

**CITATION:** Kingsway General Insurance Company v. Gore Mutual Insurance Company, 2010 ONSC 5308  
**COURT FILE NO.:** 09-CV-391268  
**DATE:** September 27, 2010

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF KINGSWAY GENERAL INSURANCE COMPANY and  
GORE MUTUAL INSURANCE COMPANY  
PURSUANT TO REGULATION 283/95  
UNDER THE INSURANCE ACT, R.S.O. 1990, c. I.8, as amended**

**AND IN THE MATTER OF AN ARBITRATION PURSUANT TO THE  
ARBITRATION ACT, 1991, S.O. 1991, c.17**

**BETWEEN:**

**Kingsway General Insurance Company**

Applicant (Appellant)

- and -

**Gore Mutual Insurance Company**

Respondent (Respondent)

**COUNSEL:**

Mark S. Wilson for the Applicant (Appellant)  
Mark K. Donaldson for the Respondent (Respondent)

**HEARING DATE:** September 23, 2010

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**REASONS FOR DECISION**

**PERELL, J.**

**1. Introduction and Overview**

[1] Mr. William Higgs was injured in a motor vehicle accident and received statutory accident benefits. There is a dispute between Kingsway General Insurance Company and Gore Mutual Insurance Company as to which is responsible to pay the benefits.

[2] Parting company with precedent and a line of authorities that begins with *Axa Insurance v. Markel Insurance Company of Canada* (Arbitrator Fidler, December 9, 1996), aff'd [1997] O.J. No. 2186 (Gen. Div.), Arbitrator Kenneth J. Bialkowski ruled that Kingsway General should pay. It now appeals.

[3] The appeal concerns the interpretation of s. 66 (1) of the Statutory Accident Benefits Schedule, Ont. Reg. 403/96, enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8, and the correctness of the precedent established by *Axa Insurance v. Markel Insurance Company of Canada*, *supra*, which is now almost 14-years old and an authority regularly followed by arbitrators.

[4] For the reasons that follow, I conclude that *Axa Insurance v. Markel Insurance Company of Canada*, *supra*, is wrong and it should not be followed. Arbitrator Bialkowski's award was correct, and, accordingly, Kingsway General's appeal should be dismissed.

[5] These reasons are being released with my Reasons for Decision in *Security National Insurance Company v. Markel Insurance Company*, 2010 ONSC 5309, which is another appeal in which I rule that the *Axa Insurance v. Markel Insurance Company of Canada* decision is wrong. The appeals were argued together, and their Reasons for Decision should be read together.

## 2. Factual Background

[6] Mr. William Higgs is an Ontario resident. In February 2008, he was injured in a single tractor-trailer motor vehicle accident while he was driving in the State of Pennsylvania.

[7] At the time of the accident, Mr. Higgs was working as a self-employed owner-operator for Trowbridge Transport Limited. He had worked in this capacity since 2002, when he entered into the first of a series of Owner-Operator Agreements between his sole proprietorship, "Bill Higgs and Sons" and Trowbridge.

[8] Under the Owner-Operator Agreement, Mr. Higgs was obliged to equip his vehicle in accordance with Trowbridge's standards. He was responsible for maintenance of the vehicle, and Trowbridge was responsible for maintenance of any trailers. Trowbridge agreed to obtain insurance on Mr. Higg's vehicle. Under the agreement, there were restrictions on the use of substitute drivers for the vehicle. Passengers were not permitted without Trowbridge's approval. Under the agreement, Mr. Higgs was subject to drug-testing and the agreement could be terminated if he failed a drug test or refused to take one.

[9] At the time of signing the 2008 Owner-Operator Agreement and at the time of the accident, Mr. Higg's registration of his business name had been expired since August 2007. He remained a self-employed person who had contracted with Trowbridge.

[10] At the time of the accident, Mr. Higgs owned the tractor that he was operating. The tractor was plated in the name of Trowbridge, and Trowbridge had obtained vehicle

insurance on the tractor from Kingsway General. The tractor was a scheduled vehicle on a Kingsway Policy, and Mr. Higgs was a listed driver on the policy. He, however, was not a named insured under the policy.

