SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Security National Insurance Co.*, 2024 YKSC 22

Date: 20240517
S.C. No. 21-A0075
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
(DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

PLAINTIFF

AND

SECURITY NATIONAL INSURANCE CO.

DEFENDANT

Before Justice E.M. Campbell

Counsel for the Plaintiff — Lesley Banton

Counsel for the Defendant — R. Nigel Beckmann

REASONS FOR DECISION

INTRODUCTION

[1] In this stated case, the Government of Yukon, Department of Health and Social Services ("Yukon") asserts a right of recovery against first party insurance based on the provisions of three Yukon statutes regarding the recovery of health and medical costs as well as medical-related travel expenses incurred by Yukon in providing health care and related services to a Yukon resident who was injured in a motor vehicle collision in the United States.

[2] Christopher Boughner was cycling in La Quinta, California on November 8, 2018, when he was struck and injured by a motor vehicle. The driver of the motor vehicle, who was at fault, had third-party liability coverage in the amount of 25,000 U.S. dollars only.

[3] As a result of the motor vehicle collision, Mr. Boughner required hospitalization and medical care in California and in the Yukon. Yukon has incurred the costs of providing insured health and medical services as well as medical-related travel benefits to Mr. Boughner pursuant to the Yukon's: *Health Care Insurance Plan Act*, RSY 2002, c 107, the *Travel for Medical Treatment Act*, RSY 2002, c 222 and the *Hospital Insurance Services Act*, RSY 2002, c 112. Mr. Boughner, as a Yukon resident, was entitled to receive those services and benefits pursuant to the applicable statutes. It is my understanding that Mr. Boughner continues to receive medical treatment for his injuries. Yukon was and continues to be required to provide and pay for those services and benefits, to which Yukon residents are entitled, in accordance with the applicable statutes. The damages to Mr. Boughner and the costs incurred by Yukon, due to the injuries he sustained, exceed the amount of coverage held by the U.S. driver who caused the accident.

[4] However, at the time of the accident, Mr. Boughner was insured under an automobile insurance policy issued by the defendant, Security National Insurance Co. ("Security National"). The policy included a S.E.F. No. 44 - Family Protection Endorsement ("SEF 44") coverage. The endorsement provided that Security National would indemnify Mr. Boughner or an eligible claimant under the policy for the amount they are legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured

person by accident arising out of the use or operation of an automobile up to the limit of the policy coverage.

[5] Yukon brought this claim against Security National to recover the costs of health and medical services as well as medical-related travel expenses it incurred because of Mr. Boughner's bodily injuries that it could not recoup from the at-fault under-insured motorist or their insurer. Yukon argues it has a direct claim against Security National as an eligible claimant under the SEF 44 and/or is subrogated in the rights of Mr. Boughner to be compensated under his SEF 44 coverage with respect to the costs it incurred because of his injuries.

QUESTIONS IN ISSUE

[6] The questions submitted by the parties for determination in this stated case are as follows:

1. Is Mr. Boughner entitled to recover the cost of "insured health services", "insured services" or "travel expenses" provided to Mr. Boughner, against Mr. Boughner's S.E.F. Family Protection Endorsement coverage ("SEF Insurance"), on any basis, pursuant to one or more of the following statutory provisions:

    a) Section 10 of the *Health Care Insurance Plan Act*;
    b) Section 11 of the *Hospital Insurance Services Act*; and/or
    c) Section 12 of the *Travel for Medical Treatment Act*.

2. Is the Government of Yukon entitled to recover the costs of "insured health services'', "insured services'' or "travel expenses" provided to Mr. Boughner, against Mr. Boughner's S.E.F. Family Protection Endorsement coverage ("SEF 44 Insurance") by way of subrogation or on any other basis, pursuant to one or more of the following statutory provisions:

    a) Section 9 of the *Health Care Insurance Plan Act*;
    b) Section 10 of the *Hospital Insurance Services Act*; or
    c) Section 11 of the *Travel for Medical Treatment Act*.

[7] For the following reasons, I am of the view that the answer to both questions is no.

POSITIONS OF THE PARTIES

Yukon

[8] First, Yukon submits that Security National is required to indemnify Mr. Boughner for the amount he is legally entitled to recover from the under-insured at-fault motorist as compensatory damages in respect of the bodily injuries he sustained in the motor vehicle collision because he is a named insured and, therefore, an eligible claimant under the SEF 44. Yukon submits the amount Mr. Boughner is entitled to recover under the SEF 44 coverage includes the cost of insured health services, insured services and travel expenses provided to Mr. Boughner by Yukon pursuant to the applicable legislation.

[9] Yukon submits that Mr. Boughner is not only entitled but obliged to recover the cost of the insured health services (pursuant to s. 10 of the *Health Care Insurance Plan Act*), insured services (pursuant to s. 11 of the *Hospital Insurance Services Act*) and travel expenses (pursuant to s. 12 of the *Travel for Medical Treatment Act*) that were provided to him due to the bodily injuries he sustained in the collision.

[10] In addition, Yukon submits that, based on the wording of the applicable statutory provisions, Yukon is “subrogated to all the rights’’ of Mr. Boughner for the purpose of recovering the cost of insured health services (s. 9 of the *Health Care Insurance Plan Act*), insured services (s. 10 of the *Hospital Insurance Services Act*) and travel expenses (s. 11 of the *Travel for Medical Treatment Act*) it incurred as a result of the collision that caused the injuries to Mr. Boughner. Yukon argues that, based on the

legislation's broad and all-encompassing language, any compensation Mr. Boughner may be entitled to, whether by way of contract or tort, because of injuries sustained as a result of a wrongful act of another person, is subject to a right of subrogation by Yukon because it is the initial tortious wrong that gave rise to the applicable tort and contract claims. According to Yukon, this includes benefits from the victim's private contracts of insurance, such as the SEF 44 coverage Mr. Boughner contracted with Security National.

[11] Second, Yukon submits it has a direct claim against Security National because Yukon is an "eligible claimant" under the SEF 44. Yukon submits that the Director, Minister and Administrator respectively are charged with the responsibility of administering the *Health Care Insurance Plan Act*, the *Travel for Medical Treatment Act* and the *Hospital Insurance Services Act.* As such, they meet the definition of an "eligible claimant" under the SEF 44, that is, any other person entitled to maintain an action against the inadequately insured motorist for damages because of the bodily injury to the insured person.

[12] Yukon submits that, pursuant to its legislation, Yukon can maintain an action in damages against the inadequately insured motorist who is responsible for the bodily injury to Mr. Boughner. Therefore, pursuant to the terms of the SEF 44, Security National is contractually bound to indemnify Yukon directly as an eligible claimant.

Security National

[13] At the hearing, counsel for Security National clarified that the at-fault motorist's insurer paid Mr. Boughner without Mr. Boughner having to start litigation in the United

States[1]. Nonetheless, Security National does not take the position, in this case, that Yukon does not have standing because Mr. Boughner did not have to commence litigation against the tortfeasor.

[14] Security National agrees that Mr. Boughner's SEF 44 coverage is triggered in this case because the at-fault motorist coverage was not sufficient to cover Mr. Boughner's damages. However, Security National argues that Yukon has neither a direct claim nor a subrogated claim against Mr. Boughner's SEF 44 coverage.

[15] Security National submits that the statutory provisions relied upon by Yukon in support of its claim specifically target expenses paid in respect of a wrongful act or omission of another person, and that they relate to losses caused by the conduct of a third party. Security National points out that all three statutes relied upon by Yukon provide that where health and medical insured services are provided or medical travel expenses are incurred in respect of an injury resulting from a wrongful act or omission of another person, Yukon "shall be subrogated to all rights of the [injured] person for the purposes of recovering" costs or expenses. Therefore, Security National argues that any right of recovery, which Yukon may have, if any, arises only where a loss is occasioned by a third party, and must be by way of a subrogated right.

