

**IN THE MATTER OF the Insurance Act, R.S.O. 1990, as amended
AND IN THE MATTER OF Ontario Regulation 283/95, as amended
made pursuant to the Insurance Act
AND IN THE MATTER OF the Arbitration Act, 1991, R.S.O. 1991, c.17
AND IN THE MATTER OF an Arbitration**

BETWEEN:

**UNIFUND ASSURANCE COMPANY and
AXA INSURANCE COMPANY OF CANADA**

Applicants

- and -

ST. PAUL FIRE INSURANCE COMPANY

Respondent

PRELIMINARY DECISION

I. INTRODUCTION AND FACTS

A Pre-Arbitration Hearing in this case was held before me by way of telephone conference calls on December 6 and December 10, 2007. The first Applicant, Unifund Assurance Company ("Unifund") was represented by Daniel Strigberger. The second Applicant, Axa Insurance ("Axa") was represented by Kerri Knudsen. The Respondent, St. Paul Fire Insurance Company ("St. Paul"), was represented by Angela James.

The first Pre-Arbitration Hearing in this matter was held before me on July 6, 2006. The outcome of the first Pre-Arbitration Hearing is confirmed in my letter to counsel dated July 17, 2006.

At that time, I was advised that these two loss transfer cases arise as a result of a motor vehicle accident that took place on July 2, 2003, on Highway 17 near Sudbury, Ontario. A heavy

commercial vehicle operated by Sylvie Chabot and insured by St. Paul was travelling eastbound on Highway 17. A motor vehicle being operated by David Tweedle and insured by Unifund was also travelling eastbound on Highway 17. A collision occurred between the vehicle operated by Ms. Chabot and the vehicle operated by Mr. Tweedle. As a result of that collision, the vehicle operated by Mr. Tweedle crossed into the westbound lanes and struck an automobile being driven by Ambrose Dwyer. The vehicle operated by Mr. Dwyer was insured by Axa. Mr. Tweedle was killed as a result of the collision. Unifund paid statutory accident benefits as a result of the death of Mr. Tweedle. Axa paid statutory accident benefits to Ambrose Dwyer and/or Sharon Dwyer who was a passenger in the vehicle operated by Ambrose Dwyer. Unifund and Axa both seek to transfer this loss to St. Paul pursuant to Section 275 of the *Insurance Act*.

A second Pre-Arbitration Hearing was held before me on October 24, 2006. The outcome of the second Pre-Arbitration Hearing is confirmed in my letter to counsel dated November 1, 2006. During the course of the second Pre-Arbitration Hearing, the Arbitration was tentatively scheduled to take place on May 28 and 29, 2007. I was also advised at that time that Ms. Chabot was examined by counsel for David Tweedle as part of this Arbitration and as part of a tort action arising as a result of this motor vehicle accident.

By letter dated March 15, 2007, from counsel for Axa, I was advised that a preliminary issue had arisen and that all counsel were in agreement that I should determine the preliminary issue prior to the Arbitration.

A third Pre-Arbitration Hearing was held before me on May 9, 2007. The outcome of the third Pre-Arbitration Hearing was confirmed in my letter to all counsel dated May 14, 2007. The preliminary issue that the Parties wanted me to deal with prior to the Arbitration involved the issue of abuse of process. In this case, St. Paul's insured, Ms. Chabot was charged with and pleaded guilty to careless driving under the *Highway Traffic Act*. Ms. Chabot apparently gave evidence at her Examination for Discovery held in August, 2006, that was inconsistent with the facts that were read into the record at her Highway Traffic Act Hearing and purportedly accepted by her counsel on her behalf. The issue to be determined by me is whether St. Paul should be precluded from adducing certain evidence from Ms. Chabot (and from an expert engineer) that is inconsistent with the facts agreed to by her counsel that formed the basis for her conviction when she pleaded guilty to careless driving under the *Highway Traffic Act*.

During the third Arbitration Hearing, the Hearing of the preliminary issue was scheduled to take place before me on September 21, 2007, and the Arbitration Hearing was scheduled to take place on March 7, 2008.

A fourth Pre-Arbitration Hearing was held before me on August 9, 2007. A preliminary decision regarding the fourth Pre-Arbitration Hearing was released by me on August 27, 2007.

The Hearing of the Preliminary issue regarding abuse of process was held before me on September 21, 2007. After a full day Hearing, I reserved my Decision regarding that preliminary issue.

