IN THE MATTER OF THE *Insurance Act,* R.S.O. 1990, c I.8, s. 268 (2) and
Ontario Regulations 34/10 and 283/95 thereunder;
AND IN THE MATTER OF the *Arbitration Act*, 1991, S.O. 1991, c. 17;
AND IN THE MATTER OF an Arbitration

BETWEEN:

DUFFERIN MUTUAL INSURANCE COMPANY

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing:

Daniel Strigberger: Counsel for Applicant, Dufferin Mutual Insurance Company (hereinafter called Dufferin)

Jessica L. Rogers: Counsel for Respondent, Aviva Insurance Company of Canada (hereinafter called Aviva)

Introduction:

This matter comes before me pursuant to the *Arbitrations Act* 1991 and Section 268 of the *Insurance Act* R.S.O. 1990 c I.8, as amended, to arbitrate a dispute between two insurers with respect to priority.

The insurers in this matter were able to resolve the priority dispute. Aviva has accepted priority and did so shortly after the first pre-hearing.

However, the insurers have not been able to reach agreement on whether or not Aviva is responsible, having accepted priority, to pay adjusting fees incurred by Dufferin while they were handling the Accident Benefit claim. In addition, the parties have not been able to reach an agreement with respect to costs.

These are the two issues that have now come before me.

This matter proceeded by way of a combined written and oral Hearing. No witnesses were called. Each of the parties submitted a Document Brief, Factum and Book of Authorities. Oral submissions were made on July 14, 2021.

The following have been made Exhibits to the Arbitration Hearing:

Exhibit 1	Arbitration Agreement between Dufferin and Aviva dated June 17, 2021
Exhibit 2	Document Brief of Dufferin Mutual Insurance Company
Exhibit 3	Document Brief of Aviva Insurance Company of Canada

The documents before me included an Affidavit of Jill Armstrong who is a claims representative with Dufferin and an Affidavit of Michael McCormick a senior litigation specialist at Aviva. In addition, I had before me various correspondence between the parties and counsel, various emails and attached to the Affidavit of Jill Armstrong was the account and log notes of Sedgwick Canada Inc. who had been retained as an independent adjuster to manage the Accident Benefit file of the claimant.

Facts/Chronology:

On July 2, 2019, the claimant was involved in a motor vehicle accident. At that time he was riding a bicycle when he was struck by a vehicle owned and operated by the Aviva insured.

The claimant applied for Statutory Accident Benefits to Dufferin who insures his son. However, Dufferin took the position that the claimant was not principally dependent for financial support or care on his son on the date of loss.

At the time of the accident, the claimant was 78 years of age. The claimant submitted an OCF-1 to Dufferin.

Dufferin is relatively a small mutual insurance company located in Shelburne, Ontario. According to the Affidavit of Jill Armstrong, at all material times she was the only full-time claims examiner for the insurer. They did have two part-time adjusters working with them at the time this particular claim was submitted. Ms. Armstrong admits that she does handle Accident Benefits Claims but she may outsource complex or potentially catastrophic claims to independent adjusters. In this particular case the evidence indicates that the claimant had serious injuries and

was a possible CAT case. Accordingly, Ms. Armstrong retained Ross MacDonald at Sedgwick Canada Inc. to adjust the claim. According to the Sedgwick Canada invoice, the referral appears to be on July 3, 2019.

Dufferin through its independent adjuster determined that it was not the priority insurer as the evidence did not support the claimant being principally dependent for financial support or care on his son. Accordingly, Dufferin put Aviva on notice of a priority dispute. They served the Notice to Applicant of Dispute between Insurers dated August 13, 2019. The Notice of Dispute clearly indicates that Dufferin was taking the position that "the applicant is not dependent on the Dufferin Mutual Insurance policyholder."

By letter dated August 19, 2019 directed to Sedgwick Claims, Lydia Trotnan, an adjuster at Aviva wrote requesting some additional information. The letter indicated that Aviva at that time had not been able to speak to their insured to confirm the relationship between the claimant and their named insured and they requested the following documents:

- Copy of the police report
- Details of their investigation/copies of any statements
- Copy of AutoPlus completed to rule out higher levels of priority
- Details confirming how the claimant sustained injuries
- Copy of the application for Accident Benefits confirming date of receipt
- Accident Benefits paid to date
- Confirmation that the (claimant) was not in the course of his employment and not entitled to WSIB.

The letter also indicated that this information was required, and once their own investigation was completed, they would respond accordingly.

It is acknowledged by Dufferin that this letter was not responded to by either Dufferin or Sedgwick. Further, the information requested was not sent by Dufferin until much later and after the Arbitration had been commenced.

On February 20, 2020, Lydia Trotnan emailed Sedgwick enclosing a copy of their previous letter of August 19, 2019 and advised "to date we have not received the following requested documents. Please refer to our letter of August 19, 2019. We require the requested information in order to make a decision regarding …. claim. Please call me if you have any questions."

Daniel Strigberger, counsel for Dufferin, was retained on October 30, 2019 and on that same day prepared a Notice to Participate and Demand for Arbitration and served it on Aviva on October 31, 2019. The Notice proposed myself as the Arbitrator.

Aviva did not respond to the Arbitration Notice within 30 days. Having not received a response, on February 27, 2020, counsel for Dufferin wrote to me requesting that I accept appointment as Arbitrator pursuant to Section 8 of Ontario Regulation 283/95.

