

**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 by way of a telephone conference call on August 9, 2007, at 4:00 p.m. 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.

By way of background, reference can be made to my letters to counsel dated July 17, 2006, November 1, 2006, and May 14, 2007. A Hearing of a preliminary issue has been scheduled to take place on September 21, 2007. Counsel have agreed that depending on how the preliminary issue is decided, the determination of the preliminary issue could substantially shorten the proceedings between the Parties. The preliminary issue involves 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 is 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 at the Hearing of the preliminary issue is whether St. Paul should be precluded from adducing evidence from Ms. Chabot that is inconsistent with the facts agreed to and that form the basis for her conviction when she pleaded guilty to careless driving under the Highway Traffic Act. Put another way, where findings of fact are made by a Court, can a Party re-litigate the facts?

At the Hearing of the preliminary issue that is scheduled to take place on September 21, 2007, it was agreed by counsel that Mr. Strigberger's client and Ms. Knudsen's client would be the Moving Parties and Ms. James' client would be the Responding Party. A timetable was agreed to by all counsel with respect to the preparation of an Agreed Statement of Facts and any Affidavits to be filed by St. Paul and any other documents to be filed by the Parties.

By letter dated August 3, 2007, Ms. James advised that counsel have agreed upon an Agreed Statement of Facts which will address most of the facts. In addition, Ms. James has served two Affidavits sworn by Ms. Chabot. By letter dated August 7, 2007, Mr. Strigberger advised that he and Ms. Knudsen do not take issue with Ms. James filing the two Affidavits at the Preliminary Hearing scheduled to take place on September 21, 2007.

However, in her letter dated August 3, 2007, Ms. James advised that she has obtained and served upon counsel an Accident Reconstruction Report which she wishes to put before me as new evidence at the Hearing of the preliminary issue on September 21, 2007. Mr. Strigberger's letter dated August 7, 2007, advises that he and Ms. Knudsen take issue with Ms. James' client (St. Paul) filing the Accident Reconstruction Report at the Hearing of the preliminary issue scheduled to take place on September 21, 2007.

Accordingly, counsel requested that a telephone conference pre-arbitration hearing take place on August 9, 2007.

The issue to be decided by me is whether the Accident Reconstruction Report dated July 3, 2007, should be filed with me at the Hearing of the preliminary issue scheduled to take place on September 21, 2007. Counsel for St. Paul advised that the Accident Reconstruction Report was

commissioned by St. Paul in the last few months. The Highway Traffic Act Trial in question took place sometime in 2005.

Ms. James submitted that there are a few circumstances when a party can lead evidence at a Hearing that is inconsistent with the outcome of an earlier Highway Traffic Act proceeding. These circumstances include the following:

- (1) Where evidence was not available at the time of the original Hearing. In this regard, Ms. James advised that St. Paul Insurance was not involved in the Highway Traffic Act Trial. Ms. James also submitted that one of the reasons for challenging the finding made at the Highway Traffic Act Trial is that the Engineering Report was not available at the time of the Highway Traffic Act proceeding;
- (2) Whether fairness should dictate that additional facts can be lead such that it is not an abuse of process.

Ms. James advised me that Ms. Chabot's evidence at her Examination for Discovery will not be filed with me at the Hearing scheduled to take place on September 21, 2007. However, she submits that the Engineering Report should be before me in order for me to be able to consider whether there is new evidence and whether fairness would dictate me admitting the Engineering Report at the Arbitration Hearing itself.

It should be noted that both counsel for Axa and counsel for Unifund objected to the Accident Reconstruction Report being filed with me at the Hearing scheduled to take place on September 21, 2007. Mr. Strigberger (counsel for Unifund) submitted that the purpose of the September 21st Hearing is to determine if St. Paul can introduce facts inconsistent with the Highway Traffic Act conviction. By filing the Accident Reconstruction Report that contains opinions that are inconsistent with the facts upon which the Highway Traffic Act proceeding was based, Mr. Strigberger submitted that St. Paul is trying to introduce information "through the back door" when that information could not be introduced through the "front door".

In addition, counsel for Unifund submitted that by filing the Accident Reconstruction Report and having me determine whether it is "new evidence", I would have to have all of the "original

evidence” that was available at the time of the Highway Traffic Act proceeding in order to determine whether the Accident Reconstruction Report constitutes new evidence.

Counsel for Unifund also submitted that the expert opinions contained in the Accident Reconstruction Report are based upon facts that were available and in existence at the time of the original Highway Traffic Act Trial. The only thing “new” is the opinions and perhaps the methodology used by the expert to arrive at his opinions. Counsel for Unifund submitted that Ms. Chabot could have obtained the same opinions prior to the Highway Traffic Act Trial.

Ms. Knudsen (counsel for Axa) agreed with and supported the submissions made by Mr. Strigberger. In addition, she pointed out that the fundamental issue to be decided at the Hearing of the preliminary issue on September 21, 2007, is whether St. Paul can lead new evidence and if so, in what circumstances. Once this issue is decided, the next question is whether the Accident Reconstruction Report constitutes new evidence. Ms. Knudsen submitted that it is not appropriate for me to have the opinions and conclusions from the Accident Reconstruction Report in front of me before deciding whether St. Paul can lead new evidence and if so, in what circumstances it can do so and whether the Accident Reconstruction Report constitutes new evidence. Ms. Knudsen does not object to me having in front of me the basis upon which the expert came to his opinions in preparing the Accident Reconstruction Report. In essence, Ms. Knudsen and Mr. Strigberger were concerned that I might be “tainted” by having the opinions of the Accident Reconstruction Report in front of me prior to making my decisions that are the subject matter of the Hearing of the preliminary issue.

By way of reply, Ms. James submitted that there would be harm in me having the Accident Reconstruction Report in front of me, that it could be admitted by me for limited purposes and I could charge myself not to consider it for any other purposes.

In the course of the submissions, I told counsel that I have not reviewed any of the four Decisions that were provided to me by counsel in May, 2007, regarding the abuse of process issue. It should also be noted that counsel did not review this law with me.

I also advised counsel that they should be prepared to address the following issues at the Hearing of the preliminary issue:

- (1) Is the test for admitting fresh evidence on Appeal different than the test for admitting fresh or new evidence in an abuse of process context?


- (2) Is the Accident Reconstruction Report in question new evidence?
- (3) How have the Courts interpreted "new evidence"?

I also advised Ms. James that I would like to know when St. Paul was put on notice of the claim or claims arising as a result of the accident in question.

After hearing all of the submissions, I advised counsel that I am going to reserve my Decision on whether I am going to review the Accident Reconstruction Report in question until I have heard the submissions of counsel at the Hearing of the preliminary issue scheduled to take place on September 21, 2007. Until I have heard the submissions at the Hearing of the preliminary issue, I am not in a position to decide whether the Accident Reconstruction Report should or should not be reviewed by me prior to deciding the preliminary issue.

I thank counsel for their able submissions and the professional manner in which counsel conducted themselves.

August 27, 2007



J. Jay Rudolph, Arbitrator