

COURT FILE NO.: CV-0800-358-137-0000

DATE: 20090519

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RBC GENERAL INSURANCE COMPANY, Applicant
ING INSURANCE COMPANY OF CANADA, Respondent

BEFORE: G.R. Strathy J.

COUNSEL: *Harry P. Brown and Jason Frost for the Applicant*

Douglas A. Wallace for the Respondent

DATE HEARD: April 16, 2009

ENDORSEMENT

[1] This appeal from a decision of an arbitrator raises an interesting question concerning the law applicable to an accident benefits priority dispute between two auto insurers. The question arises because there is a difference between the law of Ontario and the law of Alberta concerning which insurer is required to pay benefits to a person injured in an automobile accident. It is an issue of first impression that is of some importance to the parties as they do business in both provinces. The arbitrator found that Ontario law applied, even though the accident occurred in Alberta, because the policy under which the injured party claimed was issued in Ontario.

Factual Background

[2] On November 10, 2006, Kenneth and Emma Flaig, residents of Ontario, were involved in a motor vehicle accident in Alberta. They were passengers in a vehicle owned and operated by an Alberta resident. That vehicle was registered in Alberta and was insured under a policy issued in Alberta by ING Insurance Company of Canada ("ING"). Mr. and Mrs. Flaig were named insureds under their own standard Ontario automobile policy ("O.A.P. 1") issued by the applicant RBC General Insurance Company ("RBC"). ING and RBC are licensed to carry on business in both Ontario and Alberta.

[3] Mr. and Mrs. Flaig were badly injured as a result of the accident. They submitted an application for accident benefits to their own automobile insurer, RBC, in Ontario. Although they had a right to apply for Alberta benefits under the ING policy, they did not do so. RBC

made payments to the Flaigs and gave notice to ING of its intention to dispute priority in accordance with O. Reg. 283/95, which I shall discuss shortly.

[4] The matter went to arbitration by agreement between the parties under the *Arbitration Act, 1991*, S.O. 1991, c. 17. The arbitrator determined that Ontario law applied to the dispute and that, as a result, RBC was responsible to pay statutory accident benefits to the Flaigs. I will discuss the arbitrator's reasons in more detail below.

[5] The arbitration agreement provided that an appeal would lie to a judge of this Court on any point of fact, or on a point of law, or on a point of mixed fact and law.

No-Fault Overview

[6] Under the Ontario *Insurance Act*, R.S.O. 1990, c. 1.8, a person injured in an automobile accident is entitled to "no-fault" benefits. The injured party can make application to any one of a number of insurers, including his or her own automobile insurer and the insurer of the automobile in which he or she was an occupant.

[7] The Ontario *Insurance Act* contains a set of cascading rules to determine which insurer is ultimately liable to pay statutory accident benefits, the priority insurer being the insurer of an automobile in respect of which the injured person is an insured (ss. 268(2)).

[8] The statutory scheme provides that the first insurer to receive an application for benefits must pay the claim, but may claim indemnity for the benefits from the priority insurer. Ontario Regulation 283/95 stipulates that priority disputes between insurers are to be determined by arbitration under the *Arbitration Act, 1991*. The result is that the injured person receives benefits immediately on filing an application and the responsibility between insurers is sorted out through arbitration. Although not directly relevant to this case, there are "loss transfer rules", which allow the insurer paying benefits to be reimbursed by a second party insurer for all or part of the claim when the second party insurer's policyholder was at least partly at fault for the accident. This allows for the balancing of the costs of no-fault benefits between different classes of vehicles.