By letter dated February 27, 2020, I wrote to counsel for Dufferin and to Lydia Trotnan at Aviva confirming I had accepted the appointment. Efforts were made from my end to schedule a pre-hearing date and my arbitration assistant received an email on April 8, 2020 from Ms. Trotnan advising that they had assigned the case to their litigation department and that an adjuster would be assigned shortly. There was no indication in the email that the matter was being assigned to counsel.

By way of email dated April 13, 2020, counsel for Aviva notified counsel for Dufferin that she had been appointed. The email confirms the appointment of the Arbitrator. It also notes that her client had previously requested documentation from Dufferin/Sedgwick and counsel goes on to state:

> "Can you please provide any documentation that you have establishing that .. is not insured under any other policy at the time of the accident".

Counsel for Dufferin responds promptly and by way of an email dated April 23, 2020 to Aviva's counsel a Share File link is forwarded containing what is described as "the dependency brief". The dependency brief included the following:

1. A Statutory Declaration by the claimant noting that he was financially independent and did not rely on anyone for financial support. The declaration confirmed his income in 2018 of $15,605.28, that he is married and his wife's income was $13,523.65. He also confirmed the joint monthly expenses totalling $2,530.00.
2. Notices of Assessment for the claimant and his wife were also produced.
3. T4 slips were included.

On July 29, 2020, counsel for Aviva emailed counsel for Dufferin acknowledging receipt of the financial documentation but requested information on the issue of care. Counsel indicated that she wanted to confirm that the claimant had no pre-accident care requirements and asked if there were any statements or medical information dealing with that issue. The OCF-3 was also requested.

Counsel for Dufferin had his assistant respond the same day in terms of providing the OCF-3. The OCF-3 also contained a consultation note from the family doctor, which contained some past medical history. The consultation note indicated that the claimant had a pituitary mass prior to the accident that had undergone a resection. According to his daughter, he has frequent vertigo attacks, which they believe, are related to the mass and had prompted several visits to the emergency room.

By email dated April 30, 2020, counsel for Aviva requested from counsel for Dufferin the pre-accident clinical notes and records of the family doctor. She referenced the consultation note describing the frequent vertigo attacks.

On May 11, 2010, counsel for Dufferin emailed counsel for Aviva noting that after reviewing the file that they did not have copies of any pre-accident medical records. By this time, a pre-hearing had been scheduled with respect to the priority dispute to take place on June 22.

By way of email dated June 18, counsel for Dufferin wrote to counsel for Aviva noting "is your client close to accepting priority? Costs will become an issue if we have to attend this call". The latter in reference to the pre-hearing.

By way of response, counsel for Aviva noted that she had requested the family doctor's pre-accident clinical notes and record. She wanted to review them due to the reference of the frequent vertigo attacks to make sure that this was not a significant issue. She proposed that the pre-hearing be adjourned.

By way of reply, counsel for Dufferin declined to adjourn the pre-hearing indicating that he did not want to delay. He also indicated that there was no evidence that the claimant was unable to do anything due to vertigo.

The last email exchange on that same day prior to the pre-hearing was from counsel for Aviva who noted that she would proceed with the pre-hearing on the Monday to prevent the delay but that she would still be requesting the pre-accident records. It was her position that she did not have enough information to know the impact if any, of his vertigo prior to the accident.

The pre-hearing proceeded as scheduled. At the pre-hearing counsel for Aviva repeated her request for the pre-accident records. Counsel for Dufferin during the pre-hearing undertook to produce those records.

The pre-accident records were provided to counsel for Aviva by way of an email dated July 22, 2020.

By way of an email dated August 11, 2020, Aviva accepted priority on the following terms:

1. Aviva will pay the arbitrator's account; and,
2. Each party will be responsible for its own costs.

It is relevant to note at this point that there had been no payment summary or payment request for specific items by Dufferin from Aviva. In other words, the evidence suggested that Aviva was not aware at this time that there would be a claim for adjusting fees. Counsel for Dufferin was not agreeable to the term that each would bear their own costs and proposed that instead Aviva pay Dufferin costs in the amount of $1,000.00.

In the meantime, over the next few months there appears to what can only be describe as a comedy of errors with respect to arranging to get a copy of the Accident Benefits file from Dufferin/Sedgwick to Aviva so that it can take over adjusting responsibility. Counsel was under the impression that either Dufferin and/or counsel for Dufferin would send the file directly to her client. Counsel for Dufferin seems to be under the impression that as he had sent the Accident Benefits file to counsel for Aviva, that she would send that on to her client. It takes some time before everyone becomes aware that Aviva does not yet have a copy of Dufferin's file and indeed does not receive a copy until December 2, 2020. Aviva then commences adjusting the file. However, they do not advise Dufferin that they are now adjusting the file. That ultimately gets sorted out.

There is then the request for reimbursement. Again, there appears to be confusion as to who is making the request for reimbursement, whether a breakdown is provided and whose responsibility is it for providing the information. For example, counsel for Aviva writes to counsel for Dufferin on December 3 indicating that her client has not yet been advised about the amount of reimbursement being sought and details has not yet been provided. Counsel for Dufferin responds almost immediately indicating that the reimbursement numbers had been sent on October 26, with a complete payment summary.

Ultimately, the information is exchanged but not before counsel for Dufferin has written to me requesting that a further pre-hearing be scheduled as reimbursement has not been received. However, it is Aviva's evidence that they issued a cheque on January 22, 2021 for $73,113.71. However, on investigation it was found that Dufferin had never cashed that cheque. That cheque was reissued in the same amount $73,113.71 on March 10, 2021. This amount did not include $18,722.48 for adjusting fees.

