**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 Section 268 AND
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT***

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

AXA INSURANCE (CANADA), AXA GENERAL INSURANCE COMPANY and
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
as represented by THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

DECISION

COUNSEL

D'Arcy McGoey – Thomas, Gold, Pettingill LLP
Lawyer for the Applicant, The Dominion of Canada General Insurance Company
(hereinafter referred to as "Dominion")

Lorraine Takacs – Hughes, Amys LLP
Lawyer for the Respondent, The Motor Vehicle Accident Claims Fund
(hereinafter referred to as the "Fund")

PROCEEDINGS

The arbitration proceeded before me on March 14, 2014 on the basis of Document Briefs filed by each party and the oral evidence of an underwriter and a claims adjuster from Dominion.

ISSUES

This priority dispute arises out of a motor vehicle accident that occurred on March 7, 2011. Adrian Hunter (the "claimant") was struck as a pedestrian by a 2000 Acura that at one time was insured by the Dominion but purportedly removed from the policy at the request of the owner on December 5, 2011, some 3 months prior to the subject accident.

The first issue before me is whether insurance coverage on the subject vehicle was properly removed by Dominion. If Dominion coverage remained on the vehicle then the Dominion policy would stand in priority to the Fund.

If it is found that Dominion insurance coverage was properly removed, the next issue that must be dealt with is the effect of relatively new legislation requiring an insurer to complete a reasonable investigation to determine if any other insurer is liable to pay benefits in priority to the Fund before putting the Fund on notice of a priority dispute.

> **3.1 (1) this section applies to disputes relating to accidents occurring on or after September 1, 2010. O. Reg. 38/10, s. 5.**
>
> **(2) Before giving a notice to the Fund under section 3, an insurer must,**
>
> > **(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and**
> >
> > **(b) provide particulars to the Fund of the investigation and the results of the investigation. O. Reg. 38/10, s. 5.**

I must determine whether Dominion breached it's obligations under s.3.1 of Ont. Regulation 283/95 as amended by Ont. Reg 38/10. If I find that the section has been breached, does such breach preclude Dominion from proceeding with the Arbitration? If not precluded from proceeding with the Arbitration, what is the remedy for a breach of the section?

1. COVERAGE ISSUE

Dominion's underwriting file and the oral evidence of it's underwriter clearly confirms that the subject 2000 Acura was a described vehicle under Dominion policy APP 1540254. A written statement signed by the named insured and owner of the vehicle Isam Abdulahai dated August 23, 2011 confirms that he took insurance off the 2000 Acura in December 2010. There is no evidence before me that the owner claims that valid insurance remained on the vehicle at the time of this accident. The Dominion underwriting file includes a "Policy Change" form confirming that the 2000 Acura was deleted from the policy effective December 5, 2010. The Dominion underwriter testified that the vehicle was removed from the policy on that date. She testified that a letter was sent to the insured confirming the coverage change and the changes with respect to premium payment as there remained another vehicle on the policy. Dominion has been unable to produce a copy of the actual letter sent to it's insured and was only able to produce a sample letter as to what would have been

provided to it's insured. At the time of the deletion it was not Dominion's policy to keep a copy of such letters. Dominion now keeps copies of such letters in pdf format.

I am satisfied that the subject vehicle was properly deleted on December 5, 2010, some three months prior to the subject accident. I fully accept the evidence of the underwriter in this regard. She presented as an honest, straightforward witness and her oral evidence was fully supported by the documents in the underwriting file. I do not believe that Dominion's failure to produce a copy of the actual letter sent to the insured in any way affects the policy status at the time of the accident. I accept the evidence of the underwriter that it was sent. There was no evidence adduced by the owner that such letter was not received. Furthermore, this is a coverage deletion as requested by the owner as opposed to a cancellation of coverage by the insurer where there are strict technical requirements in the interest of consumer protection.

Overall, I am satisfied that there was no Dominion insurance coverage on the subject vehicle at the time of the accident.

