IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended

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

AND IN THE MATTER of an Arbitration

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

NORTHBRIDGE INSURANCE

Respondent

AWARD

Counsel:

Wawanesa Mutual Insurance Company (Applicant): Kevin D.H. Mitchell

Northbridge Insurance (Respondent): Daniel Himelfarb

Introduction:

This matter came before me pursuant to the *Arbitrations Act* 1991 initially to arbitrate a dispute as between insurers with respect to a priority claim. Ultimately the insurers were able to resolve both the priority dispute and the question of quantum as between themselves. However there were unresolved issues relating to indemnification with respect to interest and the costs of the proceeding. The insurers were unable to resolve that and ultimately we proceeded with a costs and interest hearing on August 12, 2016. The costs hearing lasted for slightly over 3 hours.

Background:

By way of background, the parties were involved in a priority dispute arising out of an accident that occurred on November 12, 2013. Three individuals: Aferdita, Agnesa and Gentrit Raka were involved in that collision and claimed Statutory Accident Benefits. Although there is an argument about deflection it does appear that the first Application for Accident Benefits for these 3 individuals was received by Wawanesa Mutual Insurance Company (hereinafter called "Wawanesa"). As a result Wawanesa initiated the arbitration although Northbridge at one point also sent out a Notice of Dispute. Prior to the first prehearing Northbridge accepted priority. However issues relating to costs flowing from deflection and interest remained outstanding.

In order to understand the parties' position a detailed analysis of the facts relative to both Wawanesa and Northbridge "adjustment" of these 3 claims is important. Before setting out the facts it is to be noted that Wawanesa takes the position that Northbridge should pay not only the costs of the arbitration but should also pay Wawanesa's "legal fees, adjusters' fees, administrative costs and disbursements that were reasonably incurred by Wawanesa due to Northbridge's deflection". Northbridge takes the position that there was no deflection and even if there was any deflection that no costs should flow from that. In addition Wawanesa is seeking its costs of what it described as a successful arbitration based on the acknowledgment by Northbridge prior to the first prehearing that they were the priority insurer. Lastly Wawanesa also seeks costs of the costs hearing. Northbridge will concede that some costs would be payable to Wawanesa with respect to the arbitration alone but those would be minimal. Northbridge claims its costs of the costs hearing. Finally each of the insurers has a different position with respect to when interest should run on the agreed payments that were made to the various AB claimants and were the subject matter of a reimbursement by Northbridge.

Facts:

1. The accident occurred on November 12, 2013.

2. According to the Northbridge log notes First Contact occurred when the claimant notified the insurer that the accident had occurred on November 12, 2013. There are various entries between November 12 and November 14 with respect to the assignment of the claim. None of these notes indicate whether anyone is injured.

3. On November 14, 2014 Asif Shafique at Northbridge is assigned to the file. He notes that he reviews the CROMS (Collision Reporting and Occurrence Management System). He indicates and I quote: "INSD driving her children to school, was on Exeter and making the RHT onto Wellington. She was stopped and got rear ended – 3 occupants INSD's vehicle and one TP's. No injuries". There is no indication as to source of this information.

4. The log notes indicate that Mr. Shafique tried to call the insured, Lufti Raka (husband and father of the driver and children in the car), on November 14th and November 15th. There was no contact at that time.

5. On November 15, 2013 Mr. Shafique sent out a letter to Mr. Raka. The letter noted that Northbridge had been trying to get in contact with him with respect to "their investigation of the above-mentioned claim". He was asked to contact Mr. Shafique or alternatively to provide some information. No AB application accompanied the letter. From other information on the file I have surmised that Mr. Shafique was not an accident benefit adjuster but a property damage adjuster.

6. There is then no activity from the Northbridge side of the file from the date the letter was mailed until December 10, 2013. However there was activity on the Wawanesa end. On December 4, 2013 the Wawanesa log notes indicate that Sharon Ditner (an AB adjuster) spoke to Lufti. Lufti advises that it was his wife involved in the accident. He notes that she will be home later. Another adjuster is asked to make the follow up call as Ms. Ditner will be out of the office. It is unclear from the entry why this contact was initiated between Lufti and Wawanesa and who called whom. However that same day Ms. Ditner sent out a letter to Aferdita Raka dated December 4, 2013 enclosing the AB application package and other relevant documentation (OCF-2, OCF-3, OCF-5, etc.). Later that day there was contact between another adjuster at Wawanesa and Aferdita. In that call Aferdita provided details of the accident. She mentioned that 2 of her children were in the vehicle and both were complaining of muscle pain. While it was unclear as to whether they had any injuries the adjuster indicated that she would send out AB packages for the children "to be on the safe side". At that time there was also a discussion about the fact that the vehicle that Aferdita was driving at the time of the accident was her husband's taxi/limo. Wawanesa was advised that the vehicle was insured with Northbridge and the policy information was provided. Aferdita also mentioned "the claim has been reported to Northbridge". The adjuster noted that there may be a priority issue. On December 5th the letters and AB packages were sent out for the 2 children: Agnesa and Gentrit.