Finally, relevant to the issue before me is information from Michael McCormick's Affidavit on behalf of Aviva. Mr. McCormick indicates that Aviva handles the adjusting of accident benefits by having their claims handled internally by employees. Aviva rarely sends such claims to outside adjusting firms. Mr. McCormick's evidence was that this particular claim would not have been sent to an outside adjusting firm. When accepting priority, the file was referred to Lydia Trotnan, an internal adjuster at Aviva. Adjusters at Aviva who handle accident benefits are not required to keep track of their time and do not docket their time.

Thus ends the chronology and how this matter ends up before me on an issue of both quantum (are adjusting fees payable) and what costs, if any, should be awarded in the circumstances of this case both up to acceptance of priority and the reimbursement by Aviva and what costs flow from this hearing itself.

Claim for Adjusting Fees

Position of the Parties

The claim for adjusting fees is advanced on the basis that the *Arbitration Act* grants power to Arbitrators to order equitable remedies. It is helpful that both parties concede that point. Pursuant Section 31 of the *Arbitration Act* 1991, Arbitrators are granted power to issue equitable remedies.

Further, both parties agree that section 31 of the *Arbitrations Act* also give Arbitrators power in priority disputes to rely on the equitable remedy of unjust enrichment. Both parties make reference to *R. v. Lombard Insurance Co. of Canada,* 2010 ONSC 1770 a decision of Justice Perell in this regard. Aviva and Dufferin both accept that Justice Perell confirmed that the Arbitrator has jurisdiction to Order reimbursement in a priority dispute beyond repayment of the Statutory Accident Benefits alone. Again, the parties agree that this jurisdiction is tied to the equitable remedy of unjust enrichment.

Where the parties disagree is whether the remedy of unjust enrichment can extend to including adjustment fees in the circumstances of this case. It is this difference between the two parties that I will focus on when reviewing the parties' positons.

Dufferin submits that it is a small local farm mutual insurer who routinely retains an independent adjuster to deal with complex *SABS* claims. Dufferin submits that this is a real cost and not some hypothetical expense. It is a cost to administer this claim that was thrust upon Dufferin when it received the OCF-1. Pursuant to Regulation 283/95 Dufferin had to respond to the claim. It was a potentially catastrophic claim and ultimately Dufferin paid out $73,113.71 in benefits up until the time that priority was accepted by Aviva.

Dufferin submits that the adjusting fees of $18,722.48 were needed in order to adjust this complex and medically significant claim. It further submits that the amount of the adjusting fee incurred is to a large degree as a result of Aviva taking too long to accept priority and then once having accepted priority taking longer to start adjusting the file itself.

Dufferin submits that it suffered a financial loss in order to handle the claim and ultimately its claim handling fell to the benefit of Aviva. Dufferin submits that Aviva is therefore unjustly enriched if they are not obliged to reimburse Dufferin for the adjusting fees expended to handle the file until Aviva accepted priority. As to the case law to support their position, Dufferin relies on *R. v. Lombard* (supra). In that case, The Fund claimed repayment of "all adjusting and investigating fees, expenses and costs paid-to-date". Justice Perell pointed out that there was divergence in the Arbitration case law and that there had been no judicial pronouncement about whether an Arbitrator in a priority dispute had the jurisdiction to Award a reimbursement beyond the repayment of Statutory Accident Benefits. As noted above, Justice Perell found that the Arbitrator did have that jurisdiction. Dufferin relies on paragraph 74 where Justice Perell states:

> "I also agree that this jurisdiction is tied to the idea of unjust enrichment, which entails that the cost for which reimbursement is being sought are costs that were incurred for the ultimate benefit of the insurer that will assume responsibility for the Statutory Accident Benefits."

Dufferin submits that Aviva benefited from the adjustment of the file by Dufferin and the fact that it had to incur adjusting fees in order to do so while Aviva would not have incurred those fees does not take away from the fact that Aviva still benefits and/or is unjustly enriched by the benefit that flowed from the file being handled by the independent adjuster.

Dufferin also relies on the decision of Arbitrator Densem in *Her Majesty the Queen (MVACF) v. The Guarantee Company of North America* a Private Arbitration decision from July 25, 2012. In that case, MVACF claimed reimbursement for some $14,000.00 that had been expended in field adjusting expenses. The facts differ slightly from this case in that the Respondent, Guarantee, acknowledged that adjusting services of a similar or same nature would have been engaged by them had the *SABS* claim be presented to them first. The issue before Arbitrator Densem was whether or not the adjusting expenses were repayable in accordance with the unjust enrichment principle. Dufferin points to this case as Arbitrator Densem concluded those expenses were recoverable. He notes that where an expense is reasonable and would have been incurred by the priority insurer had they received the first OCF-1 and they have now been saved that expense because the first insurer paid it then that first insurer should be able to cover those expenses from the actual priority insurer. Dufferin submits that this reasoning should be applied and further notes that Arbitrator Densem indicated that for there to be an application of unjust enrichment there was no requirement that there were "special circumstances, extreme cases, or evidence of deliberate or unreasonable indifferent behaviour on the part of the priority insurer". This he took from Justice Perell's decision (supra) and Dufferin submits that as a matter of law the equitable remedy of unjust enrichment does not require any evidence of such conditions or behaviour. As long as the expenses were reasonable and there was a benefit to the priority insurer then reimbursement should follow.

