CITATION: Aviva Insurance Canada v. Harland-Bettany, 2023 ONSC 3395
DIVISIONAL COURT FILE NO.: DC-22-567-00
DATE: 20230607

2023 ONSC 3395 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: AVIVA INSURANCE CANADA, Appellant

AND:

JULIE-ELLYN HARLAND-BETTANY, Respondent

LICENCE APPEAL TRIBUNAL, Intervenor

BEFORE: Firestone RSJ, Pomerance and Matheson JJ.

COUNSEL: *Geoffrey L. Keating,* for the Appellant

Christopher I.R. Morrison & *Sherilyn Pickering,* for the Respondent

Douglas Lee, for the Intervenor

HEARD at Toronto: Wednesday, May 31, 2023

ENDORSEMENT

[1] The Appellant Aviva Insurance Canada ("Aviva") appeals from a preliminary issue decision of the Licence Appeal Tribunal (the "LAT") dated August 24, 2022, and the subsequent Reconsideration Order dated September 21, 2022. The LAT has not heard or determined the underlying issues in the application brought by the Respondent Julie-Ellyn Harland-Bettany (the "insured").

[2] The LAT (an intervenor on this appeal) raises a preliminary issue regarding this Court's jurisdiction to hear an appeal from a preliminary issue decision of the LAT prior to the LAT's final decision on the merits. After hearing submissions on this preliminary issue, the panel advised the parties that the appeal would be dismissed for want of jurisdiction with reasons to follow. These are those reasons.

Background

[3] On February 5, 2017, the insured was involved in an incident whereby she slipped and fell on ice while exiting her vehicle. On February 8, 2017, the insured completed an application for Statutory Accident Benefits ("SABs").

[4] Aviva paid benefits for several years following the incident. Subsequently, the insured sought and was denied payment for occupational therapy, physiotherapy, medical marijuana, rehabilitation exercise, cost of assessments, home modifications and assistive devices. Aviva also denied the insured's application for a Catastrophic Impairment Designation. The insured filed an application with the LAT to determine her entitlement to these disputed SABs in accordance with the procedures set forth in the *Statutory Accident Benefits Schedule,* O.Reg. 34/10 (the "Schedule").

[5] It is in this context that a case conference was held on September 29, 2021 before Adjudicator R. Sharma. Aviva raised the issue, for the very first time, whether the incident was an "accident" as defined in the Schedule, putting into question the insured's entitlement to benefits. Given the delay in raising this issue and the lack of notice, the Adjudicator denied Aviva's request to add this to the list of issues to be determined. The Adjudicator instructed Aviva to bring a motion to the Tribunal under Rule 15 of the *Common Rules of Practice and Procedure*.

[6] Aviva filed its motion on January 24, 2022. It was decided as a preliminary issue by Adjudicator Craig Mazerolle by way of the Motion Decision released August 24, 2022. The Adjudicator held that Aviva did not raise the preliminary issue in a timely fashion and that, in any event, the incident was an "accident" under the Schedule.

[7] Aviva's request for reconsideration of the Adjudicator's decision was dismissed by Vice-Chair E. Louise Logan by way of the Reconsideration Order dated September 21, 2022. As a result of this determination the insured's application before the LAT continues.

Analysis

[8] In *Penney v. The Co-Operators General Insurance Company*, 2022 ONSC 3874 (Div. Ct.), the Divisional Court confirmed the principle that this Court has no jurisdiction to hear an appeal from an interlocutory decision of the LAT. Writing for the Court, Swinton J. states at para. 26 as follows:

> Given the language of s.11(1) and (6) of the *LAT Act*, read in the context of the entire statute and the objective of preventing fragmentation of and delay in administrative proceedings, I conclude that this Court has no jurisdiction to hear an appeal of an interlocutory decision of the LAT. In my view, this conclusion is consistent with the instruction from the Supreme Court of Canada in *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 that the courts should respect the Legislature's decisions with respect to institutional design (at paras. 24, 36). Here, the Legislature choose not to confer a right to appeal interlocutory decisions of the LAT to the Divisional Court.

[9] The Divisional Court has consistently followed the decision in *Penney*: *Grewal v. Peel Mutual Insurance Company*, 2022 ONSC 4082 (Div. Ct.), at paras. 2-4; *Allo v. Licence Appeal Tribunal et al.*, 2022 ONSC 6368 (Div. Ct.), at paras. 8-13; *Kahissay v. Intact Insurance Company*,

2023 ONSC 3395 (CanLII)

2022 ONSC 6537 (Div. Ct.), at paras. 4-7; *Tamayo v. Licence Appeal Tribunal et al.*, 2023 ONSC 1692 (Div. Ct.), at para. 4.

[10] In *Grewal*, the Court quotes *Law Society of Upper Canada v. Piersanti*, 2018 ONSC 640, at para. 16, to explain why an appeal lies only from a final decision of an administrative tribunal:

> In regulatory proceedings, fragmentation and/or bifurcation of issues and piecemeal court proceedings are discouraged. Rather the preferred course is to allow matters to run their full course before the tribunal and then consider all the legal issues arising from the proceeding, following its conclusion. In conduct proceedings that involves a finding of professional misconduct or conduct unbecoming.

2023 ONSC 3395 (CanLII)

[11] The Court found the same policy considerations applied to LAT decisions: "It is preferable to avoid the fragmentation and delay in the administrative process that would result if appeals were available before there has been a final determination of the claim": *Grewal*, at para. 7.

[12] As the Court states in *Delic v. Enrietti-Zoppo,* 2022 ONSC 1627 (Div. Ct.), at para. 7:

> It is not the form of the order, but its effect that governs. An interlocutory decision can contain final orders. An order is final if it disposes finally of a claim. An order is not final just because it is one of substance. Where the effect of an order is to continue the inquiry, it is not final.

Examining its effect, the LAT's preliminary issue decision is interlocutory in nature. It does not finally dispose of the substantive issues in the insured's underlying application before the LAT.

[13] The decision in *Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107 (Div. Ct.), was decided before the pronouncement in *Penney*. In any event, *Porter* is distinguishable. Unlike the case before us, the only issue to be determined by the LAT in *Porter* was whether the incident was an "accident" within the meaning of the Schedule. Here, however, the insured's underlying disputes have not been determined.

[14] In accordance with the reasoning in *Penney* and the objective of preventing fragmentation of and delay in administrative proceedings, we conclude that at this juncture, the Court lacks jurisdiction to hear this appeal from the LAT's preliminary issue decision. To hold otherwise would mean that each time a preliminary issue is determined by the LAT an appeal could be brought to this Court. This would defeat the underlying objective of preventing fragmentation and delay, underscored in *Piersanti*, *Penny* and *Grewal*.

[15] This does not mean that Aviva has no right to appeal the preliminary issue decision. The Court will have jurisdiction to hear this issue following the final determination of the underlying matters currently before the LAT. At that time, all appeal rights can be exercised together, thereby

avoiding fragmentation, delay and the risk of duplicate or contradictory evidentiary findings. This is the most just and efficient way of proceeding.

Conclusion

[16] Regarding the preliminary issue raised we conclude that this Court does not have jurisdiction to hear this appeal.

[17] The day before the hearing of the proposed appeal, the parties submitted a joint responding factum on jurisdiction. They requested that if there was no jurisdiction that the Court convert the proposed appeal into an application for judicial review.

[17] As set out in *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446, at paras. 42-43, it is only in rare cases that the Court will exercise the discretionary remedy of judicial review given the legislative scheme for the resolution of disputes over SABs. The legislative intent is to limit access to the courts for these disputes. Further, in this case, Aviva would need to overcome the well-established principle of prematurity that courts should not interfere with ongoing administrative processes absent exceptional circumstances. The Court therefore declines the parties' request to convert the proposed appeal into an application for judicial review.

[18] In all the circumstances there shall be no order as to costs.

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Firestone RSJ.

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Pomerance J.

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Matheson J.

Date: June 7, 2023

2023 ONSC 3395 (CanLII)