IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c I.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:

ECHELON INSURANCE

Applicant

- and -

GORE MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Daniel Strigberger: Counsel for Echelon Insurance (hereinafter called Echelon)

Matthew Owen: Counsel for Gore Mutual Insurance Company (hereinafter called Gore)

Introduction:

This matter comes before me pursuant to the *Insurance Act* R.S.O. 1990 c I.8, as amended, specifically Section 268 of the *Insurance Act* and Ontario Regulation 283/95, as amended. This matter involves a priority dispute as between Echelon and Gore with respect to the payment of Statutory Accident Benefits to the claimant arising out of a motor vehicle accident on August 18, 2018.

I rendered a Decision on a preliminary issue in this matter on December 21, 2022 in which I declined to allow the claimant to be added as a party to the priority dispute. No appeal was launched from that Decision that I am aware of.

By way of background, the Accident Benefit claim arises out of an incident that occurred on August 18, 2018. The claimant was operating her Yamaha motorcycle when it was involved in an accident with a pick-up truck.

The motorcycle is insured by Echelon under policy number X32100197-9. The Echelon policy does not carry any optional benefits.

Gore insures the claimant's 2003 Buick Rendezvous. This policy carried optional, med rehab/attendant care benefits. This increased her limits for med rehab and attendant care to $130,000.00.

The claimant's claim remains open. The present med rehab/attendant care limits of $65,000.00 have been exhausted. Clearly for the claimant, access to optional benefits could be important. She did sustain serious injuries including left rib fractures, facial lacerations, right humerus fracture, and left distal radius fracture. However, this is a priority dispute and not a dispute between the claimant and her insurer.

An OCF-1 was submitted to Echelon and received by Crawford on September 27, 2018. The claimant was represented and her lawyer faxed the Application to Crawford on September 26, 2018.

Echelon served a Notice to Applicant of Dispute between Insurers dated November 13, 2018 on both Gore and the claimant.

Echelon then served the Notice to Participate and Demand for Arbitration on Gore only on October 29, 2019. That led to my appointment as Arbitrator and various subsequent pre-hearings and ultimately this Hearing.

Counsel submitted various Factums, Joint Book of Documents, Books of Authority, and as well we had a half-day of oral submissions. Counsel also submitted a signed Arbitration Agreement in June of 2021.

Relevant Facts:

There is no dispute with respect to the facts.

I have already noted that the claimant had significant injuries. She was taken from the scene of the accident to Tillsonburg District Memorial Hospital and then airlifted to London Health Sciences.

Her OCF-1 that was submitted to Echelon was signed by the claimant's sister, PW, on August 24, 2018. The Application for Accident Benefits shows that the claimant had retained a lawyer. I note that the Application while signed on August 24th it was not faxed out by the claimant's counsel until September 26th and the document itself indicates it was received by Crawford and Company, agent for Echelon, on September 27, 2018.

It is important to note that almost a month had gone by from the claimant's sister signing the Application for Accident Benefits and the delivery and receipt of that document by Echelon.

Echelon submitted an Affidavit signed by the claimant's sister in which she indicated that when the OCF-1 was submitted to Echelon that the claimant's sister was not aware of the existence of the Gore policy with optional benefits. Although there is no Affidavit by the claimant herself,

hearsay evidence is presented by the claimant's sister in her Affidavit suggesting that she believes that the claimant was not aware that she had optional benefits.

However, the evidence before me showed that on June 23, 2016, a letter was sent to the claimant by her broker, Will Insurance Brokers Limited. In that letter they advised that she had been sent various documents outlining the significant changes made to the standard automobile policy with respect to Accident Benefit coverage effective June of 2016. The letter notes that the coverage for med rehab and attendant care is combined into one and the total amount lowered it to $65,000.00.

Significantly, the letter then states:

> "You have asked to increase to $130,000.00 non catastrophic at an additional $53.00 but I can't do it on the computer until closer to the renewal date".

The letter then went on to offer other optional benefits that the claimant may want to consider.

The Certificate of Insurance shows that the policy renewed on May 16, 2017. A copy of the Certificate of Automobile Insurance was produced covering the time period of July 15, 2018 to July 15, 2019 with respect to the Gore coverage. The Certificate is clearly directed to the claimant at her primary address and notes that she has purchased the optional med rehab and attendant care benefit up to $130,000.00.

