IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 283/95

AND IN THE MATTER OF THE MOTOR VEHICLE ACCIDENT CLAIMS ACT,
R.S.O. 1990, c. M.41

AND IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT,
S.O. 1990, c. 17

BETWEEN:

AXA INSURANCE COMPANY OF CANADA

Applicant

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE**

Respondent

DECISION

COUNSEL:

Kerri Knudsen for the Applicant

John Friendly for the Respondent

ISSUES:

1. Was a 1987 Oldsmobile 98 Regency Brougham automobile bearing license plate number 795 EOY registered at the time to Joyce Vella, involved in an accident with Vikas Sharma on July 17, 2004 and if so, was the Vella automobile under the care and control of the Vella family at the time of the accident?

2. Is the applicant, Axa Insurance Company of Canada, entitled to amend the terms of the arbitration agreement to add the issue of possible resilement from an agreement to accept priority in this matter?

3. The issue of whether the policy of motor vehicle liability insurance had been properly cancelled prior to the accident, while the subject matter of this arbitration, will dealt with at a later date if the parties cannot resolve that issue.

DECISION:

1. The 1987 Oldsmobile Brougham automobile with license plate number 795 EOY and registered to Joyce Vella was involved in the motor vehicle accident with Vikas Sharma on July 17, 2004. At the time of the accident the motor vehicle was under the care and control of the Vella family.

2. Axa cannot amend the arbitration agreement to add the issue of possible resilement.

HEARING:

1. The hearing in this matter took place in the city of Toronto, in the province of Ontario, on November 6 and December 14, 2007

FACTS & ANALYSIS:

This priority dispute arbitration arises out of a motor vehicle accident that occurred on July 17, 2004. On that date, a 10-year-old child, Vikas Sharma, was apparently struck by a motor vehicle backing out of a parking spot in a parking lot located on the north east corner of Bloor street and Ashbourne road in the city of Toronto.

As a result of the accident, Vikas Sharma was apparently injured. His parents apparently did not have a valid motor vehicle liability policy at the time of the accident. Vikas Sharma submitted a completed application for Accident Benefits to Axa Insurance Company of Canada ("Axa"), the insurance company he believed insured the car that hit him. Axa pursuant to the Statutory Accident Benefit Schedule paid Vikas Sharma accident benefits. Axa takes the position,

however, the Vella Motor vehicle was not involved in the accident or if it was, it was not in the care and control of the Vella family at that time. Finally, Axa submits that it did not have a valid motor vehicle liability policy on the Vella vehicle at the time of the accident. In light of the above, Axa takes the position that the Fund is responsible for the payment of accident benefits to and on behalf of Vikas Sharma.

In addition, shortly prior to the commencement of the hearing, Axa raised the issue of whether the Fund had agreed to take over the responsibility for payment of the accident benefits and whether the Fund could now resile from this agreement. The Fund opposed any amendment to the arbitration to include this issue. I will deal first with the vehicle identity issue and then the resilement issue.

On July 17, 2004, 10-year-old Vikas Sharma was sitting on a curb in a strip mall parking lot located at 3888 Bloor Street West, which is at the northeast corner of Bloor Street West and Ashbourne Road. Apparently a vehicle had been in the parking lot backing up and struck Vikas Sharma, knocking him over. His father, Vinod Sharma, was with Vikas at the time of the accident. He approached the driver of the vehicle and had a short conversation with him prior to the vehicle driving away. Mr. Sharma went into a near by convenience store and borrowed a pen and wrote down the license plate number on a package of cigarettes and then he used a payphone to call the police.

Police Constable Astra Kiens testified at the hearing in this matter. She was the investigating police officer. She went through the Toronto Police Service I/CAD Event Details Report, which basically gives a computer summary of all the events that were recorded by the police in this matter. That report indicates that at 6:09 p.m, Mr. Vinod Sharma called the police and advised that his son had just been hit by a car with bearing license number 795 EOY and that the car was last seen Southbound on Ashbourne. The I/CAD also indicates that a vehicle license check was made and that the plate number was assigned to a 1987 four door blue Oldsmobile.

