

Axa Insurance (Canada) v. Old Republic Insurance Company

[1998] I.L.R. I-3558

Ontario

Ontario Court (General Division), March 6, 1998.

Insurance (Automobile) Named insured — Regulation making user of company car a named insured held to be valid — Insurance Act, R.S.O. 1990, c. I.8, s. 268(5) — Statutory Accident Benefits Schedule, O. Reg. 776/93, s. 91(4).

This was an appeal on a question of law from an arbitrator's award. P was injured when she was the occupant of the company car used by her husband. It was insured by O, and P also owned another vehicle insured by A. The liability of O or A to pay her statutory accident benefits was in issue. Subsection 268(5) of the Insurance Act required a named insured under a policy to claim under that policy. Under s. 91(4) of the Statutory Accident Benefits Schedule, P's husband was deemed to be a named insured, and as his spouse and as an occupant of the car, she was required to claim against O. The arbitrator had held that s. 91(4) was ultra vires, as the Lieutenant Governor in Council did not have power to deem a person to be a named insured within the meaning of s. 268 of the Act.

Held: The appeal was allowed. The term 'named insured' was not defined in the Act. There was no inconsistency with s. 91(4) of the Schedule which treated users of company cars as if they were owners, and s. 268(5) of the Act. The Schedule did not close the class of 'named insureds'. The Lieutenant Governor in Council had authority to determine entitlement to statutory benefits by regulation. Thus, s. 91(4) of the Schedule was valid, and P's benefits were to be paid by O.

Counsel: G.D.E. Adair for the applicant;

J.D. Tomlinson for the respondent;

Before: before Lax J.

Lax J.: This is an appeal on a question of law from an Award of an arbitrator issued on June 9, 1997. The contest is between the applicant insurer, AXA, and the respondent insurer, Old Republic, as to which insurer is responsible for the payment of statutory accident benefits to Pauline Hayward arising from a motor vehicle accident on August 1, 1995. The issue in dispute is the priority of payments under s. 268 of the Insurance Act, R.S.O. 1990, c. I.8. The learned arbitrator determined that s. 91(4) of the Statutory Accident Benefits Schedule, Ontario Regulation 776/93, as amended ('the Schedule'), is ultra vires the Lieutenant Governor in Council of the Province of Ontario with the result that AXA is required to pay the accident benefits claim in dispute.

FACTS

The submission to arbitration and this application proceeded on agreed facts. The claimant, Pauline Hayward is the spouse of Tony Hayward. They are both ordinarily resident in Ontario. The accident occurred in an automobile owned by Mr. Hayward's corporate employer, insured by Old Republic and made available to Mr. Hayward for his regular use. Pauline Hayward was an occupant of this vehicle at the time of the accident. Pauline Hayward is the owner of another vehicle which is insured by AXA. Pauline Hayward is an 'insured' under both policies of insurance and a 'named insured' under the AXA policy. There is an issue as to whether Pauline Hayward is a 'named insured' or the spouse of a 'named insured' under the Old Republic policy. Before Pauline Hayward reported her injuries to AXA, her husband called Old Republic and was advised that AXA should be notified. AXA commenced payment of accident benefits to Pauline Hayward as required by s. 2 of Ontario Regulation 283/95. A Notice of Dispute between Insurers was provided to Old Republic in October 1995. The arbitration was initiated by AXA and determined in favour of Old Republic.

ISSUE

The learned arbitrator defined the issue in this way: whether Tony Hayward is a 'named insured' under a policy of insurance issued by Old Republic within the meaning of that term as contained in Section 268(5) of the Insurance Act. This section provides that if a person is a named insured under a policy, accident benefits are to be claimed under that policy. By virtue of s. 91(4) of the Schedule, which applies to accidents after January 1, 1995, Tony Hayward is deemed to be a named insured under the Old Republic policy. As a spouse of a named insured, Pauline Hayward also has a claim for statutory accident benefits under the Old Republic policy. Section 268(5.2) of the Insurance Act provides that in circumstances where there is more than one insurer against whom payment of statutory accident benefits may be claimed (as is the case here), and the person making the claim was an occupant of the vehicle at the time of the incident (as is also the case here), the person 'shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.' The learned arbitrator recognized that s. 268(5.2) would dictate that Old Republic was liable for the payment of the benefits, if Tony Hayward was a named insured under the Old Republic policy. He concluded that it was ultra vires the Lieutenant Governor in Council, in the exercise of its power to issue regulations, to deem someone to be a named insured within the meaning of that term as used in Section 268(5) of the Insurance Act. The issue on this appeal is whether the learned arbitrator was correct in that conclusion.

