

IN THE MATTER OF AN ARBITRATION

PURSUANT TO: Section 148.2(1) of the Revised Regulations
to the *Insurance (Vehicle) Act* (BC Reg 447/83) and
the *Arbitration Act*, RSBC, 1996 c. 55 (the “Act”)

BETWEEN:

E.B.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DETERMINATION OF CERTAIN COSTS ISSUES

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Arbitrator

Rose Keith QC

Date of Submissions regarding Costs

June 28, 2021

Date of Award

August 3, 2021

ISSUE TO BE ARBITRATED

1. The parties agreed to submit this matter to arbitration pursuant to s. 148.2 of the *Insurance (Vehicle) Regulation B.C. Reg. 447/83* (the “*Regulation*”) of the *Insurance (Vehicle) Act*, R.S.B.C.1996 c. 231 (the “*Act*”). The parties have agreed that I have jurisdiction to determine issues relating to costs arising from that arbitration.
2. The motor vehicle accident that was the subject of this arbitration occurred on September 4, 2014. My award in the arbitration was rendered on April 5, 2021.
3. The parties have asked me to determine the discrete issue of whether the arbitrator’s fees and expenses incurred in holding the hearing are recoverable disbursements in this proceeding.

ANALYSIS

4. The UMP provisions pertaining to costs are found in section 148.2 of the *Regulation*. The relevant provisions provide as follows:
 - (2) Notwithstanding subsection (1), section 11(1)(c) of the *Commercial Arbitration Act* does not apply in respect of an order for costs of an arbitration.
 - (3) An arbitrator may make an order as to costs of an arbitration only on a party and party basis.
5. Section 11 of the former *Arbitration Act* which was in force at the time of this accident and by agreement of the parties applies to these proceedings, provided as follows:
 - 11(1) The costs of an arbitration are in the discretion of the arbitrator who, in making an order for costs may specify any or all of the following:
 - (a) the persons entitled to costs.
 - (b) the persons who must pay the costs.
 - (c) the amount of the costs or how that amount is to be determined.
 - (d) how all or part of the costs must be paid.
 - (2) In specifying the amount of costs under (1)(c), the arbitrator may specify that the costs include
 - (a) actual reasonable legal fees, and
 - (b) disbursements, including the arbitrator’s fees, expert witness fees and the expenses incurred for holding the hearing.

6. Rule 41 of the BCICAC provides as follows:

- (1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
- (2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 21(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
- (3) In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
- (4) Costs include:
 - a. The fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal.
 - b. The fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred.
 - c. The legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitration tribunal to be entitled to recover such costs; and
 - d. The commencement fee, administration fees, and the expenses incurred by the Centre.

The parties are jointly and severally liable to pay the Centre's fees and the tribunal's fees and expenses.

7. Rule 21(2) of the BCICAC rules states as follows:

21. Conduct of the Arbitration

(2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits.

8. The Respondent's position is that because section 11(1)(c) does not apply to UMP arbitrations, my scope of authority to award costs does not extend to the discretion to order the payment of indemnity costs, arbitrator's fees, and expert fees and expenses incurred during the hearing. The Respondent says that as the scope of authority to determine costs under s. 11(1)(c) of the Arbitration Act is specifically removed during an UMP arbitration, it is replaced with the narrower authority to award party and party costs under Part 10 of the Regulation.
9. The respondent does not argue that the reference to s. 11(1)(c) in section 148.2(2) and 148.2(3) of the *Regulations* removes the authority of an arbitrator to award expert fees and expenses incurred during the hearing as costs rather they differentiate arbitrator's fees and argue that the authority to order those are excluded.