Dufferin also submits that I should not be concerned in making my decision as to whether this will result in a "floodgate" of claims being made for adjusting fees. This is in reference to a decision from Arbitrator Jones in *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company* dated April 5, 2005. In that case, Arbitrator Jones was satisfied that expenses for independent medical examinations, cost of designated assessments centers and surveillance should be reimbursed. However, he suggested that he would have concluded otherwise if he had been asked to deal with the reimbursement of adjusting expenses. Reviewing Arbitrator Jones's decision, one could conclude that he may not have made an Order for adjusting expenses (although this was clearly obiter) as it might require a costly examination of accounts and whether the accounts were reasonable which would take away from the intention of the priority dispute process which is to be quick, efficient and relatively predictable. Dufferin points back to Arbitrator Densem's decision where he stated that if matters are complicated and time

consuming that that is not a sufficient legal basis to deny recovery of expenses in reimbursement within the Statutory Accident Benefit priority framework.

Finally, Dufferin points out that there are other good reasons to conclude that adjusting expenses should be payable in the appropriate circumstances. They point out that if a priority insurer is aware that they may be exposed to paying back the first party insurer for expenses such as adjusting expenses that satisfy the unjust enrichment principle that it would encourage the priority insurer to move promptly to accept the priority dispute rather than sit back and let the insurer who received the first OCF-1 to continue adjust the claim. Dufferin suggests this approach encourages prompt assumption of claims by priority insurers.

Aviva's position is that while they accept the unjust enrichment principle that it has not been satisfied nor is it applicable to the circumstances of this case.

Aviva points out to the fact that Ontario Regulation 283/95 is silent on whether one insurer is required to reimburse another insurer for "expenses" incurred in the course of handling an Accident Benefit claim. Aviva points to the decision of Arbitrator Malach in *Certas Direct Insurance Company v. Allstate Insurance Company* November 10, 2004 where he concluded that the insurer ultimately responsible to pay benefits must reimburse the insurer handling the claim for the benefits that it paid. However, if one were to extend that to include expenses incurred in the handling and the processing of the claim then that could mean that an Arbitrator hearing a priority dispute would have to hear evidence about the cost of claims, disbursements, postage, investigations, adjusting expenses and other expenses. This would result in the hearing taking much longer and being more complicated and that was not the intent of Regulation 283/95.

Aviva also references Arbitrator Jones's decision in *Zurich Insurance Company v. Co-operators Insurance Company* (January 2007) where Arbitrator Jones while not dealing with adjusting costs was dealing with legal expenses incurred in defending a first party claim before priority had been accepted. Arbitrator Jones found that the successful party in the priority dispute was not entitled to recover its legal costs in defending the claims at FSCO. Arbitrator Jones felt that to allow for legal costs incurred in such first party disputes to be recovered regularly would lead to an endless examination of accounts and their reasonableness. He noted that while that may be unfair that ultimately it would sort itself out as in the next case the same insurer may be the beneficiary of those costs. He therefore declined to exercise his equitable jurisdiction. That decision was appealed and heard on April 25, 2008 by Justice Darla Wilson. Justice Wilson upheld Arbitrator Jones's decision. Justice Wilson indicated that she agreed with Arbitrator Jones's assessment of the facts and she did not find any error in law. She specifically found that she did not accept the argument that Arbitrator Jones had used an incorrect test in the case when deciding not to award reimbursement of the legal fees. She also noted:

> "it is an exercise of discretion based on the particular facts of the case and he declined to do so for reasons clearly annunciated in his decision.".

Aviva submits that I should follow Arbitrator Jones's decision as upheld by Justice Wilson.

Aviva submits that Arbitrator Densem's interpretation of Justice Perell's approach is too expansive and notes two decisions from Arbitrator Bialkowski that suggest it should be more restrictive. In *MVAC v. Dominion/Travelers* October 2, 2019 and *Echelon General Insurance Company v. Unifund* December 16, 2019, Arbitrator Bialkowski was asked to look at the reimbursement of expenses based on the equitable remedy of unjust enrichment. Arbitrator Bialkowski noted that he like Arbitrator Malach believed that the legislative intent was that each insurer should bear its own expenses in the handling of the Accident Benefits claim even if another insurer is ultimately found to be in priority. He felt that there policy reasons that were applicable. Like Arbitrator Jones, he suggested that the legal and adjusting cost that each insurer ultimately bears would all balance out. To allow the recovery of these types of costs would lead to additional issues as to the reasonableness of those costs which was not contemplated in the efficient process under Regulation 283/95. Arbitrator Bialkowski ultimately held in both decisions that for these policy reasons that the unjust enrichment principle should only be reserved to the most extreme cases such as situations where an insurer has deliberately refused to accept priority simply to avoid adjusting costs. Aviva submits that this is the only reasonable interpretation and the only interpretation that does not function to unduly complicate priority proceedings that are intended to be as quick and efficient as possible. Aviva submits that these policy reasons are a sufficient basis to deny the recovery of administrative expenses including adjusting fees except in extreme cases. Aviva submits that the facts of this case are not an extreme case.

Aviva also relies on the amendments made to Regulation 283/95 in 2010. These amendments includes Section 2.1(6) and (7) which specifically note that where an insurer fails to comply with its obligation to accept the first OCF-1 and commence paying benefits (commonly known as deflection) that that insurer will then be responsible for reimbursing the Fund or another insurer for "any legal fees, adjusters fees, administrative costs and disbursements that are reasonably incurred by the fund or other insurer as a result of the non-compliance". Aviva submits that if the legislatures intended for recovery of these types of expenses in circumstances other than where there was a deflection that the legislator would have specifically included that in Regulation 283/95.

