**IN THE MATTER OF AN ARBITRATION UNDER**
**THE *ARBITRATION ACT*, S.O. 1991, c. 17**
**THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 (as amended)**
**ONTARIO *REGULATION* 283/95 (as amended)**

**BETWEEN:**

**ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA (RSA)**

Applicant

-And-

**DOMINION OF CANADA INSURANCE COMPANY (Dominion) and**
**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE**
**(The Fund)**

Respondents

**BEFORE:** Arbitrator Fred Sampliner

**COUNSEL:** Derek Greenside for RSA
Mark Donaldson for Dominion
Marie Sydney for The Fund

## DECISION ON COSTS

This matter comes before me following the Fund's withdrawal of its appeal to Superior Court from the July 12, 2017 arbitration decision of this Tribunal. The Fund accepted priority for Shanice Hunter Clarke's *Statutory Accident Benefits* (SABS) and also settled RSA's SABS reimbursement claims, adjusting expenses and legal fees incurred before August 23, 2018.

The remaining issues[1] in this matter are:

[1] The Fund agrees in its submissions to pay $9,000.00 to settle Dominion's legal costs of the appeal, and Dominion agrees to accept this amount. I will assume this issue is resolved unless the affected parties advise me otherwise.

1. Whether RSA or the Fund is responsible to reimburse Dominion $42,000.00 for its legal expenses, calculated on a partial indemnity basis.[2]
2. Whether RSA is entitled to reimbursement from the Fund of post-August 23, 2018 legal costs in the amount of $3,464.75 plus HST.
3. Which party is responsible for the expense of this arbitration proceeding.

The parties' Arbitration Agreement of March 1, 2017 provides that the determination of their costs and the arbitration expenses "shall be decided in the sole discretion of the Arbitrator." Costs determinations are provided for in section 54 of the *Arbitration Act*, S.O. 1991. This Tribunal proceeds to determine costs based on the parties' written submissions.

Subsection 9(1) of *Ontario Regulation* 283/95 sets out the over-arching principle applying to costs determinations in these priority disputes:

> Unless otherwise ordered by the arbitrator or agreed to by all the parties before commencement of the arbitration, the costs of the arbitration for all parties, including the costs of the arbitrator, shall be paid by the unsuccessful parties to the arbitration.

In this decision, I also consider the factors in Rule 57.01(1) of the *Rules of Civil Procedures*:

1. The principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
2. The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
3. The amount claimed and the amount recovered in the proceeding;
4. The apportionment of liability;
5. The complexity of the proceeding;
6. The importance of the issues;
7. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
8. Whether any step in the proceeding was,
   (i) improper, vexatious or unnecessary, or
   (ii) taken through negligence, mistake or excessive caution;

[2] The Fund does not dispute the quantum of Dominion's legal costs.

9. A party's denial of or refusal to admit anything that should have been admitted;

10. Whether it is appropriate to award any costs or more than one set of costs where a party,

    (i) commenced separate proceedings for claims that should have been made in one proceeding, or

    (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

11. Any other matter relevant to the question of costs

(My underlined portions)

The Fund maintains that RSA should not have added Dominion as a party and should not be held responsible for Dominion's legal costs. The Fund argues that on RSA's best case both it and Dominion would be on the same priority level and that the claimant had chosen RSA over Dominion in making her 2013 SABS application to RSA.[3] The Fund asserts that RSA knew or should have known early on that Dominion could not be held liable in this adjudication.

I view Arbitrator Bialkowski's comments from *State Farm and Dominion of Canada*[4] *as* pertinent to the circumstances of this case:

> The fact situation before me is one that is seen on a regular basis. A first party insurer obtains some information which suggests that another insurer may stand in priority but the documentation necessary to confirm such information and assess priority is in the hands of a second party insurer who is not in a position to release such documentation by reason of PIPEDA concerns. An arbitration is commenced. An order for production is made. The documentation is produced which confirms that the second party does not stand in priority. The arbitration is withdrawn and the second party insurer seeks its costs and refuses to share the costs of the arbitrator.

The Fund's position that RSA would have known the final outcome before commencement of the process or during the initial stages is contradicted by the facts. This arbitration was first organised in July 2014, approximately fifteen years post-accident. At that time, RSA admitted it had previously purged most of its coverage records for the accident period. Dominion acknowledged it had some coverage records for the claimant's mother and other family members. The parties began the process of sharing their materials, records from the Insurance Bureau of Canada, Auto Plus reports and available Ministry

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[3] *Insurance Act* 268(4)

[4] *State Farm Insurance Companies and The Dominion of Canada General Insurance Company*, (K. Bialkowski, November 12, 2013)

of Transportation records at the time of the initial prehearing. Their productions and analysis of the material was not complete until further in the process.

At the time of the first prehearing discussion, there was no indication that the Fund did not hold Dominion as a potential target insurer subject to the Tribunal's determination. During the numerous prehearings, the Fund made no submission that Dominion should be dismissed. The Fund's lack of submission that Dominion should be dismissed together with their ongoing document exchanges establishes that the Fund acquiesced to Dominion's inclusion as a reasonably necessary party to the investigation of priority in this dispute. Conversely, RSA would have been negligent to have failed to include Dominion as a potential priority insurer. I reject the Fund's argument that Dominion was an unnecessary party to this legal action and find that Dominion's participation was entirely reasonable through completion of discovery.