A copy of the Echelon policy was also produced in which it insures a 2004 Yamaha under a Riders Plus insurance policy covering the time period July 5, 2018 to July 5, 2019. That policy is clear that there were no optional benefits purchased.

Turning back to the early stages of this claim.

There was nothing before me to provide any explanation for the delay between the signing of the OCF-1 on August 24th and its submission to Crawford on September 26/27. There is no evidence explaining what if anything was done during this time period to make any further inquires about possible insurance that would cover the claimant and in particular whether there was any policy with optional benefits.

Echelon then issued its Notice to Applicant of Dispute between Insurers dated November 13, 2018. The grounds under part 3 as to why Notice was being given to another insurer are set out below:

> "[The claimant] was travelling on her motorcycle insured with Echelon, when third party passenger vehicle pulled out striking her causing significant injuries. We note upon investigation that Gore Mutual policy number 1179314 has optional benefits for med rehab, and therefore would be priority insurer of [the claimant's] Accident Benefit claim".

Again, there is no dispute on the facts set out by Echelon that they insured the motorcycle that the claimant was on at the date of loss and that the only basis they pursued a claim for priority as against Gore was because it's policy had optional benefits.

Gore acknowledged receipt of the Notice to Applicant of Dispute by letter dated November 13, 2018. They asked for some information including a copy of the OCF-1 and a copy of the Echelon policy.

By letter dated February 7, 2019, Gore declined to accept priority. In their letter of that date, they acknowledged that the claimant's policy with Gore did contain optional benefits but took the position that as an Application for Accident Benefits had already been submitted and received by Echelon, then in accordance with OPCF-47 and the Arbitral decision in *Jevco Insurance Company v Chieftain Insurance Company* (Arbitrator Samworth March 11, 2016) that priority rested with Echelon regardless of optional benefits.

This position then resulted in the Demand to Submit to Arbitration being served by Echelon on Gore on October 29, 2019.

On March 23, 2022, counsel for the claimant sent a letter to the Gore submitting an OCF-1. The covering letter relies upon the decision of the Court of Appeal in *Continental Casualty Company v Chubb Insurance* 2022 ONCA 188. The letter suggests that this decision supports that despite the claimant making an initial Application for Accident Benefits to Echelon, the insurer of the motorcycle, that the availability of the optional benefits with the Gore policy means that they should accept the OCF-1 and commence adjusting the file.

A new OCF-1 is attached to the letter. There is a Schedule "A" to the OCF-1 in which the claimant says that in reliance of the Court of Appeal decision that she now may apply to Gore for "additional benefits" and that she is seeking relief from forfeiture.

Gore responds by way of email dated April 26, 2022 to the claimant and her counsel advising that there is a priority dispute between Echelon and Gore as to who is obligated to pay the Statutory Accident Benefits. The priority rules under Regulation 283/95 require that only one completed OCF-1 be submitted to an insurer and as that has already been submitted to Echelon that Echelon should continue to handle the Accident Benefit file until the priority dispute has been dealt with.

Counsel for the claimant responded to this by letter dated June 6, 2022. She states as follows:

> "Pursuant to the OPCF-47, once Gore agrees to start paying her benefits, my client agrees and undertakes not to make any further claims to Echelon for benefits.
>
> Further, under the terms of the OPCF-47, your company is not allowed to rely on the priority rules to deny my client's claim, yet that is exactly what your company is doing...".

There is no dispute that as yet the claimant has not brought an Application at the Licencing Appeal Tribunal to seek benefits from Gore or to seek relief from forfeiture.

As noted earlier, the claimant did seek to be added as a party to this priority dispute and to advance a claim for relief from forfeiture before me. I declined to make that Award as set out in my preliminary decision dated December 21, 2022.

I should also point out that in terms of this proceeding, Ted Watson, adjuster handling this file at Gore was called to give evidence.

<u>Position of the Parties:</u>

Echelon

I reproduce below the OPCF-47 as the wording of this is key to this case.

AGREEMENT NOT TO RELY ON SABS PRIORITY OF PAYMENT RULES
OPCF 47

Issued to	Policy Number	Effective Date Year Month Day

1. Purpose of This Endorsement

This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident benefits under this policy may, by the priority of payment rules in Section 268 of the *Insurance Act*, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have been purchased under this policy.
This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.

2. What We Agree To

If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.

