**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 GENERAL INSURANCE

Applicant

- and -

HAY MUTUAL INSURANCE COMPANY

Respondent

**DECISION**

**Appearances:**

Echelon General Insurance (Applicant): Jamie R. Pollack

Hay Mutual Insurance Company (Respondent): Doug Wallace

**Introduction:**

This matter comes before me pursuant to the *Arbitration Act, 1991* to arbitrate a dispute as between insurers with respect to a priority issue pursuant to the *Insurance Act* and its Regulations (specifically Regulation 283/95 as amended).

This claim arises out of a motor vehicle accident that occurred on February 14, 2017. On that day Nicholas Hugh and Nakaya Johns were involved in a single vehicle accident in Ontario.

Mr. Hugh and Mr. Johns were passengers in a vehicle insured under a standard OAP-1 by the applicant, Echelon General Insurance (hereinafter called "Echelon"). Mr. Hugh and Mr. Johns applied to Echelon for statutory accident benefits.

Hay Mutual Insurance Company (hereinafter called "Hay") insured, inter alia, a 2004 Pontiac Montana owned by Jenni Schroley under a standard OAP-1. Mr. Johns and Mr. Hugh were employees of Fresh Venture Farms, a sole proprietorship owned by Jenni Schroley.

Echelon takes the position that pursuant to Section 268 of the *Insurance Act* Hay is the priority insurer with respect to accident benefits payable to Mr. Johns and Mr. Hugh on the grounds that either Mr. Hugh or Mr. Johns had regular use of their employer's vehicle at the time of the accident and therefore are deemed to be a named insured under the Hay policy pursuant to Section 3(7) of the SABS.

However this preliminary issue deals with a requirement pursuant to Section 3(7) that Mr. Hugh and Mr. Johns must meet prior to the determination as to whether their employer's vehicle was made available for their regular use.

The issue before me is whether Mr. Hugh or Mr. Johns were "an individual who is living and ordinarily present in Ontario."

This matter proceeded by way of written submissions only. I have reviewed the following:

- Written Submissions of the Applicant;
- Written Submissions of the Respondent;
- Reply Submissions of the Applicant;
- Document Brief of the Applicant;
- Books of Authorities filed by both the Applicant and Respondent.

**The Issue in Dispute:**

Were Mr. Hugh and/or Mr. Johns "living and ordinarily present in Ontario" at the time of the accident?

**Result**

Mr. Hugh and Mr. Johns were living and ordinarily present in Ontario at the time of the accident. The reasons for this conclusion are set out below.

**Facts:**

The evidence before me included an Agreed Statement of Facts dated July 15, 2019, various documents that the parties felt had relevance to the dispute, written statements taken of Jenni Schroley, Alyssa Miller, Brianna Rushton and the examination under oath of Nakaya Johns taken March 4, 2019. In addition there were extracts of information from various websites with respect to the Temporary Foreign Worker's Policy.

I have reviewed all the information and have determined that the following are the relevant facts for the purposes of this decision.

The accident that is the subject matter of this dispute took place in Ontario on February 14, 2017. Mr. Johns and Mr. Hugh were passengers in a vehicle operated by Alyssa Miller. Brenda Rushton was the front-seat passenger.

Mr. Johns was born on June 1, 1986 in Jamaica and was 30 years old at the time of the accident. He is a Jamaican citizen. He completed high school in Jamaica and worked doing labouring jobs in roofing and carpentry while living there. He had a common-law spouse with whom he had resided for two years prior to the accident. He had dependant step-children. His mother, step-father and younger sister all lived in Jamaica.

In 2016 Mr. Johns was hired by Fresh Venture Farms pursuant to the Temporary Foreign Worker Program. Pursuant to this program Mr. Johns arrived in Ontario on January 4, 2017. According to his Employer Contract he was obliged to work for Fresh Venture Farms as a general labourer to pick and process peppers. This arrangement required Mr. Johns to leave Canada on or before September 6, 2017.

Pursuant to the agreement the employer was obliged to provide accommodations for the worker. Mr. Johns was provided accommodation and lived at 7458 Bruce Scott Road in Thedford.