[11] At the time of the accident, Mr. Higgs was the named insured in an automobile insurance policy issued by Gore Mutual for a 1996 Oldsmobile automobile.

[12] After the accident, Mr. Higgs applied to Kingsway General for accident benefits, and Kingsway General served Gore Mutual with a Notice of Dispute Between Insurers. It took the position that Gore Mutual was the insurer liable to pay the accident benefits.

[13] Gore Mutual disagreed, and Kingsway General commenced an arbitration proceeding, which was heard by Arbitrator Bialkowski. The arbitration was heard based upon written submissions, briefs of authorities, an Agreed Statement of Facts, a Joint Document Brief, and transcripts of Mr. Higgs examination under oath.

[14] The crucial issue to be determined on the arbitration was the interpretation and application of s. 66 (1) of Ont. Reg. 403/96 (*Statutory Accident Benefits Schedule – Accidents On or After November 1, 1966*), which states, with my emphasis added:

66 (1) An individual who is living and ordinary resident in Ontario **shall be deemed** for the purpose of this Regulation **to be the named insured** under the policy insuring an automobile at the time of the accident if, at the time of the accident,

(a) the insured **automobile is being made available** for the individual's regular use **by a corporation, unincorporated association, partnership, sole proprietorship or other entity;** or ....

[15] Arbitrator Bialkowski held that Mr. Higgs was a "deemed named insured" under s. 66 (1) because the tractor was made available to Mr. Higgs by: (a) the sole proprietorship of Bill Higgs & Sons, or (b) an other entity; namely the joint venture comprised of Bill Higgs & Sons and Trowbridge under the owner/operator agreement.

[16] In regards to the interpretation and application of s. 66 (1), Arbitrator Bialkowski stated:

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I am satisfied that the legislative intent of Section 66 (1) of the SABS and its predecessor, Section 91(4) of the SABS, is to place the truck insurer in priority to the individual's private automobile insurer in circumstances where the accident occurred involving the truck in the course of the commercial arrangement between the parties.

[17] As already noted, Kingsway General appeals the award of the arbitrator. The Arbitration Agreement provides for a right of appeal to a single judge of the Superior Court on an issue of law or an issue of mixed fact and law.

### 3. Standard of Review

[18] On an appeal from an arbitration award in a priority dispute under the *Insurance Act*, R.S.O. 1990, c. I.8 between insurer companies, the standard of appellate review is correctness in relations to questions of law and reasonableness in relation to questions of mixed fact and law. See *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. No. 2157 (S.C.J.), in which Justice Brown undertakes a comprehensive and very helpful review of the case law. See also *Oxford Mutual Insurance Co. v. Co-operators* (2006), 83 O.R. (3d) 591 (C.A.).

[19] In the analysis that follows, I intend to apply the correctness standard because the attack and the defence of the arbitrator's award respectively focused on his application of legal principles and on the arbitrator's interpretation of the regulations under the *Insurance Act*.

### 4. Analysis

[20] To use the language of s. 66 (1) of Ont. Reg. 403/96, the decisive issue in the arbitration was whether the insured tractor in which Mr. Higgs was an occupant was "being made available for [his] regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity." If the vehicle was being made available by one of these entities, then pursuant to s. 66 (1), Mr. Higgs would be deemed to be the named insured under the policy insuring the tractor.

[21] Arbitrator Bialkowski decided that the tractor was being made available by a sole proprietorship or that it was being made available by another entity, a joint venture, and, accordingly, he concluded that Mr. Higgs was a deemed named insured under the insurance policy issued by Kingsway General for the tractor.

[22] Kingsway General appeals Arbitrator Bialkowski's award, and it submits that there was no "other entity" and relying on the authority of *AXA Insurance v. Markel Insurance Co. of Canada*, *supra*, it submits, that under s. 66 (1) of Ont. Reg. 403/69, an individual who carries on business as a sole proprietorship cannot have his or her vehicle made available to himself or herself. The corollary of this submission is that under s. 66 (1), a sole proprietorship can make available a vehicle only to someone other than the individual who is the sole proprietor.

