

Insurance

Court of Appeal rules on out-of-province application of Ontario's priority regime

By **Matthew Umbrio**



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(September 17, 2020, 10:02 AM EDT) -- In *Travelers Insurance Company of Canada v. CAA Insurance Company* 2020 ONCA 382, the Court of Appeal addressed the extra-provincial application of the Ontario *Insurance Act* in the priority dispute context. The decision provides much needed guidance for priority disputes involving accidents that occur outside Ontario.

Background

Patricia Soloway was injured in a motor vehicle accident in Nunavut. She was insured under a Nunavut policy issued by Travelers Insurance Company of Canada (Travelers) to the government of Nunavut (the Nunavut policy). Soloway was entitled to statutory accident benefits (SABs) under the Nunavut policy.

Soloway, however, was not ordinarily resident in Nunavut, as she was there acting in a temporary capacity. 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).

The CAA, as per the policy, covered an insured wherever they drove in North America, meaning that the coverage followed Soloway to Nunavut. As a result, she was entitled to benefits under either policy and chose the more generous 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 its claim in an arbitration, which was upheld on appeal. Travelers then further appealed to the Court of Appeal.

Arbitral decision

The arbitrator concluded that Travelers was an "Ontario insurer" because it was "licensed to undertake automobile insurance in Ontario" pursuant to the Ontario *Insurance Act*.

In any event, the arbitrator determined that, as a signatory to the Power of Attorney and Undertaking (PAU), Travelers should be considered an Ontario insurer. Pursuant to Ontario's priority scheme, as Travelers insured the vehicle that Soloway had been an occupant of when she was injured, Travelers was responsible for the payment of her SABs.

Court of Appeal

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

Power of Attorney and Undertaking signatory

The Court of Appeal relied on 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. The governing principle derived from the *Unifund* decision is that Ontario's insurance laws do not have

extraterritorial effect.

Justice Ian Binnie, for the Supreme Court in *Unifund*, had previously explained that the PAU was "about enforcement of insurance policies" and that the PAU's purpose is "to protect insureds," not insurers.

As a result, the Court of Appeal rejected the arbitrator's conclusion that as a signatory to the PAU, Travelers was an Ontario insurer, finding instead that the "use and application of the PAU in favour of insureds is context specific."

If Soloway had driven her Nunavut vehicle in Ontario, and sustained injury in Ontario, the court noted that Travelers would have had to provide her with the Ontario-level benefits as per the PAU. Absent those exact 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 s. 268 as it operated in Ontario. In rejecting this argument, the Court of Appeal 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. In reference to the requirement that disputes about indemnification are to be resolved by arbitration under the *Insurance Act*, Justice Binnie had commented that "if the appellant were an Ontario insurer, it would be required to arbitrate Unifund's claim."

The Court of Appeal rejected the assertion that, since Travelers was licensed to undertake automobile insurance in Ontario and had offices in Ontario, it was necessarily an Ontario insurer. The court 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.

This is the first part of a two-part series.

Matthew Umbrio is an associate lawyer at Rogers Partners LLP. His civil litigation practice focuses on insurance defence matters including motor vehicle accident claims, property damage claims, occupier's liability and product liability.

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