IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTIONS 268 and 275, *REGULATION 283/95* and REGULATION 664, as amended

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

DECISION ON COSTS – BEGIN PRELIMINARY AWARD

COUNSEL:

Eric Grossman for the Applicant

Sandi J. Smith for the Respondent

BACKGROUND:

This matter began in late 2006, when I was appointed to arbitrate a dispute between ING and ICBC, involving both a claim by ING for reimbursement from ICBC pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act*, and a priority dispute under section 286 of the *Act.* After conducting two pre-hearing teleconferences with counsel in early 2007, an issue arose as to whether the arbitration that had been commenced addressed the *SABS* claims made on behalf of Gary Kregar only (a passenger in a truck involved in the accident), or whether the claims of Bonnie Begin – his spouse and the driver of the truck at the time of the accident – were also part of the arbitration.

Counsel for ICBC advised that her client had never received a Notice of Commencement of Arbitration relating to Ms. Begin's claim. Counsel for ING asserted that the notice had been sent. ICBC disputed this, and relying on the one-year limitation period set out in section 7(2) of *Regulation 283/95,* took the position that ING could not add Ms. Begin's claims to the Kregar arbitration. ING challenged this, and sought to add the issue to the arbitration. ICBC contended that I did not have the jurisdiction to determined "the limitation issue", absent consent of both parties.

ING then brought an Application to the Superior Court, seeking an Order directing me to decide the issue, or alternatively to have the court determine that the notice had been provided in time. Affidavits were filed in support of the application, and cross-examinations held. Motions were argued, and adjournment requests contested. Ultimately, the matter was heard in September 2008, and the court determined that I had the jurisdiction to determine the "limitation issue" with respect to Ms. Begin's claim. The court also directed that I determine the issue of costs of the court application, at the conclusion of the arbitration.

An arbitration hearing was then convened to determine the limitation issue in December 2009. I found that a Notice of Commencement of Arbitration regarding Ms. Begin's

claim had been sent by ING to ICBC, and that despite the flaws inherent in the notice and accompanying letter, the disputes relating to her claims were properly before me.

As the above matters were proceeding, an application pursuant to section 31 of the *Workers' Safety Insurance Act* was brought to that Tribunal. The Tribunal determined that both Mr. Kregar and Ms. Begin were acting in the course of their employment at the time of the accident, and are therefore not entitled to claim benefits under the *Statutory Accident Benefit Schedule*. I have been advised that ING is presently engaged in discussions with the WSIB regarding the amount of the reimbursement to be made, pursuant to the assignments obtained.

Counsel for ING subsequently forwarded a Bill of Costs to ICBC, seeking payment for legal fees incurred both for preparation and attendance at the court application, as well as for the arbitration hearing. ICBC has not paid any of these costs. It contends that the amounts sought are excessive, and that in any event, it should not be responsible to pay any of the costs incurred, as the priority dispute should have been held in abeyance pending the determination of the WSIAT application.

As counsel could not agree on these issues, I have been asked to determine the matter. I have received extensive submissions from both parties, in which they refer to (and attach) several cases on a variety of issues.

COSTS SOUGHT BY ING:

As may be evident from the foregoing, each step in this litigation has been hard–fought and aggressively pursued. Not surprisingly, the legal costs incurred by the parties have been significant. ING has submitted a Costs Outline totaling $67,353.69 at a partial indemnity rate, and $82,093.17 on a full indemnity basis. The supporting time dockets consist of nineteen pages of entries.

PARTIES' ARGUMENTS:

I will not set out the parties' lengthy submissions in detail, but will focus on the main points raised. There were many disputes between the parties at various stages of the litigation relating both to procedural issues and the timing of various steps taken that counsel allege should be considered in determining the quantum of costs payable. While I have reviewed all of the material filed, I see no point in repeating these arguments.

ICBC's position

Counsel for ICBC contended that the issue raised before the court in the application was novel, and that the case law suggests that a "no costs" award is appropriate in these circumstances. She noted that while I had determined the limitation issue in ING's favour on the facts, I did not accept the majority of their arguments on the legal points raised and that success at the arbitration was therefore divided. Finally, she maintained that the costs relating to the arbitration were unnecessarily incurred, given the determination by WSIAT that Ms. Begin was an employee in the course of her employment at the time of the accident, and therefore not entitled to benefits under the *SABS*.

Ms. Smith also took issue with the quantum of costs claimed by ING, noting that various entries in the time dockets submitted relate to time spent either on the Kregar claim, communicating with the client, or on matters unrelated to the preliminary issue. She also noted that seven different lawyers at the firm had worked on the matter over the period in question, and that the dockets suggest duplication of efforts and excessive preparation. She advised that the account rendered by her firm to ICBC for their fees was significantly lower than that claimed by ING, estimating that it would amount to approximately $14,000 on a partial indemnity basis.

She also noted that several items included on the disbursement list are not recoverable under the Tariff.

ING's position

Counsel for ING contended that given its success both in court and at the arbitration, his client was entitled to recover its costs. He submitted that there were no special circumstances that should mitigate against an award of costs on a substantial indemnity scale. He categorically denied ICBC's assertion that the issue of whether an arbitrator had jurisdiction to determine a limitation issue was novel, and filed various cases in support of that position. He asserted that ICBC had prolonged the proceedings unnecessarily by insisting that the matter proceed before the court, and by requiring that the affiant of the supporting affidavit be cross-examined in advance of the hearing of the application.

Mr. Grossman also submitted that it was unreasonable for ICBC to have questioned the sworn evidence provided by four members of his firm that the Begin notice had been sent. He suggested that this was akin to alleging fraud, and that as their evidence was ultimately accepted by me, this position should attract cost sanctions. He explained that several members of the firm had worked on this matter because ICBC put ING to the strict proof of every aspect of the claim, noting that Ms. Smith had requested that four members of the firm submit to either cross-examination on affidavits provided or examinations under oath in the context of the arbitration hearing. He also stated that any references in the dockets to "client contact" related to time spent seeking answers to the numerous undertakings requested by counsel for ICBC.

Counsel also submitted that ICBC's contention that these costs were needlessly incurred in light of the determination by WSIAT that both Mr. Kregar and Ms. Begin were employees is a "red herring". He noted that an insurer is obligated to adjust a claim and pay accident benefits pending the determination of a "WSIB issue", and that given the disparity in the level of benefits afforded by the WSIB fee schedule and the *SABS*, the insurer paying benefits will always experience a shortfall. He contended that the WSIAT case law was inconsistent with respect to whether or not an accident benefits insurer could bring a section 31 application on its own at the relevant time, and cited a decision in which the Tribunal declined jurisdiction to address an application brought by a first

party insurer involved in a proceeding before the Financial Services Commission of Ontario.

RELEVANT PROVISIONS:

The following provisions of the *Arbitration Act, 1991* are relevant to my determination of this matter -

> ***8.*** *(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.*
>
> ***17.*** *(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.*
>
> **17.** *(3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.*
>
> ***54.*** *(1) An arbitral tribunal may award the costs of an arbitration*
>
> *(2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.*

ANALYSIS & FINDINGS:

Section 54 of the *Arbitration Act* provides me with the jurisdiction to award costs of an arbitration, although it does not set out any criteria to be applied in such an exercise. After hearing the court application brought by ING, Justice Trotter directed that the issue of costs relating to the court application be addressed by me at the conclusion of the arbitration, given that the preparation that went into the 'substantive issue' that he did not determine would be useful at the arbitration. Given the fifteen months that elapsed between the hearing of the application and the arbitration on the limitation issue, I am not sure that that was the case. In any event, I have considered the parties' lengthy

submissions on costs, as well as the criteria set out in Rule 57.01 of the Rules of Civil Procedure, and set out my conclusions below.

As a general matter, I find that both parties contributed to the length and complexity of this dispute and consequently, to the amount of costs expended. Once it was known that the parties did not agree as to whether the Begin claim was properly part of the arbitration, ICBC took a "hard line" position and instead of agreeing to add that issue to the ongoing proceeding, forced ING to bring a court application to determine the matter. Given the provisions of the *Arbitration Act, 1991* set out above (sections 8(2) and 17 in particular) and the case law cited in Justice Trotter's decision, this was not a reasonable position to take. The judge granted the Order sought by ING, and ICBC should be accordingly pay the reasonable costs incurred by ING that are associated with that part of the process.

Justice Trotter also addressed ICBC's request that the proceedings be stayed, pending the determination of the section 31 application brought to WSIAT. He stated as follows -

> This submission makes a great deal of sense to me. Had I decided to determine the substantive issues between the parties (as opposed to ordering that the matter be referred to the arbitrator), I would have been very concerned about the prospect of wasting valuable court time while this important issue remains outstanding. However, I stop short of fettering the discretion of the arbitrator and leave it to her discretion.