If I am inclined to determine that adjusting expenses can be awarded based on the equitable jurisdiction then Aviva submits that the unjust enrichment principle does not apply here. Aviva submits that it does not (unlike Guarantee in Arbitrator Densem's case) ever hire independent adjusters. Aviva's in-house adjusters handle Accident Benefit claims and they do not incur adjusting fees. Therefore, Aviva argues that there is no unjust enrichment. There were no expenses paid for in terms of adjusting fees that Aviva would otherwise have paid for if they had received the first OCF-1 or accepted priority at an earlier stage. Aviva submits that they did not benefit from these expenses as they themselves would never had incurred it.

Even if one argues that Aviva in some way benefited from these expenses, Aviva submits that the value of that cannot be calculated due the different cost models used by the insurers. The in-house model used by Aviva cannot be compared to the outside adjuster model used by Dufferin. These expenses are quite different and cannot be compared. Aviva submits that Justice Perell in *R v. Lombard* did not provide any guidance on how to calculate the value of the enrichment and suggest that the line of cases rejecting these types of expenses due to the very difficulty in calculating those expenses should be accepted. Aviva submits that I should distinguish between administrative costs that can be compared: Insurer's Examinations or surveillance where the cost is the same to each insurer and therefore one only looks at reasonableness as opposed to adjusting fees where the cost is not comparable as between Aviva and Dufferin.

By way of reply, Dufferin submits that calculation problems should not defeat the right of a priority insurer to reimbursement based on the Arbitrator's equitable jurisdiction. As long as there is a benefit flowing from one insurer to the other then the expenses are recoverable and it is the Arbitrator's job to look at the evidence and determine what a reasonable adjusting fee would be. On the issue of the amendment to Ontario Regulation 283/95 in 2010 Dufferin submits that that section is specifically directed towards circumstances of deflection and cannot be interpreted to mean that the Arbitrator does not have jurisdiction to Award appropriate expenses based on unjust enrichment in accordance with Justice Perell's decision.

Analysis and Findings

Priority disputes between insurers are governed by Ontario Regulation 283/95 and Section 268 of the *Insurance Act*. In the case before me, there is not a dispute as to which of the two insurers are ranked in priority but rather Aviva having accepted priority what reimbursement they are obliged to make to Dufferin. Specifically whether or not adjusting expenses are recoverable.

Most helpful to the decision making process is the fact that both insurers acknowledges that expenses are recoverable based on the doctrine of unjust enrichment and that I have jurisdiction to make such an award based on it being an equitable remedy. That jurisdiction flows from Section 31 of the *Arbitration Act* that provides "an arbitral tribunal shall decide a dispute in accordance with the law, including equity, and may order specific and performance, injunctions and other equitable remedies.". The sole question therefore before me is whether the doctrine of unjust enrichment should be extended to require Aviva to reimburse Dufferin for adjusting fees in the amount of $18,722.48 that Dufferin incurred while handling the Accident Benefit claim before it was ultimately transferred to and handling taken over by Aviva.

I have carefully reviewed the very detailed Factums of both counsel and the case law. I have concluded that adjusting fees are recoverable in priority disputes based on unjust enrichment and that they are recoverable in the circumstances of this case.

My analysis begins with the decision of Justice Perell in *R v. Lombard* (supra). In that case, Justice Perell notes that in its Notice of Appeal The Fund indicated that it was claiming repayment of "All

adjusting and investigating fees, expenses and costs paid to date.". Justice Perell noted that there was a divergence in the Arbitration case law and up until the time of his decision, there had been no judicial pronouncement about whether an Arbitrator in a priority dispute had the jurisdiction to award reimbursement beyond the repayment of Statutory Accident Benefits. Justice Perell clearly found that an Arbitrator did have such jurisdiction. He tied that jurisdiction to the idea of unjust enrichment. He states:

> "unjust enrichment entails that the cost for which reimbursement is being sought are costs that were incurred for the ultimate benefit of the insurer that will assume responsibility for the statutory benefits. Put differently, the first insurer cannot recover for costs that do not benefit the insurer assuming responsibility for the Statutory Accident Benefits."

Justice Perell clearly ties the recovery of administrative costs in a priority dispute to whether or not those costs ultimately benefitted the priority insurer. I therefore approach my analysis of this case as to whether or not the adjusting fees paid by Dufferin benefitted "Aviva".

While counsel refer to a number of cases that predated the decision of Justice Perell, I have focused on cases that postdate Justice Perell where Arbitrators have had an opportunity of being informed by his decision and comments in the *Lombard* case. I did carefully review Justice Wilson's decision which was made in 2008 some 2 years prior to Justice Perell's decision. Justice Wilson did not deal with the broader issue of unjust enrichment in her decision. She focused on whether legal costs were payable and not the broader analysis as completed by Justice Perell. In reviewing the two decisions, I do not find there to be a difference of opinion as between Justice Perell and Justice Wilson. Justice Wilson notes that in cases such as these where reimbursement is in dispute that it is an exercise of discretion for the Arbitrator based on the particular facts of the case. I do not see anything in Justice Wilson's decision that would suggest that in the case before me I would be bound to find that adjusting fees would not be the subject matter of a reimbursement. To the extent that there is any difference between Justice Perell and Justice Wilson's analysis, I prefer the broader approach of Justice Perell.

Turning now to those cases where Arbitrators have had an opportunity of commenting on Justice Perell's decision. Arbitrator Densem's decision in *(MVACF) v. The Guarantee Company of North America* (supra) is one of those decisions. I agree with Arbitrator Densem when he concluded that in order for unjust enrichment to apply that there did not have to be special circumstances, an extreme case or some evidence of deliberate or unreasonable behaviour on the part of the priority insurer before those expenses could be reimbursed based on unjust enrichment. I therefore disagree with Arbitrator's Bialkowski's decision in *MVAC v. Dominion/Travelers* (October 2, 2019) where he concludes that only in special circumstances such as deflection can expenses beyond benefits be paid to or on behalf of the claimant in a priority dispute. I do not agree with Arbitrator Bialkowski's interpretation of the amendment to Regulation 283/95 where he says that that amendment was intended to only recover those sort of expenses where there had been a deflection. In my view, Justice Perell's decision (even though it predated the

amendment to the Regulation) clearly stands for the proposition that the principle of unjust enrichment is applicable to priority disputes. I see nothing in the amendment to the regulation that would suggest it intended to overrule Justice Perell's decision. Rather the purpose of that amendment, in my view, was to provide some specific punishment to insurers who had deflected a claim and that that punishment could then be meted out without the necessity of Arbitration proceedings to determine entitlement to reimbursement in deflection cases.

I also respectfully disagree with Arbitrator Bialkowski in his decision in *Echelon General Insurance Company v Unifund Assurance* (supra) where he suggests that adjusting costs or legal costs should not be recoverable in a priority dispute solely because of the additional costs that would have to be incurred by insurers. Arbitrator Bialkowski at paragraph 30 of that decision suggests that the avoidance of the additional layer of costs that would be incurred to determine whether expenses were reasonable, hourly rates were reasonable, whether independent medical assessments were required, whether surveillance was necessary, provided a strong policy basis for the conclusions that he had reached. With respect, I disagree. These are costs that are routinely incurred in many accident benefit claims and clearly fall within the unjust enrichment principle enunciated by Justice Perell. I agree with Dufferin that just because there may be additional time expended in examining the reasonableness of expenses is not a grounds for finding that they are not recoverable at all. I agree with Dufferin that in fact policy considerations suggest that these expenses should be recoverable. Such a policy encourages insurers to act promptly in priority disputes as they are aware that there may be costs or expense incurred that they may ultimately become responsible for. If they are not responsible for these types of expenses there is little to motivate an insurer to take over a priority dispute or to move quickly in its investigation knowing that these types of expenses if incurred which clearly flow to their benefit would not be repayable.

I agree with Arbitrator Densem and prefer his approach as set out his *MVACF) v. The Guarantee* decision (supra) where he states:

> "Justice Perell was clearly familiar enough with the case law that if he thought such additional conditions were appropriate he would have said so. I am of the similar view. I see no valid reason whether in law or in practice to deny recovery from a priority insurer of administrative expenses incurred by a first insurer provided the first insurer can establish on a balance of probabilities that those expenses were reasonable both in the fact they were incurred, and in their quantum, and that they inured to the benefit of the priority insurer with respect to the statutory benefits claim it is taking over.".

I also agree with Arbitrator Densem where he states:

> "the only argument I have seen in the arbitration decisions to support limiting when such expenses should be recoverable or allowing some of them but not others, is that it could prove complicated and time consuming to deal with such claims of reimbursement.

> Although I accept that this may be true, I do not view it has having a sufficient legal basis to deny recovery of those expenses to a first insurer from the priority insurer who has ultimate responsibility in law to administer and pay the statutory benefits claim.".

Therefore, having found broadly that these types of adjusting expenses are recoverable I now look at the question as to whether they were reasonable and whether they inured to the benefit of Aviva.

Aviva submits that they did not receive any benefit from the adjusting expenses on the grounds that had the claim come to them first that it would have gone in-house where no "adjusting expenses are incurred". While I understand that Aviva may not have sent this claim out to an independent adjuster, that does not mean that Aviva does not incur adjusting expenses. They have the expense of an in-house adjusting department. While it is not comparing apples to apples I simply do not accept the argument that Aviva does not incur some form of adjusting fees within their own organization. Nor do I see that as necessarily as a relevant consideration. If it were to be the law that only two insurers who make use of outside independent adjusters can recover adjusting expenses in a priority dispute then insurers such as Dufferin would never be able to recover adjusting fees. Farm Mutual Insurers such as Dufferin would never be able to recover adjusting fees in a priority dispute against the Goliath such as Aviva. That seems to be inherently unfair and not in keeping with the principle of unjust enrichment and reimbursement in a priority dispute.

Therefore, I find that even though Aviva may not themselves have chosen to make use of independent adjusters in their business model that does not mean the principle of unjust enrichment is not applicable here. Clearly, Aviva had a benefit that inured to them as a result of Dufferin adjusting the file. There was no argument put forward by Aviva that the work done by the adjusting firm was not reasonable or that they mishandled the file in some way. When Aviva took over its accident benefit claim they took over a properly adjusted and managed AB file and to that extent they benefited from the monies Dufferin paid to the independent adjuster to ensure the file was properly handled.

There is no doubt that the expenses were incurred. I reviewed the log notes and invoices of the adjusting company and I am satisfied that the adjusting costs were reasonable in the circumstances.

While the expenses were reasonable I do find that some of the delay in Aviva taking over this priority dispute must fall at the feet of Dufferin. Had Dufferin responded in a prompt manner to Aviva adjuster's letters of August 19, 2019 and February 20, 2020 the priority dispute may have resolved earlier. There was also a delay in getting reasonably required documentation to Aviva's counsel once the Arbitration had been commenced. I find that the request to get some pre-accident medical records to confirm that the claimant did not have any pre-accident issues that may have resulted in an argument that there was dependency for care were reasonable. Taking all this into consideration I am awarding the reimbursement of the adjusting fees but they will be

reduced by 40% to reflect the delay noted above. I therefore, award the sum of $11,233.48 in adjusting fees. These are payable by Aviva to Dufferin within 30 days subject to any Appeal.

