COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mazzei v. Insurance Corporation of British Columbia,* 2023 BCCA 367

Date: 20230920
Docket: CA49221

Between:

Sebrina Mazzei

Appellant
(Claimant)

And

Insurance Corporation of British Columbia

Respondent
(Respondent)

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An award of an Arbitrator under the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 and the *Arbitration Act*, S.B.C. 2020, c. 2, dated June 19, 2023 (*Mazzei v. Insurance Corporation of British Columbia*).

Oral Reasons for Judgment

Counsel for the Appellant:	T.R. O'Mahony
Counsel for the Respondent:	A.M. Gunn, KC J.G. Cummings
Place and Date of Hearing:	Vancouver, British Columbia September 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 20, 2023

Summary:

The applicant seeks leave to appeal and a stay of proceedings in relation to an arbitration award issued pursuant to the underinsured motorist protection provisions of the Insurance (Vehicle) Regulation. The arbitrator found that the applicant was not a member of a household with her father and boyfriend at the time she was injured in a motor vehicle accident, and therefore was not an "insured" within the meaning of the Regulation. The applicant raises five grounds of appeal in relation to the arbitrator's application of the law. Held: Application dismissed. The applicant did not identify an extricable error of law arising out of the arbitrator's award, and therefore this Court had no jurisdiction under the Arbitration Act to entertain an appeal.

[1] **HORSMAN J.A.**: The applicant, Sebrina Mazzei, seeks leave to appeal and a stay of proceedings in relation to the award of the arbitrator, Dennis C. Quinlan, K.C., pronounced on June 19, 2023, dismissing her application for a declaration that she was an insured pursuant to s. 148.1(1) of the *Insurance (Vehicle) Regulation* B.C. Reg. 447/83 (the "Regulation") (the "Award").

Factual History

[2] The background to this matter was summarized in the reasons for the Award:

> 1. On December 7, 2019, Sebrina Mazzei (the "Claimant") suffered serious injuries when she and three other persons were riding as passengers in a vehicle that left the roadway and went down an embankment while travelling near Oyama, B.C. (the "Accident").
> 2. The driver of the vehicle in which the Claimant was a passenger was at fault for the Accident.
> 3. As the driver did not have third party liability insurance coverage, he was an uninsured motorist as defined in section 20 of the Insurance (Vehicle) Act [RSBC 1996) Chapter 231 (the "Act").
> 4. The Claimant and Respondent subsequently entered into an agreement whereby the Respondent paid the Claimant the sum of $50,000 in respect to her section 20 claim.
> 5. The Respondent consented to the Claimant proceeding to arbitration under the Arbitration Act [SBC 2020) Chapter 2 for a determination as to whether she was an insured for the purpose of underinsured motorist protection compensation pursuant to Part 10, Division 2 of the Insurance (Vehicle) Regulation B.C. Reg. 447 /83 (the "Regulation), and if so, how much (the "UMP Proceeding").
> 6. At the time of the Accident the Claimant was not named as an owner or renter in an owner's certificate, or a person issued a driver's certificate, as those terms are defined in section 1 of the Act.

> 7. It is the Claimant's position she met the definition of insured for the purpose of UMP, as a result of being a member of the household of a person named in an owner's certificate and/or driver's certificate.

[3] Section 148.1 of the Regulation, in brief summary, defines "insured" as including a "member of a household" of a person named as the owner in an owner's certificate or a person holding a driver's license. "Household" is defined in s. 1 of the Regulation to mean "a person ordinarily dwelling in the same dwelling unit".

[4] The applicant's boyfriend (SC) and her father (BM) were each named as an owner in an owner certificate for their vehicles. The issue in the arbitration was whether SC and BM formed a "household" with the applicant, and were "ordinarily residing" in the one-bedroom apartment where the applicant lived in Vernon (the "Vernon Apartment") at the time of the Accident (see reasons at paras. 8–10). If yes, the applicant would be an insured for the purpose of underinsured motorist protection compensation (see reasons at paras. 72–76).

[5] There was no dispute between the parties as to the applicable legal framework. In her submission before the arbitrator, the applicant cited, among other cases, *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209. In *Thomson*, the Supreme Court of Canada interpreted the phrase "ordinarily resident" to mean the residence where, in the settled routine of a person's life, they ordinarily live. In her submission before the arbitrator, the applicant quoted the following passage from *Thomson* at 231–232:

> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. […]

[6] The applicant also cited and relied on the decision of the Ontario Court of Appeal in *Ferro v. Weiner*, 2019 ONCA 55. At para. 17 of *Ferro*, the Ontario Court of Appeal summarized the law as holding that the existence of a household is

evidenced by the extent to which its members "share the intimacy, stability and common purpose characteristic of a functioning family unit". The Court observed that the household is "constituted not only by its members' patterns of living with each other, but also by their settled intentions": at para. 18. To constitute a household, there must be intimacy, unity, and permanence: at para. 20.