10. The Respondent says that party and party costs refers to tariff costs and regular disbursements, providing me with the discretion to order that the successful party be reimbursed for its expert witness fees and hearing fees, but that this discretion does not extend to the party's share of the arbitrator's fees. They raise four reasons supporting this conclusion:
- a. Parties to an UMP arbitration generally adopt the Supreme Court Civil Rules which do not contemplate the decision maker's fees as disbursements.
 - b. Arbitrator's fees are different than the usual expenses involved in proving a claim. If they were generally accepted as being part of regular disbursements, then they would not need to be specifically mentioned as being included disbursements in s. 11(2).
 - c. Arbitrator's fees do not come within the scope of the definition of disbursements as defined by our courts; and
 - d. UMP coverage is considered coverage of last resort which explains why the legislature elected to remove the arbitrator's discretion to award arbitrator's fee and hearing room expenses in the UMP context.
11. The Claimant says that as the parties agreed to have the arbitration governed by the Supreme Court Civil Rules, the normal rule providing successful parties with costs apply, and the arbitrator's fee is a recoverable disbursement under those rules. The Claimant says that the effect of s. 148.2 was specifically addressed in a March 1, 20011 decision of Arbitrator Camp, which awarded costs including arbitrator fees to the successful claimant.
12. Following consideration of the impact of section 148(2) and (3) of the Regulations, arbitrator Camp concluded that he had authority to award arbitrator fees as part of his costs award. Arbitrator Camp stated as follows:
19. Dealing first with the issue of the nature of costs that I can properly award, I find that as a result of section 148.2(2) and section 148.2(3) of the *Regulation*, I am constrained to only award party and party costs and I am not permitted to award actual reasonable legal fees as specified in section 11(2)(a) of the *Commercial Arbitration Act*. The parties agreed that the jurisprudence stemming from the *Rules* pertaining to costs (now Rule 14) ought to be applied *mutatis mutandus* to the UMP arbitration process. In this regard disbursements are subject to a two-pronged test. First it must be shown that they have been necessarily or properly incurred. Second it must be shown that the amount of the disbursement is reasonable.
13. I agree with arbitrator Camp that as a result of section 148.2(2) and 148.2(3) I am constrained to only award party and party costs and am not permitted to award actual reasonable legal fees as specified in section 11(2)(a) of the *Commercial Arbitration Act*.

Specifically, s. 148.2(2) makes subsection (c) of Section 11 of the *Arbitration Act* inapplicable to an assessment of costs following an UMP arbitration. In other words, I do not have authority to determine the amount of costs or how that amount is to be determined. I am confined to awarding costs only on a party and party basis. The question then becomes whether arbitrator's fees are awardable as a disbursement under the *Rules*.

14. The British Columbia Court of Appeal in *Allard v. The University of British Columbia*, 2021 BCSC 60 considered the costs regime in arbitrations generally. At paragraph 78 the Court described the operation of that regime as follows:

[78] While costs fall within an arbitrator's discretion, the "normal rule" in arbitrations is that the successful party is entitled to "indemnification costs unless there are special circumstances that would warrant some other type of costs": *Goel*, at paras. 66 – 69 and 80; *Teal Cedar*, at paras. 78 and 85. This conclusion is consistent with the express wording of BCICAC Rule 41(2) which states that "the normal or typical costs award in arbitration includes reasonable legal and other expenses" and Rule 41(4) which states that costs include "the legal and other expenses reasonably incurred in relation to the arbitration".

15. In describing the role of an award of indemnification costs, the Court of Appeal referred to the aims of the Legislature, stating:

[80] The Cost Award is also consistent with the aims of the Legislature. Full indemnification of a successful party to an arbitration was apparently both expressly contemplated and a stated purpose for amendments to the *Arbitration Act*. In his introduction of the *Attorney General Statutes Amendment Act* (No. 2), 1990 (Bill 76), the Honourable Mr. Russell Fraser, Attorney General for British Columbia, as recorded in Hansard, said:

An amendment of the Commercial Arbitration Act will clarify an arbitrator's authority to award costs for actual reasonable legal fees, disbursements, arbitrators' fees, expert witness fees and expenses of the arbitration hearing. This is an interesting amendment. It will preserve a desirable feature of arbitration: namely, the ability of a party to recover its actual costs. The amendment will help to ensure that the Commercial Arbitration act remains an attractive option for business people [emphasis added].

[81] This statement undermines the petitioners' expressed concern about the unintended "chilling effect" of awarding indemnity costs and supports the opposite conclusion: namely, that parties are more likely to pursue commercial arbitration precisely because doing so permits them to recover their actual costs.

16. The special circumstances that exist in an UMP arbitration is section 148.2(2) and 148.2(3) which eliminate the entitlement to indemnification costs and rather limit the successful party to party and party costs.

