

**IN THE MATTER OF SECTION 275 OF THE *INSURANCE ACT*, R.S.O. 1990,  
AND *ONTARIO REGULATION 664***

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17**

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**SECURITY NATIONAL INSURANCE COMPANY**

**Applicant**

- and -

**AVIVA INSURANCE COMPANY OF CANADA**

**Respondent**

**ARBITRATION DECISION**

**COUNSEL:**

Tessie Kalogeras for the Applicant

Andrew P. Smith for the Respondent

**ISSUE:**

1. Is Aviva required to repay Security National the amount of HST that it paid to service providers who provided medical and rehabilitation treatment to the Claimant beyond the \$50,000 limit set out in section 18(3) of the SABS?

**RESULT:**

1. Yes, Aviva is required to reimburse Security National for the HST paid that exceeds the \$50,000 limit provided for claims outside the Minor Injury Guideline in section 18(3) of the SABS.

HST paid by an insurer for medical and rehabilitation services does not form part of that monetary limit, and second party insurers are therefore liable to indemnify first party insurers for HST paid with respect to medical and rehabilitation treatment claims, regardless of whether the total amount sought exceeds \$50,000.

**BACKGROUND:**

1. Bruce Armstrong was injured while riding his motorcycle on University Avenue in downtown Toronto on October 8, 2015, when the driver of a car either pulled out of a parking spot or made a lane change, resulting in a “T- bone collision” between the two vehicles.

2. Mr. Armstrong applied for and received accident benefits under the *SABS* from his insurer, Security National Insurance Company (“Security National”). Security National has commenced an arbitration against Aviva Insurance Company of Canada (“Aviva”), the insurer of the car that struck the Claimant, seeking indemnification for the benefits that it has paid out pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act*. Aviva accepts that its driver is fully at fault for the accident, and that it is obliged to indemnify Security National for all reasonable amounts paid to Mr. Armstrong under the *SABS*, less the applicable deductible.

3. Security National has paid various benefits to Mr. Armstrong, including a total of \$51,625 in medical/rehabilitation benefits. Section 18(3) of the *SABS* provides that the sum of those benefits for claims outside of the Minor Injury Guideline (“MIG), that are

not catastrophic, shall not exceed \$50,000. The parties agree that the additional \$1,625 sought by Security National consists of HST paid to various health care providers who provided treatment to the Claimant. Aviva contends that it is not required to pay any amounts over the \$50,000 limit set out in subsection 18(3), as Security National's decision to do so constitutes gross mishandling of the claim.

4. The general question raised in this case is whether Ontario's HST is part of the monetary limit set out for medical/rehabilitation benefits provided in section 18 of the *SABS*, or whether it is payable regardless of whether that would result in the amount owing for med/rehab benefits exceeding \$50,000 for claims that are not subject to the limit imposed by the MIG.

**THE EVIDENCE:**

5. The parties filed an Agreed Statement of Facts setting out the facts outlined above. They also filed various Guidelines and Bulletins published by the Superintendent of Financial Services in Ontario ("FSCO"). No *viva voce* evidence was called and the parties exchanged written submissions setting out their arguments on this issue.

6. The parties agree that Security National paid \$32,811.58 to the Claimant for Income Replacement Benefits, \$12,507.66 for Attendant Care and a total of \$51,625 to his healthcare providers for Medical / Rehabilitation benefits under the *SABS*. As noted above, the parties agree that the amount paid out under the category of medical/rehabilitation benefits in excess of \$50,000 consists solely of the HST payable on the services provided.

7. Aviva has agreed to indemnify Security National for all of the amounts paid out, less the \$2,000 deductible, save for the \$1,625 it says exceeds the \$50,000 monetary limit provided in section 18(3) of the *SABS*.

