

IN THE MATTER OF THE INSURANCE ACT,  
R.S.O. 1990, c. 1.8, Section 268 and Regulation 283/95 made under the Insurance Act

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

AND IN THE MATTER OF AN ARBITRATION;

**BETWEEN:**

**THE DOMINION OF CANADA GENERAL INSURANCE COMPANY**

Applicant

- and -

**CERTAS DIRECT INSURANCE COMPANY**

Respondent

**DECISION**

**COUNSEL:**

D'Arcy McGoey for the Applicant

Todd J. McCarthy for the Respondent

**HEARING DATE:**

Counsel filed written submissions and a teleconference hearing was held with regard to this matter on, August 31, 2012.

## **ISSUES & ANALYSIS:**

This matter initially came before me to deal with a priority dispute between the parties. More specifically, I dealt with the issue of whether Dominion of Canada General Insurance Company (Dominion) had provided Certas Direct Insurance Company (Certas) with a notice of intention to dispute within 90 days of receiving the application for accident benefits, and if not, should the “saving provisions” of Section 3 of Regulation 283/95 apply. I ultimately decided that while there were reasonable reasons for Dominion’s delay, they had waited too long after determining that Certas might be in priority to advise Certas, and therefore could not proceed with the arbitration. This decision was subsequently overturned on appeal. The parties have now requested that I deal with the following issues:

1. Attendant care costs
2. Costs of surveillance, accounting reports and investigation
3. Examination for discovery transcripts
4. Cost of mediations
5. Legal costs of applicant in defending the arbitration and action
6. Costs of the priority arbitration
7. The arbitrator’s fee
8. Interest.
9. Cost of the quantum hearing

I will deal with each of these items individually.

### **1. Attendant care costs:**

The parties largely agreed upon the amount of attendant care expenses that Dominion had incurred on behalf of the injured, however, there appears to have been a disagreement as to the arithmetical calculation of the amount. A review of attending care documentation provided in the “Brief of Documents of the Applicant: Reimbursement, Interest and Costs” Tab 1, pages 46-51, reveals that a total of \$47,045.84 was paid. To the extent that that total has not been reimbursed to Dominion, it should be paid.

**2. Costs of surveillance, accounting reports and investigation:**

The total amount spent by Dominion in this regard amounted to \$52,295.65. The injured party was a self-employed artist, among other things, and it was reasonable, in my view, to retain an accountant to quantify the claimant's income replacement benefit.

The surveillance investigation was used to assist in determining the extent to which the claimant was injured and therefore potentially entitled to receive various benefits. There was no evidence presented to me to suggest that the amount spent was unreasonable.

Counsel for Certas submitted that such amounts were not properly payable in priority disputes. I disagree. In Wawanesa Mutual Insurance Company vs. Kingsway General Insurance Company, (released April 25, 2005) I noted that there was a difference between loss transfer and priority disputes and stated:

Counsel at the hearing discussed whether there was a distinction to be made with regard to the recovery of IME's, DAC's and surveillance. IME's and DAC's are, of course, specifically referred to or allowed, under the schedule and are used to confirm or deny the need for various benefits. They are certainly ancillary to the providing of benefits and as such should be recoverable. Surveillance, while not mentioned in the schedule, is part of the normal cost of determining entitlement and should be recoverable.

My view remains as stated and accordingly Certas is to reimburse Dominion for this amount.

I will also deal at this time with a submission made by counsel for Certas to effect that some of the costs and disbursements and other expenses incurred by Dominion were as a result of a claim for punitive damages as against Dominion and that Dominion is still involved in an ongoing court action in this regard.

While I agree that Dominion is, of course, still involved in the court action because of the claim for punitive damages, I am satisfied that the expenses mentioned above were incurred to reasonably deal with the Claimant's entitlement to benefits and therefore should be reimbursed.

### **3. Examination for Discovery Transcripts:**

As I understand it the transcripts in question were used principally for the tort and accident benefit claims as opposed to the priority dispute and are therefore not recoverable.

