**THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended**

**AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended**

**AND IN THE MATTER OF an Arbitration**

BETWEEN:

**ECONOMICAL MUTUAL INSURANCE COMPANY**

Applicant

and

**AVIVA CANADA INC., AXA INSURANCE COMPANY (CANADA), ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE ON BEHALF OF THE MOTOR VEHICLE ACCIDENT CLAIMS FUND, and MICAH BRISSON**

Respondents

# COSTS DECISION

**Heard: July 15, 2014**

Counsel:

Robert H. Rogers for the respondent, Aviva Canada Inc. (“Aviva”)

John Friendly the respondent, Her Majesty the Queen (“HMQ”)

SCOTT W. DENSEM: ARBITRATOR

**Introduction**

My Award in this arbitration was issued January 29, 2013.I held that at the time of the accident, the SABS claimant, Micah Brisson, was principally dependent for financial support and care upon her father, Martin Brisson, who was insured with Aviva. As a result, Aviva was responsible to pay SABS to Micah Brisson. The Award was not appealed.

This decision deals with the issue of the quantum of costs which HMQ is entitled to recover from Aviva, consequent upon the conclusion in my Award[1] that the successful parties in the arbitration were entitled to receive their costs from the unsuccessful party or parties.

HMQ was one of the successful parties in the arbitration. Aviva was the unsuccessful party. Aviva has settled the costs claims of the other parties to the arbitration. The costs claim of HMQ could not be resolved. I have therefore been asked to fix the costs which HMQ is entitled to recover from Aviva.

I received written submissions from counsel, and I heard oral submissions from counsel in respect of the costs issue.

Aviva has not disputed my conclusion that HMQ is entitled to recover costs from it. What is in dispute is the quantum of the costs claim advanced by HMQ.

[1]At page 45.

**Analysis**

HMQ's claim for costs is set out in a Bill of Costs dated March 7, 2013.[2]The total amount claimed for partial indemnity fees is $35,762.50. The total amount claimed for disbursements is $895.72. The total costs claim is $36,658.22. A detailed summary of dockets entered in support of the hours claimed was submitted by HMQ.[3]

The claim for fees is made up of three components. The first component is a claim for 111.75 hours worked on the arbitration by HMQ counsel, Mr. John Friendly. It is undisputed that Mr. Friendly is a counsel of approximately 31 years' experience. It is also not disputed that Mr. Friendly is well recognized counsel, respected for his skill, and knowledge in the relevant field that I will categorize generally as "insurance litigation".

The Bill of Costs sets out the fee claim for Mr. Friendly based on a Substantial Indemnity Rate of $420 per hour, and a Partial Indemnity Rate of $280 per hour. The partial indemnity fee portion of the Bill of Costs attributable to Mr. Friendly is $31,290.00.

The second component of the claim for fees relates to two HMQ law clerks. The Substantial Indemnity Rate attributed to the law clerks is $97.50 per hour. The Partial Indemnity Rate for the clerks is $65 per hour. The total partial indemnity fee claim attributable to the law clerks is $1,235.00 for 19 hours worked.

[2] HMQ Costs Brief, Tab 2.
[3] HMQ Costs Brief, Tab 3.

The third component of the HMQ claim for fees relates to two students-at-law. The Substantial Indemnity Rate attributed to the law students is $75 per hour. The Partial Indemnity Rate for the students is $50 per hour. The total partial indemnity fee claim attributable to the law students is $3,237.50 for 64.75 hours worked.

The disbursements claim in the Bill of Costs is a very minor part of the HMQ claim for costs. It was not contested by Aviva, and neither party found it necessary to make any submissions addressing the disbursements. My analysis will therefore be confined to dealing with the issues concerning HMQ's claim for fees.

HMQ's submissions emphasized that this arbitration was a complex matter involving at the outset several different insurers as well as HMQ. In the beginning the issues were also complicated, and it took a good deal of time, skill and effort to narrow down the issue to one of principal dependency limited to the involvement of just HMQ and Aviva. HMQ summarizes this point in paragraph 29 of Her written submissions as follows, "*The hearing took two days but from a work value analysis, it was the equivalent to the work required for a four or five day hearing*."

In oral submissions, Mr. Friendly emphasized that although HMQ was seeking only partial indemnity costs, he urged me to consider the appropriateness of the amount claimed in a particular context. The context asserted was that HMQ, the payor of last resort in the SABS priority system, was involved in this litigation at considerable expense to the taxpayer with several different insurers, arguably any of which may have had superior obligations to HMQ to pay SABS in this case.

HMQ submitted that even though Aviva was cooperative throughout in working to streamline the issues, it nevertheless had three possible insurance policies that might have had to respond in this case ahead of HMQ, and it was still necessary to conduct the full arbitration, including a two day hearing, to have the priority issue determined.

Consequently, HMQ had no alternative but to advance its position vigorously and ensure that all steps were taken to protect the position of the taxpayer so that taxpayer funds would not be paid out when an insurer should properly be funding the SABS claim.