[16] Security National submits that subrogation is an equitable doctrine, and that its objectives, in the insurance context, are to ensure that the insured be fully compensated, and that the loss falls on the person who is legally responsible for causing it.

[1] It is unclear whether Yukon has recovered any money from that settlement.

[17] Security National submits that SEF 44 coverage is an optionally purchased extension of automobile insurance coverage that provides the insured person first party coverage if they become victims of an under-insured motorist. Security National adds that SEF 44 coverage is safety net coverage that insures the purchaser for any shortfall they experience in recovering against an under-insured motorist who is legally responsible for their injuries. It is the victim's own insurance, and not that of the tortfeasor. Therefore, Security National submits that it would be illogical to permit another insurer, or a public health plan, as here, to claim and recover against a victim's own SEF 44 coverage when the legislation only provides a right of recovery against the wrongdoer or the tortfeasor.

[18] Security National asserts that Yukon is statutorily obliged to provide, free of charge, the services and benefits that Mr. Boughner received, yet it seeks a windfall by recovering from additional private insurance coverage that the victim purchased on his own. Security National adds that the predominant line of case law authority holds that the statutory authority to subrogate does not include private insurance contracts held by someone other than the tortfeasor.

[19] In addition, Security National submits that a historical analysis of Yukon legislation's predecessor reveals that the purpose and intent in enacting this legislation was to enable the government to recover health care costs from the person responsible for the wrongful act or omission, or their insurer, not from the victim's own insurer. According to Security National, the statutory provisions clearly state that the victim's right to recover the costs of "insured health services", "insured services" or "travel expenses" the victim received is only against the tortfeasor and the tortfeasor's insurer.

Security National submits that Yukon's subrogated rights are therefore limited and cannot be broader than the statutory rights afforded to the insured victim for the purposes of recovering health and medical costs as well as medical travel expenses resulting from the wrongful act or omission. Security National submits that Yukon's statutory right to subrogation cannot be read in isolation and must be read in that context. Therefore, Yukon's rights to recover by subrogation are restricted to recovery against the person responsible for those costs and that person's insurer.

[20] Second, Security National maintains that Yukon does not meet the definition of an "eligible claimant" under the SEF 44. Security National submits that the endorsement's title "Family Protection Endorsement" reveals the intended nature of the coverage. According to Security National, an eligible claimant includes the insured person and other natural persons who have a direct right of action against the under-insured motorist for damages. An eligible claimant does not encompass a government department or agency.

[21] Security National also argues that if Yukon were successful in arguing it has either a direct claim or a subrogated right to recoup its expenses against the SEF 44, it could prejudice the insured victim who incurred the additional expense of purchasing SEF 44 coverage. Security National submits the wording of the SEF 44 coverage is clear that a claim that exceeds the limit of the coverage would result in each eligible claimant sharing the proceeds on a pro rata basis, thus reducing the recovery of the insured victim, no matter what the government policy in that regard may be.

ANALYSIS

The nature and object of the SEF 44

[22] SEF 44 coverage is optional automobile insurance coverage that can be purchased at extra cost to the insured person. SEF 44 coverage allows an insured person or an eligible claimant to claim up to the policy's stated limit, in the event of injury or death sustained by an insured person in an accident arising out of the use or operation of a motor vehicle in cases where the at-fault driver is under-insured. The contractual claim may be subject to deductions as set out in the endorsement. SEF 44 coverage is first party coverage.

[23] SEF 44 coverage is considered excess insurance in that: "[t]he amount payable … is excess to any amount actually recovered … from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover" from specifically listed sources. (para. 4 of SEF 44; *Lombard Insurance Company v Campbell-MacIsaac*, 2004 NSCA 87, ("*Campbell-MacIsaac*") at para. 55; *Kuzyk v Commercial Union Assurance Company of Canada,* 1991 ABCA 260 ("*Kuzyk*") at para. 24).

[24] SEF 44 coverage has been described by the courts as "last ditch", "last resort" or "safety net" coverage; *Campbell-MacIsaac* at para. 55; *Kuzyk* at para. 24; *Reimer v Wawanesa Mutual Insurance Company*, [1999], 176 Sask R. 82 (Saskatchewan Court of Queen's Bench) ("*Reimer*") at para. 11.

[25] The protection offered by an SEF 44 endorsement has been found to be a protection against the shortfall a victim may experience in the recovery of the full amount of their lawful claim against an under-insured motorist, subject to the

deductions set out in the endorsement (see *Reimer* at para. 11). In *Reimer*, the Saskatchewan Government Insurance or "SGI" - the entity responsible for the province's compulsory auto insurance program – brought a subrogation claim against Wawanesa, the victims' insurer, to recover out of province personal injury statutory benefits paid to Saskatchewan residents, the Reimers, injured in an automobile accident in the United States caused by an under-insured motorist. In that case, SGI had paid over $150,000 in "no-fault impairment and medical expense benefits" to the Reimers under the applicable statutory scheme. The Reimers had purchased an insurance policy through Wawanesa that had SEF 44 coverage. The Court of Queen's Bench described the nature of SEF 44 coverage as follows:

> [27] … Reimers are insured under the S.E.F. 44 endorsement for the financial loss they may suffer by failing to recover the full amount of their lawful claim against the under-insured motorist. Wawanesa's policy does not insure the motorist at fault, nor does it per se provide an indemnity for the liability of the motorist at fault. It provides an indemnity for the risk that the motorist at fault is under-insured. …

[26] The clauses of the endorsement that are most relevant to the matter before me are as follows:

> **S.E.F. No. 44 - FAMILY PROTECTION ENDORSEMENT**
>
> **1. DEFINITIONS**
>
> Where used in this endorsement,
>
> …
>
> (b) The term "dependant relative" means:
>
> (i) a person,

(1) under the age of 18 years who resides with the named insured and is principally dependant upon the named insured for financial support;

(2) 18 years of age or over who, because of mental or physical infirmity, is principally dependant upon the named insured or the spouse of the named insured for financial support; or

(3) 18 years of age or over who, because of full-time attendance at a school, college or university, is dependant upon the named insured or the spouse of the named insured for financial support; or

(ii) a parent or relative,

(1) of the named insured; or

(2) of the spouse of the named insured, residing in the same dwelling premises and principally dependant upon the named insured or the spouse of the named insured for financial support.

(c) The term “eligible claimant” means:

(i) the insured person sustaining bodily injury;

(ii) any other person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the inadequately insured motorist for damages because of the death of an insured person or because of bodily injury to an insured person.

(d) The words “Family Protection Coverage” mean the insurance as provided by this form of endorsement and any other coverage provided by virtue of a contract of insurance providing indemnity similar in nature to the indemnity provided by this endorsement, whether described as underinsured motorist coverage or not.

…

(f) The words “insured person” mean:

(i) the named insured and his or her spouse if residing in the same dwelling premises and any dependant relative of either, while:

(1) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the general provisions, definitions and exclusions of the policy;

(2) an occupant of any other automobile but excluding the person who leases such other automobile for a period in excess of 30 days or who owns such other automobile unless underinsured motorist insurance is in force in respect of such other automobile; or

(3) not an occupant of an automobile who is struck by an automobile;

(ii) if the named insured is a corporation, an unincorporated association or partnership, any officer, employee or partner of the named insured for whose regular use the described automobile is provided (which individual shall be considered “named insured” for the purposes of Definition 1(b), and his or her spouse if residing in the same dwelling premises, and any dependent relative of either, while:

(1) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the general provisions, definitions and exclusions of the policy;

(2) an occupant of an automobile other than the automobile referred to in (ii)(1)

above leased by the named insured for a period in excess of 30 days or owned by the named insured provided underinsured motorist insurance is in force in respect of such other automobile; or

(3) not an occupant of an automobile who is struck by an automobile;

provided that where the policy has been endorsed to grant permission to rent or lease the described automobile for a period in excess of 30 days, any reference to the named insured shall be construed as a reference to the lessee specified in that endorsement.