### **4. Cost of Mediations:**

As I understand it, two mediations were held with regard to the tort/ accident benefit matters. They were not primarily for the purpose of the priority dispute per se, and therefore are not recoverable

### **5. Legal Costs of Applicant in Defending the Arbitration and Action Commenced by the Claimant:**

Dominion incurred \$77,442.60 in legal fees in defending the legal action and FSCO arbitration brought by the injured party. Dominion maintains that Certas only recently took over the accident benefit file and had they done so earlier on Certas rather than Dominion would have incurred the cost of the court action and FSCO hearing. Dominion maintains that but for Certas' unreasonable delay in taking over the matter they would not have been put to this expense.

In the matter of Zurich Insurance Company and Co-Operators Insurance Company (Arbitrator Jones, released January 2007) I dealt with a similar claim. In that case I denied the claim for the cost of defending the injured party's arbitration application and hearing.

I wish to make it clear that I fully accept that I have the equitable jurisdiction to order the cost of defending the court and FSCO arbitration hearings. As in the Zurich and Co-Operators matter, I am not convinced that this was a situation where Certas simply delayed taking over the priority in order to avoid paying the cost of defending the claimant's accident benefit claim. This priority dispute arose when Dominion failed to give notice to Certas within the time frame prescribed in Regulation 283/95 and the subsequent priority hearing and appeal were as a result of the late notice. I am in total agreement with the comments made by Wilson, J. in the appeal case Zurich Insurance Company and Co-Operators General Insurance Company, court file no.: 07-CV-326827 –PD1, released May 1, 2008)

For the reasons stated above, I choose not to exercise my discretion in this regard and accordingly those legal costs are not recoverable.

**6. Dominion's Cost of the Priority Arbitration and Disbursements:**

Dominion was ultimately successful with regard to the notice issue that led to the priority arbitration and accordingly should be reimbursed for its disbursements which are agreed upon at \$727.00. It should also be reimbursed for some of its legal costs associated with the priority arbitration, on a partial indemnity basis. This is not a case for full indemnity, in my view. The reason for the arbitration was that Dominion missed the notice period set out in the applicable regulation and a hearing was required to determine if Dominion should be allowed to proceed with its claim. While Certas vigorously presented its position at the arbitration and at the appeal level, there is nothing that I was presented with that suggests that Certas did this simply to avoid administering the claim.

Dominion has quite rightly pointed out that the accident benefit claim itself is very large and a great deal of money has already been paid out to the claimant. This is one of the considerations that counsel for Dominion suggests that I should take into account when determining counsel fee. While I am cognisant of this, I am also cognisant of the fact that the arbitration in question was restricted to a fairly narrow issue regarding the timing of the notice given by Dominion to Certas. When all is said and done, the arbitration took roughly two and a half days. I am prepared to award \$11,000.00 for their costs, plus G.S.T.

**7. The Arbitrator's Fees:**

I understand that Dominion has paid this account. In light of the fact that Dominion was successful on appeal they should be reimbursed this full amount.

**8. Interest:**

Counsel for Dominion submits that interest should run from the date of notice, being April 28, 2004 at the Courts of Justice Act rate of 2.8%. Counsel for Certas submits that interest should only run from the date of the 2009 Superior Court decision and the doctrine of laches should apply. While I agree that I have considerably discretion in this area, I accept the reasoning of Arbitrator Holland in Jevco Insurance Company and Dominion Insurance Company, (released

August 24, 1985) wherein he held that the insurer has had the use of the monies over the years and accordingly should pay interest. Accordingly, I order that interest be paid at the agreed rate of 2.8% commencing on the date of notice with recalculation of additional amounts owing every six months thereafter.

**9. Cost of the Quantum Hearing:**

I may be spoken to as to the issue of cost of the quantum hearing if the parties are unable to agree.

**Dated at Toronto, this \_\_\_\_\_ day September 2012.**

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**Morris Guy Jones**  
**Arbitrator**