Analysis

The Statutory Scheme

Section 224(1) of the Insurance Act defines 'insured' as '... a person insured by a contract whether named or not and includes every person who is entitled to no-fault benefits under the contract whether or not described therein as an insured person.' The Insurance Act contains no definition of 'named insured.' Section 268(1) requires that every motor vehicle liability policy must provide for statutory accident benefits as set out in the Schedule. Sections 268(2) to (5.2) establish a priority scheme for liability to pay statutory accident benefits. It distinguishes between occupants and non-occupants. An

occupant's first recourse is to the insurer of the automobile in respect of which the occupant is an insured and then to the insurer of the automobile in respect of which the person was an occupant (ss. 268(2)1.i and ii respectively). The scheme recognizes that there may be instances where an insured will have recourse against more than one insurer for statutory accident benefits. In these circumstances, the claimant is given absolute discretion to decide the insurer from which he or she will claim benefits (s. 268(4)). However, if the insured is a named insured under a contract evidenced by a motor vehicle liability policy, s. 268(5) requires that the claim be brought by the named insured, or by his or her spouse or dependant, against the insurer of that policy. Applying this provision to the facts here, Pauline Hayward, being a named insured under the AXA policy, would claim benefits from AXA.

Sections 268(5.1) and (5.2) deal with the situation where a person is a named insured under more than one policy. Section 268(5.1) is similar to s. 268(4) in that it permits a named insured, in his or her discretion, to decide the insurer from which he or she will claim benefits. However, by virtue of s. 268(5.2), if the claimant is an occupant of an automobile in respect of which the person is a named insured or the spouse or dependant of a named insured, the claim must be made against the insurer of the vehicle in which the person is occupant. Tony Hayward is deemed to be a named insured under the Old Republic policy for the purpose of statutory accident benefits set out in the Regulation. If s. 91(4) of the Schedule is effective, s. 268(5.2) requires Pauline Hayward's claim for statutory accident benefits to be paid by Old Republic and not by AXA.

Legislative History and Interpretation of s. 91(4) and s. 268(5)

Section 268(5) of the Insurance Act provides:

Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

The relevant portion of s. 91(4) of the Schedule provides:

... if an insured automobile is made available for the regular use of an individual who is living and ordinarily resident in Ontario by a corporation ... the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation.

(italics added)

Section 91(4) of the Schedule replaced s. 91(1) of the Schedule for accidents occurring after January 1, 1995. Previously, the section did not contain the language which appears in italics in the extract referred to above. Its concluding language was '... the individual shall be deemed for the purpose of this Regulation to be the named insured.' The predecessor to this section was considered by Roberts J. in *AXA Home Insurance Co. v. Western Assurance Co.* (1994), 21 C.C.L.I. (2d) 120 (Ont. Gen. Div.) It was then Section 3(1) of the Schedule, O. Reg. 273/90 and stated: '... this Schedule applies to the individual and his or her spouse and their dependants as if the individual were a named insured.' It was the opinion of Roberts J. in *AXA Home Insurance* that s. 3(1) dealt solely with the identification of persons covered by the no-fault provisions. He stated in his judgment at p. 125:

It does not extend the definition of 'named insured' for any other purposes and, in particular, does not extend the definition of 'named insured' under s. 268(5) to include those persons eligible for no-fault benefits as defined in s. 3(1).

(Emphasis in original)

He concluded that the arbitration decision in *Sittler v. Canadian General Insurance Co.*, [1993] O.I.C.D. No. 72, File No. A-000951 and A-004495, which arrived at a contrary conclusion, was incorrect in law.

Arbitrators followed the *AXA Home Insurance* decision, finding that the issue of a priority determination under s. 268 of the Insurance Act is separate and distinct from the

issue of entitlement to accident benefits. They have held that the Schedule expands the class of insureds for the purposes of receiving statutory accident benefits under the Schedule, but not for the purpose of determining priorities under the Insurance Act: *Portch v. Markel Insurance Co. of Canada*, [1995] O.I.C.D. No. 29, File No. A-007701 and A-008360, appeal dismissed [1996] O.I.C.D. No. 204, File No. P-008360 and P-007701; *Movahedi v. State Farm Mutual Automobile Insurance Co.*, [1995] O.I.C.D. No. 75, File No. A-006901 and A-008245; *Addai-Agyekum v. Coachman Insurance Co.*, [1995] O.I.C.D. No. 161, File No. A-009690 and A-009691, appeal dismissed [1997] P96-00013; *Boateng v. Coachman Insurance Co.*, [1996] O.I.C.D. No. 1, File No. A-009580 and A-009571; *Aujla v. Progressive Casualty Insurance Co. of Canada*, [1996] O.I.C.D. No. 39, File No. A-951628 and A-951269, appeal dismissed [1997] File No. P-96-00027. They have done so on the basis that the determination in AXA Home Insurance is inconsistent with the principle that the injured person must first look to his or her own insurer for accident benefits. It is to be emphasized that each of these decisions was considering predecessor regulations to s. 91(4).

