**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8 Section 275 AND
ONTARIO REGULATION 664 of R.R.O. 1990, Section 9**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

WAWANESA INSURANCE COMPANY and
CHARTIS GENERAL INSURANCE COMPANY

Respondents

COSTS DECISION

COUNSEL

Jonathon Kahane-Rapport – Raphael Barristers
Lawyer for the Applicant, Co-operators General Insurance Company

Katherine E. Kolnhofer/Antonietta Alfano – Bell, Temple
Lawyer for the Respondents, Wawanesa Insurance Company &
Chartis General Insurance Company

ISSUE

1. What costs, if any, is a second party insurer entitled to recover from a first party insurer in a priority dispute where the claim of the first party insurer is withdrawn before a first pre-arbitration telephone conference is even held ?

2. Who should pay the costs of the arbitrator in such circumstances?

FACTS

The facts are outlined in explicit detail in the submissions provided by both parties.

At risk of oversimplification I will attempt in the paragraphs to follow to provide a thumbnail overview of those facts. This matter came before me as a loss transfer dispute between insurers pursuant to the provisions section 275 of the Insurance Act.

On December 23, 2009 Alyssa Jaramillo was struck as a pedestrian by a 2005 GMC Savana cargo van insured by the Respondents, Wawanesa Mutual Insurance Company and Chartis General Insurance Company. (hereinafter referred to as "Wawanesa")

Alyssa Jarimillo was an insured person with respect to a policy of automobile insurance issued by Co-operators General Insurance Company (hereinafter referred to as "Co-operators") on December 23, 2009 and applied to the Co-operators for various Statutory Accident Benefits. Such accident benefits were paid by the Co-operators.

During the adjusting of the accident benefit claim of Alyssa Jaramillo the question arose as to whether the 2005 GMV Savana that struck her exceeded 4500 kilograms at the time of the accident making it a heavy commercial vehicle entitling Co-operators to pursue loss transfer against Wawanesa.pursuant to s. 275 of the Insurance Act.

Prior to putting Wawanesa on notice of a loss transfer claim Co-op did some preliminary investigation with respect to gross vehicle weight of the subject van.

On July 13, 2010 the Co-operators adjuster ran a plate search with the Ministry of Transportation. That plate search revealed the owner of the vehicle involved was a company called Acuity Holdings Ltd. and the vehicle being commercial GMC Savana white van, year 2005 with an empty weight of 3,540 kilograms.

On July 14, 2010 a Co-operators adjuster made a file note indicating a Google search of the gross vehicle weight of the 2005 GMC Savana vehicle might be 8,600 pounds or 3,909 kilograms.

On December 10, 2010 (almost a year post accident) Co-operators served Notice of Loss Transfer. Counsel was appointed by Wawanesa. This was followed by communications between the parties as there remained some confusion in the mind of the Co-operators adjuster over the weight of the subject vehicle. Part of the confusion had to do with information in the possession of Co-operators that the GVWR (gross vehicle weight rating) may have been as high as 5,377 kg. It should be noted that the loss transfer legislation involves GVW (gross vehicle weight) and has nothing to do with GVWR.

On June 1, 2011 counsel for Wawanesa sent a copy of the Vehicle Information Sheet with respect to the subject vehicle to Co-operators. This showed a gross vehicle weight of 3,904 kg well below the legislative threshold of 4,500 kg to be considered a heavy commercial vehicle and subject to loss transfer. On July 21, 2011, Co-operators received a report from it's engineer Gord Jenesh that the weight of the vehicle including the weight of the driver was as high as 3,901 kg. yet Co-operators continued with it's pursuit of loss transfer.

There are several log entries in and around the same period which show that the Co-operators own investigations supported the vehicle's weight to be under 4500 kg:

- July 13, 2011 log entry: "Loss xfer- although our own investigations were pointing towards possibly not being loss xfer."

