CITATION: Her Majesty the Queen in Right of Ontario (Minister of Government and Consumer Services) v Royal & Sun Alliance Insurance Company of Canada, 2021 ONSC 3922
COURT FILE NO.: CV-20-651383
DATE: 20210531

ONTARIO SUPERIOR COURT OF JUSTICE

RE: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the MINISTER OF GOVERNMENT AND CONSUMER SERVICES ("MOTOR VEHICLE ACCIDENT CLAIMS FUND"), Appellant

-and-

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, Respondent

BEFORE: F.L. Myers J.

COUNSEL: *Marie Sydney*, for the appellant
Damien Van Vroenhoven, for the respondent

HEARD: April 30, 2021

ENDORSEMENT

Background

[1] In Ontario, the SPF 6 policy of insurance provides insurance coverage to people who may be held liable for losses caused by motor vehicles that they do not own or drive. The policy covers claims against the insured for vicarious liability for the driver or car despite the fact that the insured does not own or drive the car.

[2] In this case, the underlying claim involves whether Beck Taxi may have vicarious liability for an accident in which one of its dispatched taxi cabs hit a pedestrian. Beck Taxi does not own the 850 cabs that it dispatches under its familiar orange and green branding.

[3] This case is not about the liability for the accident however. The question is who pays the Statutory Accident Benefits to which the victim is entitled – Beck's SPF 6 insurer or the government's Motor Vehicle Accident Claims Fund.

[4] The Fund appeals the decision of an Arbitrator who found that Beck Taxi's SPF 6 insurance policy was not a "motor vehicle liability policy" as defined in s. 1 of the *Insurance Act*, RSO 1990, c I.8. As a result of that holding, the SPF 6 policy does not include the *Statutory Accident Benefits Schedule* under s. 268 (1) of the statute.

[5] The Fund argues that the Arbitrator erred in law in finding that insurers under SPF 6 policies are not required to pay SABs. It says that Beck's SPF 6 insurer, Royal & Sun Alliance Insurance Company of Canada ("RSA") should be liable to pay SABs to the car accident victim.

[6] For the reasons that follow the appeal is dismissed.

Jurisdiction

[7] The parties were required to arbitrate their dispute about the applicability of SABs to an insurance policy under O. Reg 283/95 under the *Insurance Act*. Subsection 8(1) of the regulation provides that the arbitration is subject to the *Arbitration Act*, 1991, SO 1991, c 17.

[8] This appeal arises as of right under the *Arbitration Act*, *1991* because the arbitration agreement between the parties provides for an appeal on questions of law and mixed fact and law.

Standard of Review

[9] The appellant argued that because this is a statutory appeal, the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), requires the court to apply the usual standard of review in appeals as set out in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII).

[10] RSA did not argue that a standard of reasonableness continues to apply to arbitrations in Ontario after *Vavilov*. Rather, it argued that the arbitrator's decision was one of mixed fact and law and is therefore subject to the deferential standard of review of "palpable and overriding error" under *Housen*.

[11] As the parties did not make submissions on whether *Vavilov* has displaced *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 (CanLII) and other cases that apply a reasonableness standard to appeals of commercial arbitration awards, I will not deal with the issue.

[12] In *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 (CanLII) my colleague Davies J. finds that *Vavilov* applies in the precise circumstances before me (a statutorily mandated SABs arbitration under the *Insurance Act*). I am required to follow my colleague's decision unless there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate". See: *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788 (CanLII) at paras. 62 and 63.

[13] I agree with Hainey J., in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 (CanLII), at para. 67, that the decision of Davies J. was expressly limited to statutory arbitrations and cannot to be taken as standing for a broader proposition that *Vavilov* applies generally to all appeals from commercial arbitrations in Ontario.

[14] The Supreme Court of Canada has recognized that the question of whether the highly deferential reasonableness standard of review applicable to appeals from commercial arbitration decisions should remain applicable despite *Vavilov* is an important issue that has yet to be resolved. See: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (CanLII) at para. 46. I am not to be taken to be deciding anything except that I must follow my colleague's decision on the standard of review on arbitration appeals involving the SABs under the *Insurance Act* that both parties before me accepted as controlling.

The Issue

[15] On November 29, 2014 a pedestrian reported being hit by a Beck Taxi that did not remain at the scene. She reported a cab number but, Beck has delivered evidence that the taxi with that number was not near the location of the accident at the time reported.

[16] Until an insurer is identified as insuring the car that struck the victim, liability for SABs presumptively lies with the Fund under s. 268 (2)2(iv) of the *Insurance Act.*

[17] The Fund has yet to be able to require Beck to tell it which of its cabs was at the scene at the time of the accident. This issue was expressly left open by the Arbitrator below.

[18] Beck Taxi has an SPF 6 policy with RSA that provides Beck with insurance coverage as follows:

> The Insurer agrees to indemnify the Insured against liability imposed by law upon the Insured for loss or damage arising from the use or operation of any automobile not owned in whole or in part by or licenced in the name of the Insured, and resulting from bodily injury to or the death of any person or damage to property of others not in the care, custody or control of the insured. [Emphasis added.]

[19] The SPF 6 policy is a standard form policy recognized under s. 227 of the *Insurance Act*. It is not part of the standard motor vehicle policy for owners and drivers of cars. Rather, it covers businesses who might have vicarious liability for damage caused by cars that it does not own – like taxi companies. RSA says it is business insurance rather than car insurance. It is attached to Beck' commercial general liability policy.

[20] The standard SPF 6 policy wording is silent on SABs. But s. 268 (1) of the statute deems SABs coverage into every Ontario "motor vehicle liability policy".

[21] Section 1 of the *Insurance Act* defines the term "motor vehicle liability policy"as follows:

> "motor vehicle liability policy" means a policy or part of a policy evidencing a contract insuring,
>
> > (a) the owner or driver of an automobile, or
> >
> > (b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person's employee or agent or any other person on that person's behalf,
>
> against liability arising out of bodily injury to or the death of a person or loss or damage to property **caused by an automobile or the use or operation thereof**; [Emphasis added.]

[22] As Beck Taxi was not the owner or driver of the taxi in issue, the question of whether its SPF 6 policy might be a "motor vehicle liability policy" falls under (b) of the definition.

The Word "Person" includes a Corporation

[23] In para 54 of her decision, the Arbitrator held that the word "person" in para. (b) of the definition of "motor vehicle liability policy" does not include a corporation and refers only to a natural person. On that basis, she found that Beck Taxi is not a "person" for the purposes of the definition of "motor vehicle liability policy". Hence the policy is not one that meets the definition as used in s. 268 (1) to attract the application of the SABs.

[24] I my respectful view, the Arbitrator's interpretation of the statute amounts to an error of law.[1]

[25] The Arbitrator accepted that the word "person" is used throughout the statute and includes corporations. Insurance companies could not be licensed in Ontario otherwise. However, the Arbitrator reasoned that since the word "person" is not defined in the statute, its meaning depended on the particular usage.

[26] The Arbitrator held:

> However, if a company contracts for coverage for automobiles that it owns or its employees drive, that would be captured by the first part of the definition of "motor vehicle liability policy" described in part (a) as an "owner or driver". The fact that. part (b) of that provision specifies that the second entity that may be insured is a "person who is not the owner or driver" in my view must be read with part (a) in mind. I find that the use of the term "person" in part (b) was intentional and that a company, such as Beck Taxi Limited, does not fit within this part of the description.

[27] I do not understand the Arbitrator's logic. First, I am not sure that she is correct in finding that if a car is driven by a person's employee, liability would fit under para. (a). Subsection (b) deals expressly with cars driven by employees. In addition, the distinction between (a) and (b) is based on the identity of the person whose conduct is insured. If the person is the owner or driver, it is under (a). If the car is being used or operated by someone who is an "employee or agent or any other person on that person's behalf" then it fits under (b).

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[1] Even if a reasonableness standard of review applied, I would not find this decision within the reasonable range of interpretations available. It was reached without reference to the definition of the word "person" in the *Legislation Act, 2006* as discussed below. See: *Vavilov* at paras. 115 to 124.

[28] Neither of these issues provides a logical basis to find that of the 1,121 times the word “person” is used in the *Insurance Act*, in this one instance, the Legislature intended to exclude corporations. People who may be found liable for cars driven by their employees or others on their behalf are as or more likely to be corporations than individuals. How many individuals have employees compared to corporations? I do not know. But I cannot see any reason why a person who insures employees or others who drive on his, her, or its behalf cannot be a corporation based on the wording of the definition.

[29] Of greatest significance, the word “person” is a defined term. It is not defined in the *Insurance Act*. It is defined in the *Legislation Act*, 2006, SO 2006, c 21, Sch F. Section 87 of that statute defines the word “person” in every act and regulation to include a corporation.