7. On December the 10th Mr. Shafique from Northbridge notes that he had received a message from the broker, Curtis, to call the insured, Lufti. Mr. Shafique made the call and Aferdita answered the phone. She advised that she would have her husband call later. Lufti called a couple of hours later. He advised that his wife was in pain and needed medical treatment. Mr. Shafique advised that he would have an AB adjuster contact the Raka's. It is worth noting that by that time Wawanesa had already sent out their accident benefit package 4 or 5 days earlier. Later in the day the broker was also advised that an AB adjuster was being assigned to the claim. By mid-afternoon the file had been assigned to Lesa Maitland, an AB adjuster at Northbridge. The log note assigning the matter to her indicates:

"Lesa, please address A-B exposure – WSIB?"

8. Now that Ms. Maitland is assigned to the file on behalf of Northbridge from an AB perspective she starts to take action. On December 11th early in the morning she calls "the claimant". Although not clear it does appear that she speaks to the wife. The wife gives some details of the accident. She says that her son has a whiplash and her daughter has low back pain. She also notes that she has neck pain, low back pain and various other injuries including depression. When the insured is finished outlining her injuries Ms. Maitland goes on to explain the available benefits. She then states that she will have an adjuster contact her to take a statement. The log note goes on to say:

> "At which time she advised me that she had her own personal insurance with Wawanesa. Her vehicle was in the shop. She did report the claim already to Wawanesa."

After the conversation with the insured Ms. Maitland makes some additional notes and incorrectly concludes that Wawanesa has priority as the wife is not listed on their policy. She then notes that she will send out a priority claim letter and applications.

9. We then have the letter that Mr. Mitchell claims constitutes deflection. This letter is dated December 12, 2013 and is directed to Aferdita Raka from Ms. Maitland. The letter states:

> "Further to our telephone conversation on December 11, 2013, this letter serves to confirm that you are covered by your personal automobile insurance policy through Wawanesa Insurance Company.
>
> According to the priority rules of Ontario, one must claim from the automobile insurance policy as highest priority should it be available for any medical expenses relating to an automobile accident, even if one was an occupant of another vehicle at the time of the accident.
>
> Trusting that you have understood the above priority concept in Ontario, we would now proceed to close your file at Lombard Canada."

The letter does go on to offer an opportunity to speak with Ms. Maitland if there are any questions or concerns. Ms. Maitland does include an Application for Accident Benefit form. Similar letters are sent out on the same day to the 2 children. Therefore at this point in time the Raka family have been sent an AB application form from Wawanesa and one from Northbridge. Neither insurer have received a completed AB form as yet. Of significance is Ms. Maitland's last note for December 11th "Plan of action close claim if no apps received within 30 days."

10. We then have a fax dated December 17, 2013 being sent from Hands on Health Wellness Centre to Sharon Ditner at Wawanesa. This faxed letter purports to enclose a signed OCF-1 on behalf of Aferdita Raka. There are however identical faxes sent out on December 18th for Agnesa from Hands on Health Wellness Centre to Sharon Ditner and on the 19th for Gentrit Raka. Again these enclose the OCF-1s. To complicate matters the Application for Accident Benefits that have been signed by the claimants and are faxed by the clinic are clearly not the Application for Accident Benefits that either Northbridge or Wawanesa sent out. Contrary to Regulation 283/95 the Application for Accident Benefits does not have the name and address of the insurer in the top box on the left hand side. It is blank. I therefore draw a conclusion that the 3 OCF-1s that were sent to Wawanesa had either been downloaded by the clinic or had been available to them. As if we are not already deep in the world of Alice in Wonderland the matter gets even curiouser when you look at the dates on the OCF-1s. Aferdita Raka signed Agnesa Raka's OCF-1 on November 13, 2013, she signed her own on December 18, 2013 and Gentrit signed his OCF-1 on November 20, 2013. Therefore 2 of the OCF-1s were signed before either Wawanesa or Northbridge sent out the Application for Accident Benefit forms.

11. The log notes of Wawanesa do not have any note as to when the fax was received from Hands on Wellness Centre. However there is a note that the file began to be adjusted by responding to OCF-23s and other documents on or about December 19, 2013.

12. Ms. Maitland on January 6, 2014 reviews her file and notes that Aferdita is listed on both the Wawanesa and the Northbridge policy. She therefore notes "priority is with Northbridge as she was driving Northbridge vehicle at the time of the accident". However she is of the view that Gentrit's AB priority rests with Wawanesa.

13. On January 8, 2014 the Accident Resolution Group sends a letter to Lesa Maitland at Northbridge advising that they have been retained by Gentrit Raka to represent his interests with respect to the accident. An authorization is enclosed with a request for the complete file. Northbridge responds to the letter on January 9, 2014 enclosing a copy of an auto plus search indicating that Gentrit is listed on a policy with Wawanesa covering the relevant time period.

14. On January 15, 2014 Northbridge receives an OCF-1 for Agnesa Raka signed on January 9, 2015. On January 17, 2014 Northbridge receives an OCF-1 for Gentrit signed January 10, 2014 and finally the OCF-1 for Aferdita is received on January 31, 2014 signed January 23, 2014. Northbridge now commences to adjust the file as well.

15. Ms. Maitland sends out a Notice to Applicant of Dispute Between Insurers with respect Gentrit's claim to Wawanesa dated January 17, 2014. A Notice of Dispute with respect to Aferdita's claim is sent by Ms. Maitland dated March 21, 2014 and also the same day for Agnesa Raka. The Notice to Applicant of Dispute indicates that the basis for the

priority claim is that Gentrit is a named insured under the Wawanesa policy, Aferdita is a listed driver under the Wawanesa policy and Agnesa is a dependant of Aferdita.

16. Wawanesa sends out its Notice to Applicant of Dispute Between Insurers to Northbridge with respect to all 3 insureds also in March of 2014. The Notices to Dispute are all dated March 13, 2014. In the meantime both insurers continues to adjust the files.

17. On March 13, 2014 Northbridge log notes show that Ms. Maitland spoke with Sharon at Wawanesa. Her note indicates that "it appears that all 3 claimants submitted their OCF-3s to Wawanesa. Mrs. is claiming a non earner benefit." One can surmise at this point both Ms. Maitland and Ms. Ditner should have been aware that both insurers had received OCF-1s and both were involved in their respective claims. Unfortunately Wawanesa's notes do not reflect this telephone call. However log notes of Ms. Ditner from April 1 and April 22 of 2014 clearly indicate that she is aware that Northbridge is also making payments and/or adjusting this file. She notes that if Northbridge had approved an OCF-23 then limits may have already been paid under the MIG. However there does not appear to be an effort between either of these 2 adjusters to contact one another and sort out who should be handling these claims.

18. By May 2, 2014 it does appear that Ms. Maitland is aware that priority will rest with Northbridge. She sends a letter to Wawanesa asking for a copy of their policy in order to confirm whether there are any optional benefits available. The letter is directed to Ms. Ditner and dated May 2, 2014. It is noted "we continue to investigate this matter. We ask that you kindly provide a copy of the above-noted policy." Therefore while the log note of Ms. Maitland makes reference to wanting to get a copy of the policy to determine if optional benefits are available the letter to Wawanesa does not make reference to the optional benefits. To complicate matters more this letter is not referred to in the Wawanesa log notes.

19. The next relevant event occurs on June 19, 2014. Ms. Ditner gets a phone call from the Accident Resolution Group advising that they have been unsuccessful in getting the AB files from Northbridge. The person from Accident Resolution Group asked Wawanesa to send a release. Ms. Ditner notes that she asks why that would be. She suggests it would save time if the paralegal got her clients' signatures and sent them to Wawanesa and then they would be able to request the file from Northbridge directly. She also notes in her log note that Northbridge has requested the Wawanesa AB files but they are unable to provide the file without a release and therefore they also need a release. It would seem clear at this point that Ms. Ditner knew there was an AB file at Wawanesa and an AB file at Northbridge. Again no efforts seemed to be made to contact the adjuster at Northbridge to be sure that only one insurer is actually handling these AB files.

20. On June 26, 2014 Julie Marshall (an individual at Wawanesa) puts a note on the file indicating that she and Sharon have had a discussion and that a follow up letter to Northbridge should be sent asking for their position on priority within 30 days or the matter will be referred to counsel. It is noted:

> "We have confirmed we received the AB apps first and began paying as obligated and therefore should actively pursue recovery. The fact an AB app was later submitted to Northbridge for the same claimant and they began paying and put us on notice is a separate issue...we maintain Northbridge policy is primary for all 3 claimants."

Ms. Ditner then makes a log note shortly after Ms. Marshall's indicating: "It has come to my attention that claimants have made AB claims to Northbridge". The log notes suggest that Ms. Ditner was or should have been aware of this long before June 26, 2014.

21. Ms. Maitland in the meantime is apparently waiting for the Wawanesa file and a release from the policy holder. In a note of July 10th she indicates that she has sent another letter to Wawanesa requesting an update.

22. At this point counsel become involved for Wawanesa. Mr. Mitchell on behalf of Wawanesa sends out a Notice Demanding Arbitration in or around September 25, 2014. My appointment occurs shortly thereafter.

23. In the Wawanesa log notes there is an indication on January 2, 2015 that Ms. Ditner received a release from Northbridge on November 31, 2014 that would have allowed Wawanesa to provide Northbridge with a copy of the Wawanesa policy. Ms. Ditner notes that initially she mistook the release to be one for a copy of the AB file. She copied the AB file and then when she realized what the request was for she sent the release on to underwriting. Underwriting was now requiring a release signed by the named insured, Lufti Raka, before information with respect to the policy could be released. The result of this was as of January 2, 2015 Northbridge still did not know whether Wawanesa's policy had optional benefits which could make a difference with respect to priority.

24. On January 15, 2015 Ms. Maitland sent a follow up letter to Ms. Ditner asking for a copy of the certificate of insurance so that Northbridge could substantiate and confirm that Mr. Raka had not purchased optional benefits under the policy. In the meantime my office had scheduled the prehearing in the priority dispute as Mr. Himelfarb had been retained by Northbridge. By letter dated January 6, 2015 the prehearing is confirmed for April 23, 2015.

25. On April 23, 2015 Mr. Himelfarb emailed Mr. Mitchell indicating "my office has made several requests of you for a copy of your client's policy/declaration page with Wawanesa so as to be able to confirm there are no optional benefits...it seems unreasonable to have to wait until a prehearing to have the same discussion and get no further along.

26. By email dated April 23, 2015 Mr. Mitchell requested that I make an order to produce the Wawanesa policy on consent. I sent out a letter confirming that order also on April 23rd.

27. By email dated April 27, 2015 Mr. Mitchell provided Mr. Himelfarb with the relevant certificates of insurance confirming that there were no optional benefits.

28. A very brief prehearing took place on April 27, 2015 where Mr. Himelfarb indicated he had only just received the certificate and expected to get some instructions with respect to priority.

29. On May 4, 2015 by way of email Mr. Himelfarb confirmed to Mr. Mitchell that priority had been accepted. A further prehearing scheduled for June 5th was cancelled on the advice of counsel that priority had resolved although there were still some pending and possible issues with respect to indemnification, interest and costs.

30. Ultimately the question of quantum was agreed upon. Mrs. Raka's accident benefit claim indemnification was agreed upon at $6,976.50, Agnesa's at $3,134.50 and Gentrit's at $14,059.98.

31. With respect to interest Wawanesa points out that the last payment made by Wawanesa for Mrs. Raka was May 1, 2014, for Agnesa was April 9, 2014 and for Gentrit was August 15, 2014. The claim for interest is made from December 23, 2013 to October 13, 2015 and according to the interest calculations put forward by Wawanesa the following are being claimed:

a)	Mrs. Raka's interest	-	$148.25
b)	Agnesa's interest	-	$ 67.79
c)	Gentrit's interest	-	$270.65
	Total interest		$486.69

32. Northbridge submits that if interest is awarded that it should only begin to accrue from April 27, 2015 when they were provided with the information with respect to the optional benefits. They note that they indemnified Wawanesa on October 13, 2015.

Taking the total indemnity paid of $24,170.98 and using a 1.3 interest rate per annum they claim that the highest figure for interest to be awarded if any should be $145.03.

Relevant Legislation:

With respect to the issue of deflection and costs Ontario Regulation 283/95 as amended by Regulation 38/10 provides the following in Section 2.1:

2.1 (2)

An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits.

2.1 (3)

The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers

2.1 (4)

The applicant shall use the application provided by the insurer and shall send a completed application to only one insurer.

2.1 (5)

An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer.

2.1 (7)

An insurer that fails to comply with the section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the noncompliance.

Also relevant to the issue I am asked to determine is Section 9.1 of the Regulation. This provides the following with respect to Arbitrators' fees:

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.

Finally in terms of relevant legislation I also take note of Rule 57.01 (1) of the *Rules of Civil Procedure* and accept that the factors laid down in that Rule can be considered by me in determining whether to award costs. Generally speaking that Rule allows me to consider:

1. Any offer to settle;
2. The amount being claimed;
3. The complexity of the proceeding;
4. The conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding;
5. Whether any step in the proceeding was vexatious or unnecessary or taken through excessive caution.

Finally I accept as indeed both counsel submitted that according to the *Rules of Civil Procedure* and as applied by various other Arbitrators in looking at disputes relating to priority that the amount of expenses awarded should be done keeping in mind the principle of proportionality (Rule 57.01 (1) (a)).

Position of the Parties:

Wawanesa take the position that Northbridge through its actions and in particular its letter of December 12, 2013 deflected the claims of the 3 Raka's and accordingly irrespective of having admitted priority in or around the time of the prehearing should be responsible for paying costs from the date of Mr. Mitchell's involvement. To that end Mr. Mitchell in his materials included a claim for fees and disbursements commencing from his retainer on August 26, 2014 through to July 21, 2016 (just before the cost hearing). Mr. Mitchell claims fees of $18,073.00. He claims HST on the fees of $2,349.49. He also claims various disbursements (postage, photocopying, process serving, couriers and printing) for a total inclusive of HST of $730.68. The total claim for fees and disbursements as of July 25, 2016 is $21,153.17.

Mr. Mitchell's position is that it was clear from the outset that Northbridge who insured the cab that the Raka's were in were the priority insurer and there should not have been any dispute with respect to that. Mr. Mitchell takes the position that the request for the optional benefits could not be complied with until either an order of the Arbitrator or the receipt of a release

from the named insured under the policy and accordingly no fault should be attributed to Wawanesa for failing to provide Northbridge with information as to the availability of optional benefits before those events occurred.

Wawanesa takes the position that the letter of December 12, 2013 from Northbridge to the Raka's constitutes a clear deflection contrary to Section 2.1 (5) of Regulation 283/95. He claims that the deflection is clear in that Northbridge while enclosing an Application for Accident Benefits advises the insured that they will be closing their file. He submits that the letter was a clear and blatant effort to discourage the Raka's from completing the Northbridge OCF-1 and filing their claim with Northbridge. Wawanesa further argues that had that not been done that Northbridge would have received the first Application for Accident Benefits and Wawanesa would not have then had to adjust the file and incur the various expenses outlined in Mr. Mitchell's costs documents.

Northbridge takes the positon that there was no deflection. While counsel was fairly candid in admitting that the letter of December 12, 2013 did not use the best wording that one might have sent out in these circumstances, that the letter itself enclosed an Application for Accident Benefits and that was what was required. More importantly Mr. Himelfarb argues that even if I find that there was some deflection that the circumstances of this case do not meet the requirements of the Regulation. Mr. Himelfarb submits that there was no evidence presented that Northbridge's letter of December 12, 2013 "was intended to prevent or stop the applicant from submitting a completed application". Mr. Himelfarb submits that one cannot conclude there was any intention to do anything based on the evidence before me (log notes and the letter). Mr. Himelfarb points out that there were no examinations under oath made of either the adjusters, Ms. Maitland or Ms. Ditner. He notes that neither of them were called as witnesses. Northbridge points out that Wawanesa has the burden of proof in these circumstances and indeed Mr. Mitchell acknowledges that. It is argued for Northbridge that failure to call the witnesses result in there being a failure to meet the burden of proof and I cannot on the evidence before me reach any conclusion as to whether Northbridge **intended** to stop the applicant from submitted a completed application.

Northbridge also argues that even if I conclude that there is some deflection that in the very unusual circumstances of this case that no costs should flow from that. The fact is that even if the letter had been intended to deflect an application it did not and Northbridge as well as Wawanesa received completed OCF-1s contrary to Regulation 283/95. Further both insurers began adjusting the files. Both insurers sent out Notices of Dispute to each other.

Northbridge also submits that before making any award of costs in circumstances when there may be deflection that I have to look at whether there is any evidence that the arbitration itself was commenced as a result of the deflection. Northbridge submits that the arbitration itself was commenced without any mention of a possible deflection by Wawanesa. Indeed the Notice to Submit to Arbitration does not make reference to deflection at all. Northbridge submits that it was not until after the arbitration was commenced and priority was accepted that the issue of deflection was even raised and then only as a result of Northbridge's apparent

refusal to pay costs or sufficient costs. Northbridge argues that as the arbitration had nothing to do with deflection that no costs should flow to Wawanesa solely on the deflection argument.

Northbridge also submits that Wawanesa failed to conduct an examination under oath of any of the actual claimants themselves in order to determine why Wawanesa was initially selected as the recipient of the first application and/or why a subsequent Application for Accident Benefits was sent in to Northbridge.

Finally on the issue of deflection Northbridge argues that it cannot deflect an Application for Accident Benefits where an insured has already demonstrated his or her intention to apply for those accident benefits to another insurer. In other words as the insured had already signed an Application for Accident Benefits and submitted it to Wawanesa how could it be argued that Northbridge in its behaviour was deflecting the claim.

In terms of positions the parties indicated to me at the conclusion of the argument that an offer to settle had been made and that both agreed that offer should be considered by me in my determination.

The first offer was made by Wawanesa in the amount of $7,287.82. It was current in terms of its amount being claimed as of October 21, 2015 and was open for acceptance until November 30, 2015. Mr. Mitchell's position as of August 8, 2016 was that that offer was not open for acceptance as there would be additional costs incurred over the subsequent 8 months.

Mr. Himelfarb served an offer to settle on August 8, 2016. Mr. Himelfarb's position was that Northbridge would pay $10,000.00 all-in towards costs and would also pay any outstanding account as of August 8, 2016 of the Arbitrator. Obviously these offers were not accepted.

Analysis and Award Re: Deflection and Costs that Flow from That

I have reviewed at length the documents counsel provided (Record of the Applicant and Record of the Respondent). I do agree with Mr. Himelfarb that it would have been helpful to have had the oral evidence of both the adjusters. I am not sure that any evidence from the actual claimants would have been helpful. I have also reviewed an extensive Book of Authorities provided by Wawanesa. The principles that I draw from the case law and which I apply in my analysis and award are as follows:

1. The principle that underlies Section 2 of Regulation 283/95 is that the first insurer to receive an Application for Accident Benefits must pay now and dispute later. The rationale for this is obvious. People injured in car accidents should receive statutorily mandated benefits promptly and should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay. (*Kingsway General Insurance Company v Ontario* 2007 ONCA 62 (CanLII) paragraph 19).

2. In priority dispute proceedings the general rule has developed that full indemnity for costs is not appropriate. Generally a partial indemnity is awarded as it accords with the Ontario litigation practice. There are many cases where partial indemnity has been the basis for award in priority disputes. (*State Farm Insurance Company v Dominion of Canada General Insurance Company* private arbitration Arbitrator Bialkowski November 12, 2013 and *Aviva Insurance Company of Canada v Sovereign General Insurance Company of Canada* private arbitration Arbitrator Lee Samis January 27, 2016).

3. Generally speaking once a private arbitration has been commenced by an insurer the insurer responsible for the payment of the claim is exposed to legal costs of the other insurers involved in the arbitration even if the matter is resolved early in the arbitration process. (*Co-operators General Insurance Company v Wawanesa Insurance Company and Chartis General Insurance Company* private arbitration Arbitrator Bialkowski November 15, 2013).

4. Various Arbitrators have determined that with respect to partial indemnity costs the percentage to apply can be anywhere from 60 to 75% of the full amount of the costs incurred. (*Wawanesa Mutual Insurance Company v Markel Insurance Company of Canada* private arbitration Arbitrator Bialkowski March 8, 2012 and *Aviva Insurance Company of Canada v Sovereign General Insurance Company* private arbitration Arbitrator Samis January 27, 2016).

5. On the issue of deflection there was one case provided to me in which costs had been awarded on the grounds that one insurer had deflected the claim. This is the decision of Arbitrator Bialkowski on May 18, 2016 in the case of *State Farm Mutual Automobile Insurance Company v TD Home and Auto Insurance et al.* I have carefully reviewed that case. In that decision it was conceded that TD ought to have forwarded an accident benefit package to the mother of a seriously injured claimant when TD was first approached. There was no doubt on the facts of that file that when TD was first approached that they would have been aware that there were serious injuries and that there was an AB claim to be made. TD claimed that the error was incidental and not part of a systemic strategy. The Arbitrator found that TD deflected the claim but could not conclude on the evidence before him that it was a deliberate attempt. Rather there was simply the fact of deflection and a conclusion that the AB package should have been sent on. He was also able to conclude on the evidence before him that if the package had been sent to TD that it would have been executed and returned to TD and they would have received the first application.

   Having made those findings the Arbitrator concluded that he had the right pursuant to Regulation 283/95 as amended by Regulation 38/10 to sanction TD pursuant to Section 2.1 (7). The Arbitrator therefore ordered that TD would be responsible for the full indemnity costs of the Motor Vehicle Accident Claim

Fund and State Farm as well as the Arbitrator's costs with respect to the proceedings up to that date.

I find that the facts involved in that case are substantially different from the facts of this case. I distinguish that case on the following grounds:

1. Northbridge did send out an Application for Accident Benefits to the 3 claimants;

2. The claimants filed Applications for Accident Benefits to both Wawanesa and to Northbridge;

3. There was no evidence before me that if the letter of December 12th sent out by Northbridge had not included the "deflection terminology" that an Application for Accident Benefits would only have been sent to Northbridge. In fact the facts seem to be to the contrary.

Taking all the above into consideration I have concluded that the letter from Northbridge of December 12th does in fact constitute a deflection. I note that when this claim was initially reported to Northbridge no injuries were reported. Only a property adjuster was involved. I therefore do not find that in the initial first contact that there was any deliberate deflection or otherwise on the part of Northbridge when they did not send out the initial Application for Accident Benefits. Indeed that was not argued by Wawanesa.

However on December 11, 2013 Northbridge was clearly notified through the conversation with Aferdita Raka that both she and her children were injured. While she mentioned that she had her own personal insurance and that she had reported the claim to Wawanesa , Aferdita did not advise the Northbridge adjuster that she had sent in an Application for Accident Benefits to Wawanesa nor did she say that she had received an Application for Accident Benefits from Wawanesa. Therefore in my view the obligation of Northbridge at that point was to send an Application for Accident Benefits for Ms. Raka and her 2 children. That Application for Accident Benefits should not have been accompanied by a letter suggesting that Northbridge was going to be closing its file. Nor should that letter have suggested that in accordance with the priority rules Ms. Raka should be making her claim essentially to Wawanesa although Wawanesa's name was not referred to in the letter. To make matters worse Ms. Maitland was in fact wrong in suggesting to Ms. Raka that her claim more properly fell with another insurer. The fact was that priority rested with Northbridge.

Unfortunately I did not hear any evidence from Ms. Maitland as to what she did or did not intend with respect to this letter. At best it seems Ms. Maitland may have been under the impression that the Raka family had applied for accident benefits to Wawanesa although that is certainly not clear. Without there being any evidence from Ms. Maitland with respect to that belief all I can conclude on the evidence in front of me is that Ms. Maitland was aware that "Ms. Raka's vehicle was in the shop and the claim had been reported to Wawanesa". That did not mean that the Raka family intended to pursue a claim for accident benefits from

Wawanesa. Even if there was that suggestion that did not in my view take away from the obligation of Northbridge to send out an Application for Accident Benefits to the insured and her children and not to provide a letter with wording that clearly was intended, in my view, to make sure the Raka family did not send in an Application for Accident Benefits to Northbridge. In fact Northbridge told them they were closing their file. I therefore find that the letter of December 12th and the actions of Northbridge were contrary to Section 2.1 (5) intended to prevent or stop the applicant from submitting an application for accident benefits to Northbridge and/or to redirect the applicant to another insurer.

The more difficult question is what flows from my conclusion. Are there any costs that Wawanesa incurred that I should award on the grounds that in accordance with Section 2.1 (7) of the Regulation that there were legal fees, adjusters' fees, administrative fees or disbursements that were reasonably incurred as a result of the non-compliance?

In this particular case, considering the very unusual circumstances I do not see that there were any legal fees, adjusters' fees, administrative costs or disbursements that flowed from the deflecting letter of December 12, 2013. By the time that letter was signed the Raka family had already signed "blank" OCF-1s presumably at the request of Hands of Health Wellness Centre. Again Mrs. Raka had signed on behalf of her daughter on November 13, 2013 and Gentrit had signed on November 20, 2013. Mrs. Raka did however sign her own application on December 18, 2013. While Northbridge's letter of December 12th is wending its way to the Raka family the clinic is getting ready to send out signed OCF-1s. They are sent out December 17th, 18th and 19th to Wawanesa. We know Wawanesa sent the AB package on December 4, 2013. That package contained the claim number. The claim number appears on the fax and the documents (OCF-1) sent in by Hands on Health. I therefore must conclude in the absence of any other evidence that certainly by December 17th and likely earlier the Raka family had received the package from Wawanesa, had conveyed that information to Hands on Health who then faxed over the applications. I have no evidence before me whatsoever as to when the deflecting letter from Northbridge was received. I do not feel I can make any assumptions with respect to that. Was it in the hands of the Raka family by December 17th when the Hands on Health faxes were going out? If they had had it in their hands by then would it have made any difference? I suspect not. I therefore conclude that on the evidence before me that even though the letter of December 12, 2013 was clearly an effort to deflect or redirect the Raka's accident benefit claim that it did not in fact result in the Raka's doing anything other than what they planned to do in or around that time and that was to submit their application to Wawanesa.

On top of that I must consider the fact that the effort of Northbridge to deflect the claim was completely unsuccessful. The Raka family, through their paralegal that was retained in early 2015, also sent in Applications for Accident Benefits to Northbridge. These were received on January 15th, 17th and 31st. Therefore even though an effort was made at deflection it was completely unsuccessful. Not only that but both insurance companies failed to communicate effectively with each other with a result that both continued to adjust the claims simultaneously. I therefore find no basis for making an award of costs to Wawanesa even though I have found that there was a deflection. I certainly do not condone Northbridge's letter

and had there been any evidence before me that as a result of the deflection Wawanesa had received the first application and had incurred costs as a result, I would have awarded costs. However that evidence was not before me and in fact the evidence seemed to be to the contrary.

Therefore despite the very able and interesting submissions on the part of counsel for Wawanesa I decline to award any costs partial or substantial ndemnity flowing from the deflection.

Interest:

The difference between the parties with respect to what interest is payable is $341.66. Mr. Mitchell claims that interest should be payable from December 23, 2013 when the first payment for each of the 3 accident benefit claimants was made by Wawanesa up until the date of indemnification on October 13, 2015 for a total of all 3 claimants of $486.69. The calculations were set out in some detail in Mr. Mitchell's factum and there was no dispute taken by Northbridge with respect to the manner in which the interest was calculated. Northbridge disputed the time period for which interest was claimed.

Northbridge submits that if interest is awarded that it should run from April 27, 2015 when they were provided with the information with respect to optional benefits up until the date of indemnification. Their calculations are at $145.03. As I have found that it was not unreasonable for Wawanesa to require an order and/or a release to provide copies of their policy on the issue of optional benefits I am prepared to find that interest should run prior to April 27, 2015. However at the same time I have also found that Wawanesa could have and should have responded to that request earlier. I was appointed in 2014 and an order could have been requested at that time for the production of the certificate of insurance. Northbridge had made its position clear by that time. I am therefore going to award 50% of the interest being claimed. Northbridge will pay to Wawanesa interest in the amount of $243.34.

Costs of the Arbitration:

This then brings me to the question of what costs should be awarded absent the deflection and considering that Northbridge did ultimately accept priority shortly around the time of the first prehearing. Considering that Northbridge did ultimately accept priority shortly around the time of the first prehearing and considering my award with respect to interest.

My concerns with respect to this issue is that the arbitration in this matter really was completely unnecessary had Wawanesa advised Northbridge that there were no optional benefits on the policy. The evidence seemed to be quite clear that if Northbridge had been advised after their first request that there were no optional benefits that priority would have been accepted. Certainly it was accepted with alacrity once that information was provided. However I do not feel that Northbridge was absolutely clear in its initial request on this issue. While Ms. Maitland's note indicated that she was requesting a copy of the Wawanesa policy in

order to determine whether there were optional benefits, her letter to Wawanesa did not in fact state that. One must keep in mind that by the time the letter of Ms. Maitland went on May 2, 2014 requesting a copy of the policy that both insurers were continuing to adjust the file. The only question asked in that letter of May 2, 2014 is "we are continuing to investigate and we ask you provide a copy of the above-noted policy". It is not clear what is being investigated. Is this something related to adjusting the file or priority? The letter could have been clearer. Therefore I do not see any reason why Wawanesa should be deprived of costs commencing in or around August of 2014 when Mr. Mitchell was retained to pursue the priority dispute. The evidence before me does not suggest (at least through the log notes and the documents produced) that there were any discussions between Northbridge and Wawanesa up until that time about what optional benefits were available. There did appear to be some confusion over some provision of releases and the purposes of those releases. However I find that it was not unreasonable for Wawanesa in or around August of 2014 to retain Mr. Mitchell and for Mr. Mitchell to send out a demand for arbitration on September 25, 2014.

Northbridge also raised in their argument that when considering the costs of the arbitration I should consider whether the arbitration arose as a result of the deflection or whether it arose solely because of the priority issue not being completed. Having reviewed all of the evidence and heard submissions on that point I am satisfied that when the arbitration was commenced by Mr. Mitchell that there was no indication that an argument was being made with respect to deflection. It was not raised in any of the materials (Notice to Submit to Arbitration), it was not raised at the prehearing and in fact I only became aware of it as an issue as the costs arbitration approached. I am satisfied that it was not unreasonable for Wawanesa to commence the arbitration but that the reason the arbitration was commenced was because Northbridge had not accepted priority not because there was a claim that a deflection had occurred.

Clearly the arbitration and the dispute itself was extended because information was not exchanged in a timely fashion on the question of whether optional benefits were available or not. This question was at the forefront by the time mid-January of 2015 rolled around. Ms. Maitland sent a letter to Ms. Ditner on January 15, 2015 in which she specifically asks for a copy of the certificate of insurance or declaration in order to confirm that there were no optional benefits. There was no response to this letter from Wawanesa. Mr. Himelfarb submits that he made numerous requests to Mr. Mitchell for a copy of the declaration page to confirm that there were no optionals (see email April 23, 2015). Mr. Himelfarb made it clear that that was the only issue holding up the resolution of the priority dispute. Mr. Mitchell's submissions on this point are that Wawanesa due to privacy reasons was not able to release the optional information/certificate of insurance either without a release from the named insured and/or an order of the Arbitrator. The latter was only requested on April 27th.

I conclude that the issue of priority could have been resolved more quickly had Wawanesa or counsel for Wawanesa responded to Northbridge's request with respect to the optional benefits earlier.

In my view Wawanesa cannot be faulted for taking the position that they will not release confidential information unless there is either an order or release. I am supported in this approach by Arbitrator Bialkowski in his decision of November 12, 2013 in *State Farm Insurance Company v Dominion of Canada*. In that case Arbitrator Bialkowski pointed out that the fact situation before him is one seen regularly. A first party insurer gets information that suggests another insurer may stand in priority but documentation is needed in order to confirm that. However the information is in the hands of the second party insurer who cannot release that information due to PIPEDA concerns. As a result an arbitration is commenced, an order for production is made and then as soon as the production is made the other party accepts priority and the arbitration is withdrawn. That is indeed some of the circumstances that were involved in this case. Arbitrator Bialkowski comments in his decision and I quote:

> "I find that State Farm cannot be criticized for seeking confirmation that Dominion's policy did not provide coverage to the claimant by reviewing the underwriting or broker's file. As a result of PIPEDA restrictions that could only be obtained by an order through the arbitration process."

Arbitrator Bialkowski in that case declined to award costs on a full indemnity scale but rather awarded costs on a partial indemnity scale. I agree with Arbitrator Bialkowski and I did not find that Wawanesa's reliance on issues of confidentiality in not responding to the optional issue should deprive them of costs.

I am therefore prepared to make an award to Wawanesa of the costs of the arbitration. However when making that award for costs I do take into consideration the following:

1. Wawanesa did not seek at an earlier stage from the Arbitrator an order requiring the production of the certificate of insurance relating to the existence of optional benefits;

2. The fact that this case settled in terms of priority within days of the information being provided with respect to the optional benefits;

3. That there was only one very short prehearing;

4. That the amount in dispute (for which indemnification was sought) was $24,000.00;

5. The offers to settle for costs prior to the hearing on costs by Wawanesa of some $7,000.00 and by Northbridge for $10,000.00.

The most difficult part of this claim for Wawanesa now, in my view, is the fact that an offer was made of $10,000.00 for costs. That is in excess of what I am going to be awarding. Mr. Mitchell's bill that was submitted in the amount of some $21,000.00 includes some work that was done for Wawanesa in relation to the actual accident benefit claim of the 3 Raka's. In my

view that should not be included in an arbitral costs award as that in essence is what was being claimed as a result of the deflection. I have also found that this arbitration was not commenced as a result of a deflection but rather was a pure priority dispute and the deflection issue came up later as a basis for arguing increased costs. Wawanesa has been unsuccessful on that issue. When I review his bill and look at the time spent usefully on issues relating to priority I find a reasonable sum for the costs of Wawanesa with respect to commencing the arbitration relating to the priority dispute, dealing with the prehearings, dealing with productions and up until the offer to settle of August 8, 2016 is $5,500.00 with respect to costs, HST of $715.00 plus disbursements of $730.68 for total of $6,945.68.

I therefore award Wawanesa the costs of the arbitration up to the date of the offer to settle of August 8, 2016 in the amount of $6,945.68.

The next issue in terms of costs is who, if anyone, should be awarded costs of the actual cost hearing. There are arguments to be made both pro and against each of the insurers in this matter being awarded costs.

The most telling argument is in favour of Northbridge who made an offer to settle of $10,000.00 prior to the cost hearing proceeding. Northbridge fairly would argue that that offer having not been accepted they should be awarded the costs of the cost hearing alone. In my view Northbridge should be awarded costs with respect to the cost hearing. Northbridge was successful on the deflection issue at least from the point of view that while there was deflection nothing flowed from that in terms of additional costs. However while I feel Northbridge should be given its costs in relation to that hearing I also am concerned that Northbridge's behaviour with respect to the deflection cannot be seen to be condoned. I therefore award costs to Northbridge of the costs hearing but in a reduced amount of $1,500.00. My estimate is that partial indemnity costs for the lengthy submissions made by counsel and a 3 hour cost hearing would have been in the range of $3,500.00.

However with respect to the Arbitrator's costs it is my view that this cost hearing should really never have proceeded. Reasonable offers were made by both parties. Accordingly with respect to the Arbitrator's account I order that that be split 50/50 between Wawanesa and Northbridge.

DATED THIS 23rd day of September, 2016 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP