IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended
Section 268(2), as amended, and Ontario Regulations 34/10 and 283/95 thereunder;
AND IN THE MATTER of the *Arbitration Act, 1991*, S.O. 1991, c.17;
AND IN THE MATTER of an Arbitration

BETWEEN:

ECHELON INSURANCE

Applicant

-and-

CERTAS HOME AND AUTO INSURANCE COMPANY and
WAWANESA MUTUAL INSURANCE COMPANY

Respondents

CERTAS HOME AND AUTO INSURANCE COMPANY

Applicant

- and –

ECHELON INSURANCE and WAWANESA MUTUAL INSURANCE COMPANY

Respondents

DECISION

COUNSEL

Krista M. Groen, counsel for the Applicant, Echelon Insurance Company (hereinafter referred to as Echelon).

Meridith Harper, counsel for the Respondent/Applicant, Certas Home & Auto Insurance Company (hereinafter called Certas).

James Schmidt, counsel for the Respondent Wawanesa Mutual Insurance Company (hereinafter called Wawanesa).

INTRODUCTION

This matter comes before me pursuant to the *Arbitration Act*, 1991, s. 268 of the *Insurance Act*, R.S.O. 1980 as amended and Ontario Regulation 283/95 as amended.

I have been retained on consent as a private arbitrator to determine a priority issue between the above-noted insurers with respect to a motor vehicle accident that occurred on July 3, 2020.

By way of background, on that date the claimant was driving an uninsured Suzuki motorcycle. The motorcycle was involved in an accident with another vehicle that was insured by Certas.

Wawanesa insures the claimant's mother. Echelon insures the claimant's father. Certas, in addition to insuring the striking vehicle by way of a separate policy, also insured an alleged spouse of the claimant.

The claimant sustained significant injuries in this accident. His accident benefit file was ultimately settled for $400,000. Unfortunately, the claimant passed away on May 27, 2024.

The claimant applied to Echelon for statutory accident benefits. The claimant was not a named insured nor listed driver under the Echelon policy. Echelon takes the position that Certas is in priority either based on spousal status or striking vehicle. Certas' position is that either Wawanesa or Echelon stand in priority based on dependency or regular use.

Therefore, the issues that I have been asked to decide include dependency, spousal status, regular use and there is also a limitation argument.

PROCEEDINGS

This was a written hearing. Each party filed a Factum and Book of Authorities. There was a Document Brief filed by Echelon which included:

- A signed Arbitration Agreement
- Certificate of Automobile of Insurance March 27, 2020
- Certificate of Automobile Insurance of Certas December 11, 2019
- Certificate of Automobile Insurance of Wawanesa July 3, 2020
- Motor Vehicle Accident Report
- Transcript of an EUO of the claimant from September 16, 2020
- Transcript of a further EUO of the claimant on September 13, 2023
- Transcript of the EUO of the claimant's father from October 29, 2024

Certas also provided various documents with respect to its position that the Certas policy relating to the claimant's alleged spouse was not properly put on notice within the 90 day time period as required under Regulation 283/95.

BACKGROUND AND SUMMARY OF FACTS

On the date of loss of July 3rd, 2020, the claimant was operating a 2008 SX7 motorcycle. He was proceeding northbound on Ormont Drive when allegedly against a red light he struck a third party vehicle traveling westbound on Weston Road through the intersection.

The motorcycle was uninsured at the time of the accident.

The claimant was not a named insured or listed driver under any other policy. Certas insured the striking vehicle under policy no. XC296923.

The claimant submitted an OCF-1 to Echelon on July 15, 2020. Echelon had issued a policy to the claimant's father bearing policy no. X321237722. On the OCF-1 the claimant indicated he was covered under his father's policy with Echelon based on dependency.

In addition to insuring the third-party driver, Certas also insured the alleged spouse of the claimant under policy no. D4585893. This policy had an effective date of December 11, 2019 to December 11, 2020. The named insured was the alleged spouse. Her address is shown as 1250 Peelar Crescent in Lefroy. The vehicle insured is a 2016 Mercedes-Benz C300W/C300.

Turning back to the Echelon policy, it has as the named insured the claimant's father. The address is 1250 Peelar Crescent in Lefroy. The policy period is March 16, 2020 to October 5, 2020. The described automobile is a 2016 Volkswagen Tiguan. Under vehicle use it is indicated to and from work. Kilometres to work are noted to be 7 and annual kilometres driven is indicated as 12,000.

