

(J) Jan 23/02

Court File No.:00-CV-202023

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND and
Applicant

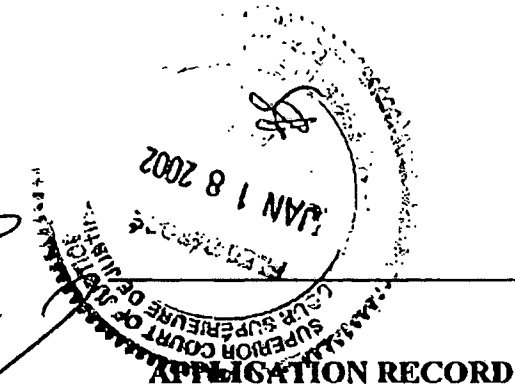
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY
Respondent

Superior Court of Justice
Proceedings commenced at Toronto

Feb 11 2002

Endorsement, as per typewritten
endorsement signed by me

Barthouie,



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provided both parties a full opportunity to make submissions. However, the conclusion he reached on the merits, in my opinion, was wrong.

[3] In his first award the arbitrator found that the fraud of the insured with respect to the ownership of the vehicle did not negate its liability to pay at least some SAB benefits as provided in the Regulations. He relied upon the decision of the Court of Appeal in *Campanaro v. Kim*, 41 O.R. (3d) 545, (1998) O.J. No. 3518 and *Ashton v. Tu*, 40 O.R. (3d) 690, (1998) O.J. No. 2239. I agree with this conclusion and his reasons.

[4] In his second award, the arbitrator considered the insurer's position that the automobile was excluded from coverage by reason of Section 6.17 of the Policy. It provides:

"THE INSURER SHALL NOT BE LIABLE under this Policy for loss, damage, injury or death arising from the ownership, use or operation of any automobile,

...

(d) provided by the insured to any person for regular or frequent use, except an active partner or a full time employee of the business stated in Item 3 of the Application, PROVIDED that this exclusion does not apply while the person is using the automobile in the business stated in Item 3 of the Application; and

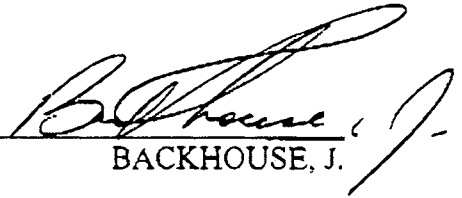
..."

[5] The policy of insurance in this case is a Garage Policy which is in effect a combined owner's/non-owner's motor vehicle liability policy. See *Goos and Non-Marine Underwriters, Members of Lloyd's*, unreported, September 25, 1998 (Director of Arbitrations Delegate S. Naylor) (Appeal No.P-96-000 38).

[6] The policy qualifies as a "motor vehicle liability policy" within the meaning of that term in the *Insurance Act* R.S.O. 1990, c.I.8. The Policy would have covered this automobile if it was used by the owner or an employee of Auto Imports. Section 6.17 of the Policy provides an exclusion based on who is using the vehicle. As such it is ineffective to avoid liability for all SABS by reason of Sections 225, 233(2), and 240 of the *Insurance Act* and *Statutory Accident Benefit Schedule S.58*.

[7] Once a policy of insurance is issued which was intended to cover the automobile involved in the accident, the liability to pay some SABS cannot be avoided because of misrepresentation or fraud or because a driver is excluded. The fact that Section 6.17 is drafted as an exclusion to coverage generally does not change the reality that Section 6.17(d) is an exclusion based on who is driving.

[8] In the result, the application is allowed. Brief written submissions may be made as to costs.


BACKHOUSE, J.

Released: February 11, 2002

COURT FILE NO.: 00-CV2002023

DATE: 20020211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

The Motor Vehicle Accident Claims Fund

Applicant

- and -

The Dominion of Canada General Insurance
Company

Respondent

REASONS FOR JUDGMENT

Backhouse, J.

Released: February 11, 2002