2. "REASONABLE INVESTIGATION OF PRIORITY" ISSUE

Priority disputes in Ontario are governed by Ontario Regulation 283/95. It provides a process for determining which insurer is responsible for payment of statutory accident benefits to an individual where such individual may have access to more than one policy. The first insurer to receive a completed application for benefits is required to pay benefits pending resolution of the priority dispute. That is the situation here where Dominion first received the claimants completed application and was legally obligated to pay benefits pending a determination as to whether the Fund or some other insurer stood in priority. The Regulation requires that the priority dispute be resolved by way of an arbitration pursuant to the Arbitration Act 1991.

After September 1, 2010 significant, and important changes to Ontario Regulation 283/95 were instituted with respect to disputes against the Fund. Insurers now *must conduct reasonable investigations before putting the Fund on notice.* The investigations which Dominion was required to conduct were for the purposes of determining if any other insurers were responsible to pay benefits higher in priority to the Fund. Furthermore, the particulars of the investigations *must be provided to the Fund.*

Following the September 1, 2010 amendments Section 3.1 of O. Regulation 283/95 now provides:

> ***3.1*** *(1) this section applies to disputes relating to accidents occurring on or after September 1, 2010. O. Reg. 38/10, s. 5.*
>
> *(2) Before giving a notice to the Fund under section 3, an insurer must,*
>
> > *(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and*
> >
> > *(b) provide particulars to the Fund of the investigation and the results of the investigation. O. Reg. 38/10, s. 5.*

It would appear that the legislative intent of the amendment was to avoid "dumping" on the Fund. This is a situation where an insurer receiving a completed application for benefits and knowing that their coverage had been deleted, cancelled or lapsed simply puts the Fund on notice thereby putting the responsibility on them to conduct an investigation, at he public's expense, to determine if any other insurer is the priority insurer. The amendment effective September 1, 2010 seems to transfer this obligation to the insurer who receives the completed application for benefits.

The dumping issue is referred to in the case of Co-operators General Insurance Company v. HMQ in the Right of Ontario as represented by the Minister of Finance (Arbitrator Novick – January 2013), at page 11 of the decision Arbitrator Novick writes:

> *"Mr. Sokol argued that insurers should not be permitted to conduct cursory investigations and "dump" claims on the Fund. I agree with that statement and support the policy reasons underlying it. Insurers should never forego a proper investigation that may identify other priority insurers simply because they think there is an argument to be made that the Fund is responsible to pay benefits under Section 268(2) of the Act. The Fund should be the "payor of last resort" and insurers should not lazily direct DBI Notices to the Fund."*

In my view s.3.1 was designed to prevent "dumping on the Fund" and place the obligation to investigate priority on the insurer first served with a completed application.

What constitutes a "reasonable investigation of priority" will obviously depend on the facts of each case. In the facts before me, the claimant was struck as a pedestrian by a vehicle previously insured with Dominion but uninsured at the time of the accident. I am of the view that Dominion was obligated by reason of s.3.1 to conduct a reasonable investigation as to whether there was any other insurer who might be obligated to pay accident benefits to the claimant before putting the Fund (insurer of last resort) on notice of the priority dispute.

The definition of "insured person" in the Statutory Accident Benefits Schedule, Ontario Regulation 34/10, includes the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependent of the named insured or of his/her spouse. Therefore, any "reasonable investigation of priority" would consider the definition of "insured person" as contained in the Statutory Accident Benefits Schedule.

On the facts before me it would appear that reasonable inquiries might include:

- did the claimant have his own policy of automobile insurance?

- was he a listed driver on someone's automobile policy?

- was he the spouse of someone with an automobile policy?

- was he dependent on someone with an automobile policy?

- did he have "regular use" of another vehicle with insurance?

- did the driver of the uninsured vehicle have personal coverage?

- were there other "involved vehicles" that may be insured?

In my analysis I will first look at what Dominion did and then look at what Dominion did not do to determine if there was a breach of s.3.1 of Ont. Reg. 283/95.

