IN THE MATTER OF AN ARBITRATION under the *ARBITRATION ACT*, 1991, and pursuant to the provisions of Section 268 of the *INSURANCE ACT* AND ONTARIO REGULATION 283/95 THEREUNDER

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

SCOTTISH & YORK INSURANCE COMPANY LTD.

Applicant

- and -

ZURICH INSURANCE COMPANY LTD.

Respondent

DECISION

COUNSEL

Derek Greenside – Kostyniuk & Greenside
Counsel for the Applicant, Scottish & York Insurance Company Ltd.
(hereinafter referred to as "Scottish & York")

Alon Barda – Rogers Partners LLP
Counsel for the Respondent, Zurich Insurance Company Ltd.
(hereinafter referred to as "Zurich")

ISSUES - INDEMNITY, INTEREST AND COSTS

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and with Zurich having accepted priority, the issue before me is to determine the issues of indemnity, interest and costs. With respect to its claim for indemnity, the Applicant seeks recovery of benefits paid to and on behalf of the claimant, as well as the costs of defending the underlying accident benefits claims, including the cost of s.44 *Statutory Accident Benefit Schedule* examinations.

PROCEEDINGS

[2] The matter proceeded on the basis of Document briefs, Books of Authority and written submissions.

FACTS

[3] Shelbie Kerr (Claimant) was a passenger in a U-Need-A-Cab when it was rear-ended by another vehicle insured with Scottish & York on December 16, 2015. The driver of the cab identified himself as Zahedur Rahman.

[4] Scottish & York obtained an AutoPlus Gold Report on December 24, 2015, which confirmed that the owner (Ataur Rahman) of the cab in which the claimant was a passenger, was insured with Belair Direct Insurance at the time of the accident.

[5] Arbitration proceedings were commenced against Belair Direct Insurance (Intact Insurance). Counsel appointed on behalf of Belair Insurance subsequently advised that Belair Insurance does not insure cabs and produced a Certificate of Automobile Insurance which confirmed coverage on a 2004 Pontiac Montana SE and not the 2015 Toyota Camry that the claimant was a passenger in at the time of the accident.

[6] Subsequent investigation, completed by counsel for Scottish & York, confirmed that the 2015 Toyota Camry was insured by Zürich Insurance.

[7] Zürich Insurance were added to the within priority Application as a Respondent by the second tier insurer Belair in June 2019, some 3½ years after the subject accident of December 16, 2015. Zürich Insurance vigorously contested the Application, including an appeal of the Arbitrator's Decision with respect to a Motion for Productions, until April 9, 2021, when they conceded priority but have continued to dispute indemnity and costs. On June 29, 2021, Zurich advised Scottish & York of the contact information of the adjuster to handle the open accident benefits claim from that date forward. On July 7, 2021, counsel for Scottish & York advised counsel for the claimant of the contact information of the adjuster at Zurich to whom all further accident benefits claims were to be submitted.

[8] Scottish & York had paid the following benefits and expenses during the administration of this claim as per the payment summary provided:

Medical and Rehabilitation	$ 15,563.30
Cost of Examinations	$ 14,825.60
Investigation and Legal	$ 31,093.41

[9] Zurich reimbursed the Applicant for the Medical and Rehabilitation payments on July 7, 2021. Zurich made no payment towards the Costs of Examinations or Investigation and Legal, the latter essentially being the costs associated with the defence of the underlying accident benefits claim.

[10] I am advised that since payment was made by Zurich, a further medical and rehabilitation expense was incurred by the Applicant in the amount of $497, for which Zurich

is prepared to reimburse the Applicant, provided it is a reasonable expense paid to or on behalf of the claimant. I am to be advised if it remains an issue.