Echelon relies on this document to support its position that as long as the criteria set out in the OPCF-47 are met that it does not matter when the Application for Accident Benefits is submitted to the optional benefit insurer. Once the Application is submitted, the OPCF-47 is activated and the priority rules are set aside. Echelon argues that it does not matter if a previous OCF-1 had been submitted to a different insurer. Echelon submits that the OPCF-47 does not limit the number of OCF-1s and that an insured should have the right to correct an error if it submitted its initial OCF-1 to the non-optional benefit insurer. As long as in those circumstances the insured agrees not to continue to seek benefits from the first insurer they submitted their Application to but rather only seek benefits from the optional benefit insurer then the OPCF-47 is activated and the priority rules are set aside.

Echelon acknowledges that but for the OPCF-47 and the existence of the optional benefits it would be the priority insurer under Section 268 of the *Insurance Act*. The claimant was the named insured under their policy. Echelon insured the motorcycle that the claimant was an occupant of when the loss occurred.

Echelon submits that the claimant's injuries prevented her from participating in the Application process and that the OCF-1 was prepared and submitted by her lawyer and her sister. Echelon suggests that the evidence supports that no one was aware of the optional benefit policies with Gore when the OCF-1 was submitted to Echelon. Had the claimant's sister and her lawyer been aware of the optional benefits then clearly they would have submitted their OCF-1 to Gore.

Echelon argues that it is inequitable, unfair, and contrary to the consumer protection nature of the Ontario Statutory Accident Benefits to prevent the claimant from accessing and receiving enhanced benefits from Gore which she has paid a premium for.

Echelon also suggested it is inherently unfair for it "to be saddled" with paying Accident Benefits to the claimant just because there was a lack of awareness about the availability for the optional benefits with Gore at the time the OCF-1 was submitted. Echelon also suggests that it is absurd to decide a priority dispute on its merits based on where the claimant applied for benefits first.

Most importantly, Echelon relies heavily on the decision of the Court of Appeal in *Continental Casualty v Chubb Insurance Company of Canada* (Supra) to suggest that some obiter comments made by the court in that case result in distinguishing the facts of this case from my decision in *Jevco v Chieftain* (Supra). In that case, in very similar circumstances to here, I concluded that there was no right of the insurer in Echelon's position to pursue a claim in priority against the optional benefit insurer when the former had received the OCF-1 first. There was no appeal taken from my decision.

Echelon also relied upon a bulletin that was issued by the Commissioner of Insurance, Dina Palozzi, on November 19, 1997 shortly after the OPCF-47 came into place. That bulletin was subsequent to an earlier one from 1996 when the Endorsement had first come into existence.

Counsel for Echelon points out that the Endorsement is noted to be mandated in order to ensure that optional Accident Benefits are portable and that the insured person can access them regardless of the priority of payment rules set out n Section 268 of the *Insurance Act*. The bulletin goes on to explain how the priority rules are essentially suspended when an OPCF-47 is "applicable" to the person under the policy.

Some of the relevant sections from the Endorsement are set out below:

> "For example, an insured person had purchased the additional income replacement benefits and has now suffered an impairment as a result of an accident and is unable to work. If this person qualifies to receive the income replacement benefit, then the optional accident benefits would be "applicable" and the OPCF-47 would become operational. The insured person should apply to the insurer from whom the optional benefit coverage was purchased".
>
> "The endorsement also provides that where an insured person claims both mandatory accident benefits and optional accident benefits from an insurer, the insured person agrees not to apply for **SABS** under another policy. This is to prevent double compensation".
>
> "It is important to note that the insured person makes one **SABS** application only. In this case the insured can choose which insurance policy to go with. The insured would choose the policy with supplementary medical rehabilitation and attendant care coverage. This insurer would be responsible for paying both the optional and mandatory coverages".

Echelon accepts the case law which started with the decision of Arbitrator Samis in *Echelon General Insurance Company and Co-operators General Insurance Company* (Samis January 20, 2015) there are 4 criteria that the claimant must meet as set out in the OPCF-47 in order to activate the coverage. Those criteria are:

1. That optional Statutory Accident Benefits are purchased;
2. That the optional Statutory Accident Benefits are applicable to the claimant;
3. "The person claims SABS under this policy as a result of the accident" (that they apply to the optional benefit insurer); and,
4. That the claimant agrees not to make a claim for SABS under any other policy.

Echelon argues that the claimant meets all these criteria.

There is no dispute that the claimant meets criteria 1 as she purchased optional benefits from Gore. There is also no doubt that she meets criteria 2 as the optional benefits are applicable to her as the named insured and she sustained injuries.

