

Focus ALTERNATIVE DISPUTE RESOLUTION

Reasonableness standard affirmed in insurance case

Courts reluctant to intervene in dispute resolution mechanisms established by statute



Marco Falco

Canadian courts are showing increasing deference to the decisions of arbitrators. There are a number of reasons for this trend. First, courts are recognizing the expertise of arbitrators, who deal with specific legal issues on a regular basis. Second, out of respect for legislative intent, courts defer to the statutory regimes put in place to resolve disputes through arbitration.

A recent decision of the Ontario Court of Appeal, *Intact Insurance Co. v. Allstate Insurance Co. of Canada* 2016 ONCA 609, applies the principle of deference to the judicial review of insurance arbitrations. In *Intact*, the court established that the presumptive standard of review applicable to an insurance arbitral award is reasonableness, absent exceptional circumstances.

Intact concerned a priority dispute between two insurers that provided coverage under separate motor vehicle liability policies. The issue was which of the two insurers was responsible for paying the injured parties' statutory accident benefits. The matter was resolved through arbitration, as required by O. Reg 283/95, *Disputes Between Insurers*.

In August 2010, the insured and her daughters were involved in a motor vehicle accident. The daughters were catastrophically injured. They applied for and received statutory accident benefits from Intact, the insurer of the vehicle in which they were riding. Intact argued that because the insured and her daughters were financially dependent on the insured's boyfriend at the time of the accident, the insurer for the boyfriend, Allstate, was liable to pay the statutory accident benefits.

The arbitrator held that the insured and her daughters were not principally dependent for financial support on the insured's boyfriend at the time of the accident. In the arbitrator's view, the "relationship [between the insured and her boyfriend] was not one of permanence." Accordingly, the arbitrator held that Intact was liable for the accident benefits.

On appeal to the Superior Court, Justice Russell Raikes reversed the arbitrator's decision. The court held that the arbitrator made an error of law by importing



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a permanency requirement in the assessment of the insured's relationship with her boyfriend at the time of the accident. Applying the less deferential standard of "correctness," the court concluded that the arbitrator was speculating about the future of the insured's relationship. The arbitrator's decision was set aside and Allstate was held liable to pay the statutory accident benefits. The court's decision was based on the fact that the insured and her daughters were principally dependent on the boyfriend at the time of the accident.

On further appeal to the Court of Appeal, the court held that the arbitrator's decision was unreasonable. In the court's view, the arbitrator's focus on the temporary nature of the relationship between the insured and her boyfriend was based on "speculation and unreliable inferences." The relationship between the insured and boyfriend was a developing, but "real" relationship at the time of the accident, in which the insured and her daughters were dependent on the boyfriend for support. Accordingly, Allstate was liable for the statutory accident benefits.

In reaching this conclusion, the Court of Appeal overturned Justice Raikes' conclusion that the arbitrator's decision should be reviewed on the less deferential correctness standard. Rather, the court held that the standard of review generally applicable on appeals from insurance arbitrations should be the more deferential standard of reasonableness.

Citing the Supreme Court of Canada's leading decision in *Dunsmuir v. New Brunswick* 2008 SCC 9, the court concluded that when reviewing the decision of an insurance arbitrator, the

correctness standard rarely applied, unless the issue at hand involves one of jurisdiction, constitutionality, or raises a general question of law "of central importance to the legal system as a whole and outside the adjudicator's specialized area or expertise."

The court offered a range of reasons for why it should presumptively apply a reasonableness standard to insurance arbitration.

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Insurance arbitrators engage in the business of interpreting their home statute, i.e. the *Insurance Act*, R.S.O. 1990, c.1-8 and its related regulations. The courts recognize the expertise of insurance arbitrators in this regard.

Moreover, as with other forms of private arbitration, the parties in insurance arbitration can choose the decision-maker who will decide their case. This choice creates the presumption that the parties will select an arbitrator

with the necessary expertise.

Further, the Ontario Legislature has created a specific statutory regime in which the insurance arbitrator must resolve priority disputes between the insurers before a court can intervene. The deference to the arbitrator's ruling arises out of respect for the alternative dispute mechanism created by statute.

In addition, the issue of priority disputes between insurers is the type of legal question that attracts a deferential standard of review. The court recognized that the issue before it did not raise constitutional matters, questions of jurisdiction, or matters of central importance to the legal system.

The *Intact* decision reflects a reluctance by Canadian courts to get involved in dispute resolution mechanisms established by statute, such as interest arbitration. By elevating the standard of review to reasonableness, the Ontario Court of Appeal has confirmed that appellate intervention in arbitration should occur in limited and exceptional circumstances.

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Girl Scouts sued after girl barred from troop

The cookie can crumble in surprising ways when it comes to money. A disgruntled Brooklyn, N.Y., mother is suing the Girl Scouts for US\$30 million after her daughter was expelled when use of cookie sales money was questioned, reports nypost.com. The mother, who said her 9-year-old daughter sold 80 boxes of Girl Scout cookies, was upset that the money raised by the troop was not used for a party, which they voted for, but a camping trip instead. "Everything was fine till I asked her (the troop leader) about the ... money. That's when it flipped," she alleged. "Based upon everything that has transpired over the last year and all of our efforts," Barbara Murphy-Warrington, the CEO of the Girl Scouts of Greater New York, wrote to the mother, "it is our determination, for which we have the sole responsibility, that Troop 207 is not a viable option for you." Despite the fact the organization says it has offered to register the girl with other troops, the mother has taken the case to the county's Supreme Court after two human rights complaints were dismissed. — STAFF