[11] The Applicant seeks recovery of the legal costs incurred in pursuing this priority dispute. The following is a summary as provided by the Applicant Scottish & York of the time spent by the articling student and lawyers, Derek Greenside (year of call 1987) and Nestor Kostyniuk (year of call 1979) prosecuting this priority application, excluding all time spent addressing the preparation for and appearance at the Appeal before Mme. Justice Pollak on September 16, 2020:

Law Student	0.9 hrs. @ Partial Indemnity Rate $100.00	$ 90.00
Derek Greenside	36.7 hrs. @ Partial Indemnity Rate $240.00	$8,808.00
Nestor Kostyniuk	0.5 hrs. @ Partial Indemnity Rate $260.00	$ 130.00

[12] Mme. Justice Pollak awarded the Applicant $5,000.00 in costs following the dismissal of the Appeal by Zurich Insurance on November 19, 2020. This amount was paid by Zurich on July 8, 2021.

[13] The prosecution of this priority Application included, but was not limited to, the following legal services completed by Kostyniuk & Greenside:

- Participation in pre-arbitration hearings on February 21, 2019, April 18, 2019, July 31, 2019, September 9, 2019, November 21, 2019, March 3, 2021;
- Communications with the claimant's legal representative to obtain further information concerning insurance on the cab the claimant was an occupant in at the time of the accident;
- Communications with the tort defendant's legal representative to obtain further information concerning insurance on the cab the claimant was an occupant in at the time of the accident;
- Communications with the Corporation of the City of London City Clerk's Office to obtain further information concerning insurance on the cab the claimant was an occupant in at the time of the accident;
- Drafting submissions with respect to the preliminary issue raised by Zürich insurance as to whether the Applicant should be compelled to produce records and communications between them and Belair Insurance and their respective principles;
- Drafting submissions with respect to the Applicant's entitlement to indemnity, prejudgment interest and costs.

[14] The Applicant Scottish & York retained Evans Philp LLP to represent their interests with respect to the underlying accident benefits claim and a summary of their accounts as paid by Scottish & York has been provided to Zurich.

ANALYSIS AND FINDINGS

[15] The Applicant Scottish & York has claimed that Sections 1 and 7 of *Ontario Regulation 283/95* provide an Arbitrator with jurisdiction to Order reimbursement beyond the repayment of Statutory Accident Benefits. That jurisdiction is grounded upon the principle of unjust enrichment. Justice Perell, in agreeing with Arbitrator Robinson in *Ontario (Minister of Finance) v. Lombard Insurance Company of Canada 2010 ONSC 1770,* stated:

> *"I also agree that this jurisdiction is tied to the idea of unjust enrichment, which entails that the costs 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 benefits. In the case at bar, the connection to unjust enrichment entails that the Fund would not necessarily be held harmless for all expenses and costs it paid to date. Rather, it would be entitled to recover only those costs that unjustly enriched Lombard because Lombard is saved having to incur those expenses."*

[16] In a similar fashion, Arbitrator Samis agreed with the approach taken by Arbitrator Robinson and Justice Perell. In *Aviva Insurance Company of Canada v. Sovereign General Insurance Company 2016 CarswellOnt 21859*, Arbitrator Samis stated:

> *"I agree with Justice Perell's characterization that priority, unlike loss transfer, is in the nature of an equitable restitution, or unjust enrichment remedy. To the extent that an insurer has incurred out-of-pocket costs for claims administration expenses, these should be recoverable in full to the extent that they were reasonably incurred. These are expenses for the benefit of the target insurer. It is not necessary that the target insurer actually enjoy some advantage as a result of the expenditure, but just that the target insurer is relieved of the obligation to have incurred the expense. This would include investigation costs, independent medical examination costs, legal costs of defending a disputatious entitlement proceeding. These items should be passed through on a 100 per cent basis if reasonably incurred."*

[17] On the basis of these decisions, the Applicant Scottish & York claims that it is entitled to recovery of the costs and expensed incurred with respect to the underlying accident benefits claim. However, there appears to be both arbitral and judicial decisions holding that such costs and expenses are not recoverable.

[18] A detailed historical analysis of the jurisprudence on the subject is required.

[19] It would appear that the first case dealing with the issue was that of *Certas Direct Insurance Company v. Allstate Insurance Company* (Arbitrator Malach - November 10, 2004). Arbitrator Malach held that the expenses incurred in defending the accident benefits claim brought by the claimant were not recoverable in the priority dispute before him, as no such authority was provided to the arbitrator in O. Reg 283/95 - Disputes Between Insurers.

