

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.I.18, Section 268 and Regulation 283/95;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17;

AND IN THE MATTER of an Arbitration between:

B E T W E E N :

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

A W A R D

Counsel:

Derek Greenside

Counsel for the Applicant, Security National Insurance Company of Canada

Kevin Mitchell

Counsel for the Respondent, Wawanesa Mutual Insurance Company of Canada

Background:

1. The parties to this matter have been involved in a priority dispute arising out of an accident which occurred on June 23, 2010. The claimant made a claim for statutory accident benefits as against Security National Insurance Company ("Security

National"). Apparently, the claimant was a passenger within the vehicle insured by Security National.

2. Security National commenced the priority dispute as against Wawanesa Mutual Insurance Company of Canada ("Wawanesa"), by Notice to Applicant of Dispute Between Insurers dated September 17, 2010. It was asserted that the claimant's husband had regular use of a company vehicle insured by Wawanesa. A particular policy number was given (though, as the matter evolved, other possible policy numbers were identified).

3. A Demand to Participate in the Appointment of an Arbitrator was issued on May 9, 2011. I was appointed as Arbitrator on consent of the parties in December 2011, confirmed same in writing on December 15, 2011 and convened the first pre-arbitration teleconference on February 3, 2012.

4. The Arbitration proceeded pursuant to an Arbitration Agreement executed by the parties.

5. There were pre-arbitration teleconferences held on February 3, 2012, September 5, 2012 and January 9, 2013. There was to be a further pre-arbitration teleconference on February 13, 2013 which did not proceed and, ultimately, counsel for Security National confirmed, in an email of February 25, 2013, that his client was satisfied that Wawanesa had provided satisfactory evidence confirming that the appropriate policy in question was properly cancelled such that the priority dispute arbitration was to be abandoned.

6. The parties disagree as to whether costs should be awarded in favour of Wawanesa and, if so, the quantum of such costs. I have been called upon to make a decision in this regard and, as agreed upon between the parties, I received detailed cost

submissions from counsel for Wawanesa under cover of April 24, 2013 and detailed submissions in response from counsel for Security National received under cover of May 3, 2013.

7. As a starting place, the Arbitration Agreement executed on behalf of the parties provide, *inter alia*, as follows:

Legal Costs:

The parties agree that the costs of the Arbitration shall be in the discretion of the Arbitrator. The amount or scale of such costs shall be determined in accordance with the *Arbitration Act* and determined by the Arbitrator in the event that there is any dispute between the parties. For the purpose of determining entitlement to costs, the Arbitrator shall take into account the conduct of the Arbitration proceedings and any conduct which has led to unnecessary costs or delay. With respect to determining costs, the Arbitrator may take into account any formal offer of settlement made by any party. Any such formal offer of settlement shall not be disclosed to the Arbitrator until the decision has been reached on the pertinent issues other than costs.”

8. Pursuant to Section 54 (1) of the *Arbitration Act, 1991*, I may award the costs of an Arbitration. Section 54(2) explains that the costs of an Arbitration consist of a party’s legal expenses, the fees and expenses of the Arbitral Tribunal and any other expenses related to the Arbitration.

9. Counsel for the parties have provided me with a number of authorities which are all consistent to the effect that costs of an arbitration under the *Insurance Act* are typically awarded on a partial indemnity scale unless there is an offer to settle in play (which is not the case before me) or unless there is some exceptional or extraordinary

conduct on the part of one party or the other which should take the matter out of the norm (which, once again, is not the case in the matter before me).

10. Counsel for Security National takes the position that this priority dispute could have been avoided entirely had Wawanesa produced proof of cancellation of insurance. I am not persuaded in this regard. Moreover, it appears that there were at least 3 policies issued by Wawanesa (one or more of which may have insured a vehicle which was alleged to have been provided to the claimant's spouse for regular use). It was not until a representative of Wawanesa's named insured was produced for an examination under oath on July 12, 2012 and further productions were made that Security National ultimately came to be satisfied that it could not successfully advance the within priority dispute arbitration.

11. Thus, I am satisfied that Wawanesa is entitled to its costs of the within Arbitration on a partial indemnity scale. I must now determine the quantum of those costs.

12. Counsel for Wawanesa has delivered a Bill of Costs which is asserted to be costs "actually incurred". From this, I understand that the Bill of Costs represents amounts billed to and payable by Wawanesa to its counsel. Fees total \$15,998.50 together with disbursements of \$846.61 and HST of \$2,182.97 for a total of \$19,028.08. Of the fees incurred, the vast majority of the time spent was that of Mr. Mitchell (called to the Bar in 1994 and exceptionally well versed in private arbitrations such as priority and loss transfer disputes under the *Insurance Act*).

13. Wawanesa submits that if the Bill of Costs is reduced by 33% to reach a partial indemnity figure, the total should be \$13,001.97.

14. Counsel for Security National makes a number of worthy arguments in his written submissions. Among others:

- (a) If costs are sought in the amount of \$19,028.08, this represents 73% of the total amount sought by Security National in the priority dispute (\$26,043.30). These costs are disproportionate to the amount at stake in the dispute.
- (b) The amount sought, even if reduced by 33%, is excessive, having regard for other awards of costs in other cases.
- (c) The amount sought is extraordinarily high, whether at the full or discounted amounts, having regard for the total fees expended by Security National to its own counsel (\$13,277.50 for all fees, disbursements and applicable taxes).

15. Counsel have provided me with a number of decisions of other arbitrators in relation to the matter of costs:

- (a) Arbitrator Bialkowski, in *Wawanesa Mutual Insurance Company v. Markel Insurance Company of Canada* (March 8, 2012), reduced Wawanesa's demand for costs from \$11,529.58 to \$6,300.00 (allowing 54.6% of the amount claimed). He was of the view that partial indemnity costs ought to be approximately 60% of full indemnity costs. There should be some reduction in consideration of the proportionality submission and some items in the disbursement list which might be considered to be full indemnity costs.

- (b) Arbitrator Samis, in *AXA Insurance (Canada) v. CNA Canada* (July 22, 2001), noted that AXA had incurred solicitor-client costs of more than \$17,000.00 and was seeking an award of costs of \$8,000.00 (47% of the total). In this case, there were 11 pre-hearing teleconferences, work associated with a court ordered appointment of Mr. Samis as Arbitrator, substantial amounts in dispute (though, by the time of the hearing, the amount claimed had been reduced to approximately \$189,000.00 of which Arbitrator Samis awarded some \$119,000.00). There was a half day hearing. Arbitrator Samis viewed the success as between the parties to be partially divided and awarded costs of \$5,000.00 (62.5% of the amount claimed).
- (c) Arbitrator Novick, in *Kingsway General Insurance Company v Aviva Canada Inc.* (July 2012), was called upon to determine costs under circumstances similar to the within matter (though it would appear there were a greater number of pre-hearing teleconferences and examinations under oath of two parties in Kenora, Ontario). Aviva submitted a bill of costs in the total amount of \$14,787.45. Arguments were made in relation to proportionality (the amount being claimed was close to 1/3 of the total amount of benefits paid to the claimant to that time). Arbitrator Novick awarded legal fees of \$6,328.00 (inclusive of taxes) compared as against a demand of some \$11,700.00 (54%). Virtually all of the disbursements sought were allowed.
- (d) Arbitrator Jones, in *The Dominion of Canada General Insurance Company v. Certas Direct Insurance Company* (September 2012), was called upon to make a number of determinations including costs of the

priority arbitration. While the amount sought is not specified, Arbitrator Jones awarded \$11,000.00 for costs plus taxes in connection with a matter which is described as very large with a great deal of money having been paid out to the claimant. The arbitration involved 2.5 days. He awarded costs in the amount of \$11,000.00 plus taxes.

16. I start my analysis by gathering together all fees claimed by counsel for Wawanesa and the law clerks working under him. The total for fees amounts to \$15,998.50. I am satisfied, based on submissions made by counsel for Security National and my review of the Bill of Costs delivered on behalf of Wawanesa, that a significant amount of time relates to matters which historically would have been described as "between a solicitor and his own client" and not assessable. By that, I am not suggesting anything inappropriate; far from it, it appears that counsel for Wawanesa worked diligently, conscientiously and thoroughly in relation to this matter. However, the devotion of time to a matter does not necessary mean that such time is assessable as between parties (whether on a partial indemnity or substantial indemnity basis). For this reason, together with a consideration of the principle of proportionality, I reduce this sum to \$13,000.00. I award 60% of this amount, equal to \$7,800.00, for the fees properly payable by Security National to Wawanesa together with HST on this amount of \$1,014.00.

17. Disbursements are claimed in the amount of \$846.61 plus applicable taxes. I have disallowed facsimile, postage, photocopies and courier charges in the amount of \$256.33 (inclusive of taxes) and allow the balance of \$693.44 (inclusive of taxes).

18. Thus, the total award for costs (inclusive of fees, disbursements and taxes) payable by Security National to Wawanesa is the amount of \$9,507.44.

19. I am indebted to counsel for the parties for their courtesy and professionalism throughout the course of the Arbitration and their detailed and thoughtful submissions in relation to the issues of costs which I was called upon to determine.

Dated at Toronto, this day of May, 2013.

Vance H. Cooper, Arbitrator