

CITATION: Dominion of Canada General Insurance Company v. Ridi, 2021 ONSC 3707
DIVISIONAL COURT FILE NO.: DC-20-118-AP
DATE: 20210520

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MCWATT A.C.J.S.C.J., SACHS AND J.A. RAMSAY JJ.

BETWEEN:)
)
The Dominion of Canada General Insurance)
Company) Kadey B.J. Schultz and Jason Frost for the
) Applicant
)
Applicant)
)
– and –)
) Laura L. Dickson for the Respondent for the
Filippo Ridi by his litigation guardian Maria)
Lilley) Respondent
)
Respondent)
)
– and –)
)
The Ontario Trial Lawyers Association) Steven D. Bezaire and Ryan Alkenbrack for
the Ontario Trial Lawyers Association
– and –)
)
The Insurance Bureau of Canada) Jeff Galway and Justin Manoryk for the
Insurance Bureau of Canada
Interveners)

HEARD: May 17, 2021 at Toronto by
videoconference

J.A. RAMSAY J.

[1] The insurer appeals under s.11 of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Schedule G, from the decision of an adjudicator. The appeal lies to this court as of right on a question of law alone. Since this appeal concerns a matter of statutory

interpretation it raises a question of law. The standard of review is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

The issue

- [2] Section 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 provides that every motor vehicle insurance contract is deemed to provide the accident benefits set out in the Statutory Accident Benefits Schedule, O.Reg. 34/10 (the “Schedule”). Section 14 of the Schedule requires the insurer to pay medical, rehabilitation and case management benefits under sections 15 to 17 and, if the impairment is not a minor injury, attendant care benefits under section 19. Until June 3, 2019, in the case of catastrophic injury, section 19 of the Schedule provided that the maximum benefit for attendant care is \$6,000 a month, and a total maximum payout of \$1,000,000. The issue as framed by the parties is whether, in the case of accidents that occurred before June 3, 2019, the amount of HST payable for attendant care services is included in these maximums or whether it has to be paid by the insurer in addition.

The case

- [3] The respondent was injured catastrophically in a car accident on March 21, 2014. He used the services of attendants, some of which were subject to HST. He claimed, and was awarded, attendant care benefits under s.19 of the Schedule, which, at the time, read:

19.(1) Attendant care benefits shall pay for all reasonable and necessary expenses,

(a) that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant ...

(3) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:

1. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 5 of subsection 28 (1) has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed ...

ii. \$6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident.

2. Unless increased by any optional benefits available to the insured person in accordance with paragraph 4 or 5 of subsection 28 (1), the amount of the attendant care benefits paid in respect of the insured person shall not exceed, for any one accident,

i. \$1,000,000, if the insured person sustained a catastrophic impairment as a result of the accident ...

[4] The insurer interpreted section 19 to mean that the HST paid to attendants came out of the monthly \$6,000 monthly maximum and the \$1,000,000 policy limit. The insured applied to the Licence Appeal Tribunal for an order that the HST amount was payable in addition to the monthly maximum and the policy limit. The Adjudicator ruled in favour of the insured. The Tribunal rejected an application for reconsideration. The insurer now appeals to this court.

[5] Since the Adjudicator's decision, the Schedule has been amended. It now reads:

19.(3) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:

1. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28 (1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28 (1) has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed ...

ii. \$6,000 per month *plus the amount of any applicable harmonized sales tax payable under Part IX of the Excise Tax Act (Canada) for accidents that occur on or after June 3, 2019*, if the insured person sustained a catastrophic impairment as a result of the accident.

[6] The amendment removed the \$1,000,000 policy limit from section 19 of the Schedule and moved it to s.18 to provide a \$1,000,000 policy limit in addition to HST for medical, rehabilitation and attendant care benefits for accidents that occur on or after June 3, 2019. A similar amendment was made to section 25 of the Schedule. Previously, section 25(5) set a maximum payment for assessments at \$2,000 per assessment. The amendment now fixes the maximum at \$2,000 plus the HST amount.

[7] Section 56 of the *Legislation Act, 2006*, S.O. 2006 c. 21, Sched. F provides:

56.(1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different.

[8] The amendments, then, do not help us to interpret the legislation as it read before.

The appellant's argument

[9] The appellant insurer says that HST meets the definition of "expenses incurred" in s.19(1) of the Schedule. It cites s.3(7)(e) of the Schedule, which provides:

3.(7) (e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,

(i) the insured person has received the goods or services to which the expense relates,

(ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense ...

The Adjudicator's decision

[10] The Adjudicator decided that HST is not a “reasonable and necessary” expense and therefore was not subject to the \$6,000 limit in s.19(3) of the Schedule or the policy limit of \$1,000,000. He concluded that the insurer has to pay it as a tax, which the Adjudicator found was distinct from an expense. The problem with this reasoning is that the tax legislation does not impose an independent obligation on the insurer to pay HST and s. 14 of the Schedule only requires the insurer to compensate the insured for attendant care benefits as they are defined under s. 19: “reasonable and necessary expenses.” Therefore, if the HST is not a “reasonable and necessary expense” under the Schedule, the Schedule does not obligate the insurer to pay it.

HST

[11] Harmonized sales tax is the combination of provincial retail sales tax and federal goods and services tax, collected by both governments cooperatively under s.349 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 and s.50 of the *Retail Sales Act*, R.S.O. 1990, c. R.3. Some attendant care services are taxable under Part IX of the *Excise Tax Act* and some are not. Payments on insurance claims are not subject to HST.

[12] The *Excise Tax Act* provides:

123.(1) In section 121, this Part and Schedules V to X,

financial service means

(f.1) the payment or receipt of an amount in full or partial satisfaction of a claim arising under an insurance policy.

[13] Part V of that Act makes financial services an exempt supply, unless they are included in Part IX of Schedule VI, which deals with certain insurance policies held by non-residents.

[14] It is explained succinctly in the Canada Revenue Agency's GST/HST Memorandum 17.16 of August 2014:

9. Under life and health insurance policies, the settlement of a claim is usually limited to the payment of financial benefits such as death benefits, annuity benefits, accident and sickness benefits and disability and income replacement payments. These payments that

are made by the insurer in full or partial satisfaction of an insurance claim arising under an insurance policy are included in paragraph (f.1) of the definition of financial service and are not excluded from that definition by any of paragraphs (n) to (t). These payments are exempt supplies of financial services.

- [15] The tax statutes do not require the insurer to pay HST. The insurer compensates the insured for the amount of HST paid or payable by the insured for attendant care if the Statutory Accident Benefits Schedule requires it. The question, then, is what the Schedule requires the insurer to pay.

Guidelines and Bulletins

- [16] Under s.268.3 of the *Insurance Act*, the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario may issue guidelines on the interpretation of the Statutory Accident Benefits Schedule. The Act requires the guidelines to be considered in any determination involving the interpretation of the Schedule (s. 268.2). If a guideline is incorporated into the Schedule by reference, it is binding (s. 268(2.1)). The Arbitrator relied on a number of these guidelines to justify his decision that the insurer's obligation to pay HST exists even if the insured has otherwise reached their policy limits. He also relied on one bulletin, which he recognized not to be binding.
- [17] The Schedule does not incorporate specific guidelines by reference. It refers to specific subject matter that may be contained in guidelines and incorporates any guidelines that are issued on those subjects. For example, s.19(2) of the Schedule provides that the monthly attendant care benefit is calculated by multiplying the total number of hours per month by an hourly rate that does not exceed the maximum hourly rate established under the guidelines. The section does not give the Chief Executive Officer the power to require payments in excess of the \$6000 monthly limit or the \$1,000,000.00 limit.
- [18] The only Guideline dealing with attendant care benefits is Guideline 03/10, which provides hourly rates for attendants and says that these rates include all administrative costs, overhead and related fees and that insurers are not required to pay expenses that exceed the hourly rate. It does not mention HST and does not preclude payment for HST amounts as reasonable and necessary expenses in addition to the hourly rates. It does not purport to authorize payments that exceed the limits in s.19(3) of the Schedule.
- [19] The Adjudicator relied on guidelines and a bulletin, all of which were issued before the amendments of 2019 and none of which deal with attendant care. Sections 15(2) and 16(4) of the Schedule as it read before the amendments provided for guidelines to set the maximum rates for services and prices of goods in connection with medical and rehabilitation services. Section 17 dealt with case management services. Section 18(3) of the Schedule set the limit for medical and rehabilitation claims at \$1,000,000 in the case of catastrophic injury.
- [20] Section 25 of the Schedule provides for payment for assessments to determine eligibility for accident benefits. Section 25(3) provides that the insurer is not required to make

payments for assessments in excess of the maximum set by the guidelines. Section 25(5) as it read before the amendment set a maximum payment of \$2,000 per assessment.

- [21] Guideline 03/14 (Professional services) sets hourly and other rates of payment for services for medical, rehabilitation and case management benefits in sections 15, 16 and 17 of the Schedule, and provides that HST is not included in these amounts but is payable in addition as a reasonable and necessary expense. It does not purport to authorize payment in excess of the limits set in s.18 of the Schedule. It could be read as authorizing \$2,000 plus HST for an assessment under s.25, but it does not clearly say so.
- [22] Guideline 02/16 (Cost of goods guideline) provides that if the HST is applicable to an item for which an insurer is liable under sections 15 and 16 of the Schedule, then the HST is payable by the insurer as part of the reasonable expense for that item. It provides the retail price as the appropriate cost of goods related to medical and rehabilitation benefits and provides that the HST is payable in addition to retail cost. It does not purport to authorize payment in excess of the limit set by s.18 of the Schedule.
- [23] Guideline 08/10 (Cost of assessments and examinations) issued under s.25 of the Schedule, however, departs from the approach in Guidelines 03/10, 03/14 and 02/16. It purports to authorize payments in excess of the \$2,000 limit in s.25(5). That Guideline says nothing about attendant care benefits.
- [24] The Adjudicator also referred to Bulletin No. A-04/15 (Use of Credit Information for Fleets/Commercial Use/Public Use Vehicles and Harmonized Sales Tax), which has since been taken down from the FSCO (now FSRA) website. It said:

HST is addressed in three Guidelines issued by the Superintendent Financial Services - the cost of assessments and examinations guideline, the professional services guideline and the cost of goods guideline. The professional services guideline states that “if the HST is considered by the CRA to be applicable to any of the services or fees listed in this guideline, then the HST is payable by the insurer in addition to the fees as set out in this guideline”. The costs of assessments and examinations and costs of goods guideline include similar statements.

FSCO expects that insurers will apply the HST legislation correctly in accordance with any direction from CRA. *The HST is a tax and is not part of the benefit limits set out in the SABS* (emphasis supplied).

- [25] The bulletin was issued in June of 2015 and to the extent that it suggests that HST is a tax, not an expense within the meaning of the Schedule, it is contradicted by the cost of goods guideline issued in 2016, which specifically states that HST is to be considered a “reasonable expense.” In my view the use of this non-binding bulletin led to a non-sequitur in the Adjudicator’s reasoning, to wit: that HST is not a reasonable and necessary expense, but the insurer must pay it.

Principles of statutory interpretation

[26] Today there is only one principle or approach to the interpretation of a statute. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, paragraph 21. This principle is codified in section 64 of the *Legislation Act, 2006*.

[27] With respect to mandatory terms of insurance contracts, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] 2 SCR 23, paragraph 49, the Supreme Court said that the primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole.

[28] With specific reference to Statutory Accident Benefits, in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 8, paragraph 42, the Court of Appeal approved the following statement:

The SABS is remedial and constitutes consumer protection legislation. As such, it is to be read in its entire context and in its ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. The goal of the legislation is to reduce the economic dislocation and hardship of motor vehicle accident victims and as such, assumes an importance which is both pressing and substantial.

[29] It is also basic to the purpose and intent of the Statutory Accidents Schedule that there are limits on compensation. Automobile insurance is designed to be both fair and affordable. The statutory policy itself says with respect to the attendant care benefit, “This benefit may compensate you and other insured persons for some of the expense of an aide or attendant, including transportation for an aide or attendant to accompany the insured person to and from medical and rehabilitation treatments.” (OAP 1, p. 25.) The policy uses similar language with respect to medical and rehabilitation benefits. In other words, the statutory scheme specifically contemplates that insured persons may not be fully compensated for the costs associated with their care and rehabilitation as a result of their accident.

[30] The scheme of the Schedule is to set out certain defined benefits and limits, and to delegate to the Chief Executive Officer the power to set reasonable rates for services that may be needed by the insured.

Application

[31] Section 19 of the Schedule is not ambiguous.

[32] With respect to attendant care, section 19 of the Schedule incorporates the guidelines by reference only to the hourly rates for services. The only applicable guideline says nothing about HST and does not purport to authorize payment in excess of the limits in s.19(3) of the Schedule. For accidents that occurred before June 3, 2019, amounts of HST payable for taxable attendant care services are to be paid as part of the attendant care benefit, in addition to the hourly rate set by the Guideline, but only to the extent of \$6,000 a month

and \$1,000,000 in total. This approach is consistent with the purpose and scheme of the Schedule's approach to accident benefits in general and does not lead to any anomaly or absurdity.

- [33] In my view the Adjudicator's interpretation of section 19 of the Statutory Accident Benefits Schedule was incorrect. The appeal should be allowed, the decision of the Adjudicator should be set aside and the respondent's application to the Licence Appeal Tribunal should be dismissed.
- [34] The parties agree that in this event there should be no order as to costs.

J.A. Ramsay J.

I agree. _____
McWatt A.C.J.S.C.J.

I agree. _____
Sachs J.

Released: May 20, 2021

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JJ.

BETWEEN:

The Dominion of Canada General Insurance Company

– and –

Filippo Ridi by his litigation guardian Maria Lilley

REASONS FOR JUDGMENT

Released: May 20, 2021