[20] Arbitrator Malach noted that Ontario Regulation 283/95 specifically sets out that all disputes between insurers, "as to which insurer is required to pay benefits under section 268 of the *Act* shall be settled in accordance with this Regulation". He stated that accordingly, in an Arbitration pursuant to Regulation 283/95, an Arbitrator determines which insurer is to pay **benefits**. That would lead one insurer reimbursing the other for "benefits" paid out under the SABS. He noted that the Regulation was silent as to whether one insurer was to reimburse the other for expenses incurred in the course of the handling of the claim for benefits under the SABS. Arbitrator Malach concluded that it was therefore the legislative intent that each insurer would bear its own expenses of handling a claim, even if ultimately another insurer was found responsible to pay benefits to the claimant. He stated that the hearing to determine the reasonableness of such expenses could take longer and be more complicated than the real issue as to which insurer had to pay the benefits.

[21] Several year later, Arbitrator Jones dealt with the issue as to whether the successful party in a priority dispute was entitled to recover the legal costs in defending claims made by the claimant at FSCO. In *Zurich Insurance Company v. Co-operators Insurance Company* (Arbitrator Jones - January 2007), the arbitrator held that such expenses were not recoverable on the facts before him. However, unlike Arbitrator Malach in *Certas* (supra), he concluded that he would have such authority on the principles of unjust enrichment or restitution in the proper set of facts.

[22] At page 7 of his decision, Arbitrator Jones in referring to O. Reg 283/95 writes:

> *"The intent of the legislature was to create a quick, efficient and predictable dispute resolution scheme. To allow for legal costs incurred in the first party disputes to be recovered regularly in priority disputes would lead to an almost endless examination of accounts and their reasonableness. While this may seem unfair, as one insurer had incurred the cost handling of a case the other insurer was ultimately responsible for, it should be remembered that in the next case that same insurer may be the beneficiary.*
>
> ...
>
> *In this particular case I am not persuaded that I should exercise my equitable jurisdiction whether it be with regard to unjust enrichment or restitution.*
>
> ...
>
> *Nothing in my decision should be read to mean that there is no situation where such legal expenses are recoverable. In the ordinary course, for reasons expressed above,*

those costs are not to be recovered. There may be situations, however, where an insurer deliberately refuses to accept priority, simply do avoid expenses. They do so at their peril."

[23] On appeal, the findings of Arbitrator Jones were upheld by Madam Justice Wilson on May 1, 2008. Madam Justice Wilson found that he appropriately exercised his discretion to disallow the claim for legal fees of defending the first party claim based on the facts before him.

[24] A few years later, in *Minister of Finance v. Lombard Insurance Co. of Canada* [2010] O.J. No. 1210, the issue was dealt with by Justice Perell. This was an appeal from a priority dispute decision of Arbitrator Novick. The issue of what the successful insurer in a priority dispute was entitled to recover was considered. At first instance, Arbitrator Novick found that the Fund was the priority insurer and made no finding as to her jurisdiction to order repayment of costs incurred by the Fund in investigating the matter. In its Notice of Appeal, the Fund was seeking repayment of "all adjusting and investigating fees, expenses and costs paid to date". In his decision, Justice Perell noted that there was a divergence in the arbitration case law and no judicial pronouncement as to the jurisdiction to award a reimbursement beyond the repayment of statutory accident benefits. This is clearly wrong. The appeal decision of Madam Justice Wilson in *Zurich* (supra) was obviously not brought to the attention of Justice Perell. In any event, Justice Perell did not rule as to what, if any, expenses of the Fund were recoverable, but simply found that the jurisdiction to award reimbursement beyond repayment of benefits existed on the basis of the equitable remedy of unjust enrichment. He simply referred the matter back to Arbitrator Novick to decide the matter on the principles of unjust enrichment. There is no information as to what Arbitrator Novick found or whether the claim was resolved by way of settlement before she could deal with the issue.