At approximately 6:38 p.m, Officer Keins arrived on the scene. She then spoke to Mr. Sharma, who gave her the plate number 795 EOY. She indicated that Mr. Sharma showed her a little

piece of paper with the license number on it. He also told her that the vehicle in question was blue.

In her "Fail to Remain Report", Officer Keins noted that Mr. Sharma had described the driver as male, white, tall, medium weight, glasses, 55 plus years, short light brown hair.

Interestingly, a copy of P.C. Keins business card was filed as an exhibit at the hearing and on the back of that card is a number 795 EOY. P.C. Keins advised that she had not written the number on the card but assumed that Mr. Sharma did so shortly after her arrival.

Before leaving the sequence of events immediately following the accident, I should note that the I/CAD report indicates that the police, after obtaining the license plate number also got the address of the registered owner, Ms. Joyce Vella, being 1625 Bloor Street West, Unit 1120. Apparently another constable attended at that location at 6:58 p.m, however there was no answer at that location.

On April 17, 2005, or approximately 9 months later, Mr. Sharma gave a written statement to a representative at Axa In that statement Mr. Sharma described the car as:

> An older model car. It was blue… There were two people in the car. The male was skinny, with glasses, he looks tall. His face was boney and hollow. It was a western guy. He was white in colour… The female was in the passenger seat… when he was leaving I got the license plate number. I'm positive that the number I wrote down was the correct plate number…

Mr. Sharma was questioned with regard to this matter at an examination for discovery held on August 31, 2007 or approximately 3 years after the event. At that time Mr. Sharma described the driver as:

> He was a bit skinny, a bit tall, and does not have much hair…but it was light, not black, like medium black.

Mr. Sharma was then asked:

> Q: So was it just a ring around his head of hair or was it a bit of hair on top? Do you remember?
>
> A: No the top was missing.
>
> Q: Okay, the top was bald?
>
> A: I can't really tell.

Mr. Sharma also indicated that he thought the driver was wearing reading glasses and was tall, and was in his early 40's. He also indicated that there was a female passenger in the car.

At the examination for discovery he described the car as medium size, blue and four doors and old.

Counsel for Axa pointed out what I consider to be minors discrepancies in Mr. Sharma's statement and also his admission at the examination for discovery that he has difficultly recognizing people and as well as his inability to identify the picture of the driver. Mr. Sharma had admitted that he only saw and spoke to the driver for a short period of time. Other than the issue of the age of the driver, where Mr. Sharma originally thought he was in his 40's, his description, both of the driver and the car have been fairly consistent. I note that the Vella car was blue, older and four doors as indicated by Mr. Sharma. His description of the driver could fit that of Mr. Kohen, his son in-law of the deceased owner, although he has dark brown rather than black hair, and was approximately 41 at the time of the accident. While Mr. Kohen testified that he wears contact lenses rather than glasses, a signed statement by the superintendent of the deceased's apartment building, Mr. John St. George, described Mr. Kohen as in his late 30's, tall and slender build and wearing prescription glasses.

Vikas Sharma, the 10 year old who was hit by the car, had a very limited opportunity to see the car and the driver. At the examinations for discovery he described the car as being dark blue but thought that it was new. He described the driver as white, blonde or grey hair with glasses. In a

signed statement given March 3, 2005 he indicated that he was hit by a dark blue, medium size car. He thought that the driver was wearing glasses. He said that there was a female passenger in the car at the time of the accident.
After investigating the accident at the scene, PC Keins turned the matter over to the "hit and run" squad of the Toronto Police Services. Detective Constable Lackey of that division handled the investigation. Detective Lackey's investigation seems to have been limited to a number of phone calls. He did not inspect the Vella vehicle or follow up on other possible leads.