…

(i) The term "spouse" means either of a man or woman who:

(i) are married to each other;

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity; or

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabitating or have cohabitated within the preceding year, and includes;

(iv) either of a man and woman not being married to each other who have cohabitated:

(1) continuously for a period of not less than five years; or

(2) in a relationship of some permanence where there is a child born of whom they are the natural parents, and have so cohabitated within the preceding year.

…

2. INSURING AGREEMENT

In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as a compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.

3. LIMIT OF COVERAGE UNDER THIS ENDORSEMENT

(a) The Insurer's maximum liability under this endorsement, regardless of the number of eligible claimants, or number of insured persons injured or killed, or number of automobiles insured under the policy shall be the amount by which the Limit of Family Protection Coverage exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as required by law in lieu of such insurance, of the inadequately insured motorist and of any person jointly liable therewith.

(b) Where this endorsement applies in excess, the Insurer's maximum liability under this endorsement is the amount determined in accordance with paragraph 3(a) less the amounts available to eligible claimants under any first loss insurance as referred in paragraph 7 of this endorsement.

4. AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

(a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the Insurer be obliged to pay

any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.

(b) The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:

(i) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;

(ii) the insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;

(iii) the Régie de l'assurance automobile du Québec;

(iv) an unsatisfied judgment fund or similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;

(v) the uninsured motorist coverage of a motor vehicle liability policy;

(vi) any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;

(vii) any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

(viii) any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained;

(ix) any Family Protection Coverage of a motor vehicle liability policy.

(c) In the event that the Insurer is presented with claims by more than one eligible claimant and the total of the amounts payable to the eligible claimants exceeds the limit of the Insurer's liability under the endorsement as set out in paragraph 3, the insurer may pay to each eligible claimant a pro rata portion of the amount otherwise payable to each eligible claimant. In the event that payments are made to eligible claimants under this endorsement prior to the receipt of actual notice of any additional claims, then the limits of this endorsement as referred to in paragraph 3 of this endorsement shall be the amount determined in paragraph 3 less the amounts paid to the prior eligible claimants.

…

S.E.F. No. 44 SUPPLEMENT

…

3. These supplementary agreements modify only the Family Protection Coverage of the policy. Except as provided herein, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.

The scope of Mr. Boughner's and Yukon's statutory right of recovery

[27] As part of the universal health care system in place in this Territory, Mr. Boughner, as a Yukon resident, was eligible and entitled to receive, free of charge[2],

[2] Yukon pays for the costs of eligible health and medical related services as well as for the costs of eligible related medical travel benefits to the extent provided by Yukon legislation. However, it can be

insured health services and other insured services covered by the *Hospital Insurance Services Act* (s. 2) and the *Health Care Insurance Plan Act* (s. 2). In addition, pursuant to the *Travel for Medical Treatment Act* (s. 2), he was eligible and entitled to receive certain medical travel benefits covered by Yukon. In accordance with the legislation, Yukon paid for the services and benefits Mr. Boughner received because of his injuries from the Consolidated Revenue Fund[3]. Yukon now seeks to recoup those costs.

[28] The *Health Care Insurance Plan Act*, the *Hospital Insurance Services Act,* and the *Travel for Medical Treatment Act* contain specific provisions that confer upon Mr. Boughner and Yukon the right to recover those costs. The language of the three statutes is very similar and is as follows:

> ***Health Care Insurance Plan Act***
>
> **9 Government subrogated**
>
> On the provision of insured health services to an insured person in respect of an injury resulting from a wrongful act or omission of another person, the Government of the Yukon shall be subrogated to all rights of the insured person for the purpose of recovering the cost of the insured health services, and may bring an action either in its own name or in the name of the insured person for the recovery of the amount thereof and effect a settlement of the claim. S*.Y. 2002, c.107, s. 9* (my emphasis)
>
> **10 Suit by insured person**
>
> (1) Despite section 9, an insured person who, as a result of a wrongful act or omission of another person, suffers an injury for which they have received insured health services, may recover the amount of the cost of providing these services to them from the person guilty of the wrongful act

said that Yukon residents financially contribute to some extent to the payment of those costs through income taxes they pay each year, if any.

[3] See s. 3 of the *Health Care Insurance Plan Act*; and s. 4 of the *Hospital Insurance Services Act*.

or omission in the same manner as though that person had been required to pay for those services.

(2) Every insured person described in subsection (1) who commences an action for the recovery of damages for personal injuries shall include therein a claim on behalf of the Government of the Yukon for the cost of any insured health services provided to the insured person.

(3) If an insured person receives an amount in respect of insured health services received by them either in an action to receive damages for personal injuries or by other means, the person shall immediately pay the amount so recovered to the Minister. *S.Y. 2002, c.107, s.10* (my emphasis)

Hospital Insurance Services Act

10 Subrogation

On the provision of insured services to an insured person in respect of an injury resulting from a wrongful act or omission of another person, the Government of the Yukon shall be subrogated to all rights of the injured person for the purpose of recovering the cost of those insured services, and may bring an action either in its own name or in the name of the insured person for the recovery of the amount thereof and effect a settlement of the claim. *SY 2002, c.112, s.10* (my emphasis)

11 Suit by insured person

(1) Despite section 10, an insured person who, as a result of a wrongful act or omission of another person, suffers an injury for which they have received insured services may recover the amount of the cost of providing those services to them from the person guilty of the wrongful act or omission in the same manner as though they themselves had been required to pay for those services.

(2) Every insured person described in subsection (1) who commences an action for the recovery of damages for personal injuries shall include therein a claim on behalf of the Government of the Yukon for the cost of any insured services provided to them.

(3) If a resident recovers an amount in respect of insured services received by them either in an action to recover

> damages for personal injuries or by other means they shall immediately pay the amount so recovered to the Government of the Yukon. *SY 2002, c.112, s.11* (my emphasis)
>
> ***Travel for Medical Treatment Act***
>
> **Travel expenses resulting from wrongful act, etc.**
>
> 11 When travel expenses of a person in respect of an injury resulting from the wrongful act or omission of another person have been paid pursuant to this Act, the Government of the Yukon shall be subrogated to all rights of the person for the purpose of recovering the expenses and may bring action either in its own name or in the name of the person. *S.Y. 2002, c. 222, s. 11*(my emphasis)
>
> **Recovery of Expenses**
>
> 12(1) Despite section 11, if travel expenses have been paid in respect of a person who, as a result of a wrongful act or omission of another person suffers an injury, the person may recover the amount thereof from the person guilty of the wrongful act or omission in the same manner as though the guilty person had been required to pay therefor.
>
> (2) Every person described in subsection (1) who commences an action for the recovery of damages for personal injuries, shall include therein a claim on behalf of the Government of the Yukon for any travel expenses provided to the person.
>
> (3) When a person recovers an amount in respect of travel expenses received by the person in an action for damages for personal injuries or by other means, the person shall immediately pay the amount so recovered to the Government of the Yukon. *S.Y. 2002, c. 222, s.12* (my emphasis)

[29] It is not disputed that, based on the above statutory provisions, Mr. Boughner and Yukon have a statutory right of recovery against the at-fault motorist and that motorist's insurer. However, as the at-fault motorist was not sufficiently insured to cover

the costs Yukon incurred, Yukon is seeking to recover its costs from Mr. Boughner's own insurer through his SEF 44 coverage.

[30] One of Yukon's arguments in support of its claim is that, based on the language of the applicable statutory provisions, Yukon is subrogated in "all the rights" of Mr. Boughner's to claim compensatory damages for the costs of the insured health and other insured services as well as travel benefits paid by Yukon, for the bodily injuries he suffered as a result of the accident caused by the under-insured motorist. According to Yukon, Mr. Boughner is entitled to claim compensation for those costs against his SEF 44 coverage. As Yukon's statutory right to subrogation is all encompassing, it therefore extends to a right to claim compensation against Mr. Boughner's own insurer pursuant to his SEF 44 coverage.

[31] Yukon acknowledges that there is only a small body of case law regarding the issues before the Court. It has presented three decisions in support of its claim. Two of those are decisions that concern the rights of workers' compensation boards to be subrogated to the rights that injured workers have against their insurer for benefits paid by the Board to the injured workers.

[32] First, in *Licata v Royal Insurance Co*, (1986), 54 OR (2d) 397 ("*Licata*") (ONSC), the Divisional Court considered whether the Ontario Workers' Compensation Board ("the Board") was subrogated to the rights an employee had against his own insurer, where the employee who had been struck and injured by an unidentified vehicle in the course of his employment elected to receive benefits under workers' compensation legislation rather than filing a claim against his insurer under his own automobile insurance policy. As required by the Ontario *Insurance Act,* the employee's insurance

policy provided for payment of all sums that he was legally entitled to recover from an unidentified motorist. Section 8(4) of the Ontario *Workers' Compensation Act*, provided that where the employee elected to claim benefits under the act, the Board was subrogated to all rights of the employee regarding the employee's injury and could maintain an action in the employee's name against the person against whom the action lies. In that case, it was admitted by the insurer that, if Mr. Licata had not elected to receive workers' compensation benefits, he could have successfully brought an action against his insurer for the damages claimed by the Board considering the nature and scope of the insurance coverage mandated by the Ontario *Insurance Act*. Nonetheless, the insurer argued the Board was not subrogated to the claim Mr. Licata could have brought against his own insurer. The Divisional Court held that the plain and ordinary meaning of s. 8(4) meant that the Board was subrogated to the rights Mr. Licata had against his insurer. In coming to its conclusion, the Divisional Court, at para. 10, considered ss. 8(1) and 8(4) of the Ontario *Workers Compensation Act*, which provided that:

> …
>
> 8(1) Where an accident arising out of and in the course of his employment happens to an employee under such circumstances as entitle him … to an action against some person other than his employer, the employee … if entitled to benefits under this Part, may claim such benefits or may bring such action.
>
> …
>
> (4) If the employee elect[s] to claim benefits under this Act ... the Board, [is] subrogated to all rights of the employee ... in respect of the injury to the employee and may maintain an action in the name of the employee ... against the person against whom the action lies and any amounts recovered

> over and above all amounts expended by the Board ... in respect of such claim and action shall be paid to the employee ... and any such surplus paid to the employee or his dependants shall be deducted from the amount of any future compensation or other benefits to which he ... may become entitled in respect of the accident that gave rise to the injury. (my emphasis)

[33] Based on the specific wording of the applicable legislation, the Divisional Court held that the expression "against the person against whom the action lies" in ss 8(4), included the insurer against whom the employee could have elected to claim the damages paid by the Board. The Divisional Court, at paras. 11 and 12, stated as follows:

> It will be noted that s. 8(4) provides that where the employee has elected to claim benefits under the Act the Board is subrogated to all rights of the employee in respect of the injury of the employee and may maintain an action in the name of the employee against the person against whom the action lies.
>
> Here Mr. Licata has elected to claim benefits under the Act; also by virtue of s. 231(1)(a) of the Insurance Act and the policy of insurance issued to him by the defendant, Mr. Licata has a right of action against the defendant for the damages he suffered in the accident of April 16, 1981. Unless for some reason the words in s. 8(4) are not to be given their plain and ordinary meaning then the Board is subrogated to the rights Mr. Licata has against his insurer.

[34] In coming to its conclusion, the Divisional Court, at para. 18, rejected the insurer's argument that the Supreme Court of Canada had already determined in *Madill v Chu,* [1977] 2 SCR 400 ("*Madill*"), at 410, that the Board was only subrogated to claims the employee has in tort arising out of his injury:

> It was contended on behalf of the respondent that the reference in s. 8(1) to the entitlement of a workman "to an action against some person other than his employer" is to be construed as including the insurer. This contention, however,

> fails to take into account the fact that the type of action contemplated by the section against any "person other than the employer" must be founded in tort rather than contract, and that an action against the insurer must of necessity be based on the terms of the contract of insurance.

[35] The Divisional Court stated that it viewed the above noted comment in *Madill* as *obiter* and added that the majority of the Supreme Court of Canada did not elaborate or provide reasons anywhere else in their decision as to why the type of action contemplated by the statute would have to be founded in tort only.

[36] Yukon also relies on *New Brunswick (Workplace Health, Safety and Compensation Commission) v Gillespie*, [1996] 137 DLR (4th) 202 (NBCA), where the Court of Appeal of New Brunswick considered similarly worded legislation and fact pattern as in *Licata*. The court came to the same conclusion as in *Licata* and held that the New Brunswick Workers' Compensation Board was subrogated to the Plaintiff's claim against his insurer. The court found that the "subrogation remedy created by the section was predicated on the ability of the injured worker to bring an action against his insurer, an action based on the liability of a tortfeasor" (at para. 6).

[37] However, in my view, the reasons provided by the Supreme Court of Prince Edward Island – Appeal Division in *MacNeill v Co-operators General Insurance Co*, 2003 PESCAD 9 ("*MacNeill*") (a case filed by Security National) in coming to a different conclusion, are more persuasive. In that case, one of the questions the court considered was whether the Prince Edward Island Workers' Compensation Board's rights of subrogation extended to any amounts payable to the plaintiff, Mr. MacNeill, under the SEF 44 endorsement. The facts that gave rise to that case are as follows. In the course of his employment, Mr. MacNeill had been operating a work vehicle owned

by his employer when he was struck by an under-insured third-party motorist. The insurer of Mr. MacNeill's employer carried an SEF 44 Family Protection Endorsement. As an injured worker, Mr. MacNeill received workers' compensation benefits pursuant to the Prince Edward Island *Workers' Compensation Act.* The Workers' Compensation Board asserted, based on the language of the Prince Edward Island workers' compensation legislation, that any compensation an injured worker could be entitled to as a result of their injury, whether by tort or contract, was subject to a right of subrogation by the Workers' Compensation Board, including a right to claim compensation against the SEF 44 coverage.

[38] The statutory provisions at issue before the court were as follows:

> [66] …
>
> 11. (1) Where an accident happens to a worker in the course of employment in such circumstances as entitle him or his dependants to an action against some person other than his employer, the worker or his dependants if entitled to compensation under this Part may elect to claim the compensation or to bring the action.
>
> (2) An election under subsection (1) shall not be validly made unless, prior to the making thereof, a qualified officer of the Board has counselled the worker or his dependants, as the case may be, as to the consequences of the election.
>
> (3) If the worker or his dependants bring such action and less is recovered and collected than the amount of the compensation to which the worker or dependants would be entitled under this Act, the worker or dependants are entitled to compensation under this Part to the extent of the differences.

> (3) If the worker or dependants have claimed compensation under this Part, the Board shall be subrogated to the position of the worker or dependant as against such other person for the whole or any outstanding part of the claim of the worker or dependant against the other person.
>
> (4) It is not obligatory upon the Board to sue for or require payment of damages caused by the accident and the Board has full power to compromise the cause of action or release its claim therefore if, in its discretion, it thinks it inadvisable to bring action for the damages. (my emphasis)

[39] The court held, based on the wording of the statute, that the Workers Compensation Board did not have a right of subrogation against the benefits paid pursuant to the SEF 44 endorsement because its right of subrogation was limited to the compensation available from or through the tortfeasor directly, and did not extend to amounts payable to the plaintiff by contract under his SEF 44 coverage. In coming to this conclusion, the court noted, at para. 66, that the Board's right to seek "reimbursement of money paid, or expenses incurred, on behalf of an injured worker … is a right of subrogation created by statute and so limited by the words of that statute."

[40] The Supreme Court of Prince Edward Island recognized there were two lines of cases on the issue, one of which included the two decisions relied upon by Yukon. However, the court preferred the line of authority that found that a Board's right of subrogation is limited to the compensation available from or through the tortfeasor directly because it focussed on the specific wording of the statutes at issue:

> [67] One line of authority is of the view that any compensation to which the injured employee may be entitled because of his injury, whether by way of contract or tort, is subject to a right of subrogation by the Board because the

initial tortious wrong gave rise to the applicable contract and/or tort claims. (See: New Brunswick v. Gillespie, [1996] N.B.J. No. 302 (NBCA); and Licata v. Royal insurance Co. (1986), 54 O.R. (2d) 397, [1986] O.J. No. 221 (H.C.J., Div.Ct.).)

[68] The other line of authority, which I find more persuasive, states that a Board's right of subrogation is limited to the compensation available from or through the tortfeasor directly. (See: Madill v. Chu, [1997] 2 S.C.R. 400; Peters v. Alberta (W.C.B.), [1970] A.J. No. 524 (Alta. C.A.); Kuzyk v. Commercial Union Assurance Co. of Canada, [1991] A.J. No. 951 (Alta.C.A.).) This is an interpretation of the statutory right which focuses upon the specific words used in the statute. There is a right of action by a worker "against some person" other than his employer; there is a right of subrogation by the board to the position of the worker "against such other person." The "such other person" referred to in the subsection granting a right of subrogation appears to be a clear reference to the "person" referred to in s-s.11(1), and in the context of s-s.11(1) that "person" is clearly the tortfeasor.

[69] This statutory right of subrogation does not subrogate the Board to the position of the worker with respect to anyone from whom the worker may claim compensation, but rather only with respect to the person against whom the worker has a right of action because of the accident. Therefore, the legislative authority to subrogate does not encompass benefits from private contracts of insurance held by someone other than the tortfeasor. As stated by Ritchie J. in Madill v. Chu:

> It was contended on behalf of the respondent that the reference in s. 8(1) to the entitlement of a workman 'to an action against some person other than his employer' is to be construed as including the insurer. This contention, however, fails to take into account the fact that the type of action contemplated by the section against any 'person other than the employer' must be founded in tort rather than contract, and that an action against the insurer must of necessity be based on the terms of the contract of insurance.

> This was the passage relied upon and applied by the motions judge in this matter.
>
> [70] The courts in Gillespie and Licata refused to accept that Ritchie J.'s comments in Madill v. Chu should be read as their plain meaning appeared, arguing those comments were obiter and too brief to be of value. However, the comments of Ritchie J. follow a long-standing principle with respect to the damages owing to a plaintiff in a negligence action when the injured plaintiff also receives benefits from a private insurance contract. As far back as 1874 the Court of Exchequer in Bradburn v. The Great Western Railway Company (1874), L.R. 10 E1, affirmed this principle. In that case Pigott, B. stated at p. 3:
>
> > The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.
>
> Pigott, B. in Bradburn uses the same analysis with respect to the contractual nature of the benefit as is given by Ritchie J. in Madill v. Chu. (my emphasis)

[41] The Supreme Court of Prince Edward Island continued and held at paras. 76 and 77:

> [76] … As noted earlier, the actual words of the statutory right of subrogation in the instant case state that the Board has a right of subrogation against "such other person," i.e., the person other than his employer who can be sued by the worker. The statute entitles the worker to an action against someone and the Board is given a right of subrogation to the position of the worker with respect to "the claim", i.e. the tort action. There is no general right given to the Board to subrogate against any and all claims the worker may have against anyone or pursuant to any contract of insurance.

> There is no reason to read in such extraordinary breadth to the rights given to the Board. There is nothing to suggest that the Legislature intended the Board to have such broad rights. The plain, clear meaning of the words used is that where the worker can sue a tortfeasor for damages as a result of the wrong done to him, the Board can be subrogated to the position of the worker against the tortfeasor, if the worker has elected to receive workers' compensation benefits.
>
> [77] Even the reference in s-s. 11(5) to the Board's "action for the damages" underlines the intent in that section to tie the Board's right of subrogation to the negligence claim against the tortfeasor, because damages are attainable only by way of the tort action. The contract "claim" is not a claim for damages; it is a claim for the insurance money due under the contract.

[42] Finally, the Prince Edward Island Supreme Court stated at para. 81 that "there is nothing in the words used [in the statute] to suggest that the Legislature intended the Board should be entitled to claim against proceeds of insurance held or paid for by someone other than the tortfeasor".

[43] The third decision that Yukon referred to is *Kuzyk*. That case bears many similarities to the matter before me. In that case, a passenger of a motor vehicle was injured and hospitalized because of a collision with another vehicle. The Alberta Health Minister paid for her care under the scheme provided for in that province's *Hospitals Act*. The driver of the other vehicle, who was solely responsible for the collision, was insufficiently insured and did not possess sufficient assets to compensate all the claims arising from the accident. However, the victim had an insurance policy that included an SEF 44 endorsement. The Alberta Health Minister sought to recover hospital costs from the victim's insurer by way of subrogation. On appeal, the Minister also advanced, as does Yukon here, a direct claim against the insurer based on the wording of the SEF 44

endorsement. Yukon points to the latter part of the decision in support of its argument that it has a direct claim against Security National as an eligible claimant, based on the interpretation of the insurance contract.

[44] Going back to the issue of subrogation, the Court of Appeal of Alberta explained in *Kuzyk* that the common law principle of subrogation contemplates that "one who has assumed a risk of obligation for another should receive with that all the opportunity of the other to avoid or recoup the obligation" (para. 5). The court held that the Minister could not invoke the principle of subrogation because she did not assume the obligation of someone else; the obligation was hers as per the legislation.

[45] In addition, the Court of Appeal of Alberta found that the statute in question did not give the Minister a right of subrogation against the victim's own SEF 44 coverage because it found the wording of the statute permitted a subrogated claim against the wrongdoer only. I note the statutory interpretation argument put forward by Yukon here is essentially the same argument that the Alberta Minister of Health unsuccessfully advanced before the Court of Appeal of Alberta in *Kuzyk.* As Yukon does in this case, the Alberta Minister argued that the existence of a wrongdoer responsible for the victim's injuries was sufficient to trigger the Minister's right to "step into the shoes" of the victim for other compensation claims, including a claim in contract against the victim's own insurer. In support of her argument, the Alberta Health Minister relied on the wording of s. 58(1) of the *Hospitals Act*, which is similar to the statutory provisions at play in this case. Section 58(1) of the *Hospitals Act* provided that:

> [9] …
>
> When as a result of a wrongful act or omission of another, a person suffers personal injuries and becomes a beneficiary,

> (a) the beneficiary has the same right to recover the cost of insured services against the person guilty of the wrongful act or omission as he would have had if he had been required to pay for the whole cost of the hospital services which he received, and
>
> (b) the Minister is subrogated to the right of recovery of the beneficiary in respect of the cost of insured services furnished and the Minister may maintain an action either in his own name or in the name of the beneficiary to recover the cost of the insured services to which he is hereby subrogated. (my emphasis)

[46] Justice Kerans, writing for the Court of Appeal of Alberta, rejected the argument of the Minister regarding her rights of subrogation on the basis that: (i) the victim's right of recovery created by the statute was limited to a claim against the wrongdoer; and (ii) the Minister's right of subrogation could not be broader than the statutory right of recovery conferred upon the victim in the first place. Justice Kerans wrote:

> [10] The first subsection deems Kuzyk to have, against the wrongdoer, the same rights that she would have had if she had paid herself for her hospital care. By this pretence, the Act establishes the liability of a tortfeasor for the hospital care. Even in the absence of the second subsection, this might even suffice to trigger a result not unlike subrogation: having granted a cause of action to Kuzyk to recover something she does not need to recover, it would be unfair not to let the Minister, who does have something to recover, take over her suit.
>
> [11] Mr Hnatiuk argued that, because the subsection confers this cause of action on Kuzyk, and because the Minister is thus subrogated to Kuzyk, it follows that the Minister may step into the shoes of Kuzyk for other compensation claims. These would include, for example, her contract with the defendant insurer. Mr. Hnatiuk argued that one need not look elsewhere than at the first subsection for this conclusion.
>
> [12] The learned trial judge relied instead on the second subsection. He held that the use of the word "subrogation" there triggers the subrogation that would indubitably flow if Kuzyk had in reality incurred a debt when hospitalized.

[13] I do not agree with either proposition and my reason is simple: the subsection limits the right created to "the right of recovery of the beneficiary" and "against the person guilty". In the context, the right of recovery to which the law refers is Kuzyk's right of recovery against the wrongdoer, and no other. The Minister thus has a limited right of subrogation. See, for an example, W.C.B. v. Peters (1990) 74 Alta. L.R. (2d) 352.

[14] It is said for the Minister that the existence of a wrongdoer merely triggers the Minister's unlimited subrogation against Kuzyk. The simple answer is that the statute does not say that.

[15] It was said that this view runs against our decision in Bigl Estate. The Court there said that the subsection used "subrogation" in its ordinary sense. We there faced the problem of division of spoils between the Minister and the patient where the wrongdoer cannot pay both in full. It was argued there that, despite the use of the word, the Minister should rank equally with the patient. The Court instead gave force to the ordinary meaning of the word, and limited the capacity of the Minister to take the fruit of litigations from the pocket of the patient. It did not deal with the prospect of subrogation against somebody other than the wrongdoer. But the Court there took that limit for granted. See p. 352.

[16] I accept that the subsection uses the word in its ordinary sense, but the scope of the subrogation is limited. It deems Kuzyk somehow obliged to pay her hospital bill, but only for the purposes of collecting from the tortfeasor. Granted that limit, subrogation is as usual.

[17] The learned trial judge took the opposite view. He relied on a statement by this Court in James v. Rentz (1986), 27 D.L.R. (4th) 724 at 726. There, the patient died and Survival of Actions Act R.S.A. 1980, c. S-30 provided that only suits involving actual financial loss survived. The majority held that the deeming provision went far enough to meet that test because it created a deemed loss by the patient behind which we should not go.

[18] For the purposes of this case, I need not challenge the fiction that, for the survival of the action, Kuzyk suffered

> an actual loss. The problem before me is whether the fiction exists in other circumstances. It does not.
>
> [19] I therefore conclude that the Minister is neither subrogated nor has a right under the statute to advance a claim in the name of Kuzyk against her insurer, as opposed to the wrongdoer's insurer, for the Minister's loss. The Minister can, of course, assert subrogation for any monies Kuzyk actually received from the tortfeasor for her hospital care. The statement of agreed facts said something was received, but did not say whether it was shared with the Minister. I only observe that this appeal is not about that. (my emphasis)

[47] I am of the view that the same reasoning applies in this case considering the very similar wording of the Yukon statutory provisions at issue. The starting point of the analysis must be that without the fiction created by the three statutes, Mr. Boughner would not have the right to claim the costs of the health and medical services, as well as the medical-related travel benefits he received but did not have to pay pursuant to the statutory health scheme in place in the Yukon.

[48] Mr. Boughner's right to recover those costs comes from the statutes. In my view, the language of the three statutes is clear. Mr. Boughner's statutory right to claim and recover the costs of the services and benefits he received is "**from** the person guilty of the wrongful act or omission"[4] (my emphasis) who caused the injuries as though that person had been required to pay them. His statutory right of recovery is limited to a claim against the wrongdoer or the wrongdoer's insurer when applicable. The statutory provisions do not confer upon Mr. Boughner the right to claim those costs against

[4] See s. 10 of the *Health Care Insurance Plan Act*; s. 11 of the *Hospital Insurance Services Act*; and s. 12 of the *Travel for Medical Treatment Act*.

anyone else, including his own insurer. The French version of the statutory provisions is not any broader.

[49] As for Yukon's right of subrogation, Yukon submits that *Kuzyk* and *MacNeill* are distinguishable because the language of Yukon's statutory right of subrogation is much broader than the provisions at issue in those two cases.

[50] Yukon submits that in *MacNeill* the statutory provisions specifically restricted the right of recovery of the victim "as against some person other than his employer" and the right of subrogation was confined "as against such other person", and that those rights were similarly statutorily restricted in *Kuzyk*; whereas here, the statutory provisions are broadly worded and encompass "all rights of the insured person for the purpose of recovering the cost of the … services". According to Yukon, this broad wording expressly includes the rights of Mr. Boughner to claim against his own insurer, based on his SEF 44 coverage, the amount that he is legally entitled to recover from the at-fault under-insured motorist by statute as damages in respect of the bodily injuries he sustained in the collision. Again, in my view, Yukon's argument overlooks the fact that its statutory rights to be subrogated to "all rights of the victim" cannot be broader than the rights conferred upon the victim in the first place. Yukon's rights of subrogation are subject to the same statutory limits that are imposed on the rights granted to the victim, that is a right to recover "**from** the person guilty of the wrongful act or omission" (which extends to the wrongdoer's insurer), no one else (my emphasis).

[51] Yukon also tried to distinguish *Kuzyk* on the basis that, according to Yukon legislation, it is not Mr. Boughner but the tortfeasor who is deemed to have incurred the costs paid by Yukon. However, I do not see how that difference is of any help to Yukon

considering that the right to recover conferred upon Mr. Boughner is clearly limited by the statutes to a claim against the wrongdoer only, as clearly expressed in the three statutory provisions relied upon by Yukon:

> ***Health Care Insurance Plan Act***
>
> **10 Suit by insured person**
>
> (1) Despite section 9, an insured person who, as a result of a wrongful act or omission of another person, suffers an injury for which they have received insured health services, may recover the amount of the cost of providing these services to them **from the person guilty of the wrongful act or omission** in the same manner as though that person had been required to pay for those services. (my emphasis)
>
> ***Hospital Insurance Services Act***
>
> **11 Suit by insured person**
>
> (1) Despite section 10, an insured person who, as a result of a wrongful act or omission of another person, suffers an injury for which they have received insured services may recover the amount of the cost of providing those services to them **from the person guilty of the wrongful act or omission** in the same manner as though they themselves had been required to pay for those services. (my emphasis)
>
> ***Travel for Medical Treatment Act***
>
> **Recovery of Expenses**
>
> 12(1) Despite section 11, if travel expenses have been paid in respect of a person who, as a result of a wrongful act or omission of another person suffers an injury, the person may recover the amount thereof **from the person guilty of the wrongful act or omission** in the same manner as though the guilty person had been required to pay therefor. (my emphasis)

[52] In my view, Yukon's argument that Mr. Boughner and Yukon, through subrogation, have a statutory right of recovery against Mr. Boughner's insurer fails on the wording of the legislation, which imposes clear limits on the right of recovery granted to them. The three statutes confer upon them a right to recover from the person guilty of the wrongful act or omission (or their insurer) only, they do not confer a right to recover against the victim's own insurer. As stated earlier, Yukon's rights of subrogation cannot be broader than the rights conferred upon Mr. Boughner for the purpose of recovering the costs of the health and medical services as well as the medical travel benefits provided to him by Yukon.

[53] As the language of the statutory provisions is clear, it is not necessary to resort to extrinsic aid of statutory interpretation. Nonetheless, I note that the Journals of the Council of the Yukon Territory (First Session) 1960, and (First Session, Volume 2) 1971, filed by Security National, regarding the territorial ordinances that preceded the current legislation, confirm, in my view, that the intent in enacting those provisions was to provide for a statutory mechanism to allow Yukon to recoup the costs of insured medical and health care services, either through the victim's own claim or through subrogation, from the third party "guilty of the wrongful act or omission" or their insurer, that is the person responsible for those costs. In addition, the statutory language used in the *Ordinance to Provide Hospital Insurance for Residents of the Yukon Territory*, Chapter 2 enacted in 1960 (First Session) contains language almost identical to the current legislation regarding the scope of the victims' right to claim the costs of the services and benefits provided and paid by Yukon. The rights of subrogation granted to the Commissioner at the time are also worded in an almost identical manner: "the

Commissioner shall be subrogated to all rights of the injured person for the purpose of recovering the cost of such insured services." (ss. 11 and 12 of the *Ordinance*).

Does Yukon have a direct claim against Mr. Boughner's SCF 44?

[54] As stated earlier, Yukon relies on *Kuzyk* to argue that it is an eligible claimant under the SEF 44 and, as such, can assert a direct claim against Security National. As in *Kuzyk*, the standard definition of an eligible claimant under Mr. Boughner's SEF 44 includes a person, in addition to the insured, who "is entitled to maintain an action … against" the tortfeasor because of bodily injuries to an insured person in the accident. In *Kuzyk,* the Alberta Health Minister argued that, based on the legislation, she could maintain an action against the tortfeasor because of the injuries to *Kuzyk*, and by the terms of the insurance policy the insurer agreed to indemnify her directly as an eligible claimant. Yukon points out that the Court of Appeal of Alberta stated it found no fault in that argument. However, since the Minister had not sued the insurer directly, had not raised that argument at the trial stage, and the time for a suit under the policy had already expired, the court refused to give effect to that argument. Yukon submits that, in doing so, the Court of Appeal of Alberta explicitly left open the possibility of a direct claim, namely, Minister versus insurer, under an SEF 44 endorsement.

[55] It should be noted though that, despite the failure of the direct liability argument in *Kuzyk* on the ground that the Minister had not advanced that argument at the trial level, the Court of Appeal of Alberta found it prudent to speak to possible available defences based on clause 4(b) of the SEF 44 endorsement, which, as here, "excludes any claims already paid by other insurers, or by government agencies", and provided that an eligible claimant's claim "is excess to any amount the claimant recovers [']…

from any source…[']" (at para. 24). The court noted that "[t]his underlines the last-ditch or "safety net" nature of the policy, and raises serious doubts about the status of the Minister." (at para. 24). The court also noted that the claim of the Minister had been or could be paid from the Consolidated Revenue Fund of Alberta and that the federal government[5] and Albertans also appeared to contribute. In addition, the court briefly reviewed the insurer's defence based on the exclusions enumerated specifically in clause 4(b). In the *Kuzyk* case, as here, clause 4(b) of the SEF 44 made specific reference to certain sources of funds that may be deducted from any claim, including a "… policy of insurance providing … medical expense or rehabilitation benefits" (at para. 25). The insurer, relying on *Canadian Pacific et al v Gill*, [1973] SCR 654 ("*Gill*"), argued that the provincial *Hospitals Act* created a form of social insurance amounting to a policy of insurance similar to what had been found in *Gill* with respect to the *Canada Pension Plan Act,* RSC, 1970 c C-5. However, the Court of Appeal found that the answer to the Minister's direct claim argument was much simpler than the argument raised by the insurer. Justice Kerans wrote for the court, at para. 28:

> The answer for this case is much simpler than that. The Minister cannot claim under the policy at all without relying upon the statutory fictions, discussed above, that Kuzyk incurred the cost of hospitalization and the Minister insured Kuzyk. If she is deemed an insurer to assert coverage, one should hold to that fiction when one applies the exemption clause. The fiction indeed contains two elements fatal to the Minister's position: it operates only as against the tortfeasor, and it pretends that a policy of insurance exists between the Minister and Kuzyk.

[5] Section 3 of the *Health Care Insurance Plan Act* and s. 3 of the *Hospital Insurance Services Act* specifically authorize Yukon to enter into agreements with the Federal government regarding federal contributions to the costs of health and medical related services provided by Yukon pursuant to those statutes. However, there is no evidence before me that such agreements are or were, at any relevant times, in place.

[56] Yukon distinguishes its direct claim from *Kuzyk* by pointing out that its legislation does not give rise, as it did in Alberta, to the fiction that the victim incurred the costs of the benefits and services paid by Yukon because of their injuries, as in a case of an insurance policy. Instead, there is a direct link between Yukon and the tortfeasor because the statutes deem that the tortfeasor was required to pay for those costs. It may be that the difference in wording as some significance with respect to the application of the deduction clause. However, I am mindful that, in *Kuzyk*, the Court of Appeal did not review the Minister's direct claim argument in any detail because it rejected it on the basis that the Minister had not raised it in a timely manner. I am also mindful that in *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7, ("*Sabean*") at paras. 7, 41 and 43 (a case not cited by the parties), the Supreme Court of Canada found that the ordinary meaning of a "policy of insurance providing disability benefits or loss of income benefits or medical expenses or rehabilitation benefits" at clause 4(b)vii of the SEF 44 at issue – which is identical to clause 4(b)vii of Mr. Boughner's SEF 44 – was clear and refers to a "private insurance policy purchased by the insured" that does not include the Canadian Pension Plan disability benefits.

[57] In any event, I am of the view that I do not have to delve into the application of the deduction clause as a possible defence to Yukon's direct claim argument because Security National does not rely on the application of that clause in support of its position in this stated case. In fact, counsel for Security National cautioned against concluding that a universal health care regime, such as the one that exists in the Yukon, constitutes a source under clause 4(b) of the SEF 44 considering the possible negative impacts this conclusion may have on an insured person's claim, in that it would also

lead to the conclusion, according to Security National, that those costs are deductible from the limit of the insured person's coverage. I will abstain from weighing in on Security National's position with respect to the application of the deduction clause because the scope of that clause was not fully argued before me and is not necessary to answer the questions before me.

[58] In my view, the answer to the direct claim question raised in this case lies in the definition of an "eligible claimant" under the SEF 44, and most particularly in the meaning of the expression "other person", included in that definition.

[59] In *Campbell-MacIsaac*, at para. 58, the Nova Scotia Court of Appeal stated that:

> … [T]he specific terms of the SEF 44 endorsement should be read in the context of the wording of the entire endorsement and not in isolation. As well, the terms of the endorsement must be interpreted in light of the overall purpose, that it is a "last ditch", "safety net" and "insurance excess."

[60] The Nova Scotia Court of Appeal's view regarding the interpretation of the specific terms of an SEF 44 endorsement is consistent with the general principles of contractual interpretation for standard form contracts, such as insurance policies, reiterated by the Supreme Court of Canada in *Sabean*:

> [12] In *Ledcor Construction Ltd. v. Northbrige Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction

> be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.
>
> [13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.
>
> …
>
> [37] Third, the decision in *Gill* is confined to a distinct statutory context. When interpreting a statute, the court searches for the intention of the legislature. In interpreting a standard form policy of insurance, the court is concerned with the ordinary meaning of the contract as it would be understood by the average insured.
>
> …
>
> [42] … The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity. (my emphasis)

[61] These general principles of interpretation were applied by the Court of Appeal for British Columbia in *Economical Mutual Insurance Company v Gill*, 2017 BCCA 351:

> [27] The general principles of insurance policy interpretation are well-established. They were summarized as follows by Justice Rothstein in *Progressive Homes Ltd*[6]:
>
> > [22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (…).

[6] *Progressive Homes Ltd v Lombard General Insurance Co. of Canada*, 2010 SCC 33.

> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (…). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (…), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (…). Courts should also strive to ensure that similar insurance policies are construed consistently (…). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> [24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (…). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (…). (my emphasis)
>
> …
>
> See also: *Ledcor Construction Ltd.* at paras. 49–51; *Sabean v. Portage La Prairie Reference for Mutual Insurance Co.*, 2017 SCC 7 at para. 12 …
>
> [28] Courts must be cautious against searching for or creating an ambiguity where none exists: *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada* (1998), 54 B.C.L.R. (3d) 111 at para. 22 (C.A.); *Riordan v. Lombard Insurance Co.*, 2003 BCCA 267 at para. 20, 13 B.C.L.R. (4th) 335. "An ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made": *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at para. 26, 57 B.C.L.R. (4th) 212 (*per* Lowry J.A.).

[62] In *Johnston v State Farm Mutual Automobile Insurance Co.*, [1994], 153 NBR (2d) 385 ("*Johnston*"), the New Brunswick Court of Queen's Bench, Trial Division, had to determine whether the corporate plaintiffs met the definition of eligible claimants under the SEF 44 coverage of their employee and principal shareholder, Mr. Johnston,

who was injured in a motor vehicle collision. The corporate plaintiffs claimed they had sustained substantial loss of profit and income because of Mr. Johnston's disability.

[63] The definition of an "eligible claimant" in that case was identical to the definition in Mr. Boughner's SEF 44, and included the subsection upon which Yukon relies to argue it is an eligible claimant under the SEF 44:

> (c) The term "eligible claimant" means:
>
> (i) the insured person sustaining bodily injury;
>
> (ii) any other person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the inadequately insured motorist for damages because of the death of an insured person or because of bodily injury to an insured person. (my emphasis) (p 4)

[64] Also, the terms "dependant relative", "insured person", "spouse", "Family Protection Coverage" and "Insuring Agreement" of the SEF 44 at issue in *Johnston* were essentially identical to Mr. Boughner's SEF 44.

[65] In addition, the argument put forward by the corporate plaintiffs in that case was the same as the one advanced by Yukon here. They argued that, since the corporate plaintiffs could maintain an action against the owner and driver of the third-party vehicle for damages flowing or derived from Mr. Johnston's injuries, the corporations met the definition of an "eligible claimant" and were entitled to claim their damages under the SEF 44 coverage. The court disagreed and dismissed the corporate plaintiffs' claim.

[66] The court found, based on the overall SEF 44 coverage scheme, that, while a corporate entity that owns motor vehicles may be a named insured to protect the persons using its vehicles as well as their families, the expression "other person" under

the definition of “eligible claimant” only included natural persons because SEF 44 coverage is intended to protect natural persons, their families, and, to some extent dependant members of their extended families. The court explained its reasoning as follows, at pp 7 and 8:

> …
>
> … The family protection endorsement is, as its title suggests, an endorsement to provide insurance protection to named insureds and their families. Spouses and dependant relatives of a named insured are insured persons when they are occupants of an automobile or if they are struck by an automobile while, for example, walking along a street or sidewalk. They are eligible claimants if they are entitled to maintain an action for damages they suffer as the result of injury to an insured person to whom they are married or upon whom they are dependant. They are eligible claimants if they are entitled to maintain an action under fatal accidents legislation with respect to the death of an insured person.
>
> The endorsement recognizes that business entities provide vehicles for the use of officers, employees and partners. If the business entity is the named insured in a policy with a family protection endorsement, the person for whose use the vehicle is provided is an insured person and is deemed to be a named insured for the purpose of the first branch of the definition of dependant relative.
>
> The scheme of the coverage provided by the endorsement, as well as its title, make it clear that it is intended to protect only natural persons, their immediate families, and – within limits – dependant members of their extended families.
>
> It would do violence to the scheme of the endorsement to extend its coverage to a corporation that claims derivative damages in respect of injury to an employee or shareholder.
>
> The corporate plaintiffs are not eligible claimants as defined in the endorsement. (my emphasis)
>
> …

[67] I find the New Brunswick Court of Queen's Bench reasons compelling, and I adopt them, as the terms of the SEF 44 in that case were essentially identical to the ones before me. The definition of "eligible claimant" and, more specifically, the meaning of the terms "other person" cannot be read in isolation from the other provisions of the endorsement, including its title, that delineate the scope, object and purpose of the SEF 44 endorsement. As stated in *Reimer*, SEF 44 coverage is not additional insurance for the motorist at fault, nor does it per se provide an indemnity for the liability of the motorist at fault. It provides an indemnity for the risk that the at-fault motorist is under-insured. When one looks at the endorsement as a whole, what is envisaged by the SEF 44 is the protection of a limited number of people, the insured person, their spouse and, within limits, dependant members of their extended families, against that risk. In that context, the term "other person'' cannot be extended to mean something other than a natural person (or their representatives). In addition, in light of the people specifically referred to in the definitions and other clauses throughout the SEF 44, I do not see how it could be said that an average Yukon resident applying for optional safety net insurance entitled Family Protection Endorsement would understand or view the expression "other person" under the definition of an "eligible claimant" as including the Yukon government or government representatives for the costs of health services and travel benefits the government is statutorily obliged to provide to them (as Yukon residents) free of charge.

[68] Mr. Boughner, the injured insured, entered into a contract with Security National for excess insurance which was not compulsory, paid the premiums, was injured by an under-insured driver, and now finds himself in a situation where, if Yukon is successful

in this matter, he risks receiving a pro-rated portion of the amount otherwise wholly payable to him (clause 4(c) of the SEF 44). In my view, this situation would amount to the victim having to pay for health and medical services as well as medical travel expenses he was entitled to obtain free of charge pursuant to the universal health scheme in place in this Territory. The fact that, according to counsel for Yukon, Yukon has a policy in place, which is not before me, to the effect that a victim must be fully compensated prior to Yukon seeking compensation for its costs does not change the terms of the insurance policy.

[69] In my view, Yukon does not meet the definition of "other person" under the definition of an eligible claimant because it is not a natural person (or possibly a representative of that person). Neither do the Minister, the Administrator or Director respectively in charge of the three statutes at issue, because they are not bringing this claim on their own behalf as a spouse or extended dependants of the insured and injured person; they are bringing this claim on behalf of the government.

[70] Therefore, I conclude that Yukon (representing the Minister, Administrator or Director in charge of the application of the three Yukon statutes at issue) does not have a direct claim against Mr. Boughner's SEF 44.

[71] Finally, going back to the contractual aspect of the first question put to me on this stated case, as stated earlier, Security National does not insure the at-fault motorist nor does the SEF 44 provide an indemnity for the liability of the at-fault motorist. Courts have found that an SEF 44 endorsement provides a protection against the risk that the tortfeasor may be under-insured up to the limits of the insurance policy contract. As I have found, Mr. Boughner's contracted with Security National to protect himself and

other closely related natural persons, not the government, against that risk. Therefore, considering the nature, object and scope of Mr. Boughner's insurance policy contract, and more particularly of his SEF 44 endorsement, I am of the view that Mr. Boughner's SEF 44 cannot be interpreted as giving him a right of recovery, on behalf of Yukon, against his insurer for the costs of the services and benefits he received pursuant to the statutes. Therefore, Mr. Boughner cannot personally advance a contractual claim, on behalf of Yukon, under his SEF 44, against Security National, to recover the costs of health and medical services as well as of the medical related travel benefits Yukon was statutorily required to pay for him.

CONCLUSION

[72] As stated at the outset of my reasons, both questions in this stated case must be answered in the negative.

[73] The issue of costs may be spoken to by the parties if they are unable to resolve the issue between them.

_____
CAMPBELL J.