The subject accident occurred on March 7, 2011. By letter dated March 10, 2011 counsel for the claimant Adrian Hunter advised Dominion of the accident. The solicitor advised that the claimant was in the Hamilton General Hospital and that his sister Mary Schofield was his power of attorney. The claimant had been living alone and did not own or operate a motor vehicle. Separate tort and accident benefit files were opened by Dominion.

On March 16, 2011 the accident benefits adjuster (who testified at the arbitration herein) spoke to the claimant's sister Mary Schofield by phone. It was learned that the claimant was mentally challenged but living independently at Central Place. He had poor judgment.

On March 18, 2011, the adjuster reported to her supervisor at Dominion that the claimant was 57 years old and was mentally challenged, reportedly with an intellect of a 9 or 10 year old. A question was raised, even though living on his own, whether he might be dependent on someone.

A file note was made March 21, 2011 that with respect to priority, Dominion had to make sure he was not dependent on someone.

Dominion received the completed application for benefits on March 24, 2011. In it, the claimant indicated that he was unemployed and had no other sources of insurance (own policy, listed driver on some other policy, spouses policy, employers policy or rental policy).

It was not until late March 2011 that Dominion realized that coverage had been deleted on the vehicle involved in the collision.

A supervisor's note dated March 30, 2011 makes reference to:

- putting the Fund on notice
- checking dependency with sister
- making sure he is not a listed driver or dependent on sister
- determining claimants income and who pays his bills
- find out if the driver has a policy

A claims note dated March 30, 2011 makes reference to information contained in a report from an Occupational Therapist that the claimant could not read or write but lived independently in a subsidized apartment building in Hamilton and was able to manage his finances with the assistance of his bank manager. Mary Schofield assisted him with grocery shopping.

On April 5, 2011 the Fund was served by fax with a Notice of Dispute.

On April 19, 2011 the adjuster for the Fund wrote to Dominion requesting:

- Copy of claimant's Application for Accident Benefits
- Claimant's relation to this claim
- Claimant's relationship to your insured
- Copy of complete Motor Vehicle Accident (Police) Report confirming claimant's involvement in the accident in question
- Details of loss
- Copy of signed statement obtained from your insured
- Copy of signed statement obtained from the claimant
- Any information you have gathered with respect to any other vehicle/insurer that may have priority or other insurer you have also placed on Notice
- If you have placed other insurers on Priority Dispute Notice, please provide copies of Notices sent to the insurers as well as their reply correspondence
- Any information from your AB file which you have authorization to release, including information regarding the extent of the claimant's injuries, statements, filed adjusters' reports, medical reports and other relevant documentation
- the quantum of AB Benefits paid to date by type, ie. IRBs, Med/Rehab, Attendant Care, etc.
- Information with regard to any Loss Transfer or WSIB issues
- Full details into investigations conducted to determine what other insurer or insurers are liable to pay in priority to the MVACF, as is required under Section 3 of the DBI Regulation along with complete underwriting file
- On what basis you are denying coverage and on what basis you are claiming the other insurers have priority
- Any evidence you have obtained to support your claim that we have priority for this claim not already submitted to us.

A file note dated May 16, 2011, makes reference to obtaining insurance information with respect to Mary Schofield's sister and Power of Attorney of the claimant.

On June 15, 2011, AXA (insurer of Mary Schofield) was served with a Notice if Dispute. AXA was eventually let out of the priority dispute in the summer of 2012 once all parties were satisfied that the claimant was not principally financially dependent on his sister Mary Schofield. Dominion was responsible for paying the costs of AXA.

A supervisor's note dated June 23, 2011, suggests that a statement should be obtained from the driver of the vehicle.

Log note dated August 24, 2011, confirms meeting with insured owner of vehicle. Advised that driver lives with his father in Hamilton who owns a Camry. There is a notation that a statement should be obtained from driver to see if he has access to insurance.

Log note August 26, 2011 indicates that claimant receiving ODSP and has been living in subsidized housing for 15 years.

On October 18, 2011, Dominion finally obtained a statement from the driver of the subject vehicle. Noted that his parents own a vehicle insured with TD. He did not believe he was a listed driver on the policy.

