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Insurance

More on out-of-province application of Ontario's priority regime

By **Matthew Umbrio**

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(September 23, 2020, 2:48 PM 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 (the Nunavut policy) issued by Travelers Insurance Company of Canada (Travelers), as well as an Ontario policy issued by CAA Insurance Company (CAA), as she was not ordinarily resident in Nunavut.

The CAA coverage, as per the policy, covered an insured wherever they drove in North America. As a result, she was entitled to benefits under either policy and chose the more generous benefits available under the Ontario policy.

CAA began paying those benefits, but pursued Travelers for reimbursement through Ontario's priority regime. CAA was successful in their claim in an arbitration, which was upheld on appeal. Travelers then further appealed to the Court of Appeal.

Statutory regime

The relevant provisions of the *Insurance Act* (the Act) stipulate that policies issued in Ontario, and vehicles operated in Ontario under policies issued in another province, are governed by the Act.

With respect to the statutory accident benefits schedule (SABS) regime, vehicles operated in another province, under a policy issued in another province, are clearly not governed by Part VI because the priority rules stipulated by s. 268 of the Act only apply if both insurers are subject to those rules.

Section 268(1) stipulates that the priority rules apply to "every contract evidenced by a motor vehicle liability policy." This is limited by the definition of "contract" in s. 224 and by s. 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.

The Court of Appeal further explained that s. 226(2) functions to limit the application of the 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, 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 s. 268 to Travelers and to the Nunavut policy.

Even after finding that s. 268 was improperly applied, the court reviewed whether, if s. 268 did apply,

the arbitrator applied the section properly.

Firstly, the arbitrator held that since Soloway had "regular use" of the vehicle she was operating at the time of the accident, she would be considered a deemed named insured. As she was considered a named insured under the CAA policy and a deemed named insured under the Travelers policy, s. 268(5.2) would apply and Travelers would stand in priority as the insurer of the vehicle in which Soloway was an occupant.

In finding that the arbitrator misapplied the law, the Court of Appeal 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 these two issues, CAA would have stood in priority due to Soloway's choice to claim benefits from CAA.

Primmum Insurance Co. v. Allstate Insurance Co.

CAA argued that the Court of Appeal should apply the reasoning in *Primmum Insurance Co. v. Allstate Insurance Co.* 2010 ONSC 986. The Court of Appeal 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 Soloway's ongoing benefits.

Conclusion

The Court of Appeal provided much needed guidance for priority disputes involving accidents that occur outside Ontario. Specifically, the court noted that the term "Ontario insurer," used by Justice Ian Binnie in *Unifund Assurance Company of Canada v. Insurance Corporation of British Columbia* 2003 SCC 40, 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 occurred.

This is the second of a two-part series. Part one: Court of Appeal rules on out-of-province application of Ontario's priority regime.

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