I had a similar view on this issue when the matter was discussed at a subsequent pre-hearing call with counsel in December 2008. Ms. Smith advised that the Tribunal would be hearing the section 31 application in March 2009, and suggested that the arbitration be held in abeyance pending the resolution of that issue. Mr. Grossman objected to that approach. I heard further submissions from counsel on this point in early January 2009, and determined that the arbitration would be held in abeyance until the WSIAT decision was rendered, so that the arbitration could be conducted in a more focused and efficient manner once the results of the section 31 applications were known. Arbitration dates

were set for late September and early October 2009, in the hope that the issue would be resolved by then.

A further pre-hearing call was convened in June 2009, at which time Ms. Smith advised that the WSIAT hearing had commenced in March as scheduled, but had not been completed. She estimated that a decision would be forthcoming by the end of the year. She also stated that as Ms. Begin had admitted that she had been in the course of her employment at the time of the accident, the Tribunal would conclude that Ms. Begin was not entitled to benefits under the *SABS*, and that it would take a further six to eight weeks to clarify the amount of the WSIB reimbursement. She contended that in light of the extra time required to complete the WSIB process, the scheduled arbitration dates should be adjourned. She reasoned that once the shortfall between the WSIB payments and payments under the *SABS* could be calculated, the parties would likely be able to reach a settlement of the issues.

Mr. Grossman renewed his objection to holding the arbitration in abeyance pending the determination of the WSIAT matter. He then explained that the allegations of negligence underlying the limitation issue in the Begin claim made it difficult for him to advise his client with regard to any settlement offers from ICBC. He stated that ING would not be able to entertain any settlement offers until a clear determination was made on the limitation issue. He urged me to reconsider my earlier ruling that the arbitration be adjourned pending the completion of the WSIAT matter, and stated that once the limitation issue was resolved one way or the other, the process could move forward in a more efficient way. On the basis of those submissions, I reversed my earlier ruling, and determined that the matter would proceed to hearing. New hearing dates were scheduled in December 2009.

Having urged me to reconsider my earlier ruling and press ahead with the arbitration, ING must bear some responsibility for the subsequent costs that were incurred. As logical as it may have seemed at the time to clarify the issues of potential negligence hovering over the limitation defence asserted by ICBC, that approach resulted in ING incurring

significantly higher legal fees than would have been necessary had the matter been held in abeyance pending the completion of the WSIAT matter, as had originally been determined.

While ING was ultimately successful at the arbitration, a review of the decision reveals that many of the arguments made by its counsel were not accepted. I did accept the evidence of its witnesses on the factual question of whether the notice had been sent as alleged, but noted several deficiencies both in the notice itself and the evidence regarding the process followed in sending it out. I find no basis for the allegations in ING's costs submissions that ICBC's refusal to accept the evidence of its witnesses approaches fraud and that costs sanctions should result.

I also find that some of the time docketed by counsel for ING was excessive or duplicative, given all of the circumstances. While the issue was clearly of great importance to the firm, and I can appreciate the interest in preparing thoroughly for both the application hearing and arbitration, it is not appropriate to expect ICBC to pay for all of the time expended.

I do not intend to go through a line-by-line analysis of the account submitted. Given my comments above, I do not find this to be a case where costs at the full indemnity rate are justified. The fees submitted by ING at the partial indemnity rate are just over $61,000, exclusive of tax and disbursements. Taking all of the above factors into account, I direct ICBC to pay $33,000 of the fees claimed, being roughly the full amount (reduced somewhat for duplication, excessive preparation) relating to the court application and cross-examination, and half of the fees associated with the examinations under oath and arbitration (similarly reduced).

There was some suggestion in the materials that no accounts were actually rendered by counsel to ING, and that therefore no tax would be payable. If that is the case, I agree that no tax should be added. If not, then the 5% GST applicable at that time should be added to the $33,000 figure.

Disbursements

I have been sent two different versions of ING's disbursement list. Aside from a small difference in the amount of GST applied (which has been explained), there is a difference of approximately $460 between the two lists. One list includes an amount for "conduct money", "agents fees" and $150 more for process serving/filing fee than the other list. It is not clear which list has been forwarded to counsel for ICBC for comment.

Given the above, I make no order regarding disbursements to be paid at this time. If counsel for ING can clarify which amounts are being pursued, and copy counsel for ICBC on that correspondence, I will be happy to determine the matter upon hearing submissions from counsel for ICBC.

I will have my office contact yours so that a further pre-hearing call can be scheduled in order to move this matter forward.

DATED at TORONTO, ONTARIO this _____ DAY OF DECEMBER, 2010.

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Shari L. Novick
Arbitrator