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INSURANCE LAW BULLETIN

June 2021 – Kerry Figliomeni & Samuel Kirwin

HST – Included in Attendant Care Limits
Dominion of Canada General Insurance Company v. Ridi

Introduction

On May 20, 2021, the Ontario Divisional Court released its judgment in the case of *Dominion of Canada General Insurance Company v. Ridi* ("*Ridi*"). The Court held that HST for taxable attendant care expenses arising from an accident that occurred **prior to June 3, 2019** is paid **as part of the attendant care benefit** up the maximums set out in s. 19 of the *Statutory Accident Benefits Schedule* ("*SABS*"), as the section read at that time.

In general, the attendant care benefit is paid to compensate an insured (who is outside of the MIG) for reasonable and necessary expenses incurred for services provided by an aide, attendant, or long term care facility in accordance with a Form 1. Some of these services will be taxable (i.e. when provided by a licenced facility) and some will not (i.e. when provided by a family member or friend).

Leaving aside optional benefits, s. 19 of the *SABS* (as it read prior to June 3, 2019), set maximums of $3,000.00 per month / $36,000.00 total for non-catastrophically impaired insureds, and $6,000.00 per month / $1,000,000.00 total for catastrophically impaired insureds. The section was silent on the applicability of HST and whether the tax was included in the maximums set by the *SABS*, or whether HST was to be paid in addition to, and outside of the *SABS* maximums. Portions of the *SABS* were amended as of June 3, 2019, and in particular, s. 19 of the *SABS* was revised to include wording confirming that for any accidents on or after that date, HST is now paid on top of/separately from the attendant care maximums laid out in the *SABS*. *Ridi* now confirms that for accidents **before June 3, 2019**, HST is included in the maximum monthly/total amounts payable for taxable incurred accident benefit expenses.

Facts

This case arose from a motor vehicle accident that occurred on March 21, 2014. The insured, Filippo Ridi, was subsequently deemed catastrophically impaired. Mr. Ridi incurred monthly attendant care expenses, some of which were taxable. Mr. Ridi claimed and was paid attendant care benefits. However, an issue arose as to whether HST was included in the catastrophic maximums payable for attendant care benefits or not.

Initial Decision

The insurer believed that HST was included in the maximum amounts payable for attendant care for accidents that occurred prior to June 3, 2019. Mr. Ridi applied to the Licence Appeal Tribunal ("LAT"), requesting an order that the HST was to be paid in addition to those maximums. The insurer took the position the HST was included in the definition of "expenses incurred" in s. 19(1) and as referred to in s. 3(7)(e) of the *SABS*. The LAT rejected this argument and found that HST was not a "reasonable and necessary" expense under s. 19. Therefore, it was not subject to the *SABS* limits for attendant care benefits payable. The LAT found in favour of Mr. Ridi and held that HST was to be paid separately, as a tax, not as part of the maximum limits for attendant care. The LAT rejected the insurer's applications for reconsideration. The insurer appealed to the Divisional Court on a question of law.

Divisional Court Decision

On appeal, the Divisional Court determined that while the LAT was correct in finding that applicable HST was payable by the insurer, the LAT erred in determining that the insurer ought to pay for HST in addition to the attendant care maximums set out in the *SABS* for accidents that occurred prior to June 3, 2019.

The Court held that the LAT incorrectly relied on FSCO guidelines and bulletins that did not deal with attendant care benefits specifically, and that the LAT's finding that HST was not a "reasonable expense" led to a non-sequitur in reasoning: "that HST is not a reasonable and necessary expense, but the insurer must pay for it". Based upon the principles of statutory interpretation, the Court found that while the *SABS* was consumer protection legislation, there were limits on compensation as it was designed to be "both fair and affordable", ultimately confirming that "insured persons may not be fully compensated for the costs associated with their care and rehabilitation as a result of their accident."

The Court held that s. 19 of the *SABS* was not ambiguous, and that for accidents **prior to June 3, 2019**, HST was to be paid as part of the maximums set out in the *SABS* for taxable attendant care services.

Conclusion

Since there have undoubtedly been a vast number of *SABS* claims made in relation to accidents that occurred prior to June 3, 2019, it is important that insurers are aware of the outcome of the decision in *Ridi.* While the decision dealt with a catastrophically impaired insured, arguably, the same reasoning can also be applied to non-catastrophic cases.

Based on *Ridi*, insurers are justified in including HST on taxable attendant care benefits within the maximum amounts payable under the *SABS*, if the motor vehicle accident occurred **prior to June 3, 2019**. As a result, it may be prudent to review any such open files to determine whether HST ought to be added back into the amount of attendant care benefits paid, if such amounts were previously removed.

It is important to note that ***Ridi* does not apply to accidents that occurred on or after June 3, 2019**. Therefore, for any such accidents, HST remains payable in addition to/separately from the maximum attendant care benefits payable under the *SABS*.