

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	Judge/Case Management Master Myers J	Court File Number: CV-20-00648296-0000
---------------	---	--

Title of Proceeding:

Walmart Canada Corp Plaintiff(s)
 -v-
AIG Insurance Company of Canada Defendants(s)

Case Management: ☐ **Yes** If so, by whom: **X No**

Participants and Non-Participants: *(Rule 59.02(2)(vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Walmart Canada Corp	Erin Crochetiere	erin.crochetiere@rogerspartners.com		Y
2) AIG Insurance Company of Canada	Ramon Andal	randal@moodiemair.com		Y
3)				
4)				
5)				

Date Heard: *(Rule 59.02(2)(c)(iii))* **March 17, 2021**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion
 ☐ Appeal
 ☐ Case Conference
 ☐ Pre-Trial Conference
 ☒ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing
 ☐ Telephone
 ☒ Videoconference
 ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule 59.02(2)(c)(v))*

A declaration that AIG has a duty to defend and indemnify Walmart for defence costs in Court File No. CV-17-1337240-00 issued in Newmarket.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Order to go as asked in para. 1 of the Notice of Application.

Costs: On a **substantial** indemnity basis, fixed at \$ **51,854.46** are payable
by **respondent** to **applicant** [when] **forthwith**

Brief Reasons, if any: *(Rule 59.02(2)(b))*

While it might be possible in some lawsuits to allocate defence costs among claims that are covered and claims that are not covered by relevant insurance while the lawsuit is still ongoing, this is not one.

The insurer is unable to point to any defence costs that are exclusively referable to claims that do not fall within the scope of its obligation to indemnify Walmart or its contractor. All that is required under the policy is that the claims be in relation to the contractor's work. That is a very broad definition. While it may be the case that the contractor was not technically beyond the 15 minute allowable service standard under its contract with Walmart, that in no way detracts from the claims made against Walmart being "related to" to cleanup, warning, and cone placement obligations of the contractor. Walmart may have overlapping obligations itself. There is no way at this stage to determine the basis for liability that may ultimately be found. Nor is there a way to distinguish between defence costs expended on the exact same facts and issues whether ultimately a finding is made against Walmart, its contractor, or both. All that is necessary is a "mere possibility" that the contract of insurance may have to respond. All of the claims in paragraph 9 of the statement of claim include facts and issues for which there is more than a mere possibility that the contractor's work was engaged. Moreover, it does appear that under the wording of the duty to defend, the insurer may have left itself open to paying all defence costs in a "suit" in which insurable claims are made. Nothing in the language of the duty to defend term limits the obligation to pay the full costs of the "suit".

While it is admirable, perhaps, that at the last minute AIG discovered its duty to defend and offered an allocation, there is no way on the evidence before the court to make allocation findings. Similarly, while Mr. Andal expresses concern with the costs incurred on this application, I note that it has taken the applicant more than two years of efforts to have AIG finally accept its contractual obligation. If AIG was concerned with controlling costs better, perhaps it should have stepped up as the payor to both limit the need for adverse proceedings and to assert some controls over financial issues.

Walmart is entitled to its costs of the application on a substantial indemnity basis. This is the norm for duty to defend cases. I have reduced the full indemnity fees of \$50,762.50 to 90% to reflect substantial indemnity. That is \$45,686.25 or \$51,625.46 with HST. With disbursements, the all-in amount is \$51,854.46. The rates charged by the applicant's counsel are well below market in comparison to general commercial civil litigation cases. The hours incurred, while at the higher end, are well explained by the insurer's ongoing refusal to even acknowledge its contractual duty.

Finally, I note that AIG consents to the declaration that Walmart be entitled to appoint and direct its own counsel in the Newmarket action as claimed.

Additional pages attached: ☐ Yes ☒ No

March 17, 20 **21**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*