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

DECISION ON PRLIMINARY ISSUE

Counsel Appearing:

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

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

Judith Hull: Counsel for the Claimant, RM, (hereinafter called the Claimant)

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. I have been asked to make a decision as to which of Echelon or Gore are the priority insurer with respect to the payment of Statutory Accident Benefits to the Claimant arising out of the motor vehicle accident of August 18, 2018.

The hearing on the actual priority issue is now scheduled for April 20, 2023. The matter before me today is whether or not the Claimant can be added as a party to this Arbitration both for the purpose of arguing the priority dispute itself and as well for the purpose of seeking relief from forfeiture.

This preliminary matter proceeded before me on November 18, 2022. Ms. Hull submitted materials on behalf of the Claimant and as well I received written submissions both from Echelon and Gore. All parties were given an opportunity to make oral submissions.

The Accident Benefit claim itself arises out of an incident that occurred on August 18, 2018 when the Claimant was operating her Yamaha motorcycle and it was involved in an incident 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 and the Claimant had purchased optional, medical, and rehabilitation benefits on her Gore policy. The Claimant had a number of injuries in this accident including left rib fractures, facial lacerations, right humerus fracture, left distal radius fracture, and she also required multiple surgeries. She was taken from the scene of the accident to Tillsonburg District Memorial Hospital and then airlifted to London Health Sciences. The Claimant submitted her application for Accident Benefits to Echelon.

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

Echelon served the Notice to Participate and Demand for Arbitration on Gore only on October 29, 2019 as a result of which I was appointed as Arbitrator to preside over this priority dispute.

Chronology:

It is helpful before turning to an analysis of the preliminary issue to look at a chronology with respect to the priority dispute itself and how it has proceeded through the Arbitration process.

1. Notice of Dispute to Applicant and to Gore, November 13, 2018.
2. Demand to Submit to Arbitration served by Echelon on Gore, October 29, 2019.
3. Arbitrator Samworth retained January 23, 2020.
4. Initial pre-hearing took place May 15, 2020. Echelon sought to delay the Arbitration pending a decision from the Court of Appeal on optional benefits. Counsel for Gore submitted there was no indication that the decision would assist with the dispute before me and wanted to press on.
5. Second pre-hearing took place December 10, 2020. No decision had been rendered from the Court of Appeal as yet and counsel for Gore wishes to move the Arbitration forward and the Arbitration was booked for June 25, 2021.
6. The parties filed submissions and then just before the hearing date on June 24, 2021, Echelon sought an adjournment submitting that the materials that had now been placed before me justified waiting for the Court of Appeal's decision. I agreed to adjourn the

hearing and the time to complete the Arbitration under Regulation 283/95 was extended to April 29, 2022.

7. Third pre-hearing took place December 15, 2021. The Court of Appeal had still not rendered its decision. Gore continued to request that this matter be moved forward.
8. March 7, 2022 the Court of Appeal released the decision in *Continental Casualty Company v Chubb Insurance Company of Canada* 2022 ONCA 188.
9. On April 4, 2022 a further pre-hearing took place and the Arbitration hearing was booked for June 14, 2022. There was some argument about what additional materials could be filed. Echelon also wanted to call Ted Watson, the adjuster at Gore, as a witness. Orders were made with respect to the above.
10. In order to allow the additional materials, a further adjournment was granted on June 5, 2022 and a new hearing date was scheduled for July 20, 2022.
11. The July 20, 2022 hearing date was vacated shortly before the hearing was scheduled to take place as counsel for Gore had a family emergency.
12. On August 10, 2022 the first Application was made to seek to add the Claimant as a party to the priority dispute.

It should also be noted that over the course of submitting materials for the hearing Gore and Echelon submitted a signed Arbitration Agreement prior to the first scheduled date of the hearing of June 2021.

Relevant Facts:

As noted earlier, the Claimant had significant injuries and had been airlifted to London Health Centre. She remained in the trauma unit there until August 29, 2018 and then transferred to Cambridge Memorial Hospital where she remained until September 10, 2018. She was then an inpatient for rehabilitation at Parkwood Hospital until December 18, 2018 when she was discharged home.

The Claimant claims that there was an urgency to complete the OCF-1 and get her benefits started as she needed the income replacement benefits to avoid defaulting on various payment obligations she had. In addition, there were accessibility issues in her home relating to discharge and it was important to get benefits going so the medical team could ensure the Claimant had the proper treatment team and assistive devices.

