IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, 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:

KINGSWAY GENERAL INSURANCE COMPANY

Applicant

- and -

AVIVA CANADA INC.

Respondent

DECISION ON COSTS

COUNSEL:

Catherine Zingg for the Applicant
Susan Bromley for the Respondent

ISSUES:

1. Is Aviva Canada Inc. ("Aviva") entitled to recover its legal fees and disbursements incurred in defending the priority dispute brought against it by Kingsway General Insurance Company ("Kingsway')?

RESULT:

1. Aviva is entitled to recover legal fees in the amount of $5,600 plus HST, and disbursements in the amount of $2,681.35 plus HST. .

BACKGROUND:

Cheryl Leach (also known as Cheryl Rodgers) sustained injuries when the vehicle in which she was an occupant was involved in a single-vehicle collision on February 11, 2006. That vehicle was insured by Kingsway. Ms. Leach submitted an application to Kingsway for payment of accident benefits on May 17, 2006, and Kingsway accepted the application and has paid various benefits.

Kingsway has initiated a priority dispute against Economical Mutual Insurance ("Economical") and Aviva Canada Inc. ("Aviva'). The allegations against the Respondents are based on information obtained by Kingsway that indicated that Ms. Leach was living with Curtis Batiuk at the time of the accident, and that each of these insurers had issued auto policies to Mr. Batiuk. Essentially, Kingsway claimed that either (or both) Economical or Aviva was in higher priority to pay Ms. Leach's claim, as she was either a spouse or a dependent of Mr. Batiuk, or was a listed driver on one (or both) of the policies.

Prior to the arbitration having been commenced, Joseph Griffiths, then counsel for Aviva, contacted Gregory Bailey, then counsel for Kingsway, in writing on April 15, 2008, and enclosed written statements taken from both Ms. Leach and Mr. Batiuk. Mr. Griffiths stated that given the content of the statements, Ms. Leach would not meet the definition of "spouse" in section 224 of the *Act*, and requested that Kingsway abandon its claim against Aviva within ten days. He advised that if Kingsway was not prepared to do so, Aviva would "enter a vigorous defence and seek complete indemnity from Kingsway for all legal costs incurred from this date forward."

Kingsway did not agree to abandon the claim against Aviva at that point. It commenced arbitration against both Economical and Aviva, and claimed that the Respondents had deflected the claim. Initially, both Economical and Aviva asserted that Kingsway had provided its notice of intention to dispute its obligation to pay benefits beyond the ninety-

day time frame permitted by section 3 of the regulation. Economical has since withdrawn that defence. The parties agree that Kingsway's notice to Aviva was received on January 4, 2007, well beyond the ninety-day period mentioned in the regulation.

The arbitration process has proceeded through various steps. Pre-hearing teleconferences were convened on September 30 and November 30, 2009, May 18, 2010, and January 10, March 22, June 28 and September 23, 2011. Examinations under oath of Ms. Leach and Mr. Batiuk were held in Kenora, Ontario in August 2010, and attended by all counsel.

Ms. Bromley took over from Mr. Griffiths as counsel for Aviva in September 2010. Sophia Chaudri assumed carriage of the matter on Kingsway's behalf in November 2010. Ms. Bromley proposed that Aviva be let out of the arbitration at a pre-hearing call on January 2011. Ms. Chaudri advised that she would review the evidence and advise by mid-February whether Kingsway intended to continue to pursue Aviva. Ms. Bromley raised the issue again during the pre-hearing call on March 22, 2011. Ms. Chaudri advised that she was still awaiting production of various undertakings provided at the examinations, and that she required all of the information before deciding whether to let Aviva out of the arbitration.

Ms. Bromley then wrote to Ms. Chaudri on March 24, 2011, and advised that if Kingsway chose to abandon the arbitration against Aviva at that stage in the proceeding, Aviva would require payment of its costs.

A further pre-hearing call was convened on June 28, 2011, at which Ms. Chaudri advised that several of the outstanding undertakings had finally been received. When Ms. Bromley raised the question of letting Aviva out of the arbitration, Ms. Chaudri again advised that she was not prepared to do so. She advised that Kingsway would be relying on the 'savings provisions' in section 3(2). At Ms. Bromley's request, I ordered Kingsway to produce all relevant documentation and information in its possession related to the ninety-day issue, and the section 3(2) defence that it intended to assert.

After receiving some documentation from Ms. Chaudri, Ms. Bromley wrote to her on September 2, 2011, and again requested that Kingsway consent to a dismissal of the arbitration against Aviva. She expressed the view that the evidence provided did not support an argument under section 3(2), and confirmed again that Aviva would be seeking its costs. On September 22, 2011, Ms. Chaudri wrote to Ms. Bromley and finally advised that she had received instructions to consent to a dismissal of the application for arbitration against Aviva, on a without costs basis. Counsel for Aviva rejected the offer, and advised that her instructions were to seek costs on a full indemnity basis.

Counsel could not resolve the issue. It was agreed that the parties would file written submissions on the point and that I would issue a decision with reasons.

Aviva has submitted a Bill of Costs for a total amount of $14,787.45, of which $10,355 is legal fees, $1,346.15 is HST, and disbursements of $3,086.30 (inclusive of HST).

SUBMISSIONS

Aviva's position:

Ms. Bromley argues that Aviva should be entitled to its full indemnity costs, as Kingsway had no valid evidentiary basis for including Aviva in the arbitration. She noted that Mr. Griffiths had provided written statements from both Mr. Batiuk and Ms. Leach to counsel for Kingsway in April 2008 that clearly refuted the allegation that Ms. Leach and Mr. Batiuk were "spouses". She also submitted that no evidence was ever provided to substantiate Kingsway's claim that the 'savings provisions' in section 3(2) of the regulation should apply, to justify the fact that it provided notice of its intention to dispute its obligation to pay benefits to Aviva well beyond the allowable ninety-day period.

Ms. Bromley pointed out that Mr. Griffiths had proposed that Kingsway abandon the arbitration against Aviva in April 2008, and had offered to "go out without costs" at that time. Kingsway rejected the offer, and counsel for Aviva was then required to participate

in many pre-hearing teleconferences and attend the examinations under oath in Kenora, at considerable expense. She contended that given that Kingsway only agreed to abandon the arbitration in September 2011, Aviva should be compensated for having been put to the trouble and expense of defending the claim for three and one-half years, when Kingsway's application for arbitration against Aviva was barred on its face, given that notice had been provided well after the ninety days permitted by the regulation.

Counsel noted that the parties have not executed an Arbitration Agreement, and that costs may therefore be awarded pursuant to section 54 of the *Arbitration Act*. She noted that that provision provides me with jurisdiction to award a party's legal expenses and any expenses related to the arbitration. She noted that subsection 54(5) also permits me to take into account a rejected offer to settle when making a costs award.

Aviva's Bill of Costs consists of approximately forty-two hours of 'lawyer time" (excluding the time spent in preparing these submissions) expended for preparation and attendance at the various pre-hearing teleconferences, reviewing productions and correspondence, and attending at the examinations under oath. A further two hours is claimed for the time expended by a Law Clerk to prepare and organize documents sent and received. The bulk of the disbursements sought relate to expenses incurred in attending the examination under oath in Kenora.

Kingsway's position:

Counsel for Kingsway contended that it was not immediately apparent that Aviva was a potential "priority target", and that there was a valid argument for asserting a defence under subsection 3(2) of the regulation. Ms. Zingg also suggested that conflicting information had been obtained from Mr. Batiuk regarding how long he had been living with Ms. Leach, and that it was not unreasonable for Kingsway to have waited until after the examinations under oath were held and the productions subsequently obtained, before agreeing to release Aviva from the arbitration.

Counsel noted Justice Wilson's endorsement of Arbitrator Jones' decision in *Zurich Insurance v. Co-operators Insurance Company* (unreported arbitration decision, dated January 2007, affirmed on May 1, 2008) to the effect that legal costs are only to be awarded "in the most extreme of cases". She also referred to my comments in *Motors Insurance v. HMQ/MVACF* (Yavorska) (unreported, February 10, 2010) regarding an arbitrator having equitable jurisdiction to order repayment of costs incurred when a refusal to accept priority is motivated by the desire to avoid expense, and submitted that that had not occurred in this case. Ms. Zingg also noted my comment that any costs awarded should be restricted to time spent by counsel on large steps in the process, as opposed to the few hours of preparation for the steps inherent in the early stages.

Finally, Ms. Zingg cited a recent decision by Arbitrator Bialkowski (*Wawanesa v. Markel,* unreported, dated March 8, 2012) in a Loss Transfer proceeding in which he stated that the principle of proportionality should be applied in awarding costs. She argued that the same reasoning should apply to priority disputes. She noted that the total amount of benefits paid to Ms. Leach to date is approximately $45,000, that the total costs and disbursements claimed by Aviva was close to one-third of that amount, and contended that a costs award in that range would offend the principle of proportionality.

REASONS/ ANALYSIS:

I find this to be an appropriate case in which to exercise my jurisdiction under section 54(1) of the *Arbitration Act* and order Kingsway to reimburse Aviva for the legal costs and expenses incurred in defending the claim brought against them. I note that the costs being sought in the *Zurich v. Co-operators', supra*, case referred to by Ms. Zingg were costs incurred by a "first insurer" at a FSCO arbitration hearing, that it was attempting to recover from the insurer that was ultimately determined to be the priority insurer. Given the different context, I find it to be of limited precedential value.

As priority disputes have become more complex, the frequency of disputes over the quantum of costs payable have increased. While the circumstances of each case must be

considered in determining the quantum of costs awarded, some general guidelines have emerged from the cases in this area.

In the Motors case, *supra*, the Fund advised Motors that it was prepared to accept priority after the first pre-hearing teleconference was scheduled, but before it was convened. Counsel for Motors argued that the legal costs incurred by his client up to that point should be recoverable. I acknowledged that while costs should generally be awarded to the successful party, the priority regulation does not necessarily contemplate that outcome in every case. I determined that the Fund was not obliged to reimburse Motors for its legal costs, and that while costs might generally be awarded to counsel for time spent on large steps in the process, I did not think a costs award was merited for the few hours spent by counsel in the initial stages of an arbitration proceeding.

I also addressed a request for a costs award in the case of *State Farm v. AXA Insurance (Grlak)* (unreported, July 12, 2010). In that case, a settlement of the priority dispute was reached on the day prior to the scheduled start of an arbitration, once some important documentation was finally received. Counsel for State Farm sought repayment of $17,500 in costs, and I awarded $9,000.

I note that Arbitrator Bialkowski awarded approximately one-half of the amount of costs sought in the *Wawanesa v. Markel*, *supra,* case referenced above. He chose to award partial indemnity costs rather than the full indemnity rate, and stated that there should be some reduction in the quantum sought in recognition of the principle of proportionality.

Using these cases as a guideline, I find that Aviva is entitled to be reimbursed by Kingsway for legal fees of $5,600, plus HST of $728, for a total of $6,328. I also find that Aviva should be reimbursed for disbursements of $2,681.35, plus HST of $348.58, for a total of $3029.93. I have allowed all disbursements related to the attendance in Kenora for the examination under oath, but have not allowed the amounts claimed for photocopies, long distance and legal research.

While the principle of proportionality may not always be applicable in a priority dispute, I am prepared to heed the general message that the fees awarded in a case of this type should not amount to a significant percentage of the amounts in issue between the parties. I also find that an award of fees at the partial indemnity rate is appropriate, although there may well be cases in which a higher rate is warranted.

When the circumstances of this case are considered, I find that Kingsway ought to have released Aviva from the proceeding at a much earlier point than it did. Both Mr. Griffiths and Ms. Bromley consistently raised the lack of evidence supporting a section 3(2) defence, yet Kingsway ignored their requests and continued to forge ahead in pursuing productions related to the spousal and dependency issues. Regardless of the confusion surrounding whether Ms. Leach and Mr. Batiuk met the definition of "spouses" under the *Act*, Kingsway should have considered whether it could realistically get over the hurdle of not having provided notice to Aviva within the ninety days required by section 3(1) of the regulation. Insurers are well aware that the test for invoking the 'savings provisions' in section 3(2) is difficult to meet, especially in view of the Court's comments in *Kingsway v. West Wawanosh* (2002) 58 O.R. (3rd) 251.

While I did not hear evidence on the "3(2) issue", I presume that in light of Kingsway's ultimate decision not to pursue that argument and to let Aviva out of the proceeding, the evidence on that point was not particularly strong. The basis for asserting the defence would have been in Kingsway's singular possession from the outset, as opposed to the information on the dependency and spousal issues that took awhile to obtain from third parties. Counsel for Kingsway clearly chose to disregard the several letters sent by counsel for Aviva warning that costs would be pursued, and while they are entitled to prosecute the case as they see fit, they must bear the consequences of not heeding these warnings, in the face of their ultimate agreement to abandon the arbitration against Aviva.

ORDER:

For the reasons set out above, I hereby order Kingsway to pay Aviva costs of $9,357.93, comprised of $5,600 towards legal fees incurred, $728 for HST on fees, $2,681.35 for disbursements, and HST of $348.58 on those. These amounts should be paid within thirty days of this decision.

I will forward my account for time expended on this issue to counsel for Kingsway. If any offers to settle are relevant in this regard, I would ask counsel to advise me within seven days.

DATED at TORONTO, ONTARIO this _____ DAY OF JULY, 2012.

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Shari L. Novick
Arbitrator