Up until the time of the accident Mr. Johns had not opened a Canadian bank account. He did not have either a Jamaican or an Ontario driver's licence. He did not get a credit card here in Ontario. He was paid by cheque and would be taken to the bank where he could cash his cheque. He would send some of the money he earned in Canada to help support his family back in Jamaica.

In her statement the employer, Ms. Schroley, indicates with respect to Mr. Johns that

> "It was my plan for him to return – however, if he was a problematic employee he could have been sent home. He was a good worker from what I saw when he was with me."

As will be seen, Ms. Schroley has a history of re-hiring foreign workers.

Turning now to Mr. Hugh. Mr. Hugh was born on March 11, 1985 in Jamaica and was 31 years old at the time of the accident. According to his OCF-1 he worked as a self-employed subsistence farmer and taxi driver in Jamaica before coming to Ontario. He was in a common-law relationship in Jamaica and had three dependants that he supported.

Mr. Hugh arrived in Canada on January 5, 2017 also pursuant to the Temporary Foreign Worker Program. He was also hired to work for Fresh Venture Farms. Mr. Hugh had worked for Fresh Venture Farms previously. He did a work term in 2016 and had done two other work terms previously with a different employer.

Mr. Hugh was scheduled to return to Jamaica on or before September 5, 2017. He also lived in the furnished house provided by Fresh Venture Farms where Mr. Johns lived. There were three other employees who also lived there.

In Ms. Schroley's statement of April 4, 2017 she confirms that she would most likely have re-hired both Hugh and Johns after the expiration of their contracts but had not told them this at the time of the accident.

Mr. Hugh had a Jamaican and an International licence and therefore he was the driver of the vehicle that was insured by Hay. The employees were allowed to use this vehicle for the purposes of transportation to and from work and for shopping for food and other necessities.

However, on the date of the accident Mr. Hugh and Mr. Johns had not used that car as they were planning on some social activities with Alyssa Miller and Brianna Rushton.

According to Ms. Miller's statement she describes Nick and Jonathan as two new friends. She had been text messaging them the week prior up to the time of the motor vehicle accident. The plans were that they were going to hang out that day and have beers. Prior to the accident they had gone to a grocery store and bought a case of beer, stopped in a store to buy cigarettes and put gas in the car.

Brenda Rushton in her statement confirms that she and Alyssa had been text messaging Nick and Jonathan for about a week. They had met them a week prior to the accident while they were in the grocery store. It seems some agreement had been reached through the course of the week that they would "hang out together". She confirms Ms. Miller's statement as to the events leading up to the accident.

Turning now to the circumstances of employment that brought Mr. Hugh and Mr. Johns to Canada. The rights and obligations of both the employer and the worker are governed by a contract called "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2017". Both Mr. Johns and Mr. Hugh signed this Agreement.

The agreement provides that the employment is seasonal and will not be for a period of any longer than 8 months nor less than 240 hours in a period of six weeks unless there is some emergency.

The employer undertakes to employ the worker from the date they arrive in Canada and in the case of Mr. Johns and Mr. Hugh up until September 6, 2017.

The Agreement provides that the applicable Ontario Provincial Labour Laws apply as well as the customs of the district in order to "give the same rights to Caribbean workers as given to Canadian workers".

The employer undertakes to provide clean adequate living accommodations to the worker at no cost to the worker. The contract provides some detailed information about what types of accommodations are considered to be appropriate. The payment of wages is to be weekly and in Canadian currency.

The employer also undertakes to immediately arrange for health coverage for the worker and to obtain Workers' Compensation for the worker. Appropriate deductions are made from their paycheque for these obligations.

Fresh Venture paid its employees $11.43 per hour. It deducted from its employees' pay C.P.P., E.I. and Federal income tax.

Both Mr. Johns and Mr. Hugh were provided with social insurance numbers and O.H.I.P. coverage which expired at the end of their work terms.

Mr. Johns earned $3,626.17 gross based on a 2017 T4 issued by Fresh Venture Farms. Mr. Hugh earned a total of $18,684.73 and $12,707.28 gross based on 2016 and 2017 T4s issued by Fresh Venture Farms.

