IN THE MATTER of the *Insurance Act,* R.S.O. 1990,
c.I.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act,1991,*
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

BELAIR DIRECT INSURANCE

Applicant

and

DOMINION OF CANADA GENERAL INSURANCE (TRAVELERS)

Respondents

A W A R D

Counsel:

Mahroze Khan
Counsel for the Applicant BELAIR DIRECT INSURANCE ["Belair"]

Neil Colville-Reeves
Counsel for the Respondent DOMINION OF CANADA GENERAL INSURANCE ["Dominion"]

This priority dispute has a lengthy history which is not necessarily relevant or pertinent to the issues in dispute before me. Briefly, the underlying automobile accident occurred on August 30, 2013. On April 19, 2016, I provided reasons which would have found Dominion to be the higher priority insurer. However, I was obliged to follow a decision of a judge of the Superior Court of Justice and found against Belair. Belair appealed my decision and Akbarali J., not constrained to follow a coordinate judge of the Superior Court of Justice, agreed with my reasons and found in favour of Belair on January 16, 2017. Dominion appealed this decision to the Court of Appeal for Ontario and this court released its decision on February 2, 2018 which upheld the decision of Akbarali J.

The parties were able to resolve many aspects of the quantum of reimbursement but were unable to resolve all of these issues. Consequently, I was retained again to complete the

arbitration as it relates to the quantum of reimbursement. The initial pre arbitration teleconference in relation to this aspect of the matter was held on January 30, 2020. There were numerous teleconferences held. The net result of the foregoing was the following procedural understanding or agreement.

The only exhibit so marked at the hearing was the arbitration agreement signed by counsel for the parties on September 28, 2023. I received written submissions which are detailed in this award. In addition, I received the applicant's document brief, supplementary brief and authorities brief, the respondent's arbitration brief which consisted of written submissions together with 47 tabs of collected documents, and the respondent's reply authorities brief.

Belair has the initial burden of proof to establish past claims were incurred prior to Dominion (now Travelers) assuming carriage of the underlying accident benefit claim. This issue may turn on the legal definition of "incurred". It may also turn on proof of payment or reconciliation as between or amongst payment screens, cheque records, documentation submitted by the claimant, etc.

Once, and to the extent that, Belair has satisfied its onus in this regard, the onus or burden of proof will shift to Dominion to prove that claims were paid on a grossly unreasonable basis or that certain claims were grossly mishandled.

Given the shift in onus, I received written submissions on behalf of the applicant, Belair, written submissions on behalf of the respondent Dominion, reply submissions, on behalf of Belair, and reply submissions, on behalf of Dominion.

I made it very clear to the parties, through the series of pre arbitration teleconferences, that I did not want to be put in the position of serving as a bookkeeper or accountant to reconcile the payment of benefits, the paperwork to substantiate the payment of benefits, reimbursement, or the lack of reimbursement. While the parties have attempted to cooperate in this regard and minimize my role as bookkeeper, the documents provided to me and the written submissions go on at great length to try to "explain" this situation. It is imperfect and less than ideal but I will do my best to try to work through the information and documentation to determine what claims for reimbursement remain outstanding, why reimbursement has not been made and what relief I can and should provide as arbitrator.

In April and May 2018, the insurers worked through the logistics of handing off the content of the Belair claims file to Dominion and a timeline and process whereby Dominion would assume day-to-day responsibility for and carriage of the underlying accident benefit claim. The claims file, such as it was at that time, was apparently provided to Dominion on May 24, 2018.

The foregoing process was not without issues or challenges. Belair had previously operated under a claim system known as OPUS. This system was in place from 2013 until June 1, 2017. On or about June 1, 2017, Belair switched to the Claims Centre system.

On September 29, 2018, and January 23, 2019, Belair made a written request for reimbursement in the amount of $1,004,882.25.

On January 19, 2021, Belair provided the OPUS historical payments to Dominion. On March 16, 2021, Belair received a cheque from Dominion in the amount of $250,568.40. This cheque was misplaced, whether by reason of the pandemic or otherwise, and was not cashed. Belair requested that the cheque be cancelled and reissued on September 1, 2022. A replacement cheque was received on January 24, 2023.