[25] The finding of Justice Perell is really not in conflict with Arbitrator Jones and Madam Justice Wilson in *Zurich* (supra) where each was of the view that the jurisdiction to award reimbursement beyond the repayment of benefits existed, but that the equitable remedy of unjust enrichment was not available on the facts of the case before them for the policy reasons detailed by Arbitrator Jones.

[26] Several years later, Arbitrator Samis also dealt with the subject issue. Arbitrator Samis, on the basis of the decision in *Minister of Finance v. Lombard Insurance Co. of Canada* (supra), awarded the Fund reimbursement of expenses beyond accident benefits paid to or on behalf of the claimant. A careful review of the decision of Arbitrator Samis reveals that the decisions of Arbitrator Malach in *Certas* (supra) and Arbitrator Jones and Madam Justice Wilson in *Zurich* (supra) were never brought to his attention. There is simply no reference in his decision to these arbitration decisions and the judicial determination on the subject.

[27] I am of the view that the findings in *Certas* (supra) and *Zurich* (supra) are appropriate to the facts before me. On its face, O. Reg 283/95 provides for the reimbursement for **"benefits"** paid to or on behalf of the insured. It is silent with respect to the reimbursement for expenses. I, like Arbitrator Malach in *Certas* (supra), believe that the legislative intent was that each insurer would bear its own expenses of handling the accident benefits claim of an insured, even if ultimately another insurer might be found in priority and responsible to pay the benefits paid to the claimant. There are strong policy reasons to so hold. For every priority dispute where an Applicant insurer is denied recovery of the legal costs of defending the underlying accident benefits claim, it will be the Respondent in another where it will not have to pay those legal costs. It should all balance out. To allow the recovery of the successful insurer in a priority dispute of the legal costs it incurred to defend the underlying benefits claim would lead to additional issues as to the reasonableness of those costs and the necessity of the steps to defend the first party claim. As Arbitrator Jones wrote at page 7 in Zurich (supra), as approved on appeal by Justice Wilson:

> "*To allow for legal costs incurred in the first party disputes to be recovered regularly in priority disputes would lead to an almost endless examination of accounts and their reasonableness. While this may seem unfair, as one insurer had incurred the cost handling of a case the other insurer was ultimately responsible for, it should be remembered that in the next case that same insurer may be the beneficiary.*"

[28] On the basis of these policy reasons, I do not find the application of the principle of unjust enrichment is applicable on the facts of the case before me. That is not to say there are no circumstances in priority disputes that the exercise of such equitable jurisdiction is applicable. There may be situations where an insurer has deliberately refused to accept priority, in clear circumstances where it ought to have, simply to avoid expenses of adjusting the first party claim or defending it. There may be situations where an insurer deliberately delays the arbitration process far beyond reason to avoid the expenses of adjusting the first party claim of defending it. In such circumstances, the application of the equitable doctrine of unjust enrichment might be applicable. On the facts before me, there is no suggestion of same. The contesting of the priority issue was legitimate. There is no evidence in this case that Zurich deliberately refused to accept priority simply to avoid the expense of adjusting the first party claim. Zurich was only added to the priority dispute years after the accident and the initial Notice to Belair. Zurich raised a legitimate issue regarding the validity of such Notice taking the position that notice was not provided within 90 days of having received a competed application and that the second tier insurer Belair had no connection to the claimant and was not an insurer "liable to pay accident benefits". The basis for their position was in part thought to be the communications between Scottish & York (as first tier insurer) and Belair (second tier insurer). To my mind, this was a novel approach to questioning the validity of the Notice provided and worthy of arbitral determination. I have long struggled with the difficulties faced by a third tier insurer brought into the priority dispute years after a motor vehicle accident. On a preliminary motion, the Arbitrator found that these communications were not relevant following a careful review of the existing jurisprudence with regard to adding of additional insurers by a second tier insurer. Zurich unsuccessfully appealed the

Arbitrator's decision. Zurich then proceeded to accept priority. I do believe that the position taken by Zurich in questioning the late notice provided to it was not frivolous and was worthy of consideration. In the circumstances I, like Arbitrator Jones in *Zurich* (supra), find that although the equitable jurisdiction does exist, it should only be used in the most extreme of cases and this is not one of them.

[29] Determination of this issue as to whether the costs and expenses in defending the underlying accident benefits claim are recoverable in a priority dispute is most important to the insurance industry. If found that such costs were recoverable in a priority dispute, then a significant layer of additional costs would have to be incurred by the insurers. Determinations would have to be made as to whether the steps taken to defend the first party claim were reasonable, was the time spent by their counsel reasonable, were the hourly rates of the lawyers involved reasonable, were independent medical assessments really required, was surveillance necessary etc.. It would be tantamount to an assessment of costs with respect to the work performed in defending the claim brought by the claimant for accident benefits whether at FSCO, the LAT or in a civil action. I am satisfied that they should only be recoverable in special circumstances not of which exist in the case before me.

[30] The *Statutory Accident Benefits Schedule O. Reg. 34/10* deals with the "cost of examinations" in sections 25 and 44. Included in the indemnity sought by Scottish & York was the amount of $15,563.30 for "costs of examinations". In its materials, Zurich indicates that they are all with respect to s. 44 examinations as opposed to s. 25 examinations. In my view s. 44 examinations (insurer independent medical assessments) are not benefits paid to or on behalf of the claimant and therefore not recoverable in a priority dispute. They are part and parcel of defending the underlying accident benefits claim which are not recoverable except in special circumstances. Any portion of the "cost of examinations" that were reasonable s. 25 examinations would be subject to indemnification.

[31] The Applicant Scottish & York has claimed that the applicable Pre-judgement Interest Rate is 2% for an Application initiated as against Zurich on June 17, 2019 and claims interest from that date on the expenses that it has incurred.

[32] I accept the rate of interest proposed by the Applicant. However, I do not believe interest ought to be paid from the date Zurich was brought into the priority dispute, but in accordance with the calculation of interest as set out in the *Courts of Justice Act*, unless the full $15,563.30 was incurred prior to Zurich being brought into the dispute. As for the interest sought with respect to the $5,000 awarded with respect to the appeal of the motion for productions, I do not believe I have jurisdiction to deal with this. If it is helpful to the parties, I would allow interest at 2% from December 19, 2020 and the date of payment July 8, 2021. This would provide Zurich with a reasonable period of time (one month) to satisfy the costs award. The total interest amount in dispute is negligible and I am hopeful that the parties can come to an agreement with respect to the calculation. If not, I would consider submissions from both counsel.

[33] I find that the Applicant Scottish & York is entitled to its legal costs of this arbitration, including the motion for productions on a partial indemnity basis. I assess those costs in the discretion provided to me by the *Arbitration Act*, *1991 c. 17,* at $8,000. There has been mixed success on the present motion for indemnity, costs and interest. Scottish & York was successful in its claim for legal costs of the priority dispute and the issue of interest. Both could and should have been resolved prior to the present motion. Zurich was successful in its defence of Scottish & York's claim for recovery of the costs of defending the underlying accident benefits claims. There was mixed success on this motion. In the circumstances, each party will bear their own costs of the motion herein. Each party is to pay 50% of the Arbitrator's costs of the motion herein.

ORDER

[34] On the basis of the findings aforesaid, I hereby order that:

1. Zurich is the priority insurer;
2. Zurich is to pay interest on the indemnity payments made at the rate of 2%, in accordance with the provisions of the *Courts of Justice Act*;
3. Zurich is to pay to Scottish & York legal fees on a partial indemnity basis with respect to the priority dispute and motion for productions, fixed at $8,000;
4. Zurich is not responsible to reimburse Scottish & York for the costs of defending the underlying accident benefits claim, or the costs of s. 44 examinations;
5. Each party to bear its own costs with respect to this indemnity, costs and interest motion;
6. Each party is to pay 50% of the Arbitrator's account with respect to this indemnity, costs and interest motion.

DATED at TORONTO this 18th)

day of August, 2021.)

K. J. Bialkowski

KENNETH J. BIALKOWSKI
Arbitrator