With respect to the O.H.I.P. coverage a Facts sheet from O.H.I.P. was included in the book of documents. This was a document from the Ministry of Health and Long Term Care with specific reference to temporary foreign workers.

The Facts sheet indicates that a temporary foreign worker who has a valid work permit can be eligible for O.H.I.P. coverage. In order to be eligible they must meet the following criteria:

- Must be employed full-time with an employer in Ontario for a minimum of six months;
- Maintain their primary place of residence in Ontario;
- Be physically present in Ontario for at least 153 days in any 12 month period; and,
- Be physically present in Ontario for 153 of the first 183 days immediately after establishing residency in the province.

At the time of this accident both Mr. Hugh and Mr. Johns had O.H.I.P. coverage.

Also submitted in evidence was a series of questions and answers from a website relating to the F.A.R.M.S. program. At number 11 in answer to the question "What type of health coverage is available to the worker?" is the following answer:

> "In Ontario workers are covered under provincial O.H.I.P. immediately upon entry. There is no waiting period. Repeat workers have their provincial Health Card numbers renewed and new workers are taken by their employer to a Ministry of Health and Long Term Care office or outreach site for processing."

Similarly at question 14 in response to whether there is work place safety and insurance coverage is the following answer:

> "All workers are covered from the moment they enter Ontario until they depart. It is mandatory by law. WSIB provides coverage for work related accidents."

At question 19 there is a discussion about whether these workers are subject to regular payroll deduction with respect to income tax, Canada pension and employment insurance. In response to that question is the following answer:

> "Yes, seasonal agricultural workers are eligible at retirement and upon approval to receive monthly payments from their contribution to the Canada Pension Plan. Workers are subject to deductions for employment insurance and in approved cases can collect benefits recognizing the work is insured and not the worker. Income tax is deducted based on T.D. 1 information, total world income and whether an exemption treaty exists between their country and Canada. Income tax filing is mandatory and in most cases the worker will be refunded the income tax deducted."

With respect to a more detailed analysis of these gentlemen's activities while in Ontario unfortunately Mr. Hugh was not examined under oath. Mr. Johns however did indicate that he bought a cell phone in Ontario. While he didn't have a bank account he did go to the bank and cash his cheque there and would send about $400.00 home per week.

With respect to their living accommodation they remained at the farm house that was provided to them by their employer. Mr. Johns was in a bedroom with his own bed but he did share the bedroom with another individual. When asked about mail Mr. Johns indicated he did not receive mail at the farm house. However, it seems unclear as to whether that is because he just didn't get mail as opposed to whether he did or did not consider the farm house to be his mailing address. Of note is the fact that both Mr. Hugh and Mr. Johns on their application for accident benefits indicated under Applicant Information – Part 1 that they resided at 7458 Bruce Scott Road in Thedford, Ontario, N0M 2N0. Mr. Johns and Mr. Hugh both gave as a work number their Ontario work number, 519-872-8114. Mr. Johns did not provide a home phone

number. Mr. Hugh did give a home phone number but it is unclear as to whether that is an Ontario cell phone number or otherwise.

We also know that these gentlemen since arriving in Ontario in January had, by the time of the accident on February 14, 2017, managed to meet two young women and develop some form of friendship that would allow them to exchange text messages and plan to get together for beers.

After the motor vehicle accident Mr. Hugh returned to work for Fresh Venture Farms and then returned home to Jamaica at the end of his work term where he resumed driving his taxi.

Mr. Johns returned home to Jamaica after the accident to live with his mother.

Mr. Johns and Mr. Hugh as of the date of the Agreed Statement of Facts: July 12, 2019, "currently reside in Jamaica".

A Notice to Applicant of Dispute Between Insurers was delivered by Echelon on March 28, 2017 to Mr. Hugh, Mr. Johns and Hay Mutual Insurance Company. The Notices claim that Mr. Hugh and Mr. Johns had regular use of their employer's vehicle.

