IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

and

AVIVA INSURANCE COMPANY and STATE FARM INSURANCE COMPANY/CERTAS HOME & AUTO INSURANCE COMPANY

Respondents

PRELIMINARY ISSUE COSTS DECISION

Counsel:

Sharon C. Dagan for the Applicant

Derek R. J. Greenside for the Respondent Aviva Insurance Company

Mark K. Donaldson for the Respondent State Farm Insurance Company/Certas Home & Auto Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

This costs decision arises out of my Preliminary Issue Decision issued January 10, 2020. That decision dealt with the issue as to whether the applicant ("Dominion") had properly commenced arbitration within the one year time limit set out in Regulation 283/95.

For the reasons set out in my Preliminary Issue Decision, I held that Dominion had properly commenced arbitration, and that the matter may proceed, if necessary, to a hearing on the main priority issue. The main issue is whether Dominion or either of the Respondents ("Aviva", "Certas") is the highest priority insurer pursuant to section 268 of the *Insurance Act*.

Pursuant to directions in my Preliminary Issue Decision, counsel delivered written costs submissions which I have read and considered.

I was not made aware of any offers to settle the preliminary issue by any of the parties which may have impacted the costs determination.

Positions of the Parties Respecting Costs

I will summarize the parties' positions on the costs issue as follows:

Dominion's submissions, Bill of Costs, and dockets, indicate that the work in connection with having the preliminary issue decided totalled just over 50 hours for either three lawyers, or two lawyers and a law clerk.

Most of the time was spent by Dominion's current counsel, Ms. Sharon Dagan, a 1997 call to the bar. Lesser amounts of time were spent by Ms. Dagan's predecessor,

Lorraine Takacs, a 1996 called to the bar, and Hailey Miller. I am not certain whether Ms. Miller was a junior lawyer or a law clerk. The amount of time spent by Ms. Miller was not significant so my uncertainty as to Ms. Miller's status has no bearing on my decision on the costs issue. The hourly rate for Ms. Dagan and Ms. Takacs was $225. Ms. Miller's hourly rate was $110.

The combined value of the Dominion legal team services being claimed comes to just under $11,500 for fees, plus HST, for a total of $12,954.32. Dominion is also seeking indemnity for disbursements associated with the arbitration of the preliminary issue which consist of the account I rendered in connection with the preliminary issue. My account was based on what would be considered a substantial indemnity or solicitor – client hourly rate of $500 per hour for 16 hours in preparation of my Preliminary Issue Decision, plus HST. In case it has any relevance, my year of call is 1983.

The focus of Aviva's submissions is that the amount of time spent on the matter by the Dominion legal team was out of proportion with what was required to deal with the matter. Aviva supports this position by demonstrating the comparatively modest amount of time spent on the matter by its legal team which consisted of Mr. Derek Greenside, a 1987 call to the bar, and a law student, Mr. Michael Silver. A total of just over 13 hours was spent on the matter by Aviva's legal team, with most of that being work done by Mr. Greenside.

Of significance, Aviva points out in its submissions that the partial indemnity hourly rate of Mr. Greenside was $198. Aviva and Certas both questioned whether the $225 rate sought for Ms. Dagan and Ms. Takacs is a partial indemnity rate or a higher

rate. In its reply submissions, Dominion confirmed that the $225 hourly rate is a full indemnity rate. I will discuss the significance of the differing levels of costs which can be awarded in the analysis portion of my decision.

In its submissions, Certas, submits that Dominion ought not to be entitled to a full recovery of its costs, even on a partial indemnity scale, on the basis that the preliminary issue determination was necessary because Dominion did not properly handle the commencement of arbitration proceedings in this matter. The essence of this argument seems to be that even though Dominion was technically or legally correct in the manner it commenced arbitration involving Certas and Aviva, its service of multiple processes, some valid some not, and its failure to involve Aviva until arbitration had already got underway, created a confusing situation whereby it was understandable that Certas and Aviva might challenge the validity of the proceedings.

Certas also advance an argument that the amount of the costs being sought by Dominion for the resolution of what is only a preliminary issue is wholly out of proportion to the amount of SABS at stake for the entire priority dispute. Certas estimates SABS in issue for priority purposes at approximately $14,000.

In its reply submissions, Dominion responds to Certas' argument that the measure of costs to which Dominion is entitled should reflect the principle of proportionality. Dominion submits that it attempted to address this very issue with Aviva and Certas by suggesting that the parties enter into what is known in the industry as a "standstill agreement". Effectively this is an agreement whereby the parties agree to temporarily halt arbitration proceedings pending developments usually outside of those

proceedings which could have an impact on either how arbitration proceedings would continue or their actual outcome. Generally speaking, the parties usually also agree that the passage of time during which a standstill agreement is in effect will have no bearing on any time limits or limitation periods.

In this case, before work proceeded in earnest to deal with the preliminary issue in this arbitration, Dominion suggested to Aviva and Certas that they enter into a standstill agreement until the claimant's tort claim had been settled. The reason for this is that the claimant's counsel advised he could not discuss settlement of the claimant's SABS claim until after her tort claim had been settled.

The purpose of this suggestion was to allow for the possibility that the claimant's SABS claim could be settled, and the quantum of SABS in dispute for priority purposes crystallized, once the claimant's tort claim was resolved. If the amount of SABS in dispute crystallized – especially at a modest amount, it might have enabled the parties to have productive settlement discussions respecting the arbitration issues.

Dominion received a response to the suggestion from Aviva. A specific response from Certas was not indicated in Dominion's submissions. I do not think it would be an unreasonable inference to make that Certas probably agreed with Aviva's response. Aviva indicated to Dominion that it did not see how a standstill agreement would benefit either respondent.

The reasoning is not explained in any of the submissions. I would suggest that a reasonable explanation is that Aviva and Certas felt that the facts of this case raised an

important interpretation issue with respect to s. 7 (3) of Regulation 283/95. This issue needed to be determined regardless of the quantum of SABS in dispute.

In any case, Aviva and Certas did not agree to a standstill agreement and the determination of the preliminary issue proceeded to a conclusion. Dominion points out that the claimant's SABS claim has not crystallized. Although SABS paid were in the range of approximately $14,000 when the arbitration of the preliminary issue proceeded, there is no guarantee that this will be the ultimate amount in dispute. The claimant's SABS claim is still open.

Analysis

Section 54 (2) of the *Arbitration Act, 1991* which governs these proceedings provides that the costs an arbitrator may award consists of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

Subsection 9 of Regulation 283/95 provides as follows:

> 9 (1) Unless otherwise ordered by the arbitrator or agreed to by all parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration.
>
> (2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*.

Essentially section 56 of the *Arbitration Act, 1991* provides in certain circumstances for the assessment of arbitration costs by an assessment officer in the same manner as costs under the rules of court.

In dealing with issues concerning arbitration costs, the courts have approved of applying the provisions of the *Courts of Justice Act,* section 131 (1), and the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure.[1]

In my opinion, there is no reason why the same principles ought not to apply to costs issues arising out of the determination of a preliminary issue, just as they would to the determination of all issues which would dispose of the entire arbitration.

In its submissions, Certas has included some arbitration case law dealing with costs. One of those decisions happens to be one of my own – *Jevco Insurance Company v. Pafco Insurance Company & Co-operators Insurance Company*, January 18, 2016 ("*Jevco v. Pafco & Co-operators*"). These decisions cite several Superior Court and Court of Appeal decisions which confirm the applicable principles of determining entitlement to, and quantum of costs. I will address these, as necessary, in my analysis.

There are essentially three levels at which costs may be awarded. The first level is "partial indemnity costs". The term, "partial indemnity costs" is defined in Rule 1.03 of the Rules of Civil Procedure as follows:

> "partial indemnity costs" means costs awarded in accordance with Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning;

The second level of costs is known as "substantial indemnity costs". This term is defined in rule 1.03 of the Rules of Civil Procedure as follows:

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[1] See *Security National Insurance Company v. Wawanesa Mutual Insurance Company* [2014], O.J. No. 609, ONSC, Morgan J. ("*Security v. Wawanesa*").

> "substantial indemnity costs" means costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A and "on a substantial indemnity basis" has a corresponding meaning,

The Rules of Civil Procedure further point out (see Rule 1.04 (4) and (5)) that the terms "partial indemnity costs", and "substantial indemnity costs", are intended to replace the earlier terminology of "party and party costs", and "solicitor and client costs" respectively.

Costs on a substantial indemnity basis, or full indemnity basis are known as "elevated costs". One of the most important principles concerning the awarding of costs in litigation is that costs should be awarded on a partial indemnity scale, unless special circumstances apply to justify the awarding of elevated costs.

This principle has been well-established at common law. A recent statement of it is set out by the Ontario Court of Appeal in *Davies v. The Corporation of the Municipality of Clarington et al.*, (2009 ONCA 722 CanLII) ("*Davies v. Clarington*"). The court stated (at para. 28):

> This court, following the principal established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

In *Net Connect Installation Inc. v. Mobile Zone et al.* (2017 ONCA 766 CanLII), the Court of Appeal reiterated this principle, and emphasized that an award of full indemnity costs requires circumstances even more exceptional than circumstances justifying an award of substantial indemnity costs. The court stated (at para 8):

> There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: (*Davies v. Clarington...*). Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

Therefore, my first consideration must be: is there anything about the circumstances of the arbitration of the preliminary issue which would justify an award of costs to Dominion on other than a partial indemnity basis?

I have no difficulty in answering this question. The answer is "No". In my view there is nothing about the circumstances of the arbitration of the preliminary issue, and by that I mean the conduct of Aviva or Certas, that would in any way justify costs being awarded on an elevated scale. This is a case for partial indemnity costs only.

It was suggested in Dominion's submissions, but not strenuously argued, that I should take into account the fact that Aviva and Certas did not take up Dominion's proposal to enter into a standstill agreement in considering whether full indemnity costs would be appropriate.

I do not agree. In my opinion, the refusal by Aviva and Certas to enter into a standstill agreement and to persist in their wish to have the preliminary issue determined by me is not the kind of conduct the Court of Appeal is citing as "worthy of sanction". In my view, the question of whether Dominion had properly commenced arbitration within the relevant time limit was very much an arguable issue. Aviva and

Certas were well within their rights as litigants to seek to have an Arbitrator's decision on the issue.

By the same token, I do not think that Dominion should have its entitlement to partial indemnity costs diminished by the fact that it could have handled the commencement of arbitration proceedings in a less confusing manner. It is a mitigating factor that Dominion proposed a standstill agreement to put the arbitration on hold until it was clear how much the entire priority dispute would be about. I think it is implicit in this proposal that Dominion would likely have been prepared to negotiate on both the issues of entitlement to recover SABS paid, as well as the quantum, especially if it was clear that the SABS claim was going to be capped at a modest level.

Dominion was not left with any choice however, but to argue the preliminary issue through to a conclusion, given the positions taken by Aviva and Certas. In my view this is also an important consideration for the concept of "proportionality" in costs as set out in Rule 57.01 (1) (a). If Dominion wished to maintain its claim to have one of either Aviva or Certas declared the priority insurer, it was left with no alternative but to resist Aviva's and Certas' efforts to "knock out" that priority claim based on the limitation period argument. Had Dominion lost on the issue, it would have had no right to recover any SABS paid to the claimant, whether that turns out to be a modest amount, or a large amount.

Therefore, I conclude that Dominion should be entitled to costs of the arbitration of the preliminary issue on a partial indemnity scale.

There is a useful discussion of the case law relevant to how much should be recovered when partial indemnity costs are awarded in the costs Award of Arbitrator Vance Cooper in *Security National Insurance Company v. Wawanesa Mutual Insurance Company* (May, 2013) (*Security National v. Wawanesa"*) (Tab B, Certas' costs submissions).

Arbitrator Cooper adopts the rule of thumb applied by Arbitrator Bialkowski in his Awards dealing with costs which was based on common law and other arbitral decisions. The rule of thumb is that partial indemnity costs should be in the range of 60% of what the successful party charged his own client. I see no reason not to apply that approach in this case.

I also need to satisfy myself that the amount claimed by Dominion for costs relates to matters as between the parties, as opposed to work done that was strictly internal for the purposes of the solicitor – client relationship between Dominion and its counsel. Having reviewed the dockets provided by Dominion, I was satisfied that the work set out in the dockets does appear to relate to inter-party matters. I did not see anything that I would classify as strictly solicitor – client work.

Finally, I should also address the question of whether the amount of time spent by the Dominion legal team was grossly out of proportion to what ought to have been required to properly deal with the arbitration of the preliminary issue.

On this point I will start with the proposition set out in *Lawyers Professional Indemnity Co. v. Geto Investments* ([2002] O. J. No 1001). The court stated that with respect to the number of hours to be allowed, it is not the court's function to second

guess successful counsel on the amount of time that should have been spent unless the time was grossly excessive.

In this case, Dominion's team included two senior counsel who worked on the case during the relevant time frame. Both lawyers had over twenty years experience. Aviva and Certas were similarly represented by senior counsel, with even more experience at the bar than the Dominion legal team.

Mindful that I should not "second guess" successful counsel on the amount of time spent, I am reluctant to conclude that the amount of time spent by Dominion on the matter meets the "grossly excessive" threshold. On the information before me, the major difference in time spent seems to be with respect to preparing the written submissions on the preliminary issue. Ms. Dagan spent about 25 hours on this for Dominion. It may have been more time than other counsel would have spent in the same circumstances, but I do not think that necessarily places it in the "grossly excessive" range.

I found the written submissions provided by all counsel on the preliminary issue to be very thorough, well-reasoned, and quite helpful. The fact that the Aviva legal team was able to accomplish its effective work (Mr. Greenside's time spent in preparing Aviva's preliminary issue submissions was just over 4 hours) in substantially less time than Dominion's team, leads me to commend it for its remarkable efficiency, as opposed to criticize Dominion's team for expending a "grossly excessive" amount of effort.

Applying the costs principles which I have discussed to this case, I would allow Dominion's claim for fees on a partial indemnity basis. I would calculate the appropriate

partial indemnity rate for Ms. Takacs and Ms. Dagan of Dominion's legal team to be $135 per hour (60% of $225). I would calculate the partial indemnity rate for Hailey Miller to be $66 per hour (60% of $110).

I should mention that hourly rates of $225, even as a partial indemnity amount, for counsel with over 20 years' experience, and a law clerk (on the assumption that Ms. Miller may be a law clerk) are well within the prescribed ranges established by the Costs Subcommittee of the Rules Committee back in July, 2005 (*cf.* the commentary under Rule 57.01 in the Rules of Civil Procedure).

I would allow a total of 50 hours for fees, calculated based on my aforementioned partial indemnity calculations, with 45.5 of those hours being attributed to Dominion's senior counsel at $135 per hour, and 4.5 of those hours being attributed to Hailey Miller, at $66 per hour. This produces an allowance for partial indemnity fees of $6,440.00 (rounded). HST of $837.20 should be paid on that amount, for a total fees and HST amount of $7,277.20.

Dominion should also be indemnified by Aviva and Certas in respect of my account for the determination of the preliminary issue. Inclusive of HST that account totalled $9,040.00.

I agree with Dominion's submission that Aviva and Certas should be equally responsible for the payment of the costs which I have awarded to Dominion. Aviva and Certas should make payment in equal shares of **$3,638.60 each** to Dominion to satisfy this costs award.

Aviva and Certas should make payment in equal shares of **$4,520.00 each** to the Arbitrator to satisfy the Arbitrator's account for the Preliminary Issue Decision. I note that Aviva has already made a payment for the indicated amount so its share of the Arbitrator's account is satisfied. Certas' share of the Arbitrator's account remains outstanding.

Should there be any other matters which require my attention with respect to my Preliminary Issue Decision and the determination of costs for same counsel should advise. Counsel should also contact me or my ADR Co-ordinator with respect to their intentions for proceeding with the arbitration on the remaining priority issues

Dated at Toronto, April 7, 2020

Scott W. Densem, Arbitrator