The priority dispute arbitration was initiated on October 31, 2011.

Dominion log note dated November 29, 2011 confirms a telephone conversation with Mary Schofield and information obtained. Noted that claimant's ODSP was $880/month. Noted that he was not dependent upon her at all and paid all of his bills form his ODSP cheque. Claimant was previously married but his spouse has since died.

A statement was obtained form Mary Schofield by AXA dated June 23, 2011 and sent to Dominion on December 9, 2011. The information contained therein confirmed that the claimant was not financially dependant on Mary Schofield. AXA was finally let out of the priority dispute arbitration in the summer of 2012.

The foregoing paragraphs outlines the steps taken by Dominion to investigate the priority issue. The Fund maintains that the investigation was not reasonable. The Fund claims that Dominion only looked at "dependency" in a cursory way prior to putting the Fund on notice and did not explore the other possible sources of insurance. Before putting the Fund on notice Dominion never:

1) obtained a statement from the claimant;

2) obtained a statement from the sister Mary Schofield;

3) identified the driver and completed an Autoplus to confirm insurance coverage;

4) independently verified the information obtained from Schofield;

5) independently verified the information obtained from the claimants lawyer;

6) completed a liability investigation to determine other "involved vehicles";

7) explored whether the claimant had "regular use" of another's vehicle;

8) obtained a statement from the driver to identify other sources of insurance.

What constitutes a "reasonable investigation"? Those very words are also used in s.3(2) of Ont. Regulation 283/95 and a body of jurisprudence has emerged interpreting those words. I accept that the interpretation of those words apply equally to s. 3.1.:

> *"The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time: Ontario Municipal Insurance Exchange (OMEX) v. Liberty Mutual Insurance Company (15 October 2000), unreported (Jones); Coseco Insurance Co. v. Allstate Insurance Co. (15 November 2001), unreported (Malach); ING Halifax Insurance Co. v. Liberty Mutual Insurance Co. (Malach, January 2, 2002) [page 634]; Federated Insurance Co. of Canada (Malach, September 2, 2003); Coseco Insurance Co. v. Lombard Insurance Co., (3 June 2004), unreported; Liberty Mutual Insurance Co. v. Zurich Insurance Co. (2007) CanLII 54080 (On.S.C.)."*

The Merriam-Webster dictionary defines "reasonable" as:

- fair and sensible
- fairly or moderately good
- not too expensive

As I have indicated aforesaid, the determination of "reasonable investigation" must be determined on the facts of each case. On the facts before me I find that Dominion knew early on that it must investigate priority. It obtained information early on from claimant's counsel and the sister of the claimant that the claimant was intellectually challenged with an intellect of a 9 or 10 year old. He was being represented by his sister as Power of Attorney. Given the pre-accident intellectual state of the claimant and the nature of the serious injuries sustained by him in the subject motor vehicle accident, I find it was reasonable for Dominion not to obtain a signed statement from the claimant in the circumstances. It was reasonable on the information available to conclude that the claimant did not own a motor vehicle, was not licensed and did not have regular use of a motor vehicle. This left dependency, insurance available to the driver of the subject vehicle and a determination that there were not other involved vehicles which may have insurance as priority routes to explore.

In my view an attempt ought to have been made at an early stage to obtain a statement from Mary Schofield to determine specifically what income the claimant had available to him, the living expenses that he had and the financial and care contributions that she was making to her challenged brother, if any. The exact amount of the claimants monthly ODSP benefit was not discovered until long after the Fund was put on notice. A more thorough investigation of "dependency" ought to have been completed before putting the Fund on notice.

I do not find that Dominion's investigation of other "involved vehicles" was unreasonable. The police report indicates that the claimant simply ran across the road and was struck by the subject vehicle. The police report makes no reference either in the diagram on the face of the police report or vehicle description of other vehicles involved. It would not be reasonable in the circumstances here to incur the expense of obtaining a copy of the full police file to determine if there were parked cars when none are referred to in the body of the police report. Furthermore there is a body of jurisprudence as to what constitutes an "involved vehicle" and it is clear from that jurisprudence that there must be some causal link between such vehicle and the actual collision. There was nothing here to suggest to the Dominion that any other vehicle was "causally linked" to the subject collision.