17. I agree with the respondent that I do not have authority to exercise a discretion to order the payment of indemnity costs due to the exclusion of section 11(1)(c), however I do have the authority to order costs on a party and party basis. The respondent concedes that the authority to order party and party costs provides me with the authority to order reimbursement for expert witness fees and hearing fees but argues that I have no authority to award arbitrator's fees.
18. I conclude that in an UMP arbitration the arbitrator's authority to award costs is limited to party-to-party costs, with the question remaining whether arbitrator's fees are recoverable as disbursements, that is whether they have been necessarily or properly incurred and relate directly to the exigencies of the proceeding.
19. The respondent argues that arbitrator's fees are not awardable as the *Rules* do not contemplate the decision maker's fees as a disbursement, noting that parties to a Supreme Court Action do not have to pay for the cost of the judge when they go to trial, regardless of whether they win or lose. Parties to an UMP arbitration do not make a choice about proceeding with arbitration rather than proceeding with a Supreme Court Action. That choice is made for them by the legislation. In my view, the fact that parties to a Supreme Court Action do not have to pay for a judge does not answer the question of whether arbitrator's fees are awardable as a disbursement when ordering party and party costs. I note that jury fees are awardable as a disbursement when the parties choose in a Supreme Court Action to have a jury be the decision maker.
20. The respondent argues that arbitrator's fees are different from the usual expenses involved in proving a claim which is why the court in *Allard* referenced Hansard. The court also referenced expert witness fees and there is no suggestion by the respondent that they should be treated differently than any other disbursement. The reference in *Allard* does not provide authority or a basis for treating arbitrator's fees distinctly, rather it leads to the question of whether arbitrator's fees, or any other fees incurred in the conduct of an arbitration have been necessarily or properly incurred in the conduct of the proceeding.
21. The respondent argues that arbitrators' fees do not come within the scope of disbursements as defined by our courts, referring to the Court of Appeal decision in *Chandi v. Atwell*, 2014 BCCA 446. The issue in *Chandi* was whether, in principle, an out-of-pocket payment of interest incurred by a successful litigant as an expense in funding disbursements in litigation is recoverable as a disbursement. The court explained that the question of whether interest is recoverable as a disbursement lies "in the correct interpretation of Rule 14-1(5) when read in the context of the purposes of the costs regime and the general legal environment governing recovery of pre-judgment interest, including the *Court Order Interest Act*, R.S.B.C. 1996, c. 79." The Court phrased the question in the following way:
 7. The critical question, ultimately, is whether an out-of-pocket expense is a recoverable disbursement only if it was incurred because of necessities arising directly from the legal and factual issues inherent in the particular litigation, rather than from the circumstances of the litigant (for example, a litigant's lack of financial means), or, whether any reasonable out-of-pocket expense incurred by a

litigant because of the litigation is recoverable as a disbursement, provided it was necessarily or properly incurred.

22. Section 2 of the Court Order Interest Act prohibits an award of interest on the costs that are awarded following judgment. This informed in part the court's decision to not allow interest as a recoverable disbursement.
23. The court in *Chandi* provided guidance as to what a recoverable disbursement is, stating at paragraph 79:

79 The rule, in its current form, permits the recovery of “disbursements...incurred in the conduct of the proceeding”. In my view, quite apart from the language “incurred in the conduct of the proceeding” the term “disbursement”, when used in the context of a costs rule that relates to the taxation of costs in particular litigation, does contain limits that narrow its potential broad applicability. It appears to me that the purpose of permitting the recovery of disbursements in the context of a cost's regime is to permit the recovery of those expenses that arise inherently and directly from the issues in the case which relate, as the appellants suggest, to the direction, management, or control of litigation and which pay for materials and services used to prove a claim or defence. These expenses arise directly from the nature and conduct of the allegations in a proceeding. By contract, interest expenses do not arise from the nature of the allegations or the conduct of proceedings, they arise from unrelated causes including the financial circumstances of a party. In my view, as such, they do not fall within the meaning of the word “disbursements” in the costs rule.

80...To be recoverable a disbursement must arise directly from the exigencies of the proceeding and relate directly to the management and proof of allegations, facts and issues in litigation, not from other sources. In my view, that is what is captured by the phrase “the conduct of the proceeding”.

24. The respondent argues that arbitrators' fees are not recoverable as a disbursement as they are not expenses that relate directly to the proof of facts and issues in litigation. To be recoverable as a disbursement, a cost must arise from the nature of the allegations or the conduct of the proceedings. I find that arbitrator's fees, similar to jury fees, arise from the conduct of the proceedings and are thus a disbursement which are recoverable as party and party costs. Arbitrators' fees in an UMP arbitration are costs which arise directly from the exigencies of the proceeding.
25. The respondent submits that as UMP coverage is considered coverage of last resort, a part of that has been the removal of the arbitrator's discretion to order that one side should pay the fees and expenses of the arbitration. I find that while the legislature removed the ability of an arbitrator in an UMP arbitration to award the successful party their actual legal fees, it has clearly retained the arbitrator's discretion to award party and party costs, applying the principles as established in the jurisprudence in the cost's regime. In applying those principles, and in particular in assessing whether the arbitrator's fees are a recoverable disbursement under the costs regime, I conclude that arbitrators' fees arise directly from the exigencies of the proceeding and arise as a result

of the conduct of the proceeding and are therefore recoverable as a disbursement by the successful party.