**Position of the Parties:**

Echelon takes the position that both Mr. Johns and Mr. Hugh were living and ordinarily present in Ontario on the date of the accident. Echelon submits that while Mr. Hugh and Mr. Johns had only been in Canada a short time prior to the accident that that in and of itself is not sufficient for one to conclude that they were not "ordinarily present in Ontario". Echelon points to the fact that both of them had come to Ontario to work and would be in Ontario for 8 months. Both intended to return and work again and indeed Mr. Hugh had been employed the year previously by the same employer and by another employer on two previous occasions.

Echelon points out that both gentlemen had made friends. While there was no evidence as to whether Mr. Johns did or did not file tax returns, taxes were deducted from his paycheque. Both were covered pursuant to O.H.I.P. with a significant requirement of residency predicated before either Mr. Johns or Mr. Hugh would be permitted to be eligible for O.H.I.P. Both Mr. Hugh and Mr. Johns had social insurance numbers.

Echelon relies on *Thomson v. Minister of National Revenue, 1946 Carswell Nat. 76* a decision of the Supreme Court of Canada. In that case the Supreme Court was tasked with determining whether an individual was "residing or ordinarily resident in Canada" within the meaning of the Income War Tax Act. Echelon makes reference to the following comment from the Court:

> "The expression 'ordinarily resident' carries a restricted signification, and although first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the

course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence."

"...'temporary residence', 'ordinary residence', 'principal residence' and the like, the adjectives do not affect the fact that there is in all cases residence: and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset."

Echelon also relies on the decision of Justice Mullen in *Parkes v. Heiberg, [1992] O.J. #1921*. In that case the plaintiff was a Jamaican national who worked in Ontario as a farm labourer on a temporary basis under a similar agreement as the case here. He had been granted a temporary work permit to assist in harvesting crops on three different occasions. He'd been working approximately two months when he was involved in a motor vehicle accident. The evidence was he worked on the farm, lived in a house with other workers, received mail, filed tax returns and had a bank account. When he was not working as a farm labourer he lived in Jamaica with his mother. The test in that case was whether the plaintiff was "ordinarily resident outside of Ontario". Justice Mullen found that the plaintiff's residency in Ontario was of a sufficiently permanent nature that at the time of the accident he would be considered "ordinarily resident".

Lastly, Echelon relies on a series of decisions in the case *16-001904 v. Security National Insurance Company*. The initial decision was from the Ontario Licencing Appeal Tribunal (2017 Carswell Ont. 8381). In that case the applicant had been injured in an accident in Alberta. Security National had paid under the Alberta policy and closed its file as available limits had been used up. The applicant then applied for statutory accident benefits from Security National based on the Ontario policy. As the accident had occurred outside Ontario whether or not the insured was an insured person required a determination as to where he resided. Although the facts of this case are quite different Echelon points out that Adjudicator Marzinotto concluded that an individual may be a resident whether they live in a place permanently, temporarily or ordinarily reside there. She therefore concluded that despite the fact that he was in Alberta earning money as a truck driver his intention was to return to Ontario. He was therefore an Ontario resident.

This decision was upheld in a reconsideration decision: *G.K. v. Security National Insurance Company, 2017 Carswell Ont. 19211*. The request for reconsideration was denied. An appeal to the Divisional Court by the insurer was dismissed. *Security National Insurance Company v. Kumar, 2018 Carswell Ont. 9365*.

Echelon submits that at the time of the accident Mr. Hugh and Mr. Johns were living and ordinarily present in Ontario. It did not matter that they were scheduled to go back to Jamaica in September. At the time of the accident they had established themselves with a presence in

Ontario, including a place to live, a job, O.H.I.P. coverage, W.S.I.B. coverage, deductions from their wages for the purposes of Canadian tax, E.I. and C.P.P.; and, had started developing a social circle.

Hay submits that neither Mr. Johns nor Mr. Hugh would be considered to be "living and ordinarily present in Ontario" for the purposes of Section 3(7)(f).

Hay submits (and there doesn't appear to be any disagreement on this point) that in analyzing this matter one must look at the *Insurance Act* and the Regulation and any interpretation should work harmoniously with the scheme of the Act, the object of the Act and the intention of the Ontario Legislature (*Rizzo & Rizzo Shoes Ltd. RE [1998] 1.S.C.R. 27*).