Costs

I will deal with the issue of costs of the priority dispute leading up to Aviva taking over the handling of the claim separately. With respect to the costs flowing from the adjusting issue as the main question before me was whether adjusting expenses were recoverable at all. I conclude that Dufferin was entirely successful on that point and although the quantum was reduced that that does still not take away from their success on the key legal issue.

The Arbitration Agreement provides that legal costs are to be determined by me taking into account the success of the parties the conduct of the proceedings and the principles generally applied in litigation before the courts of Ontario. Taking all that into account, Aviva will pay Dufferin its costs of the Arbitration relating to the adjusting expenses and the costs of the Arbitrator relating to that issue only.

Parties Position and Argument

Issue 2: Can Dufferin recover against Aviva? What Costs if any are recoverable by Dufferin as against Aviva up to Aviva's commencement of adjusting the claim

Dufferin submits that it should be paid its costs for the time period from the commencement of the Arbitration up until Aviva reimbursed Dufferin.

Dufferin submits that the claimant sustained significant injuries in this accident. $73,113.71 was ultimately reimbursed. This was a claim, Dufferin submits with significant exposure with a potential to be catastrophic and senior counsel was retained (Call 2002) in order to pursue the priority dispute.

Dufferin submits that it was entirely successful in the priority dispute portion of this claim. In other words Aviva accepted priority after the pre-hearing and accordingly costs leading up to that time should be payable by Aviva to Dufferin.

Dufferin submits that Ontario Regulation 283/95 establishes a presumption of costs against the unsuccessful party. It makes reference to Section 9(1) which suggests that unless otherwise ordered by the Arbitrator or agreed to by the parties the costs of the Arbitration including the costs of the Arbitrator will be paid by the unsuccessful parties to the Arbitration and that these costs are to be assessed in accordance with Section 56 of *Arbitration Act.*

Dufferin relies on a line of cases which they submit establish that costs associated with arbitrating priority disputes are recoverable once a Private Arbitration has commenced and that the insurer

who ultimately accepts responsibility or is found responsible in terms of priority is responsible for paying the legal costs of the other insurers involved in the Arbitration (see *Security National Insurance Company v Wawanesa Mutual Insurance Company*: decision of Arbitrator Cooper May 21, 2013, *Wawanesa Mutual Insurance Company v State Farm Mutual Insurance Company*: decision of Arbitrator Cooper October 20, 2016, and *Wawanesa Mutual Insurance Company & Northbridge Insurance Company*: decision Arbitrator Samworth September 23, 2016).

Dufferin also relies on the very recent decision of *Heartland Farm Mutual v The Guarantee*: a decision of Arbitrator Bialkowski May 26, 2021, which confirmed that legal costs associated with the determining the viability of a priority dispute and the reasonable steps taken to commence that dispute are recoverable similar to the costs incurred by plaintiff's counsel in a personal injury action being entitled to costs of steps taken before the claim was issued. Dufferin submits that there is no reasonable basis for an insurer that accepts priority to refuse to pay <u>any costs</u> once an Arbitration is initiated.

Dufferin submits that there are other good reasons that it should be entitled to costs not only because they were the "successful" litigant in the Arbitration. They rely on the following:

1. Aviva delayed in responding to Dufferin's Arbitration Notice;
2. Aviva delayed in appointing counsel;
3. Aviva delayed in accepting priority within 120 before the first pre-hearing;
4. Aviva went on a "goose chase" seeking documentation for a possible care dependency which was unreasonable in the circumstances;
5. Having accepted priority on August 11, 2020, Aviva unreasonably delayed in starting to adjust the file; and,
6. Aviva unreasonably delayed in providing reimbursement for the benefits.

Dufferin therefore submits that Aviva's conduct in this proceeding has been unreasonable and should therefore attract a larger costs Award.

Dufferin submits a costs outline in which it sets out full indemnity costs at $5,394.08 plus disbursements of $117.71 for a total of $5,509.79. This includes costs of the senior counsel retained to handle the file as well as his law clerk.

Finally, Dufferin points to an offer to settle costs made when Aviva accepted priority. Dufferin offered to settle the costs of the Arbitration (prior to there being adjusting fees in dispute) of $1,000.00. There was no counter offer.

Aviva on the other hand submits that Dufferin's actions both with respect to the preliminary stage of the proceedings and up to Aviva accepting priority created special circumstances that does not support granting costs to Dufferin.

Aviva points to Dufferin's failure to respond to its letter of August 2019 where it requested various documentation to assist it in investigating priority. This letter was never responded to. Nor was the follow up letter of February 2020 responded to. Aviva submits that the failure of Dufferin to respond to Aviva's request for information to assist it in investigating priority contributed to the delay, the need to initiate the Arbitration as well as both insurers retaining counsel.

Aviva also submits that when it requested medical documentation on the issue of pre-accident care that Dufferin declined to produce that until it was discussed at the initial pre-hearing. Had that documentation been produced earlier and when requested that may have resulted in the need for a pre-hearing becoming unnecessary and Aviva could have accepted priority earlier.

Aviva also points to the fact that it suggested that the initial pre-hearing be adjourned in order to allow for the exchange of documentation but that was rejected by Dufferin thus forcing both parties to proceed to the pre-hearing with the resulting costs of both counsel as well as the Arbitrator.