[23] I confess that I found Kingsway General's submission as to the interpretation of s. 66 (1) of Ont. Reg. 403/69 to be odd because I saw no reason why under s. 66 (1) of the regulation, a sole proprietor could not or should not be able to make a vehicle available to himself or herself.

[24] The oddity of Kingsway General's interpretation was demonstrated to me by several examples I posed to counsel during the argument of the appeal. I posed the example of a father owning a truck and operating a cartage company as a sole proprietorship in which the father employed his son as a co-driver. If the father and son were injured in a motor vehicle accident, then following the authority of *AXA Insurance v. Markel Insurance Co. of Canada*, *supra*, the son - but not the father - would be a

deemed named insured under the truck's insurance policy. In contrast, if the father incorporated his business, then both the father and the son would qualify as a deemed named insured under the truck's insurance policy. (See *AXA Insurance Company v. Markel Insurance Company of Canada* (Arbitrator Fidler, December 18, 1998), rev'd [1999] O.J. No. 5724 (Gen. Div.), restored [2001] O.J. No. 294 (C.A.))

[25] The result of a sole proprietor being disqualified from making a vehicle available to himself or herself is, however, indeed supported by the award of Arbitrator Fidler in *AXA Insurance v. Markel Insurance Co. of Canada*, *supra*, which award was upheld by Justice Day on appeal.

[26] In that case, Mr. Iakovenko owned a GMC tractor, and as an independent contractor, he entered into an owner/operator agreement with Canada Transportation Systems Corp. ("Canada Transport"). Under the owner/operator agreement, Canada Transport would provide loads and pay Mr. Iakovenko to transport them. The tractor's plates were owned by Canada Transport, and it insured the tractor under a policy with Markel Insurance. Mr. Iakovenko, however, was not a named insured under the Markel Insurance policy. While driving the tractor, Mr. Iakovenko was involved in an accident and was injured. At the time of the accident, he was a named insured under a policy for his own personal vehicle issued by AXA Insurance.

[27] AXA argued that Canada Transport had made the vehicle available to Mr. Iakovenko. Arbitrator Fidler disagreed, and he held that Mr. Iakovenko had made the vehicle available to Canada Transport and that he was not a named insured. The explanation for Arbitrator Fidler's conclusion is found in the following two passages from his award:

Based on the facts and circumstances of this case, I do not feel that [Canada Transport] is making this vehicle available for Mr. Iakovenko's regular use. I agree with the submission made by Mr. Wilson that it is Mr. Iakovenko that is making the vehicle for use by [Canada Transport]. .... I therefore find that Mr. Iakovenko is not a named insured under the Markel policy as defined in Section 91 (4) [the predecessor to what is now s. 66(1)].

Unfortunately, the decision that I have come to does not result in a common sense solution to this problem. It troubles me that when a truck driver has an accident while operating his truck in the course of transporting goods pursuant to an owner/operator agreement, that he should have to go back to his personal insurance to claim, when his personal vehicle had nothing to do with the accident. It appears that an attempt is being made to require the insurer of the vehicle that was actually involved in the accident, particularly in a commercial situation to be responsible for the accident benefits. Unfortunately the problem appears to be in the wording, particularly of section 91 (1). If the intention is as I suspect, then a change in the wording is required. I make my decision based on the wording that is before me.

[28] As appears, Arbitrator Fidler felt driven by the language of what is now s. 66 (1) of the Regulation to the conclusion that when there is an owner/operator agreement, the driver of a vehicle that is owned by the driver cannot be a deemed named insurer, apparently because the driver makes the vehicle available to the transport company which, in turn, does not make it available to the driver of the vehicle. In the result, an individual who is a sole proprietor cannot make available a vehicle to himself or herself.

[29] I, however, see nothing in the language of what is now s. 66 (1) that forces this conclusion that troubled Arbitrator Fidler. In my opinion, there is no problem in the wording of the Regulation, which can be taken literally or for its plain meaning. There is no reason to exclude, exempt, or disqualify a sole proprietor from being able to make a vehicle available to himself or herself.

[30] It is worth noting here (as Arbitrator Samis noted in *Security National Insurance Company v. Markel Insurance Company* (November 20, 2009), the companion award under appeal) that the deeming provision applies if the vehicle that is the subject of the contract of insurance is made available to an individual for regular use by the sole proprietorship or other entity regardless of whether that sole proprietor or other entity is a named insured under the policy of insurance on the vehicle.