By letter dated October 2, 2007, counsel for St. Paul advised me in writing that she intended to move for the following two Orders:

- (1) A determination that the ordinary rules of law apply to the subject accident; and
- (2) An Order that, as the matter is governed by the ordinary rules of law and a Trial Record has been served, this loss transfer Arbitration ought to be stayed pending the liability determination to be made by the Court in the tort action.

II. SUBMISSIONS OF COUNSEL

As noted above, a Pre-Arbitration Hearing was held before me by way of a telephone conference call on December 6, 2007. At that time, counsel for St. Paul advised that it is her position that the loss transfer has to be decided by the ordinary rules of law and that the Arbitration should be stayed pending the result of the tort action. She advised that she wishes to bring a Motion to this effect.

Counsel for Unifund and Axa took issue with the timeliness of the Motion being proposed by counsel for St. Paul given that the Arbitration Hearing is scheduled to take place on March 7, 2008.

I was advised that the Trial of the tort action will take place in Sudbury. I was advised that there is an Assignment Court in Sudbury on January 9, 2008. Counsel for St. Paul obviously does not know when the Trial of the tort action will take place. At the Trial of the tort action, the Family Law Act claimants are bringing an action for damages resulting from the death of Mr. Tweedle in the above-noted accident. The Defendants are Ms. Chabot as well as the owner of the heavy commercial

vehicle that she was operating at the time of the accident. Neither Axa or Unifund is involved in any way in the tort action.

Counsel for Unifund and Axa submitted that they have a statutory right to seek a loss transfer and that there is only a limited right to stay the Arbitration as set out in Section 275(5) of the *Insurance Act*. Counsel for Unifund and Axa submitted that there is no basis to stay an Arbitration to allow a concurrent tort action to proceed. Reference was made to a decision of Arbitrator Jones where he refused to stay a priority dispute where the same issue of coverage was going to be dealt with by a Court. It should be noted that Arbitrator Jones' Decision was not provided to me or exchanged by counsel.

Counsel for Unifund and Axa also stated that if the Fault Determination Rules apply, there is no basis for staying the Arbitration. Counsel for St. Paul agreed with this proposition. Counsel for Unifund and Axa were not in agreement with the statement made by counsel for St. Paul that the ordinary rules of law necessarily apply to this case. Counsel for Unifund and Axa stated that it is possible that Rule 6 and Rule 10 of the Fault Determination Rules apply to the facts of this case. They also indicated that there might be other Rules that apply to the facts of this case. More importantly, they submitted that I cannot decide whether the Fault Determination Rules apply without having all of the evidence before me and without me making findings of fact.

Counsel for St. Paul acknowledged that there is no automatic right to stay the Arbitration. She submitted that the ordinary rules of law will apply to the facts of this case although, as previously mentioned, counsel for Unifund and Axa do not agree with her position in this regard. She stated that the tort action will proceed soon although she was not able to state when it will proceed.

I adjourned the Pre-Arbitration Hearing at that time and asked that it continue on December 10, 2007, by way of another telephone conference call. At the continuation the Pre-Arbitration Hearing on December 10, 2007, counsel for St. Paul submitted that no extra work would have to be done in order to allow me to decide in a summary way whether Rule 6 or Rule 10 of the Fault Determination Rules can apply where three vehicles are involved in an incident.

III. DECISION

After hearing all of the submissions, it is my view that in order to decide if the ordinary rules of law apply, I have to hear all of the evidence and submissions of counsel and I have to make findings of fact and determine if any of the Fault Determination Rules apply. Accordingly, the decision as to whether the ordinary rules of law apply involves a determination of a question of mixed fact and law. I am not prepared to make this determination by way of a Preliminary Motion. Accordingly, the request by counsel for St. Paul to bring a Motion for an Order that the ordinary rules apply to the accident in question is hereby denied.

With respect to the request by counsel for St. Paul that she be permitted to bring a Motion that this loss transfer Arbitration be stayed pending the liability determination made by the Court in the tort action, I have asked counsel for St. Paul to advise me as to the outcome of the Trial Scheduling Court that is scheduled to take place on January 9, 2008.

I have also decided that I am prepared to receive short written submissions together with any applicable case law in order to address the issue as to whether this loss transfer Arbitration should be stayed pending the determination of liability in the tort action. Counsel for St. Paul has agreed to file her moving material no later than January 14, 2008, and counsel for Unifund and Axa have agreed to file their responding material no later than January 28, 2008. My intention is to have a Decision to them regarding St. Paul's Motion for a stay well before the March 7, 2008, Arbitration Hearing although I can make no firm commitment to counsel in this regard.

January 9, 2008



J. Jay Rudolph, Arbitrator