With respect to criteria 3, Echelon's position is that now that the claimant has submitted an OCF-1 to Gore and has agreed not to pursue any further claim for benefits against Echelon that she therefore meets criteria 3 and 4.

Echelon argues that my interpretation and Arbitrator Samis's interpretation of criteria 3 in particular was wrong. Both Arbitrator Samis and I concluded that in order to comply with criteria 3 that the claimant must submit the first Application for Accident Benefits to the optional benefit insurer in order to activate the Endorsement. Echelon argues that it's wrong and unfair to the Applicant as it forever precludes them from pursuing optional benefits for which they paid an added premium. Rather, the proper interpretation, according to Echelon, is that as long as an OCF-1 is submitted at some point to the optional benefit insurer and the claimant agrees not to pursue the actual priority insurer that the OPCF-47 is then activated.

Echelon also relies on the decision of Justice Turnbull in *Yaromich & Heartland* 2021 ONSC 3759 CANLII. In that decision, Justice Turnbull doubted whether my decision was correct in *Jevco & Chieftain* (Supra) in which I concluded that the claimant could not re-elect under the *SABS* or the *Insurance Act* to pursue a claim against the optional benefit insurer. Justice Turnbull noted at paragraphs 49 to 51 that there was no legislation that prevented a claimant from withdrawing their Application and resubmitting it to another insurer as indeed the claimant did in this case. Those comments were obiter.

On the issue of re-election and/or sending in a second OCF-1 to the optional benefit insurer, Echelon submits that there is no legislative authority that prevents a claimant from withdrawing her Application and re-electing or refiling a new one. The Statutory Accident Benefits Schedule does not speak to that. The only regulatory provision that covers it is Section 2.1(4) of Ontario Regulation 283/95 which states:

> "2.1(4) the applicant shall use the application provided by the insurer and send the completed application to only one insurer".

Echelon submits that this section does not prevent a claimant from re-electing to an optional benefit insurer in the circumstances of this case. It submits that Section 2.1(4) has to be interpreted in the context of a priority dispute and not prohibiting the right of the claimant to re-elect in appropriate circumstances. Echelon also submits that there is some doubt as to whether Section 2.1(4) is actually binding on the insured as it is a Regulation dealing with disputes between insurers.

Echelon also made submissions with respect to the effect that the decision the Court of Appeal in *Continental v Chubb* (Supra) had on my decision in *Jevco & Chieftain*.

Echelon argues that the Court of Appeal held that OPCF-47 displaces the priority rules under Section 268 of the *Insurance Act*. They reference paragraph 91 of the decision where the court states:

> "Second contrary to the SCJ's conclusion and the Echelon Arbitrator's reasons I conclude that OPCF-47 displaces the Section 268 priority rules. That is because OPCF-47 is inconsistent with those rules and because Section 227(2) of the *Act* makes OPCF-47 effective in accordance with its terms even though it may be inconsistent with section 268 priority rules".

Also paragraph 93 and I quote:

> "where applicable on its face OPCF-47 contradicts those provisions if a claimant applies for SABS to an insurer providing optional enhanced SABS coverage, the coverage is applicable and the claimant agrees not to apply for SABS to another insurer, OPCF-47 requires the optional enhanced SABS coverage insurer and not the Section 268 priority insurer to pay both basic, mandatory, and optional enhanced benefits".

Echelon interprets this to suggest that where a claimant applies for benefits under the OPCF-47 there is no such thing as a priority insurer. Therefore, Echelon is not bound by the priority rules and Gore should properly accept the claimant's Application. Echelon argues that where the evidence is that the claimant did not realize initially that they could apply to the OPCF-47 insurer but subsequently applies to that insurer for those benefits and that insurer denies the claim on the basis of the priority rules which they are not entitled to under the OPCF-47, then responsibility for the payment of the benefits lies with the optional benefit insurer.

Echelon's final submissions is that the approach that they suggest for the interpretation of the OPCF-47 is one that would promote clarity, certainty, and predictability with the insurance industry in priority disputes involving optional benefits. Their submissions are set out in paragraph 20 of their supplemental Factum and I quote:

> "Echelon's position in this matter promotes clarity, certainty, and predictability. In cases like this, the Section 268 insurer would provide the OPCF-47 insurer with a priority dispute notice within the 90-day deadline. The OPCF-47 carrier would acknowledge and confirm that the OPCF-47 displaces the priority rules under Section 268(2) of the act. The file would change hands and the claimant would start getting benefits from the OPCF-47 insurer. Moreover the costs and expenses incurred by both insurers on the priority dispute issue would be minimal".