[7] The arbitrator was guided by these principles, which were not disputed by the respondent. The arbitrator described the law as "settled" (reasons at para. 97). He acknowledged that the term "household" has been given a liberal and flexible interpretation, and that each case must be considered on its facts (reasons at para. 101). He accepted the applicant's submission that permanence is informative in assessing ordinary residence, but is not determinative (reasons at para. 144).

[8] Before the arbitrator, the applicant submitted that since September 2022, "she and her parents and boyfriend all lived as a family unit, as evidenced by everyone contributing to the functioning of the household, including buying groceries, cooking and cleaning" (reasons at para. 78). This arrangement came about after the applicant's son passed away in July 2019, at the age of 22. Additionally, the applicant asserted that "the fact that the living arrangement at the time of the Accident was temporary was of no consequence because there was no case law requiring a need for permanency to the mode of living" (reasons at para. 85).

[9] The respondent argued that the applicant's "evidence and that of her supporting witnesses was neither credible nor reliable" as evidenced by "social assistance and clinical records suggesting the Claimant was living alone in the three months leading up to the Accident" (reasons at paras. 87–89).

[10] The arbitrator concluded:

> 162. I recognize the legal principle that the Act and Regulation are benefit conferring so as to be construed broadly in favour of the insured or in this case the potential insured.
>
> 163. However such principle of interpretation does not in my view extend so far to as to require one to ignore the evidence adduced. The legislation must still be interpreted in accordance with settled jurisprudence: [*Ferro v. Weiner*, 2019 ONCA 55] at para. 22.

> 164. In summary the evidence does not support the conclusion that the Claimant and her boyfriend SC, or the Claimant and her father, BM, were customarily or in the settled routine of life, ordinarily residing together.
>
> 165. As such, the Claimant was not a member of a household of a person named in an owner's certificate or driver's certificate.
>
> 166. The relationship between the Claimant and SC was in its early stages such that the purpose of their residing together was temporary so as to allow the Claimant time to recover from the loss of her son, at which time SC would return to his own residence.
>
> 167. While they may have resided together, it cannot be said they were ordinarily residing together.
>
> 168. The fact they subsequently had the settled intention to live together does not impact their status as at the date of the Accident.
>
> 169. Similarly the Claimant's father stayed with the Claimant on a temporary basis for the specific purpose of providing emotional support to her, on the mutual understanding that he would return to his permanent home once she was functioning better.
>
> 170. Had it been the intention of the legislature that an insured for the purpose of UMP was to include persons in the circumstances of the Claimant, wording such as found in section 78 in respect to Part 7 benefits would have been employed in sections 148.1(1)(b) or b.1).
>
> 171. I thereby dismiss the Claimant's application for a declaration that she was an insured pursuant to section 148.1(1).

[11] The applicant filed the Notice of Application for leave and stay on July 25, 2023.

Legal Test

[12] Section 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 governs appeals from arbitration proceedings. Section 59 reads:

> **Appeals on questions of law**
>
> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
>
> (a) all the parties to the arbitration consent, or
>
> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> […]

> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.
>
> (5) If a justice of the Court of Appeal grants leave to appeal under subsection (4), the justice may attach to the order granting leave conditions that the justice considers just.
>
> […]
>
> [Emphasis added.]

[13] Section 59 of the *Arbitration Act* replaced s. 31 of the former *Arbitration Act*, R.S.B.C. 1996, c. 55. The wording for the test for leave to appeal is identical. Both versions of the *Arbitration Act* only allow for appeals on questions of law: *Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.,* 2021 BCCA 285 at para. 14; *Greg Dowling Architects Inc. v. J. Raymond Griffin Architect Inc.*, 2012 BCCA 366 at para. 3.

[14] Three requirements must be met before leave can be given to appeal an arbitration award:

> (1) the appeal must be based on a question of law;
>
> (2) the judge must be satisfied that one of the three circumstances identified in s. 59(4) exists; and
>
> (3) the judge must be prepared to exercise the residual discretion implicit in the phrase “the court may grant leave …”

MSI Methylation Sciences, Inc. v. Quark Venture Inc., 2019 BCCA 448 at para. 54.