The Claimant says that both her arms were casted in or around the time that the OCF-1 was being completed. She claims she was unable to participate in the process to apply for benefits both due to the casting of her arms which prevented her from being able to sign documents and as well due to the significant levels of pain medication that she was taking.

The Claimant says that her sister, PW, (next of kin) therefore handled the Claimant's various affairs including her insurance claim. PW understood that the Claimant was insured with Echelon with respect to her motorcycle and contacted Echelon and their adjuster at Crawford on the

Claimant's behalf. In her submissions the Claimant says that she was not aware that she purchased optional med rehab benefits from the Gore until she received Echelon's Notice to Applicant of Dispute between Insurers dated November 13, 2018. There is no Affidavit evidence to support this bald factual assertion. I make no finding on whether the Claimant was or was not aware, that she had purchased optional benefits at the time her OCF-1 was submitted to Echelon, and, in any event, I do not find that question relevant for the purposes of this hearing.

The Claimant submitted her OCF-1 to Echelon and Echelon commenced handling the Accident Benefit claim.

When the Claimant received the Notice to Applicant of Dispute she says she was supportive of the transfer of the claim from Echelon to Gore. The Notice provided to her only indicated that she should respond to the form and send in a Notice that she wanted to be involved in the proceeding only if she objected to the claim being transferred. The Claimant says not only did she not object to the claim being transferred but she supported the claim being transferred and therefore she felt there was no need to complete the form.

Following the release of the decision from the Court of Appeal in *Continental v Chubb* (Supra), the Claimant, through her counsel, submitted a second OCF-1 to Gore. The OCF-1 is dated March 22, 2022.

Mr. Ted Watson of the Gore was assigned to deal with the Application. He responded via email on April 26, 2022 as follows:

> "We have received your Application for Accident Benefits. There is currently a dispute between Echelon and Gore as to who is obligated to pay your Accident Benefits. Pursuant to the priority dispute rules contained in O. Reg 283/95, an insured person shall only submit a completed OCF-1 to one insurer. As you have previously submitted an Application to Echelon, Echelon is bound to provide accident benefits to you until the priority dispute is resolved".

Ms. Hull responded to this email by letter dated June 6, 2022. In this letter she took the position that her client was entitled to claim optional benefits from Gore pursuant to the OPCF 47. Ms. Hull claimed that once Gore started to pay her client benefits then the Claimant would agree not to make any further claims to Echelon.

Ms. Hull also indicated in the letter that it was her position that under the terms of the OPCF 47 that Gore was not allowed to rely on the priority rules to deny her client's claim. She cited *Continental v Chubb* (Supra) as support of that position.

An Application was then made in August by Ms. Hull to counsel for Echelon and Gore to have the Claimant added to the priority dispute. Echelon consented and Gore did not.

The Claimant then brought this motion to seek standing to participate in the priority dispute as well as seek relief from forfeiture.

This sets the scene for the parties' submissions on whether or not the Claimant should be given standing.

Relevant Legislation:

Before turning to the parties submissions it is helpful to set out the relevant sections of Regulation 283/95 to the *Insurance Act*, which sets out the scheme for priority disputes. The relevant sections are set out below:

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.

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

2.1(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 pending the resolution of any dispute as to which insurer is required to pay the benefits.

3.(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.

4.(1) An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Chief Executive Officer.

4.(2) Despite subsection (1), if the insurer that gives notice under section 3 is the Fund, no notice shall be given to the insured person under subsection (1).

5.(1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice.

5.(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim the insurers referred to in the notice.

5.(3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the

insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the *Arbitration Act*, 1991.

7.(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act*, 1991 initiated by the insured person.

Also relevant to the issues before me are the following sections from the *Insurance Act*:

Section 280(1)

This section applies with respect to the resolution of a dispute in respect of an insured's person entitlement to Statutory Accident Benefits or in respect of the amount of Statutory Accident Benefits to which an insured person is entitled.

Section 280(2)

The insured person or the insurer may apply to the License Appeal Tribunal to resolve a dispute described under Subsection (1).

Lastly, the parties have referenced the *Arbitration Act* the relevant provision being Section 31 set out below:

> An Arbitration Tribunal shall decide a dispute in accordance with the law, including equity, and may order specific performance, injunctions and other equitable remedies.