The owner of the 1987 Oldsmobile that was alleged to have struck Vikas Sharma was Ms. Joyce Vella. Prior to her death on July 1, 2004, 17 days before the accident, Ms. Vella kept her vehicle at her and her husband, Charlie Vella's resident at 1625 Bloor Street West in Mississauga. Mr. Vella as well as Ms. Vella's three children, Steven Young, Bernard Young, and Martha Kohen, as well as Martha's husband, Paul Kohen testified at the hearing.

While I will not go into great detail with regard to the evidence of each individual witness, the essence of their testimony was that Ms. Vella had died unexpectedly on July 1, 2004 and shortly there after the family met to assign various tacks that had to be done to wind up her estate. Steven Young was given the task of cleaning Ms. Vella's vehicle and trying to sell it. He in essence took possession of it at that time. He claims that the vehicle remained at Ms. Vella's 1625 Bloor Street residence until he took it to his own apartment building located at 5294 Dundas Street West, where the car was located at the north end of his building's parking lot. Steven testified that he drove the vehicle to work on two occasions in early July to clean the vehicle. It was not entirely clear when the car was first taken to Steven's parking lot but it would have been before July 12, 2004 accordingly to Steven, as that was the date that he had obtained the Used Motor Vehicle Information Package.

Mr. Young also testified that on a couple of occasions he took the car to a coffee shop in a small mall located about 100 feet from his resident for a few hours at a time to show it off and attract potential buyers. Steven Young testified that he did not drive the vehicle to pick up the vehicle information package, as he was aware that the insurance had been cancelled on July 9, 2004. Steven testified that from the time that he picked up the vehicle information package on July 12,

2004 until the time the vehicle was towed to the Canadian Tire store on September 14, 2004 the vehicle remained in his apartment building parking lot and was not driven. He indicated that on September 14, 2004 he flagged down a passing tow truck and had the car towed to the Canadian Tire store where his brother in-law, Paul Kohen, worked. He did not get a receipt from the tow truck driver. The reason for taking it to the Canadian Tire store was to give the vehicle more exposure to potential buyers. This was apparently successful as the vehicle was sold on or about September 16, 2004.

While I appreciate that the accident occurred quite some time ago and that the Vella family was under considerable stress at the time, given the reason passing away of their mother, I'm concerned with regard to the lack of precision as to when the vehicle was last driven. The date of July 12, 2004, while convenient, as that was the date the vehicle information package was obtained, it is not necessarily accurate. I further note that Michael Young purported to cancel insurance on the car on July 9, 2004. The cancellation was done as payments we made automatically through Ms. Vella's visa, and one was coming due shortly after her death. Money was in short supply and the family decided to cancel the insurance at that time. This would leave them with a problem should they want to move the car or allow to a prospective purchaser to test-drive it after July 9, 2004.

Counsel for the Fund challenged the time lines given by the various members of the Vella family as to when the vehicle was moved. He also noted that Paul Kohen advised Detective Constable Lackey when contacted by police that the vehicle was still at Ms. Vella's residence. Counsel for the Fund suggested that this, at bare minimum, shows some uncertainty as to the movement of the car, and also suggests that it could have been a deliberate move by Paul Kohen to suggest to the police that the car was further from the scene of the accident then it actually was. Steven Young's residence is located only approximately .3 kilometres from the accident scene.

A great deal of time was spent at the hearing dealing with the physical description of the driver and how it was similar or different from the members of Vella family. The description given by Mr. Sharma included; male, skinny, a bit tall. His face was boney and hollow and he may have had reading glasses. He had short light brown hair although this was later described as medium

black. At one point Mr. Sharma described the driver as 50 plus years and another time being in his 40's.

