

was preferable to continue to encourage timely delivery of benefits of all persons injured in car accidents and leave the process of determining which insurer was the correct insurer to pay those benefits to the insurers themselves. The crux of the nexus test is the applicant's choice of the insurance company from whom it sought benefits was not arbitrary.

[2] The Supreme Court of Canada granted leave and allowed the appeal "for the reasons of *Juriansz J.A.*" (2015 SCC 19).

[3] In the interim, Zurich had begun adjusting the claim and paid benefits totaling \$960,622.12. It seeks reimbursement of this amount plus interest. Chubb assumed adjusting and payment of benefits following the Supreme Court of Canada's decision. In May, 2016 a full and final settlement with Ms. Singh was reached for additional benefits totaling \$1,500,000. Chubb also seeks reimbursement for the amounts it paid. It may also wish to challenge the amounts paid to Ms. Singh by Zurich.

[4] The issues which remain to be arbitrated are answering the second and third questions of the Arbitration Agreement. In paragraph 6 of Justice Goldstein's decision, the three questions are set out. The parties have the answer to the first question - - is Chubb an insurer under Section 268 of the *Insurance Act* and Ontario Regulation 283/95? The answer from the Supreme Court of Canada was Yes. The second question to be answered is if Chubb is an insurer, did it comply with the dispute settlement mechanism in the Regulation. The third question is what amounts, if any, is Chubb responsible to indemnifying Zurich?

[5] In the interim, Stanley Tessis unfortunately passed away and Zurich and Chubb cannot agree on a new arbitrator even after conducting a mediation in June, 2017. At that mediation, counsel for Zurich agreed to bring this application. At the time of the accident, Ontario Regulation 283/95 governed "Disputes Between Insurers" and directed the *Arbitration Act, 1991*, S.O. 1991, c. 17 apply. Section 16(1) of that statute mandates, "When an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedure that was used in the appointment of the arbitrator being replaced".

Analysis

[6] It is relevant to note the application for accident benefits and the dispute between these insurers arose in 2006 or within months after the September 23, 2006 accident. Importantly, this was before an amendment to Section 8 of Ontario Regulation 283/95 which changed the procedure for appointing arbitrators. The change was not retroactive as the amended regulation specifically applied "to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010". The previous version of the regulation, which the parties and I agreed applies, merely directs that the provisions of the *Arbitration Act, 1991*, *supra*, apply.

[7] It is on this basis I can dispose of the alternative argument of Zurich that its letter of January 19, 2018 proposing the Honourable Douglas Cunningham as arbitrator prevails. This letter was not directly responded to by counsel for Chubb within the 30 days set out in the subsection 8(2) of the post September 1, 2010 accident regulation. That subsection deems acceptance of the individual proposed if there is no response within 30 days. Counsel for Chubb failed to directly respond within 30 days.

[8] As stated above, Section 16 of the *Arbitration Act, 1991, supra*, requires the parties to follow the procedure used in the appointment of the arbitrator being replaced. Section 10 provides the court's authority to appoint the arbitrator. Section 13 limits the party's right to challenge an arbitrator only on the basis of lack of qualifications or a reasonable apprehension of bias. While counsel for Chubb did not suggest that either of Zurich's preferred choices, the Honourable Douglas Cunningham or the Honourable Stephen Goudge were not qualified, it did rely on case law, notably from the Court of Appeal. That decision, *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 contains comment on how disputes such as these:

- (a) are adjudicated by arbitrators with relevant expertise" (at paragraph 29); and
- (b) the parties - automobile insurers - are highly sophisticated litigants represented by specialist counsel" (at paragraph 50).

[9] The court concluded given these and other factors, an appeal to the Superior Court regarding disputes between automobile insurers will engage questions of mixed fact and law that must be reviewed for reasonableness (at paragraph 53). However, where the issue before the insurance arbitrator "is an 'exceptional' question (one of jurisdiction, a constitutional question, or a general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area or expertise), a correctness standard of review may be applicable." To that end, I conclude that the determinative factor is to examine the nature of the dispute between the insurers.

[10] Zurich's evidence, borne out by the Supreme Court of Canada's decision, is that Chubb's conduct in refusing to accept the initial application and unsuccessfully contesting their obligation to adjudicate the claim for accident benefits (while following the dispute resolution process) resulted in an unacceptable delay in Ms. Singh receiving the automobile statutory accident benefits to which she was entitled. To the contrary, Chubb's evidence is that its policy was for accidental death and dismemberment, not a motor vehicle liability policy, and thus it is not responsible for the payment of automobile accident benefits to Ms. Singh. The consequences of how Zurich and Chubb responded to their obligations to receive the application for accident benefits, adjust the claim and pay automobile accident benefits to Ms. Singh has yet to be determined. Chubb has proposed Mr. Ken Bialkowski or Ms. Shari Novick to replace Mr. Tassis. Their expertise in automobile insurance priority disputes between insurers is acknowledged by both parties.

[11] Chubb has also identified eight issues in dispute between these insurers in paragraph 10 of its factum. The eight issues expand and develop the two questions which remain to be answered from the Arbitration Agreement between Zurich and Chubb stated above. The first two questions raise issues of deflection and the consequences which should flow if deflection occurred. Based on this description of the various issues between Zurich and Chubb, I conclude the focus is more on how each insurer responded to its obligation to provide Ms. Singh with statutory automobile accident benefits and less on the intricacies of what benefits were paid and when in what is regularly described as a highly regulated industry involving many millions of dollars.

[12] Chubb also cites in paragraph 31 of its factum and submitted to me that there are “novel arguments in play not answered by any of the priority case law”. To that end, I conclude it is preferable to have an individual with experience in determining the law, over experience in arbitrating disputes between automobile insurers over which insurer is responsible for the payment of accident benefits.

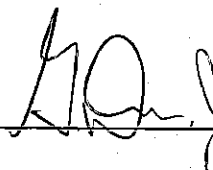
[13] While familiarity with the adjusting and payment of statutory automobile accident benefits can be an asset and valuable, it is not something that counsel or rather, “specialist counsel” would be unable to explain to an arbitrator with years of judicial experience.

[14] Counsel for Chubb also raised in its submission the use of its preferred choices by the firm representing Zurich before me on prior occasions. In my view, that is not a relevant consideration as different matters can result in a different preference. Neither party submitted that either of the other insurer’s proposed choices to the arbitrator lack the skill to determine the issues between them.

[15] As a result, I appoint the Honourable Douglas Cunningham as arbitrator for this dispute between Zurich and Chubb.

Costs

[16] The parties agree that in the event Chubb was successful, they should receive costs fixed in the amount of \$5,000.00. If Zurich was successful, they should be awarded costs fixed in the amount of \$7,500.00. As a result, I award costs payable by Chubb to Zurich in the amount of \$7,500.00.



Mr. Justice G. Dow

Released: May 16, 2018

CITATION: Zurich Insurance Company v. Chubb Insurance Company, 2018 ONSC1907
COURT FILE NO.: CV-17-578260
DATE: 20180516

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ZURICH INSURANCE COMAPNY

Applicant

- and -

CHUBB INSURANCE COMPANY OF CANADA

Respondent

REASONS FOR DECISION

Mr. Justice G. Dow

Released: May 16, 2018