- July 13, 2011 log entry: "We believe based on our investigation that both GVW and the GVWR on TPveh is less than 4500 kg unless it was carrying an illegal load."
- July 25, 2011 log entry: "Our investigations also show under 4500kg. We will not refer this to legal counsel."

Finally, on January 11,2012 Wawanesa was served with a Notice to Submit to Arbitration. Communications continued between the parties.

In October 2012, I was retained to act as arbitrator in this loss transfer dispute and an initial pre-arbitration telephone conference was arranged for December 11,1013. The conference was adjourned. On December 12, 2012 Co-operators' engineer Gord Jenesh prepared a report after weighing the subject vehicle indicating the weight to be 2,930 kg.

The Co-operators proceeded to abandon it's pursuit of loss transfer before the first pre-arbitration took place and Wawanesa is now seeking it's costs.

ANALYSIS AND FINDINGS

Wawanesa seeks costs of $7,874.40 inclusive of HST and has provided a detailed Bill of Costs in support of it's claim. It should be noted that 13.4 hours were spent with respect to the loss transfer claim and 15 hours with respect to the preparation of cost submissions.

Co-operators takes the position that the claim presented by Wawanesa is excessive and inappropriate. It states that it never received clarification from Wawanesa as to the weight of their insured's vehicle. It submits that costs should only be awarded for legal work done after the January 11, 2012 Notice to Submit to Arbitration. They point out that there never was a single pre-arbitration conference completed before it abandoned it's pursuit of loss transfer.

On the evidence before me I am satisfied that Wawanesa is entitiled to it's costs on a partial indemnity basis from the date it received Notice of Loss Transfer being December 10, 2010. From the outset it ought to have been clear from the police report that the vehicle involved was a 2005 GMC Savana van. Co-operators provided initial Notification of Loss Transfer to Wawanesa on December 10, 2010 almost a year following the subject accident. Prior to that it completed a plate search on July 13, 2010 which indicated that the subject vehicle had an empty weight of 3,540 kg. It did a Google search on July 14, 2010 which indicated a gross vehicle weight of 3,909 kg. At no time prior to giving notice to Wawanesa of it's loss transfer claim did it ever request to weigh the subject vehicle at it's own expense. At no time prior to putting Wawanesa on notice did it retain an engineer to assist. This was subsequently done and demonstrated that the vehicle's weight did not exceed the 4500 kg threshold. I am of the view that with reasonable effort the weight of the van could have been determined before putting Wawanesa on notice on December 10, 2010.

Having received the December 10, 2010 Loss Transfer Notification I feel it was reasonable for Wawanesa to appoint counsel to deal with the heavy commercial vehicle and weight issues.

In the months to follow and before the actual arbitration was commenced Co-operators was provided with the subject vehicles Vehicle Information Sheet showing a gross weight of 3,904 kg and a report from it's engineer in July 2011 showing a weight of 3,901 kg.. Despite this preliminary information the arbitration was commenced in September 2012. By so doing Co-operators, in my view, then became exposed potentially to the legal costs of Wawanesa depending on the outcome of the loss transfer dispute. The loss transfer arbitration was abandoned after the Co-operators received a report from it's engineer Gord Jenesh dated December 12, 2012 showing that the subject vehicle had been physically weighed without tools at 2,780 kg and with tools at 2,930 kg.

In reaching my decision I have considered the relevant legislation and authorities with respect to costs in a loss transfer claim.

The Disputes Between Insurers legislation deals with the issue of costs. Section 9 (1) of O. Reg. 283/95 states:

> 9. (1) Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. O. Reg. 283/95, s. 9 (1).
>
> (2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*. O. Reg. 283/95, s. 9 (2).

I am compelled to follow this general directive as contained in the Disputes Between Insurers legislation in the absence of special circumstances. On the facts before me there were none. I must then look to the Arbitration Act.

