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RECENT DEVELOPMENTS & TRENDS IN CASE LAW

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Deference, Deference, Deference: The Effect of *Teal* on the Standard of Review Applied to Insurance Arbitration Awards

In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, the Supreme Court of Canada drew an important distinction between how the standard of review is applied in appeals from civil matters, as opposed to appeals from an arbitral award.

Where the appeal is from a civil proceeding, the nature of the question before the appeal Court, i.e. legal, factual, or mixed, is dispositive of the standard of review. For example, a pure question of law will attract the deferential standard of "palpable and overriding error" in a civil appeal.

Appeals from commercial arbitral awards are a different beast. According to *Teal*, the nature of the question under review on appeal from an arbitral award is not dispositive of the standard of review the appellate Court will apply. The mere presence of a legal question, on its own, does not preclude the application of a deferential reasonableness standard to a commercial arbitral award. This is because commercial arbitrators are presumed to have specialized expertise, having been selected by the parties for their knowledge and skill.

A recent decision of the Ontario Court of Appeal, *Unifund Assurance Co. v. Dominion of Canada General Insurance Co.*, 2018 ONCA 303, applies the reasoning in *Teal* to appeals from insurance arbitral awards.

Unifund establishes that the nature of the question on appeal from a statutory accident benefits ("SABS") arbitral award is not necessarily determinative of the standard of review the Court will apply.

In the case of a SABS arbitrator, the appellate Court will most likely apply a deferential standard of review, based on the arbitrator's presumed expertise in interpreting insurance statutes. The fact that the statutory interpretation at issue raises a question of law, arguably within the purview of the appeal Court's expertise, is of no moment. So long as the legal question is not one that *Teal* and other decisions identify as "exceptional", deference to the arbitrator's analysis is required.

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Facts

Unifund involved a priority dispute between the insurer of an automobile repair shop where the insured was injured (the "Shop Insurer") and the insurer of a motor vehicle liability policy insuring the insured's personal vehicle (the "Vehicle Insurer").

After the insured was injured, the Shop Insurer paid SABS to the insured. Approximately two weeks later, the Shop Insurer delivered a notice to the Vehicle Insurer asserting that the Vehicle Insurer was in higher priority to pay the insured's SABS claim under the *Insurance Act*, R.S.O. 1990, c.I.8 (the "Notice"). Notably, at that time, the Shop Insurer did not send the Notice to the insured. In fact, the Shop Insurer did not the Notice to the Insured until months later.

At the arbitration hearing of the priority dispute between the insurers, the Vehicle Insurer objected to the arbitrator's jurisdiction on the basis that the Shop Insurer's failure to notify the insured of the priority dispute within ninety (90) days of the application for SABS violated O. Reg. 283/95 (the "Regulation"), such that the arbitrator had no jurisdiction to hear the dispute.

The arbitrator rejected this argument. She held, based on her interpretation of the Regulation, that the Shop Insurer was not precluded from pursuing its SABS priority dispute even though it did not send the Notice to the insured until well after ninety-days of the SABS application.

On appeal to the Superior Court, the appeal judge allowed the Vehicle Insurer's appeal after applying a correctness standard of review to the arbitral award. The appeal judge held that the arbitrator erred in her interpretation of the Regulation.

The Shop Insurer appealed this decision to the Court of Appeal. The Court of Appeal allowed the appeal and restored the arbitrator's original award.

Reasonableness is the Presumptive Standard of Review for a Legal Question Decided by a SABS Arbitrator

Citing *Teal* and other recent decisions of the Court of Appeal, the Court noted that although a question of statutory interpretation is normally characterized as a legal question, attracting the less deferential standard of review of correctness, the fact that a legal question is engaged in an appeal from a SABS arbitrator is not determinative of the standard of review.

The presumptive standard of review applicable to a SABS arbitrator, who enjoys expertise in interpreting her governing statute, is reasonableness. Only in "exceptional" circumstances, i.e. the "unlikely scenario" that the insurance arbitrator is required to adjudicate a question of jurisdiction, a constitutional question, or a general question of law that is of "central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", will the correctness standard of review apply.

Otherwise, in all other cases, where the SABS arbitrator is deciding a question of law, deference applies and the standard of review is reasonableness:

> The two recent decisions of this court, *Intact and Belairdirect*, accordingly provide for a presumptive reasonableness standard of review for a question of law determined by an arbitrator within the SABS regime. This is subject to an "exceptional" question of law that may require a correctness standard…

The question before the arbitrator in this case involved an interpretation of the arbitrator's "home statute", i.e. the Regulation, in the context of the "overall SABS regime". The applicable standard of review is reasonableness.

The Effect of *Teal* on Appeals from Insurance Arbitrators

Although *Teal* did not involve an appeal from an insurance arbitration award, the principles articulated in the decision have had a significant impact on appellate jurisprudence in Ontario.

The idea that the question before the appeal Court does not necessarily determine the standard of review significantly narrows the circumstances in which correctness review will apply to an arbitral award. It is arguable that, following *Unifund*, the correctness standard will almost never apply to insurance arbitral awards.

An appeal Court adjudicating a SABS arbitral award should be guided by the principle of deference, based on the arbitrator's presumed expertise in interpreting the arbitrator's home statute. Even where the arbitral award raises a pure question of law, so long as none of the "exceptional" circumstances identified above apply, deference remains the law of the land.