The above description does not describe Bernard or Steven Young, Charlie Vella, or Martha Kohen. The description, however, in many ways describe Paul Kohen. Paul is six feet in height, somewhat slim, has a somewhat boney and hollow face. He is balding, with dark blonde or light brown hair. He was approximately 41 at the time of the accident. While he stated that he does not use glasses the building superintendent, Mr. George St. John, indicated that he did. Given the limited time that Mr. Sharma had to view the driver at the accident scene, as well as Mr. Sharma's admitted difficulty in remembering faces, it is worthy of note that Paul Kohen does resemble the description given by Mr. Sharma to a remarkable degree.

With regard to the female passenger in the car, no one obtained a good enough view of her to give a proper description and accordingly it is impossible to say if it was Martha Kohen.

Various numbers of the Vella family testified that on the evening of the accident, which was a Saturday, Paul, Martha, Michael and Charlie as well as other family members were having diner at Charlie's residence. They had done this regularly prior to Ms. Vella's death and continued to do so after her death. The Kohen's testified that dinner involved a meal and playing cards and normally commenced at 5:00 p.m. The accident itself occurred after 6:00 p.m.

While I accept that this dinner may well have taken place, it was not mentioned to the police or other investigators, nor at examinations for discovery. It was brought up for the first time at the hearing that took place 3 years after the accident. It is therefore difficult to be extremely precise regarding the timing of the get-togethers held 3 years previously and accordingly I give little weight to this particular evidence.

Upon weighing all of the evidence, one is driven to the conclusion that the 1987 blue Oldsmobile 98, license plate 795 EOY was the vehicle involved in the accident. Mr. Sharma wrote down the vehicle number shortly after the accident and gave the same number to the police dispatch and the investigating police officer. He correctly described the vehicle as being blue, four door, and

an older model. Steven Young's residence where the vehicle was apparently kept in the time frame surrounding the accident was only .3 kilometres from the accident scene. Mr. Sharma's description of the driver, while not an exact match, does fit that of Paul Kohen. It is surprisingly close given the limited opportunity that Mr. Sharma had to observe the driver.

In the final Analysis, it does matter if Paul Kohen was the actual driver as long as the Vella family had the care and control of the vehicle during the time frame, then Axa has failed to displace the onus it has in this case. There is no suggestion that the vehicle was stolen and then was involved in an accident. Steven Young's evidence was that the car remained in his parking lot during the relevant time frame. It defies belief that someone took the car without permission, got involved in an accident and took the car back to the same parking spot.

In light of the above, I find that the Vella vehicle was involved in the accident of July 17, 2004.

MOTION TO AMEND PROCEEDINGS:

Axa, on October 26, 2007 advised the respondent and myself, by way of a letter, that it wished to argue that the Fund had agreed to take over priority of this matter on April 25, 2005 and that they could not subsequently resile from that agreement. The arbitration hearing was scheduled to commence to commence November 6, 2007, or in approximately 10 days. A teleconference pre-hearing was held on October 30, 2007 to discuss this issue. At that time I ordered that the original hearing on the issue of the identification of the vehicle involved in the accident should proceed as scheduled on November 6, 2007. I furthered ordered that Axa bring a motion returnable on December 14, 2007 to deal with their request to have the resilement issue dealt with as part of this arbitration.

In presenting its motion, AXA took essentially took two positions:

1. The resilement issue was part of the arbitration proceedings from the commencement of the arbitrations; or
2. If it was not, the Axa should be permitted to amend the arbitration proceedings to include that issue.

I will deal first with the question of whether the resilement issue was part of the arbitration prior to it being raised on October 26, 2007. This requires an examination of some of the early letters and documents in this matter.

Axa originally refereed this matter to arbitration on January 12, 2006. On January 13, 2006 a teleconference was conducted by myself with counsel for Axa, The Fund, Gore Mutual Insurance and Traders General Insurance Company. These last two insurers had been brought into the arbitration by Axa. The issues for the arbitration were discussed at the teleconference and confirmed by myself by way of a letter to the parties, being:

1. Who is responsible for payment of Accident Benefits to or on behalf of Vikas Sharma arising out of the motor vehicle accident of July 17, 2004?