[31] As a matter of legal status, a sole proprietorship has no legal status separate from the individual who is the sole proprietor. An individual, amongst other things, has the capacity to employ himself or herself and to convey his or her own property to himself or herself, which is a way of conveying property in joint ownership or of severing a joint ownership. An individual can in some circumstances contract with himself or herself. For instance, a partner can purchase or sell goods and services to his or her partnership. There is no necessary reason to conclude that an individual cannot make a vehicle he or she owns or possesses available to himself or herself so as to qualify as a deemed named insured under s. 66 (1) of Reg. 403/96. Keeping in mind that under s. 66 (1), a corporation, which is a legal fiction and does not exist in nature, can make an insured vehicle available, there is no reason to conclude that a sole proprietor, who actually exists as an individual and can make a vehicle available, cannot as a rule of law make it available to himself or herself.

[32] In my opinion, Arbitrator Fidler was wrong, and Justice Day in very short Oral Reasons was wrong in establishing a rule or interpretation that a sole proprietor cannot make his or her own property available to himself or herself. To be fair, both Arbitrator Fidler and also Justice Day seemed to have focused their attention on whether Canada Transport made the insured vehicle available to Mr. Iakovenko, and there is nothing erroneous in their making what is largely a fact-based determination that Canada Transport did not make the insured vehicle available to Mr. Iakovenko. Their error arises in concluding without any explanation that the insured vehicle could not be made available by Mr. Iakovenko who was a sole proprietorship to himself, which is a question they beg but actually do not ask and answer.

[33] The vehicle was available for Mr. Iakovenko to use - he was using it at the time of the accident - but Arbitrator Fidler would have it that making the vehicle available to Mr.

Iakovenko was something that did not and could not occur because Canada Transport as a factual matter did not make it available and Mr. Iakovenko as a sole proprietorship was legally incapable of making the vehicle available to himself. In my respectful opinion, however, that is not a conclusion that is driven by the language of what is now s. 66 (1) of the Regulation.

[34] Returning to the case under appeal, there is, therefore, no error in Arbitrator Bialkowski's ultimate conclusion that Mr. Higgs as a sole proprietor could and did make his insured tractor available to himself and thus by the operation of s. 66 (1) of the Regulation, he was deemed to be a named insured under the policy for the insured tractor.

[35] While I see no error in his ultimate conclusion, I do not, however, agree with Arbitrator Bialkowski's argument to distinguish the *AXA Insurance v. Markel Insurance Co. of Canada* line of authorities. He reasoned that those cases were different because they involved an individual making a vehicle available to a hauling company while in the case before him "the owner/operator contract was between a sole proprietor and the hauling company." The problem with this reasoning is that from a contract law perspective, a contract with a sole proprietor is a contract with an individual. A sole proprietorship is in law the individual who is the sole proprietor. Where Arbitrator Bialkowski was correct was in arriving at the ultimate conclusion that a sole proprietor making a vehicle available to himself was not disqualified from the scope of s. 66 (1).

[36] Arbitrator Bialkowski felt constrained to justify his decision by reviewing the caselaw that considered what is now s. 66 (1) in the years that followed the decision in *AXA Insurance v. Markel Insurance Co. of Canada, supra*, and by undertaking an analysis of what the Legislature must have intended when it enacted the regulation.

[37] I will undertake a similar analysis of the case law, but it is the long route to arrive at what, in my view, is a straightforward, common sense, and plain meaning interpretation of s. 66 (1).

[38] In the case at bar, the appellant, Kingsway General criticized Arbitrator Bialkowski for interpreting s. 66 (1) in light of his conclusion that the Legislature intended s. 66 (1) and its predecessor to make the commercial insurer responsible for accident benefit claims arising from the commercial operation of the vehicle.