I now turn to the submissions of the Gore.

Gore

On the facts, the Gore argues that they disagree with Echelon's position that there is evidence that the claimant was not aware of the availability of the optional benefits from Gore to the extent that has any bearing on this decision. Gore points to the following:

1. There is no evidence explaining the one month gap between the signing of the OCF-1 by the claimant's sister and the faxing of it to Echelon.
2. There is insufficient evidence to explain what was done to inquire about insurance coverage during that period.
3. There is no evidence from the claimant directly herself about her actual knowledge of the availability of the Gore benefits particularly in light of the letter of June 9, 2016 that shows she expressly requested her coverage be increased with the Gore.
4. There was no evidence of a head injury or any mental incapacity on the part of the claimant as a result of the accident. There was no evidence to suggest that the claimant was incapacitated due to medication for the month between the OCF-1 being signed and the fax of the document to Crawford/Echelon.

On the issue of the OPCF-47, Gore relies on my decision in *Jevco & Chieftain* (Supra) and the Court of Appeal in *Continental & Chubb* (Supra) which Gore argues supported the conclusions reached in *Jevco & Chieftain*.

Gore submits that the OPCF-47 did not amend or change the priority rules. Rather, it was designed to create a situation that would contractually obligate the optional benefit insurer to accept a claim for Accident Benefits if that claim was received rather than deny it even though another insurer may stand in priority as indeed Echelon does in this case. Essentially it prevents an optional benefit insurer, if the OPCF-47 is triggered to denying the claim outright because another insurer stands in priority under Section 268 of the *Insurance Act*.

Gore submits that this Endorsement, which is a contractual undertaking, does not purport to nor indeed can amend the legislative priority rules. Therefore, Section 268 of the *Insurance Act* applies unless the OPCF-47 is activated.

Gore submits that on the facts of this case, the Endorsement is not triggered because the 4 criteria set out in the Endorsement become operable have not been met.

Gore acknowledges that the first 2 criteria are met: the optional Statutory Accident Benefits were purchased from Gore and that they are applicable to the claimant. Gore submits however that the claimant has submitted an OCF-1 to another insurer and therefore she has claimed *SABS* under another policy. This in essence results in a violation of the 4th criteria by which the claimant is to agree not to make a claim for *SABS* under another policy. She has already done that.

Gore submits that this is a priority dispute under Section 268 of the *Insurance Act* and not a dispute between the insured and Gore. Any such claim would have to be submitted to the Licensing Appeal Tribunal (hereinafter called the LAT) which has absolute jurisdiction to adjudicate disputes between insured persons and the insurer in Accident Benefit cases. The LAT does not have jurisdiction for disputes between two insurers.

With respect to Echelon's submission that the OPCF-47 and the *Insurance Act* and its regulations do not limit a claimant from filing more than one OCF-1 and that in essence they have the right to re-elect in order to activate OPCF-47, Gore relies on Regulation 283/95 Section 2.1(4) (Supra). While this is a regulation that is entitled Dispute Between Insurers, Gore submits that it applies equally to insureds and many of the provisions of the Regulation deal directly with an insured and their obligations in applying for Accident Benefits.

Gore submits Section 2.1(4) is absolutely clear. The wording is mandatory that the Applicant <u>shall</u> use the Application provided by the insurer it gives notice to and <u>shall</u> send the completed Application to <u>only one</u> insurer.

This section was designed to streamline the process for claimants to receive timely Accident Benefits and to ensure that their claim was being adjusted immediately by the insurer that received the first Application and not bog down in a priority dispute with no payments being made.

Gore submits that there is nothing in the *Insurance Act*, the *SABS*, Regulation 283/95, or indeed the OPCF-47 that allows a claimant to submit an Application to one insurer and then later to withdraw it and re-submit to another insurer.

The wording of the OPCF-47 and the bulletin that was issued back in 1998 support (as indeed does the case law) submits the Gore, that to activate the OPCF-47 the claimant must submit the OCF-1 to the optional benefit insurer. If it does not submit it to the optional benefit insurer the Endorsement is not activated and the priority rules continue to stay in place. Gore submits that the later submission of the OCF-1 to it in June of 2022 is irrelevant for the purposes of this priority dispute.