<u>The Parties Submissions:</u>

Echelon and the Claimant

Echelon and the Claimant are aligned with respect to their position in this preliminary matter and their respective submissions will be dealt with together. The Claimant and Echelon submit that the claimant has a significant interest in the priority proceedings and decisions as ultimately it will effect the amount of benefits that would be payable to the Claimant. If I conclude that Gore is the priority insurer then the Claimant will argue that she is entitled to the optional benefits available under the Gore policy. Conversely, if I conclude that Echelon is the priority insurer then she may be limited to the non-optional benefits under the Echelon policy.

However, both Echelon and the Claimant seem to acknowledge in their submissions that the Claimant also has the option either now or in the face of an adverse finding in the priority dispute to pursue a claim as against Gore at the Licensing Appeal Tribunal. The Claimant acknowledged

that no Application at the Tribunal has been initiated as yet but notes at paragraph 27 of her submissions:

> "If the Claimant does not get standing in this hearing, she will bring a LAT Application upon any denial of her Application to Gore".

The Claimant and Echelon argue, however, that rather than forcing the Claimant to proceed with an Application at the LAT that it makes more sense for her claim against the Gore to be dealt with in this forum as it promotes equity, efficiency, and certainty. It is for that reason that the Claimant says she advances a claim for relief from forfeiture citing Section 31 of the *Arbitration Act* and suggesting that I have jurisdiction to order equitable remedies. Both the Claimant and Echelon also refer to the decision of Arbitrator Bialkowski in *Chubb Insurance Co. of Canada and Continental Casualty Co.* 2018 CarswellOnt 5527. The decision of Arbitrator Bialkowski was the Arbitration which ultimately was looked at by the Court of Appeal in *Continental v Chubb* (supra).

Both Echelon and the Claimant submit that there is no prohibition under Regulation 283/95 to having the Claimant added to the Arbitration at this stage. They also submit that while Sections 5(1) and 5(2) speak to an insured seeking to participate in a priority dispute to "object" to the transfer of the claim that does not necessarily mean that the insured person is precluded from seeking to participate in a priority dispute when they want to support the claim being transferred. Again, they rely on Arbitrator Bialkowski's decision in *Chubb and Continental* where he allowed the claimant, Peter Ekstein, to have standing in the Arbitration despite not having filed the required notice under Regulation 283/95. Echelon and the Claimant submit that neither the Notice of Dispute nor Regulation 283/95 expressly say that if the insured fails to object that they would then be barred from participating in an Arbitration at a later date. Nor they submit does the notice or Regulation prevent an insured person who chooses to support the transfer of priority from participating either as a party or intervener in a priority dispute.

Echelon says that Section 5 of the Regulation only deals with the process where the claimant objects to the transfer and it has no relevance where an insured person consents or wants to advocate for the file transfer. Echelon also suggests that the Court of Appeal in *Continental v Chubb* (Supra) recognized that seeking such status is an option available for a claimant in circumstances such as these.

On the issue of relief from forfeiture, the Claimant quite clearly in her submissions indicated that she was seeking to be added as a party to this Arbitration for the express purpose of seeking relief from forfeiture. Echelon in their materials seems to have misunderstood the Claimant's position and suggested that in fact she was not seeking the right to relief from forfeiture. Rather, she was only seeking status to participate as an adverse finding in the priority dispute could potentially prejudice her access to optional benefits. Based on both the written and oral submissions, I am satisfied that the Claimant is seeking to be added to this Arbitration in order to seek relief from forfeiture against the Gore and that must be taken into consideration when I determine the right of the Claimant to participate.

Lastly, Echelon submits that the Court of Appeal decision in *Continental v Chubb* (Supra) stands for the proposition that there is a distinction to be made in a priority dispute between an optional benefit insurer and an non-optional benefit insurer based on whether or not the claimant participated in the priority dispute proceeding. Echelon submits that the Court of Appeal distinguished my decision in *Jevco Insurance Company v Chieftain Insurance Company* (Arbitrator Samworth March 11, 2016) on the grounds that in that case, the claimant was not participating in the priority dispute while in the *Chubb and Continental* case, Arbitrator Bialkowski allowed the claimant to participate. Echelon submits that in the circumstances where the claimant participates in the priority dispute that based on the Court of Appeal's decision an Arbitrator would have the right to consider the following:

1. Right of the insured to re-elect to claim benefits from the optional benefit insurer.
2. To choose to have the optional benefit insurer deemed the priority insurer pursuant to Section 268 of the *Insurance Act* and the OPCF 47.
3. To avoid potential unfairness arising from an insured's error when initially applying for the *SABS* by allowing relief from forfeiture.