## **RELEVANT STATUTORY AND REGULATORY PROVISIONS:**

The following provisions are relevant to my determination of this matter:

### ***Insurance Act***

*268.3 (1) The Superintendent may issue guidelines on the interpretation and operation of the Statutory Accident Benefits Schedule or any provision of that Schedule.*

*(1.1) The Superintendent may issue guidelines setting out the treatment, services, measures or goods applicable in respect of types of impairments for the purposes of payment of a medical or rehabilitation benefit provided under the Statutory Accident Benefits Schedule, and such guidelines may include conditions, restrictions and limits with respect to such treatment, services, measures or goods.*

*(2) Subject to section 268.2, a guideline shall be considered in any determination involving the interpretation of the Statutory Accident Benefits Schedule.*

*(2.1) Despite subsection (2), a guideline that is incorporated by reference into the Statutory Accident Benefits Schedule is binding.*

*(3) A guideline takes effect on the day it is published in The Ontario Gazette.*

*275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.*

*(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.*

### **Regulation 664**

*9. (2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,*

*(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,*

*(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises,*

**SABS – Section 18 (version in effect from August 26, 2015 – March 3, 2016)**

*18. (1) The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed \$3,500 for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline. O. Reg. 34/10, s. 18 (1).*

*(3) The sum of the medical and rehabilitation benefits paid in respect of an insured person who is not subject to the financial limit in subsection (1) shall not exceed, for any one accident,*

*(a) \$50,000; or*

*(b) if the insured person sustained a catastrophic impairment as a result of the accident, \$1,000,000.*

**SABS – Section 18 (version in effect as of June 8, 2019)**

*18. (1) The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed \$3,500 **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** for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline.*

*(3) The sum of the medical, rehabilitation and attendant care benefits paid in respect of an insured person who is not subject to the financial limit in subsection (1) shall not exceed, for any one accident,*

*(a) \$65,000 **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**; or*

*(b) if the insured person sustained a catastrophic impairment as a result of the accident, \$1,000,000 **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.***

*(emphasis added)*

**RELEVANT FSCO GUIDELINES & BULLETIN:**

Various Guidelines and Bulletins issued by FSCO were also referred to by counsel, the relevant portions of which are excerpted below -

**Superintendent's Guideline No. 03/14 - Professional Services Guideline**

***Introduction***

*This Guideline is issued pursuant to subsection 268.3 (1) of the Insurance Act for the purposes of subsections 15 (2) (b), 16 (4) (a), 17 (2) and 25 (3) of the Statutory Accident Benefits Schedule – Effective September 1, 2010 (SABS), and applies to expenses related to services rendered on or after September 6, 2014.*

***Purpose***

*This Guideline establishes the maximum expenses payable by automobile insurers under the SABS related to the services of any of the health care professions or health care providers listed in the Guideline. These maximums are applicable to:*

- *a medical benefit under clauses 15 (1) (a), (b), or (h) of the SABS;*
- *a rehabilitation benefit under clauses 16 (3) (a) to (g) or (l) of the SABS;*
- *case management services under subsection 17 (1) of the SABS; or*
- *conducting an examination, assessment or provision of a certificate, report or treatment plan under subsection 25 (1) 3 of the SABS.*

*Insurers are not prohibited from paying above any maximum amount or hourly rate established in the Guideline.*

*Services provided by health care professionals/providers, unregulated providers and other occupations not listed in the Guideline are not covered by the Guideline. The amounts payable by an insurer related to*

*services not covered by the Guideline are to be determined by the parties involved.*

### ***Harmonized Sales Tax (HST)***

*The applicability of the HST to the services of any health care professionals or health care providers listed in this Guideline falls under the jurisdiction of the Canada Revenue Agency (CRA). 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 an insurer in addition to the fees as set out in this Guideline.*

### **Bulletin – A-04/15 : Property & Casualty – Auto**

*To the attention of all insurance companies licensed to transact auto insurance in Ontario:*

*FSCO is reminding insurers of the requirement to obtain consent when accessing credit information when accessing credit information in connection with fleets or commercial or public use vehicles. **This Bulletin also clarifies how applicable HST charges affect benefit limits under the Statutory Accident benefits Schedule (SABS)***

### ***Harmonized Sales Tax (HST)***

*The applicability of HST is governed under federal legislation and administered by the Canada Revenue Agency (CRA).*

*However, HST is addressed in three Guidelines issued by the Superintendent of 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 an insurer in addition to the fees as set out in this Guideline”. The Costs of Assessments and Examinations and Costs of Goods Guidelines include similar statements.*

*Insurers are reminded that in the absence of such wording in the SABS of other such Guidelines (e.g., Minor Injury Guideline), the direction remains the same.*

*FSCO expects that the 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 added)*

## **Superintendent's Guideline No. 02/16 - Cost of Goods Guideline**

### ***Introduction***

*This Guideline, issued pursuant to section 268.3 of the Insurance Act and incorporated by reference in sections 15 and 16 of the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("SABS"), applies to expenses related to all goods provided **on or after June 1, 2016**.*

### ***Purpose***

*This Guideline establishes the maximum expenses payable by automobile insurers for goods delivered under sections 15 and 16 of the SABS which require insurers to pay for "reasonable and necessary" expenses incurred by or on behalf of an insured person, with the exception of goods provided under subsections 15(1)(h) and 16(2)(l). Goods provided under subsections 15(1)(h) and 16(2)(l) are payable if the insurer agrees they are essential for the treatment or rehabilitation of the insured person, and for which a benefit is not otherwise provided in the SABS. Insurers are not prohibited from paying above any maximum amount established in this Guideline.*

### ***Harmonized Sales Tax (HST)***

*The applicability of the HST to goods referred to in sections 15 and 16 of the SABS falls under the jurisdiction of the Canada Revenue Agency (CRA). If the HST is considered by the CRA to be applicable to an item for which an insurer is liable under those sections, then 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.*

## **PARTIES' ARGUMENTS:**

### *Security National's submissions*

8. Counsel for Security National contended that the provisions and guidelines cited above make it clear that Aviva is obliged to indemnify her client for HST paid beyond the \$50,000 limit for medical and rehabilitation expenses referred to in section 18 of the SABS. She noted that section 268.3 (1.1) and (2) of the Act provide that the Superintendent may issue guidelines with respect to the payment of medical and

rehabilitation benefits, and that these guidelines are binding. She argued that given this provision, an insurer must abide by guidelines issued, and does not have the flexibility to interpret them in a manner that suits its purposes.

9. Counsel specifically noted that the Professional Services Guideline No. 03/14 issued by FSCO just over a year before the accident, provides that if the Canada Revenue Agency (“CRA”) considers HST to be applicable to any of the services listed, as is the case here, “the HST is payable by an insurer in addition to the fees” set out in the Guideline.

10. Counsel also noted that Bulletin A-04/15, issued in June 2015, a few months before the accident, clarifies and reiterates that HST is payable by insurers apart from the amounts that a claimant is entitled to receive for treatment. She highlighted the statement that “HST is a tax and is not part of the benefits limits set out in the SABS”, and noted that FSCO released a further Guideline in June 2016, following the accident, that is consistent with the above two pronouncements.

11. Ms. Kalogeras submitted that the above excerpts provide a clear and consistent message from the FSCO Superintendent that insurers are required to pay HST owing with respect to services provided related to claims submitted under sections 15 and 16 of the SABS for medical and rehabilitation treatment, regardless of whether the total amount paid out exceeds \$50,000. She noted that despite this clear direction, several insurers have chosen not to do so, and that as a result, several class action lawsuits have been recently filed in the Toronto Superior Court of Justice against these insurers, including the Respondent, Aviva.

#### *Aviva's submissions*

12. Counsel for Aviva advised that his client accepts that its insured was 100% at fault for the accident, and that it is required to indemnify Security National pursuant to section 9(2) of *Regulation 664*. He submitted, however, that any amount paid by Security National over the \$50,000 monetary limit for medical/rehabilitation benefits set out in

section 18(3) of the *SABS* is not recoverable, as any HST paid related to those benefits should be included within the \$50,000 limit provided.

13. Mr. Smith noted that the jurisprudence permits an exception to the rule that the Loss Transfer provisions require second party insurers to reimburse first party insurers for all of the benefits that they have paid out, in cases where a claim has been grossly mishandled, and where “significant mistakes are made that result in benefits being paid at a higher level than they would have been if the claims handler had acted in a reasonable fashion” (*Aviva v Royal and SunAlliance*, February 21, 2018). He contended that any payments made over the monetary limits set out in the *SABS* cannot be described as reasonable, and would therefore meet this test.

14. Counsel submitted that the question of whether HST paid to service providers is included in the \$50,000 limit set out in section 18(3) of the *SABS* is essentially an exercise in statutory interpretation. He referred to the Supreme Court of Canada’s instruction in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 that the words in a provision must be read in “their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament”. He contended that while the *SABS* require insurers to pay reasonable and necessary expenses for medical and rehabilitation benefits, there is no mention of HST payments being excluded from the monetary limits specified, and argued that this should not be “read in” to the *SABS*. He noted that the *SABS* has been amended many times over recent years, and suggested that if the legislators had intended that insurers pay more than the specified monetary limits, they could have amended the regulation to say so.

15. Counsel noted that section 18(3) of the *SABS* was in fact amended in June 2019 to specifically exclude HST from the monetary limit applicable to what is now a combined Medical, Rehabilitation and Attendant Care benefit. He contended that if the Applicant’s argument that HST was not included in the \$50,000 limit before June 2019 is accepted, the recent amendment would have been unnecessary. He emphasized that the new version of section 18(3) specifies that HST is to be paid in addition to the maximum benefit for

accidents that occur on or after June 3, 2019, and argued that by implication, the converse must be true for claims made arising from accidents before this date, and that any other interpretation would render the new provisions redundant.

16. Mr. Smith pointed out that the 2016 Guideline referred to by the Applicant was not in effect at the time of the accident, and that the 2015 Guideline does not contain specific language directing that HST paid is not included in the monetary limit for a benefit set out in the *SABS*. He acknowledged that FSCO Bulletin No. A-04/15 does specify that HST paid is not part of the benefit limits set out in the *SABS*, but contended that bulletins issued by FSCO are not binding on insurers, and cannot alter what is provided in the *SABS*.

17. Counsel noted that section 268.3 of the *Act* outlines when a FSCO Guideline should be considered in interpreting the *SABS*, and that subsection (2.1) provides that a guideline is only binding if it is incorporated by reference into the *SABS*. He contended that the Divisional Court outlined the test for determining whether a guideline is incorporated by reference into a provision in *Scarlett v. Belair Insurance Company* 2015 ONSC 3635, and that Justice Gordon determined that in order to be incorporated by reference into a statute or regulation, the provision in question must be both referred to expressly in the statute or regulation, and required for the proper interpretation of that part of the regulation. He argued that this test is not met in this case, as none of the guidelines referred to by the Applicant are referenced in the relevant sections of the *SABS*, and that section 18 does not require reference to a guideline to be properly interpreted.

18. Finally, Mr. Smith acknowledged that class action lawsuits have been commenced against his client and other insurers in Ontario, but noted that the class has not yet been certified, nor any of the allegations or evidence tested. He contended that those actions are therefore irrelevant to this proceeding.

19. The Applicant did not file any Reply submissions.

**ANALYSIS & REASONS:**

20. Having carefully considered the parties' submissions, I find that the HST paid by a first insurer that is applicable to treatment received by a claimant is recoverable from a second insurer, even if the total amount being sought is greater than the \$50,000 monetary limit set out in section 18(3) of the *SABS*. To be clear, I find that HST payments required to be made are not included within the \$50,000 limit for medical and rehabilitation expenses in cases outside the MIG, and that Aviva must reimburse Security National for the \$51,625 that Security National paid for medical and rehabilitation benefits in this case.

21. As noted above, the version of section 18(3) of the *SABS* that was in effect at the time of the accident in question did not explicitly refer to HST payments. It simply stated that the sum of medical and rehabilitation benefits payable to a claimant who is not subject to the Minor Injury Guideline and had not sustained a catastrophic impairment "shall not exceed, for any one accident, \$50,000". While that provision has recently been amended to explicitly state that the HST payable on benefits paid by an insurer is not included in the monetary limit provided, that was not the case at the time.

22. Should the phrase "the sum of medical and rehabilitation benefits paid in respect of an insured person" be interpreted to include HST owing on services provided, if such a tax is required by the CRA ? In my view, it should not. Following the contextual analysis required by *Re Rizzo, supra*, and considering the *SABS* as a whole, I find that the legislators did not intend that a claimant's right to reasonable and necessary treatment be reduced by the amount of tax imposed by CRA, a third party. That would be contrary to the consumer protection orientation of the *SABS*, and not in keeping with its overall scheme (see *Smith v Co-operators General Insurance Co.* [2002] 2 S.C.R. 129).

23. Both parties referred to the Guidelines issued by the FSCO Superintendent and the Bulletin referred to above in their submissions. Section 268.3 of the *Act* provides the Superintendent with the authority to issue guidelines with respect to the interpretation of

the *SABS* and subsection (2) states that a guideline “shall be considered in any determination involving the interpretation of the *SABS*”. Subsection (2.1) provides that a guideline that is incorporated by reference into the *SABS* is binding. Counsel for Aviva argued that the Guidelines in issue here are not incorporated by reference into the *SABS*, and are therefore not binding. I do not disagree with this, but in my view, section 268.3 makes it clear that any applicable guidelines issued prior to the accident must be considered when interpreting section 18(3) of the *SABS*, and I will do so below.

24. The Professional Services Guideline was issued in September of 2014. It states that the applicability of HST to services provided by health care providers falls under the jurisdiction of the CRA, and that if CRA considers HST to be applicable to any of the services listed in the guideline, it is payable in addition to the fees charged. While this does not specifically state that these payments should not be included within the \$50,000 limit in section 18(3), it does clearly distinguish the services received from the tax payable on those services, and in my view, supports a finding that amounts paid for HST are separate from amounts paid for the benefits themselves.

25. Bulletin A-04/15 was issued nine months later. It specifically states that “the HST is a tax and is not part of the benefit limits set out in the *SABS*”. Counsel for Aviva argues that this Bulletin alters the *SABS* and should be ignored. I disagree. While I accept that a Bulletin issued by the Superintendent is not binding and does not carry the same weight as a Guideline referred to in section 268.3(2), I find that it can be relied on as an interpretive aid in the exercise of statutory interpretation.

26. Aviva contends that the June 2019 amendments to section 18(3) of the *SABS* that explicitly provide that HST paid is not included in the monetary limits cited would not have been necessary, if the interpretation urged on me by Security National were true. While I appreciate that in general terms an amendment passed that directs a certain practice can be referred to in order to support an argument that the prior practice was different, I find that the circumstances here permit a different interpretation. It is evident that despite the FSCO Guidelines and Bulletin cited above, the practice among insurers of

either not reimbursing claimants for HST paid, or only paying up to the monetary limits set out in the *SABS* once the amount of benefits and the associated HST reached that limit remained. The amendment was passed against that backdrop, and I think it is safe to assume that it was done to clarify, in as strong a manner possible, the legislators' intention that HST not be included in the monetary limit spelled out.

27. For the reasons outlined above, I find that Aviva is required to repay Security National the full amount of \$51,625 for Medical /Rehabilitation benefits and applicable HST that it has paid out to Mr. Armstrong.

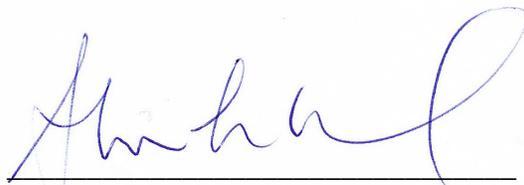
**ORDER:**

Aviva must indemnify the amount of \$51,625 to Security National for payments it made to Mr. Armstrong for medical and rehabilitation benefits received, and the applicable HST, pursuant to section 275 of the Act.

**COSTS:**

Given the result, Security National is entitled to be paid its legal costs incurred in this proceeding, on a partial indemnity basis. If counsel cannot agree on the quantum of costs to be paid, I invite them to contact me in writing, and a timetable will be set for the exchange of submissions on this issue.

**DATED at TORONTO, ONTARIO this \_\_\_23<sup>rd</sup>\_\_\_ DAY OF OCTOBER, 2019**



**Shari L. Novick**  
**Arbitrator**