IN THE MATTER OF an Arbitration under the *Arbitration Act*, 1991
and pursuant to the provisions of Section 268 of the *Insurance Act*
and Ontario Regulation 283/95 thereunder

AND IN THE MATTER OF an Arbitration

BETWEEN:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

CUMIS GENERAL INSURANCE COMPANY

Respondent

MEMORANDUM

Counsel for Security National: A. Sandy Williams

Counsel for Cumis: Kimberly Jossul

AWARD RE COSTS

The parties have come to me to deal with costs. Counsel advise that they have had notice of the request for costs and ask me to deal with it at this time. I have received Mr. Williams' letter of May 8, 2014 and attachments. The attachment is a "Bill of Costs".

The steps taken by the applicant were the most preliminary steps, and the amount of time expended is not extraordinary. A total of 12.7 hours is claimed for lawyer time and 0.5 hours for a clerk.

This expenditure of time represents the time in taking on a new litigation assignment. It addition to taking instructions and reviewing the loss circumstances, counsel would need to evaluate the viability of proceedings, and would need to expend time determining and commencing and serving appropriate proceedings, communicating with counsel, arranging an arbitration, and participating in a prehearing conference. The amounts involved appear quite appropriate for all of those steps.

In this matter the parties launched an arbitration proceeding with respect to a priority dispute. Prior to the arbitration proceeding the legal counsel for Security National had written to the claims adjuster at Cumis and had communicated in various ways with respect to the perceived issue about whether or not a "completed application" had been received in this case. The parties ultimately resolved the issue. But this resolution did not take place until the arbitration was commenced, and a first pre-hearing conference was held. After the first pre-hearing

conference counsel for Cumis made further investigations on a secondary issue with respect to whether or not the Security National policy had been properly cancelled. Upon determining that second issue and evaluation of the main issue about the "completed application" Cumis accepted that they have the highest priority.

So very early in the process the parties have been able to successfully focus on the issues in dispute and bring the matter to an expeditious resolution. This of course is commendable and is in the best interests of all of the parties.

Now the parties' dispute whether or not Security National should be entitled to be paid costs for the legal process that they have undertaken in this matter.

The regulations which provide for these disputes are contained in Ontario Regulation 283/95. Section 9 of that Regulation provides as follows:

> **"[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.**
>
> **[2] The costs referred to in Subsection [1] shall be assessed in accordance with Section 56 of the Arbitration Act, 1991."**

Section 56 of the Arbitration Act provides procedural steps and enforcement steps with respect to costs but does not give any direction for principles to be applied.

I take my direction from the Regulation to be that I should award costs in the circumstances unless I find that there is some reason not to award costs.

I am troubled by the notion that intercompany disputes should be burdened by costs disputes when the insurers are able to come to some relatively expeditious conclusion of the case. These types of disputes involve only insurers. All insurers should expect to in the position of paying costs and in the position of receiving costs in a large number of cases over time. Applying a burdensome process for determination of costs associated with relatively routine transaction simply adds to the aggregate costs sustained by the industry, increases the friction, and delays ultimate resolution of cases. It simply does not seem like a good idea to be encouraging more disputes between insurers.

I am also mindful of Section 3 of the Arbitration Act which provides as follows:

> **"The arbitral tribunal shall decide the dispute in accordance with the arbitration agreement and the contract, if any, under which the dispute arose, and may also take into account any applicable usages of trade."**

I observe from several decades of experience with insurance disputes, that in almost every case insurers have pragmatically agreed to rapid disposition of litigation on a no-cost basis. Any other attitude is extremely rare and usually predicated on some pre-litigation opportunity to avoid the litigation and fair warning to the other prospective litigant. This only makes good business sense and, of course, when we are dealing with disputes between insurers, the business case for this approach is compelling.

Therefore, in accordance with Section 9 of Ontario Regulation 283/95, and based on the known usage in the trade on this point, I would order "otherwise" with respect to costs claimed, in the

absence of a missed opportunity to avoid litigation. In such circumstances I would order no costs to the parties.

In this case, however, there was a missed opportunity. In July 2013 counsel for Security National put forward his position on the completed application issue. He put forward case law. There was discussion at that time. It seems that Cumis did not accept that position at the time and it was necessary for Security National to go forward into the arbitration proceeding, have a pre-arbitration hearing, and thereafter re-evaluate the issue. That history justifies an award of costs, to the extent the costs could be attributed fairly to the additional steps.

The additional steps involved would require the commencement of arbitration proceedings, the arrangements for an arbitration hearing, preparation for and participation in the arbitration pre-hearing, and associated documentation with that process. The arbitration pre-hearing itself was probably about half an hour. The commencement and scheduling activities would have taken a modest amount of time in a well-organized office where these types of proceedings are frequently encountered. In my view a reasonable amount of costs to be allocated to these steps is $500.00, inclusive of HST.

I decline to award costs for the other activities with respect to the initial retention, matter review, research, client communications and so forth. For the reasons set out, I do not consider it in accordance with the usage in the trade nor do I consider that there is a compelling policy reason to engage the parties in cost negotiations and disputes absent special circumstances such as "missed opportunities" for resolution of the identified issues. I hasten to add that the early disposition by the parties is an important feature. Protracted proceedings might be viewed differently.

Therefore I order that $500.00 in costs should be paid by Cumis to Security National. Cumis will have responsibility for the arbitrator's account.

Date: May 9, 2014