[9] The regime in Alberta is different. The Alberta *Insurance Act*, R.S.A. 2000, c. I-3, provides that accident benefits are paid by the insurer of the automobile in which the injured person is an occupant or, in the case of a pedestrian, the insurer of the automobile that struck him or her. Section 644 of the Alberta statute provides that an injured occupant of a vehicle, who is not named in the vehicle's insurance policy, is deemed to be a party to the insurance policy and is entitled to recover under the contract in the same manner as if he or she had been a named insured. Unlike the situation in Ontario, there are no rules to determine priority between insurers and there is no dispute resolution process similar to the arbitration procedure under O. Reg. 283/95. Presumably, this is because there is only one insurer liable in the case of an occupant of the automobile. The only issue, which is rare but not unknown, is whether the injured party is an occupant or a pedestrian: see, for example, *Alberta Motor Assn. Insurance Co. v. Allstate Insurance Co.*, [2007] 3 W.W.R. 688, 45 C.C.L.I. (4th) 46 (Alta. Q.B.).

[10] It is acknowledged that the Flaigs had the right to claim no-fault benefits from their own insurer, RBC, which issued a policy that provided them with coverage in any vehicle, anywhere in Canada. The Flaigs also had a right to make a claim under the policy issued by ING in Alberta, and they were statutorily deemed to be parties to that contract. They chose not to make a claim under that contract. Section 268(4) of the Ontario *Insurance Act* provides that where a person has recourse against one or more insurers for the payment of benefits, the person may, "in his or her absolute discretion" decide the insurer from which he or she will claim the benefits. There were good reasons why the Flaigs might have claimed under the RBC policy. Perhaps they felt more comfortable dealing with their own insurer in their home province; perhaps they thought that the Ontario benefits were "richer" as Mr. Wallace asserts. The reasons for their decision matter not. They had a perfect right to claim under their policy and they did so. RBC paid the benefits as it was contractually and statutorily obliged to do. RBC then sought reimbursement from ING for the benefits it had paid and also sought to charge ING with responsibility for payment of any future benefits.

Arbitrator's Decision

[11] RBC submitted to the arbitrator, as it did before me, that the determining factor in inter-provincial insurance disputes of this kind is the jurisdiction where the motor vehicle accident occurs. RBC relies on the decision of the Supreme Court of Canada in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110. ING's position was that the Court should apply the law applicable to the insurance contract under which the claim is made.

[12] The arbitrator noted that s. 123 of the Ontario *Insurance Act*, provides that a contract of insurance issued in Ontario to a resident of Ontario shall be construed according to the law of Ontario. He then noted that the O.A.P. 1 form incorporates the *Statutory Accident Benefits Schedule* ("SABS") set out in O. Reg. 403/96 of the *Insurance Act*, which provides, in s. 3, that the benefits are to be provided in respect of accidents that occur anywhere in Canada or the United States and are to be paid by the insurer that is liable to pay under ss. 268(2) of the *Insurance Act*. Section 57 of the SABS provides that if a person is injured in another province of Canada or in the United States, the person may elect to receive the benefits under the Regulation or the benefits that would be available to a person resident in the jurisdiction where the accident occurred, unless the person receives benefits under the law of the jurisdiction in which the accident occurred. The upshot of this is that the Ontario *Insurance Act* contemplates that a person insured under an Ontario insurance policy, who is injured in another province or state, has three options: he or she (i) can receive benefits under the law of the jurisdiction where the accident occurred, if available; (ii) can claim Ontario benefits under their own policy; or (iii) can claim, under their own policy, the benefits that would have been available in the jurisdiction where the accident occurred.

[13] The arbitrator found that the Flaigs were "named insureds" under the Ontario policy issued by RBC and that under the Ontario priority rules, RBC was the priority insurer.

[14] The arbitrator found that the matter was not governed by the decision of the Supreme Court of Canada in *Tolofson v. Jensen*. That was a case dealing with inter-provincial tort disputes, in which the Supreme Court found that the law of the place where the tort occurred – the *lex loci delicti* – should generally apply. The arbitrator found that the matter was expressly dealt with in Ontario by s. 57 of the SABS:

Section 57 of Ontario Regulation 403/96 deals directly with the interaction of other systems, and accidents outside of Ontario. There is an election for the injured person to select coverage from a specific insurance carrier. If the election is made, the law of the Province of Ontario would apply directly to payments of statutory accident benefits. I find that section 57 was put in place so that Ontario residents could look directly to their own insurers for statutory accident benefits. If they elected to do so, they would receive Ontario statutory accident benefits from their Ontario insurers, under the Ontario contract, and in Ontario.