[39] In his award, Arbitrator Bialkowski stated: "When one considers the legislative intent of Section 66 (1) of the SABS, it only makes sense to treat the commercial partnership created by the owner/operator as an "other entity." Kingsway General's criticism, which was echoed by the respondents, Markel Insurance in the companion appeal, was that this inferred legislative intent is not consistent with the language of s. 66 (1). In my opinion, however, it is not necessary to speculate what the Legislature intended from a policy perspective in allocating or distributing responsibility between insurers. Whatever were the Legislature's policy intentions, there is no reason to read into the language and application of s. 66 (1) an exclusion or disqualification for sole proprietors who make a vehicle available to themselves in the course of their own business.

[40] Turning to the case law, four cases have followed *AXA Insurance v. Markel Insurance Co. of Canada*, *supra*, in quite similar factual circumstances; namely: there was a sole proprietor owning a vehicle which he was using for carry loads for a corporation with which he had contracted pursuant to an owner/operator agreement; the corporation owned the vehicle's licence plates; the corporation had insured the vehicle; the sole proprietor was not a named insured in the corporation's insurance policy; the sole proprietor had insurance on another vehicle that was used for personal use; and the issue was whether the sole proprietor was a deemed named insured in the policy covering the vehicle that was in the accident. The four awards are: (1) *Markel Insurance Company of Canada and State Farm Mutual Automobile Insurance Company* (Arbitrator Hudson, March 31, 2000); (2) *AXA Assurance Company and ING Insurance Company of Canada* (Arbitrator Samis, May 25, 2006); (3) *Certas Direct Insurance Company and Insurance Corporation of British Columbia* (Arbitrator Novick, June 2009) and (4) *Security National Insurance Company and Markel Insurance Company* (Arbitrator Samis, November 20, 2009).

[41] In each of these cases, the same pattern emerges. The arbitrator asks whether the sole proprietor has made the vehicle available to a corporation with which he was contracting or whether it is the corporation that has made the vehicle available to the sole proprietor. With one exception (the companion appeal), after concluding that the corporation was not making the vehicle available to the individual who is the sole proprietorship, the arbitrators in these cases, never asked the question of whether the sole proprietor might be providing the vehicle to himself. With no exceptions, the arbitrators in these cases read into s. 66 (1) of the Regulation the impossibility of a sole proprietor making a vehicle available to himself or herself.

[42] In *Security National Insurance Company and Markel Insurance Company* (Arbitrator Samis, November 20, 2009), the companion appeal, Arbitrator Samis does ask the question of whether the insured vehicle was being made available to the individual, (Mr. McKerchar) by a sole proprietorship, (Mr. McKerchar). While Arbitrator Samis acknowledges that in the real world of facts this is arguable, he concludes that in the world of s. 66 (1) of the Regulation, this is not possible. Thus, he states in his award:

There are facts in this case which would support, to some extent, an argument that the vehicle was made available by McK by the Tidy Scott [McK's sole proprietorship]. It was also argued that the vehicle was made available to McK by a joint venture between The Tidy Scott and Pinnacle Transport.

In terms of the case I am asked to read section 66 (1) of the regulation as if the vehicle was being made available for Duncan McK's use by Duncan McK/The Tidy Scott. This puts a strain on the wording of the regulation that it cannot reasonably bear in a contextually sensitive analysis. The regulation directs us to look for a relationship between two parties, where one, an entity has dominion and control over the vehicle, and makes the vehicle available to another, an individual.

I am driven to look at the true essence of the relationship in this matter. The principals, for various business reasons, have chosen to structure their relationship with various formalities. I am not required by the regulation to look at those formalities but I am required to look at what is, in fact, the transaction, and what is being made available. In my view, I should look to the true essence of the transaction to determine whether this vehicle was being made available for McK's use by a sole proprietorship or other entity.

[43] In my respectful opinion, a major fallacy in the reasoning in this passage is that s. 66 (1) of the Regulation does not direct one to look for a relationship between two parties. Rather, it creates the possibility of relationships existing between entities that it acknowledges to exist. The regulation directs one to accept relationships as existing between individuals and unincorporated associations, partnerships, sole proprietorships, or other entities, such as joint ventures, even though unincorporated associations, partnerships, sole proprietorships, or other entities are not in and of themselves legal entities separate and apart from the individuals that comprise the unincorporated associations, partnerships, sole proprietorships, or joint ventures, etc.