Sections 54 to 56 of the Arbitration Act 1991, S.O. , c. 17 reads as follows:

> **Costs**
> **Power to award costs**
> **54.** (1) An arbitral tribunal may award the costs of an arbitration. 1991, c.17, s.54 (1).
>
> **What constitutes costs**
> (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. 1991, c.17, s.54 (2).
>
> **Request for award dealing with costs**
> (3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs. 1991, c.17, s.54 (3).
>
> **Absence of award dealing with costs**
> (4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration. 1991, c.17, s.54 (4).
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> **Costs consequences of failure to accept offer to settle**
> (5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding

costs in respect of the period from the making of the offer to the making of the award. 1991, c.17, s.54 (5).

Disclosure of offer to arbitral tribunal

(6) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than costs. 1991, c.17, s.54 (6).

Arbitrator's fees and expenses

55. The fees and expenses paid to an arbitrator shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred. 1991, c.17, s.55.

Assessment

Fees and expenses

56. (1) A party to an arbitration may have an arbitrator's account for fees and expenses assessed by an assessment officer in the same manner as a solicitor's bill under the *Solicitors Act*. 1991, c.17, s.56 (1).

Costs

(2) If an arbitral tribunal awards costs and directs that they be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court. 1991, c.17, s.56 (2).

Idem

(3) In assessing the part of the costs represented by the fees and expenses of the arbitral tribunal, the assessment officer shall apply the same principles as in the assessment of an account under subsection (1). 1991, c.17, s.56 (3).

Account already paid

(4) Subsection (1) applies even if the account has been paid. 1991, c.17, s.56 (4).

Review by court

(5) On the application of a party to the arbitration, the court may review an assessment of costs or of an arbitrator's account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (5).

Idem

(6) On the application of an arbitrator, the court may review an assessment of his or her account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (6).

Time for application for review

(7) The application for review may not be made after the period specified in the assessment officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise. 1991, c.17, s.56 (7).

In reaching my decision with respect to costs I have considered the factors set out in Rule 57.01(1) of the Rules of Civil Procedure, which include:

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 complexity of the proceeding;
5. The importance of the issues;
6. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
7. Whether any step in the proceeding was improper, vexatious or unnecessary; and
8. Any other matter relevant to the question of costs

I am also cognizant in awarding costs of proportionality, particularly with respect to the time spent preparing costs submissions which outweighed the issues spent on the substantive issue, and have considered the following decisions:

1. Toronto (City) v. First Ontario Realty Corp., [2002] 59 O.R. (3d), 568 (S.C.);
2. Boucher v. Public Accountants Council (Ontario), [2004] 71 O.R. (4d), 291 (C.A.);
3. Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC, [2005] 75 O.R. (3d), 638 (C.A.);
4. Zesta Engineering Ltd. v. Cloutier, [2002] 21 CCEL (3d), 161 (O.N.C.A.).

Once the actual arbitration was commenced the Co-operators was exposed to a claim for legal costs if it were unsuccessful in it's loss transfer claim with those costs being in the discretion of the arbitrator pursuant to section 54 of the Arbitration Act, 1991, S.O., c.17. Co-operators submitted that only legal expenses after the actual arbitration was commenced ought be considered. No authorities were provided to support this proposition. I believe that legal expenses reasonably incurred after formal notice of loss transfer ought be considered just like plaintiffs counsel in a personal injury action being entitled to legal fees for work completed and assessable disbursements incurred before the issuance of the Writ of Summons and service of the Statement of Claim.

I also express some concern with the 15 hours expended for preparation of cost submissions. There must be some proportionality given the amount the costs in issue for the claim itself (13.4 hours of legal work). I have considered this in my assessment of the reasonable partial indemnity costs to which Wawanesa ought to be entitled.

On a partial indemnity basis I find Wawanesa entitled to costs fixed at $3500 inclusive of HST.

ORDER

I hereby order that Co-operators pay to Wawanesa costs, inclusive of HST, of $3,500. I order that Co-operators pay the arbitrators costs of this costs determination.

DATED at TORONTO this 15th)

day of November , 2013.)

KENNETH J. BIALKOWSKI
Arbitrator