With respect to the manner in which costs should be assessed, HMQ submitted that costsof arbitration should be assessed by an arbitrator in the same manner that a judge would assess costs in a proceeding before the courts of Ontario. Such an assessment would contemplate following the requirements of the *Arbitration Act*[4], and the Rules of Civil Procedure.[5]

Aviva's position, as advocated by Mr. Rogers, is based on three arguments.

1) The amount of costs awarded in a dispute between insurers that is required to be resolved by arbitration should reflect the manner in which Regulation 283/95 is intended to operate. Aviva submits that the primary purpose of the Regulation is to ensure that injured accident victims are provided with SABS as required without delay. The dispute resolution mechanism to address priority disagreements between insurers is really a secondary aspect to the legislation. It contemplates expeditious, inexpensive resolution of such disputes in a summary, less involved process.

[4]S.O. 1991, c. 17, section 54.
[5]*Courts of Justice Act,* R.R.O. 1990 Reg. 194, as amended, R. 57.01.

The amount of costs awarded in such disputes should reflect the less intensive process. It should not be approached in the same way that the assessment of costs would be done in a proceeding before the courts, which is typically a much more complex process. In support of this submission Mr. Rogers referred me to several cases that I will address later in these reasons.

2) With respect to quantum of HMQ's claim for costs, Aviva disagrees with HMQ's characterization of the nature of the dispute. Mr. Rogers argued that the issue arbitrated was not complex. It was confined to resolving a legal issue concerning principal dependency. Much fact evidence that would otherwise have to be introduced through witnesses or documents concerning support was agreed to at the outset of the hearing. Aviva's position is that there is nothing about this particular arbitration that would take it out of the approach described by Aviva's first argument.

Therefore, Aviva submits that both the hourly rates claimed by HMQ are too high in the circumstances, and the amount of time spent on various parts of the case by the HMQ legal team exceeds what is reasonable. Mr. Rogers cites in particular time spent on what I will term preliminary matters such as pre-arbitration conferences, and the time spent on the preparation of written material.

3) Aviva's third argument is essentially an extension of the preceding paragraph concerning argument number two. Aviva argues that it in determining an appropriate partial indemnity hourly rate for HMQ's fees, significant emphasis should be placed upon what HMQ permits outside counsel retained by HMQ to handle legal matters on its behalf to charge per hour as a substantial indemnity rate. Based on information counsel

confirmed has been provided by HMQ to Aviva, such outside counsel are permitted to charge between $192 per hour at the low end, and $235 per hour at the high end.

Mr. Friendly was concerned that Mr. Rogers was arguing that it would be appropriate for me to consider this range as a substantial indemnity rate, and then reduce it from there to an even lower partial indemnity rate. He submitted that it would be unfair to HMQ to assess costs of inter-party litigation based on the rates that have been negotiated by HMQ with its outside counsel, since there are many factors that would go into the setting of such rates that have nothing to do with the principles of assessing costs between parties in litigation.

Mr. Rogers alleviated this concern by indicating that he was not advocating the reduction of the HMQ outside counsel rates on this basis to arrive at an appropriate partial indemnity rate. He did stress however, that a $225 to $235 per hour partial indemnity rate would fall exactly into line with what senior, experienced insurance defense counsel would qualify for in terms of a partial indemnity hourly rate, based on a consideration of their substantial indemnity rates allowed by their private insurer clients. In his written submissions, Mr. Rogers stated that his substantial indemnity hourly rate with respect to the insurers for whom he acts averages $320.00 per hour.

At this point I will note that Mr. Rogers enjoys the status of a very reputable, and experienced senior counsel in the insurance litigation field. His comments on the hourly rates of private insurance counsel are based on the personal experience of his own practice, but I am prepared to accept them as representative of the situation generally pertaining to insurance defense counsel of similar status.

Mr. Rogers submits that even acknowledging Mr. Friendly's expertise and experience, the appropriate partial indemnity hourly rate for his work in this matter should not exceed $225 per hour to $235 per hour.

In determining what I find to be an appropriate, partial indemnity assessment of HMQ's costs, I will describe the factors which I conclude are appropriate in making the assessment. In the course of doing so I will address the arguments advanced by counsel that I have summarized.

My authority to award costs of arbitration derives from section 54 of the *Arbitration Act, 1991*. The section provides that the arbitrator has discretion with respect to awarding costs because it says, *"An arbitral tribunal **may** award the costs of an arbitration"*[6]

The costs that may be awarded consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.[7]

An arbitrator must also consider section 9 of Regulation 283/95. That section states as follows:

> 9 (1) Unless otherwise ordered by the arbitrator or agreed to by all parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration.
>
> (2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*.

[6]Section 54 (1).Arbitrator's emphasis.
[7]Section 54 (2).

> (3) If the arbitral tribunal does not deal with costs in an award, a party may, within 30 days of receiving the award, request that it make a further award dealing with costs.

In my view section 9 acknowledges the discretion given to the arbitrator to decide the entitlement to costs, the quantum of costs, and to designate the litigant who should pay costs. Unless the arbitrator concludes that a different order is appropriate however, section 9 stipulates that costs of the arbitration shall be paid by the unsuccessful parties. The parties themselves can contract out of this result by agreeing to their own terms regarding payment (or non-payment) of costs.

