

**CITATION:** Royal & Sun Alliance Insurance Company of Canada v. SNIC, 2023 ONSC Number  
**COURT FILE NO.:** CV-21-00665731-0000  
**DATE:** 20230825

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA  
Plaintiff

**AND:**

SECURITY NATIONAL INSURANCE COMPANY Defendant

**BEFORE:** Justice Chalmers

**COUNSEL:** *A. Lifshitz*, for the Plaintiff/Responding Party

*M. Kennedy*, for the Defendant/Moving Party

**HEARD:** June 27, 2023, by videoconference

**ENDORSEMENT**

**OVERVIEW**

[1] The Defendant, Security National Insurance Company (Security National) insured Steve Germain pursuant to a standard Ontario automobile policy (the Auto Policy). The Plaintiff, Royal & Sun Alliance Insurance Company of Canada (RSA) issued a policy of emergency travel and medical insurance to Mr. Germain (the Travel Policy). The Travel Policy was with respect to a trip taken by Mr. Germain to Las Vegas, Nevada in July 2019.

[2] On July 12, 2019, Mr. Germain was involved in an automobile accident in the State of Nevada. RSA paid for certain out-of-province medical expenses pursuant to the terms of the Travel Policy. RSA then demanded that Security National reimburse RSA for the amounts paid. Security National took the position that the Travel Policy is in priority to the Auto Policy and as a result, there is no obligation on Security National to reimburse RSA with respect to Mr. Germain's medical expenses.

[3] Security National brings this motion for summary judgment dismissing the claims of RSA. For the reasons set out below, I find that Security National is not liable to reimburse RSA for the payments it made for Mr. Germain's medical expenses. I grant summary judgment in favour of Security National and dismiss the action.

## **FACTUAL BACKGROUND**

### ***The Travel Policy***

[4] RSA provided Out of Province Emergency Travel Medical Insurance to Mr. Germain. The coverage was provided pursuant to a Master Policy which was issued to the Canadian Imperial Bank of Commerce. Mr. Germain was automatically covered under the Travel Policy through his Visa Aerogold Infinite credit card.

[5] The Travel Policy includes an Out of Province Emergency Travel Medical Insurance Certificate. The Certificate includes the following clause:

“WHAT’S COVERED: [...] Costs for Hospital accommodation and necessary medical supplies (except the costs of a private room or suite unless one is medically required) in excess of what is covered by Your Government Health Insurance Plan.”

Part 3 of the Certificate provides:

#### Additional Information About Your Coverage:

8. In a medical emergency you must use the closest hospital or medical facility as determined by us. After the company pays your health care provider or reimburses you for covered expenses, it will seek reimbursement from your government health insurance plan and any other medical insurance plan under which you may have coverage...

9. If another insurer insures you as well, we will co-ordinate with them to make sure the payments do not exceed the expenses you have incurred”.

### ***The Auto Policy***

[6] Security National insured Mr. Germain pursuant to a standard Auto Policy. The Auto Policy provides the benefits set out in the *Statutory Accident Benefits Schedule (SABS)*. Part V of the *SABS* schedule is entitled; “Medical, Rehabilitation and Attendant Care benefits”. The schedule provides:

14(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit.

(2) The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services;

[....]

Under the section of the schedule entitled "Other Collateral Benefits", s. 60(2) provides:

60(2) Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part VI is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law.

[7] Section 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, adds the *SABS* to every contract of automobile insurance. The section provides as follows:

**Statutory accident benefits**

268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26(1)

[...]

**Excess Insurance**

268(6) The insurance mentioned in subsection (1) is excess insurance to any other insurance not being automobile insurance of the same type indemnifying the insured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268(6).

***The Accident***

[8] On July 12, 2019, Mr. Germain was a passenger in a ride share vehicle, when he was involved in an automobile accident. Mr. Germain was injured. He incurred medical and hospital expenses. The medical expenses were paid by RSA. A claim summary explanation of benefits from the third-party adjuster, Global Excel, shows that \$73,362.46 was paid to Mr. Germain to compensate him for the medical expenses.