In addition to the arbitration Award which is the subject of this appeal, there have recently been three private arbitrator's decisions which have considered s. 91(4): *AXA Insurance v. Markel Insurance Company of Canada*, unreported arbitrator's Award, Arbitrator J.T. Fidler, released December 9, 1996, *State Farm Mutual Automobile Insurance Company v. Canadian Surety Insurance Company*, unreported arbitrator's Award, Arbitrator S.M. Malach, released, November 26, 1996; *Co-Operator's General Insurance v. Cigna Insurance*, unreported arbitrator's Award, Arbitrator L. Samis, released, August 14, 1997.

In *AXA Insurance v. Markel*, it was unnecessary for Arbitrator Fidler to consider the effect of the amendment to s. 91(4) as he concluded that the claimant was not a named insured under the policy. Nevertheless, he offered his opinion that the amendment was effective to permit an individual to claim accident benefits under a 'regular user' policy and to invoke s. 268(5.2).

In State Farm Mutual, Arbitrator Malach held at p. 10 of his Award:

The new wording in Section 91(4) makes it clear that the individual who qualifies under Section 91(4) is not simply to be a named insured for the purpose of the SABS. The section in clear words sets out that such a person is to be the named insured under the policy. If that was not clear enough, the section goes on to state that the individual who qualifies under the section is to be the named insured for the purpose of Statutory Accident Benefits.

It is clear to me that the legislators intended to change the situation which existed prior to January 1, 1995 when the legislators changed the wording in Section 91(4) from the wording that previously applied in Section 91(1). The legislators have made it clear that the individual who qualifies under Section 91(4) is to be the named insured under the policy.

In Co-Operator's General Insurance v. Cigna, Arbitrator Samis had the benefit of reviewing the Award which is the subject of this appeal. He disagreed with the reasoning and the result reached by the learned arbitrator herein and came to the conclusion that there was statutory authority for the enactment of s. 91(4) and that it was not inconsistent with the Insurance Act.

Did the Arbitrator err in law?

The learned arbitrator based his decision on the fact that s. 224 of the Insurance Act recognizes a distinction between an 'insured' and a 'named insured' and that these words 'were intended to have their ordinary meanings as used in the insurance industry.' (p. 4). In finding s. 91(4) ultra vires, the arbitrator was of the opinion that the Regulation purported to define an expression used in a statute. Clearly, he considered that 'named insured' was a statutory term which had been amended by regulation. Although he recognized the changes which had been made to the Regulation since the judgment of Roberts J. in AXA Home Insurance, he nonetheless thought that this judgment remained good law. He also thought that, by implication, Roberts J. had found

that it was an error in law for the Lieutenant Governor in Council to have attempted to expand the definition of 'named insured'. With great respect, I am of the view that the arbitrator erred in reaching this conclusion.

Both the learned arbitrator and Roberts J. appear to have proceeded on the basis that there is a fixed definition of 'named insured' in the Insurance Act. There is no such definition and the arbitrator recognized this in his Award at p. 4:

The terms 'named insured' and 'insured' have long had specific meanings in the insurance industry. At their simplest, the 'named insured' is the person named in the contract of insurance as the insured. The 'insured' means a person who, whether by statute or by contract, has some or all of the rights of the named insured. This distinction is recognized in the definition of 'insured' contained in s. 224(1) of the Insurance Act.

While I agree that s. 224(1) of the Insurance Act recognizes a distinction between an 'insured' and a 'named insured' I do not agree that s. 268(5) purports to fix the class of 'named insureds'. Nor does any other section of the Insurance Act purport to do this. The legislature specifically refrained from defining 'named insured' and the distinction between an 'insured' (which is a defined term) and a 'named insured' (which is not a defined term) is one which is susceptible to interpretation. I agree with Arbitrator Malach that under the language of s. 91(1) which deemed the individual to be the named insured 'for the purpose of this Regulation,' it was reasonable for arbitrators to conclude that the legislature had intended that the individual who qualified would be treated as a named insured for the purpose of the Schedule only and not for the purpose of determining priorities under s. 268 of the Insurance Act. Section 91(4) now provides that the individual '... shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation.' (Emphasis added) I do not think that this language is susceptible to any interpretation other than that the legislature intended that regular users of company cars

were to be treated as if they were owners (who invariably are 'named insureds') and that priorities as between insurers would be determined accordingly.