The Fund contends it neither sought Dominion's participation nor its liability in this matter at any time, and should not have to pay the resulting costs. The Tribunal's final prehearing letter[5] specifically requested the parties to submit an Agreed Statement of Facts and Statement of Issues, but the parties did not submit this material. If this had been done, the Fund's position would likely have been known. The Fund's Factum submitted in the arbitration also does not discuss its position with respect to Dominion.

In the absence of a statement from the Fund during the arbitration process indicating its position, I accept the Fund's Notice of Appeal[6] as the best evidence of its position. In that Notice the Fund requested the following relief:

> (j) setting aside the legal ruling of the Arbitrator that "Dominion did not have an auto policy covering Shanice at the time of the accident, and it was not the priority insurer"...and his legal ruling that "Dominion is not responsible to pay Shanice SABS"
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> (l) declaring that if it were to be determined in this arbitration that Shanice Clarke was a "dependent" of her grandmother, Delores Clarke, at the time of Shanice's accident, then Dominion is the priority insurer required to pay SABS to Shanice Clarke, pursuant to section 268(2)2i of the *Insurance Act*;

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[5] Prehearing letter to counsel of January 30, 2017
[6] The Fund's Notice of Appeal dated August 10, 2017

The Fund's request for relief in its Notice of Appeal is not contradicted by other evidence and confirms that it held both RSA and Dominion as potential target insurers in this priority arbitration.

The Fund likewise argues that RSA was unsuccessful against Dominion. The definition of success is the accomplishment of an aim or achievement of a favorable outcome.[7] The Fund's acceptance of its priority and reimbursement of RSA's SABS and expenses unquestionably qualifies as a successful outcome. I do not accept the Fund's assertion that RSA was unsuccessful.

I view the Fund's position as a request that the Tribunal make a *Bullock*-type order that parcels out costs.[8] This brings me to Arbitrator Jones below comments about the intended simplicity of the priority system (*Zurich Insurance Company and Co-Operators Insurance Company*[9]):

> The intent of the legislature was to create a quick, efficient and predictable dispute resolution scheme. To allow legal costs incurred in first party disputes to be recovered regularly in priority disputes would lead to an endless examination of accounts and their reasonableness. While this may seem unfair, as one insurer had incurred the cost of handling of a case the other insurer was ultimately for, it should be remembered that in the next case the same insurer may be the beneficiary.
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> (My underline)

I agree with Arbitrator Jones' above comments about promoting systemic efficiency and predictable results as related to costs. Further on in this decision Arbitrator Jones observes that exceptional circumstances are needed to establish that an insurer is unjustly enriched or that restitution should apply. I agree.

This Tribunal's decision states that the Fund received the claimant's first completed SABS application in October 1998 and did not accept the claim or commence proceedings to dispute priority with potential insurance carriers at that time.[10] It is undisputed that the nearly 15 years between the claimant's first and second OCF-1 applications contributed to the dearth of coverage information and added difficulty to determining priority.

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[7] The Concise Oxford Dictionary (8th Ed. 1992) p. 1217, 1347
[8] *Moore (Litigation Guardian of) v. Wieneke*, 2008 ONCA 162
[9] (G. Jones, January 2007)
[10] *Royal and Sun Alliance Insurance Company and Dominion of Canada Insurance Company et. al.* (F. Sampliner, July 12, 2017) at pg. 7

RSA met the *Regulation's* obligation when it received the claimant's OCF-1 by instituting this dispute process. Awarding costs against RSA when it is the successful party in this process would reduce the incentive for insurers to add potentially liable parties in priority disputers. That result would undermine the intention of the *Regulation* and efficiency of the process. Considering that reasoning I do not accept that equitable relief is appropriate and refuse the Fund's request to award all or a portion of Dominion's costs against RSA.

The Fund's acceptance of full responsibility for the claimant's SABS establishes it is the sole unsuccessful party in this matter. I am compelled to follow the *Regulation's* general directive to award that Dominion's legal costs are the responsibility of the Fund at the partial indemnity rate, and that the Fund also pay the arbitration expenses of this determination.

The Fund contends that RSA's $3,464.75 legal expense claim is inflated. I accept that partial indemnity rates between 60% and 75% are the general rule for cost awards in these matters[11], which equates in this case to a range between approximately $2,600.00 and $2,000.00 plus HST. RSA's total 8.5 lawyer hours post August 23, 2018 is lower than the Fund's 15 hours for the same time period, although RSA billed at a much higher hourly rate than the Fund's lawyers. Considering time and value, I determine that RSA is entitled to $2,300.00 as reimbursement for its legal expenses post-August 23, 2018 plus HST on that amount.

**Order:**

1. The Fund shall pay Dominion $42,000.oo for reimbursement of its legal costs plus HST on that amount.
2. The Fund shall pay RSA $2,300.00 for reimbursement of its legal costs plus HST on that amount.
3. The Fund shall pay the arbitration expenses of this costs determination.

Fred Sampliner

February 23, 2019

Fred Sampliner, Arbitrator

[11] *Aviva Insurance Company of Canada and Sovereign General Insurance Company*, (L. Samis, January 27, 2016)