

*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, as amended;*

*AND IN THE MATTER OF AN ARBITRATION*

***BETWEEN:***

***TD GENERAL INSURANCE COMPANY***

***Applicant***

***- and -***

***NORTHBRIDGE PERSONAL INSURANCE CORPORATION***

***Respondent***

**DECISION ON COSTS**

**COUNSEL:**

Patricia M Hill for the Applicant

Linda M. Kiley for the Respondent

**BACKGROUND:**

1. Amanda Austin sustained serious injuries when she was involved in an accident on September 4, 2018. She was thirty-four years old at the time, and the mother of a six-year old son. The father of her son is Dustin Jarvis. At the time of the accident Ms. Austin was an occupant of a vehicle insured by TD General Insurance Company (“TD”) that was owned by Mr. Jarvis, but was being driven by someone else.

2. Ms. Austin (“the Claimant”) and her son lived with her parents in Huntsville, Ontario. Her father, Perry Austin, was a named insured on an automobile policy issued by Northbridge Personal Insurance Corporation (“Northbridge”) at the time. The Claimant was apparently a listed driver on that policy at one point, but she was not listed on the policy or excluded from driving the vehicle at the time of the accident.

3. Mr. Jarvis also lived in Huntsville, not far from Ms. Austin’s parents. The Claimant regularly drove Mr. Jarvis’ vehicle for work purposes and to take their son to activities. Ms. Austin and Mr. Jarvis have apparently never lived together and do not therefore meet the definition of “spouses” in section 224 of the *Insurance Act*.

4. The Claimant applied to TD for payment of accident benefits under the *SABS*. TD investigated and formed the view that Ms. Austin may have been principally dependent for financial support or care upon her father. It provided notice to Northbridge of its intention to dispute its obligation to pay benefits to Ms. Austin on November 3, 2017. Northbridge denied that the Claimant was dependent on its insured, and TD commenced arbitration against Northbridge on June 1, 2018.

5. I was retained to arbitrate the matter in July 2018. Northbridge retained Linda Kiley to represent them in this proceeding in August 2018. After various steps were taken by counsel, TD ultimately accepted that it was the priority insurer on July 25, 2019, approximately fourteen months after commencing the arbitration.

6. Northbridge seeks payment of its legal costs of the proceeding from TD. TD resists paying any costs, and the parties have asked me to exercise my jurisdiction under section 54 of the *Arbitration Act* to determine this issue.

**STEPS IN PRIORITY DISPUTE:**

7. Both counsel have provided extensive written submissions, in which they outline the steps taken in the priority dispute and their positions on Northbridge's request for costs. These reveal the following facts:

8. On August 20, 2018, approximately two weeks prior to the initial pre-hearing call being convened, Ms. Kiley wrote to Patricia Hill, counsel for TD, providing information that her client had obtained relating to the question of financial dependency. She advised that Ms. Austin worked an average of thirty hours per week running a house cleaning business, and provided an estimate of her earnings. She also provided an estimate of Ms. Austin's expenses, as well as those of her parents' household in which she lived. Ms. Kiley also advised that the Claimant had not been a listed driver on her father's Northbridge policy since 2012, and claimed that as Ms. Austin's income exceeded her expenses, she was clearly not principally dependent on her father for financial support.

9. An initial pre-hearing call was then convened on September 4, 2018. Ms. Hill, advised that she had received instructions to conduct an Examination Under Oath of the Claimant. Counsel exchanged correspondence after that call regarding the timing of the examination, at which the Claimant's representative would also be participating.

10. The EUO took place on December 3, 2018. It was conducted via Skype, with Ms. Austin and her counsel attending a court reporter's office in Huntsville, and Ms. Hill and Ms. Kiley attending in Toronto. Ms. Hill suggests that it was completed in less than one hour.

11. A further pre-hearing call took place on December 14, 2018. Ms. Hill advised that she was awaiting instructions from her client regarding whether to conduct an

Examination Under Oath of Dustin Jarvis, the TD insured, as well. Ms. Kiley wrote to Ms. Hill requesting that if an EUO were to take place, that it be scheduled expeditiously, as her client wanted to resolve the priority dispute by the end of January 2019. Much correspondence ensued between counsels' offices regarding potential dates for scheduling the EUO, which was partially complicated by Mr. Jarvis' lack of availability.

12. Our third pre-hearing call, scheduled for February 20, 2019, was rescheduled to a date in May 2019, so that counsel could first conduct Mr. Jarvis' EUO. That examination took place on March 20, 2019, via Skype. Again, Mr. Jarvis attended at a court reporter's office in Huntsville, and counsel in this dispute attended in Toronto. Ms. Hill suggests that this examination was also completed in less than one hour.

13. Ms. Kiley subsequently wrote to Ms. Hill in April 2019 suggesting that none of the evidence obtained from either the Claimant or Mr. Jarvis had changed Northbridge's position that TD was in priority to pay the claim. She stated that if TD continued to deny priority, it should produce an accounting report to support its position. She noted that a further pre-hearing call was to be held a few weeks later, and advised that if TD had not abandoned the arbitration by that time, Northbridge would be pursuing a claim for costs.

14. The third pre-hearing call took place on May 13, 2019. Ms. Hill advised that TD had retained an accountant to provide an expert opinion on the issue of financial dependency, and that they had requested further documentation. A subsequent call was scheduled for June 28, 2019. Ms. Kiley contacted Ms. Hill a few times by email in the interim, to ask if the accounting report had been received.

15. Ms. Hill advised during the fourth pre-hearing call on June 28, 2019 that she continued to await the accountant's report. She agreed to follow up with her client and contact the accountant to determine the reason for the delay. A further call was scheduled for July 18, 2019. Ms. Kiley advised in writing later that day that given the delay, Northbridge would be pursuing its costs of the dispute from TD.

16. Ms. Kiley spoke with Ms. Hill by telephone in the evening on July 17<sup>th</sup>, regarding the pre-hearing call scheduled for the following day. When she was advised that Ms. Hill had not yet received the accounting report, she wrote to me advising that counsel had agreed to adjourn the pre-hearing call scheduled.

17. On July 25, 2019, Ms. Hill advised by email that she had received instructions to accept priority for Ms. Austin's claims. Ms. Kiley responded that as previously advised, Northbridge would not agree to a dismissal of the matter without costs, and that her client was seeking payment of its costs by TD.

18. When counsel could not resolve the issue, a subsequent teleconference was convened on September 10, 2019. Ms. Kiley advised that she had sent a Bill of Costs to Ms. Hill on September 5<sup>th</sup>, requesting costs of \$13,014 plus HST. Ms. Hill advised that her client would not agree to pay any costs. Counsel then agreed to a timetable for exchanging written submissions on the issue.

**PARTIES' POSITIONS:**

*Northbridge's submissions*

19. The initial Bill of Costs referenced above outlines the time spent by Ms. Kiley and her law clerk from the date she was retained by Northbridge until July 25, 2019, when TD accepted priority. It seeks fees of \$13, 014 plus HST of \$1,691.82, for a total of \$14,705.82. Ms. Kiley's time is charged at \$355 per hour, and her clerk's time is charged at \$130 per hour.

20. A second Bill of Costs was filed with Ms. Kiley's written submissions. It includes the time referenced above as well as time spent on preparing the written submissions and the second Bill of Costs, and for further research. The total fees claimed in this document, dated November 7, 2019, is \$21,080 plus HST of \$2,740.40 for a total of \$23,820.40.

21. Ms. Kiley seeks payment of her costs on a partial indemnity basis, with interest. She claims that Northbridge had provided TD with the essential information required to

conclude that Ms. Austin was not principally dependent on her father for financial support in August 2018, shortly after she was retained. She submits that despite having been so advised, TD took eleven months to conduct further investigations that did not substantially change what was already known in August 2018, prior to the first pre-hearing call.

22. Counsel for Northbridge claimed that the Examination Under Oath of Ms. Austin was not helpful, given the severity of her brain injury. She also stated that Mr. Jarvis' examination was not necessary, given that the Claimant was an occupant in his TD insured vehicle, and that TD would therefore be in priority pursuant to subsection 268(2)1(ii) of the *Act*, unless it could prove that Ms. Austin was principally financially dependent on her father, the Northbridge insured.

23. Finally, counsel contended that there was much delay in waiting for the report from the accountant retained by TD, and that all of the above steps caused Northbridge to incur unnecessary legal costs.

*TD's submissions*

24. Counsel for TD contends that each party should bear its own costs of the proceeding, as the matter was resolved in the initial stages, without the need to prepare for a hearing. She submitted that if costs are to be awarded, the quantum requested by Northbridge is excessive. She noted that the dispute was resolved in just over one year, and that as soon as her client received the accountant's report, it accepted priority.

25. Counsel submitted that the circumstances of the Claimant's life, coupled with the fact that the TD insured vehicle involved in the accident had been reported as "taken without consent", raised various priority issues that merited further investigation. She noted that Ms. Austin lived with her parents, but had a child with the TD insured and was in his vehicle at the time of the accident. She also noted that the Claimant was self-employed and earned a modest income, and that she had been a listed driver on her father's Northbridge policy at some point prior to the accident. Ms. Hill submitted that

these facts raised questions of financial dependency, but also questions regarding whether the Claimant was a spouse of Mr. Jarvis, as well as whether she had “regular use” of her father’s vehicle.

26. Counsel for TD stated that efforts were made to keep costs down by arranging for both EUOs to be done by Skype. She noted that all correspondence was responded to in a timely fashion, and that it was unrealistic for Northbridge to expect TD to abandon the dispute before it received a report from the accountant that it had retained.

27. Finally, Ms. Hill acknowledged that counsel for Northbridge had provided information regarding the Claimant’s income and expenses at the outset of the dispute, but noted that she had not explained where that information came from, and it was accordingly difficult to know how reliable it was.

**ANALYSIS & FINDINGS:**

28. Section 54 of the *Arbitration Act* provides me with the jurisdiction to award legal costs related to the arbitration to a party in these circumstances. Given TD’s position that no costs are payable, the threshold question is whether any costs should be awarded to Northbridge. I have no trouble finding that Northbridge is entitled to a costs award, given the time expended over the year or so that counsel was involved in the dispute. The more challenging determination is the question of how much should be awarded in a case of this type.

29. Before addressing the particulars of this case, I will restate some general principles from earlier decisions on costs that I have rendered, cited by both parties. In *Motors Insurance v. MVACF* (February 10, 2010) I stated that costs should not be routinely awarded for time spent by counsel for the few hours that may be spent investigating and assessing a claim for priority, or participating in pre-hearing calls at the early stages of an arbitration. I then stated in *State Farm Mutual v AXA Insurance* (July 2010) that when an arbitration progresses through the initial stages, and counsel are

required to prepare for hearing, draft factums, prepare examinations of witnesses and craft submissions, they should be compensated for the time spent on these steps.

30. As I recently stated in *Aviva v Co-operators General and TD Insurance* (December 12, 2019) -

*A central tension exists between the idea that priority disputes should be conducted efficiently and in a streamlined manner on the one hand, and the reality that the issues involved can be factually and legally complicated and often require counsel to devote many hours to the dispute, as it evolves to its eventual conclusion. In my view, it is important that these disputes continue to be conducted in a more streamlined manner than a typical civil action - where procedural steps and rules can often result in much delay and cost – but also that parties involved in priority disputes be entitled to cost recovery on a fair basis. Any other approach would result in capable counsel not taking these cases on, which would impact the relatively efficient manner in which the many disputes of this type are currently conducted.*

*That said, I remain of the view that costs should not be routinely awarded for the few hours that counsel may spend on conducting an initial review of a claim once retained, or for participating in a brief pre-hearing call or two that take place early in the process (see *Motors v. HMQ (MVACF)* (February 10, 2010) and *State Farm Mutual v AXA Insurance* (July 2010)). However, once significant steps like preparing for and attending Examinations Under Oath, or reviewing detailed productions received must be taken, that time should be acknowledged and appropriately compensated by the party that is ultimately unsuccessful. Each case is distinct and will require a different level of attention, making it hard to enunciate a hard and fast rule for the level of an unsuccessful party's contribution to legal costs.*

31. This case falls somewhere in the “middle zone”. Four pre-hearing calls were convened, and two brief EUOs conducted via Skype. Counsel for Northbridge’s participation in the dispute lasted just less than one year. No arbitration dates were scheduled or prepared for. The total fees sought are \$21,080 (excluding HST), which includes time spent for preparing submissions in support of the claim for costs.

32. I find that an appropriate amount to award for fees in this case is \$5,000, plus HST. In my view this acknowledges that counsel for Northbridge expended a fair amount of time on the various steps involved in the process, but reflects the fact that not all items charged to a client, such as communications between counsel and client, or multiple emails regarding the scheduling of EUOs, are recoverable in cases like this.

33. I find that TD acted with reasonable efficiency in pursuing this dispute. Given the underlying facts and complicated circumstances of the Claimant's life, it was reasonable for them to have attempted to confirm the information offered by counsel for Northbridge at the outset of the process. In hindsight, it may not seem that the EUO of Mr. Jarvis was necessary, given that as a passenger in the TD vehicle, the only way that Northbridge would be in priority to pay the claim would be if the Claimant was principally dependent on her father for financial support or care. However, given the contradictory facts that had been offered to that point about whether he and Ms. Austin had ever lived together, it was not inappropriate to obtain his evidence under oath.

34. Ms. Kiley suggested that the process was unnecessarily delayed by the length of time it took for TD to obtain its accountant's report. It appears that the accountant was retained in late March or April 2019, and the report provided in late July. While a delay of three or four months is longer than the time taken in most cases, I do not find it to be excessive, given the Claimant's self-employed status and other factors outlined above.

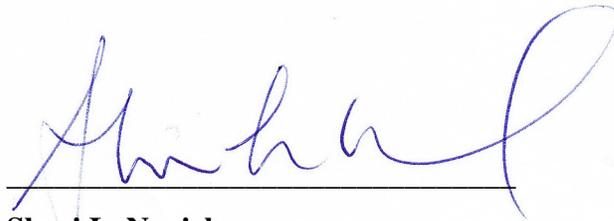
35. I should note that while the costs outlined in the second Bill of Costs submitted by Ms. Kiley's office incorporating the time spent on the 'costs portion' of the process, including ten hours for preparing written submissions in support of her request for costs, are unrealistically high, I have included some of the docketed time for this part of the process in the figure awarded above. Given TD's refusal to pay any costs, Ms. Kiley was effectively left with no choice but to prepare detailed submissions. In the end, this case illustrates that both parties lose out when counsel must devote time to this part of the process, as more costs are incurred on the process of preparing submissions than are awarded.

36. For the reasons set out above, Northbridge is entitled to recover costs of \$5,000, plus HST, from TD.

**ORDER:**

TD is hereby ordered to pay Northbridge a total of \$5,000 in fees, plus applicable HST of \$650, for a total amount owing of \$5,650, within sixty days of the date below.

**DATED at TORONTO, ONTARIO this \_\_8<sup>th</sup>\_\_ DAY OF JANUARY, 2020**



**Shari L. Novick**  
**Arbitrator**