It is for these reasons that Echelon strongly supports the right of the Applicant to be added as a participant in this priority dispute.

Gore

The Gore opposes the Claimant's request to be either added to the priority dispute, to participate in some way in the dispute, or to be given the right to argue relief from forfeiture. Gore's position can be summarized as follows:

1. I do not have jurisdiction to grant the claimant relief forfeiture and the claimant's participation as a party would therefore be moot.
2. Regulation 283/95 does not permit an insured person to participate in a proceeding unless they file an objection to the transfer of the claim and deliver that within the timeframe under the regulation (Section 5).
3. The claimant was not a party to the Arbitration Agreement entered into between Echelon and Gore and that agreement cannot be unilaterally altered or revoked.
4. There has been a considerable delay in the insured seeking to be added to this proceeding and Gore would suffer prejudice.

With respect to the first point, Gore submits that Section 268 of the *Insurance Act* clearly indicates that it is the Licensing Appeal Tribunal and only the Licensing Appeal Tribunal that has jurisdiction to deal with the disputes between an insured and an insurer. Gore says only the Tribunal can respond to any dispute between Gore and the Claimant arising out of her recent Application for Accident Benefits by way of the OCF-1. Gore relies on the Court of Appeal's decision in *Stegenga v Economical Mutual Insurance Company* 2019 ONCA 615 in support of their

position. Gore says that the *Stegenga* decision clearly indicates that exclusive jurisdiction is bestowed on the LAT by virtue of Section 288 to hear a wide array of various disagreements between an insured and insurer connected to any dispute with respect to benefits. This includes disagreements about when the insurer is obliged to provide befits, how that obligation to provide benefits has been performed and generally to deal with any dispute that falls within the Statutory Accident Benefits Schedule and Section 280 of the *Insurance Act* as between an insured and an insurer.

Gore says that the claim by the Claimant that they are entitled to re-elect and claim benefits from the Gore, that they have the right to claim optional benefits from the Gore, and/or the right to relief from forfeiture falls within the exclusive purview of the Licensing Appeal Tribunal and not an Arbitrator conducting a priority dispute as between insurers. To the extent that Arbitrator Bialkowski allowed that to occur in the decision of *Chubb and Continental* (supra), Gore submits that decision was wrong. No appeal was taken from that decision on that issue and therefore I am not obliged to follow Arbitrator's Bialkowski's conclusions.

With respect to Section 5 of Regulation 283/95, Gore submits that this is a complete code that sets out the duties, obligations, and proceeding for priority disputes including the right of the insured to participate in such a dispute. Gore submits that as it is a complete code that the various regulatory paths given to an insured person to participate in a priority Arbitration are limited.

Gore submits that an insured person can <u>only</u> participate in an Arbitration dispute if they object to the transfer from one insurer to the other. There is nothing in the Regulation that permits an insured person to get involved in a priority dispute where they do not object to the transfer. As the Regulation does not expressly permit the insured to participate in those circumstances, therefore, the right does not exist. Gore submits that the general rule is that an insured person does not have standing to participate in the proceedings unless they meet the conditions that are set out in the Regulation and the Claimant did not meet any of those conditions. The Claimant does not object to the transfer of priority as between Echelon and Gore. The Claimant did not file a Notice of Objection within 14 days of receiving the notice of dispute. The Claimant, therefore, should not be given the right to participate at this late stage.

With respect to the Arbitration Agreement, Gore submits that the Claimant was never a party to the Arbitration Agreement as it was entered into long before she decided to seek to become involved in this hearing and/or submit an OCF-1 to Gore. Gore submits that Section 5(5) of the *Arbitration Act* says that an Arbitration Agreement can only be revoked in accordance with the Ordinary Rules of Contract Law, and that therefore the Arbitration Agreement cannot now be altered or revoked to permit a new party to the Agreement unless the Gore consents and it has not consented.

I should point out that Echelon's reply to Gore's submissions on this point is that if I decide to add the claimant to the Arbitration that then a new Arbitration Agreement will be entered into among the three parties and it is not relevant to consider the pre-existing Arbitration Agreement.