[9] RSA demanded reimbursement from Security National for the amounts paid to Mr. Germain for medical expenses. Security National denied RSA's claim for reimbursement. RSA issued its Statement of Claim on July 16, 2021. Security National delivered its Statement of Defence on December 13, 2021.

**THE ISSUE**

[10] The issue to be determined on this motion is which of RSA or Security National bears the primary responsibility for paying the medical expenses Mr. Germain incurred following the automobile accident in Nevada on July 12, 2019.

## **ANALYSIS AND DISCUSSION**

### ***Test for Summary Judgment***

[11] Security National brings this motion for summary judgment. Summary judgment will be granted if there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process:

- a. allows the judge to make the necessary findings of fact,
- b. allows the judge to apply the law to the facts and
- c. is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, at paras. 49 and 68.

[12] Here, the issue to be determined is which of RSA or Security National has the primary responsibility for paying for Mr. Germain's out of province medical expenses. This is a matter of policy interpretation and will turn on the wording used in the Travel Policy and Auto Policy. There are no facts in dispute and no issues of credibility. I am satisfied that this is an appropriate matter for summary judgment.

### ***Which Policy has the Primary Responsibility for Payment of the Medical Expenses?***

#### ***Legal Principles***

[13] Insurance policies, like other contracts, are to be interpreted based on the plain and ordinary language used: *Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.*, 2001 CanLII 21205 (ON CA), 57 O.R. (3d) 425, [2001] O.J. No. 4936 (C.A.), at para. 23. Where the court is required to interpret the terms of two policies issued by two different insurers to the same insured, the liability of the insurers is to be determined by the intent of the two insurers as revealed by the wording of the policies: *Simcoe & Erie General Insurance Co. v. Kansa General Insurance Co.*, 1994 CanLII 1741 (BC CA), at pages 6 and 7, see also *Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.*, 2001 CanLII 20561 (ON CA), [2001] O.J. No. 1835 (QL), 199 D.L.R. (4<sup>th</sup>) 654 (C.A.), at para. 9.

[14] In *Travel Insurance Co-Ordinators Ltd. v. ING Halifax Insurance Co.*, 2001 CanLII 28085 (ON SC), 57 O.R. (3d) 406, [2001] O.J. No. 4978 (S.C.J.), aff'd 2002 CanLII 53277 (ON CA), [2002] O.J. No. 3566, 167 O.A.C. 201 (C.A.), (*Travel Insurance*) the issue to be determined was whether a travel policy or an automobile policy provided primary coverage for medical expenses that were incurred when the insured was vacationing in Minnesota. Condition 9 of the travel policy provided:

The coverage outlined in this insurance are second payor plans. If there are other third party liability, group or individual basic or extended health insurance plans or contracts including any private or provincial or territorial auto insurance plan providing hospital, medical or therapeutic coverage, or any third party liability

insurance concurrently herewith, amounts payable hereunder are limited to those expenses incurred outside the province or territory of residence that are in excess of the amounts for which an insured person is insured under such other coverage.

[15] The automobile insurer took the position that regardless of the travel policy wording, section 268(6) of the *Insurance Act*, governed to make the travel policy primary. As noted above, that section provides that the SABS coverage for medical expenses, is “excess insurance to any other insurance not being automobile insurance of the same type indemnifying the insured person or in respect of a deceased person for the expenses”.

[16] The court found that based on the clear wording of the travel policy, the travel insurer provided second payor coverage that was excess to the amounts covered by the auto insurer. The court found that because the two policies were not of the same type, s. 268(6) of the *Insurance Act*, did not apply. The court held that the auto insurer provided primary coverage and therefore the travel policy was not reasonably available to the insured parties until the SABS had been exhausted: at para. 16.

[17] The Ontario Court of Appeal considered the priority of a travel policy and auto policy to pay out of province medical expenses, in *RBC Travel Insurance Company v. Aviva Canada Ltd.* (2006), 82 O.R. (3d) 490, (CA). The court found that while the language of the travel policy was not as clear as in the *Travel Insurance* case, the travel policy provided excess coverage. The travel policy provided:

This insurance only covers expenses in excess of those covered under your government health insurance plan and by any other insurance or benefit plan under which you are covered.

[....]

6. All benefits payable to you under any of our policies are in excess of the benefits for the same or similar benefits payable to you by any other insurer.

[18] The Court of Appeal concluded that these clauses in the travel policy cannot be ignored. The plain meaning of the words used in the policy led to the conclusion that the travel policy provided excess coverage. The court also found, (as Lane J. did in *Travel Insurance*) that where a travel policy does not provide first payor coverage, s. 268(6) of the *Insurance Act* has no application, and therefore the automobile insurer was required to reimburse the travel insurer for the medical expenses: at para. 45.

#### ***Wording of the RSA Travel Policy***

[19] The RSA Travel Policy consists of a Master Policy and Certificates. The Master Policy provides that the coverage is as set out in the Certificates of Insurance:

The insurance coverages and benefits provided to Insured Persons hereunder, including limitations, restrictions, conditions and exclusions, are described in the

Certificate of Insurance, the provisions of which form a part of this Policy and are incorporated herein by reference.

All insurance coverages and benefits provided herein are subject to the exclusions, limitations, terms and conditions contained herein and in the Certificate of Insurance.

[20] The Insurance Certificate for Out-of-Province Emergency Travel Medical Coverage includes the following clause:

“WHAT’S COVERED: [...] Costs for Hospital accommodation and necessary medical supplies (except the costs of a private room or suite unless one is medically required) in excess of what is covered by Your Government Health Insurance Plan.”

[21] The Certificate provides that it is excess to government health insurance plan. The Certificate does not state that it is excess to any other insurance that may provide coverage for medical expenses. Security National argues that based on the clear wording used, the Travel Policy is excess only to a government health insurance plan and is not excess to other insurance including SAB coverage in the Auto Policy.

[22] Part 3 of the Certificate provides:

#### Additional Information About Your Coverage

8. In a medical Emergency You must use the closest Hospital or Medical Facility or the facility as determined by Us. After the Company pays Your health care provider or reimburses You for covered expenses, it will seek reimbursement from Your Government Health Insurance Plan and any other medical insurance plan under which You may have coverage. You may not claim or receive in total more than 100% of Your total covered expenses or the actual expenses which You incurred, and You must repay to Us any amount paid or authorized by the Company on Your behalf if and when the Company determines that the amount was not payable under the terms of Your Policy.

9. If another insurer insures You as well, we will co-ordinate with them to make sure the payments do not exceed the expenses You have incurred.

[23] RSA relies on the part of condition 8 that provides that after payment, it will seek reimbursement from the Government Health Insurance Provider and “any other medical insurance plan under which you may have coverage.” This is the only part of the Out of Province Emergency Medical Certificate that refers to “any other medical insurance plan”.

[24] In support of its position that the Out of Province Medical coverage is excess, RSA refers to the general conditions contained in the Trip Cancellation Insurance Certificate which provides:

Subject to applicable law, any of our policies are excess insurance and are last payors. All other sources of recovery, indemnity payments or insurance coverage must be exhausted before any payments will be made under any of those policies.

[25] This wording is not found in the Out of Province Emergency Medical Certificate.

### *Analysis*

[26] RSA takes the position that the wording of the Certificate for Out of Province Emergency Travel Medical Coverage is similar to the wording of the travel policy in the *RBC Travel v. Aviva* case, and therefore its Travel Policy is a second payor. I disagree. In *RBC Travel v. Aviva*, the travel policy specifically provided that the out-of-province medical expenses coverage was excess to a government health insurance and “any other insurance or benefit plan”. The RSA Certificate for Out-of-Province Emergency Travel Medical Coverage provides that it is excess only to a government health insurance plan. It does not go on to state that it is excess to any other insurance or benefit plan.

[27] RSA relies on general condition 8 which provides that RSA will seek reimbursement from a Government Health Plan or “any other medical insurance plan under which you may have coverage”. I am of the view that this wording does not support RSA’s position that the Out of Province medical coverage is a second payor. The fact that RSA will seek reimbursement does not mean that it is excess to other insurance. It may mean that RSA will seek reimbursement from other primary policies. I am not satisfied that this is sufficiently clear language that the Travel Policy provides only excess coverage.

[28] RSA also relies on the provision in the Travel Policy that if any other insurer is liable, RSA will co-ordinate with them to make sure the payments do not exceed the total expenses incurred. In my view, this provision does not clearly indicate that the Travel Policy is excess. Again, this term could relate to a co-ordination between primary insurers to ensure the amount paid does not exceed the total expenses.

[29] RSA relies on the Trip Cancellation Certificate which specifically provides that, “subject to applicable law, any of our policies are excess insurance and are the last payors”. While the Trip Cancellation Certificate provides that it is excess insurance, similar wording is not found in the Certificate for Out-of-Province Emergency Travel Medical Coverage, which provides that it is only excess to what is covered by a Government Health Insurance Plan. I am not satisfied that RSA can rely on the wording of the Trip Cancellation Certificate to support its position that the Out-of-Province Emergency Travel Medical Coverage Certificate provides excess coverage.

[30] The fact that RSA used wording in the Trip Cancellation Certificate that specifically provides that the coverage is excess to “all other sources of recovery” but did not use the same wording in the Out of Province Emergency Travel Medical Certificate, is, in my view, fatal to RSA’s position. RSA could have used the same language in the Travel Medical Certificate as

was used in the Trip Cancellation Certificate but did not do so. The intention must have been to make the Trip Cancellation coverage excess to all other sources of recovery but not to make the Out of Province Emergency Travel Medical coverage excess to all other sources of recovery.

[31] Similarly, if RSA intended to make its out of province emergency medical coverage excess, it could have used the language set out in the travel policies in *Travel Insurance* and *RBC Travel v. Aviva*. In both cases, the travel insurer used specific language that its policy was a “second payor” and that the travel policy was “excess of those covered under your government health insurance plan and by any other insurance or benefit plan under which you are covered”. RSA does not state that the out of province medical expenses coverage is a second payor. It does not state that coverage is excess to “any other insurance or benefit plan.”

[32] I find that the RSA Travel Policy provides first payor coverage for out of province medical expenses. Section 268(6) of the *Insurance Act* provides that the auto policy is excess insurance to any other insurance not being automobile insurance of the same type indemnifying the injured person for expenses. Section 268(7) further provides that the auto policy is excess insurance to any other insurance indemnifying the insured person for expenses. These subsections of the *Insurance Act*, makes the auto policy excess to any other policy that provides first payor coverage: *Travel Insurance*, at paras. 44, 45.

### **DISPOSITION**

[33] I find that RSA is not entitled to reimbursement from the Security National. I find that Security National is entitled to the relief sought. I grant summary judgment in its favour and dismiss the Plaintiff’s action.

[34] Security National is successful and is presumptively entitled to its costs. At the conclusion of the oral argument, counsel stated that they would attempt to resolve costs. If the parties are unable to come to an agreement, Security National may deliver written cost submissions consisting of no more than 3 typed pages, excluding bills of costs, offers to settle or caselaw, within 15 days of the date of this endorsement. RSA may deliver its costs submissions in reply, on the same basis, within 15 days of receiving Security National’s submissions.



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Chalmers J.

**Date: August 25, 2023**