[15] The nub of the arbitrator's reasoning was that the dispute was a matter of contract law and not tort law. For that reason, he found that the law of the place of the contract applied. He made reference to the decision of Newbould J. in *Royal and Sunalliance Insurance Company v. Wawanesa Mutual Insurance Company* (2006), 84 O.R. (3d) 449, [2006] O.J. No. 5131 (S.C.J.). That was a "loss transfer" case, in which it was found that the law of Ontario, not the law of Vermont where the accident occurred, applied to the allocation of the cost of benefits between insurers. The arbitrator stated:

In the *Royal* decision, the Ontario insured exercised his election to obtain Ontario statutory accident benefits and the Court found that it was not necessary to consider Vermont tort law in arriving at its decision. The Court chose not to apply the *Tolofson* analysis. I likewise find that it is not necessary to look to Alberta law in this matter in that the Flaigs had made their election pursuant to the Ontario Legislation and Ontario law dictates RBC is to respond to the application for accident benefits.

[16] In conclusion, the arbitrator found that the Flaigs were entitled to accident benefits in both Ontario and Alberta and that they elected to submit their application to their Ontario insurer, RBC, as they were entitled to do. The only application for benefits was made to RBC and, as the priority insurer under Ontario law, RBC was required to pay the benefits.

[17] An issue was raised before the arbitrator as to whether ING had "deflected" the claim to RBC by telling the claimants that they should submit their application for benefits to their own insurer. He found that there had been no deflection. This was a factual finding to which there was no challenge before me.

Standard of Review

[18] The parties agree that the standard of review on an appeal from the arbitrator on a question of law is one of correctness: *Lombard Canada Ltd. v. Royal & SunAlltance Insurance Co.* (2008), 94 O.R. (3d) 62, (S.C.J.); *ACE INA Insurance v. Co-operators General Insurance Co.*, [2009] O.J. No. 1276 (S.C.J.).

Submissions of the Parties

[19] RBC submits that the arbitrator failed to answer the question put to him. It says that the Flaigs were in fact parties to two contracts – the first their own policy in Ontario and the second being their “deemed” contract in Alberta. It submits that in focusing on the question of “election”, the arbitrator failed to answer the right question – namely, which law applied to the dispute between insurers as to priority. Mr. Brown submits that priority is not a matter of “election”, it is a matter of law that must be determined according to conflict of laws principles and with regard to the relevant legislation. He submits that RBC can require ING to pay the benefits that it is required to pay under Alberta law under its “deemed” contract with the Flaigs.

[20] ING submits that the arbitrator’s conclusions were correct and reasonable. It notes that under the Ontario insurance regime there is a set of rules to determine which insurer is in priority to pay SABS. Where there is a dispute as to priority, O. Reg. 283/95 mandates a dispute resolution process between the insurers through private arbitration. This is, in effect, a statutory cause of action by one insurer against another. There is no such cause of action under Alberta law. In Alberta, the insurer of the vehicle in which the insured person is an occupant pays benefits. There is no priority dispute resolution process in the Alberta statute. In this case, RBC is pursuing a statutory claim against ING under O. Reg. 283/95. It would serve no purpose to look to Alberta law to settle a dispute between two Ontario insurers arising from a claim made under an Ontario statute, particularly where Ontario law contemplates payments of accident benefits by an Ontario insurer to its insured when an accident occurs in another province. Both the Ontario and Alberta schemes contemplate that only one insurer will pay benefits. Benefits must be paid by either RBC or ING but not both. Neither insurer is permitted to deduct the benefits paid by the other.

[21] Counsel for ING submits that the accident benefits payable under Ontario law are far richer than those under Alberta law and that to apply Alberta law would prejudice the Flaigs. The arbitrator made no finding to that effect and I am not prepared to come to that conclusion.

Analysis

[22] The difficult issue in many conflict of laws cases is not finding the right answer – it is asking the right question. The question answered by the arbitrator was: “Is the law of Ontario or the law of Alberta applicable to the within dispute?” It seems to me that the starting point is to ask “What is the legal basis of the dispute?”

[23] Before turning to this question, I will briefly examine three key decisions that have a bearing on the issue before me.

[24] In *Tolofson v. Jensen*, one of the two underlying disputes at issue was a tort case raising the question of the law applicable to a motor vehicle accident involving parties resident in different provinces. The Supreme Court held that the law of the place where the tort occurred – the *lex loci delicti* – would apply. Apart from being sound on principle, the rule was certain, easy to apply and predictable. In addition, it conformed with the ordinary expectation of people that they will be governed by the law of the place where they happen to be at a given time.

[25] Conflict of laws issues were again considered by the Supreme Court of Canada in the more recent case of *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63 ("*Unifund v. ICBC*"). The issue in that case was whether an Ontario insurer, which had paid statutory accident benefits to its Ontario insured who was injured in a British Columbia accident, could recover under the Ontario "loss transfer" provisions from the British Columbia insurer of the vehicles involved in the accident. Ontario residents were injured in British Columbia when their rented car was involved in an accident with a truck. Both the rented car and the truck were insured with the Insurance Corporation of British Columbia ("ICBC"). The claimants applied for and received no-fault benefits under their own Ontario auto insurance policy, issued by Unifund. Under s. 275 of the Ontario *Insurance Act*, the payor of no-fault benefits is entitled to indemnification (loss transfer) from the insurer of any heavy commercial vehicle involved in the accident and Unifund applied to the Ontario Superior Court for the appointment of an arbitrator to determine the issue. ICBC moved for a stay of the arbitration on several grounds, one of which was that the Ontario scheme could not apply to it. The motion judge granted the stay, but the Court of Appeal held that an arbitrator should be appointed, who could then deal with the constitutional and jurisdictional issues. The Supreme Court of Canada allowed the appeal, finding that the Ontario insurance scheme was inapplicable to ICBC and that an arbitrator had no authority or jurisdiction to deal with the claim.

[26] Justice Binnie, giving the judgment of the majority of the Supreme Court, noted at paras. 9 and 10 that Unifund's claim was purely statutory in nature:

Unifund's problem is to find a cause of action. In this appeal, we are dealing only with Unifund's quite separate and distinct claim under s. 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABs under the Ontario Act.

It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC, in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

[27] Later, at para. 27, he stated that:

While at one level, the argument is about which court has jurisdiction over the dispute (and if more than one court qualifies, then whether

Ontario is the convenient forum for its resolution), the underlying issue is whether, in light of the territorial limitation on provincial legislation, the respondent, Unifund, has a viable cause of action at all against the out-of-province appellant. If it is concluded, as the constitutional question asks, that s. 275 of the Ontario Act is "constitutionally inapplicable to the appellant ... [because of] territorial limits on provincial jurisdiction", then Unifund's action under the Ontario Act should be stopped irrespective of where it is brought.

[28] Justice Binnie noted that, unlike the situation in Ontario, there are no loss transfer provisions in the British Columbia no-fault plan, because ICBC is the only provider of motor vehicle insurance in that province.

[29] The majority of the Supreme Court concluded that the loss transfer provisions of the Ontario *Insurance Act* were not constitutionally applicable to ICBC in the circumstances of the case and there was not a sufficient connection between ICBC and Ontario to make them applicable – ICBC did not sell insurance in Ontario, its insured vehicles were not in Ontario, and the accident did not take place in Ontario. Justice Binnie stated, at para. 83:

The most that can be said for the respondent in this case is that the fact of a motor vehicle accident in British Columbia triggered certain payments in Ontario under Ontario law. However, the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (the motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of "elsewhere". It can also be said that these payments in Ontario, in turn, triggered a deduction of an equivalent amount under the laws of British Columbia. Again, however, the decision of the British Columbia legislature to attach legal consequences (the deduction) in that province to an event that occurred in Ontario (the SAB payments) does not bring the appellant (beneficiary under the British Columbia legislation) into the orbit of the Ontario legislature for the purpose of taking away the British Columbia benefit in favour of an Ontario insurance company.

[30] The third decision, which was applied by the arbitrator, is that of Newbould J. in *Royal & Sunalltance Insurance Co. v. Wawanesa Mutual Insurance Co.*, referred to above. In that case, the driver of a truck was involved in an accident in Vermont. He applied for and received no-fault benefits under the insurance policy on his own personal automobile, which was insured by Wawanesa. The truck he was driving at the time of the accident was licensed and registered in Ontario and insured under a policy issued by Royal in Ontario. Wawanesa claimed against Royal under the loss transfer provisions of s. 275 of the Ontario *Insurance Act*. Royal argued, on an appeal from an arbitrator's decision, that as the accident occurred in Vermont, the law of Vermont – the *lex loci delicti* – should apply and, as there were no loss transfer provisions in

Vermont, Wawanesa had no right to claim against Royal. The arbitrator had rejected that submission and had held that Wawanesa had the right to claim.

[31] Justice Newbould pointed out that, unlike *Tolofson v. Jensen*, the case before him was not a tort claim. He stated, at para. 14:

That is not the issue that is alive between Wawanesa and Royal. It is not a tort claim. Rather, the claim by Wawanesa is a statutory claim under section 275 of the [Ontario *Insurance*] Act that is a separate and distinct claim from any underlying tort claim that might be brought between the parties involved in the accident. There would be no purpose served in this case by looking to the law of Vermont to settle a dispute between two Ontario insurers arising from a claim made under the Act, an Ontario statute.

[32] Referring to *Unifund v. ICBC*, including the extracts at paras. 9 and 10 of Justice Binnie's judgment quoted above, Justice Newbould stated, at para. 17 of his judgment, that:

... a claim under section 275 of the Act is separate and distinct from the underlying tort action and the allocation between insurers under this section is not to be made by a consideration of general principles of tort law but by the rules set out in the Ontario regulations.

[33] He concluded, at paras. 19 and 20, that the claim was governed by Ontario law and not by Vermont law:

In the case at bar, the arbitrator was not dealing with a tort claim between the parties to the Vermont accident but rather was dealing with the second leg of the statutory benefits scheme under the Act requiring an allocation of the cost between two Ontario insurers. An analysis of underlying Vermont tort law is not of any assistance in determining that issue, nor is it of assistance to consider that under the Vermont accident benefits legislation there is not a loss transfer provision that allocates the cost of benefits paid under that Vermont legislation between insurers.

In my view the statements of Justice Binnie in *Unifund v. ICBC* govern the results of the case at bar and Royal is bound by the provisions of section 275 of the Act. Therefore the result reached by the arbitrator was correct, albeit for the wrong reasons.

[34] Against this background, I return to the question I asked earlier in these reasons: "What is the legal basis of the dispute?" The nature of the dispute and its legal basis must be identified in order to determine the applicable law.

[35] The claim by RBC is based squarely on the priority provisions of s. 268 of the *Insurance Act* and O. Reg. 283/95, which provides a mechanism for the resolution of priority disputes. It is not a tort claim. It is similar to the statutory loss transfer scheme under consideration in *Unifund v. ICBC* and in *Royal & Sunalliance Insurance Co. v. Wawanese Mutual Insurance Co.*, in the sense that it is a purely statutory remedy that allows an insurer to be reimbursed by another insurer for no-fault benefits that it is required to pay under its own policy. Without that remedy, the insurer paying benefits, under its own contract with its insured, would have no means of recovering contribution from the other insurer. As Binnie J. said in *Unifund v. ICBC*, RBC either has a statutory cause of action against ING or it has no cause of action at all.

