

**SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation: *Motiontek Productions v. Northbridge General Insurance Corporation,*  
2019 NSSM 66**

**Date:** 2019-12-06

**Docket:** SCCH 490481

**Registry:** Halifax

Between:

Motiontek Productions and Stojan Stan Bioksic

*Claimants*

- and -

Northbridge General Insurance Corporation, Gateway Insurance Brokers Ltd.,  
and 45 North Broadcast Group Inc.

*Defendants*

**Adjudicator:** Eric K. Slone

**Heard:** In Halifax, Nova Scotia on October 29, 2019

**Appearances:** Stojan Stan Bioksic for the Claimants

John Boyle, for the Defendant Northbridge General Insurance Corporation

David Dexter, for the Defendant Gateway Insurance Brokers Ltd.

Lindsay Cuvilier, for the Defendant 45 North Broadcast Group Inc

**BY THE COURT:**

[1] The Claimant Stojan Stan Bioksic (“Bioksic”) is the principal of Motiontek Productions (“Motiontek”), based in Toronto. Their business is supplying video services to the film and broadcast industries, sometimes with Bioksic behind the camera and sometimes as a renter of high-end equipment for others to use. It was in the latter capacity that the incidents giving rise to this

claim arose.

[2] The Defendant 45 North Broadcast Group Inc. (“45 North”) is the company through which Charles (Chuck) Calder carries on a video services business in Atlantic Canada. In 2016 and again in 2017 Calder had a need to rent an expensive and highly specialized video lens, a Canon HJ40x10 model, which has a value in the tens of thousands of dollars. He arranged to rent same from Motiontek.

[3] The Defendant, Northbridge General Insurance Corporation (“Northbridge”), is the company which supplied 45 North with insurance coverage for the lens, via a rider in its main insurance policy. Gateway Insurance Brokers Ltd. (“Gateway”) was the broker that arranged for the insurance.

[4] To make a long story short, the lens was lost (likely stolen) in transit in or about early September 2017, while in the care and control of a commercial courier company. The Claimants expected that 45 North’s insurance would cover the lens’s replacement, as well as consequential costs. It turned out to be not so simple. For reasons which I will go into later, Northbridge denied coverage though it eventually made a partial settlement with 45 North, which in turn made a payment of \$66,000.00 to Motiontek in early February 2018. The insurance proceeds provided \$40,000.00 while Mr. Calder was obliged to come up with the rest of the funds from his own resources.

[5] The Claimants believe that the \$66,000.00 fell short of their actual losses by \$10,000.00 which they seek to recover in this claim.

### **The case against Gateway**

[6] The claim against Gateway has no arguable basis in fact or law, and I already ordered that it be dismissed on the day of the hearing. The Claimants added Gateway in an abundance of caution, believing that there was a possibility that Northbridge might deny that it provided coverage altogether. That is not the case. Northbridge denies responsibility for the claim but does not deny the authenticity of the policy. There is no reason to hold the insurance broker responsible for anything that it did, or failed to do as, essentially, a middleman.

### **The case against Northbridge**

[7] The case against Northbridge must also be looked at closely. The Claimants must somehow bring themselves within the terms of the policy to succeed in any direct claim against the insurer.

[8] The Claimants were careful enough to require that 45 North carry insurance but did not pay close enough attention to the details of that insurance.

[9] The same lens had been rented to 45 North almost exactly a year before, in September 2016. What 45 North procured at that time for the Claimants' benefit was a Certificate of Liability Insurance dated September 23, 2016, which confirmed that 45 North had obtained a rider to its general liability policy covering the lens for a value of \$65,000.00. The wording of the endorsement was, simply:

Lens valued at \$65,000. The model is a Canon HJ40x10.

[10] The certificate showed that the policy was effective September 25, 2016 and expired on the same date in 2017. Had the Claimants properly turned their mind to the document, or made any inquiries, they would have understood that this expiry date concerned the liability policy as a whole, which covered vehicles and other aspects of the 45 North operation. It had little if anything to do with the rider concerning the lens. 45 North was not insuring the lens for any more time than it was actually planning to use the lens. Logically, it asks, why would it continue to carry insurance on an item that it did not own for a period longer than the item would be in its possession?

[11] As such, a year later that Certificate was meaningless. Indeed, in connection with the second (and ill-fated) rental, 45 North supplied the Claimants with a new Certificate dated August 16, 2017. It contained a bit more detail concerning the insurance on the lens. It contained the following:

With respect to the leasing of equipment to 45 North Broadcast Group Inc. for the period of August 21, 2017 to August 29, 2017. Fujinon lens. Canon lens is \$62,000, Sachtier Tripod and head, \$11,500, Sony PDW-F800 \$45,000. Small Home Depot monitor \$2,250 with power options. Sony RM- B150 \$2,200 with 2 cables.

[12] That Certificate also indicated that the expiry date of the policy was 09/25/2017.

[13] Northbridge takes the position that the expiry date of the policy is irrelevant to the situation concerning the Claimants. What is relevant is the reference to “the period of August 21, 2017 to August 29, 2017.” That is the period during which the Claimants’ equipment was insured.

[14] The evidence of Chuck Calder was that though he was finished with the equipment on the 29<sup>th</sup> of August 2017, he was not actually able to pack it up and ship it back to the Claimants via courier until August 30, 2017. It was also Mr. Calder’s evidence that the equipment was all there, intact and in perfect condition when he sent it off via courier on August 30, 2017.

[15] Logically, the loss occurred sometime between August 30, 2017 and September 6, 2017, when the equipment (minus the missing lens) was received by the Claimants.

[16] I cannot accept the Claimants’ position that anything shown on either Certificate provides him with direct coverage from Northbridge. The 2016 Certificate was no longer applicable, as it was clearly superseded by the 2017 Certificate.

[17] In retrospect, one must conclude that the coverage that 45 North arranged was too restrictive. It allowed for no margin of error concerning the dates for which 45 North was responsible. I am sure that neither Mr. Calder nor Mr. Bioksic paid a lot of attention to what was written on the Certificate, but their own inattentiveness does not assist either of them.

[18] On a strict interpretation, Northbridge’s responsibilities concerning this equipment came to an end on August 29, 2017. Certainly vis-a-vis its own client, Northbridge had an arguable case for denying coverage altogether, though it may have had an equally valid business case for making the settlement that it did.

[19] However, vis-a-vis the Claimants, I do not see any pathway to legal liability and the claim against Northbridge must be dismissed.

### **The case against 45 North**

[20] The legal case against 45 North is theoretically straightforward. There was a contract for rental of the equipment, with (I would suggest) an implied duty to return the equipment intact and in reasonable condition. It could also be

seen as a contract of “bailment” where the “bailee” (45 North) undertook the duty to safeguard the equipment while the items were under its control.

[21] What is still to be determined, however, is the extent of the losses that the Claimants have proven.

[22] The damages initially claimed by the Claimants were set out in an invoice dated January 24, 2018, which listed:

replacement of the lens	\$52,000.00
“cross-rentals” for 3 months	\$15,000.00
discount for August 2017 rental	(\$1,000.00)
HST	\$8,580.00
Total	\$74,580.00

[23] This loss of \$8,580.00 (allowing for the recovery of \$66,000.00) was amended to \$10,000.00 by the time the Claim was issued. The Claimant says that he had other losses, including lost rental opportunities, which he rounded up to \$10,000.00.

[24] The referred-to cross-rentals involve an arrangement that the Claimants made with another company (Joe Sutherland) to rent that company’s lens, which the Claimants could then make available to its own customers. The nominal charge for that cross-rental was \$5,000.00 per month. When asked to show some documentation to verify that charge, Mr. Bioksic explained that no actual money changed hands. The \$5,000.00 per month was applied as a credit to other transactions between the Claimants and Sutherland, who do regular business with each other, with money flowing in both directions depending on who is providing the service (or rental) to whom.

[25] The other claimed losses were a bit more difficult to pin down. The most concrete evidence was some email communication suggesting that there was some interest in renting the lens during a time when the Claimants did not yet have the cross-rental available. The Claimants, being unsure if they would have a lens to rent out, had to decline the opportunity.

[26] Counsel for the Defendant 45 North raised a number of defences to the

additional damages claimed. Some of these are easily disposed of. For example, the argument is made that the Claimants achieved a “betterment” by getting a brand-new lens in the exchange. While betterment may apply when replacing an item that has depreciated over time, the evidence here does not show that the lost lens was in anything other than perfect condition. There is no evidence that the Claimants are any better off.

[27] The other argument which I easily dismiss is mitigation. Counsel suggested that the Claimants could have pursued a lens in the second-hand market, and potentially saved some money. I accept Mr. Bioksic’s evidence that the market for these lenses is extremely limited and that there simply were none available in North America. I also accept his explanation that it would have been risky to try to buy a second-hand lens in Europe, because of the possibility of hidden defects and the lack of recourse against a private vendor. Buying a new one with a full warranty from Canon was reasonable and responsible. I find that there was no failure to mitigate.

[28] The arguments that are not so easily disposed of concern the lack of proof of the losses, as well as the issue of HST.

[29] The HST point is this: when insurance pays for a lost item to a commercial party that is itself responsible to charge HST, the insurer does not have to pay the HST on that item. There is clear authority from CRA’s own website that the loss is covered net of GST/HST and the insured person can recover the tax paid by claiming an input credit.

[30] To use the example here, the cost of the replacement lens was \$52,000.00 plus HST, which for the Claimants (in Ontario) would have been 13% or \$6,760.00, for a total of \$58,760.00. An insurer paying the claim would only have paid the Claimants \$52,000.00, and upon the replacement of the lens for \$58,760.00 the Claimants would have been entitled to claim an input credit for the \$6,760.00, which would either generate a refund or otherwise reduce the HST being remitted. Assuming for sake of argument that the Claimants elected to accept the insurance payout and not replace the lens, they would have been able to keep the \$52,000.00. They would not get the extra HST money.

[31] Counsel for 45 North says that her client should not have to pay the HST.

[32] The wrinkle here is that 45 North is not an insurer. The HST rules refer to settlement of an insurance claim.

[33] However, to complicate the matter, part of the total \$66,000.00 that 45 North was paying was Northbridge's \$40,000.00 insurance settlement.

[34] Mr. Bioksic appears to be convinced that he is not entitled to any relief for the HST that he paid on the new lens. I am not convinced that he is correct. Although he created an invoice directed to 45 North for the lens and associated costs, that was not really the nature of the transaction. He was not selling the lens to 45 North. The losses that he was charging to 45 North were in the nature of damages. When the Claimants purchased the new lens, they would have been entitled to claim the input credit for the HST on that lens. I am not convinced that the Claimants were obligated to charge HST on the damages that they suffered. At the very least, the \$40,000.00 part of the payment by 45 North ought to have been considered as insurance proceeds. Hopefully, the Claimants can go back to the HST Authorities and straighten out their situation, but the bottom line is that damages must be proved, and I am not convinced that the HST on the new lens is a recoverable loss.

[35] The other aspect of the damages that is open to question concerns whether or not the \$15,000.00 for cross renting the Sutherland lens has been adequately proved. There is scant documentation. There is a written statement from Joe Sutherland where he states that his company "... did however agree to and received cross-rentals of equipment from Stan Bioksic, the proceeds from which were used to retire his outstanding debt of \$15,000." What I understand this to mean is that value was exchanged in return for the lens. I generally found Mr. Bioksic to be credible, and I consider this loss to be proved.

[36] I also reject the argument that the Claimants could have bought the new lens earlier than they did, and thus saved money on cross-rentals. It was by no means clear that they could or should have moved more quickly, given the complexity of the situation and the uncertainties that they were encountering.

[37] The loss connected with missed rental opportunities is also scantily documented, but I can accept that there was some loss which I assess nominally at \$500.00.

[38] Totalling up the Claimants' damages, we arrive at \$52,000.00 for the lens, \$15,000.00 for cross-rentals and \$500.00 for other income losses. That totals \$68,000.00, for which the Claimants have already received \$66,000.00. The shortfall is therefore \$2,000.00.

[39] The Claimants also claim costs including the cost of travel to Halifax in connection with the claim. Mr. Bioksic apparently made three trips to Halifax including a trip to issue the claim, one in connection with an abortive hearing date, and the third for the hearing before me.

[40] Travel expenses are discretionary. As I noted in a 2010 case of *Pettit v. Murchy*, 2010 NSSM 73 (CanLII):

40 The question of travel expenses is within my discretion. Section 15 of the Small Claims Court Forms and Procedures Regulations provides:

15 (1) The adjudicator may award the following costs to the successful party:

- (a) filing fee;
- (b) transfer fee;
- (c) fees incurred in serving the claim or defence/counterclaim;
- (d) witness fees;
- (e) costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;
- (f) reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;
- (g) additional out of pocket expenses approved by the adjudicator.

41 In the circumstances here, the Claimant had no option but to press this claim and, having been forced to leave Nova Scotia with little notice, she was forced into travelling back at considerable expense for the trial.

42 The decision to bring Ms. Jacques as a support and possible witness was also reasonable. The Claimant is by her own admission someone with vulnerable mental health and facing the Defendants in a court room could have been an intimidating experience if faced alone. Also, the evidence of Ms. Jacques was of some value, in that it cast serious doubt on the credibility of the Defendant Ms. Turlings.

43 The cost must be reasonable. Unfortunately, as explained, it was not a simple matter for the Claimant to travel to Nova Scotia. She needed to take a train as well as a plane, and had to arrange for a car rental and hotel while here. The total claimed for the Claimant and Ms. Jacques is \$1,785.00. This includes the car rental and accommodation for several days, during which she hoped or expected to wrap up this matter with a court decision in hand. I explained to her that she could not expect a decision that quickly.

44 While it is far from an exact science, I am inclined to reduce the travel claim slightly to a more reasonable level, which I find to be \$1,400.00.



[41] In *Perry v. Team Auto Used Auto Sales*, 2017 NSSM 66 (CanLII) another Adjudicator of this Court reduced the travel expenses claimed on account of the fact that the Claimant was only partly successful in his claim.

[42] Here, the Claimants only succeeded to a small extent, recovering \$2,000.00 out of the \$10,000.00 that they claimed.

[43] I also consider that one of Mr. Bioksic's trips to Halifax was unnecessary, in that he could easily have issued the claim from Ontario and engaged process servers to serve the Defendants. He chose a much more expensive option.

[44] I am prepared to allow \$199.35 for issuing the claim, plus \$1,500.00 toward travel expenses. I disallow the claim of \$125.00 plus HST for a witness fee, as that is greatly in excess of witness fees payable under the applicable tariffs.

[45] The Claimants shall recover against the Defendant 45 North only:

Damages	\$2,000.00
Cost to issue claim	\$199.35
Travel expenses	\$1,500.00
Total	\$3,699.35

**Eric K. Slone, Adjudicator**