[30] Neither counsel below brought this definition to the attention of the Arbitrator. I raised it with counsel and offered to receive supplementary written submissions on it. Counsel for RSA argues that under s. 47 of the *Legislation Act*, *2006,* the definition in s. 87 can be displaced if the contrary intention appears or if the definition would give the word a meaning that is inconsistent with its context. He submits that this is what the Arbitrator held.

[31] I agree that the Arbitrator held that finding the word “person” in subsection (b) of the definition of “motor vehicle liability policy” is inconsistent with its context. But, as I discuss above, I am unable to accept that premise. The definition in the *Legislation Act, 2006* therefore governs.

Are Beck Taxis Driven on Behalf of Beck?

[32] At paras. 55 and 56 of her decision, the Arbitrator held:

> 55. The driver who was driving the Beck taxi that struck Ms. Prost was not an employee of Beck Taxi, or its agent. I have no evidence before me to suggest that they would have been driving the taxi on Beck Taxi's behalf. While I am not aware of the monetary or other details of the legal relationship between Beck Taxi and the drivers who drive the vehicles that it dispatches, the Fund has provided no evidence to suggest that they are employees or agents of Beck, nor that they drive those vehicles on Beck's behalf.
>
> 56. The result of the above is that the SPF 6 endorsement - while providing excess liability coverage to Beck Taxi for potential vicarious liability claims arising out of the use or operation of its non-owned vehicles - is not a motor vehicle liability policy as defined in the Act. It

> is an endorsement to the CGL policy issued by RSA, and does not provide coverage for accident benefits in the Schedule. I appreciate that the SPF 8 endorsement was determined to be a motor vehicle liability policy in the *Daimler Chrysler, supra*, case, summarised above. In my view, that endorsement is entirely different and distinct from the SPF 6. It provides coverage to a lessor in the event that the lessee of a vehicle no longer has coverage. As it essentially replaces a policy that has either lapsed or been cancelled, it only makes sense that it would also provide coverage for accident benefits.

[33] The Fund argues that the SPF 6 policy, found at page A185 of Caselines, by its terms, covers,

> THE AUTOMOBIOLES IN RESPECT OF WHICH INSURANCE IS TO BE PROVIDED ARE…USED IN THE APPLICANT'S BUSINESS OF TAXI DISPATCH.

and

> "AUTOMOBILES OPERATED UNDER CONTRACT" ON BEHALF OF THE APPLICANTS ARE AS FOLLOWS:…850 TAXIS…

[34] If the Fund is arguing that as a matter of fact, Beck Taxis are driven on behalf of Beck, then that is a question of fact that is not appealable in this arbitration.

[35] But, what I take the Arbitrator to be saying is that just because a company insures itself for the commercial risk of vicarious liability does not mean its employees or agents drive the taxis or that the taxis are driven on behalf of Beck so as to fit within para. (b) of the definition of "motor vehicle liability policy". Beck Taxi does not carry motor vehicle fleet insurance with SABs benefits because it does not own or drive the cars.

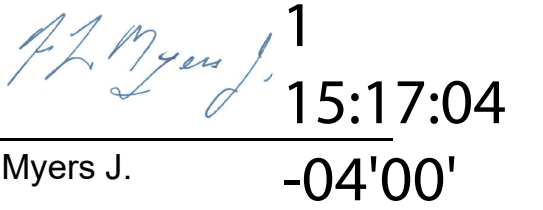
[36] The Arbitrator agreed with Arbitrator Samis in *ING Insurance Company v Temple Insurance* (May 7, 2008) that SPF 6 coverage does not cover the car, its owner, or its driver. Its purpose is to protect an insured from liability that might be imposed on its for another reason – like taxi dispatching for example. I agree with the analysis provided by Arbitrator Samis in the *Ing* case.

[37] The issue then is one of law or mixed fact and law. I see no error, let alone a palpable or overriding error, in the Arbitrator's decision that there was no evidence that Beck Taxis are driven by employees, agents, or on behalf of Beck. This is not a question that turns on the identification of any individual driver. It is simply a recognition that an SPF 6 CGL endorsement insurance is not a species of motor vehicle liability policy that are intended to carry SABs under the statutory scheme.

Outcome

[38] The appeal is therefore dismissed.

[39] RSA is entitled to its costs of the appeal on a partial indemnity basis fixed in the amount of $6,200 all-inclusive.



F.L. Myers J.

Date: May 31, 2021