2. Did the various parties receive proper notice of intent to dispute and if not, do the savings provision apply?

While I note that especially issue number one is very broadly drafted, at no time during the initial pre-hearing was the issue of resilement brought up.

In the time between the original pre-hearing of January 13, 2006 had Axa requesting to bring the resilement issue forward on October 26, 2007, there were a number of further teleconference pre-hearings to deal with the refinement of the issues and other matters. At no time during those pre-hearings was the possible resilement issue raised. I note that on July 3, 2007, at the request of Axa, Gore Mutual and Traders General Insurance companies were let out of the arbitration. On July 17, 2007 a further pre-hearing was held where the Fund attempted to refine the issues in dispute. The Fund sent these out by way of an email on July 17. 2007. Axa did not disagree with that email, and Axa did not raise the resilement issue at that time.
I further note, that in its factum, dated October 23, 2007, at paragraph 6, Axa sets out what issues for the arbitration were. The resilement issue was not raised in their factum.

I am satisfied, based on a review of the evidence before me, is that the resilement issues was not before me prior to counsel raising it on October 26, 2007. Accordingly the only way Axa can deal with that issue at this arbitration is if an amendment is permitted.

Axa submits that amendments are permitted in accordance with section 25 of the Arbitration Act, S.O. 1991, c.17 which states:

> 25 (1) an arbitral tribunal may require that parties submit their statements within a specified period of time.
>
> (2) The parties' statements shall indicate the facts supporting their positions, the points at issue and the relief sought.
>
> (3) The parties may submit with their statements the documents they consider irrelevant, or may refer to the documents or other evidence they intend to submit.
>
> (4) The parties may amend or supplement their statements during the arbitration; however, the arbitral tribunal may disallow a change that is unduly delayed.

The Arbitration Act does not specify, in detail, what constitutes a "statement" for the purposes of section 25 of that Act.

In Bab Systems Inc. vs. McLung , [1994] O.G.No 3029 (Ont. Gen. Div.) (affirmed May 9, 1995) Doc. C 20593 (Ont. C.A.), the Ontario Court of Appeal held that:

> "Statement" is the accepted term used in arbitral proceedings corresponding to the word "pleading" in the

> litigation process. "Statement" means the claimant's statement containing the facts supporting its claim.

Priority disputes held pursuant to Regulation 283/95 and the Arbitration Act, have not generally tended to have a formal documents entitled "statements". Such "statement" in my view, would include letters or documents or agreements made by the parties during the course of the arbitration process. What constitutes the statement may vary by individual case. In our particular case, the letters confirming the pre-hearing teleconference discussions and associated documents would constitute the statements. In some ways, for purposes of this motion, it is not so much what constitutes these statements that we must now address, but rather what the test is to allow an amendment to these statements. This is where section 25(4) of the Arbitration Act provides some assistance. This provides that the arbitrator made disallow a change that is unduly delayed.

Counsel for Axa suggests that for there have been "undue delay" there must have be "undue prejudice" to one of the parties. In support of this position, she cites the case of AMEC E and C Services Limited vs. Nova (Canada) Limited. In that case the court was dealing with a matter that was before it and had to decide whether to stay the court action and refer the matter to arbitration. The court referred the matter to arbitration, as most of the work that had been done on the court action would have been of use in the arbitration proceedings. The court held that the parties originally agreed to proceed by way of arbitration and therefore should be able to do so. That case really stands for the proposition that if the parties originally agreed to arbitration rather than a court resolution of the conflict, they should be allowed to arbitrate unless the delay had caused some undue prejudice.

Counsel for Axa also submits that while not binding, the Rules for Civil Procedure and more specifically, Rule 26.01 may provide guidance as when to allow an amendment in arbitration.

That rules states:

> On motion at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment.