On the issue of prejudice, Gore submits that it has been more than 3 years since the initial Demand for Arbitration was made. The parties have already prepared significant written materials over the course of the 2 aborted hearings, the latter of which was only aborted due to a family emergency. None of the issues that are now being raised have ever been brought up before August of 2022 and if allowed this would add significant complexity and costs to an Arbitration at a very late stage.

Decision and Analysis:

A. Can the Claimant be added as a participant to these proceedings under Ontario Regulation 283/95.

I agree with Gore that Regulation 283/95 does not contemplate an insured participating in a priority proceeding in the circumstances of this case. Regulation 283/95 is indeed a complete code with respect to priority disputes under Section 268 of the *Insurance Act*. The regulation contemplates that the insured will make only 1 Application for Statutory Accident Benefits. If that insurer disputes its obligation to pay as it does not believe it is the priority insurer under Section 268 of the *Insurance Act* then that insurer must give Notice to all other insurers who it says may be responsible for paying as well as giving that notice to the insured. Prior to the present format of Regulation 283/95 an insured often submitted 2 or more Applications for Accident Benefits. No insurer would agree to pay pending the dispute and the insured was left without benefits. The Regulation was amended to require the insured person to submit only 1 Application and the insurer that received that was duty bound to pay benefits to the insured while it and any other insurer "duked it out" in a priority dispute.

Section 5 does recognize that there are certain limited circumstances when an insured person may want to become involved in a dispute. I find that this section limits those circumstances to only those where the insured person **objects** to the transfer of the claim. I cannot imagine that the legislature intended that an insured person could get involved in a priority dispute where it agreed to the transfer of the claim. It would provide another layer of costs, make the proceedings more complicated, and unnecessary. If the insured person does not object, to the transfer, there is no viable reason, in my view, for them becoming involved in the dispute between the two insurers. If on the other hand they object then there is every reason for the insured person to be involved and explain the reason for their objection and to make their own submissions on the priority dispute itself. The Claimant readily admits that she does not object to the transfer of her Accident Benefit file from Echelon to Gore. Therefore, I find that she does not qualify under Section 5(1) to participate in this dispute.

In addition, Section 5(2) specifically provides that if the insured wants to participate in the dispute, they must give notice within 14 days of receiving the Notice of Dispute Between Insurers to then file a form advising that "she objects to the transfer of the claim". I note again that section 5(2) only allows the insured to give notice if they object to the transfer of the claim. The

Claimant again did not object to the notice of the transfer of the claim and even if she did, she did not give notice within 14 days. Section 5(2) provides that if that notice is not given by the insured person then they are not entitled to object to any subsequent decision to transfer the claim to the insurers referred to in the notice. The Claimant did not give notice within 14 days and therefore she is not entitled to participate in this hearing.

When I review Regulation 283/95 in its entirety and specifically those sections that I noted earlier, it presents to me a clear scheme to facilitate disputes between insurers with some very limited rights to the insured person when and only when they object to the proposed transfer. The scheme is intended to simplify this process and make it cost efficient and to conclude the insured could become involved in priority disputes when they have no objection is not consistent with the scheme.

As Arbitrator Bialkowski in *Chubb and Continental* took a different approach, I feel it is important to review that decision. At the outset, I disagree with Arbitrator Bialkowski's decision to add the insured in that case but the circumstances were somewhat different. In *Chubb and Continental*, Mr. Ekstein was involved in a motor vehicle accident on July 12, 2015. He was struck by a pick-up truck while jogging. *Chubb* insured Mr. Ekstein's personal vehicle and did not have optional benefits. CNA had a commercial fleet policy with respect to the business of which Mr. Ekstein was an office and director. The CNA policy did provide optional benefits, however, the evidence before Arbitrator Bialkowski was that CNA consistently told Mr. Ekstein that there were no optional benefits available under their policy.

Mr. Ekstein applied to Chubb. Chubb took the position that Mr. Ekstein was a deemed named insured under the CNA policy and had regular use of the vehicle and therefore they were the priority insurer.

The Notice of Dispute Between Insurers was sent out on August 17, 2015. The insured did not file any notice indicating that they wished to participate in any priority dispute. However, it is clear that once Arbitrator Bialkowski was appointed that he allowed the claimant's lawyer to participate in all of the pre-hearings. He notes that it was only after all the pre-hearings had taken place and submissions were being made that late in the day, CNA took the position that the claimant had no standing to participate in the priority dispute. That was raised in their submissions. CNA argued that Mr. Ekstein's failure to respond to the notice precluded his participation in the proceeding.

This therefore was one of the issues before Arbitrator Bialkowski. Arbitrator Bialkowski concludes that the claimant ought to have status to participate in the priority dispute proceedings. He notes that that the claimant through his counsel participated in the pre-arbitration conferences leading up to the hearing and the objection to the participation was only raised in the Respondent's Factum. In addition, Arbitrator Bialkowski concluded that Section 5 of Regulation 283/95 does not explicitly prohibit Mr. Ekstein's participation in the Arbitration. He noted that the Regulation is silent to a situation where the insured supports the Application

to transfer priority. He noted that the Regulation would have only required Mr. Ekstein to file the notice within 14 days if he was objecting to the transfer and as he did not object therefore the notice requirements did not apply to him.

Arbitrator Bialkowski felt that Regulation 283/95 in those circumstances did not bar the insured from participating in the hearing. Even if it did he concluded that he had the discretion to give standing in appropriate circumstances. He noted that the claimant had a significant interest in the priority decision as it could effect the amount of benefits available to him and there was no evidence of any prejudice to the Respondent in allowing the claimant to proceed. He also found he had the right to order equitable remedies under Section 31 of the *Arbitration Act* and therefore gave relief from forfeiture to the claimant if needed with respect to his failure to file notice under the Regulation and allow him to participate in the proceeding.

I disagree with Arbitrator Bialkowski's interpretation of Regulation 283/95. I do note that there were differing circumstances before him. I however, conclude that an insured who does not "object" to the transfer of his/her accident benefit file as between 2 insurers does not have standing to participate in the priority dispute under Regulation 283/95.

I think it is important to note that the Appeal from Arbitrator Bialkowski's decision as ultimately heard by the Court of Appeal did not include any appeal on Arbitrator Bialkowski's decision to allow the insured to participate in the hearing. In fact, while Mr. Peter Ekstein is shown as the insured person in the style of cause on the decision, neither he nor his counsel participated in the Appeal.

B. Do I have jurisdiction to grant the relief sought by the insured and Echelon

As I noted earlier the Claimant seeks to be involved in this priority dispute not only in order to support Echelon's position but also to seek relief from forfeiture. In the context of the latter it would seem that the Claimant wants to make arguments with respect to her right to claim Statutory Accident Benefits as against Gore so that she could claim optional benefits.

I agree with Gore that any issues as between the Claimant and Gore with respect to her entitlement to claim benefits is within the exclusive jurisdiction of the Licencing Appeal Tribunal. I find that the Court of Appeal's decision in *Stegenga* (Supra) provides the Tribunal with an extremely broad array of powers to decide disputes between insured and insurer. In my view, this would include whether or not the Claimant can pursue a claim against Gore for optional benefits. I do not see that falling within the jurisdiction of an Arbitrator assigned to hear a priority dispute between 2 insurers. While my decision on the priority dispute may ultimately direct where the claimant will be receiving her benefits from I am not and will not decide whether or not she has the right to re-elect or pursue a claim against Gore. This is consistent with my conclusion in the *Jevco and Chieftain.*

Echelon, argues that the Court of Appeal supports that I do have that jurisdiction. References to made to paragraph 107 and 108 of the Court's decision in *Continental and Chubb*. I have carefully reviewed the Courts comments and it is my view that they are obiter and do not in any way clearly indicate whether a priority dispute Arbitrator has jurisdiction to make decisions relating to claims as between the insured and the insurer. In the *Continental and Chubb* case the Court of Appeal was asked to rule on whether or not the Superior Court judge who had heard the Appeal from Arbitrator Bialkowski was right when they concluded that Chubb was obliged to indemnify Continental for basic mandatory *SABS* payments while Continental was obliged to pay Mr. Ekstein optional benefits under the OPCF 47. This flowed from a decision that had been rendered by Arbitrator Samis in *Echelon General Insurance Company v Co-operators General Insurance Company* 2015 CarswellOnt 20908. In that case, Arbitrator Samis concluded that the payment of the mandatory Accident Benefits rests with the insurer who has priority under Section 268 of the *Insurance Act* and therefore even though another insurer may be obliged to pay standard and optional benefits, the priority insurer must then reimburse that insurer for the basic *SABS*.