Gore disagrees with Echelon's interpretation of the decision of the Court of Appeal in *Continental and Chubb* (Supra). It submits the Court of Appeal did not intend to say that the OPCF-47 displaces Section 268 of the *Insurance Act*. Rather, if the Endorsement is activated then it limits Gore's right to pursue a priority dispute under Section 268 of the *Insurance Act* even though there is another insurer higher in priority.

Gore argues that Echelon is trying to gain an advantage when it is clearly the priority insurer who received the OCF-1 first Echelon is trying to gain something from the contractual relationship between the Gore and the claimant which would be to the benefit of Echelon.

Gore submits there is nothing unfair in a conclusion that Echelon does not have a right to pursue priority in the circumstances of this case keeping in mind that it insured the motorcycle that the claimant was on and is providing the actual benefits that the claimant's premium was intended to purchase. Gore did not insure the motorcycle and there would have been no priority claim as between Echelon and Gore but for the argument based on the optional benefits.

As to Echelon's argument that their interpretation of the OPCF-47 would lead to clarity within the industry and certainty on how to proceed with these cases, Gore does not agree. Nor does it suggest that is the proper interpretation of the relevant legislation.

Gore points out that there is nothing under Section 268 of the *Insurance Act* that reference the optional benefits. If the legislature had intended that there be a priority dispute process as outlined by Echelon when one insurer has optional benefits then it would have been provided for under Section 268 of the *Insurance Act*. Gore argues that the fact that Section 268 of the *Insurance Act* was not amended at the time the Endorsement came in suggests that their interpretation was correct. Once the OPCF-47 is properly triggered, Section 268 simply does not apply so there is no need to have references to the optional benefits within the priority hierarchy set out under that section.

Gore also made submissions on the decision of Justice Turnbull in *Yaromich & Heartland* (Supra). Gore's submissions on Justice Turnbull's comments with respect to the *Jevco & Chieftain* decision are set out below:

1. Heartland was a dispute between the insured person and the insurer brought in Superior Court and was not a priority dispute.
2. The facts of that case involved an insured who before an OCF-1 was sent to either insurer was given false information about the existence of optional benefits.
3. It was the conduct of Heartland in not providing the information of the availability of their optional benefits that led Justice Turnbull to allow the claim to proceed against Heartland even though the OCF-1 had not been initially submitted.
4. Justice Turnbull commented in obiter that my conclusion in *Jevco* that an Applicant cannot re-elect to which insurer it can claim benefits from may be incorrect. These comments were made without the benefit on an argument concerning the OPCF-47 and the priority dispute rules and are therefore of little persuasive value here. They are not binding and they are incorrect.

Gore submits that the facts of both the *Yaromich & Heartland* and *Continental & Chubb* cases point to decisions about the right to re-elect and not necessarily about the activation of the OPCF-47. In both of those cases an insurer provided false or misleading information to the claimant that resulted in a deflection or a prevention of the claimant in making a proper election as between two potential insurers. In those cases where an insurer influenced an election by negligent misrepresentation or otherwise then the courts found that the insured person has the right to re-elect.

Gore submits that those cases are quite different than the one here. Gore submits that these two cases stand for the proposition that where an insured person has the statutory right to elect between two insurers and makes the election after negligent or intentional misrepresentation that they then have a right to re-elect. It does not stand for the proposition that one insurer can avoid a statutory liability to pay Accident Benefits in a priority dispute due to the language of a contractual term to which it is not a party: the OPCF-47.

Gore submits that my decision in *Jevco & Chieftain* is correct and that I should apply similar analysis to the case before me and conclude that the OPCF-47 has not been activated and Echelon has no right to pursue a claim for priority in the circumstances.

Decision and Relevant Statutory Authority:

I have already reproduced a copy of the wording from the OPCF-47. In light of the submissions of counsel, it is also helpful to reproduce the entirety of Section 268 of the *Insurance Act* which I set out below:

SCHEDULE "B"
Insurance Act, R.S.O. 1990, c. I.8

Statutory accident benefits

268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. 1993, c. 10, s. 26 (1).

Exception, public transit vehicles

(1.1) Despite subsection (1) and the *Statutory Accident Benefits Schedule*, no statutory accident benefits are payable in respect of an occupant of a public transit vehicle, in respect of an incident that occurs on or after the date this subsection comes into force, if the public transit vehicle did not collide with another automobile or any other object in the incident. 2011, c. 9, Sched. 21, s. 4.

(1.2), (1.3) Repealed: 1996, c. 21, s. 30 (1).

Indexation

(1.4) Subject to subsection (1.5) and to the terms, conditions, provisions, exclusions and limits established by the *Statutory Accident Benefits Schedule, the Schedule* shall provide that, in respect of incidents involving the use or operation, after December 31, 1993 and before section 29 of the *Automobile Insurance Rate Stability Act, 1996* comes into force, of an automobile,

(a) every continuing periodic amount payable by an insurer as an income replacement benefit, education disability benefit, caregiver benefit or loss of earning capacity benefit in accordance with the *Schedule* shall be revised, effective the 1st day of January in every year after 1994, using the indexation percentage published under subsection 268.1 (1); and

(b) every monetary amount set out in the *Schedule* shall be revised, effective the 1st day of January in every year after 1994, by adjusting the amount by the indexation percentage published under subsection 268.1 (1). 1993, c. 10, s. 26 (1); 1996, c. 21, s. 30 (2).

No decrease in payments

(1.5) A continuing periodic amount payable by an insurer in accordance with the *Statutory Accident Benefits Schedule* shall not be reduced by the operation of the indexation percentage referred to in subsection (1.4). 1993, c. 10, s. 26 (1).

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

Excess insurance

(6) The insurance mentioned in subsection (1) is excess insurance to any other insurance not being automobile insurance of the same type indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (6).

Idem

(7) The insurance mentioned in subsection (1) is excess insurance to any other insurance indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (7).

Payments pending dispute resolution

(8) Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved. R.S.O. 1990, c. I.8, s. 268 (8); 1993, c. 10, s. 1.

I also set out Section 2 of Ontario Regulation 283/95:

Disputes Between Insurers, O Reg 283/95

0.1 In this Regulation,

"application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule;

"benefits" means statutory accident benefits as defined in subsection 224 (1) of the Act;

"completed application" means a completed and signed application;

"Fund" means the Motor Vehicle Accident Claims Fund continued under subsection 2 (1) of the Motor Vehicle Accident Claims Act;

"Schedule" means, in respect of an accident, the Statutory Accident Benefits Schedule as defined in subsection 224 (1) of the Act that applies in respect of the accident. O. Reg. 38/10, s. 1.

1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

2. (1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.

(2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010. O. Reg. 38/10, s. 2.

2.1 (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.

(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.

(3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.

(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.

(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.

(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule

I have carefully considered the creative submissions of Echelon but I have reached the conclusion that I see nothing in the more recent case law or in the slightly different fact situation before me that would change the conclusions that I reached in *Jevco & Chieftain*.

The main difference is the fact that the Applicant submitted a second OCF-1 to the optional benefit insurer which had not occurred in the *Jevco & Chieftain* case.

I do not agree with Echelon's submissions that a claimant has the right to submit a second OCF-1 to the optional benefit insurer to activate the OPCF-47 and proceed through a priority dispute.

Section 2.1(4) of the Dispute Between Insurers clearly provides that the Applicant shall send a completed Application to <u>only one insurer</u>. Had the legislature intended that in circumstances such as this a second Application could be sent in to the optional benefit insurer then in my view Regulation 283/95 would have provided for that. I note the regulation requiring the Applicant to submit only one Application was amended in 2010. The OPCF-47 had long been in place by that time. I disagree with Echelon that to allow a second Application and to proceed with a priority dispute as they have outlined would create certainty. In my view, it would create more confusion and more litigation.

I stand by my decision in *Jevco Chieftain* that the OPCF-47 is only activated when the claimant submits the first OCF-1 to the optional benefit insurer and by so doing undertakes not to pursue a claim for benefits against any other insurer. Then and only then is the right to pursue a priority dispute under 268 of the *Insurance Act* stayed in order to allow that insured to receive both mandatory and optional benefits from that carrier.

That has simply not happened in this case. The claimant sent in her initial Application to Echelon who is in fact the priority insurer in the circumstances of this case. Therefore, the OPCF-47 was not activated.

I find that the OPCF-47 was not activated when a new OCF-1 was sent to Gore contrary to Section 2.1(4) of Regulation 283/95. As I said in *Jevco & Chieftain* to the extent that the claimant wants to re-elect to a different insurer is a matter between her and that insurer and not a matter for a priority dispute.