Where the Dominion investigation into priority falls short is the absence of steps at an early stage to identify the driver of the subject vehicle and investigate whether there may have been insurance available to him through personal or family motor vehicles which might be extended to provide accident benefit coverage to pedestrians stuck by the uninsured motor vehicle that he was driving. A body of caselaw emerged following the Ontario Court of Appeal decision in Co-operators General Insurance Company v. Pilot Insurance Co. (1998) (O.J.) No. 5551 which extended accident benefit coverage to occupants of and pedestrians struck by an uninsured vehicle if the driver had motor vehicle coverage personally on another vehicle.

Several other arbitration decisions have extended accident benefit coverage in similar situations namely:

> The Economical Insurance Group v. Her Majesty the Queen in Right of Ontario, represented by the Minister of Finance, Security National

Insurance Company and Kingsway General Insurance Company, decision of Arbitrator Shari Novick, dated January 2009;

Perth Insurance Company v. State Farm Automobile Insurance Company and Her Majesty the Queen in Right of Ontario, as represented by the Minister of Finance, decision of Arbitrator Shari Novick, dated May 2009.

Royal & SunAlliance Insurance Co. v. Zurich Insurance Co. (Arbitrator Bialkowski, dated February 7, 2011).

Therefore it was important for Dominion to determine what insurance coverage might have been available to the driver which may have extended accident benefit coverage to those pedestrians struck by the uninsured vehicle that he was operating at the time. This was not done before putting the Fund on notice. A statement from the driver was not obtained until October 18, 2011.

Overall, it is clear that Dominion did more than a cursory priority investigation however, it fell short in not trying to obtain a detailed statement from Mary Schofield or investigating possible insurance available to the driver. To that extent, I feel that their investigation was "unreasonable" in light of the newly created obligations created by s.3.1 of Ont. Reg 283/95. However, this is not a case where the Dominion can be said to have "dumped" upon the Fund. They did some priority investigation before putting the the Fund on notice and continued priority investigations afterwards. They simply overlooked an avenue of possible insurance coverage available to the claimant, namely possible insurance available to the driver of the uninsured vehicle. Does this preclude Dominion from pursuing the priority arbitration? No - the only remedy authorized in the priority Regulation is in s.7 which provides:

> *7(6) If the dispute relates to an accident that occurred on or after September 1, 2010, the failure of an insurer other then the Fund to comply with s.2.1 or 3.1 may be the subject of a special award made by the arbitrator [emphasis added].*

I am satisfied that the legislative intent behind s.3.1(2) is to prevent an insurer from automatically giving notice to the Fund in every case which would result in shifting the burden on the Fund to investigate the potential of other insurers. No bar to proceeding with an arbitration exists in the event of a breach of s.3.1 in my view. Rather, as arbitrator, I simply have a discretion whether to make a special award in appropriate cases.

There was no evidence before me as to the hours spent by the Fund or costs incurred by the Fund to complete the investigation that Dominion ought to have completed with respect to priority. In my view, there was a breach of the obligations set out in s.3.1 and there ought to be some deterrent to other insurers. In my opinion the "special award" that I have discretion to make is accomplished by simply denying Dominion of the costs of arbitration herein even though I find the Fund to stand in priority to Dominion and by ordering that the costs of the Arbitrator be split equally between the parties.

ORDER

I hereby order that the Fund is obligated to adjust and fund the accident benefits claim of Adrian Hunter.

I hereby order that the Fund reimburse Dominion for all payments made that are subject to indemnity plus interest calculated pursuant to the Rules of Civil Procedure.

I hereby order that Dominion and the Fund equally pay the Arbitrator's costs.

I am pleased to remain involved if the parties cannot resolve the issues of indemnity and interest.

DATED at TORONTO this 31st)

day of March , 2014.)

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KENNETH J. BIALKOWSKI
Arbitrator