Extra-Provincial Application of Ontario's Priority Scheme

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The Ontario Court of Appeal has recently released *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382[1], which addresses the extra-provincial application of the Ontario *Insurance Act* in the priority dispute context. The decision was written by Justice Lauwers, who was joined by Justice Paciocco and Justice Fairburn.

Overview

The claimant, Patricia Soloway, was catastrophically injured in a motor vehicle accident in Nunavut. She was driving a vehicle covered by a Nunavut policy issued by Travelers Insurance Company of Canada ("Travelers") to the Government of Nunavut. Under that policy, Ms. Soloway was entitled to Nunavut Statutory Accident Benefits.

Ms. Soloway, however, was not ordinarily resident in Nunavut, as she was there acting in a temporary capacity as a nurse supervisor. As a resident of Ontario, she owned a car plated in Ontario and insured by CAA Insurance Company ("CAA") under the Ontario Standard Automobile Policy ("OAP"). Under the terms of this policy, Ms. Soloway was contractually entitled to claim Ontario statutory accident benefits, which are more generous than those under the Nunavut policy.

The CAA coverage, as per the policy, covers an insured wherever they drive in North America, meaning that the coverage followed Ms. Soloway to Nunavut. As a result, the claimant was entitled to benefits under either policy, and chose the benefits available under the OAP.

CAA began paying those benefits, but pursued Travelers for reimbursement under Ontario's regime as a form of a "statutory cause of action". CAA was successful in their

claim in an arbitration, which was upheld on appeal. Travelers then further appealed to the Court of Appeal.

Issue on Appeal

The main issue was whether Travelers should be considered an "Ontario insurer" for the purpose of the priority provisions of the Ontario *Insurance Act*[2].

The Arbitrator had held that Travelers was an "Ontario insurer" because it was "licensed to undertake automobile insurance in Ontario" pursuant to the Ontario *Insurance Act*. He further held that Travelers was bound by the Power of Attorney and Undertaking ("PAU"), which was signed by Travelers in 1964. The Arbitrator held that, as a signatory to the PAU, Travelers should be considered an "Ontario insurer". As Travelers insured the vehicle that the claimant had been an occupant of when she was injured, Travelers stood in priority to CAA.

Court of Appeal

Justice Lauwers indicated that the Arbitrator made several serious legal errors and proceeded to review his decision on a standard of correctness.

Justice Lauwers noted the application of the Supreme Court of Canada's decision in *Unifund Assurance Company of Canada v. Insurance Corporation of British Columbia*, 2003 SCC 40[3]. The governing principle derived from the *Unifund* decision is that Ontario's insurance laws do not have extraterritorial effect. Allowing the Arbitrator's decision to stand would, as Justice Lauwers noted, "turn *Unifund* on its head".

PAU Signatory

Justice Lauwers analyzed the Arbitrator's holding that, as a signatory to the PAU, Travelers should properly be considered an "Ontario insurer". Justice Binnie, for the Supreme Court in the *Unifund* decision, had previously explained that the PAU was "about enforcement of insurance policies" and was not to be used to assist insurance companies to seek recovery in circumstances mirroring those in this decision. The PAU's purpose is "to protect insureds, not insurers".

As a result, Justice Lauwers rejected this holding, finding that the "use and application of the PAU in favour of insureds is context specific". If Ms. Soloway had driven her Nunavut vehicle in Ontario, and sustained injury in Ontario, Justice Lauwers noted that Travelers would have had to provide her with the Ontario-level benefits as per the PAU. Absent such circumstances, the PAU was of no benefit to CAA's argument.

Travelers as an "Ontario Insurer"

CAA also argued that Travelers was an "Ontario insurer" subject to the priority scheme in section 268 as they operated in Ontario. Justice Lauwers, in rejecting this argument, explored what the term "Ontario insurer" actually means.

The term has no technical legal meaning and is simply derived from a comment made by Justice Binnie in the *Unifund* decision. Justice Binnie, in reference to the requirement that disputes about indemnification are to be resolved by arbitration under the *Insurance Act*, had commented that "if the appellant were an Ontario insurer, it would be required to arbitrate Unifund's claim".

In the arbitral decision, CAA had provided evidence that Travelers was licensed to undertake automobile insurance in Ontario and that it had offices in Ontario. In combination with Justice Binnie's comment, the Arbitrator used the evidence offered by CAA as proof that the Nunavut insurer should be considered an "Ontario insurer" and subject to the Ontario regime.

Justice Lauwers disapproved of this reasoning, noting that many of Canada's car insurers are licensed to write car insurance across the country. He specifically stated that "mere licensing, or the presence of an office, does not convert these insurers into Ontario insurers", and held that Ontario licensing could not be the sole reason to integrate Travelers into the priority regime.

Statutory Regime

After rejecting the reasoning of the Arbitrator, the Court of Appeal refocused on the statutory regime and the supporting case law to explain why the priority regime does not apply to Travelers.

The relevant provisions of the *Insurance Act* stipulate that policies issued in Ontario, and vehicles operated in Ontario under policies issued in another province, are governed by the *Insurance Act*. Vehicles operated in another province, under a policy issued in another province, are clearly not governed by Part VI for the purposes of the statutory accident benefits regime. This is because the priority rules stipulated by section 268 of the *Insurance Act* only apply if both insurers are subject to those rules.

Section 268(1) provides guidance, stipulating that the priority rules apply to "every contract evidenced by a motor vehicle liability policy". This, however, is limited by the definition of "contract" in section 224 and by section 226.1, which in tandem restrict the situations where the priority regime would apply to instances where a vehicle that is registered and insured extra-provincially is *actually operated* in Ontario.

To further emphasize that section 268 does not apply to Travelers, Justice Lauwers explained that section 226(2) functions to limit the application of the *Insurance Act* by providing that Part VI of the *Act* does not apply to vehicles that are *not required* to be registered under the *Highway Traffic Act*.

As the vehicle was not being operated in Ontario, Ms. Soloway did not need to be registered in Ontario and her policy did not need to comply with Ontario's mandatory coverage provisions. Accordingly, the Court of Appeal held that the Arbitrator erred in applying section 268 to Travelers and to the Nunavut policy.

Justice Lauwers went a step further in his analysis, even after finding that section 268 was improperly applied. The Court of Appeal reviewed whether, even if section 268 applied, the Arbitrator applied the section properly, holding that he did not.

Firstly, the Arbitrator held that if the claimant had "regular use" of the vehicle she was operating at the time of the accident, she would be considered a deemed named insured. If she was considered a named insured under the CAA policy and a deemed named insured under the Travelers policy, section 268(5.2) would apply and Travelers would stand in priority as the insurer of the vehicle in which Ms. Soloway was an occupant. The Arbitrator found that the claimant was a deemed named insured, as she had "regular use" at the time of the accident, and thus held that Travelers stood in priority.

In finding that the Arbitrator misapplied the law, Justice Lauwers noted that no legal basis existed for the Arbitrator to force Travelers to pay more than the Nunavut limits under its Nunavut policy. Further, the Arbitrator did not consider Nunavut law, which does not include the concept of a "deemed named insured". Had the Arbitrator considered Nunavut law, and the Nunavut policy, CAA would have stood in priority due to the Ms. Soloway's choice to claim benefits from CAA.

Primmum Insurance Co. v. Allstate Insurance Co.

CAA also argued that the Court of Appeal should apply the reasoning in *Primmum Insurance Co. v. Allstate Insurance Co.*, 2010 ONSC 986[4]. In that decision, the Court of Appeal upheld the application judge's determination that the loss transfer provision in section 275 applied to an accident that occurred in North Carolina.

The application judge stated that, since both insurers are registered in and carry on business in Ontario, they may claim loss transfer, "even if the accident occurred in a non-loss-transfer jurisdiction". The application judge also specifically found that Allstate, which had issued a policy to the defendant in North Carolina, was an "Ontario insurer".

Justice Lauwers dismissed this argument, holding that *Primmum* does not discuss the priority regime and deals only with loss transfer, a scheme with an underlying purpose distinct from the priority rules.

As a result, the appeal was dismissed and Travelers was not required to reimburse CAA, nor to take over payment of Ms. Soloway's ongoing benefits.

Takeaway

The Court of Appeal provided much needed guidance for priority disputes involving accidents that occur outside of Ontario. Specifically, the Court noted that the term "Ontario insurer", used by Justice Binnie in *Unifund*, does not apply as a matter of fact to insurers that have offices in Ontario. Mere licensing, or the presence of an office, does not convert these insurers into Ontario insurers and does not result in the Ontario *Insurance Act* governing all of the policies they underwrite.

Instead, the Court of Appeal seems to be calling for a more nuanced approach, involving an analysis of the policies involved and the statutory insurance scheme in the jurisdiction where the accident. In this case, as the accident occurred in Nunavut, with a Nunavut vehicle and policy, the Court of Appeal declined to consider Travelers an "Ontario insurer".

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[1] *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382, 2020 CarswellOnt 8099.
[2] *Insurance Act*, R.S.O. 1990, c. I.8.
[3] *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63.
[4] *Primmum Insurance Co. v. Allstate Insurance Co.*, 2010 ONSC 986, 100 O.R. (3d) 788.