CITATION: Aviva Insurance v. Security National Insurance, 2017 ONSC 4924
COURT FILE NO.: CV-16-545944
DATE: 20171106

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
AVIVA INSURANCE COMPANY OF CANADA Applicant (Appellant on Appeal)	*Jason Frost*, for the Applicant (Appellant on Appeal)
– and –	
SECURITY NATIONAL INSURANCE COMPANY Respondent (Respondent on Appeal)	*A. Sandy Williams*, for the Respondent (Respondent on Appeal)
	HEARD: April 21, 2017

REASONS FOR JUDGMENT

KRISTJANSON J.

[1] On January 31 2013, Mr. Bashir Ali was a passenger in a car that was involved in a car accident. He sought accident benefits from Aviva, the driver's insurer. Aviva commenced a priority dispute arbitration against Security National on June 5, 2014 under the Ontario priority dispute regime to determine which insurer is liable to pay pursuant to the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("SABS"), a regulation under the Ontario *Insurance Act*, R.S.O. 1990, c. I.8. If Mr. Ali and Ms. Sirad Abdi Shire were spouses at the time of Mr. Ali's motor vehicle accident. Security National Insurance Company, as Ms. Shire's insurer, is the priority insurer for Mr. Ali's claim for accident benefits. The key issue in this case is whether the Arbitrator unreasonably held that Aviva had failed to establish that Mr. Ali and Ms. Shire were "spouses" within the meaning of s. 224 of the *Insurance Act*.

[2] Aviva selected Arbitrator Ken Bialkowski, and Security National consented. Before the Arbitrator, Aviva argued that Mr. Ali and Ms. Shire had been married in a religious marriage ceremony in an unspecified foreign county on an unspecified date, and were not divorced at the

time of the accident. Security National argued that all of the direct evidence indicated that Mr. Ali and Ms. Shire were not spouses at the time of accident. Security National also argued that Aviva failed to produce any evidence indicating that Mr. Ali and Ms. Shire were legally married in accordance with the laws of Ontario or any other jurisdiction. In his decision dated January 4, 2016, the Arbitrator concluded that Aviva was the priority insurer and Mr. Ali and Ms. Shire were not spouses for the purposes of the SABS. Aviva appeals the decision. I find that the decision of the arbitrator was reasonable and dismiss this appeal.

Issues

[3] This appeal raises five issues:

1. Is the burden of proof on Aviva, as the insurer receiving the initial claim for accident benefits, or on Security National, the insurer of the alleged spouse?

2. What is the standard of review of the Arbitrator's decision in this insurance priority dispute?

3. Is the Arbitrator's decision unreasonable in failing to consider whether the alleged religious marriage was valid under the law of the place of the marriage before considering whether it was valid in Ontario?

4. Is the Arbitrator's decision unreasonable given his reliance on the reasoning in *Debora v. Debora*, 1999 CanLII 1840 (ONCA), 167 D.L.R. (4th) 759 and *Kanafani v. Abdalla*, 2010 ONSC 3651, [2010] O.J. No. 2749 (SCJ)?

5. Did the Arbitrator err or is his decision unreasonable in:

    a. Providing insufficient reasons for the decision and not considering or reviewing applicable case law and authorities the appellant submitted, and

    b. Failing to consider evidence that Mr. Ali and Ms. Shire were married in their country of origin and not divorced at the time of the accident and failing to find that Mr. Ali and Ms. Shire continued to be in a relationship of some permanence?

[4] I find the Arbitrator's decision was reasonable, and I dismiss this appeal.

Arbitrator's Decision

[5] The Arbitrator reviewed the parties' written submissions, authorities, and affidavit/documentary evidence, which included surveillance video evidence, a transcript of Mr. Ali's Examination Under Oath ("EUO") completed by Aviva, and a signed statement from Mr. Ali dated July 31, 2013. He heard oral submissions.

[6] Aviva primarily sought to rely on the following evidence to establish Mr. Ali and Ms. Shire's purported marriage:

1. A signed statement dated July 31, 2013 that Mr. Ali provided (via an interpreter) to Crawford & Company in which Mr. Ali indicated that he was "legally married but separated in 1999." He refers to Ms. Shire as his wife in the statement. He also stated he has six children with Ms. Shire.

2. A letter dated September 10, 2013 sent by Aviva by Mr. Ali's counsel at the time, Levy Law Office, stated:

> As per your request of a formal government issued document confirming Mr. Ali's marital status, please be advised that our client had a religious marriage ceremony in his country of origin. However, he was not provided with any document confirming the same. At the time of the accident he has [sic] been already separated, but does not have any document confirming the same.

3. Security National's letter to Aviva, dated September 5, 2013, in which Security National noted the following: "We have conducted an investigation and Ms. Sirad Abdi Shire has informed us that she is currently legally divorced for over 10 years." Aviva conducted ISB search on October 4, 2013 and the results indicate that there was no registered divorce in Ontario between Mr. Ali and Mr. Shire.

4. With respect to the Examination Under Oath, Aviva sought to rely on the following:

    a. The fact that Mr. Ali provided evidence through a Somali interpreter at the Examination under Oath ("EUO"), which took place on January 13, 2014.

    b. Mr. Ali's evidence at the EUO that he was separated in 1999.

    c. Mr. Ali's evidence that he is Muslim.

    d. Mr. Ali's youngest son with Mr. Shire was born three years after the separation. Mr. Ali maintained that he was separated from Mr. Shire at that time.

    The Arbitrator noted that no representative of Security National was present at the EUO. Although Security National had been served with a Notice of Dispute between insurers, it was only served with a notice demanding arbitration in June of 2014, and was not alerted to the date of the EUO nor was it invited to attend.

5. Autoplus reports, which are generated by a private company that provides claims information from a database that it maintains with information provided by participating insurance companies. Notably this private company "does not guarantee the accuracy of information obtained from these sources." Aviva seeks to rely on three such reports:

a. An Autoplus report dated May 8, 2013 that suggested that Ms. Shire was insured with Security National and that Mr. Ali may have been listed as a driver on her policy of motor vehicle liability insurance.

b. An Autoplus report dated August 2, 2013 that Aviva claims indicates that Mr. Ali was an insured under Mr. Shire's motor vehicle liability insurance policy with Security National covering the period of May 2007 to May 19, 2014.

c. An Autoplus report dated October 25, 2015. Aviva claims that the report indicates that Mr. Ali and Ms. Shire obtained a policy of insurance together as spouses from Allstate, effective September 28. It also claims that the report indicates that Mr. Ali made a property damage claim to Security National for an accident while driving Mr. Shire's vehicle on May 15, 2008.

6. A myriad of circumstantial evidence that Aviva claims establishes that Mr. Ali and Ms. Shire were spouses at the time of the accident. This evidence includes surveillance that Aviva conducted at Mr. Shire's home in November and December 2013 (almost one year after the accident). Aviva claims that photographs taken from a distance show Mr. Ali at Ms. Shire's home and driving in her car. Aviva also argues that Mr. Ali and Mr. Shire's Facebook accounts have photos where Mr. Ali and Ms. Shire are pictured together.

[7] On the totality of the evidence, the Arbitrator found that he was unable to conclude that Mr. Ali and Ms. Shire were spouses based on the circumstances of the case and the limited evidence before him. The Arbitrator's conclusions are summarized in para. 42 of his decision:

> There is no evidence whatsoever as to the manner in which the two of them were purportedly married. The only information about the purported marriage ceremony was that the marriage was a religious one and took place in Mr. Ali's country of origin. The only evidence as to his country of origin is the fact that he presented his evidence on his EUO through a Somalian interpreter. Mr. Ali testified on his EUO that he was Muslim. There is no evidence before me that Ms. Shire was Muslim. Aviva has provided me with an article on "The Nikaah: A Somali Wedding Tradition" but the supporting evidence that the ceremony was a Nikaah does not exist. There is simply no direct evidence before me of the nature of the ceremony performed, when it took place, under what civil or religious laws the ceremony was conducted, who officiated, how many people attended, what dress or garb was worn or in what venue the ceremony took place….I cannot help but find that Aviva has failed to meet the evidentiary burden in this regard.

[8] The Arbitrator also made additional relevant findings of fact that supported his conclusion.

[9] Despite the information in the Autoplus reports dated May 8, 2013, the Arbitrator found that in Security National's underwriting file, which show all of Ms. Shire's policies, none of the

policies referred to Mr. Ali and none of them listed him as the driver. He found that on the policy documents, Ms. Shire is shown as being single. The Arbitrator found that the May 8, 2013 Autoplus report relied on by Aviva was difficult to decipher and that no coding explanation was provided, whereas the 2007-2013 Security National certificates clearly did not include Mr. Ali.

[10] With respect to the surveillance conducted a year after the accident, the Arbitrator found that because the photographs were taken from a distance, it was impossible to identify the individual being photographed. Moreover, the photos and surveillance information were never presented to Mr. Ali at his EUO to confirm that he was indeed the person in the surveillance.

[11] Mr. Ali's 2012 tax return, the year prior to the accident, identified him as "single", as opposed to the boxes that indicated "separated" or "divorced."

Arbitrator's legal analysis

[12] The Arbitrator relied on the Court of Appeal for Ontario's decision in *Debora v. Debora*, 1999 CanLII 1840 (ONCA), 167 D.L.R. (4th) 759 and *Kanafani v. Abdalla*, [2010] O.J. No. 2749 (SCJ).

[13] The Arbitrator stated that the Court of Appeal in *Debora* specifically found that a religious marriage performed outside of Ontario was not a legal marriage, unless there was an intention to comply with Ontario law. He found that "the case clearly stands for the proposition that the reference to 'married' in the legislation [*Family Law Act*, R.S.O. 1990 c.F.3] can only refer to persons who are considered married under the laws of Ontario, namely the *Marriage Act*." He also relied on *Kanafani v. Abdalla*, which he stated established the proposition that "even a religious marriage performed within Ontario is not *prima facie* a legal marriage if it does not meet the requirements of the *Marriage Act*...." He adopted the statement in *Kanafani*, para. 26:

> In Ontario it is a settled law of conflict of laws that the formal validity of a marriage is determined by the law of the place where the marriage was performed (*lex loci celebrationis*) or equivalently, the law of the place where the contract is executed (*lex loci contractus*).

[14] Having set out and considered the case law, he concluded at para. 29:

> I am persuaded and bound by the findings in *Debora* and *Kanafani*. I am satisfied that on the evidence before me that the religious ceremony in the case before me was not one in accordance with the *Marriage Act* and therefore Bashir Ali and Sirad Abdi Shire were not spouses at the time of the subject collision unless able to come within one of the savings or curative provisions of the applicable legislation.

Comments on Aviva's Position and the Evidence

[15] Before the Arbitrator and on this appeal, Aviva sought to rely on stereotypes and assumptions to establish that a foreign religious ceremony between Mr. Ali and Ms. Shire was a valid marriage under the laws of Canada, despite the complete lack of evidence as to the date and place of the marriage or the governing laws of the foreign jurisdiction.

[16] First, Aviva seeks to rely on Levy Law's statement that Mr. Ali was married in a religious marriage ceremony in his country of origin. No country of origin was specified in this letter or anywhere else in the evidence. Aviva assumes that Mr. Ali's country of origin is Somalia because he provided evidence through a Somali interpreter at the EUO. Aviva called no evidence as to Ms. Shire's cultural history, religion, country of origin or primary residence at the time of the alleged marriage, separation, or divorce.

[17] Based on assumptions, Aviva sought to establish that Mr. Ali and Ms. Shire were properly married according to Somali law. Aviva relied on Article 2 of the Provisional Constitution of Somalia, allegedly in effect since 2012, which it obtained from the Internet. It provides that Islam is the religion of the state, and no religion other than Islam can be propagated in the country. Of note, the alleged marriage would have taken place at least a decade before the 2012 Provisional Constitution. This is insufficient evidence of foreign law governing marriage at the time of the marriage.

[18] Aviva then went on to argue that Somalia's citizenry is almost entirely Muslim, and that the vast majority of Muslims globally adhere to Sunni Islam. In making these bald assertions, Aviva relies on a report from the PEW Research Centre titled "Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population," also obtained from the Internet.

[19] Having assumed that Mr. Ali is from Somalia, and then assumed that he is likely a Sunni Muslim, Aviva argued that the marriage ceremony was a "Nikaah," the support for which is a printout from a website called "Visual Peace Media." The printout indicates that a "Nikaah" is a ceremony "performed by a Muslim sheikh according to Islamic law." Citing this article, Aviva posits that a Nikaah may be wholly verbal, and it is possible that no documentation will be provided to the husband and wife after the ceremony. The printout is an informal account of a Somali woman's wedding ceremony and celebration. It does not establish the foreign law.

[20] Aviva's reasoning is, to say the least, problematic. First, it cannot be assumed that Mr. Ali's country of origin is Somalia. I agree with the following statement from the respondent in its written submissions: "Somalia and the horn of Africa region have been subject to domestic and international civil war, civil unrest, economic issues, and humanitarian crises since the 1980's. Given the area's history of displaced people, immigration and those seeking refugee status, the assumption that a language spoken defines a person's nationality is a poor correlation."

[21] In addition, there are numerous sects of Islam, with different marriage practices. Aviva did not inquire into the nature of Mr. Ali's religious beliefs or the way in which the wedding was conducted. While Mr. Ali testified at his EUO that he is Muslim, there was no evidence about

what particular sect of Islam he practices. As Security National argues, Aviva "relied on unreliable and unchallengeable hearsay in the form of internet articles and research polls in an effort to impute a 'one size fits all' set of customs and values to Muslims who happen to speak Somali and to the people close to them."

[22] Moreover, there was no evidence with respect to Ms. Shire's religious practice whatsoever. Aviva noted that in Ms. Shire's Facebook photos, she is wearing a hijab, "which is commonly worn by adherents of the Islamic religion." It did not provide any further argument or analysis on this point. In any event, it would not be appropriate to simply assume Ms. Shire adheres to Islam on this basis without further evidence.

[23] Most importantly, Aviva did not establish on the evidence the formal and essential validity of the foreign religious marriage under the laws of the place of the marriage in effect at the time. It did not establish the date or place of marriage, and thus could not establish whether the alleged foreign religious marriage was civilly binding in the jurisdiction in which it was performed.

Statutory Scheme

[24] The definition of spouses is set out in s. 224(1) of the *Insurance Act*:

> "spouse" means either of two persons who,
>
> (a) are married to each other,
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or
>
> (c) have lived together in a conjugal relationship outside marriage,
>
> (i) continuously for a period of not less than three years, or
>
> (ii) in a relationship of some permanence, if they are the parents of a child;

[25] "Marriage" and "married" are not defined terms under the *Insurance Act.*

[26] In addition to the saving provision under the *Insurance Act*, there is a saving provision under s. 31 of the *Marriage Act*, R.S.O. 1990, c. M.3 as follows:

> If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

Analysis

Issue #1: Burden of Proof

[27] Aviva argues that that it should not bear the burden of proof in this dispute. It relies largely on arbitral case law including the decision of Arbitrator Novick in *Economical Mutual Insurance Company v. ACE INA Insurance Company, Re* (2015 CarswellOnt 20915, Ontario Arbitration (*Insurance Act*)). Arbitrator Novick held that "in light of the sometimes arbitrary manner in which an application for benefits may be submitted, and the requirement in section 2 of the regulation that the first insurer receiving an application must "pay now, dispute later", it is not fair to ascribe a burden of proof to the applicant insurer in a priority dispute." (para. 28). She held at para. 29:

> Claimants and their representatives may in theory allege any fact as the basis for submitting an application for payment of benefits to an insurer, and unless there is no nexus between the parties, an insurer is obliged to accept the claim. While this system is designed to ensure that claimants, who may not be aware of the often complicated system dictating which insurer is in priority to pay, receive benefits on a timely basis, it would be manifestly unfair if the first insurer to receive an application who is not the priority insurer must not only adjust the claim but also bear the onus of proving or disproving some fact casually alleged by a claimant.

[28] Aviva submits that the onus of proof "ought to have rested equally between Aviva and Security National" to establish whether Mr. Ali was the spouse of Ms. Shire, with the onus on Aviva only to "lead some evidence to show why the obligation to pay the claim in question should not remain with them."

[29] I find that Aviva has the burden of proof in this case. As the insurer receiving the accident benefits claim, Aviva was the only insurer with the statutory right to seek an EUO, which is a critical tool in developing evidence for use in a priority dispute. It chose not to invite Security National to participate in the EUO. Security National does not have the statutory right to seek an EUO.

[30] There are additional policy reasons for Aviva to bear the burden of proof. As Security National submits, if there were no burden of proof on either insurer, it would encourage the applicant insurer to simply initiate a priority dispute irrespective of whether it has adequately investigated its case in fact and law. This would not be an efficient, economical system.

[31] Moreover, both Aviva and Security National recognize Arbitrator Novick's finding in *Economical* that the applicant, as the initiator of the process, must lead evidence to show why the claim in question should not remain with them. The standard of proof is the balance of probabilities. This means that in order to show that the claim should not remain with them and should instead transfer to Security National, Aviva would have to prove on a balance of

probabilities that Mr. Ali and Ms. Shire were spouses. The practical result is that Aviva bears the burden of proof in this dispute. This is how the arbitration was conducted.

Issue #2: Standard of Review

[32] The standard of review on appeal to the Superior Court from an insurance arbitrator's interpretation of SABS, and in particular the meaning of spouses for the purpose of that regulation, is reasonableness: *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609, [2016] O.J. No. 4113. As Justice LaForme held in *Intact Insurance* at para. 53:

> In general, an appeal to the Superior Court from an insurance arbitration regarding a priority dispute will engage questions of mixed fact and law that must be reviewed for reasonableness. Even if the appeal involves an extricable question of law regarding SABS, a reasonableness standard of review will still generally apply. In the unlikely scenario that 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.

[33] There is no basis for applying a correctness standard of review. Aviva argues that the recognition of foreign marriages in Canada for spouses immigrating as a family unit is a general question of law of central importance to the legal system as a whole, outside the Arbitrator's expertise, to which the correctness standard should apply. Aviva also argues that in considering the definition of spouse, definitions and interpretations of legislation such as the *Marriage Act, Family Law Act* and family law jurisprudence are outside the scope of the "home statute" of the *Insurance Act* that is applicable in priority disputes between insurers, and so should attract a correctness standard. I do not agree.

[34] Arbitrators under the *Insurance Act* are called upon to interpret the definition of "spouse" within the context of a discrete statutory regime. The reasonableness standard applies with respect to interpreting their home statute and statutes closely connected with its function, which includes issues relating to the definition of "spouse" for the purposes of accident benefits: *Alberta Teachers*, 2011 SCC 61 at para. 34, and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190; at para. 54:

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

[35] The issue here – the interpretation of "spouse" for the purposes of the *Insurance Act* in Ontario – is not a general question of central importance outside the insurance arbitrator's specialized area of expertise: *Dunsmuir*, paras. 53-54, 60. Moldaver, J in *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, 2013 CarswellBC 3619, [2013] 3 S.C.R. 895 held at para. 27:

> The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in Dunsmuir, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in Mowat, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country."

[36] The meaning of "spouse" for the purposes of an Ontario statute as set out by expert arbitrators in this limited field is not a question which is essential to the fundamental legal order of our county, nor does it have such impact on the administration of justice as a whole.

[37] This Court must analyze the issues raised by Aviva under the reasonableness standard, which encompasses "the existence of justification, transparency and intelligibility within the decision-making process", and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, para. 47.

Issue #3: Failure to Consider Validity Under Law of Place of Marriage

[38] The third issue is whether the Arbitrator's decision was unreasonable in failing to apply conflict of law rules, by first considering whether the alleged religious marriage was valid under the law of the place of the marriage before considering whether it was valid in Ontario.

[39] The Arbitrator concluded that Mr. Ali and Ms. Shire's purported religious ceremony was not performed in accordance with the *Marriage Act*, and thus they could not be considered spouses unless they satisfied one of the saving provisions in either the *Insurance Act* (s. 224(1)(b)) or the *Marriage Act* (s. 31). The Adjudicator proceeded to consider whether the parties satisfied either of these provisions. In undertaking this analysis, the Adjudicator outlined in detail the lack of evidence concerning the purported religious marriage ceremony, including where the marriage actually took place, when it took place, the nature of the ceremony, and by whom it was officiated.

[40] It is clear that there was insufficient evidence led to establish what constituted a valid marriage in the place where Mr. Ali and Ms. Shire were allegedly married (and of course there would be – there is no direct evidence as to where the purported religious marriage took place). However, the Adjudicator failed to first consider – at least explicitly – whether Mr. Ali and Ms. Shire's purported marriage abided by the laws of the place where they were married (*lex loci celebrationis*) before considering whether the purported marriage abided by Ontario law.

[41] The Arbitrator was mindful that the first question to be asked in determining the validity of a foreign marriage is whether the marriage abided by the laws of that foreign jurisdiction. He quoted *Kanafani* in his decision, which sets out that the formal validity of the marriage is determined by the law of the place where the marriage was performed (*lex loci celebrationis*) or equivalently, the law of the place where the contract is executed (*lex loci contractus*).

[42] The laws of the foreign jurisdiction must be established as fact. Courts cannot take judicial notice of foreign law. That means that: "if a party seeks to prove that foreign law is different from Canadian law, then it must be specifically pleaded by the party relying upon it, and it must be proved to the satisfaction of the Court." In the absence of such proof, foreign law is assumed to be the same as the *lex fori* (law of the forum). This means Ontario law governs in the absence of satisfactory evidence of the law of the foreign jurisdiction: *C. (M.S.) v. J.(C.F.)*, 2017 ONSC 2389 at paras. 23-24.

[43] On August 22, 2017 I wrote to the parties requesting that they provide additional submissions on the issues as follows:

> From *C.(M.S.) v. J. (C.F.)*, 2017 ONSC 2389, at para. 22, it appears that in determining the validity of a foreign marriage, a conflict of laws approach is required, to establish both formal validity and essential validity. To be formally valid, the formalities of the marriage must have conformed to the *lex loci celebrationis*, the law of the place of the marriage.
>
> That case also notes that if the party seeks to prove that foreign law is different it must be proven to the satisfaction of the court. In the absence of such proof, foreign law is assumed to be the same as the *lex fori*.
>
> In this case, it appears that as a first step, the Arbitrator considered the validity of the alleged religious marriage under the *lex fori* and the Ontario *Marriage Act* without first considering whether Aviva had established a marriage valid under the laws of the foreign jurisdiction. The consideration of the saving provision of the *Marriage Act* was done in accordance with the *lex fori* as well.
>
> It appears that this issue of the recognition of a foreign marriage based upon the law of the foreign jurisdiction, is a separate question than that considered by the Arbitrator. The finding of the Court of Appeal in *Debora* does not relate to a wholly foreign marriage, but rather a religious marriage by residents of Ontario.
>
> I therefore request submissions on the issue of whether the Arbitrator made an error of principle or law in the analysis he pursued, with reference to the *C.(M.S.)* case I have already cited, as well as *Azam v. Jan*, 2013 ABQB 301; *Yangaeva v. Kershtein*, 2001 CarswellOnt 6480, paras. 8 and 10, (affirmed on appeal, 2002 CarswellOnt 3639); *Best v. Best*, 2016 NLCA 68, and whatever other jurisprudence the parties might wish to set out.

[44] In response to my request, Aviva submitted that the relevant question was whether Mr. Ali and Ms. Shire were spouses under the *Insurance Act*, to be determined on a balance of probabilities standard. It submitted that the court should not be concerned with whether Aviva has proven the formal validity of a marriage based on *lex loci celebrationis*. I disagree. Canada is a nation of indigenous people, immigrants, and the descendants of immigrants. Where foreign religious marriages are civilly binding in that foreign jurisdiction, it is important that they are recognized for relevant purposes of Canadian law, such as insurance benefits. Proceeding as the Arbitrator did, and failing to explicitly first consider the validity of the foreign religious marriage under the *lex loci celebrationis* before then considering whether the marriage is valid in the *lex fori*, is unreasonable.

[45] Aviva submitted in the alternative that the documentary evidence it submitted established that Mr. Ali and Ms. Shire were married prior to their arrival in Canada in 1998. It maintained that Mr. Ali's country of origin is Somalia as "supported by his Muslim faith and the use of a Somali interpreter…". Aviva further submits that Mr. Ali and Ms. Shire did not obtain a divorce while residing in Ontario, as indicated by the ISB search. Aviva argues that it provided "extensive documentation" to the Arbitrator explaining the marriage requirements in Somalia, and that this evidence established the formal requirements of marriage in the *lex loci celebrationis*. Aviva referred to the Newfoundland and Labrador Court of Appeal's decision in *Best v. Best*, 2016 NLCA 68 in which the court held that reliance may be placed on information obtained from a reliable electronic source "where it is provided to the court by means of an explanatory affidavit" (para. 16). Aviva submits that it provided an explanatory affidavit to the Arbitrator explaining Somali customs surrounding marriage. Aviva suggests that the Arbitrator did not appropriately consider the evidence before it and did not assess the laws of the foreign jurisdiction.

[46] Security National submits that the Arbitrator did not commit an error of law. It submits that Aviva failed to lead sufficient evidence establishing that a formally valid marriage took place in Somalia and as such, the Arbitrator correctly applied Ontario law to making its determination: *Azam v. Jan*, 2013 ABQB 301, para. 46. Security National also asserts that in the in the absence of proof of the *lex loci celebrationis*, the laws of the *lexi fori* governs. For this reason, it submits that the Arbitrator did not err.

[47] Security National also argued that in the alternative, if this court determines that the Arbitrator ought to have provided an express analysis on the availability of *lex loci celebrationis*, there still would be no error of law. It submits that such an analysis would not have resulted in a different outcome, since Aviva failed to provide evidence as to where, when, and under what circumstances the wedding was conducted. This would have been fatal to a *lex loci celebrationis* analysis. The Arbitrator would have ultimately been forced to consider *lex fori*, which is what he did in his decision.

[48] I reject Aviva's submission that it led sufficient evidence establishing that Mr. Ali and Ms. Shire were married in Somalia and that their purported religious ceremony abided by the laws of Somalia. Aviva not only failed to lead sufficient evidence, but relied on inappropriate

stereotypes and assumptions in making its arguments. There is simply no evidence establishing that the wedding took place in Somalia. There is no evidence that Mr. Ali's country of origin is Somalia, and it was reasonable for the Arbitrator to find that there was insufficient evidence to make the inference based only on the language of the interpreter. Mr. Ali's Muslim faith provides no indication whatsoever of his country of origin. A person who is Muslim can be from any country. Even if Aviva had established that the wedding took place in Somalia, it did not provide sufficient evidence on Somali law and whether the marriage would be considered legally valid at the time of the marriage. Indeed, a printout from a website, general statistics, and a Provisional Constitution adopted at least a decade after the purported marriage simply does not meet the evidentiary standard the case law has articulated. As Security National submitted, "to recognize a foreign marriage based on such deficient evidence would allow claimants to avail themselves of insurance benefits solely by claiming that at some point several decades ago they participated in a marriage ceremony in an unknown country under unknown circumstances. To allow this would run contrary not only to public policy but also to the administration of justice."

[49] As Abella J. stated in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (CanLII) at para. 12:

> It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

[50] Justice Abella cautioned that: "This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome": *Newfoundland Nurses*, para. 15.

[51] The Arbitrator did not provide an express analysis on the validity of the marriage in accordance with the *lex loci celebrationis*. It is only when there is insufficient evidence on the *lex loci celebrationis* that the *lex fori* governs. The Arbitrator failed to explicitly address this first step in his analysis.

[52] However, the ultimate outcome was not affected in any way, and the reasons are implicit in the Arbitrator's decision. It is clear that on the record before the Arbitrator, there could not be sufficient evidence on the *lex loci celebrationis* because it was not established on a balance of probabilities where the alleged marriage took place, the date of the marriage, the type of religious marriage, nor of the laws in effect on the date of the marriage in the foreign location. The Arbitrator made these findings of fact. As a result, it was implicit in his analysis, and supported by the record, that Aviva did not and could not establish a valid marriage in accordance with the *lex loci celebrationis*. The next step in the analysis was for the Arbitrator to assess the validity of the marriage according to the *lex fori*, namely, Ontario. That is precisely what the Arbitrator did. As such, despite the Arbitrator's error, the outcome he reached was reasonable, and the only possible outcome on the evidence before him.

Issue #4: Is the Arbitrator's decision unreasonable given his reliance on the reasoning in Debora and Kanafani?

[53] The Arbitrator erred in law in relying on *Debora* and *Kanafani*, on his statement of the principles those cases stand for and on how those principles apply to this case. Neither of those cases involved foreign religious marriages; they did not establish that a foreign religious marriage performed outside Ontario is not a legal marriage in Ontario in all circumstances. However, these errors do not render the decision unreasonable given that the outcome was unaffected.

[54] The Arbitrator stated that he was persuaded and bound by the findings in *Debora* and *Kanafani*. In *Debora*, the couple were purportedly married in a Jewish religious ceremony and deliberately did not comply with the licensing and registration requirements of the *Marriage Act* in order for the husband to continue to receive a widower's pension from a previous marriage. They were later married in a civil ceremony. According to the Arbitrator, the Court of Appeal for Ontario found that a "religious marriage performed outside of Ontario was not a legal marriage" and that the reference to "married" in the *Marriage Act* "can only refer to persons who are considered married under the laws of Ontario…".

[55] The *Debora* case does not stand for these propositions. A foreign religious marriage performed outside Ontario may be a valid marriage in Ontario if it was formally and essentially valid under the *lex loci celebrationis*. In *Debora*, the parties had deliberately evaded the requirements of the *Marriage Act* and the wife sought to rely on the saving provision in the Act to find that the parties were married at the time of the religious ceremony. The court found that, given the parties' intention to not comply with the Act, the parties could not have been considered to have married in "good faith" pursuant to s. 31. The case says nothing about the validity of a foreign religious marriage performed outside of Ontario. In *Azam v. Jan*, 2012 ABCA 197 at para. 18, the Alberta Court of Appeal held:

> The traditional conflict of laws approach to recognition of foreign marriages in Canada has two distinct aspects: the marriage must be both formally and essentially valid. To be formally valid, the formalities of the marriage must have conformed to the *lex loci*

> *celebrationis*, the law of the place of the marriage. To be essentially valid, each party must have had the capacity to marry under the law of his or her pre-nuptial domicile….

[56] The Arbitrator misinterpreted and misapplied the principles in *Debora* in assessing the possible validity of Mr. Ali and Mr. Shire's purported marriage.

[57] In *Kanafani*, the parties were purportedly married in an Islamic religious ceremony in Toronto under sharia law by an Islamic religious leader. They did not obtain an Ontario marriage license and did not register the marriage. There was no evidence that the parties intended to comply with the requirements of the *Marriage Act* but there was no evidence that the lack of compliance was deliberate. Given that the religious ceremony took place in Toronto, Ontario law would govern in determining the validity of the marriage. Because the parties were not married in accordance with the *Marriage Act*, their marriage was not valid. This case does not address the validity of a foreign religious marriage.

[58] Neither *Debora* nor *Kanafani* are directly relevant in this case. Both concern situations where Ontario law would undoubtedly govern.

[59] Although the manner in which the Arbitrator relied on the cases constituted an error of law, it did not affect the ultimate outcome of the decision. There was no evidence upon which to determine whether Mr. Ali and Ms. Shire's purported religious ceremony abided by Ontario law. In fact there was no evidence to establish whether the purposed marriage took place at all, regardless of jurisdiction, as discussed above. On the evidence before him, he could not have decided that the marriage was valid under the laws of Ontario. His decision on the saving provision is also reasonable given the evidence before him. As a result, the Arbitrator's error does not affect the outcome and the reasonableness of his decision, which is amply supported by the record.

Issue 5: Other Alleged Errors

(a) **Sufficiency of Reasons**

[60] Aviva argues that the Arbitrator provided insufficient reasons for his decision and failed to consider or review all the applicable case law and authorities the appellant submitted. To determine whether the Arbitrator's reasons were sufficient, a reviewing court must ask whether the reasons assisted the court in understanding the decision's reasoning and conclusion, demonstrating justification, transparency and intelligibility. In *Newfoundland Nurses*, the Supreme Court of Canada held that the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para. 14). The Arbitrator's reasons meet this standard. An administrative decision-maker is not required to set out every piece of evidence or deal with every argument.

[61] In *Newfoundland Nurses*, Abella J. for the Court held at para. 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion …In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. [Emphasis added]

[62] In *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 (CanLII), [2012] 3 S.C.R. 405, at para. 3, the Court held that "administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons." In this case, the Arbitrator's reasons are extensive, setting out findings on all material issues, demonstrate the Arbitator's reasoning and conclusions, and serve the purpose of showing that the result falls within a range of possible outcomes.

(b) **Alleged Errors of Fact/Inferences/Weight**

[63] Aviva also argues that the Arbitrator erred in fact, in failing to make factual inferences or in failing to give appropriate weight to the evidence that Mr. Ali and Ms. Shire were married in their country of origin and not divorced at the time of the accident, and failing to find that Mr. Ali and Ms. Shire continued to be in a relationship of some permanence.

[64] There are many reasons why administrative decision-makers should be given deference on questions of fact: to limit the number, length and cost of judicial review and appeal proceedings, to respect the legislative choice to vest these bodies with decision-making authority, and to recognize the decision-maker's exposure to the evidence, familiarity with the case as a whole, and understanding of the applicable legislative regime. Similar deference is required for inferences from facts.

[65] The standard of review of reasonableness requires deference to the Arbitrator's findings of fact and inferences from fact unless "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact", a standard that "precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder:" *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 (CanLII), [2016] 1 SCR 587, at para. 30 per Brown, J. for the majority).

[66] Disputes concerning inferences or weight are questions of fact. This court on appeal is not to re-weigh or re-evaluate the evidence, or the sufficiency of evidence that has some probative value. The issue on appeal is whether there is some evidence upon which the Arbitrator could have relied to make the disputed findings of fact, and whether the decision was reasonable. In this case, the Arbitrator did not commit any reviewable error of fact.

[67] The Arbitrator clearly considered the evidence that Mr. Ali and Mr. Shire were married in their country of origin but separated since 1999. He referred to this evidence in paragraphs 23 and 32 of his decision. He also referred to the signed statement Mr. Ali provided to Crawford & Company (the adjusting firm that Aviva retained) that he was married but separated since 1999 in paragraphs 16 and 32. There was no error of fact in this regard. The Arbitrator concluded that there was insufficient evidence to establish that a valid marriage had taken place on all of the evidence before him. As I have already found, this conclusion was reasonable, and there was evidence to support his conclusion.

[68] The Arbitrator's decision that Mr. Ali and Ms. Shire were not in a relationship of some permanence was reasonable on the evidence before him. Aviva seeks to rely on the s. 224(c) of the *Insurance Act*, which provides that "spouse" can mean either of two persons who have lived together in a conjugal relationship of some permanence outside marriage if they are the parents of a child.

[69] It is true that Mr. Ali and Ms. Shire are the parents of six children. It is also true that their youngest child was born three years after they were purportedly separated. However, there was insufficient evidence to establish that Mr. Ali and Mr. Shire lived together in a conjugal relationship of some permanence. Aviva seeks to rely on surveillance that it claims indicates that Mr. Ali was living at Ms. Shire's home. An investigator took photographs from a distance of a person at Ms. Shire's house that Aviva claims is Mr. Ali. The photographs were not put to Mr. Ali on his EUO. The Arbitrator found it was impossible to identify the individual being photographed. Aviva disputes this finding. It claims that the photographs show Mr. Ali wearing the same white and black scarf and traditional white and black hat that he is found wearing in photos on his Facebook page.

[70] The Arbitrator's finding was reasonable. Mr. Ali cannot be the only possible person who wears the scarf and hat pictured, particularly if they are "traditional". Moreover, even if it was Mr. Ali in those photographs, his presence at Ms. Shire's residence is not conclusive evidence by any means that he and Ms. Shire were in a conjugal relationship of some permanence. They have six children together. It is expected (and certainly hoped) that they would be capable of interacting and co-parenting.

[71] Aviva also seeks to rely on Mr. Ali and Ms. Shire's Facebook photos. It submits that they regularly feature one another in their profile pictures and that Mr. Ali has expressed affection for Ms. Shire in a picture posted on October 8, 2015. It also submits that there are many comments on the pictures from friends and family, which implies that they are perceived as a couple in their community.

[72] It was reasonable for the Arbitrator not to rely on these pictures. The inferences Aviva seeks to draw from these pictures are far-reaching. The Arbitrator's finding that Mr. Ali and Ms. Shire were not in a conjugal relationship of some permanence at the time of the accident was a reasonable outcome on the evidence and law before him.

Remedy

[73] The Arbitrator's decision was reasonable. The appeal is dismissed, with costs. If the parties are unable to agree on costs, then Security National may provide costs submissions of no more than 3 pages together with a Bill of Costs to Judges' Administration within 10 days; Aviva may provide responding submissions, together with its Bill of Costs if it disputes the reasonableness of the fees or disbursements, in a further 10 days.

Kristjanson J.

Released: November 6, 2017

CITATION: Aviva Insurance v. Security National, 2017 ONSC 4924

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant (Appellant on Appeal)

– and –

SECURITY NATIONAL INSURANCE COMPANY

Respondent (Respondent on Appeal)

REASONS FOR JUDGMENT

Kristjanson J.

Released: November 6, 2017