The arbitrator's finding that s. 91(4) is ultra vires necessarily assumes that there is an inconsistency between the statute and this section of the Regulation. While it is well-recognized that subordinate legislation cannot conflict with its parent legislation, 'inconsistency' refers to a situation where two legislative enactments cannot stand together. Moreover, there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1982), 88 D.L.R. (4th) 1 (S.C.C.) (per La Forest J.) at p. 23. There could only be an inconsistency between s. 91(4) and s. 268(5) if the legislature intended that the class of 'named insureds' was closed. I do not think that this is borne out by the statutory language. Moreover, if this were the case, the new language of s. 91(4) would have no effect and purpose in relationship to s. 268(5.2).

The arbitrator does not refer in his Award to the extensive regulating powers set out in s. 121 of the Insurance Act. Nor does he refer to the companion decisions in *Warwick v. Gore Mutual Insurance Co.* (1997), 32 O.R. (3d) 76 (C.A.) and *Gore Mutual Insurance Company v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 88 (C.A.), where the Court considered very similar issues. In *Warwick*, it was submitted by Gore that any inconsistency between the definition of 'insured' in s. 224(1) of the Insurance Act and the definition of 'insured person' in the Schedule should be resolved in favour of the statutory definition. It was argued that the priority rules under the statute should be applied without reference to the definition in the Schedule. Laskin J.A. found no inconsistency between the two definitions and stated at pp. 82-83:

Section 268(1) adds the Schedule to every contract of insurance but then delegates to the Schedule-maker authority to define the classes of persons insured under any particular contract. Therefore the definition of 'insured person' in s. 2 of the Schedule governs Ms. Warwick's entitlement to no-fault benefits. Under that definition she is insured by Gore, not State Farm.

Even if I accepted Gore's submission that Ms. Warwick is insured by State Farm using the definition in s. 224(1) of the Act, I reject its further submission that the arguably broader statutory definition prevails over the definition in s. 2 of the Schedule. In some circumstances a definition in a statute will prevail over a definition in a regulation. But that is not the case here because the legislature has expressly said otherwise. By making contractual entitlement to no-fault benefits 'subject to the terms, conditions, provisions, exclusions and limits' in the Schedule, the legislature, in s. 268(1) of the Act, intended that entitlement to these benefits would be determined by regulation. Section 121(1), para. 9 of the Act expressly states that the Lieutenant Governor in Council may make regulations 'establishing benefits for the purposes of Part VI that must be provided under contracts evidenced by motor vehicle liability policies and establishing terms, conditions, provisions, exclusions and limits related to such benefits.' In short, the statute authorized the arguably narrower definition of 'insured person' in the Schedule.

In considering the same passage from Warwick which I have quoted, Arbitrator Samis came to the conclusion in *Co-Operator's General Insurance v. Cigna* that if the statute could authorize a narrower definition of 'insured person' to apply to Ms. Warwick, there was no reason that it could not equally authorize a broader definition of 'named insured'. I am in agreement with this conclusion. This is reinforced by a Postscript to the Warwick decision, where Laskin J.A. noted that the definition of 'insured person' in the Schedule was amended and expanded for accidents on or after January 1, 1994. Had the new Schedule applied to the Warwick appeal, Ms. Warwick would have been an insured person under both policies of insurance. He concluded at p. 88:

If anything, this expanded definition confirms that 'insured persons' under a particular automobile insurance policy are determined by the Schedule, not by the Act.

In my view, Warwick is binding authority for the proposition that it was the intent of the legislature as expressed in ss. 268(1) and 121, para. 9 of the Insurance Act to delegate to the Lieutenant Governor in Council the authority to determine entitlement to statutory accident benefits by regulation. Section 91(4) is not inconsistent with s. 268(5) of the

Insurance Act, but if it were, any inconsistency is to be resolved by reference to the Regulation because the legislature has expressly said so. Accordingly, I am of the view that the learned arbitrator erred in law and that the Award should be set aside and replaced with an order that the accident benefits of Pauline Hayward are to be paid by Old Republic. If costs are in issue, I may be spoken to.

As a Postscript to these Reasons, I wish to note that the arbitration decision of Arbitrator Samis in Co-Operator's General Insurance v. Cigna was forwarded to me by Mr. Tomlinson while I was considering my decision, but was disposed to the conclusion I have reached. Mr. Tomlinson did so notwithstanding that the decision of Mr. Samis considers and rejects the reasoning and result reached by the learned arbitrator herein and is against the position advanced by Mr. Tomlinson on behalf of his client. I thank Mr. Tomlinson for his assistance and commend him for his professionalism in fulfilling his obligation as an officer of the Court.