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

AVIVA GENERAL INSURANCE COMPANY Applicant

and

TRAVELERS INSURANCE COMPANY OF CANADA Respondent

DECISION

COUNSEL

Andy Smith, counsel for Aviva General Insurance Company, the Applicant (hereinafter referred to as Aviva).

Michelle Mainprize, counsel for Dominion of Canada General Insurance Company, the Respondent (hereinafter referred to as Dominion).

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act*, 1991 to arbitrate a dispute between two insurers with respect to a priority matter that has arisen pursuant to the *Insurance Act* and its Regulations: Regulation 283/95 as amended. The claim arises out of a motor vehicle accident that occurred on December 27, 2021. The accident occurred in Quebec. The claimants are a husband and wife who had come to Canada on October 5, 2021 from India on a visitor's visa. They were staying with their son. The son is insured with Aviva. Dominion insures the rental vehicle that the family were in when the accident occurred in Quebec.

The two claimants applied to Aviva for statutory accident benefits. Aviva takes the position that Dominion is the priority insurer.

This is a preliminary issue hearing to determine whether or not the claimants would be considered "insureds" under the Dominion policy in order to attract the application of the priority rules.

In the background is the question as to whether or not the claimants were principally dependent

for financial support or care on Aviva's insured. However, that issue is not before me in this preliminary matter.

PROCEEDINGS

I was appointed on consent to act as an arbitrator in this matter in accordance with the *Arbitrations Act* and Regulation 283/95. The parties filed an Arbitration Agreement dated November 13, 2024. We had a number of pre-hearings. This preliminary issue hearing has proceeded by way of written and oral submissions. In addition, the parties filed Joint Document Briefs which included the following:

1. Transcripts of the EUO of the male claimant's son;

2. Transcripts of the EUO of the male claimant;

3. Two electronic tickets issued by Air Canada to the claimants;

4. A copy of Immigration, Refugee and Citizenship Canada visitor record for each claimant (a post-accident document); and

5. A GCMS (Government of Canada) information request with respect to the visa application for the male claimant (pre-accident).

Both counsel also filed various Books of Authority.

ISSUES IN DISPUTE

Both parties confirmed that there were three issues in dispute that they were asking me to address:

1. Issue 1: Do the claimants have to meet the definition of an "insured person" under the Dominion policy pursuant to the s. 3(1) definition in the SABS in order for the priority scheme under s. 268 of the *Insurance Act* to apply to Dominion:

2. Issue 2: Do each of the claimants meet the definition of an "insured person" under the Dominion policy pursuant to s. 3 (1) definition of the SABS? In particular, does each fit the s. 3 (1)(c) definition of "a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario"?

3. Issue 3: Which insurer has the burden/onus of proof in this preliminary hearing and in the main hearing?

With respect to the first issue, counsel for Aviva conceded that the claimants have to meet the

definition of an "insured person" under the Dominion policy in order for the priority scheme to apply to Dominion. Therefore, there is no need for me to weigh in on that issue.

With respect to the third issue, Aviva acknowledged that it had the burden of proof in this preliminary hearing with respect to issue 2. The question as to who had the burden of proof in the main hearing would only arise if the claimants meet the definition of an insured person under the Dominion policy thus activating s. 268. If I find that the claimants meet the definition of an insured person, then we would then move forward with an arbitration on the question of dependency and it is in that context that the burden of proof arises. Both counsel therefore agreed that if I conclude that the claimants do not meet the definition of an insured person under the Dominion policy, that I do not need to deal with the burden of proof question as outlined above.

RELEVANT FACTS

The claimants are the married parents of the Aviva insured. At the time of the accident the father was 76 years old and the mother was 72 years of age.

The father was a retired assistant divisional manager with the Oriental Insurance Company. He retired in 2005. The mother has never worked.

Both claimants lived in India. The son was born in India but had come to Canada in approximately 2012. The son is married and has a child.

The claimants have a daughter who lives in India. She is married with children. They have a second daughter who lives in Canada who is also married with children. The claimants lived in India all their life and had last come to Canada in 2013 for four to five months to visit their family. They stayed with their daughter.

In India the claimants resided in an apartment that had been purchased by their son. He purchased it in 2000 or 2001.

For some time the son and his spouse lived with his parents in the apartment. The son moved to Canada in approximately 2012. His spouse continued to reside with the claimants although came to Canada from time to time. Ultimately, his spouse moved permanently to Canada in 2020.

The claimants also owned another apartment in which they did not live but they rented out.

The claimants had a bank account in India. The male claimant (the father) received a pension and the pension was deposited into the bank account in India. While visiting their son in Ontario, his parents did not access money from the Indian bank account.

On October 5, 2021 the claimants came to Canada on a visitor's visa. All the arrangements with respect to the visitor's visa were taken care of by the claimant's son.

A visa had been previously issued to the claimant's parents which according to the GCMS information request showed a valid date for the visitor's visa from April 10, 2020 to September 10, 2020. The document indicates that the purpose of the claimants coming to Canada was for a "family visit". Unfortunately, the family were unable to make use of the visitor's visa due to the onset of COVID. Their trip was therefore delayed until October 5, 2021.

Both claimants had a return ticket with Air Canada showing a departure from Lester Pearson Airport on March 11, 2022 with a flight to Mumbai, India via Frankfurt with an arrival date of March 12, 2022.

While in Canada, the claimants resided exclusively with their son, the Aviva insured, and his family. His home is in Brampton.

The son covered all their expenses. His parents had brought over $10,000 as required in order to secure their visitor's visa. This money was deposited by the son in a bank account and according to his EUO he did not use that money and it was his intention to give it back to his parents when they returned to India so they could take it to their bank and convert it from Canadian funds into rupees and use the money for living expenses in India.

Up until the accident of December 27, 2021 the claimants did not have OHIP coverage. Subsequent to the accident, the claimants continued to stay with their son in Ontario, being cared for their injuries, and ultimately secured an OHIP card. During that time the son extended their visitor's visa as evidenced by the Immigration, Refugees and Citizenship Canada visitor record showing a temporary resident status extended from May 24, 2023 to May 23, 2024. This document also indicated that the claimants must leave Canada by May 23, 2024.

In December of 2021 the claimants, along with other family members, took a trip to Quebec for a few days. In order to accommodate the numbers, a Mercedes minibus was rented on December 22, 2021. The rental period was December 21 to December 28, 2021. This was the vehicle insured by Dominion. The vehicle was rented by the claimants' son-in-law.

On December 27, 2021 the son-in-law was driving the Mercedes minibus when a tire blew out causing the minibus to lose control while on Highway 20 near Boucherville in Quebec. Both claimants were injured and submitted an Application for Accident Benefits to Aviva, their son's insurer. This accident took place 82 days after the claimants had arrived in Canada.

According to the EUO of the male claimant/father, he came to Canada in 2021 as he was retired and getting older and he needed some support/someone to care for him. However, his later evidence was that there were no specific physical or other problems that required specific care. The son's evidence was that neither his father nor mother needed any specific care in October of 2021. The evidence of the male claimant seemed to suggest that he was looking to the future. He stated at question 129, "Because of the age, I may fall down somewhere while walking also. That time who will take care? … Who will cook for me?"

On the issue of how long he intended to stay in Canada, the claimant/father's evidence was difficult to follow. At one point he says that his son told him he could stay in Canada for six months. At other places in his evidence he suggests that he and his wife had come here to stay in Canada.

When asked about his return airfare to India on March 11, 2022, the claimant/father gave evidence that he really did not know anything about that and that his son took care of everything. For example, at question 143 the claimant is asked, "How were you going to do that?" It was asked if it was the intention to stay in Canada long-term, how was he going to do that on a visitor's visa? The answer was, "I don't know about it. My son might be knowing about it."

The son's evidence on this point was much clearer. His evidence was that his parents had a six-month visa but that he was hoping that a "window" would open so he could apply for them to have permanent residency. The son's evidence was that this window had closed for some period of time due to the backlog of applications. He said that typically the window would open for permanent residency in October for about a month. He also said at some point no applications were being taken because of the backlog. At the time of his EUO on October 31, 2023 the son's evidence was that the window had still not opened at that time for him to apply for permanent residency for his parents which was why he had to continue to seek an extension of their visitor's visa so that they could stay and he could look after them.

The son's evidence was that if the window did not open while his parents were there, that they would then fly back to India in March of 2022.

At question 98 of his EUO the son was asked whether it was his parents' intention to return to India after they came to Ontario in October of 2021. His response was:

> "Yes. Because that ticket was there from October to I think March. I don't recall it but it's almost six months on it."

Prior to the motor vehicle accident, the claimants did not open a bank account in Ontario. They did not have a cell phone. They also did not have a doctor in Ontario. They had not joined any clubs or temples although the father had attended his son's temple prior to the accident. They also did not have an Ontario's driver's licence.

With respect to the claimants' apartment in India, there was some contradictory evidence. According to the claimant/father, the apartment still had some furnishings in but otherwise was empty of their personal belongings as of the time of the accident. However, according to the son's EUO, his parents' apartment in India at the time of the accident was fully furnished and still had their personal effects in it at the time of the accident. I find that the son's evidence is more credible on this point.

After the accident occurred, according to the claimants' counsel on his EUO they received an

OHIP card. Post-accident they also opened a bank account with TD Canada opened some three to six months post-accident. Post-accident they continued to live with their son. According to the visitor's record noted earlier dated May 24, 2023, as of May 23, 2024 the claimants' status in Canada was considered "temporary resident".

The last relevant piece of evidence is from the son at his EUO at question 234. He is asked that if the accident had not happened, would his parents have returned to India in March of 2022? He responded, "Right". In further questioning he was asked whether they would have continued to live in India until such time as they could secure permanent residency. The son's response (question 35) was, "Yes, or they … they might come back to Canada".

POSITION OF THE PARTIES

Dominion takes the position that the claimants do not meet the definition of an ""insured person" under s. 3(1)(c) of the SABS. That provision states as follows:

> "'Insured person' means in respect of a particular motor vehicle liability policy
>
> (c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario."

Dominion acknowledges that the claimants were an occupant of the vehicle they insured and that this accident occurred outside Ontario: in Quebec. However, Dominion takes the position that neither claimant was a resident of Ontario at any time in the 60 days prior to the motor vehicle accident.

There is no issue between the parties that the claimants would not qualify under any other definition of "insured person" under the SABS. Dominion submits that if you look at the claimants' overall life circumstances and connections to Ontario, that the evidence is clear they would not be found to be a resident of Ontario. Dominion points to the following facts:

1. They did not have an Ontario driver's licence.

2. They did not have a cell phone.

3. They did not join any clubs or temple.

4. They had a return ticket to go back to India in March of 2022.

5. But for the accident they would have returned to India in March of 2022.

6. No permanent resident application had been made for them prior to the accident.

7. They had their apartment, furniture and personal belongings in India.

8. They did not have a bank account in Ontario.

9. They did not have their own living quarters or home in Ontario but lived with their son and family and did not contribute to the rent or household expenses.

10. They did not have a history of coming to Ontario.

11. They did not have a family doctor in Ontario.

Dominion concedes that there were plans for both claimants to be sponsored by their son as permanent residents and for them to come to Canada permanently. However, Dominion submits that there were no concrete plans for this. No application had been made. This was "up in the air".

Dominion submits that the claimants were simply visitors to Ontario for an extended stay to visit relatives. Their regular life circumstances and activities remained in India.

Dominion relies upon the decision in *Thomson v. The Minister of National Revenue* 1946 Carswell NAT 76. This is a decision from the Supreme Court of Canada where the court was asked to determine whether an individual was "residing or ordinarily resident in Canada" within the meaning of the *Income War Tax Act*.

Dominion submits that while the court looked at the words "ordinarily resident" as opposed to the word "resident", that the case is still relevant and important to the issue before me. Further, this case has been relied upon and followed in a number of LAT and FSCO decisions dealing with the issue of residency. Dominion notes that in the *Thomson* case the word "residence" is described as a variable and flexible term and that its meaning can vary in the context of different matters or different aspects of the same matter. Residency addresses the degree to which a person in mind and fact has settled into, maintained or centralized his ordinary mode of living.

Dominion also points to the case of *GK v. Security National*, 2017 CanLII 33677. This was a decision from Adjudicator Lori Marzinotto from May of 2017.

In that case the applicant had been born in India and came to Toronto as a student in 2010. Between 2010 and May of 2014 he completed schooling, obtained an Ontario cell phone, lived in various apartments, worked at various jobs and in May of 2014 obtained a truck licence. The applicant in that case filed income tax returns in Canada. He attended a Sikh temple that was close to his house and although there was some controversy, the adjudicator found as a fact that he became engaged. He was also issued a three-year work permit covering the time period November 5, 2013 to November 4, 2016.

After graduation, the claimant was looking for various office jobs but a friend told him he could

make a lot of money if he went to Alberta and worked as a truck driver. The applicant thereafter purchased a one-way plane ticket to Alberta and left Ontario on August 7, 2014 while his fiancée remained in Ontario. He was then involved in an accident in Alberta on November 8, 2014. The question was whether he was still a resident of Ontario at the time of the accident.

The applicant testified he did not want to stay in Alberta and that it was his plan to make some money and go back to Ontario.

The adjudicator accepted that the claimant had established that he was a resident of Ontario and remained a resident of Ontario at the time of the accident. He had a significant relationship in Ontario, he worshipped there, he maintained an Ontario cell phone even while in Alberta and he returned to Ontario later. The adjudicator held as follows:

> "A person may be a resident whether they live in a place permanently, temporarily or ordinarily reside in a place. Residency is 'a matter of degree to which a person in mind and fact settled into or maintained or centralized his ordinary mode of living with its accessories in social relations, interests and conveniences.'"

(A quote from *Thomson*.)

Dominion submits that the claimants in this case do not have the same kind of connection to Ontario that *GK* did and therefore should not be found to be residents of Ontario on the date of loss.

It should be noted that the *GK* decision was appealed by way of a reconsideration and heard by Executive Chair Ms. Lamoureux. On December 1, 2017 she upheld the original decision. Executive Chair Lamoureux noted that the term resident is not defined in the *Insurance Act* and therefore it is a question of fact and a matter of the degree to which a person's connection with the place is permanent or temporary.

Dominion also relied on the decision in *Cruz v. Royal & Sun Alliance Insurance Company of Canada* 2001 ONFSCDRS 88 (CanLII). This was a decision from Lawrence Blackman at the Financial Services Commission.

In that case the question was whether or not a woman, who was a citizen of Mexico and who was attending school in Toronto to learn English, was a "resident of Ontario" for the purposes of statutory accident benefits. As in this case, the accident in which she was involved took place in Quebec.

Director Delegate Blackman concluded that the claimant in that case was not a resident of Ontario. Some of the facts that seemed to have swayed him in his decision included:

1. She was a Mexico citizen and was engaged to be married to her fiancé who remained living in Mexico.

2. She worked for a Mexico auto parts vendor and had been promoted to expand the international market and her employer had agreed to help her learn English by allowing her to study in Canada.

3. She had a student visa and was legally required to leave once her visa ended.

4. She did not purchase furniture or household items in Canada and did not open a bank account.

5. She did not arrange to have her mail forwarded to Canada.

Director Delegate held that the applicant's stay in Ontario was time-limited and that it was not her "settled or usual abode". He therefore concluded she was not a resident of Ontario. Of note in that case is that the claimant also had plane tickets to return to Mexico in five months and she still had her home in Mexico with her personal belongings other than the clothes she had packed for her stay.

Dominion points to the fact that Director Blackman also relied on the *Thomson* case and noted that residency is something more than visiting and something more than a temporary stay or a temporary abode.

Lastly, counsel for Dominion pointed to my decision in *Echelon v. Hay Mutual* (decision Arbitrator Samworth October 18, 2019). In that case I was asked to consider if two claimants were "living and ordinarily present in Ontario" for the purposes of s. 3(7). This was a case as to whether or not an individual who had regular use of a company vehicle would be deemed a named insured.

In that case Dominion notes that I looked at the following facts and criteria to determine whether the claimants were ordinarily resident in Ontario:

1. The fact that they were employed in the province of Ontario and whether they were paid with deductions and covered by WSIB .

2. Their purpose in coming to Ontario.

3. The length of their attendant stay.

4. Did they have OHIP coverage?

5. Had they regularly stayed in Ontario in the recent past?

6. Did they have social ties to others in the province?

7. Did they have a bank account and Ontario cell phone?

In that case the claimants came from Jamaica to Ontario to work for certain Ontario employers through a government work program. They were paid taxes and deductions as regular Ontario employees were, had WSIB coverage and lived in a residence with other workers. They stayed in Ontario for roughly eight months and were given OHIP coverage social insurance numbers. In that case the claimants had also worked at previous times in Ontario.

I concluded in that case that the claimants were ordinarily present in Ontario when the accident occurred.

Dominion points to my comment in that case that when considering the terms "living and ordinarily present in Ontario", that it was my view that the word residence carries a stricter requirement to be met than the word "present" does.

Dominion submits that the facts as to what happened to the claimants in Ontario after the accident are not relevant and should not be considered by me in order to determine whether the claimants were residents of Ontario in the 60 days prior to the accident.

Lastly, Dominion makes submissions with respect to what rules of interpretation one should apply to the section. They point out that s. 3(1)(c) deals with accidents that happen outside Ontario and submit that it is intended to limit people who can claim Ontario's SABS to people who have a clear connection with Ontario and for whom premiums have been paid for coverage regardless of where the accident occurs.

Dominion submits that the nexus to Ontario at the time of the accident must be clear and they must be more than a mere visitor or that they were physically in the province. Dominion submits that the legislature clearly intended to have a narrow or restricted coverage under this section and that I should interpret it in that light.

Dominion does not dispute Aviva's position that the legislation is generally to be read in context with its grammatical and ordinary sense and to ensure that that matches up harmoniously with the scheme of the Act and the intentions of Parliament. However, Dominion submits that these principles cannot be used in excuse to simply ignore or deny the existence of limits on coverage or to ignore and deny consequences flowing from a proper statutory interpretation simply because those consequences may not always benefit an accident benefit claimant. Dominion submits that the SABS does not provide AB coverage to every individual in Canada or in the world. Dominion submits that these claimants were not intended to be covered and that the facts of the case simply do not support sufficient connection with Ontario to make them residents of Ontario within the 60 days prior to the accident.

SUBMISSIONS OF AVIVA

Aviva submits that the claimants were residents of Ontario for 82 days prior to the accident and that is sufficient time to meet the requirement that they were resident in Ontario "anytime

during the 60 days before the accident". Aviva submits that to find that these two claimants were mere visitors would result in too narrow an interpretation of the relevant section and that that would be incongruous with the SABS purpose of consumer protection legislation.

Aviva relies on the following facts in support of their position that the claimants were residents on the date of loss:

1. The claimants had visited Ontario in 2013.

2. They were residing with their son at the time of the accident and continued to reside with him up to the time of their EUO in 2023.

3. When they came to Ontario it was with the intention of staying long-term and with no plan to return to India (see EUO of male claimant at page 62).

4. Their bank account in India could only be reactivated if the owners return in person to the bank and at the time of the EUO there was no intention to do so.

5. The claimants received an OHIP card post-accident.

6. The claimants' son continues to renew their visitor's visa and continues to plan to apply for permanent residency and pay any associated fees.

7. They had planned to come to Ontario in 2020 but were prevented from doing so by COVID.

8. The facts support a typical immigration story.

9. The claimants came here in October of 2021 to immigrate to Canada and the fact they might have trouble getting permanent status is not relevant.

10. The claimants' family is actually in Ontario including their daughter and son.

11. As the accident occurred only 82 days after they came to Canada, they had not had an opportunity to get an OHIP card, a cell phone number or find a doctor those facts should not be considered to be relevant.

Aviva also relies on the *Thomson v. Minister of National Revenue Case* (*supra*). They note the following quote with respect to residency:

> "'Residing' is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the context of different matters, but also in the different aspects of the same matter. In one case

it is satisfied by certain elements, in another by other, some common, some new."

In addition to the *Thomson* case, Aviva relies on the decision of Arbitrator Ashby in *Jaswant Kaur v. Personal Insurance Company of Canada* 2012 ONFSCDRS 50 (CanLII).

In that case the claimant came to Canada in December 2006 on a visitor's visa. The visitor's visa covered the time period of November 14, 2006 to February 12, 2007. The accident occurred on April 21, 2007 and her visitor's visa was later extended post-accident to September 30, 2007. She had tickets for a flight home for September 2, 2007. The claimant's evidence was that she came to Canada to stay with her daughter and help look after her grandson. She returned to India on September 2.

The issue before Arbitrator Ashby was whether the claimant was entitled to caregiving benefits and to do so she had to be "residing with a person in need of care". It was in that context that Arbitrator Ashby considered the word "residing."

Arbitrator Ashby noted that the words "resident", "residing" or "ordinarily resident" are undefined terms in the SABS. Based on the facts before her, she concluded that Ms. Kaur was a visitor to Canada and at all times her visit was intended to be temporary and therefore she was not residing with her daughter on the date of loss. Aviva relies on this decision as Arbitrator Ashby supports the notion that one must be flexible in looking at residency and assess all relevant factors and that the length of the stay is not determinative (see page 15).

Aviva also relies on the case of *Parkes v. Heiberg*, 1992 CarswellOnt 3426, a decision of Justice Mullen.

In that case the plaintiff was a Jamaican national who worked in Ontario as a farm labourer on a temporary basis. He had been granted a temporary work permit to assist in harvesting crops on three prior occasions. He had been working roughly two months when he was involved in the motor vehicle accident.

In that case the evidence was that the claimant lived in a house with other workers who worked on the farm, received mail, filed tax returns and had a bank account. However, when he was not working as a farm labourer he lived in Jamaica with his mother. The facts of this case are similar to the one I decided in *Echelon v. Hay* (*supra*). 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 he would be considered "ordinarily resident" at the time of the accident.

Aviva submits that when looking at the facts of this case and the case law as noted above, that clearly there is sufficient evidence of the intention of the claimants to establish themselves as residents of Ontario. Aviva submits that the residency at the 82-day mark was of a sufficiently permanent nature to qualify under the definition. While they may not yet have permanent residency status, they had a clear intention to make Ontario their permanent home.

Aviva points out that the *Cruz v. Royal & Sun Alliance* decision clearly sets out facts where individuals would not qualify for residency noting that the claimant in that case did not have a history of habitually returning to the province and there was no intention for her to make a permanent home in Ontario.

ANALYSIS AND DECISION

This is a priority dispute under s. 268(2) of the *Insurance Act*, R.S.O. 1990. Under s. 268 there are a series of rules set out that are 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 claimants were occupants of a rented vehicle insured by Dominion. Neither claimant had their own motor vehicle liability policy in Ontario. They applied to Aviva for statutory accident benefits. They were not an occupant of the Aviva car but they claim to be entitled to benefits from Aviva as Aviva insured their son on whom they claim to be dependent.

As noted earlier, both parties agree that in order for s. 268 of the *Insurance Act* to be activated and for there to be a right to claim priority by Aviva as against Dominion that the claimants must qualify as "insured persons" as defined on the Statutory Accident Benefit Schedule.

That brings us to the relevant definition of insured person under the SABS. The definition that is applicable relates to individuals who are an occupant of an insured automobile when the accident occurs outside Ontario. Both parties agree that in order to qualify an individual as an insured person, requires that they be "a resident of Ontario at any time during the 60 days prior to the accident".

Having carefully reviewed the legislative provisions, the case law provided and the facts, I conclude that the claimants were not residents of Ontario on the date of loss.

I carefully reviewed the decision of the Supreme Court in Canada in *Thomson v. Minister of National Revenue* (*supra*). Justice Rand in that case pointed out that when looking at the word "residing", it is impossible to give it a precise and inclusive definition. He noted that there are graduation of degrees of time, object, intention and continuity and that the definition is highly flexible with many shades of meaning. This makes it difficult for an arbitrator as there is no clear direction as to what the meaning of residency is. It is clearly a fact-based analysis.

While the case law submitted by counsel was helpful, there was no case that was on all fours with the facts of this case. However, I do draw a number of principles from those cases as to what to look for in determining residency. I must look at their life circumstances, what their connections are to Ontario, and whether one would characterize their time in Ontario as a visit or something more permanent. The factors that I have looked at include the following:

1. Did they file tax returns?

2. Did they have a cell phone or a local Ontario phone number?

3. What were their living circumstances in Ontario?

4. Did they have an OHIP card?

5. Did they have a family doctor?

6. Was their stay in Ontario limited (have a begin and end date)?

7. Where were their family members? Ontario or somewhere else?

8. Had they dispensed with their life in their previous place of residence in order to take up their new residence such as selling an apartment, moving their personal belongings, selling furniture, closing bank accounts?

9. Had they established a life in Ontario such as joining clubs, religious connections, making friends?

This list is not exhaustive and each case must turn on its own facts.

Having reviewed the above, I cannot agree with Aviva that the claimants had established residency in Ontario. I have no doubt that there was a plan afoot by the son of the claimants to have his parents move in with him. However, it was nothing more than a plan and no action had been taken on it. His parents had visited for five or six months previously and I find that this visit was no different to the previous one. They had an Air Canada ticket scheduled to return in March of 2022 to India. They maintained their apartment in India where they lived and the one that they owned and rented elsewhere. There had been no efforts to sell or divest themselves of their apartment. They still had a daughter who lived in India with grandchildren albeit she did not live close to the claimants. They still had their personal belongings in India. They still had a bank account in India which they could not access from Canada.

All this suggests to me that while there may have been a plan at some indeterminate time in the future to have these claimants move to Ontario, that plan had not yet materialized. The son was quite clear on that plan but in order to do so he had to find the "open window" for them to apply as permanent residents. The son's evidence was clear that assuming that window did not open, and it certainly had not opened prior to the motor vehicle accident, that he expected his parents to return to India in March of 2022 and that at that time he would give them back the $10,000 CAD they had come with so that they could change it into rupees, put it into their own bank account and fund expenses back in India.

I appreciate that the claimants had only been in Ontario for 82 days prior to the accident occurring and one could argue that that would not give them time to get a family doctor, get a

cell phone, get a telephone number and establish themselves in some community. While it may be a short time, there was absolutely no evidence of any efforts to do that at all. If it had been the plan that these individuals were going to stay no matter what, I would have expected that their son would have made efforts early on to find a family doctor, apply for OHIP cards, seek to extend their visitor's visa, whatever may be necessary. None of that was done and again the son's evidence was clear that he expected his parents to go back to India.

Aviva urged me to look at some post-accident facts as support for this intention to reside permanently in Ontario. Again, I do not disagree that that might be the intention, but the fact was that the evidence of that intention and when it may be effected was insufficient to establish residency within the required 60-day period as per the legislation. What happened after the accident is, in my view, not relevant. It is the 60 days prior to the accident that is relevant. The fact that they later got an OHIP card, had their visa extended and did not get on a flight to India has to do with the injuries that they sustained in the accident and is not relevant to determine pre-accident residency.

I note that interpreting the legislation in the context of the facts of this case that I have considered carefully the submissions by Aviva and Dominion with respect to how one interprets this provision. This provision deals with an insured person and I agree with Aviva that when looking at it from a coverage perspective that the notion of consumer protection is key. However, this is not a case where an insured person is seeking coverage under an insurance policy. Rather, it is two insurers battling over the issue of priority. While I must still keep in mind the consumer protection nature of this legislation, I do agree with Dominion that this particular provision of the definition of insured was intended to limit who is entitled to claim Ontario statutory accident benefits. This is limited to people who have some clear nexus or connection to Ontario. It was not intended to cover an individual who, for example, had come to Ontario for a vacation and then had an accident in an Ontario car in another province. Only people who have a clear and established connection in Ontario of some permanency in my view are intended to be covered by this particular definition. I do not find the claimants meet that test. They simply did not have sufficient ties to Ontario at the date of loss.

RESULT

With respect to the second issue before me, I therefore conclude that the claimants were not "insured persons" on the date of loss as they were not residents of Ontario at any time during the 60 days prior to the accident. Therefore, s. 268 of the *Insurance Act* (priority provisions) is not activated and there is no right for Aviva to advance a claim against Dominion.

In light of my finding on this issue, I do not need to go further and deal with the burden of proof.

COSTS

According to the Arbitration Agreement the parties have agreed in paragraphs 2 and 3 that if the Respondent (Dominion) is found to be wholly or partially responsible for the indemnification of

statutory accident benefits to the Applicant, that the Respondent is to honor the account of the arbitrator or a percentage thereof either as agreed upon between the parties or as ordered by the arbitrator. The same is true with respect to legal costs.

Dominion was wholly successful in this case and therefore I conclude that Aviva is to pay the costs of the arbitrator and the costs of the arbitration of Dominion. I am not fixing the quantum of those costs. I would ask the parties to try to agree upon costs but if they are unable to do so they can contact me and we can schedule a further pre-hearing to discuss setting up a costs hearing.

DATED THIS 10th day of January, 2025 at Toronto.

_____

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors
1700 – 438 University Avenue
TORONTO ON M5G 2L9