Generally speaking, only partial indemnity costs are awarded to successful litigants[8] against unsuccessful litigants as opposed to substantial indemnity costs. Usually the awarding of substantial indemnity costs against an unsuccessful litigant requires greater justification beyond the fact that thelitigant who lost was unsuccessful on the merits of the case.

In my experience, in court litigation judges on occasion decline to award costs, or award reduced costs because the issue has not been considered before, and it is of equal importance to all the parties to have a decision on a novel point of law. This factor is reflected in Rule 57.01 (d) of the Rules of Civil Procedure, "*the importance of the issues*".

In my view, given the mandatory language of section 9 of Regulation 283/95, in priority dispute and loss transfer arbitration cases this result would generally only be appropriate where the parties had directed their minds to the issue, and agreed in their

[8] In situations where there are no relevant offers to settle.

arbitration agreement that no party should be awarded costs because of the novelty of the issue**.**

A successful party might also be deprived of costs for reasons connected with how the litigation arose, or how it was conducted. This is a form of sanction for the actions of the successful party which perhaps detrimentally contributed to the litigation being commenced, and/or unfavourably affected its conduct.

Costs are rarely awarded against a successful party unless there has been some significant misconduct or abuse of process perpetrated by the successful party that is deserving of a greater punishment than simply depriving the successful party of costs.

The effect of the statutory provisions from the *Arbitration Act*and Regulation 283/95 is that the agreement of the parties is paramount in determining the terms upon which costs will be awarded, if they are to be awarded at all. In the absence of an agreement of the parties requiring a different disposition of costs, in my view an arbitrator must give effect to the mandatory language of section 9. The wording directs that the costs of the arbitration **shall** be paid by the unsuccessful parties unless the arbitrator orders otherwise.

In my opinion, this wording means that an arbitrator should award costs to the successful parties, payable by the unsuccessful parties, unless there is a reason that the arbitrator deems sufficient to not to award costs to the successful parties, or possibly to award costs against the successful parties.

Let me say here that in my judgment there is no basis in the origin of or the conduct of the arbitration by HMQ or Aviva that would disentitle HMQ to an award of costs, nor support an award of substantial indemnity costs against Aviva. To the contrary, counsel conducted this arbitration skillfully, and in an exemplary manner. Their cooperation resulted in streamlining the issues and evidence, thereby making my job less difficult than it could have been.

Even though the specific set of facts presented to me had perhaps not been presented to a court or an arbitrator before, the arbitration was nevertheless still a priority dispute involving a determination of principal dependency, an exercise which is far from unique in the insurance litigation world. Indeed, Aviva itself asserted that the issue was not complex enough to justify the amount of costs being sought by HMQ.

The Arbitration Agreement of the parties stipulates that, "*The parties agree that their costs of this arbitration will be decided by the arbitrator."*[9] The parties themselves could have considered the case to be a novel one on the facts, the law, or both, and agreed that it was an appropriate case for each party to bear their own costs. The fact that they did not do so indicates that they were of the view that the usual rule that the successful parties should be able to recover their costs from the unsuccessful parties should apply.

Notwithstanding my conclusion (and the parties agreement) that the issues at stake in this arbitration were not so exceptional as to justify no costs being awarded to any party, I do think that it is appropriate factor to consider in determining the quantum

[9] Arbitration Agreement, HMQ Costs Brief, Tab 4.

of costs that, as far as I am aware, no court or arbitrator has previously had to apply the law of principal dependency to the specific facts before me in this case. It will be seen that I have given some weight to this factor in exercising my discretion regarding the appropriate amount of partial indemnity costs recoverable by HMQ.

I wish to address now what I believe to be the important interaction of sections 9 (2)Regulation 283/95, with sections 54 (3) and 56 (2) of the *Arbitrations Act 1991*.

Section 9 (2) provides, *inter alia*, for the assessment of the costs of the arbitration for all parties in accordance with section 56 of the *Arbitration Act 1991.*

The relevant part of section 56 that would appear to apply to section 9 (2) is section 56 (2). It states:

> 56 (2) if an arbitral tribunal awards costs and directs that they may be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court.

Section 54 (3) of the *Arbitration Act 1991* gives the parties the option of requesting (within 30 days) that the arbitrator deal with costs if the arbitrator has not done so in the award.

In my view, the way these provisions are meant to interact is that if the arbitrator makes no disposition of costs in the award, then the parties may request the arbitrator make an order regarding costs. If the arbitrator fixes costs, then the parties have the option of either accepting the arbitrator's costs decision, or appealing it in accordance with the provisions of the arbitration agreement and the *Arbitrations Act 1991* governing

appeals. If the arbitrator awards costs and directs that costs be assessed, then the parties may go straight to the assessment process in the Rules of Civil Procedure.

If however, the arbitrator has made an order respecting costs without fixing the amount,or directing that they be assessed, the parties may request that the arbitrator fix the costs, or, at their option, they may have the costs assessed by an assessment officer under the rules of court.

The reason this is important is that the cited provisions plainly stipulate that the parties' costs of an arbitration, if not fixed by the arbitrator, can be assessed in accordance with the rules of court, and that means in accordance with Rule 57 of the rules of court which applies to proceedings in the courts.