[36] Mr. Brown, on behalf of RBC, submits that the central issue is whether the Ontario or Alberta priority rules apply to the dispute. He submits that the Alberta "statutory priority rules" should apply because the loss occurred in Alberta, in a vehicle owned, registered and insured in Alberta. In my view, this proposition is flawed, in part, because there are no statutory priority rules in Alberta that are comparable to s. 268 of the *Insurance Act* of Ontario. There is no statutory cause of action in Alberta. There is no need in Alberta for a mechanism to determine priority disputes because there is really only one insurer liable – the insurer of the vehicle in which the injured person was an occupant. Leaving aside the issue of whether the person is an occupant or a pedestrian, there is nothing in the Alberta statute or, apparently, in the common law, that allows an insurer that has paid no-fault benefits to recoup them from another "priority" insurer.

[37] Nor do I accept the submission of the applicant that the issue is a matter of choice of law, either the law of Ontario under the contract between RBC and the Flaigs or the law of Alberta under the "deemed" contract between the Flaigs and ING. First, the Flaigs chose not to avail themselves of the deemed contract. Had they chosen to do so, they would have received benefits and there would be no doubt that ING would have been obliged to pay the benefits without recourse to RBC. Second, the right to claim under the ING contract was the Flaigs' right, not RBC's right. No provision of Alberta law has been identified that gives an insurer in the position of RBC the right to claim indemnity for benefits that are properly payable under RBC's policy. The Alberta case referred to by counsel for RBC, *Alberta Motor Assns. Insurance Co. v. Allstate Insurance Co.*, above, involved a question, common to both policies, as to whether the injured party was an occupant or a pedestrian. If the claim was payable under one policy, it was not payable under the other. In this case, the claim is payable under both policies.

[38] Finally, I do not accept the submission on behalf of RBC that this is an impermissible extra-territorial application of Ontario law, as was found to be the case in *Unifund v. ICBC*. In this case, both insurers carry on business in Ontario and are subject to Ontario law and the jurisdiction of Ontario courts.

[39] In this case, RBC acknowledged from the outset, at it was contractually and statutorily bound to do, that it had an obligation to pay the no-fault claim made by the Flaigs. It did not take the position that the claim was governed by Alberta law for the obvious reason that its policy was issued in Ontario and was subject to Ontario law. It seems to me that the only possible choice of law for the determination of priorities is the law of Ontario, being the law of the policy

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under which the benefits were paid and under which the claim for indemnity is being asserted. This conclusion is consistent with that reached by Newbould J. in *Royal & Sunalliance Insurance Co. v. Wawanesa Mutual Insurance Co.* at para 14: "There would be no purpose served in this case by looking to the law of [another jurisdiction] to settle a dispute between two Ontario insurers arising from a claim under the [*Insurance*] Act, an Ontario statute".

[40] The procedure followed was an arbitration, ostensibly pursuant to s. 268 of the Ontario *Insurance Act*. I was informed that the parties had agreed that instead of incurring the expense of litigating the issue in Alberta, they would proceed by way of arbitration under the Ontario statute. They signed a binding arbitration agreement under the *Arbitration Act, 1991*, S.O. 1991, c. 17, giving jurisdiction to the arbitrator to determine priorities. While the procedure chosen should not affect the outcome, I have noted that the procedure is one mandated by Ontario law, and there is no comparable procedure under the law of Alberta. Nevertheless, had the claim been litigated by RBC in Alberta, the result would have been the same – RBC's claim was based not on the law of Alberta, but on rights arising under an Ontario contract that was subject to Ontario law.

[41] In my view, a rule that looks to the place of the contract in insurance disputes of this kind can be supported on principle and on policy grounds. This rule, like *lex loci delicti* in the case of torts, has the advantages of certainty, ease of application and predictability, all of which are important to insurers. The rights and obligations of automobile insurers carrying on business in Ontario and issuing policies in Ontario and should be governed by the law of Ontario, regardless of where an accident may befall the insured. The insurer's obligations and rights can be determined with certainty and the outcome will not depend on variations of provincial or state law.

Disposition

[42] In conclusion, I confirm the arbitrator's decision and dismiss the appeal with costs to the respondent fixed at \$5,000, the amount agreed by counsel.

G.R. Strathy J.

G.R. Strathy J.

DATE: May 19, 2009