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ACCIDENT BENEFITS: CROSS BORDER ADJUSTING
What Process Should be Followed

To be, or not to be, that is the question: Do claimants retain their procedural rights when they elect to receive benefits available in the jurisdiction where the accident occurred? Surprisingly, it is not a question that has generated much attention during the past few years. Nonetheless, in recent months this rather unchartered area of insurance law has become an important topic of discussion in our accident benefits practice, notably with respect to the election of benefits available in Quebec. Therefore, we thought it would be beneficial to share some of our findings.

Similar to scholastic debates on the meaning of Shakespeare's plays (or maybe not quite to this extent), we have debated how a claim for benefits should be adjusted when a claimant elects to receive the benefits available in another jurisdiction. It basically boils down to what is meant by section 59 of the *SABS* with respect the claimant's entitlement to elect benefits and receive said benefits in the ***"same amounts and subject to the same conditions as if the person were a resident of the jurisdiction in which the accident occurred"***. We are sure you will not be surprised to know that there are

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diverging opinions as to how the above should be interpreted.

Our analysis reveals that, once a claimant elects out of province benefits, the *SABS* process needs to be used to adjust the file but entitlement must be determined pursuant to the law of where the accident occurred ("*lex loci delicti*"), also known as substantive law. That being said, it then becomes a matter of differentiating between what are the claimant's procedural rights under the *SABS* and what are their substantive entitlement rights stemming from the foreign jurisdiction.

Case Law

To our knowledge, there is but one FSCO decision that speaks directly to the issue of the claimant retaining their procedural rights under the *SABS* when they elect to receive benefits from another jurisdiction, namely *Sickles v. Economical Mutual Insurance Co.*, 2011 CarswellOnt 11472.

Ms. Sickles was injured in a motor vehicle accident in the province of Quebec. Given that the accident occurred in the province of Quebec, she was entitled to elect to receive benefits in the same amounts and subject to the same conditions as if she were a resident of Quebec. She elected to do so. The issues at the hearing dealt with her entitlement to personal assistance (equivalent of Attendant Care in Ontario), as well as a request for a special award and interest. A Quebec lawyer was asked to testify as an expert on the interpretation of section 79 (personal assistance) of the Quebec *Automobile Insurance Act ("AIA").*

After finding that Ms. Sickles was entitled to personal assistance pursuant to the *AIA*, Arbitrator Rogers turned his mind on the issue of whether the claimant was entitled to a special award. In doing so, he stated that ***"although Ms. Sickles had elected to receive Quebec benefits, she retained her procedural rights under the Schedule"***. It would appear that this concept was a *fait accompli* for Arbitrator Rogers, in that there was no question that the *SABS* process applied.

The challenges in adjusting an out of province claim

For illustrative purposes, let us assume that an Ontario claimant has elected Quebec benefits under the *AIA*. One of the main challenges that an adjuster will face, in such a case, will be to differentiate between what should be processed under *SABS* or *AIA*. It must be said that differentiating between what is considered procedural and what is considered substantive is not always an easy task. To assist in this exercise, we have listed some plausible scenarios that could occur while adjusting this out of province election of benefits under the *AIA*.

1. You wish to assess the claimant – do you apply the section 44 examination provisions under *SABS* or the section 83.12 examination rules under *AIA?* Section 44 under the *SABS* is a process; therefore, you would apply the procedures established under the *SABS.*

2. Is the insurer required to evaluate the claimant's needs under the *AIA* criteria or the *SABS* criteria? This is an evaluation as to "entitlement", therefore, the foreign law applies as it is substantive.

3. In order to examine the claimant's needs, should the evaluation be

conducted by an occupational therapist licensed in Quebec or Ontario? If one is applying foreign law, one should have knowledge of the tests that need to be met with regards to entitlement in that particular jurisdiction. Therefore, it would be ideal to have an occupational therapist qualified in Quebec complete the assessment. In the event you don't and the benefit is denied, claimant's counsel could easily argue that the insurer improperly assessed the claimant's needs.

4. If the claimant does not attend an Independent Examination, is the insurer entitled to discontinue the claimant's benefits pursuant to section 37(7) of the *SABS* or section 83.29 of the *AIA*? Procedural or substantive? Again, the "discontinuance" is a process and the Ontario procedure should be utilized.

5. Is the insurer entitled to proceed with an Examination Under Oath ("EUO") pursuant to section 33(2) of the *SABS*? Given that it is a process, the answer would be yes. However, caution to the individual questioning the claimant – always remember that the facts that you will gather will need to be applied to the foreign jurisdiction benefits entitlement criteria which may be different than Ontario. An appropriate understanding of the foreign jurisdiction benefits system is warranted prior to attending the EUO.

6. Under section 50 of the *SABS,* is the insurer required to provide the claimant with a Standard Benefit Statement? The requirement to send a Standard Benefit Statement is procedural; therefore, it should be sent. However, it appears that the legislators and FSCO did not consider out of province claims when establishing the rules and procedures for the Standard Benefit Statement. For instance, in Quebec, there are no catastrophic designations. What is the insurer's obligation vis-à-vis the frequency in delivering a Standard Benefit Statement (every two months or yearly)? FSCO says that the Standard Benefit Statement cannot be modified but a lot of the information on the form is not applicable to a claim under *AIA*. Therefore, what information will you provide to the claimant and how do you convey it to the claimant without modifying the Standard Benefit Statement?

7. The claimant is not happy with the determination of entitlement (i.e. termination of benefits). Is the claimant entitled to raise a dispute under *SABS*? We are now in the "administration of the process" and given that the "process" is procedural, the *SABS* dispute resolution applies.

8. If it is found at an arbitration that the insurer unreasonably withheld or delayed payment, is the claimant entitled to a special award? Is it in accordance with *SABS* or *AIA*? The entitlement to a special award is intimately tied to the procedure (i.e. failure to follow the process in regards to notices, explanation, etc.) and exposes the insurer to possible sanctions. As such, in our view, this would fall under "procedural law" and *SABS* would apply.

9. If the arbitrator finds that the claimant is entitled to benefits, would the claimant be entitled to interest on that amount subject to the *SABS* or the *AIA*? In the *Sickles* decision, Arbitrator Rogers found that it was payable pursuant to *SABS*. With respect, the issue of interest is not, in our view, "procedural" but rather "substantive". Pursuant to section 83.32 of the *AIA*, interest is payable on an amount that was denied. It reads:

> *83.32. Where, following an application for review or a proceeding brought before the Administrative Tribunal of Québec, the Société or the Tribunal recognizes a person's entitlement to an indemnity that was formerly denied or increases the amount of an indemnity, the Société shall order, in every case, that the person be paid interest computed from the date of the decision refusing to recognize entitlement to an indemnity or refusing to increase the amount of an indemnity, as the case may be.*
>
> *Other cases requiring the payment of interest by the Société may be prescribed by regulation.*
>
> *The applicable interest rate is the rate fixed under the second paragraph of section 28 of the Tax Administration Act (chapter A-6.002).*

If foreign law is applicable in the adjudication of benefits (i.e. substantive law), then it should flow that foreign law would apply in governing interest. In the *Sickles* case, it is clear that section 83.32 of the *AIA* provided a mechanism for payment of interest and an applicable interest rate (1.4% as of October 2014).

These are but a few of the examples that adjusters will need to consider when adjusting a file dealing with an election of benefits from a foreign jurisdiction. Adjusters will undoubtedly face many more scenarios not addressed in this article that will necessitate a careful analysis as to whether “procedural” or “substantive” law applies. However, if there is any uncertainty, we recommend that the principles laid out in *Smith v. The Co-operators General Insurance Co.*, [2002] 2 SCR 129, guide your decision making. In other words, if in doubt, err on the side of caution.

Conclusion

Although out of province election of benefits claims under section 59 of the *SABS* likely represent a small percentage of the insurer’s overall accident benefits claims, it is essential to properly adjust the claims in accordance with the procedural rules under the *SABS* and the substantive law provided by the foreign jurisdiction.

As stated by the Supreme Court of Canada, it is not always straightforward to differentiate between what is considered substantive law and what is procedural law. Adjusting an out of province claim falls within what could be called a “grey zone”. Lawyers thrive on “grey zones”. If the rule is unclear or if its applicability has been unexplored and unchallenged, everything is arguable and open to interpretation. Properly adjusting the claims in accordance with the procedural rules under the *SABS* and the substantive law provided by the foreign jurisdiction should, in theory, eliminate the grey zones.

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