Counsel for Axa further points out that in considering whether to grant leave to amend, the courts have considered, among other things, whether the defence or claim is one that is tenable at law, and whether the prejudice in allowing the amendment is non-remediable.

Counsel for the Fund, in opposing the motion, raises a number of issues. He submits that the test is out in section 25(4) of the Arbitration Act is "undue delay" and does not necessarily require prejudice, but the Fund takes the position that whether or not required by the test, there is prejudice to the Fund in this case. I will come back to that argument. The Fund also argues that Axa must establish "special circumstances" to add the resilement issue at this late date. Finally, the Fund argues that even if the other hurdles were over come, the resilement issue was not tenable at law and there for should not be allowed. I will deal with this issue first.

The Fund argues that it can only pay Statutory Accident Benefits pursuant to the provisions of the Motor Vehicle Accident Claims Act, R.S.O, 1990, c. M.41. Counsel argues that in order to make payment there must be no other insurer available to pay benefits, in accordance with the priority rules set out in section 268 of the Insurance Act. Counsel submits that if there is an insurer available, any agreement made by the Fund to accept the priority would be invalid and unenforceable. Without deciding that issue completely, I would say that I have some difficulty with the Fund's position in this regard and I certainly would not agree that the proposed amendment was untenable at law.

Counsel for the Fund also argues that if in cases where a limitation period has passed, a party may not obtain an amendment only by showing that there would be no prejudice to the other side, but that the moving party must show special circumstances for the amendment. In support of that proposition he cites the case of Onishenko vs. Quinlan [1972] S.C.R.380 (S.C.C) and Burnac Leaseholds Inc F et al vs. Haberty and Rankin Limited Architects (2002) 67 O.R. (3) 685.

Counsel for the Fund argues that the Fund resiled from the agreement to take over the file on May 19, 2005 and that Axa would then have 2 years to sue on any breech of the agreement.

Finally, the Fund argues that even if irremediable prejudice must be shown, it exists in this case. It notes that based on the request by Axa on July 13, 2007, Gore Mutual Insurance Company and Traders General Insurance Company were let out of the arbitration. The Fund argues that by letting them out of the arbitration it loses any possibility of pursuing them for payment of the accident benefits. It is too late for the Fund to start a proceeding against them.

In reviewing the facts, it is clear both parties were aware that the Fund was prepared to take over priority on April 25, 2005 and they resiled from that position on May 19, 2005. Thus, the resilement occurred approximately 2.5 years before it was raised by Axa, and more then 2 years after the commencement of the arbitration. It first raised the issue approximately 10 days before the commencement of the hearing. I have heard no adequate reason for what appears to have been an "undue delay" as set out in section 25 (4) of the Arbitration Act. Counsel indicated at the hearing she only became aware of the decision in Motors Insurance Company vs. The Co-operators Insurance Company (Unreported decision of Arbitrator G. Jones, released August 23, 2004) that might have benefited Axa's argument, on October 25, 2007, and raised the issue with opposing counsel and myself the next day.

Unreported arbitration decisions are notoriously difficult to locate and I find no fault in counsel in this regard. Nonetheless, resilement occurred more then 2 years ago and having come across a favourable decision shortly before the hearing is not, in my view, sufficient explanation for what would appear to have been undue delay (see: Kingsway General Insurance Company vs. West Wawnosh Insurance Company (2002) 58 O.R. (3rd) 251 (Ont C.A.)
In the event that actual irremediable prejudice need be shown, I'm satisfied that the letting out of Gore and Traders General would constitute such prejudice, for the reasons given above.

In light of the above, I am not prepared to allow the amendment and the issue is not added to the arbitration.

In the event that the parties are unable to resolve the outstanding issue of termination of the insurance policy, they may contact me regarding a further pre-hearing to deal with that matter.

If the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated at Toronto, this _____ day February 2008.

_____

M. Guy Jones
Arbitrator