[44] What s. 66 (1) does is it treats all types of business organization as if they were a legal entity. It is a legal conceit or legal fiction that makes an entity of a corporation when in the real world the only entity is the shareholder that is the mind and body of the corporation. It is s. 66 (1) that accepts that a sole proprietorship can be an entity just like a corporation can be an entity.

[45] In *Security National Insurance Company and Markel Insurance Company*, Arbitrator Samis states that it would be completely artificial to construe the role of The Tidy Scott as anything other than the role of Duncan McKerchar. However, if Mr. McKerchar had incorporated the Tidy Scott, it equally could be said that the role of The Tidy Scott Incorporated would be the role of Duncan McKerchar. Section 66 (1) of the Regulation directs that unincorporated associations, partnerships, sole proprietorships, or other entities be accepted as entities in the same way that corporations are accepted as entities.

[46] If we change one fact in all of the four awards to make the driver who was injured in the insured vehicle the employee of the sole proprietor rather than the sole proprietor himself, then some corporation, unincorporated associations, partnerships, sole proprietorships, or other entities will have made the insured vehicle available to that employee and s. 66 (1) will then deem that employee a named insured. Section 66 (1) is a legal artifice, and it is no more artificial to admit the possibility that a sole proprietor can make a vehicle available to himself than it is to accept that a sole proprietorship can make a vehicle available to anyone.

[47] The above analysis does not conflict with several arbitration awards that have concluded that individuals who are not engaged as business are not other entities within the meaning of s. 66 (1). See for example, *The Co-operators Insurance Company v. M.J. Oppenheim in his quality as Attorney in Fact in Canada for Underwriters, Members of Lloyd's of London, England* (Arbitrator Jones, August, 2002) aff'd Superior Court of

Justice (unreported, November 27, 2002, Mesbur, J.). The purport of these awards is that the entities referred to in s. 66 (1) must be a form of business organization. Thus, a mother regularly making a vehicle available to her son is not an "other entity" within the meaning of s. 66 (1). See *State Farm Mutual Automobile Insurance Company v. Kingsway General Insurance Company* (Arbitrator Samis, October 20, 1999).

[48] The above analysis also does not conflict with *TD General Insurance Company v. Pilot Insurance Company* (Arbitrator Torric, May 31, 2007), which award expanded the organizations within the meaning of s. 66 (1) to a family employing a nanny and making a vehicle regularly available to her for family tasks.

[49] The above analysis, however, does not depend on these awards which discuss the scope of s. 66 (1) of the Regulation. The case at bar is about whether a sole proprietor that makes a vehicle available to himself or herself as part of its business affairs is outside the scope of s. 66 (1) and these other cases about s. 66 (1), while interesting, are not dispositive and while I do not disagree with them, I do not rely on them.

[50] I conclude that Arbitrator Bialkowski made no error in concluding that the sole proprietorship, Mr. Higgs, made the insured vehicle available to the individual that is Mr Higgs and that under s. 66 (1) of the Regulation, he is a deemed named insured.

[51] My conclusion on the sole proprietor issue means that for the purposes of this appeal, it is not necessary for me to rule on the correctness of Arbitrator Bialkowski's alternative rationale that the vehicle was made available by a joint venture comprised of Mr. Higgs (the individual) and Trowbridge. Assuming a correctness standard of appellate review, if Arbitrator Bialkowski was incorrect, or assuming a reasonableness standard of appellate review, if his holding was unreasonable, it would not help Kingsway General in its appeal because the sole proprietor rationale supports the award.

[52] Nevertheless, I will say that, in my opinion, a joint venture for business purposes may be an "other entity" for the purposes of s. 66 (1) and, therefore, Arbitrator Bialkowski's alternative rationale is reasonable and without any reversible legal error.

### 5. Conclusion

[53] For the above reasons, I dismiss the appeal. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Gore Mutual's submissions within 20 days from the release of these Reasons for Decision, followed by Kingsway General's submission within a further 20 days.

[54] Finally, I wish to thank counsel in this case and in the companion case for their helpful and well-presented arguments.



Perell, J.

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- and -

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Respondent (Respondent)

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**REASONS FOR DECISION**

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**Perrell, J.**

**Released:** September 27, 2010