The matter before me is a claim under Section 268 of the *Insurance Act* as to which insurer is the priority insurer for the claimant. Section 268 of the *Insurance Act* does not speak to circumstances involving optional benefit polices. I find that the OPCF-47 was not intended to be used for the actual priority insurer under Section 268 of the *Insurance Act* to shift responsibility to the optional benefit insurer when the claimant had not made the initial Application to that insurer.

Despite the able submissions of counsel for Echelon, I rely on the analysis of the OPCF-47 and the conclusions I reached set out in page 7, 8, 9, 10, and 11 of my decision in *Jevco & Chieftain*. I will not repeat those conclusions here. I attach a copy of that decision for ease of reference.

I note my approach is supported by Arbitrator Samis in the decision *Echelon v Co-operators* and by Arbitrator Cooper in *Co-operators v Certas* April 2019. Arbitrator Cooper stated at page 10:

> "I do not need to repeat the analysis provided by Arbitrator Samworth in Jevco v Chieftain, above. I agree with her analysis and it will not advance the interest of the parties herein or the industry at large by reiterating her reasons".

With respect to the decision of Justice Turnbull in *Yaromich & Heartland* I agree with the submissions of Gore that the comments at paragraph 50 of his decisions were obiter. He noted and I quote:

> "While this is not an issue I must decide on this application and it was not argued in detail before me, I must say that I am not convinced of the correctness of the Jevco & Chieftain decision".

Any comments Justice Turnbull made with respect to my approach to the priority dispute in *Jevco & Chieftain* was obiter. Clearly there were no submissions made before him on a priority dispute basis but rather the argument was as between insured and insurer. Also, as Gore pointed out, it was a case involving some significant misrepresentations or deflection by the optional benefit insurer that dictated Justice Turnbull's approach.

I also conclude that the Court of Appeal in *Chubb and Continental* while not specifically dealing with a priority dispute with similar facts did, in my view, support my conclusions set out in *Jevco & Chieftain* (see paragraphs 102 to 107).

As I outlined in my decision on the preliminary issue, I also do not find that the decision in the Court of Appeal suggests that a different result with respect to the interpretation of the OPCF-47 in circumstances such as this could result where the claimant seeks status to be heard on the Arbitration. Even if I had added the claimant here to be a party to the Arbitration, I do not find that it would have made any difference to my conclusion. As I pointed out in my preliminary decision, I do not see the comment by the Court of Appeal in their footnote at page 38 as suggesting that a priority Arbitrator has authority to provide relief from forfeiture or to hear and make decisions with respect to the right of the insured to pursue the optional benefit insurer. I found that the simple act of adding an insured to the priority dispute Arbitration would not confer jurisdiction on Arbitration to make a decision with respect to benefits. It is clearly within the jurisdiction of the LAT. In my view, had I added the Applicant to this priority dispute their only right would have been to make submissions on the interpretation of the OPCF-47 and which of the two insurers had priority. Their presence as a party would not, in my view, make any difference to my ruling nor do I think the Court of Appeal was suggesting that would be the case.

In summary, I conclude that in this case while the claimant met criteria 1 and 2 of the OPCF-47 she did not meet criteria 3 and 4 as she submitted the first Application for Accident Benefits to Echelon who did not have optional benefits. By submitting her first Application to Echelon, it resulted in the OPCF-47 lying dormant and inactive despite the later submission of a second OCF-1 to Gore.

Section 268 of the *Insurance Act* is clear in my view. In these circumstances, Echelon who insured the motorcycle that the claimant occupied is the priority insurer and it has no right to pursue a claim against Gore solely based on the fact that Gore had optional benefits.

Decision:

I find that Echelon Insurance is the priority insurer pursuant to Section 268 of the *Insurance Act* for the purposes of providing Statutory Accident Benefits to the claimant arising out the accident of August 18, 2018.

Costs:

The Arbitration Agreement provides that legal costs and the Arbitrator's costs are to be determined by the Arbitrator taking into account the success of the party, any offers to settle, or the conduct of the proceedings and the principles generally applied in litigation before the courts of Ontario.

I am not aware of any offers to settle. I would like to give counsel an opportunity to resolve the question of the legal costs and if they are unable to do so then the are to contact me so that we can set up a costs hearing.

However, with respect to the Arbitration, as Gore was entirely successful in this matter, I order that Echelon pay the Arbitration costs and that those costs will include the Arbitration costs flowing from the proceedings relating to the Hearing and decision on the preliminary issue.

DATED THIS 23rd day of August, 2023 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP