CITATION: Northbridge v Intact Insurance., 2018 ONSC 7131
COURT FILE NO.: CV-18-00603989-0000
DATE: 20181130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
NORTHBRIDGE GENERAL INSURANCE CORPORATION	*Greg P. Bailey* for the Applicant
Applicant (Appellant in Appeal)	
– and –	
INTACT INSURANCE COMPANY and CO-OPERATORS GENERAL INSURANCE COMPANY	*Joseph Lin* for the Respondent, Intact Insurance Company
Respondents (Respondents in Appeal)	*Daniel Strigberger* and *Julianne Brimfield*, for Co-Operators General Insurance Company

HEARD: November 19, 2018

ENDORSEMENT

DIAMOND J.:

Overview

[1] On March 13, 2015, Larry Petrunak ("Petrunak") was involved in a motor vehicle accident in Mississauga, Ontario. At the time of the accident, Petrunak was insured under three different automobile insurance policies: (a) a policy issued by the respondent Intact Insurance Company ("Intact"), (b) a policy in the name of Petrunak wife's issued by the respondent Co-Operators General Insurance Company ("Co-Operators"), and (c) a policy in the name of Elgin Motor Freight ("Elgin", Petrunak's former employer) issued by the applicant Northbridge General Insurance Corporation ("Northbridge").

[2] All parties to this application ultimately participated in a priority dispute arbitration to determine which insurer was responsible for the payment of Petrunak's accident benefits claim. In written reasons released on January 17, 2018, the arbitrator found that Northbridge was the priority insurer.

[3] Northbridge now appeals the arbitrator's decision on the basis that Northbridge was never provided with proper notice under section 268 of the *Insurance Act*, R.S.O. 1990 c. I.8 (the "Act") and Ontario Regulation 283/95 (the "Regulation"). While Northbridge's argument was advanced before (and ultimately rejected by) the arbitrator, Northbridge argues that the arbitrator clearly erred in failing to find that Co-Operators was precluded from arguing that Northbridge was the priority insurer due to Co-Operators' failure to provide Northbridge with proper notice as explained in greater detail hereinafter.

Standard of Review

[4] While the parties executed an arbitration agreement which provided that (a) the standard of review on a question of law would be "correctness", and (b) the standard of review on a question of mixed fact and law would be "reasonable", as recently held by the Court of Appeal for Ontario in *The Dominion of Canada General Insurance Company v. Unifund Assurance Company* 2018 ONCA 303 (CanLII), an appellate standard of review is a legal issue to be determined by the Court and not the parties themselves.

[5] In *The Dominion of Canada*, the Court of Appeal for Ontario held that the standard of review for a matter that falls within the Act or the Regulation, even for question of law, is reasonableness:

> "While Unifund seeks to characterize the 90 day period as a type of 'limitation period' in default of which an arbitration cannot be commenced, it is a time limit that exists within a statutory scheme. Its interpretation only affects those who have rights and obligations under that scheme. This is not a general question of law that transcends the specific regime, or "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": *Intact*, at para. 53. To the contrary, the interpretation issue engages a reading of s. 4 in the context of other sections of the regulation, and has regard to the objectives of the notice requirement in the context of the SABS regime. There is every reason to accord deference to the reasonable interpretation of the priority regulation by an arbitrator who has specialized knowledge and expertise working within that regime. It is a question of law arising specifically in the context of that scheme.
>
> Accordingly, I conclude that the standard of review of the arbitrator's decision in this case is reasonableness. The appeal judge erred in applying a correctness standard and in substituting his own interpretation of the regulation for that of the arbitrator. He ought to have determined whether the arbitrator's decision was reasonable, that is, whether it fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and

> law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 47; *Belairdirect*, at para. 56."

[6] While Northbridge submits that applying the standard of reasonableness to a question of law will not allow the development of certainty in this specific area, and may lead to "arbitrator shopping", I am nevertheless bound by the Court of Appeal for Ontario's decision in *The Dominion of Canada*, and I must therefore apply the reasonableness standard to this appeal. In other words, I must decide whether the arbitrator's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

Key Regulation Provisions

[7] The salient provisions of the Regulation are as follows:

> 3.(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.
>
> (2) An insurer may give notice after the 90-day period if,
>
> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
>
> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.
>
> 10.(1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers.
>
> (2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3.
>
> (3) The dispute among the insurers shall be resolved in one Arbitration.

Summary of Relevant Facts

[8] Petrunak submitted his OCF-1 Form with Co-Operators on April 21, 2015. At that time, Petrunak was in intensive care at a hospital with his wife managing his claims on his behalf. The OCF-1 Form was filed with Co-Operators because both vehicles at the Petrunaks' home were

insured with Co-Operators, and his wife had forgotten at that time of the existence of the Intact policy.

[9] When Co-Operators received the OCF-1 Form, it noted that Petrunak's employer at the time was listed as Elgin. Co-Operators contacted Elgin to inquire about insurance coverage for the truck, but Elgin would not provide any such information. Co-Operators then commenced its own investigation, obtaining an Auto Plus report confirming that Petrunak was named as an insured on policies issued by Intact, Co-Operators and a commercial policy with Economical Insurance ("Economical"). Co-Operators assumed that Economical insured the commercial truck driven on the date of the accident, and based on this assumption Co-Operators forwarded a Priority Dispute Notice to both Economical and Intact on May 25, 2015. This notice was provided pursuant to section 3(1) of the Regulation.

[10] On June 1, 2015, Economical advised Co-Operators that Economical would be conducting its own investigation of the claim. It was then discovered that Economical was, in fact, not Petrunak's insurer at the date of the motor vehicle accident. As previously stated, Northbridge was Elgin's insurer at the relevant time.

[11] Co-Operators never provided a section 3(1) notice to Northbridge. On October 2, 2015, Intact provided notice to Northbridge under section 10(1) of the Regulation. There is no dispute that Intact's section 10(1) notice was the only notice received by Northbridge.

The Arbitrator's Decision

[12] The arbitrator found that Petrunak was an occupant of the Elgin truck insured by Northbridge, and as such, Petrunak had first recourse against Northbridge for his accident benefit claims pursuant to sections 268(2) and 268(5.2) of the Act. Northbridge does not challenge this finding.

[13] In her decision, the arbitrator also found that even though Co-Operators did not provide Northbridge with notice under section 3(1) of the Regulation, Co-Operators could rely upon the notice provided by Intact to Northbridge pursuant to section 10 of the Regulation. This is the finding being challenged by Northbridge in this appeal.

[14] Specifically, the arbitrator held as follows:

> "I appreciate counsel for Northbridge's contention that it seems unfair to allow Intact to essential "save" Co-Operators by indirectly doing what Co-Operators had failed to do directly. However, when the priority scheme set out in the regulation is considered as a whole, I find that this is permitted. A priority investigation is often like chasing a moving target. As Ms. Darke's evidence revealed, inquiries directed at potential priority insurers can be frustrated, and information is revealed slowly and in a piecemeal fashion. That reality must be balanced against the public policy concern of ensuring that individuals who are in need of benefits receive them on a timely basis.

> The regulation addresses this balance by requiring a first insurer to provide notice to insurers who it claims are in a higher priority to pay within ninety days of receiving an application for benefits. It then permits those insurers, who have the benefit of more time and a singular focus, to bring in other insurers that they feel are in equal or higher priority. Section 10 clearly spells out that once added, all parties must participate in one arbitration process.
>
> I find that if the drafters of Regulation 283/95 had intended that the first insurer only be permitted to provide notice to an insurer on a higher priority "rung", they would have used clear words to convey that message. In my view, a close reading of section 3 and section 10 do not lead to that conclusion. Instead, these provisions acknowledge the reality that determining priority may take a few steps. Section 3 is designed to "get the party started". Section 10 allows that once the fun begins, others may join in and it does not really matter who arrived with whom, and at what time.
>
> I therefore find that Co-Operators' failure to provide notice to Northbridge under section 3 of the regulation in these circumstances is not fatal to its claim that Northbridge is in higher priority to pay Mr. Petrunak's claim."