There is no provision in the legislation governing arbitrations that explicitly states an arbitrator fixing costs should consider the same factors that a judge or assessment officer considers in assessing costs, including the factors in Rule 57.01. In fact, apart from the provisions I have cited, there is no provision in the legislation governing arbitrations that gives any specific direction as to how an arbitrator should fix costs.

In my view however, it would be inconsistent with the legislative provisions that I have cited for an arbitrator to fix costs in a manner different from what is required by the rules of court, when the only specific method set out in the legislation clearly contemplates assessment of arbitration costs in accordance with the rules of court.

This leads me to address the argument advanced by Aviva that arbitration costs should be assessed at lesser amounts than costs for court proceedings because the nature of the dispute resolution system calls for such a downward adjustment.

Aviva relies on case law to support this argument. I was not referred to any specific statutory provision that would warrant this conclusion, other than the submission that it should be inferred from the overall scheme of the section 283/95 dispute resolution legislation.

The first case to which I was referred is*Motors Insurance Corporation v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance (the Motor Vehicle Accident Claims Fund).*[10]

The issue was whether Motors was entitled to recover legal fees from HMQ incurred in pursuing the priority dispute. Motors had received a SABS application and paid some SABS in response thereto. As part of Motors investigation of the SABS claim it conducted an examination under oath of the SABS claimant. As a result of that examination, Motors came to the conclusion that the SABS claimant was not a dependent of Motors' insured. As a result, Motors issued a Notice of Dispute between Insurers to HMQ.

HMQ initially took the position that it would not accept priority, and Motors initiated arbitration proceedings on January 9, 2009. After the arbitration had been commenced, but before the arbitrator had presided over the initial pre-arbitration conference on November 25, 2009 (a step which is typically the first active involvement of the arbitrator in these matters), HMQ accepted priority for the claim. Further arbitration proceedings were unnecessary, although it appears that the November 25, 2009 pre-arbitration conference took place.

[10]Arbitrator Shari Novick, February 2010 ("*Motors v. HMQ*").

Motors sought to recover legal fees and disbursements from the time its counsel had first been assigned the claim, up to and including the first pre-arbitration conference on November 25, 2009. The amount sought is not specified in the decision.

The amount sought to be recovered included work done by Motors' counsel before arbitration was commencedon January 9, 2009, including conducting the examination under oath. Only the time spent between January 9, 2009, and November 25, 2009 involved work done after arbitration had been commenced. It is not clear from the decision exactly what amount of legal fees and disbursements related to which of these periods of time. The decision only mentions that approximately $500 in expenses related to the examination under oath, and that dockets had been submitted in support of Motors' claim.

Ultimately Arbitrator Novick decided that Motors ought not to recover costs in the circumstances. At page 4 and 5 of the decision she states the following:

> I acknowledge the argument made by counsel for Motors that costs will generally be awarded to the successful party, especially in circumstances in which counsel's diligent efforts result in the priority insurer (the Fund in this case) agreeing to take over the claim from the first insurer to receive the application, without having to proceed through to arbitration. However, I do not believe that the priority scheme set out in the Regulation 283/95 contemplates that outcome.

I am not exactly sure whether the costs Arbitrator Novick is referring to here relate to costs incurred prior to arbitration being commenced. If so, and what she means in her reference to Regulation 283/95 is that section 9 of Regulation 283/95 only allows

for the recovery of costs incurred to commence arbitration, and thereafter, then I would agree with that interpretation.

There needs to be a starting point for the consideration of what costs can be recovered by the successful party from the unsuccessful party. The *Arbitration Act* authorizes the arbitrator to award costs of "*an arbitration*". Section 9 of Regulation 283/95 refers to the arbitrator ordering payment of costs of "*the arbitration*".

Applying the rules of statutory interpretation, the words of a statute must be given their plain and ordinary meaning. In my view the proper interpretation of the legislation requires that for a party's costs to be recoverable in priority dispute arbitration, the costs must have been incurred to bring the arbitration into existence, or have been incurred after the arbitration has been commenced, and relate to the priority dispute arbitration.

Arbitrator Novick then goes on to discuss her view that arbitrators have equitable jurisdiction to order that legal costs be repaid, but notes that her colleague, Arbitrator Jones, in *Zürich Insurance v. Cooperators*[11] stated that this jurisdiction should be used only, "…*in the most extreme of cases."*

In *Zürich v. Cooperators*, the legal costs being sought did not relate to the priority dispute arbitration. As Arbitrator Novick notes in *Motors v. HMQ*, the costs related to Zürich's defense of the SABS claimant's FSCO claim, before priority dispute arbitration was commenced.It was in this contextthat Arbitrator Jones expressed his view that although arbitrators had equitable jurisdiction to allow recovery of such costs, the

[11] January, 2007.

jurisdiction should rarely be exercised.Arbitrator Novick paraphrases Arbitrator Jones' comments as follows:

> …the intention behind the regulation was to create a quick and efficient scheme for resolving priority disputes…if legal costs incurred were routinely recoverable, much time would be spent examining accounts and arguing about their reasonableness.