Aviva submits that Dufferin was difficult and uncooperative and in fact, it was Dufferin that forced this matter on to Arbitration and the pre-hearing when it was not necessary. Aviva submits that Dufferin is now seeking costs for these preliminary steps which Aviva suggests was made necessary by Dufferin's own conduct.

Aviva submits that it accepted priority in a timely fashion once all the necessary documentation and information was available to it to confirm it was the priority insurer.

Further, Aviva disputes that there was any delay in reimbursing Dufferin or assuming carriage of the claim and points to the facts that were outlined in this decision to reflect some confusion over the reimbursement request, the fact that a cheque was issued but never cashed and had to be reissued and that there was confusion in how the actual Accident Benefit file was to be transferred. Aviva submits in reviewing these facts its conduct was not unreasonable. As to case law, Aviva relies on the decision of Arbitrator Novick in the case of *Aviva Insurance Company v Cooperators General Insurance Company and TD Insurance* (decision December 12, 2019). In that case, Arbitrator Novick suggested that costs should not be routinely awarded for the few hours that counsel may spend on conducting an initial review of the claim once retained or for participating in a brief pre-hearing call or two that takes place early in the process. While Arbitrator Novick suggests that costs should be awarded when significant steps have been taken such as having Examinations Under Oath or reviewing detailed productions. Arbitrator Novick notes that each case is distinct and does require a different level of attention and therefore it is difficult to make a hard and fast rule as to the award of costs.

Similarly, Aviva relies on the decision of *Motors Insurance Corporation v Her Majesty the Queen* (Arbitrator Novick February 10, 2010) where she again suggests that where priority is accepted 10 months after the Arbitration was initiated once relevant documentation was received that a

costs award should be restricted only to the time spent by counsel on large steps inherent in the process as opposed to the few hours or less required to participate in an initial pre-hearing.

Finally, if costs should be Awarded Aviva submits that the proposed 75% of the Bill of Costs is submitted by Dufferin is excessive. Dufferin in response did note that it would agree to partial indemnity at 60%.

Analysis and Award

There is no dispute between the parties that an Arbitrator has jurisdiction both under the *Arbitrations Act* and indeed through the Arbitration Agreement between the parties to make an Award of costs. There also does not appear to be a real dispute between the parties that generally costs are awarded to the successful litigant. The difference is that Aviva submits that in circumstances where priority is accepted early on and there have been only a few minor events in terms of the Arbitration that costs generally should not be awarded. Dufferin on the other hand submits that in any priority dispute where one party is successful that the costs of the Arbitration should be awarded to the other party particularly in circumstances where there is a factual basis to suggest that the necessity for the Arbitration was brought about by the actions of the ultimate priority insurer.

As I indicated in my decision in *Wawanesa Mutual Insurance Company & Northbridge Insurance* (September 23, 2016) I accept that generally speaking once a Private Arbitration has been commenced by an insurer that the insurer ultimately responsible for the payment of the claim is then exposed to the legal costs of the other insurers involved in the Arbitration even if the matter is resolved early in the Arbitration process. However, the facts of that case were considerably different then the facts of this case. In this case, while Dufferin certainly was successful in that Aviva accepted priority, I do not agree with Dufferin's submissions that Aviva could have and should have accepted priority at an earlier stage and thus reduced Arbitration costs.

I am concerned that Dufferin did not respond to Aviva's letters asking for information in order to assist them in investigating priority. Those were the letters of August of 2019 and February of 2020. Had Dufferin responded to that letter of August 2019 there may very well have been no necessity for an Arbitration to be issued. There was never any explanation given by Dufferin as to why those letters were not responded to.

I am also concerned that Dufferin initially refused to provide what I consider to be reasonable documentation with respect to the claimant's pre-accident history so that Aviva could satisfy itself that this older gentleman was not dependent for care on Dufferin's insured due to issues with vertigo. While that ultimately proved to be not a fruitful line of inquiry, I cannot fault Aviva for wanting to have that information before it ultimately accepted priority. I have difficulty in understanding why Dufferin declined to provide that information and did not agree to do so until after we had discussions about its production during the course of the pre-hearing. Again, had

that information been provided when initially requested Aviva may have accepted priority sooner.

Finally, I am concerned that Dufferin did not agree to adjourn the pre-hearing. Clearly Aviva was making efforts to collect the information needed in order to determine whether it could accept priority and there was every reason to suggest that this was the type of case where an adjournment should have been agreed upon between counsel. I find that the matter had moved forward relatively promptly compared to other priority disputes that I see. Aviva in fact accepted priority on August 11, 2020 roughly 1-year from when they were put on Notice of the priority dispute. I do not find that time to be overly long considering Dufferin's failure to respond to Aviva's letter of August 2019.

I agree with Arbitrator Novick that costs should not be routinely awarded for the few hours that counsel may spend on conducting an initial review of the claim participating in brief pre-hearing. While I find that each case is distinct and requires a different level of attention I do not believe that costs should be routinely awarded on the grounds outlined by Dufferin.

I have reviewed the facts before me and taken into consideration the amount in dispute, conduct of both parties, the circumstances surrounding the issuance of the Notice of Arbitration and the need for the pre-hearing as well as the Offer that has been made. Taking all this into consideration, I conclude that Dufferin is not entitled to any costs for the time period requested and I decline to make any Award. The costs of the Arbitrator in relationship to this issue will be borne equally between the parties.

DATED THIS 12th day of August 2021 at Toronto.

_____

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP