COURT OF APPEAL FOR ONTARIO

CITATION: Pastore v. Aviva Canada Inc., 2012 ONCA 887
DATE: 20121214
DOCKET: C54288

Rosenberg and Feldman JJ.A. and Swinton J. (*ad hoc*)

BETWEEN

Anna Pastore

Appellant

and

Aviva Canada Inc. and Financial Services Commission of Ontario

Respondents

and

Ontario Trial Lawyers Association, Insurance Bureau of Canada and the Attorney General of Ontario

Interveners

Jeff Galway, for Aviva Canada Inc., Requestor

J. Thomas Curry and Joseph Campisi Jr., for Pastore

Robert Conway, for Financial Services Commission of Ontario

Lee Samis and Krista M. Groen, for the Insurance Bureau of Canada

James L. Vigmond and Brian M. Cameron, for Ontario Trial Lawyers Association

Hart Schwartz and Matthew Horner, for the Attorney General of Ontario

Gillian A. Patterson, for the Attorney General of Canada

ENDORSEMENT RE REQUEST TO REOPEN

[1] Reasons for judgment in this appeal were released by the court on September 27, 2012. On November 13, 2012 the court received a letter from new counsel for Aviva Canada Inc. which advised that the order of the court had not yet been taken out and sought to bring to the court's attention a decision released by the Supreme Court of Canada on July 12, 2012, while this court's decision was under reserve: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

[2] Aviva now asks this court to "withdraw, alter or modify its decision" based on *Rogers*. That case applied the correctness standard of review to a decision of the Copyright Board interpreting and applying its home statute rather than the reasonableness standard, because the legislative scheme gave concurrent, original jurisdiction to either the Board or to a court.

[3] On this appeal, Aviva conceded that the reasonableness standard applied. Aviva did not bring the *Rogers* case to the court's attention or seek to withdraw its concession on the applicable standard of review while the decision was under reserve.

[4] Aviva now seeks to rely on the *Rogers* case, based on a provision of the legislative scheme in the *Insurance Act* R.S.O. 1990, c. I.8 ss. 279-288 that gives concurrent jurisdiction to adjudicate, following both assessment of the claimant

and mediation, to an arbitrator or to a court. An appeal lies from the decision of an arbitrator to the Director. There is no further appeal provided from the decision of the Director, whose decision is subject to a privative clause (*Insurance Act*, s. 20).

[5] Brief submissions were requested from the parties on their positions as to whether this court should re-open the standard of review issue and rehear the case.

[6] In those submissions, counsel for Pastore did not agree that the *Rogers* case would change the standard of review in this case. Counsel gave four reasons.

[7] First, the *Rogers* case affirmed the earlier, pre-*Dunsmuir* decision in *SOCAN v. CAIP*, 2004 SCC 43, where the court had held, based on the same concurrent jurisdiction argument, as well as on other factors relevant to the Copyright Board, that the standard of review of that Board was correctness. Pastore, therefore, submits that based on the 2004 *SOCAN* decision, Aviva could have argued for the correctness standard on the hearing of the appeal, but it did not. Second, the concurrent jurisdiction statutory scheme in this case differs from the scheme under the *Copyright Act* in that the Director (or the Director's Delegate) sits on appeal from the arbitrator. It is the arbitrator whose jurisdiction is concurrent with that of the court. Third, there is a strong privative clause in the

Insurance Act, which is a factor that favours deference, while there is no privative clause in the *Copyright Act*. Fourth, the court in *Rogers* stated that the presumptively deferential approach in *Dunsmuir* continues to apply.

[8] Without commenting on the merits of these submissions or others that might be made, it is clear that the parties do not agree that an error has been made on the issue of standard of review that the court is required to correct, as occurred in *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.* (2004), 10 M.V.R. (5th) 67 (Ont. S.C.), the authority for reopening cited by Aviva. In that case, a critical subsection of the section of the *Insurance Act* under consideration had not been cited to the court, causing its decision interpreting the statute to be wrong.

[9] Although this court is not *functus officio* because the order of the court has not yet been taken out by the parties, this is not the type of rare circumstance where it is in the interests of justice to withdraw the reasons of the court and rehear the case on the merits.

[10] The request of Aviva to reopen the decision in this case is denied.

"M. Rosenberg J.A."

"K. Feldman J.A."

"K. Swinton J. (*ad hoc*)"