Decision

[15] Northbridge argues that section 3(1) of the Regulation requires Co-Operators to have given written notice "to every insurer who had claims that required to pay under that section", and it was thus an error for the arbitrator to find that Co-Operators complied with its statutory obligations by giving notice under section 3(1) of the Regulation to Economical and Intact, but not Northbridge. Simply put, Co-Operators' failure to comply with the notice obligations in section 3(1) of the Regulation should preclude Co-Operators from claiming that Northbridge is higher in priority.

[16] Northbridge argues that section 10 of the Regulation is only engaged once an insurer receives notice under section 3(1), and the insurer receiving a section 3(1) notice then disputes its obligation to pay benefits on the basis that other insurers have equal or higher priority under section 268 of the Act.

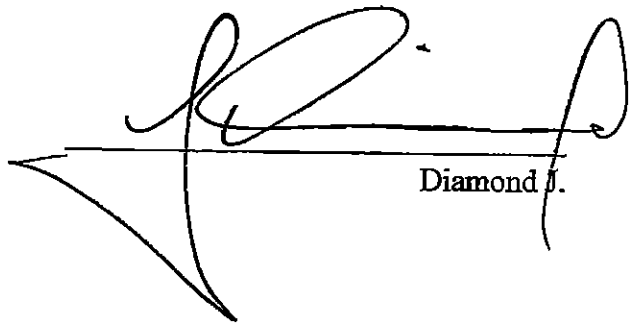
[17] While it is possible that I, or another judge of this Court, may have come to a different conclusion, I cannot find that the arbitrator's decision is unreasonable. I do not find there to be a positive obligation under section 3(1) for Co-Operators to have given a priority dispute notice to every possible insurer that may have priority over Co-Operators. Co-Operators was within the 90 day notice period when it delivered its section 3(1) notice, and at that time it claimed that only Intact and Economical were required to pay the accident benefit claim. Having giving Intact and Economical notice under section 3(1) of the Regulation, I do not find there to be an explicit legal requirement for Co-Operators to have also given Northbridge a priority dispute notice at that time. The evidence supports the reasonable conclusion that at the time the section 3(1) notices were delivered, Co-Operators did not claim that priority rested with Northbridge as the investigation had yet to be concluded. Co-Operators was not aware of whether Petrunak knew that he could

apply to Elgin's insurer, and whether the Northbridge policy included benefits which were accessible.

[18] The arbitrator took numerous practical matters and concerns into consideration, including the fact that a search for accurate insurance coverage information can often take time. I do not read section 3(1) as mandating Co-Operators, as first insurer, to provide notice to all potential parties against which it could assert a higher priority.

[19] Furthermore, section 10 required Intact to give Northbridge notice if Intact planned to defend Co-Operators' priority dispute on the basis that Northbridge had priority over Intact. Section 10(1) mandates the priority dispute amongst all insurers to be resolved in one single arbitration. As such, Northbridge faced the same exposure as Intact did, namely that it was responsible for paying Petrunak's accident benefits under section 268 of the Act. I do not find the arbitrator's interpretation of the interplay between sections 3 and 10 of the Regulation to be inconsistent with any existing jurisprudence. Again, as the standard of review is reasonableness, I find her decision to fall within a range of reasonable outcomes which are defensible in respect of the facts and the law in this proceeding.

[20] Accordingly, Northbridge's appeal is dismissed. In accordance with the agreement between the parties, Northbridge shall pay (a) Co-Operators its costs of this appeal in the all-inclusive amount of $9,000.00 within 30 days, and (b) Intact its costs of this appeal fixed in the all-inclusive amount of $2,000.00 within 30 days.



Diamond J.

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