There was a lengthy, complicated, and sometimes convoluted process whereby the content of the Belair claims file, together with log notes or claim notes maintained by Belair, were produced to Dominion. This can be explained in part by reason of the fact that the Belair "file" existed in part as a physical file, with all of the ordinary issues associated with a physical file (together with the pandemic), in part in OPUS, which was an obsolete system by the time these matters became contentious between the parties and in issue before me, necessitating the involvement of IT personnel and resources, and in part in the new Claims Centre system.

On March 31, 2023, counsel for the applicant sent OPUS payment screens, redacted for reserves, and requested reimbursement from Dominion. On May 26, 2023, counsel for the applicant sent an Excel spreadsheet with details of payments made under Claims Centre and requested reimbursement from Dominion.

Counsel for Dominion sent an e-mail on August 21, 2023 advising that certain claims for reimbursement were to be made. These totalled $342,377.84.

As best as I can determine, Belair asserts that the following amounts remain outstanding for which reimbursement is sought from Dominion:

Attendant care - $289,058.44
Housekeeping - $26,435.39
Interest payable by Belair on income replacement benefits paid as an incident of settlement of a LAT proceeding - $10,533
Reports / insurer examinations - $831.46
Expenses - $9677.59

Total - $336,555.88

As mentioned, above, the underlying accident benefit claim arises from an accident which occurred on August 29, 2013. The claimant was accepted to be catastrophically impaired as at December 20, 2013. Belair asserted policy violations such that income replacement benefits or non-earner benefits, visitor expenses and housekeeping benefits were withheld pursuant to what were alleged to be one or more section 31 violations.

There was a FSCO arbitration commenced by the claimant in relation to the section 31 dispute. This hearing was originally scheduled for April 2015 and rescheduled on consent to August 2015. The hearing was further adjourned by reason of the claimant's health. In May 2016, counsel for the claimant sent the applicant the police file and the underlying arbitration as between the claimant and the applicant was resolved promptly thereafter.

The foregoing historical summary emanates largely from the initial written submissions delivered on behalf of the applicant. This historical summary is repeated from the differing perspective of the respondent in their written submissions. From the perspective of Dominion, a demand for reimbursement in excess of $1 million was made in September 2018. Over the following five years, repeated attempts were made by Dominion to obtain basic information from Belair to support its indemnity demand. This was characterized as a painful exercise.

By January 2021, Dominion had received basic proof of payment by way of payment screens, though this information was limited to less than 30% of the value of Belair's demand for

indemnity. This information, once received, was reviewed and analyzed and indemnity was made in the amount of $250,568. Over the subsequent period of some 2.5 years, further payment screens and documents were produced, reviewed, and analyzed and a further payment in the amount of $342,377 was made by way of indemnity. Shortly before the hearing before me was scheduled to commence, Belair produced additional documents on September 27, 2023, and Dominion made a payment of $54,040 on October 11, 2023.

Counsel for Dominion submits that as of the date of preparation of his submissions, there is some $357,015 claimed in indemnity which is in dispute. Since those submissions were prepared, I believe the amount in dispute is as stated above, namely $336,555.88. If I understood the submissions of counsel for Dominion correctly, the figure in dispute may be as low as $317,896 by the time of the hearing before me on November 1, 2023.

Dominion submits that Belair seeks indemnity for attendant care benefits in the amount of $316,870 and for housekeeping benefits in the amount of $31,325.80. Dominion has paid $27,812.43 in attendant care benefits and $4,890 in housekeeping benefits.

Dominion submits that Belair's method of paying attendant care and housekeeping benefits was consistent throughout their handling of the file. Once it was determined that the claimant was entitled to $6000 per month in attendant care services and $100 per week in housekeeping services, Belair would pay any third-party service provider the amounts owing pursuant to invoices submitted and would issue a cheque for the balance to the claimant personally. The vast majority of the invoices from third party providers were submitted by a company known as AGTA or SOLUS. If there was no third-party service provider submitting invoices to Belair in a given month, the entire amount described above, i.e. $6100.00, would be paid to the claimant directly.

Dominion submits that there is no indication in any of the file material that Belair ever turned its mind to the issue of what constituted an "incurred expense". To the extent that attendant care or housekeeping benefits could be paid to a family member, Belair would be required to establish that the individual providing such services had sustained an "economic loss" as a result of providing those services for the expense to be "incurred". It is submitted that various insurance claims professionals at Belair had never turned their mind to the question of whether any family member provider had ever experienced an "economic loss". It is further submitted

that a careful review of the log notes does not demonstrate any consideration of or reference to the term "incurred" or the phrase "economic loss". There are no communications as between Belair and the claimant, or any member of the claimant's family or their legal representatives, regarding the issue of incurred expense or economic loss.

The parties agree on the essence of the legal principles which I am required to apply to determine the issues in dispute in this arbitration. There is a three-stage process required to determine the amounts owing. First, the insurer who handled the claim [Belair] must prove that the accident benefits were paid and for which reimbursement is sought. Secondly and once the foregoing onus is satisfied, the priority insurer [Dominion] must establish that the original handling insurer meets the test of bad faith or gross mishandling in the processing of the claim. Thirdly and finally, once bad faith or gross mishandling has been proven, the priority insurer [Dominion] must prove that had the file been handled properly, the payments would not have been made.

Despite the laborious and time-consuming process which I have tried to capture, above, Dominion has not challenged that payments were made and that they were made in relation to the subject claim. The primary issue, from the perspective of Dominion, is whether the attendant care and housekeeping payments that were paid directly to the claimant are subject to indemnity.

The written submissions delivered on behalf of Dominion are reproduced extensively and appear in italics as follows. I have deleted surnames by reason of privacy concerns. Matthew is the claimant and Maria is his mother.

i. Incurred

90. The Statutory Accidents Benefits Schedule provides as follows at section 3(7)(e) in relation to expenses incurred:

(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless

(i) the insured person has received the goods or services to which the expense relates,

(ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and

(iii) the person who provided the goods or services,

(A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person.

91. There is no evidence that Maria provided services to Matthew in the course of the employment or occupation in which she would normally be engaged but for the accident. Matthew testified at his examination that his mother does not work but had worked for a short period of time to 'get her out of the house'.

92. Requests have been made of Belair to provide proof that Maria was a professional caregiver or alternatively that Maria had retained any economic loss as a result of providing care to Matthew. No response has ever been provided despite Belair being aware for many years that this has been a key issue in this case. As early as July 2020, Belair was asked to clarify that only $15,000 of the attendant care claimed was provided by third parties. No response was received to this request.

93. The log notes provided by Belair make it clear that Belair never turned their mind to this issue. It is equally apparent (and it stands to reason) they Belair never requested any proof that either Maria was a professional caregiver or that she had sustained an economic loss as a result of providing services to Matthew.

94. As recently as October 11, 2023, counsel for Dominion sought confirmation from Belair that it was agreed that Maria had not sustained an economic loss. Belair refused to concede the point.

95. This issue was addressed in Jevco v. Dominion, a decision of Arbitrator Shari Novick. In that case, the evidence was consistent with the evidence in this case – namely that the handling insurer never turned their mind to the issue of whether a family caregiver had sustained an economic loss. There was no evidence in the record that the question had ever been asked and as a result no evidence was requested by the claimant or caregiver that there was an economic loss as a result of providing care to the claimant.

96. Consistent with the evidence in this case, Belair not only failed to request proof of an economic loss being sustained by Maria, they failed to determine that Matthew had promised to pay his mother for services provided.

97. In fact, the documentation submitted by counsel for Matthew provided no details whatsoever of any services being provided by Maria. The only details required by Belair was a demand for full payment at the maximum rate with the only support being not details of the services actually provided, but the original Form 1 supporting the need for those services.

98. Arbitrator Novick concluded that these material deficiencies rendered the payments made by Jevco as 'payments that were not covered under the SABS'. This is an accurate characterization. Absent evidence that there had been…

> *(a) a promise to pay;*
> *(b) that the services had actually been provided; and*
> *(c) that an economic loss had been sustained by the person providing care (as a result of providing the care)*

…then no benefit would be payable. Belair has failed to establish that ***any of these three preconditions had been met.***

99. Upon assuming handling of the claim of Matthew in May 2018, Dominion received the same Attendant Care and Housekeeping submissions that were received over the years by Belair. Dominion responded by requesting information required under section 3(7) of the SABS. None was forthcoming. Dominion has confirmed that no attendant care or housekeeping benefits were paid on the subject claim during the course of its handling of the claim.

100. Therefore, it is evident that had the claim been handled differently by Belair, and if appropriate documentation had been requested to establish that the definition of incurred was satisfied, the amounts now in issue would not have been payable.

101. As a point of contrast, the decision of Arbitrator Samworth in Economical v. Echelon is noteworthy. In that case, Economical sought indemnity from the priority insurer Echelon for

attendant care benefits paid to the mother of the injured claimant. During the course of handling the case, Economical had taken the following steps to satisfy itself that the insured's mother had sustained an economic loss:

> *(a) Satisfied itself that the mother provided details of attendant care services provided to her daughter;*
> *(b) Obtained proof that the mother had been employed prior to the accident;*
> *(c) Obtained proof by way of an ROE provided by the mother's employer that the mother had sought a leave of absence after the accident as of January 13, 2013 to 'be the primary caregiver to her daughter who is sick';*
> *(d) Economical followed up 6 months later requesting details as to whether the mother had returned to work and obtained confirmation from counsel that that the mother remained off work to assist with her daughter's care;*

102. Economical had the claimant re-assessed in December 2013 at which point the attendant care entitlement was reduced from $6,000 per month down to $1,171.82 per month. Benefits continued to be paid and no further requests were made to confirm that the mother had sustained an economic loss and benefits were ultimately terminated in September 2014.

103. Tax returns filed at the hearing confirmed that the mother's income dropped to under $1,000 in 2013 and that no tax returns were filed in 2014 and 2015.

104. Although Arbitrator Samworth found that Economical could have made a further request in 2014 to confirm that the economic loss of the mother was ongoing, she held that the fact that Economical had received proof that there was an economic loss at the outset of the claim was an important consideration in determining that there was no gross mishandling. Similarly, the fact that Economical had followed up at the 6-month mark was further evidence of their diligence.

105. Arbitrator Samworth notes that there was no reason for the adjuster to be suspicious that the mother had returned to work and that at the hearing, there was similarly no evidence that the economic loss continued was sufficient to take the case out of the 'gross negligence' handling category. Arbitrator Samworth notes:

Economical had solid proof through a record of employment from the mother's employer that she had taken a leave of absence to look after her daughter. The claimant's injuries were significant She was catastrophically impaired. Further I find that it was reasonable for Economical to rely on the claimant's lawyer's letter confirming that the mother remained off work. After all this is a system of insurance coverage that is premised on good faith. There was nothing in the file to raise any "red flags" that would lead one to believe that the lawyer would not provide accurate information. Certainly more could have been done to verify the attendant care being provided by the mother once the claimant moved to Waterloo. I'm not sure that surveillance would have been warranted but more information about the dates and times that the mother was driving from Niagara Falls to Waterloo would have been warranted. There was independent verification of this through the occupational therapist report. However I would have expected that more information could have and should have been sought. I also agree with Echelon that Economical should have at least at some point in 2014 before it terminated benefits asked for further proof that the mother had not returned to work. However based on all the evidence before me I cannot conclude that the failure to do so was a gross mishandling of the claim such that the amounts that were being sought to be recovered were grossly unreasonable. There was no information or evidence before me that the mother had in fact returned to work. I could not see any evidence in this material before me to suggest that the adjuster should have been suspicious that the mother might have returned to work. It was certainly not uncommon for insurers during this time to "autopay" attendant care once there was the initial proof of economic loss.

Therefore I find that while Economical's handling of this file was less than stellar it does not meet the standard of care of gross mishandling that in my view is required to deny reimbursement to Economical.

106. Arbitrator Samworth also notes that even if there was 'gross mishandling', Echelon had not established that the outcome would have been any different had the file been better managed:

If I am wrong on this point I also find that even if the handling of the attendant care relating to the mother's services was grossly mishandled that I still would order reimbursement. It is my view that if gross mishandling were proven (and I do find the onus to prove that is on Echelon)

that Echelon would also have to prove that if the file had been handled in a reasonable manner that the payments made would not otherwise have been made. In other words in this case if Economical's adjuster had made inquiries in 2014 as to whether or not the claimant's mother had returned to work that the result of those inquiries would have been that she had and was therefore no longer sustaining an economic loss and therefore the payments would not have been made. There is no such evidence before me.

107. In contrast, in the case of Belair's handling of the subject claim:

(a) There was never proof of any economic loss;

(b) Belair never requested any proof of an economic loss;

(c) The evidence suggests that Maria did not work at the time of the accident so could not have suffered an ongoing economic loss;

108. It is worth noting that the attendant care benefits in issue in the Economical v. Echelon case spanned 20 months and totaled less than $77,000. Echelon only challenged payments made between October 2013 and September 2014.

Belair submits, in its reply submissions to the foregoing, that a more nuanced analysis of what was reasonable in the circumstances is necessary, given the specific facts of this claim. It is submitted by Belair, and not disputed by Dominion, that the claimant required 24-hour supervision. It is submitted that limited attendant care and housekeeping services were provided by a third-party provider (AGTA or SOLUS) and that the balance of these services were provided by the claimant's mother. I will assume this to be correct for purposes of my analysis.

It is submitted on behalf of Belair that there was a promise to pay by the claimant to his mother. I am unaware of any evidence in the record before me of such a promise to pay and explicitly reject this submission. Simply put, there is no evidence in the voluminous material tendered in this arbitration of any promise to pay by the claimant to his mother for attendant care or housekeeping services.

It is submitted on behalf of Belair, in the alternative to the foregoing submission, that Belair was legally obligated to pay ongoing attendant care and housekeeping benefits. This may have been the conclusion made by the insurance claims professionals who authorized these payments to be made in the fashion described above. This may have been an inference which they drew from the facts and circumstances of the claim or an assumption which they made. It is not debated by the parties before me that the claimant required these services. Rather, the issue before me is whether these claims had been incurred in accordance with the provisions of the SABS.

The regular and routine topping up of these benefits to $6000 monthly in the case of attendant care benefits and to $100 weekly in the case of housekeeping and home maintenance benefits

demonstrates no consideration of or application of the SABS or the case law which interprets the SABS in relation to the concepts of "incurred" and "economic loss".

Belair submits that it may be able to satisfy the concept of "economic loss" by arguing that the claimant's mother or father may have incurred mileage and parking expenses transporting the claimant to and from medical appointments. Once again, I am unaware of any evidence directly on point in the voluminous materials submitted by the parties in the arbitration before me. In any event, these expenses would be addressed as a medical or rehabilitation benefit and do not satisfy the test for "economic loss" to allow for payment of attendant care or housekeeping and home maintenance benefits.

Belair submits that the claimant's mother may have sustained an economic loss to the extent that the claimant may have given her amounts of cash on a haphazard or sporadic basis in the weeks or months preceding the subject's accident. Given the claimant's injuries and impairments in the subject accident and his inability to work, he was no longer in a position to do this. If I understand this argument correctly, this economic loss would be sustained by the claimant and not by his parents.

Belair submits that "economic loss" was not defined at the times relevant to the subject claim and dispute before me. It is submitted that I should consider mileage and parking expenses as satisfying the test for "economic loss". There is no evidence of these expenses. There is no evidence in the material produced by Belair to Dominion or in any of the log notes to suggest that Belair put its mind to the concepts of "incurred" and "economic loss" so as to justify payments made to the claimant, over and above the relatively small amounts paid to third party providers. I have not been referred to any evidence in the voluminous material tendered as part of the arbitration hearing that Belair ascertained any economic loss on the part of the claimant's parents so as to support the argument which is urged upon me.

Belair submits that the Court of Appeal for Ontario, in *Henry v. Gore Mutual Insurance Co.*, 2013 ONCA 480, refused to define economic loss in relation to attendant care benefits. I respectfully disagree. The court found, at paragraphs 36-38 of its decision, that economic loss was clearly established. The claimant's mother gave up full time paid employment to provide care for her son on a 24 hour per day basis. This was the evidence in Henry v. Gore; there is no such evidence in the case before me.

I specifically find that there is no evidence of the claimant's mother or father suffering an economic loss as a result of providing services to the claimant. There is no evidence that Belair was asked to consider mileage or parking expenses as an economic loss. There is no evidence that such evidence was tendered by or on behalf of the claimant and no evidence that these expenses were incurred "as a result of providing care" to the claimant.

The Court of Appeal for Ontario released its decision in *Henry v. Gore* on July 16, 2013. The subject accident occurred on August 29, 2013. The parties to this proceeding are sophisticated insurers and should know the law and certainly stay abreast of developments in the law. That said, if there was evidence tendered from Belair that it put its mind to the issues of "incurred" and "economic loss" such that it provided the benefit of the doubt to the claimant, I would attempt to relax what may seem to be a harsh application of the law to the facts of this case. For reasons I have already provided, I have not been referred to any evidence in the Belair claims file, log notes or otherwise to suggest that these issues were given any consideration prior to authorizing payments to be made as described.

Belair submits that the law with respect to "reasonableness of payments" in a priority dispute or loss transfer dispute is summarized in the decision of Arbitrator Bialkowski in *Unifund Assurance v. Travelers Insurance Co.* Paragraphs 18 through 28 of this decision are reproduced in the written submissions of Belair. I do not believe there is any disagreement between the parties before me in relation to this recitation of the law. What is critical in the case before me is that Belair quotes from the decision that it was "certainly not uncommon for insurers during this time to "autopay" attendant care once there was initial proof of economic loss". This may be so, but this is precisely the evidence that is missing (proof of economic loss) in the subject arbitration before me.

It bears comment that upon Dominion assuming carriage of the day-to-day handling of the underlying accident benefit claim, Dominion requested proof of economic loss from the claimant and his legal representatives. No proof was provided and no attendant care or housekeeping benefits were paid on an ongoing basis. While it is certainly true that significant amounts were paid by Dominion to the claimant as part of the lump sum, full and final settlement of the underlying accident benefit claim, this recognized the insurer's exposure to pay future benefits,

on submission of appropriate evidence, rather than a recognition the benefits were owing in the past.

Belair submits that Perell J., in a case known as *Ontario (Minister of Finance) v. Lombard Insurance Company of Canada*, 2010 ONSC 1770, confirmed that an arbitrator has jurisdiction to order reimbursement in a priority dispute beyond repayment of the statutory accident benefits themselves. There is something of an argument that Dominion could be required to indemnify Belair on the theory of unjust enrichment. I disagree. For the reasons I have attempted to articulate, there was no basis on the evidence available to Belair to pay attendant care and housekeeping and home maintenance benefits in the manner in which it did. If the benefits should not have been paid by Belair, then there is nothing which unjustly enriches Dominion and necessitates some sort of equitable relief in favour of Belair.

If my findings or analysis or both are found to be incorrect, I find that there was gross mishandling in the processing of the claim as it relates to the topping up of attendant care and housekeeping and home maintenance benefits in the fashion described, above. I find that if the claim had been handled properly, the payments would not have been made. This is an inference drawn from the limited evidence in relation to what transpired as between the claimant and Dominion once Dominion began handling the underlying accident benefit claim on a day-to-day basis.

If my findings or analysis or both are found to be incorrect, it bears noting that effective February 2014, Regulation 347/13 came into effect. This regulation had the effect of amending the formula for calculating the amount of attendant care payable to non-professional caregivers. Whereas before this change, proof of any economic loss could justify payment of attendant care benefits well beyond the measure of the economic loss to the maximum payable under the SABS, the new regulation stipulated that the benefit payable for care by non-professional caregivers cannot exceed the salary foregone or the other economic loss incurred by the caregiver.

The reply submissions of Dominion, at paragraphs 19 through 22, argue persuasively that this change to the Regulation is retrospective in its application and applies to motor vehicle accidents that occurred prior to February 1, 2014. I agree with those submissions. Thus, if my

findings or analysis or both are found to be incorrect, I would allow the claim for indemnification to January 31, 2014, but disallow the claim from and after February 1, 2014.

For the reasons set out above, I decline to order indemnification for attendant care benefits in the amount of $289,058.44 and housekeeping benefits in the amount of $26,435.39.

It would appear there was a small overpayment made by Dominion in favor of Belair in relation to housekeeping benefits in the amount of $5569. This amount should be applied as a credit as against the claim for expenses, reports and insurer examinations in the amounts of $9677.59 and $831.46, respectively. If this has already been applied to give rise to these amounts, I find that Belair is entitled to indemnity in the amount of $10,509.05. If this credit has not been considered in relation to the claim for indemnity for expenses, reports, and insurer examinations, then I find that Belair is entitled to indemnity in the amount of $4,940.05.

If this has not been taken into account in relation to the amounts claimed by way of indemnity, described above, I will encourage counsel for the parties to work through those arithmetic details and, if they cannot agree, I remain seized of this matter for this limited purpose.

Belair asserts a claim for indemnity as against Dominion for interest payable by Belair on income replacement benefits paid as an incident of settlement of a FSCO proceeding in the amount of $10,533. Belair initially excluded payment of income replacement benefits, housekeeping and visitor expenses on the basis that the claimant was knowingly operating an uninsured vehicle at the time of the accident. On the eve of the FSCO arbitration dealing with this issue, Belair conceded this point on the basis that they had "new information" which satisfied the insurer that the claimant had no reason to believe that the motorcycle was uninsured.

Dominion requested details of the denial of benefits and the evidence from Belair which gave rise to the change in their position. Belair had the "pink slip" which had been provided to the claimant prior to operating the motorcycle involved in the subject accident. The position taken by Belair which gave rise to the FSCO arbitration was an assertion that the motorcycle was stolen, and that the claimant knew or ought to have known that the motorcycle was stolen, despite the claimant having been provided with an insurance slip prior to driving it on the day in question. Dominion submits that at minimum, when Belair was provided with the pink slip in June 2015,

this should have been sufficient for the commencement of payment of benefits which had been suspended. There is extensive testimony from the claimant at his examination under oath regarding the circumstances of his operation of the motorcycle such that he would have been unaware that it was uninsured at the time of the subject accident.

Belair seeks indemnity from Dominion for interest paid to the claimant as an incident of settling the FSCO arbitration. I find this to be an unreasonable claim and indemnity is denied.

There may be a further small housekeeping issue. Dominion paid the entire visitation expense in the amount of $11,556.07 based on provision of payment screens. This apparently included interest in the amount of $3,047.99. Dominion has offset this interest payment as against expenses claimed by Belair. If this has not been taken into account in relation to the amounts claimed by way of indemnity, described above, I will encourage counsel for the parties to work through those arithmetic details and, if they cannot agree, I remain seized of this matter for this limited purpose.

I remain seized of this matter to determine the relatively small mathematical issues which may be outstanding by reason of this award.

Pursuant to the arbitration agreement, the parties have an automatic right of appeal on a point of law or a point of mix fact and law to a judge of the Ontario Superior Court of justice within 30 days of the release of my award. Until the time for appeal has expired, I am not to determine the burden of costs, their scale or quantum. That said, the agreement provides that my fees, expenses and disbursements as arbitrator will generally be borne by the unsuccessful insurer. In the event of an appeal, my award is deemed to be stayed, pending the outcome of any such appeal with the exception of payment of my account for fees, expenses and disbursements which will be borne equally by the parties, pending the final determination of all appeals.

Consequently, I will proceed to render an account divided equally between the parties, to be adjusted depending upon the result of any appeal, if undertaken, an agreement between the parties or further order or disposition I may make as an incident of adjudicating costs as between the parties.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion and wish to thank counsel for their thoughtful, comprehensive, and creative submissions. Special thanks to Ms. Khan who assumed carriage of this matter from a colleague in midstream and demonstrated Herculean efforts to get up to speed and deal with a voluminous collection of documents located in a variety of sources.

Dated at Toronto, this 14th day of December, 2023

Vance H. Cooper