could be commenced would be seriously detrimental to State Farm, as with the passage of four years the applicant insurer may not have been in a position to complete a thorough liability investigation. Memories may have faded, witnesses may have disappeared, road configurations may have changed, etc.. For the doctrines of estoppel and waiver to have any meaning in loss transfer matters, then the approach as set out in *State Farm Insurance Co. and Manitoba Public Insurance Co., Re* (supra) would be the one making most sense. I find that once a loss transfer arbitration has been commenced in a timely fashion, it will deal with all requests for indemnification made and those subsequently made while the arbitration continues. This avoids a multiplicity of proceedings with possible conflicting results and is in keeping with the well accepted principles in *Jevco Insurance Co. v. York Fire & Casualty Co.*, [1996] O.J. No. 646 (Ont. C.A.), that the purpose of the loss transfer legislation is "to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude".

61 I therefore find that a new and separate cause of action is not created with each indemnity request and that Continental has waived its right to dispute loss transfer in all of the circumstances.

ORDER

62 I hereby order:

1. that Continental has waived its right to dispute loss transfer.

2. that Continental indemnify Wawanesa for those outstanding payments made to or on behalf of the claimant properly the subject of indemnification together with interest calculated pursuant to the *Courts of Justice Act*.

3. that Continental pay the costs of Wawanesa with respect to this arbitration on a partial indemnity basis.

4. that Continental pay the Arbitrator's costs.

Respondent waived right to dispute loss transfer.