COURT OF APPEAL FOR ONTARIO

CITATION: Dominion of Canada General Insurance Company v. Ridi, 2022 ONCA 564
DATE: 20220729
DOCKET: C69969

Benotto, Zarnett and Thorburn JJ.A.

BETWEEN

The Dominion of Canada General Insurance Company

Applicant (Respondent)

and

Filippo Ridi, by his Litigation Guardian, Maria Lilley

Respondent (Appellant)

and

The Ontario Trial Lawyers Association

and

The Insurance Bureau of Canada

Interveners

Laura L. Dickson and Erica J. Lamont, for the appellant

Kadey B. Schultz and Jason Frost, for the respondent

Joseph Y. Obagi, for the intervener Ontario Trial Lawyers Association

Jeff Galway, for the intervener Insurance Bureau of Canada

Heard: July 15, 2022

On appeal from the order of the Divisional Court (Associate Chief Justice Faye E. McWatt, Justices Harriet E. Sachs and James A. Ramsay), dated May 20, 2021, with reasons reported at 2021 ONSC 3707, allowing an appeal from a decision of Adjudicator Paul Gosio, dated January 24, 2020.

BY THE COURT

I. RELIEF SOUGHT

[1] The appellant insured, Filippo Ridi, was catastrophically impaired as a result of a car accident on March 21, 2014 and became eligible for attendant care benefits pursuant to Part III of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("*SABS*").

[2] The respondent insurer, The Dominion of Canada General Insurance Company (Travelers), is the insurer responsible for paying Mr. Ridi's attendant care benefits.

[3] The issue on this appeal is whether harmonized sales tax ("HST") paid or payable on the goods and services supplied to the appellant for his attendant care, is included in the computation of the maximum amounts of attendant care benefits payable by the respondent. This necessitates the statutory interpretation of the words "attendant care benefits" in ss. 14 and 19 of the *SABS* as they read prior to the amendment of s. 19 on June 3, 2019.

[4] Section 19 of the *SABS* provides that the appellant is entitled to up to $6,000 per month in attendant care benefits, to a total maximum of $1,000,000. At the time of the appellant's accident in 2014, s. 19 made no mention of HST. (Section 19

has since been amended to read, “$6,000 per month plus the amount of any applicable harmonized sales tax payable …”).

[5] The appellant argues that he is entitled to $6,000 per month and $1,000,000 total for his attendant care services, plus the amount of HST owing for those services.

[6] The appellant argues, first, that the wording of s. 19 is ambiguous because it does not mention HST and should therefore be construed in his favour. The appellant claims the legislators enacted the *SABS* to provide for catastrophically impaired accident victims, which he says is supported by guidelines and Bulletins published by the Superintendent of the Financial Services Commission of Ontario (“FSCO”). He also argues that his interpretation avoids the absurdity of the *SABS* providing different levels of benefits for different benefits-receivers, since some providers charge HST and others do not, and some insureds are not liable for HST while others are.

[7] The appellant’s position is supported by the intervenor, Ontario Trial Lawyers Association.

[8] The respondent submits that the wording of s. 19 is clear and unambiguous. Attendant care benefits are to pay for “all reasonable and necessary expenses incurred by or on behalf of the insured person…”. HST is such an expense, and

falls within the statutory maximums just as any other reasonable and necessary expense does. The respondent further submits that placing limits on coverage is important to support a universal system for all drivers that will allow every insured who is catastrophically impaired to claim up to $6,000 per month to a maximum $1,000,000 for incurred attendant care expenses.

[9] The respondent's position is supported by the intervenor, Insurance Bureau of Canada.

II. THE STATUTORY SCHEME

[10] The *SABS* was adopted pursuant to the Insurance Act, R.S.O. 1990, c. I.8. Section 268 of the *Insurance Act* provides that every motor vehicle insurance contract is deemed to provide the accident benefits set out in s. 14 of the *SABS*.

The Regulatory Framework

[11] Section 14 of the *SABS* provides that,

> [A]n insurer is liable to pay the following benefits to or on behalf of an insured person who sustains an impairment as a result of an accident:
>
> 1. Medical and rehabilitation benefits under sections 15 to 17.
>
> 2. If the impairment is not a minor injury, attendant care benefits under section 19.

[12] At the relevant time, the wording of s. 19 read as follows:

> 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. [Emphasis added.]

[13] There is no reference to HST.

Guidelines, Bulletins and Amendments Raised by the Appellant

[14] The appellant refers to guidelines from the Superintendent of the FSCO, the body that regulated automobile insurance in Ontario at the relevant time, namely the *Costs of Assessment and Examination Guideline* No. 08/10, November 2010;

the *Professional Services Guideline* No. 03/14, September 2014; and the *Cost of Goods Guideline* No. 02/16, June 2016.

[15] The *Costs of Assessment Guideline* provides "guidance concerning the $2,000 maximum amount established in s. 25 (5) (a) of the *SABS* in respect of fees and expenses for conducting any one assessment or examination, and for preparing reports in connection with it." The guideline provides that for those services, the insurer "must pay the HST in addition to the amounts payable under the *SABS*".

[16] The *Professional Services Guideline* sets hourly and other rates of payment for medical, rehabilitation and case management benefits in ss. 15, 16, and 17 of *SABS* (but not attendant care benefits set out in s. 19), and states that HST is "payable by an insurer in addition to the fees payable as set out in the [*SABS*]."

[17] The most recent guideline, the *Cost of Goods Guideline* pertains to "expenses related to all goods provided on or after June 1, 2016" in ss. 15 to 17 of the *SABS*. The guideline provides that,

> [I]f HST is considered by the CRA to be applicable to an item … the HST is payable by the insurer as part of the 'reasonable' expense for that item. This is consistent with the treatment of HST for services subject to the *Professional Services Guideline* and the *Cost of Assessments and Examinations Guideline*. "goods" are part of the "reasonable expenses" to be paid by the insurer."

[18] None of these Guidelines refer to attendant care benefits or the issue of calculating the monetary limits set out in s. 19.

[19] *SABS* maximums are also addressed in Bulletin No. A-04/15, *Use of Credit Information for Fleets/Commercial Use/Public Use Vehicles and Harmonized Sales Tax (HST)*, dated June 17, 2015, which refers to the three guidelines and provides that "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*."

[20] The appellant also points to proposals made by the Legislative Assembly to amend *SABS*, as well as the amended wording, all of which he says, support his position that HST does not count towards the s. 19 maximums.

[21] On March 13, 2019, the legislature announced its intention to amend the Schedule. Proposal Number 19-MOGF002, dated March 13, 2019, reads as follows:

> The Ministry of Finance is proposing changes to Ontario Regulation 34/10 (*Statutory Accident Benefits Schedule* - Effective September 1, 2010) under the *Insurance Act* to clarify that Harmonized Sales Tax (HST) is required to be paid by insurers in addition to the maximum accident benefit amount limits specified in the *SABS*. The proposed changes would also clarify that HST for assessments or examinations, and for preparing reports in connection with these, should be paid by insurers in addition to the maximum limits provided in the *SABS*.

> If approved, these amendments would clarify direction previously provided in a 2015 Bulletin by the Financial Services Commission of Ontario [Bulletin No. A-04/15], that HST is required to be paid in addition to accident benefit limits. [Emphasis added.]

[22] On June 3, 2019, s. 19(3)1.(ii) was amended to add the wording underlined:

> … the amount of the attendant care benefit payable in respect of the insured person shall not exceed, … $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.

III. APPLICATION OF THE LAW TO THIS PROCEEDING

The History of this Proceeding

[23] After the appellant was catastrophically impaired as a result of an automobile accident, he claimed and was awarded, the maximum benefit for attendant care provided in s. 19 of the *SABS*, that is $6,000 a month, with a total maximum payout of $1,000,000.

[24] The respondent insurer interpreted s. 19 to mean that the HST paid to attendants was included in the monthly $6,000 monthly maximum and the $1,000,000 maximum policy limit. The respondent claimed that HST is an attendant care benefit because it is a “reasonable and necessary” expense

incurred by the insured per s. 19(1), and as such, is subject to the $6,000 and $1,000,000 maximums like any other reasonable expense.

[25] The appellant disagreed and therefore applied to the Licence Appeal Tribunal for an order that HST is payable in addition to the s. 19 maximum limits.

[26] The Adjudicator decided that HST is not included as a “reasonable and necessary” expense and therefore was not subject to the $6,000 monthly limit in s.19(3) of the *SABS* or the policy limit of $1,000,000. He held that,

> The absence of “tax” in the provision leads me to conclude that it is not included in the attendant care limit and therefore not a “reasonable and necessary expense”. Indeed, to assume a broad reading of “reasonable and necessary expense”, one that includes HST, would run counter to intention and meaning of the same phrase in s. 16, along with the related concept of “reasonable fees” in s. 25(5)…

[27] In so doing, he noted that the provisions of the *SABS* are legislated and non-negotiable and should therefore be interpreted broadly. He also noted that,

> Although [FSCO Bulletin A-04/15] does not expressly address attendant care benefits, its rationale is consistent with other FSCO Guidelines and Tribunal decisions which have consistently confirmed that HST is to be paid outside of the benefit limit with respect to other benefits under the *Schedule*. I agree with the applicant’s submission that public policy would demand that the attendant care benefits be treated in a similar fashion.

[28] He concluded that the insurer therefore had to pay HST as a tax, which was distinct from the payment of accident benefit expenses.

[29] The Tribunal rejected the insurer's application for reconsideration.

[30] The respondent insurer then successfully appealed to the Divisional Court. The Divisional Court held that the adjudicator's decision was incorrect as s. 19 of the *SABS* is clear and unambiguous and,

> incorporates the guidelines by reference only to the hourly rates for services. [It] 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.

[31] The appellant insured now appeals to this court.

The Standard of Review

[32] This appeal involves the interpretation of a *Schedule* to the *Insurance Act*, which is a question of law. As such, the standard of review is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 654, at para. 37; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[33] When interpreting statutes, words 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 S.C.R. 27, at para. 21.

Analysis

[34] The appellant claims the wording in s. 19 of the *SABS* is ambiguous and does not explicitly refer to HST. He further claims that, as the *SABS* is consumer protection regulation: *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, 148 O.R. (3d) 438, at paras. 42-45, the ambiguity should be resolved in his favour such that HST payable on attendant care benefits should not be included in calculating the maximum amount payable.

[35] In *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 29-30, the Supreme Court defined "ambiguity" as follows:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible

> readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> For this reason, ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by *Driedger, and thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5). [Underline emphasis added.]

[36] A provision is not "ambiguous" simply because it is difficult to interpret or causes confusion. To be "ambiguous", there must be two or more plausible interpretations.

[37] In deciding whether the words in s. 19 are subject to two plausible interpretations and therefore ambiguous, the words regarding payment for attendant care benefits must be read in the context of the *SABS* regulation as a whole: *Bell ExpressVu Ltd. Partnership*, at para. 29.

[38] Sections 14 and 19 together establish the statutory basis upon which an insurer is obliged to pay for an insured's attendant care.

[39] Section 14 imposes liability on the insurer to pay "attendant care benefits under section 19" to an insured who sustains a non-minor impairment as a result of an accident. Section 19(1) specifies that the "attendant care benefits under section 19" are the "reasonable and necessary expenses" incurred by or on behalf of an insured, for services provided by an aide or attendant, a long-term care facility or a chronic care hospital. Section 19(3) imposes $6,000 and $1,000,000 limits to those "attendant care benefits."

[40] The phrase "attendant care benefits" must be given the same meaning when used in s. 14, imposing an obligation on the insured to pay them, and in s. 19, specifying that they consist only of "reasonable and necessary expenses" and are subject to maximum amounts.

[41] The appellant's argument is premised on the faulty proposition that the identical term "attendant care benefits" when used in s. 14 includes amounts paid in respect of HST (that is, requiring the insurer to pay the HST amounts for attendant care), but does not include amounts paid in respect of HST when calculating the maximum benefits payable in s. 19(3).

[42] In our view, the same words in ss. 14 and 19 cannot be interpreted to *require* the insurer to pay HST for attendant care services but at the same time, *exclude* HST for the purpose of establishing the maximum amount payable by the insurer for those same attendant care benefits based on the identical wording. Treating amounts required to be paid for attendant care benefits as inclusive of HST but excluding HST from the maximum amount payable for attendant care benefits would be contrary to the principle of statutory interpretation to give, "the same words the same meaning throughout a statute": *R. v. Zeolkowski,* [1989] 1 S.C.R. 1378 at p. 1387; *Thomson v. Canada*, [1992] 1 S.C.R. 385, at pp. 400-01, *per* Cory J.

[43] As such, the words in s. 19 are not reasonably capable of supporting more than one meaning. The only meaning supportable is the one advanced by the respondent insurer and the intervenor Insurance Bureau of Canada: that HST is an "attendant care benefit" within the meaning of ss. 14 and 19, as it is a "reasonable and necessary expense," and as with any other reasonable and necessary expense comprising attendant care benefits it is included in the total that is subject to the $6,000 and $1,000,000 maximum limits specified in s. 19(3).

[44] Moreover, none of the guidelines the appellant relies on refer to attendant care benefits and none address the issue of calculating the monetary limits set out

in s. 19. The statement in the Bulletin that HST is “not part of the benefits limit”, is contradicted by the *Cost of Goods Guideline* of 2016, which states that HST is a “reasonable expense” and that reasonable expenses are subject to maximum limits. In any case, bulletins are not binding unless they are incorporated in a Regulation, and this Bulletin is not.

[45] Finally, the proposal to amend the regulation purports to “clarify direction previously provided in a 2015 Bulletin by the Financial Services Commission of Ontario, that HST is required to be paid in addition to accident benefit limits”. The amendment of an Act or regulation however, “does not imply anything about the previous state of the law”, it “does not imply that the previous state of the law was different”, and it “does not imply an adoption of any judicial or other interpretation of the language used in the … regulation”: *Legislation Act*, 2006, S.O. 2006 c. 21, Sched. F, s. 56.

[46] The Divisional Court therefore correctly determined that HST payable for attendant care services is an “attendant care benefit” which is subject to the maximum limits in s. 19 and that the decision of the LAT Adjudicator was not supported by the guidelines and Bulletin cited above.

Conclusion

[47] For these reasons, the appeal is dismissed.

[48] This is a novel issue of public importance to those who have been catastrophically injured in a motor vehicle accident. There is therefore no order for costs of this appeal.

Released: July 29, 2022 “M.L.B.”

“M.L. Benotto J.A.”
“B. Zarnett J.A.”
“J.A. Thorburn J.A.”