Positions of the Parties

Applicant

[15] In her Memorandum of Argument on the leave application at para. 17, the applicant submits that leave should be granted because the arbitrator made the following five errors in the “application of the law”:

> a. failing to interpret the benefit-conferring UMP legislation in a broad and generous manner in favour of the Claimant so as to best ensure the attainment the legislation's objective to provide compensation to those who suffer loss when other legislative measures fail;
>
> b. placing undue weight on the fact that the Claimant considered the living arrangement to ultimately be temporary despite the fact that there was no evidence suggesting either the Claimant's parents or her boyfriend had made any plans to or had any intention of going back to their previous living arrangements in the near future and were settled in their way of life in the Vernon Apartment at the time of the Accident;
>
> c. placing undue weight on the fact that the Claimant considered the living arrangement to ultimately be temporary despite agreeing that permanence is not determinative to the issue;
>
> d. failing to properly interpret the phrase "ripened intention" in the context of the facts at hand; and
>
> e. erroneously analyzing the intent of the legislature by finding that had the legislature intended to cover persons like the Claimant in the UMP scheme, it would have used the language found in s. 78 of the Regulation.

[16] The applicant asserts, without elaboration, that these points all raise questions of law.

[17] The applicant then submits that the requirements under s. 59(4) of the *Arbitration Act* are satisfied because:

a) Section 59(4)(a) – proper interpretation of the Regulation is sufficiently important to justify the expense and time of court proceedings. The applicant suffered life-altering injuries and "substantial past and future losses" and would qualify for compensation if the Regulation were properly interpreted (Appellant's Memorandum of Argument at paras. 19–22).

b) Section 59(4)(b) – if the UMP scheme is not properly interpreted, British Columbians who do not hold a driver's license "…are at an increased risk of uncompensated loss compared to those who hold a driver's license" (Appellant's Memorandum of Argument at para. 23).

c) Section 59(4)(c) – "the proper interpretation of the *Regulation* is of general public importance as not only should the public understand who is and

> isn't covered by the UMP scheme, it is important too to ICBC to calculate risk" (Appellant's Memorandum of Argument at para. 24).

[18] In oral argument at the hearing of this application, the applicant modified her framing of the issues on the proposed appeal. She argues that the arbitrator's error was importing a requirement of permanence into his consideration of the settled intentions of the applicant's boyfriend and father. The applicant says that a person may be members of a household, even if they do not intend to permanently (that is, indefinitely) reside in a place. In short, the applicant says the arbitrator changed the legal test in applying it to the facts, and this constitutes an error of law.

[19] The applicant says that her new articulation of an extricable question of law is simply a variation of the error alleged in para. 17(d) of her Memorandum of Argument. It is not the case, the applicant now says, that the arbitrator simply placed undue weight on the factor of permanence. Rather, she says he applied the wrong legal test.

Respondent

[20] The respondent opposes the granting of leave to appeal for two reasons.

[21] First, the applicant has not identified a question of law. Specifically, the five "proposed points in issue involve alleged errors in the application of that law to the facts of this case" (Respondent's Memorandum of Argument at paras. 20–24). The respondent says that the applicant's attempt to recast the issue in para. 17(d) as a question of law in the course of the hearing did not succeed. Regardless of how the applicant states the point, the respondent says this case was entirely concerned with the application of settled law to the unique facts of this case.

[22] Second, that even if a question of law arose out of the Award, the applicant has failed to satisfy the criteria in s. 59(4) of the *Arbitration Act*. The respondent submits that the appeal has no chance of success, on either the reasonableness or correctness standard of review, and thus, does not meet the threshold set out in s. 59(4)(a). Additionally, the applicant's proposed points are not of general or public

importance due to the factual idiosyncrasies of this case and that the British Columbia's model for motor vehicle personal injury compensation shifted from a fault-based system to a no-fault system (Respondent's Memorandum of Argument at paras. 25–29).

Analysis

Is there a question of law?

Legal framework

[23] The threshold question on an application for leave to appeal from an arbitral award is whether questions of law "can be clearly perceived and identified": *Grewal v. Mann*, 2022 BCCA 30 at para. 32.

[24] Questions of law are "about what the correct legal test is." Questions of fact are "about what took place between the parties." Questions of mixed fact and law are about "whether the facts satisfy the legal test" (i.e., the application of a legal standard to a set of facts): *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43; *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 49; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26–27.

[25] This Court provided additional guidance on what constitutes an extricable question of law in the context of examining the scope of the right of appeal from an arbitral award in *MSI Methylation Sciences, Inc.* (at para. 72):

> … (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law…

[26] A question of statutory interpretation is normally a legal question: *Teal Cedar Products* at paras. 47, 50. However, questions about the application of a statute that

are “inextricably linked to the evidentiary record at the arbitration hearing” are questions of fact or mixed fact and law, if not pure questions of fact, and are not appealable: *Teal Cedar Products* at para. 51.

Discussion

[27] In considering whether the applicant has identified an extricable question of law arising from the award, I will begin with the applicant’s reframing of the issue stated in para. 17(d) of the Appellant’s Memorandum of Argument. While the applicant has not resiled from the position that all of the issues set out at para. 17 of her Memorandum of Argument raise questions of law, I understand her to place the greatest emphasis on the newly-framed issue.

[28] I am not persuaded that the newly-framed issue involves an extricable question of law arising from the award. As I have already reviewed, the law applied by the arbitrator was settled and non-controversial. The cases that the applicant cited to the arbitrator included consideration of permanence as a relevant factor—although not determinative—in applying the test to determine whether a person is a member of a household. The arbitrator had to assess the degree of permanence in the living arrangements between the applicant, her boyfriend and her father within the fact-specific circumstances of this case. There is no indication in the reasons that he misunderstood his task. On the contrary, the applicant acknowledges that the arbitrator correctly stated the applicable legal principles. The applicant points to paragraphs in the arbitrator’s conclusion that she takes issue with. However, she does not identify any passage in the arbitrator’s reasons that reflects that he altered the legal test in the course of applying it to the facts.

[29] The applicant’s real complaint is that the arbitrator’s application of the test should have led to a different outcome. This raises a question of mixed fact and law, and not a question of law.

[30] I turn to the remaining errors alleged by the applicant in her Memorandum of Argument (at para. 17):

a) Error (a): The applicant submits that the arbitrator failed "to interpret the benefit-conferring UMP legislation in a broad and generous manner…". In the framing of this issue, the applicant attempts to raise a question of law in respect of the interpretation of legislation. However, the essence of the applicant's complaint does not relate to the legal test to be applied under the legislation—which was not in dispute at the arbitration—but rather with the outcome of the arbitrator's application of that test to the evidence before him. The arbitrator recognizes the benefit-conferring nature of the UMP legislation and the need to interpret it broadly and generously in favour of the applicant (see reasons at para. 162). However, he concludes, that this principle does not allow him to ignore the evidence adduced (see reasons at para. 163). This point thus rests on the arbitrator's application of the facts relating to the particular circumstances of the parties within the framework of the correct legal test. It is a question of mixed fact and law.

b) Errors (b) and (c): Each of these alleged errors relate to the arbitrator's interpretation and weighing of evidence in the course of applying the legal test to the evidence. Under s. 28 of the *Arbitration Act* the arbitrator had the power to "decide all evidentiary matters, including the admissibility, relevance, materiality and weight of any evidence, and [to] draw such inferences as the circumstances justify." These alleged errors are integrally tied to the facts of the case such that their resolution would unlikely be useful to other litigants. Accordingly, they are properly characterized as questions of mixed fact and law: *MSI Methylation Sciences, Inc.* at para. 72.

c) Error (e): The fifth error relates to a discrete passage in the arbitrator's reasons for the award (at para. 170) where he notes the difference in legislative language between s. 148.1 of the Regulation (contained in

> Part 10, dealing with underinsured motorist protection) and s. 78 of the Regulation (contained in Part 7 dealing with accident benefits). The applicant argues that the arbitrator's reasoning in this paragraph is circular, and ignores the different policy considerations that underlie Part 10 and Part 7 of the Regulation. An allegation that an arbitrator has confused the purpose of a legislative provision may, in theory, raise a question of law. However, the arbitrator did not base his decision on an assumption that Part 7 and Part 10 of the Regulation have the same policy objectives. The basis of the arbitrator's decision is, as I have noted, the application of settled and undisputed legal principles to the facts of this case. Accordingly, this point as framed by the applicant is not a question of law that arises out of the Award: *MSI Methylation Sciences, Inc.* at paras. 86–88.

[31] In sum, the applicant's proposed grounds of appeal are all, at best, questions of mixed fact and law. The applicant has not identified a question of law arising out of the Award. As such, this Court has no jurisdiction to entertain the appeal.

Disposition

[32] The application for leave to appeal is dismissed. The respondent is entitled to its costs of the application from the applicant.

"The Honourable Madam Justice Horsman"