Arbitrator Novick relies on these comments in declining to award Motors any costs in connection with respect to legal fees incurred both before and after arbitration was commenced. Sheconcludes:

> Subsection 54 (2) (of the Arbitration Act) specifies that the cost of an arbitration consists of “the parties’ legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration”.
>
> …costs awards in this context should be restricted to time spent by counsel on large steps inherent in the process, as opposed to the few hours (or less) that may be required to prepare and participate in the initial prehearings that characterize the early stages of most arbitrations under the regulation.

With all due respect to Arbitrator Novick, in my opinion her decision in *Motors v. HMQ* reflects misplaced reliance on the previously cited comments of Arbitrator Jones. He made these comments inthe context of expressing his views about an arbitrator’s equitable jurisdiction to order the payment of costs which arise before the commencement of priority dispute arbitration, or which are not connected to the priority dispute arbitration. The comments were not meant to address the situation respecting costs incurred after arbitration was commenced, and related to the arbitration.

In my opinion, the most that can be taken from this case is that it is Arbitrator Novick'sview a successful party shouldnot to be able to recover costs, even after arbitration has been commenced, for legal fees incurred in connection with the time, "*required to prepare and participate in the initial pre-hearings that characterize the early stages of most arbitrations*…".

I respectfully disagree with Arbitrator Novick's view on this point. I do not see any support for that conclusion in the legislation which gives arbitrators the authority and discretion to award costs in arbitration proceedings. I am also not aware of any judicial opinion that would be binding on private arbitrators supporting this interpretation of the legislation. In my view, had the legislature wished to limit costs recovery to only certain steps once the arbitration process was commenced, it would have done so by setting out such restrictions in the Regulation, or in a tariff. The fact that this was not done, and that the legislation is quite broad in its reference to costs, indicate to me that an arbitrator should consider all activities from the time arbitration is commenced as part of the arbitrator's assessment of costs.

It may well be that the priority dispute system was designed to be a less complex, and more expeditious system than court litigation, requiring fewer steps to reach a conclusion. Hence, in priority dispute arbitration there is no provision for such steps as detailed pleadings, affidavits of documents, examinations for discovery (although in the priority dispute world the examination under oath often substitutes for discovery), mandatory mediation, and pretrial conferences.

In my opinion however, It does not follow from this that the customarily fewer steps that do take place in priority dispute arbitration leading up to the arbitration hearing should not to be considered at all in an award of costs to the successful party.

The economy of the priority dispute system derives from fewer, and possibly less complex steps. There is no logical reason however, to disallow recovery to the successful party for legal expenses incurred in connection with these fewer steps.

In my opinion, arbitrators havefairly broad discretion pursuant to section 20 of the *Arbitration Act* to determine a fair procedure to be followed in priority dispute arbitration. We do our best to work with the parties to make it as expeditious and inexpensive as possible to reach, and complete the arbitration hearing. It seems to me then, that all of the steps which the arbitrator and the parties deem necessary to get the matter to an arbitration hearing should be no less compensable in a costs award than the steps directly connected with the hearing, and the hearing itself.

Therefore, I do not regard *Motors v. HMQ* as authority for the broad proposition that awards of costs in priority dispute arbitrations should, in principle, be made on a lesser or reduced scale from court proceedings because the scheme of the priority dispute legislation warrants that interpretation.

There is nothing in the language of the legislation that indicates such awards should be restricted, or made on a reduced scale from court proceedings. To the contrary, as I have indicated, in my opinion the legislation calls for the assessment of costs after arbitration has been commenced to be done in the same manner as costs arising from court proceedings.

*State Farm Mutual Insurance Company v. AXA Insurance Company*[12] is another decision of Arbitrator Novick. State Farm sought recovery of $17,557.50for legal fees from AXA.It would appear from the decision that the amount sought was based on substantial indemnity, rather than partial indemnity, on the argument that AXA should have known from the outset that it was the priority insurer, and delayed until the "last moment" in taking over the claim.

The decision does not state whether any amount of the costs being sought related to work done prior to arbitration being commenced.

Arbitrator Novick did not accept State Farm's submission that it was clear from the outset AXA was the priority insurer. Although she did not specifically say so, it would appear that her award of $9,000.00, plus GST for costs was based on a partial indemnity assessment.

Arbitrator Novick restates her views as expressed in *Motors v. HMQ* concerning what post-arbitration commencement steps should be compensable in a costs award. She states as follows:

> …costs should not be routinely awarded for the time spent by counsel for the few hours required to investigate and assess a claim, or participate in pre-hearing calls at the early stages of anarbitration. The intent behind the *Regulation* 283/95 is to resolve priority disputes quickly and efficiently, and in my view, a close examination of lawyers' accounts and an assessment of the various amounts claimed would not be consistent with the intent of the regulation, as a general rule.

[12]Arbitrator Shari Novick, July, 2010 ("*State Farm v. AXA*").

> However, when an arbitration progresses through the initial stages, and counsel are required to compile briefs and draft factums, prepare examinations of witnesses and craft submissions, they should be compensated for the time they have spent on the steps. Arbitration hearings often address factually and/or legally complex questions, and in my view, there is no reason why counsel's efforts in this regard should not be compensated in the same manner as they are in most other types of litigation.

I have already indicated my disagreement with Arbitrator Novick's views as set out in the first quoted paragraph. I have previously outlined my reasons for that disagreement, so I will not repeat them here. In my opinion, the same reasoning Arbitrator Novick sets out in the second quoted paragraph above for awarding costs applies equally to any steps which take place once arbitration has commenced.

I am not persuaded that *State Farm v. AXA* is any stronger authority than *Motors v. HMQ* for the proposition that there is a general principle that awards of costs in priority dispute arbitrations should be made on a reduced scale from awards of costs made in court proceedings.

Counsel for Aviva made reference to another decision of Arbitrator Novick – *Kingsway General Insurance Company v. Aviva Canada Inc.*[13]This case was actually cited in support of an argument that substantial indemnity costs would not be appropriate in this case. I have already indicated my view that only partial indemnity costs should be awarded to HMQ, and indeed that is all they have sought, so I will not get into too much detail about this case.

[13] Arbitrator Novick, July, 2012 ("*Kingsway v. Aviva*")

Arbitrator Novick awarded partial indemnity costs to Aviva of $5,600.00, plus HST in legal fees, and disbursements of $2,681.35, plus HST. Aviva claimed $10,355.00, plus HST in legal fees, and $3,086.30, including HST for disbursements. It would appear from the decision that all of costs claimed were incurred after arbitration was commenced.

Interestingly Arbitrator Novick remarked that the *Zürich v. Cooperators* was of limited precedential value because it dealt with costs claimed for FSCO proceedings unconnected with, and prior to priority dispute arbitration being commenced.

Nevertheless, in reviewing the lawshe cites her own earlier cases of *Motors v. HMQ,* and *State Farm v. AXA*as support for the proposition that only large steps in the arbitration process should attract costs awards, not, *"…the few hours spent by counsel in the initial stages of an arbitration proceeding*". I have already made my comments on this point.

Arbitrator Novick also introduces the concept of "proportionality", and refers to a decision of Arbitrator Bialkowski[14] in a loss transfer case where his costs award was limited to about 50% of the amount of costs sought to bring it into line with the loss transfer indemnification amount being claimed. She stated as follows:

> While the principle of proportionality may not always be applicable in a priority dispute, I am prepared to heed the general message that fees awarded in a case of this type should not amount to a significant percentage of the amounts in issue between the parties.

[14] *Wawanesa v. Markel*, March 8, 2012.

Arbitrator Novick's costs award represented just over 60% of the amount claimed by Aviva.

I would agree that the principle of proportionality is a factor to be considered in awarding costs in these cases. I would point out however, that this principle isnot specificonly to priority dispute and loss transfer litigation, it is also a principle to be considered according to rule 57.01 of the Rules of Civil Procedure for court proceedings.

57.01 (a) states as follows: "(in exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider...) *the amount claimed and the amount recovered in the proceeding.*"

In my opinion, the principle of proportionality in terms of the costs being sought by HMQ relative to the SABS paid (and that will be paid) for this claim is not particularly relevant given the facts of this case. Micah Brisson was catastrophically impaired as a result of the accident. She suffered a severed spinal cord, and paraplegia, with various impairments that unfortunately often accompany the condition such as the loss of bowel control. The amount of SABS paid, and the exposure for the payment of future SABS is very significant, so there was a good deal of money at stake in this case. This is not a situation where the amount of costs incurred by any party is out of proportion to the amount of SABS paid or payable to the claimant.

The decision of Arbitrator Lee Sami's in *AXA Insurance (Canada) v. CNA*[15] was cited by Aviva as an example of a case where a very modest costs award was made

[15] July 22, 2011 ("*AXA v. CNA*")

even though the amount of money in SABS at stake was in excess of $1 million, and there was a voluminous amount of documents to be managed.

The first point to note about this case is that AXA indicated its solicitor and client costs were "*more than $17,000.00*", but it was seeking partial indemnity costs of only $8,000.00.

I must say that even the amount for solicitor client legal expense seems remarkably low to me for this kind of case, so I suppose AXA's counsel should be commended for their efficiency. A close reading of the decision however, indicates that the issues had been substantially narrowed by the time the matter reached the hearing stage, and the arbitration hearing required only a half a day.

I would also note that Arbitrator Samis concluded that success on the hearing was "partially divided".

This was undoubtedly a factor in Arbitrator Samis awarding AXA only $5,000.00, of the $8,000.00 it was seeking.

In my opinion, one of the most important points to consider from this case is the approach taken by Arbitrator Samis to assessing costs. Unlike Arbitrator Novick, Arbitrator Samis included in his consideration of the relevant costs expenditures each of the 11 pre-arbitration conferences, and counsel's work associated with his appointment by the court as arbitrator. He also considered the legal expense involved in AXA's participation in a private mediation of the tort claim that was proceeding concurrently with the loss transfer dispute he was arbitrating.

From my reading of his decision, it would appear that he considered this an appropriate legal expense to consider in his award of costs for the loss transfer arbitration because the mediation occurred in late 2010. He had been appointed as arbitrator earlier in the year on March 4, 2010 so the loss transfer arbitration was already underway. A review of his analysis indicates that work done at the tort mediation was instrumental in resolving some issues, and narrowing other issues that were later dealt with by him in the loss transfer arbitration; so there was a sufficient connection between the legal expense and the loss transfer arbitration to justify his consideration of it in his costs award.

In the end, in relative terms Arbitrator Samis' costs award was not very large, but in my opinion that had everything to do with the rather small amount being requested by AXA, and Arbitrator Samis' finding that there was divided success, as opposed to the adherence to any general principle that costs awards in these types of cases should be small, reduced, or otherwise lower than costs awards for court litigation.

To the contrary,Arbitrator Samis' comments as to how costs should be assessed in these matters betray no indication that there is any such general principle. He states:

> …In accordance with the Arbitration Agreement costs should follow the event. In accordance with the practice in these arbitrations, costs are awarded in favour of the successful party subject to the discretion of an arbitrator
>
> There is no hard and fast rule of costs quantification based on solicitor and client issues.

I will conclude my comments on this issue by making reference to the recent case of *Security National Insurance Company v. Wawanesa Mutual Insurance Company.*[16]This was a decision of Justice Morgan of the Ontario Superior Court.

In my opinion this case supports my view that there is no general principle that priority dispute and loss transfer arbitrations should be treated differently from court litigation in terms of the quantum of costs that can be awarded, and that an arbitrator should apply the principles set out in the *Courts of Justice Act*, and the *Rules Of Civil Procedure* in assessing costs.

In *Security v. Wawanesa*, Justice Morgan had to fix costs for what was either a priority dispute or a loss transfer arbitration, and the appeal of the arbitrator's decision that was dealt with by Justice Morgan.

Security sought partial indemnity costs of for the arbitration of $46,714.99, and for the appeal, of $20,122.42, for a total partial indemnity claim of $66,837.41.Wawanesa took issue with the Security's costs claim on the grounds that it was, "*too high for this proceeding*".

Justice Morgan makes no mention of any principle that costs in priority dispute or loss transfer arbitration should be assessed on a lower scale, or in a different manner than court proceedings. In fact, he specifically applies the provisions of the *Courts of Justice Act*, section 131 (1), and the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure. He states:

[16][2014] O.J. No. 609 ("*Security v. Wawanesa*").

> The fixing of costs is a discretionary exercise under section 131 (1) of the *Courts of Justice Act*, RSO 1990, c. 43. In considering this discretion, I am guided by the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure. These include, *inter alia*, "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed."

Justice Morgan accepted that the dockets of Security's counsel would support the hours and costs described in the Costs Outline, and concluded that it was not necessary to review them. Although he stated he would not, *"…second guess* (Security's counsel) *and his colleagues in the work they put into the file*", he felt that the overall costs demand was, *"…higher than I would have anticipated for a short arbitration and a single day appeal*." He felt the request was, "*…about $10,000.00 too high*." Consequently, he reduced Security's recoverable costs to $55,000.00, all inclusive.

I want to emphasize that Justice Morgan gave particular weight in his analysis to the factor enumerated in Rule 57.01 that places the focus on what an unsuccessful party could reasonably expect to pay, as the basis for determining a fair figure for costs.

This factor has been given special emphasis by the Ontario Court of Appeal, originally in the case of *Boucher v. Public Accountants Council for the Province of Ontario*[17], and later in*Ontario v. Rothmans Inc.*[18]

In *Ontario v. Rothmans*, the Court of Appeal stated as follows:

> …hourly rates and the notion of indemnification, while clearly important are not the *only* relevant considerations...the objective is to fix an amount that

[17](2004), 71 O.R. (3d) 291 (C.A.). ("*Boucher v. Public Accountants*")
[18][2013] O.J. No. 2367 (C.A.) ("*Ontario v. Rothmans*"). See also *Grand & Toy Ltd. v. Aviva Canada Inc.*, [2010] O.J. No. 139, a decision of Justice Belobaba of the Ontario Superior Court.

> is fair and reasonable for the unsuccessful party to pay in the particular proceeding, *rather than an amount fixed by the actual costs incurred by the successful litigant* (emphasis added by the Court).

I will now proceed to fix the costs to which HMQ is entitled based on the analysis I have set forth above, and a consideration of the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure. In accordance with the case law from our Court of Appeal and Superior Court, I will accord particular emphasis to the factor of what Aviva, as the unsuccessful party, could reasonably expect to pay in the proceeding.

I do accept HMQ's submission that there was some complexity to this proceeding, and that a significant amount of work was involved to reduce the issue to be decided by me to a very specific point concerning the law of dependency in priority dispute cases.

Like Justice Morgan in *Security v. Wawanesa*, I will not second guess the efforts of Mr. Friendly and his legal team with respect to the amount of work they put in in handling this case. I am satisfied that they spent the time they indicate they spent, in the Costs Brief provided to me. I am also not going to question the necessity of the number of hours worked. It could be argued that the result obtained justified the effort.

I will make a reduction however, for the time spent before work commenced on the order to have me appointed as arbitrator. In round figures, this works out to $2,730.00 in partial indemnity time, since it would appear from the dockets at tab 2 of the HMQ Costs Brief that about 9.75 hours were spent by Mr. Friendly up to that stage.

Although I expect that some or possibly much of this work may have had some relationship to the arbitration that was later commenced, I prefer to keep my discretion

to award costs focused on the time associated with the actual start-up, and conduct of the arbitration.

I will also make a reduction for some docketed time that, in my opinion, would more appropriately be considered a solicitor-client matter, as opposed to part of a partial indemnity assessment to be paid by an unsuccessful opposing party.

Here I reference the mention of “Mentoring/Peer Review” respecting the involvement of law clerks, and various dockets for time spent traveling to and from different locations.

Without intending to be totally exact about it, I would make a further $1,000.00 reduction in partial indemnity time on account of these matters.

Factoring in these reductions to HMQ’s overall claim for partial indemnity costs, this would leave an amount of approximately $33,000.00 to be considered in the context of the factors I feel are most relevant.

I do not accept HMQ’s submission that it is of any special significance in determining the quantum coststo which HMQ is entitled, that HMQ, as a government “payor of last resort”, had to contest this matter with several insurers, and ultimately go through a full arbitration hearing with Aviva before the matter was resolved in its favour.

The issue that I had to decide was far from clear. There was no relevant arbitral or court decision on point. Aviva had every right to contest the matter through to a decision.Had Aviva been successful, as the matter was constituted before me, HMQ, and not Aviva would have had to pay SABS to Micah Brisson.

There was a meritorious position to be advanced by both parties, and so the measure of costs should more properly reflect that, rather than the particular status of the party advancing the argument.

It is in this connection that I also give some weight to the factor that my decision on this aspect of the law of dependency was of importance to the insurance industry generally. In that sense both parties benefited equally from litigating the matter to a conclusion. As I have indicated, the parties did not feel that this was a sufficient reason to see the case as one where, because of its importance to the industry, no party should be awarded costs. I do think however, that this factor justifies some moderation of the costs to which HMQ should be entitled to recover from Aviva.

Although I have rejected the argument that priority dispute arbitrations should, in principle, attract lower assessments of costs than court proceedings, I do think Aviva's argument with respect to the appropriate partial indemnity hourly rate for cases in the insurance genre should be considered in determining the quantum of costs. It is relevant because, as the courts have emphasized, I must consider what would be fair and reasonable for Aviva, as the unsuccessful party, to pay, rather than determining the amount based only on the costs incurred by HMQ.

In considering this, I stress that I am not simply applying a subjective test which would see the costs amount determined by what Aviva would have expected to pay. It probably would not be off the mark to commentthat an unsuccessful litigant in any case will always say that it would have expected to pay less in costs than the successful litigant demands.

In my opinion, this test for assessing costs must be applied as objectively as possible. One cannot simply ask what the unsuccessful litigant in the particular case expects to pay, one must ask what any unsuccessful litigant should expect to pay for the type of case being litigated,applying the factors to be considered as set out in Rule 57.01 (1).

In applying this principle, I believe it is relevant to consider the range of solicitor-client, and hence partial indemnity fees prevailing at a given time in the area of the law relating to the case being litigated. In this situation we are dealing with a piece of insurance litigation. I have already indicated my acceptance of the submissions of Aviva's counsel with respect to the general range of the solicitor-client fee structure that exists in the business of insurance litigation today.

As a general statement, and that is all it can be since there will always be exceptions, it is true that the solicitor-client fee levels in the insurance industry are not as high as some other areas of the law.

HMQ included, as part of its Costs Brief, an article from the Canadian Lawyer magazine which contains 2014 data respecting both national and Ontario rates for lawyers' solicitor-client fees. From an Ontario sample size of 166, the data obtained indicates that in a civil litigation action including a trial of two days duration, the minimum fee was $13,414.00, the maximum was $38,967.00, and the average fee came to $21,264.00. Again, one must be careful not to place too much reliance on survey data, particularly with such a small sample size, but it is helpful nonetheless to give some consideration to the information.

In my opinion, an application of the reasonable expectation of the unsuccessful litigant principle to the assessment of costs in an insurance case such as this justifiesa further reduction of the costs amount sought by HMQ from the $33,000.00 amount calculated above.

Exercising my discretion in accordance with all of the matters I have discussed, and without suggesting there is any precise mathematical formula behind my conclusions, in my opinion it would be appropriate to reduce the value of partial indemnity costs to which HMQ should be entitled to an all-inclusive sum of $25,000.00.

HMQ is therefore entitled to recover the sum of $25,000.00 for the costs of the arbitration, payable by Aviva within 30 days of the date of these reasons.

With respect to the expense associated with my account for receiving the parties oral and written costs submissions, and preparing these reasons, in my opinion there has been divided success. The appropriate disposition with respect to my account in connection with the fixing of costs, is that HMQ and Aviva should satisfy my account in equal shares.

Dated at Toronto, August 22, 2014

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Arbitrator Scott W. Densem