

**IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

THE WAWANESA MUTUAL INSURANCE COMPANY

Applicant

and

**NORTHBRIDGE COMMERCIAL INSURANCE CORPORATION (FORMERLY
MARKEL INSURANCE COMPANY OF CANADA)**

Respondent

AWARD

Heard: August 18, 2014

Counsel:

Tim Gillibrand for the Applicant, The Wawanesa Mutual Insurance Company

J. Claude Blouin for the Respondent, Northbridge Commercial Insurance Corporation

SCOTT W. DENSEM: ARBITRATOR

Introduction:¹

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a priority dispute under Section 268 of the *Insurance Act* for the payment of *Statutory Accident Benefits*(SABS).

The issue in this case is whether the Respondent (“Northbridge”) is responsible to reimburse the Applicant (“Wawanesa”) for \$6,000.00 in funeral expenses which Wawanesa paid in response to a Death and Funeral Benefits Application (OCF 4) submitted to Wawanesa following the death of Wawanesa’s named insured, Amrik Singh. The OCF 4 claimants were Balwinder Kaur (married spouse), Jagwinder Singh (son), and Sukhjinder Singh (son).

Amrik Singh was the occupant of a truck insured by Northbridge when it was involved in an accident in California on June 7, 2008. Amrik Singh was killed in the accident. The truck was being operated by Sukhjit Lakhian Kaur (“Sukhjit Kaur”). Amrik Singh was a deemed named insured on the Northbridge policy.

Sukhjit Kaur and Amrik Singh were parents of a daughter, Simian Kaur. Sukhjit Kaur and Simian Kaur resided in the same dwelling as Amrit Singh and the claimants Balwinder Kaur, and Jagwinder Kaur.

For the purposes of this arbitration, the parties agreed that both Balwinder Kaur, and Sukhjit Kaur were spouses within the meaning of the section 224 (1) *Insurance*

¹ The facts set out in this introduction are taken from the Agreed Statement of Facts, or from the written and oral submissions of the parties on matters where the facts are not disputed.

Act definition applicable to the SABS. As such, they were both entitled to apply for and receive the Death Benefit pursuant to section 25 of the SABS.

In response to the OCF 4 submitted by Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh, Wawanesa ultimately paid \$22,500.00 for Death Benefit (section 25) SABS, and \$6,000.00 for Funeral Benefit SABS (section 26) for Amrik Singh's funeral expenses that were paid by Amrik Singh's son, Sukhjinder Singh.

Sukhjit Kaur had previously submitted an OCF 4 to Northbridge also seeking payment of funeral expenses in connection with Amrik Singh's death. Northbridge paid \$6,000.00 to Sukhjit Kaur in response to this OCF 4, before Wawanesa made the payments set out in the preceding paragraph.

Before either insurer had made any SABS payments, Wawanesa commenced a priority dispute with Northbridge claiming reimbursement for Death Benefit and Funeral Benefit SABS it would be required to pay to Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh. Ultimately Wawanesa quantified the claim and advised Northbridge that it intended to pay the claimants \$28,500. Northbridge accepted priority for the claim and paid Wawanesa \$22,500.00 for the Death Benefit part of the claim. Northbridge declined to reimburse Wawanesa for the \$6,000.00 in funeral expenses claimed by Wawanesa on the grounds that Northbridge had paid \$6,000.00 to Sukhjit Kaur for funeral expenses, arguing it should not be responsible to pay the funeral expenses twice.

Wawanesa took the position that Northbridge had paid \$6,000.00 to Sukhjit Kaur for funeral expenses unnecessarily because she had not incurred these expenses, and

that this unnecessary payment should not disentitle Wawanesa to reimbursement for the funeral expenses it had to pay to Sukhjinder Singh.

Evidence

The arbitration proceeded on the basis of an Agreed Statement of Facts, written submissions from the parties, and oral submissions from the parties.

In addition to the Agreed Statement of Facts, the following documents were made exhibits and entered into evidence at the arbitration hearing:

- 1) Exhibit 1: Arbitration Agreement executed August 1, 2014.
- 2) Exhibit 2: Agreed Statement of Facts executed August 1, 2014.
- 3) Exhibit 3: Joint Document Brief, Tabs 1 to 19 A-E.
- 4) Exhibit 4: Transcript of the Examination under Oath of Sukhjinder Lakhian Kaur, June 1, 2009.
- 5) Exhibit 5: Letter dated August 15, 2008 from Carranza Barristers & Solicitors to Wawanesa Insurance.

The Issues

- 1) Is Northbridge required to reimburse Wawanesa with respect to the \$6,000.00 Wawanesa paid for funeral benefits arising from the death of Amrik Singh in a motor vehicle accident occurring June 7, 2008?

2) If the answer to issue 1 is “yes”, what is the amount of interest owing upon the amount owing, if any?

3) What is the quantum of costs and which party has the burden of payment?

Analysis

I believe that it is helpful for this case to construct a timeline of events and documents. I have set out below the timeline that I have constructed:²

1) June 7, 2008: Motor vehicle accident resulting in the death of Amrik Singh.³

2) June 9, 2008: Invoice from Arrowhead Aftercare Mortuary & Crematory.⁴

3) June 11, 2008: Letter from Sukhjinder Singh to Arrowhead Aftercare Mortuary & Crematory undertaking to pay account and providing Visa information.⁵

4) June 12, 2008: Invoice from Benisasia Funeral Home Inc.⁶

5) June 14, 2008: Visa payment by Sukhjinder Singh of part of Benisasia Funeral Home Inc. Invoice.⁷

6) June 16, 2008: Invoice from Riverside Cemetery & Crematorium noting Sukhjinder Singh as the customer.⁸

² I have not included in the timeline every event or document from the evidence on this arbitration, only those that I consider relevant to deciding the issue between the parties.

³ Exhibit 2, paragraph 3.

⁴ Exhibit 3, tab 16 B.

⁵ Exhibit 3, tab 18 D.

⁶ Exhibit 3, tab 16 I.

⁷ Exhibit 3, tab 18, paragraph 6.

⁸ Exhibit 3, tab 16 C.

- 7) June 18, 2008: MasterCard payment by Sukhjinder Singh of the balance of Benisasia Funeral Home Inc. invoice.⁹
- 8) July 3, 2008: OCF 1 SABS application, and OCF 4 Death and Funeral Benefits Application submitted by Sukhjit Kaur to Northbridge.¹⁰
- 9) August 15, 2008: Letter from Carranza Barristers to Wawanesa advising of retainer on behalf of Sukhjit Kaur, and enclosing, *inter alia*, Kaur's OCF 1 and OCF 4 applications which had been previously submitted to Northbridge.¹¹
- 10) September 2, 2008: OCF 4 Death and Funeral Benefits application submitted to Wawanesa (received September 29, 2008) by Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh.¹²
- 11) September 8, 2008: OCF 1 SABS application submitted to Wawanesa (received September 29, 2008) by Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh.¹³
- 12) October 1, 2008: Letter from Wawanesa to Carranza Barristers advising that SABS claims on behalf of Sukhjit Kaur had first been submitted to Northbridge, and that Northbridge should deal with those claims.¹⁴
- 13) December 10, 2008: Letter from Carranza Barristers to Northbridge enclosing a copy of Sukhjit Kaur's OCF 4 Death and Funeral Benefits application together with the invoices described in paragraphs 2, 4, and 6 of this timeline.¹⁵

⁹ Exhibit 3, tab 16, paragraph 6.

¹⁰ Exhibit 3, tabs 16 D & E.

¹¹ Exhibit 5.

¹² Exhibit 3, tab 17 B.

¹³ Exhibit 3, tab 17 A.

¹⁴ Exhibit 3, tab 1.

- 14) December 17, 2008: Letter from Wawanesa to Northbridge, and Notice to Applicant of Dispute Between Insurers (“NDBI”) in reference to the Death and Funeral Benefit claims of Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh¹⁶
- 15) December 24, 2008: Northbridge prepares a cheque payable to Sukhjit Kaur the amount of \$6,000.00 payment of the funeral expenses she had applied to recover.
- 16) January 6, 2009: Letter from Carranza Barristers to Northbridge following a telephone conversation of that date, confirming that Sukhjit Kaur had paid all of the funeral expenses for Amrik Singh.¹⁷
- 17) Date unknown (but it would appear to be sometime in January, 2009): Northbridge sends a cheque payable to Sukhjit Kaur, and an OCF 9 advising that based on the representation of Carranza Barristers (January 6, 2009 letter) indicating Sukhjit Kaur had incurred all the expenses associated with the funeral of Amrik Singh she was being reimbursed in that amount by way of a December 24, 2008 Northbridge cheque.¹⁸
- 18) August 20, 2009: Letter from Samis& Company (counsel for Wawanesa) to Blouin Dunn (counsel for Northbridge) enclosing Notice Demanding Arbitration.¹⁹
- 19) May 3, 2010: Letter from Samis& Company to Blouin Dunn setting out the details of proposed payments by Wawanesa to settle the SABS claims of BalwinderKaur,

¹⁵ Exhibit 3, tab 16 H.

¹⁶ Exhibit 3, tabs 2 & 3.

¹⁷ Exhibit 3, tab 16 G.

¹⁸ Exhibit 2, paragraph 15.

¹⁹ Exhibit 3, tab 5.

Jagwinder Singh, and Sukhjinder Singh, including the payment of \$6,000.00 to Sukhjinder Singh for the Funeral Benefit.²⁰

20) May 4, 2010: Letter from Blouin Dunnto Samis& Company advising that Northbridge had already paid \$6,000.00 for the Funeral Benefit (to Sukhjit Kaur), and it would not consider reimbursement of this amount.²¹

21) June 23, 2010: Letter from Faust Law Firm (counsel for Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh) responding to message from Samis& Company advising the Funeral Benefit had already been paid to Sukhjit Kaur, confirming that funeral expenses were paid by Sukhjinder Singh, and demanding payment of same from Wawanesa.

22) July 14, 2011: Letter from Blouin Dunn to Samis& Company enclosing Northbridge's cheque for \$22,500.00 to reimburse Wawanesa for the Death Benefits paid by Wawanesa, not including the \$6,000.00 Funeral Benefit.

23) July 25, 2011: Letter from Samis& Company to Faust Law Firm enclosing Wawanesa's cheque for \$28,500.00 representing payment of Death Benefits, and the Funeral Benefit to Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh.

24) January 6, 2014: Affidavit of Sukhjinder Singh swearing that he had paid the accounts submitted by the service providers in connection with the funeral expenses of his father, Amrik Singh.²²

²⁰Exhibit 3, tab 7.

²¹Exhibit 3, tab 8.

²²Exhibit 3, tab 18.

Wawanesa's position is that it properly paid the Funeral Benefit to Sukhjinder Singh. A SABS application was submitted to Wawanesa claiming this benefit. The application was supported by sufficient evidence that the funeral expenses were incurred by Sukhjinder Singh. Wawanesa was obliged by Regulation 283/95 to pay Sukhjinder Singh the Funeral Benefit, and seek reimbursement from the priority insurer. Since Northbridge accepted priority for the claim it is obliged to reimburse Wawanesa the \$6,000.00 in Funeral Benefit paid.

Wawanesa submits that the fact Northbridge paid \$6,000.00 to Sukhjinder Kaur in response to her application for payment of the Funeral Benefit does not relieve Northbridge of the obligation to reimburse Wawanesa for the \$6,000.00 paid by it to Sukhjinder Singh for that benefit.

Wawanesa argues that subsection 26 (2) of the SABS makes it clear that the insurer must pay funeral expenses which have been incurred on behalf of the deceased insured person. The maximum payable under the subsection is \$6,000.00. Therefore, the insured person or persons entitled to be reimbursed for funeral expenses paid are the insured person or persons who have incurred those expenses, up to a \$6,000.00 maximum.

Wawanesa submits that the evidence in this case is clear that Sukhjinder Singh incurred funeral expenses on behalf of his father, Amrit Singh in excess of \$6,000.00. Conversely, Wawanesa argues that there is no evidence to support the conclusion that Amrik Singh's common law spouse, Sukhjinder Kaur, incurred any funeral expenses on his behalf.

Wawanesa emphasizes that Northbridge paid the Funeral Benefit to Sukhjit Kaur in the absence of sufficient evidence that she was entitled to receive the Benefit. The evidence indicates that in deciding to make this payment Northbridge apparently relied upon the same documents that had been submitted to Wawanesa which confirm that Sukhjinder Singh paid the funeral expenses. Wawanesa points to the fact that it would appear these documents were sent by Wawanesa to Sukhjit Kaur's counsel, Carranza Barristers & Solicitors, who then resubmitted them to Northbridge.²³

Northbridge obtained an assurance from Carranza Barristers & Solicitors that Sukhjit Kaur had paid the funeral expenses detailed by the above-mentioned documents. There were no additional documents provided however, that would support the conclusion that Sukhjit Kaur had paid any funeral expenses.

Wawanesa submits that whether Northbridge's decision to pay the Funeral Benefit to Sukhjit Kaur was based on mistake, lack of due diligence in investigating the claim, or on misrepresentation, none of these grounds provide Northbridge with a defence to Wawanesa's claim for reimbursement. They may provide a basis for Northbridge to seek reimbursement from Sukhjit Kaur. Wawanesa points out that section 47 of the SABS provides a potential remedy to Northbridge in this regard. That section requires an insured person to repay an insurer where a SABS benefit has been paid as a result of a mistake by the insurer, or the insured, or in the case of wilful misrepresentation or fraud.

²³See Exhibit 3, tab 1, and Exhibit 2, paragraph 13.

Northbridge does not vigorously contest the evidence indicating that Sukhjinder Singh incurred the funeral expenses on behalf of his father. Northbridge also does not take the position that there is evidence proving that Sukhjit Kaur directly incurred funeral expenses on behalf of her deceased common law husband.

Instead, Northbridge argues that it acted reasonably in the circumstances in deciding to pay the Funeral Benefit to Sukhjit Kaur. Northbridge relies heavily upon the written assurance that it received from Ms. Kaur's counsel supporting her claim for reimbursement.

With respect to this argument, I can understand how in the circumstances Northbridge came to the conclusion that it was appropriate to pay the Funeral Benefit to Sukhjit Kaur.

Northbridge had received from Ms. Kaur's counsel Ms. Kaur's OCF 4 application enclosing the funeral expense invoices that had been submitted to Wawanesa. Even though the invoices themselves did not confirm payment by Ms. Kaur, when they followed up with Ms. Kaur's counsel they were given a written assurance that Ms. Kaur had paid these funeral expenses.

It must be remembered that at this point Wawanesa had not made any payment for the funeral expenses, or death benefits. Wawanesa had served a NBDI on Northbridge in respect of the Death Benefit, and Funeral Benefit claims made by Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh. A careful review of the correspondence accompanying the NBDI does not confirm that any payment had been made by Wawanesa in respect of these claims, only that Wawanesa wished to hear

from Northbridge with respect to, “...any amounts paid on your behalf with regard to this claim.”

Indeed, Wawanesa did not make any payment to Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh for Death Benefits, and Funeral Benefits until July 14, 2011, a date long after Northbridge had paid the Funeral Benefit claim submitted to it by Sukhjit Kaur.

The evidence suggests that up until July 14, 2011, even Wawanesa appears to have been uncertain as to who was entitled to be paid the Funeral Benefit. This is demonstrated by the fact that when Wawanesa received Northbridge’s response (declining to pay the Funeral Benefit twice) to its demand to be reimbursed for its proposed payments to Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh, Wawanesa messaged counsel for Balwinder Kaur, Jagwinder Singh, and Sukhjinder Singh advising that the Funeral Benefit had already been paid by Northbridge to Sukhjit Kaur. It was only after receipt of a letter from counsel indicating the matter would be litigated if the Funeral Benefit was not paid to Sukhjinder Singh, that Wawanesa paid the Funeral Benefit to Sukhjinder Singh.

Based on the evidence, I conclude that Northbridge’s payment of the Funeral Benefit to Sukhjit Kaur was made as a result of a mistake of fact on the part of Northbridge. It mistakenly concluded, perhaps reasonably so, given the written assurance from Ms. Kaur’s counsel, that Ms. Kaur had paid the funeral expenses of Amrik Singh.

To decide the issue before me, it is not necessary for me to inquire further into the reasons for this mistaken conclusion. Even though I have some sympathy for Northbridge's position that it was not unreasonable for it to have paid the Funeral Benefit to Sukhjit Kaur, I am compelled to agree with Wawanesa's position that it is irrelevant to Wawanesa's claim against Northbridge in a priority dispute under section 283/95 whether Northbridge believed it had reasonable grounds to pay the Funeral Benefit to Sukhjit Kaur. I am of the opinion that this does not provide a defence to Northbridge respecting Wawanesa's priority dispute claim.

Northbridge is the self-acknowledged section 268²⁴ priority insurer. Wawanesa has satisfied the requirements of regulation 283/95 in advancing the priority claim. It has done so in timely fashion. The claim comes within the SABS benefits claims for which there is entitlement to reimbursement, and adequate evidence has been put forward establishing the validity and quantum of the claim.

Therefore, the reasonableness of Northbridge's mistaken belief that Sukhjit Kaur had paid the funeral expenses of Amrik Singh is not a sufficient reason to deny Wawanesa's claim for reimbursement of the \$6,000.00 paid to Sukhjinder Singh for the Funeral Benefit. It is not a necessary condition for my conclusion, but Northbridge may have recourse under section 47 of the SABS to pursue reimbursement of its payment to Sukhjit Kaur for the Funeral Benefit should it be so advised.

Northbridge's counsel also advanced a creative argument that Sukhjit Kaur had "incurred" funeral expenses on behalf of her late, common law husband, but not

²⁴ *Insurance Act*, R.S.O. 1990, c. I.8.

because she paid money directly to any of the funeral service providers. It was submitted that because Sukhjit Kaur contributed to the financial well-being of the entire family while Amrik Singh was alive, the value of that contribution should be taken into account upon his death so that she is deemed to have “incurred” the expenses associated with Amrik’s Singh’s death.

Counsel relied upon evidence set out in the Examination under Oath of Sukhjit Kaur²⁵ to lay the foundation for this financial contribution argument. I should note here that counsel for Wawanesa objected to the admission into evidence of this transcript. The essence of the objection was essentially a fairness argument. Counsel submitted that the examination was conducted in the absence of any representative or counsel from Wawanesa, and as such Wawanesa had no opportunity to question Ms. Kaur, or test the reliability of any of her evidence that might be favourable to Northbridge’s position.

I permitted the transcript to be made an exhibit, exercising my discretion under the *Arbitration Act* which allows arbitrators a much broader latitude for the admission of documents as evidence than might be the case in a Superior Court trial. For the reasons which follow however, the argument over the admissibility of the transcript is rather academic.

Counsel for Northbridge pointed out various passages in the transcript which confirm that Sukhjit Kaur made contributions to the financial well-being of Amrik Singh and his family. I will make brief reference to some of the points. Ms. Kaur owned,

²⁵Exhibit 4.

serviced and insured the tractor that she and Amrik Singh used when they drove on their long distance trucking operations. They pooled their financial resources to operate the business, the proceeds of which found their way in some measure into the common family financial resources. Ms. Kaur testified that she made other contributions to the family including purchasing groceries and performing household work.

For the purposes of addressing Northbridge's argument, I will accept for discussion purposes that the evidence is sufficient to demonstrate a financial contribution by Sukhjit Kaur to the Amrik Singh family unit.

I am not persuaded however, that such a financial contribution can be considered when one is determining whether funeral expenses have been incurred in respect of an insured person who dies as a result of an accident.

Our law mandates an expansive interpretation of the word "incurred" where coverage under the SABS for an insured is under consideration. In *Monks v. ING*²⁶ the Court of Appeal approved of the broad definition of the word "incurred" for SABS purposes established in *Belair Insurance Co. v. McMichael*.²⁷

Speaking for the court, Justice Cronk stated (at paragraph 49):

I conclude that an insured...need not actually receive the items or services or spend the money or become legally obligated to do so. It is sufficient if the reasonable necessity of the service or item and the amount of the expenditure are determined with certainty before the end of (the specified time limit under the applicable benefits schedule).

²⁶2008, ONCA 269 (CanLII)

²⁷(2007), 86 O.R. (3d) 68, 2007 O.J. No 1972 (Div. Ct.).

The case before me is distinguishable however, from the situation in *Monk v. ING* and *Belair v. McMichael*. In those cases the focus was on whether it was necessary for the insured person to have actually paid for or legally committed to pay for a service that was deemed reasonable and necessary for the insured person to have, to conclude that the expense for the service had been incurred by the insured person. The court was concerned not to deprive the insured person of the benefit of the required service simply because the insured person did not have the funds to pay for it at the time it was required.

In the case before me, Sukhjit Kaur did not pay or commit to pay for the funeral services for Amrik Singh, but to the extent that the funeral services were a benefit to Sukhjit Kaur as a family member and an insured person, she received the benefit of those services. They were performed by the service providers and fully paid for by Sukhjinder Singh. Unlike the claimants in *Monk v. ING*, and *Belair v. McMichael*, Sukhjit Kaur was not faced with a situation of having to make an immediate or future financial commitment in respect of the services, failing which she would not receive the benefit of the services. Once Sukhjinder Singh had paid the service providers for the funeral services, there was no funeral expense for Sukhjit Kaur to incur, and the benefit of the services had been received.

I am also of the opinion that the interpretation of section 26 (2) submitted by Northbridge places much too great a strain on the language of the section to justify its application on the grounds of promoting an expansive interpretation of coverage language in the SABS. The language of the section clearly states that the funeral

benefit shall pay for “...funeral expenses incurred”.²⁸ Applying statutory interpretation rules, in my view the plain meaning of this phrase means that the expenses for which the funeral benefit is intended to compensate must be connected with the deceased insured person’s funeral.

Although the concept of *quantum meruit*, or the valuation of such activities as unpaid household labour have a place in the SABS, for example, in deciding dependency, in my view the wording of section 26 (2) is quite specific. It is not expansive enough to make the contribution by Sukhjit Kaur to the operation of the trucking business with Amrit Singh, and to sustaining the Amrit Singh household, “funeral expenses” as intended by the section.

Conclusion

- 1) Northbridge is required to reimburse Wawanesa with respect to the \$6,000.00 Wawanesa paid for funeral benefits arising from the death of Amrik Singh in a motor vehicle accident occurring June 7, 2008.
- 2) Wawanesa is entitled to interest on \$6,000.00 calculated in accordance with section 128 of the *Courts of Justice Act* commencing July 25, 2011.
- 3) Wawanesa, as the successful party, is entitled to recover from Northbridge its arbitration costs, including its share of the arbitrator’s fees and disbursements. Should the parties be unable to agree on the quantum of costs, or if there are other matters in connection with the quantum of costs about which the parties wish to make

²⁸Underlining added.

submissions, I invite them to contact my Coordinator to schedule a telephone conference to discuss arrangements to deal with the costs issue.

Dated at Toronto, this 28th day of August, 2015

Scott W. Densem, Arbitrator