Hay submits that on the facts of this case one cannot conclude that either Mr. Hugh or Mr. Johns would be considered ordinarily present in Ontario. Hay argues that in fact they were ordinarily present in Jamaica. Hay points out that their common-law spouses and dependent children lived in Jamaica. Neither of them owned any real property in Ontario. They resided in a rental house provided by their employer. Hay points out that by the very terms of their contract their stay was temporary and there was a specific date that they had to leave the country by in order to return to Jamaica.

While Hay acknowledges that both individuals were physically present in Ontario, Hay submits that they were not ordinarily physically present in Ontario. They had only been in Ontario for five weeks. One must look at the fact that they were born, raised, educated, lived and worked in Jamaica. They were citizens of Jamaica and their respective families were in Jamaica.

Hay also submits that one must look at the amount of time that they were in Ontario in order to determine whether they are "living and ordinarily present in Ontario". Hay characterizes Mr. Johns' and Mr. Hugh's status in Ontario as simply a temporary stop-over to earn money before returning home to Jamaica to their respective families.

Hay relies on the decision of *Mann v. Manitoba Public Insurance Corporation, 1982 Carswell Man. 116 (Coct)*. In that case the plaintiff brought an action as the administrator of his deceased son's Estate. His son had been born in Manitoba and lived with his parents in Winnipeg until he was about 25 years of age. He then began to work in the United States. Although the facts are somewhat vague it looks as if he worked with a travelling carnival. He would work in the U.S. from March/April until October or November of each year and then would come back to Winnipeg for the winter. He left his personal belongings in Winnipeg.

The action that was brought on behalf of the Estate was to claim from the M.P.I.C. (Manitoba Public Insurance Company) medical expenses, funeral expenses and a death benefit. However, in order to qualify Mr. Mann's son would have to be a resident of Manitoba and part of the definition of resident of Manitoba included that it was an individual who is "living and ordinarily present in Manitoba". The Court concluded that Mr. Mann was a resident of Manitoba and

that at the time of the accident he was living and ordinarily present there. The Court noted that as he habitually returned to the place which was his home in Winnipeg for several months each year and that was the normal and ordinary routine of his life that he therefore came within that definition.

Hay submits that in applying that analysis to Mr. John and Mr. Hughs that they were living and ordinarily present in Jamaica and not in Ontario.

Hay also relies on the decision in *Cruz v. Royal and SunAlliance Insurance Company of Canada, 2001 Carswell Ont. 5643,* FSCO, Director's Delegate Blackman. In that case the question was whether or not a young woman who was a citizen of Mexico and attending school to learn English in Toronto was a "resident of Ontario" for the purposes of statutory accident benefits. The accident that she was involved in actually took place in Quebec. Hay points out some of the criteria that Director's Delegate Blackman relied on in holding that the applicant in that case was not a resident of Ontario as follows:

1. She was a Mexico citizen engaged to be married to a fiancé living in Mexico;

2. She was hired by a Mexico automobile part vendor and had been promoted to expand the international market;

3. Her employer agreed to help the applicant learn English by studying in Canada;

4. She had a student visa and she was legally required to leave after her student visa ended;

5. She did not purchase furniture or household items in Canada; and,

6. She did not open a bank account or have her mail forwarded to her in Canada.

The Director's Delegate held that the applicant's stay in Ontario was time limited and that it was not her "settled or usual abode. It was her settled intention to rejoin her family, friends and her fiancé in Mexico and therefore she was not "a resident of Ontario".

Hay points out that like Ms. Cruz, Mr. Johns and Mr. Hugh were:

- Citizens of a foreign country;

- Resided in Ontario on a temporary visa with a set return date;

- Were hired to work temporarily in Ontario;

- Did not purchase furniture or household items in Ontario;

- Did not open a bank account or receive mail in Ontario;

- Were required to leave upon the expiry of their temporary work term.

**Analysis and Decision:**

This is a priority dispute pursuant to Section 268(2) of the *Insurance Act*, R.S.O. 1990. Under Section 268 a series of rules are set out to be applied to determine which of a variety of insurers may be liable to pay statutory accident benefits in priority to another.

In this case both Mr. Johns and Mr. Hugh were occupants of the motor vehicle insured by Echelon. Neither Mr. Johns nor Mr. Hugh had their own motor vehicle liability policy in Ontario. However, Echelon alleges that either or both Mr. Hugh or Mr. Johns would be a deemed named insured under the Hay policy by virtue of Section 3(7)(f) of the Statutory Accident Benefits Schedule. That section is set out below:

> **"O. Reg. 34/10: Statutory Accident Benefits Schedule - Effective September 1, 2010, section 3(7)(f)**
>
> **Definitions and interpretation**
>
> 3. (7) For the purposes of this Regulation,
>
> (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
>
> (i) The insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or
>
> (ii) The insured automobile is being rented by the individual for a period of more than 30 days; and, ..."

In this case I am not being asked to determine whether the Hay vehicle was made available for an individual's regular use. Rather, I am asked to determine whether one even gets to that analysis by virtue of the requirement that the individual for whom the vehicle is being made available must be "living and ordinarily present in Ontario". Both Mr. Hugh and Mr. Johns in order to be deemed named insureds under the Hay policy must be an individual who is **living and ordinarily present in Ontario**. Both counsel seem to agree that there is as yet no case that specifically looks at what "living and ordinarily present in Ontario" means in context of Section 3(7)(f) of the Statutory Accident Benefits Schedule. There have been a number of cases

considering similar wording in other jurisdictions, similar wording elsewhere within the policy or looking at similar issues but where the wording revolves around the issue of "residence". I found that the decision of the Supreme Court of Canada in *Thomson* v. *Minister of National Revenue* (supra) to be most helpful and instructive on attempts to interpret the words "living and ordinarily present in Ontario". There did not appear to be disagreement amongst counsel that Mr. Johns and Mr. Hugh were "living" in Ontario. The difference was whether they were also ordinarily present in Ontario.

In the decision of the Supreme Court of Canada (see paragraph 47) Justice Rand points out that when looking at "residing" it is impossible to give it a precise and inclusive definition. He notes that there are graduation of degrees of time, object, intention and continuity. He suggests that the definition is one that is highly flexible with many shades of meaning and it can vary not only in the context of different matters but in different aspects of the matter. He distinguishes residence from things such as "a stay or a visit". However, the Court also clearly concludes that residence does not exclude circumstances where it is "limited in time from the outset". The Court clearly finds at paragraph 50 that ordinary residence can include a residence that is limited in time.

In Justice Estey's reasons he makes reference to the case of *Inland Revenue Commissioners* v. *Lysaght [1928] AC 234* in which Viscount Sumner states as follows:

> "I think the converse to ordinarily is extraordinarily and that part of the regular order of a man's life adopted voluntarily and for settled purposes, is not extraordinary."

Hay urged that I take a restrictive view of the words "ordinarily present" and that I should conclude that ordinary residence is a broader concept that "ordinarily present". I do not agree with Hay in that regard. Residence in my mind carries a stricter requirement in order to be met than does "present". While this is a dispute between two insurers the Section of the Regulation that is being considered is one that provides coverage to individuals involved in motor vehicle accidents in terms of whether they are or are not a named insured. The case law has always been clear that such provisions as this are to be given a large and liberal interpretation. As long as the approach does meet the criteria set out in *Rizzo & Rizzo* (supra) that the statutory interpretation is that the Act is to be read in its context with the grammatical and ordinary sense to match up harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

I found the case of *Parkes & Heiberg* (supra) to be very helpful. There was a claim for damages arising from a motor vehicle accident when the defendant struck the plaintiff while he was driving his bicycle on the shoulder of a county road. The plaintiff in the case was a Jamaican national who had worked in the Province of Ontario as a farm labourer. He had worked in Canada in 1987, 1988 and 1989. He had worked for various employers. The year of the accident he was working for a farmer that he had worked for in 1988. He was provided with a

house in Blenheim with some other workers where he had a bedroom. He received his mail at that address, filed his income tax returns and had a bank account. In the past he returned to Jamaica after each seasonal employment in Canada. He was scheduled to return to Jamaica on December 5, 1989 but the accident occurred on August 19, 1989.

It was noted that he otherwise lived in Jamaica with his mother. He came to Ontario voluntarily. He made friends during his stay. The issue in the case was whether or not the plaintiff was "ordinarily resident" outside the Province of Ontario within the meaning of Section 25 of the Motor Vehicle Accident Claims Act such that he would be precluded from recovering medical expenses out of the Motor Vehicle Accident Claims Fund.

Justice Mullen concluded that he was not ordinarily resident outside of Ontario. He referenced the decision of Justice Rand in *Thomson v. The Ministry of National Revenue*. Justice Mullen concluded that the plaintiff's residence was of a sufficiently permanent nature that at the time of the accident he was "ordinarily resident" in Ontario. Similarly I find that even though their stay here was time limited, that at the time of the accident Mr. Johns and Mr. Hugh were "ordinarily present in Ontario". They lived here, worked here, made some friends, had O.H.I.P. coverage and were paid in Canadian dollars with deductions for C.P.P., E.I. and tax. Both *Thomson* and *Parkes* held that one can be "ordinarily resident" even if the stay is temporary and I do not see any reason that a similar analysis should not be applied to "ordinarily present".

The decisions of the Licencing Appeal Tribunal in *G.K. & Security National* (supra) were also helpful. In this case the LAT adjudicator was asked to consider the words "ordinarily present in Ontario". However, it was not with respect to Section 3(7)(f) but rather Section 59(4)(a) of the Statutory Accident Benefits Schedule. That Section deals with the right of an individual who is involved in an out-of-province accident to elect which benefits he or she chooses to receive depending upon certain qualifying criteria.

*G.K.* was born in India and came to Toronto in May of 2010 on a student visa to study at Humber College. The accident occurred on November 8, 2014. In the four years between arriving in Ontario and the accident the insured had lived in Etobicoke, worked at McDonald's, obtained an Ontario driver's licence and attended Humber College. He graduated from Humber in August of 2013 with a business management degree. He applied for a work permit which was issued and had an expiry date of November 4, 2016. He began looking for office jobs but a friend suggested that he could make money driving a truck in Alberta. In May of 2014 he therefore secured his Ontario AZ driver's licence entitling him to drive a truck. On August 7, 2014 he left Ontario having purchased a one-way plane ticket to Alberta. Although there was some question with respect to this the adjudicator found that prior to leaving for Alberta *G.K.* was engaged and had a fiancé who remained in Ontario and whose rent he assisted in paying.

The applicant found a job in Alberta. He was involved in an accident in Alberta. He attended at the hospital in Alberta and then after being discharged returned to Ontario in January of 2015. His employment was as a truck driver for an oil company which he began in September of 2014.

The adjudicator found that 59(4)(a) did not assist as to whether an injured person was a "insured person" for the purposes of entitlement to benefits under the policy. However, although she did make that determination in the event that she was wrong she noted that she did find that the applicant was "ordinarily present in Ontario". She also found that he was a resident of Ontario under Section 3(1)(c). She noted that a person may be a resident whether they live in a place permanently, temporarily or ordinarily. This decision was upheld on reconsideration. On reconsideration the Executive Chair concluded that the Tribunal was right that individuals on a temporary work permit may be found to be "living and ordinarily present". Both the adjudicator and the Executive Chair considered the *Parkes* decision and relied upon it to reach their conclusion.

The Divisional Court in finding that the decisions of the LAT were reasonable noted at paragraph 18:

> "However it is clear from the case law in general that the Courts have not applied this term restrictively as submitted by the Appellant. Rather, the Courts have interpreted 'residence' in insurance legislation flexibly and in a context specific manner for many years, citing the tax case of *Thomson* v. *Minister of National Revenue*, and that is what the LAT did in the present case."

Although Hay relied on the *Mann* v. *Manitoba Public Insurance Corporation* (supra) decision in support of their position, I do find that in that case Justice Thompson comments on how to interpret the words "living and ordinarily present in Manitoba" in a manner that is helpful to this case. He too refers to the *Thomson* & *Minister of National Revenue* decision. He points out that Justice Estey comments that "it is not the length of the visit or stay that determines the question".

With respect to the *Cruz* & *Royal SunAlliance* (supra) case, relied upon by Hay, I agree with Echelon that it is distinguishable. Ms. Cruz was a citizen of Mexico attending school in Ontario for three months at the request of her employer. Her employer paid her her normal salary during her studies as well as her expenses. Echelon suggests that this was a business investment under the condition that Ms. Cruz return to Mexico to head the company's new department.

Echelon points out that neither Mr. Hugh nor Mr. Johns had a separate employer in Jamaica. Their purpose in coming to Canada was quite different than that of Ms. Cruz. They were coming pursuant to a contractual agreement with a Canadian employer to work in Canada where they were going to be covered under O.H.I.P. and would pay Canadian taxes on their earnings.

Applying the above case law and analysis to the situation of Mr. Johns and Mr. Hugh I find that they were both "living and ordinarily present in Ontario" at the time of the accident. I find that these terms should be given a broad interpretation. This is a definition provision under the

SABS Regulation and as such should be given a broad interpretation. I do not agree with Hay that I should give a more restrictive interpretation to "ordinarily present" as opposed to "ordinarily resident".

There is no doubt that both Mr. Hugh and Mr. Johns were living in Ontario at the time of the accident. They were also present in Ontario at the time of the accident. The only question really is whether they were "ordinarily present" in Ontario at the time of the accident. While these individuals had only been in Ontario since January at the time the accident occurred, they were scheduled to remain in Ontario until September. There was every likelihood that they would come back again the next year as indeed Mr. Hugh had done on a number of years prior to the accident. Both had O.H.I.P. coverage. Both were being paid by an Ontario employer and having deductions at source for C.P.P., income tax and E.I. Both were covered under Workers' Compensation. Both described their home/place of residence in their application for accident benefits as the farm house that was provided to them by their employer. Despite having only been here for a few weeks they had already started on a social life having met two individuals with whom they were going to be spending some time "hanging out". I do not find the fact that Mr. Johns said on his EUO that he "did not receive mail" at the farm house of any relevance. In this day and age people do not seem to write letters or receive mail but rather use text and e-mail. Mr. Johns had a phone having purchased one here in Ontario and clearly was using it for the purposes of communicating as evidenced by the statements of Alyssa and Brianna who had been texting him during the course of the week leading up to the accident. I am not sure what mail it would be that Mr. Johns or Mr. Hugh would be expected to receive at the farm house. Arguably they would not have any bills. Perhaps somebody from Jamaica could send them a letter but in the cell phone age it seems more likely that they would communicate by text, by e-mail; or, indeed by cell phone.

Nor do I find it relevant that Mr. Johns had not yet secured a bank account. He was being taken to the local bank where he was cashing his cheque and sending the money back home. That does not appear to me to be an issue that would establish whether one was or was not "present" in Ontario.

Mr. Hugh had both an international and Jamaican driver's licence. Mr. Johns did not have a driver's licence and did not obtain one in Ontario but then he was not the individual who was driving the employer's vehicle, Mr. Hugh was. Further, Mr. Johns did not have a driver's licence in Jamaica.

**Result:**

With respect to the issue before me I conclude that Mr. Hugh and Mr. Johns were on the date of loss "living and ordinarily present in Ontario".

I understand that this is a preliminary decision only and that there may continue to be an issue as a result of this decision as to whether Mr. Hugh and Mr. Johns were an individual to whom

the insured automobile was being made available for their regular use. I will contact counsel to schedule a further pre-hearing to set up some timelines with respect to that issue.

**Costs:**

Pursuant to the parties' Arbitration Agreement dated May 3, 2018 costs of the proceeding and of the arbitration are payable by the unsuccessful party. Accordingly, Hay is to pay the legal costs of Echelon relating to this preliminary issue hearing and costs of the arbitrator related to that same issue. If the parties cannot agree on quantum we can discuss setting up a costs hearing.

DATED THIS 18th day of October, 2019 at Toronto.

Arbitrator Philippa G. Samworth
**DUTTON BROCK LLP**