In *Jevco and Chieftain* I disagreed with Arbitrator Samis. The Court of Appeal in *Continental and Chubb* concluded that this transfer of payments was not contemplated under the *Insurance Act*, its Regulations, or the OPCF 47 and agreed with the conclusions in both my decision and the decision of Arbitrator Cooper in *Co-operators General Insurance Company v Certas Home & Automobile Insurance Company*: Decision April 2019. Therefore, the Court of Appeal in *Chubb and Continental* was not looking at any Appeal from relief from forfeiture or any ruling as between the optional benefit insurer and the insured. Therefore, the comments made by the Court in paragraph 107 are clearly obiter. The Court there notes that I recognized in the *Jevco and Chieftain* case that the result was harsh because the insured was not given access to the optional enhanced benefits he had purchased solely by virtue of the fact that he had applied to the non-optional benefit insurer first. I had also commented in that case that the *SABS* Claimant was not entitled to re-elect from which insurer he wanted to claim benefits, but I was not making that decision as to what options the Claimant could pursue. That question was for another forum. I was of course referring to the Financial Services Commission and/or the Court as my decision in *Jevco* was rendered prior to the change in the *Insurance Act* where jurisdiction for hearing disputes was given exclusively to the Licencing Appeal Tribunal.

The Court of Appeal just seems to be commenting on the potential unfairness that a priority dispute can bring on an insured and no more. The Court goes on to say:

> "I observe that potential unfairness arising from an insured's errors when applying for SAB may, in some cases, be corrected by invoking relief from forfeiture as happened in this case."

This is in reference to Arbitrator Bialkowski's initial decision, which again was not the subject matter of an Appeal other than with respect to the question of regular use and ultimately the payment transfer scheme between the optional and non optional insurer. I do not see this comment by the Court as suggesting that a priority Arbitrator does have authority to provide

relief from forfeiture or to hear and make a decision with respect to the right of the insured to pursue the optional benefit insurer.

Lastly, Echelon points to the footnote to paragraph 108 where the Court indicates:

> "Unlike in this case, in Jevco, the claimant did not seek status in the arbitration".

These are the key words that Echelon describes as being "the golden ticket". Echelon suggests that this is the Court of Appeal advising that if an insured seeks status in a priority dispute Arbitration then they have the right to make claims from relief from forfeiture, presumably to re-elect benefits and have decisions made with respect to the rights between the insured and the insurer (here Gore and the Claimant). I categorically disagree with this interpretation of what the Court has said. I do not agree that the simple act of adding an insured to the priority dispute Arbitration would somehow confer jurisdiction on an Arbitrator to make decisions with respect to benefits that is clearly within the jurisdiction of the Licencing Appeal Tribunal.

I therefore decline to add the Claimant as a party to the Arbitration based on Echelon's submissions that the Court of Appeal has suggested that to do so would somehow change the priority Arbitrator's jurisdiction.

With respect to the other 2 issues raised by Gore, I do not agree with them that the Arbitration Agreement that was signed sometime ago between Echelon and Gore would prevent me from adding the Claimant as a party to this hearing should I choose to do so. I agree with Echelon that if I did add the Claimant that a new Arbitration Agreement would have to be entered into.

Finally, while I am sympathetic to Gore's position that they may suffer some prejudice by adding the Claimant as a party at this late stage, I did not see any evidence of prejudice. Had I otherwise found that the Claimant could be added to this hearing under Regulation 283/95 I would not have declined to do so on the basis of prejudice.

Decision:

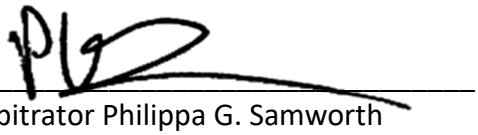
The motion of the Claimant to seek to be added as a party to the priority dispute between Echelon and Gore is denied.

Costs:

I am hopeful that the parties can reach some agreement on costs. If they are unable to do so, we can schedule a further pre-hearing to discuss how best to deal with the costs issue and whether it can be left for the hearing.

A further pre-hearing will be scheduled in any event to finalize the arrangements for the hearing for April 20, 2023.

DATED THIS 21st day of December, 2022 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP