

## WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For decisions released the week of July 7 to 11, 2008

### Insurer's claim for repayment cannot continue at arbitration after insured withdraws all claims

#### ***Tikhanova v. Aviva Canada Inc.*, FSCO A08-000046 (June 23, 2008), Arbitrator R. Kominar**

September 10, 2000 collision. Insured received accident benefits including caregiver benefits. Insurer terminated caregiver benefits in May 2007. Insured applied for arbitration. Former counsel for the parties agreed to conduct a preliminary issue hearing to determine whether insured was actually involved in a motor vehicle accident on September 10, 2000. Insurer claimed repayment of benefits if it was determined that insurer was not involved in the accident.

Insured retained new counsel who moved to withdraw the application for arbitration. Insured intended to proceed with the issues in the Superior Court of Justice. A tort action commenced also included the issue of whether or not insured was involved in a motor vehicle accident on September 10, 2000. Insurer sought to proceed with the preliminary issue hearing at FSCO, and obtain a ruling on whether insured was involved in an accident or not.

Insured was permitted to withdraw the application for arbitration, subject to a determination of expenses. Insurer had no right to maintain its claim for repayment of benefits at FSCO unless there remained an outstanding issue in dispute brought by the insured. Arbitrator rejected insurer's submission that its claim should be allowed to proceed at arbitration as it was tantamount to a counterclaim in tort. Only an insured can initiate arbitration. If an insurer, after a failed mediation, wishes to independently proceed with a dispute, its only option is to bring the matter to court. Insurer's claim for repayment and request for a ruling rule on whether insured was involved in the accident could not stand. Absent any issues brought to arbitration by the insured, there was no jurisdiction for the insurer to proceed at FSCO; any such proceeding would be a nullity. Insurer's claim dismissed on jurisdictional grounds, without prejudice to it raising the repayment issue in court proceedings or in any new application for arbitration initiated by insured.

#### **Implications:**

This decision re-iterates that the *Insurance Act* does not create an independent right on the part of an insurer to commence or continue arbitration at FSCO. That right is reserved to the insured. In this case, arbitrator held that it was open to the insurer to commence its own Court action for repayment.



## Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.