With respect to the Wawanesa policy, there are two named insureds under the policy: the claimant's mother and the claimant's father. The address is shown as 123 Lanyard Road in North York. The policy period is July 3, 2020 to July 3, 2021. There are three vehicles shown on the policy, one of which was only added on the date of loss. This was a 2017 Ford truck van. The first vehicle listed is a 2017 Ford Escape: a four-door vehicle. The evidence is that this was the claimant's mother's vehicle. The vehicle is described as a type 1. The policy indicates that a type 1 is a passenger vehicle. The policy indicates, if classified as a type 2, that that would be a commercial vehicle.

The second car listed under the policy is a 2016 Volkswagen Tiguan. It is agreed that it is the same Tiguan that is insured under the Echelon policy. This is described as the claimant's father's vehicle. It is also rated as a Type 1: personal. The only vehicle on the policy that is rated as a commercial vehicle (type 2) is the newly added Ford Transit 250 cargo van.

Prior to the accident the claimant had purchased the Mercedes-Benz that was insured under the Certas policy. Reportedly this was the claimant's vehicle and was the vehicle that he drove

although the registered owner and named insured under the policy was his alleged spouse. The cliamant spent at least $5,000 "suping up" the Mercedes. Sometime just prior to the accident the claimant separated from his alleged spouse and she claimed the Mercedes was his and it was turned over to her a week prior to the motor vehicle accident. Prior to that time the claimant had covered the cost to finance the car, the insurance and the gas which he estimated totalled $1,000 per month.

The claimant himself was born on June 22, 1996 making him approximately 27 years old on the date of loss. He was born in Argentina. He came to Canada in 2000. His family was deported at one point but they came back to Canada in 2008.

At the time of the accident, the claimant was living at 123 Lanyard Road with his 9-month-old daughter. His alleged spouse had also lived there for less than a year. However, it appears she developed some issues after the birth of her child and in or around May of 2020 the claimant had her hospitalized on a Form 2 for mental health-related issues. She did not return to live with the claimant on her release from hospital in June of 2020.

With respect to the "marriage" of the claimant and his alleged spouse, the parties agreed that there was no formal marriage in accordance with the laws of Canada. The alleged spouse's parents were Muslim. The couple participated in a religious ceremony of some sort at the alleged spouse's parents' residence in April of 2019.

There was no evidence from the alleged spouse about this ceremony but the claimant gave evidence with respect to the ceremony during the course of his EUO.

The claimant advised that he was not legally married but "just married by their religion". The claimant reported that her parents "just made me say some "s--t in their language". The claimant indicated that if he did not go through with this ceremony that their daughter would not get their blessing and at that time she was already pregnant with their child.

The claimant reported that a priest showed up and made him say some words in Arabic while holding the father's hand. The claimant describes it as being "forced to convert". He also says that he did not sign anything, he told them he did not want to get married. When asked about the ceremony he states, "which to me it didn't mean nothing". He says he was made to dress in a robe by his fiancée's father. While he acknowledged he was not physically forced to say the words, he says, "they emotionally forced me … I had no choice. I had no choice. If not, I wasn't - if not, they wouldn't talk to my ex or the kid or …" The claimant's evidence was that his parents did not come to the ceremony. His sister, her boyfriend and her parents were there. The claimant's friends did not turn up because they were Catholic. He describes everyone else, including his family, as being totally against it.

The claimant's father was asked about the religious ceremony and he advises that he was not present. He believes that his son and the fiancée were together about one year and that she lived in the house at Lanyard for about three months before she went to hospital.

The claimant's daughter was born September 22, 2019.

Turning now to the employment background of the claimant. He had been employed with a company called Form X for two years, but voluntarily left his employment in January of 2020. Reportedly, he worked 50 to 60 hours per week. Before leaving his employment, he describes himself as working as a crane inspector. Although the evidence is not completely clear, it looks as if the claimant earned somewhere between $28 and $38 per hour of which half was paid to him in cash and half was paid by cheque. No tax returns were produced. No employment file was produced.

The claimant describes himself as starting with this company as a third year carpenter's apprentice. However, they needed a "swamper" and he started doing that without a licence in the beginning of 2019. He did take a course. This involves operating or swamping a crane. It was in this latter position he believes that he earned between $36 and $38 per hour.

On August 26, 2019 the claimant sustained an injury at work. He says a chain wrapped around his waist that was attached to a huge cement bucket. He did not sustain any fractures. He did have what appears to be soft tissue injuries to his arm, leg and back. He also complained that this accident caused his heart rate to go up and that he developed PTSD.

The claimant's evidence as to what treatment he may have secured as a result of these injuries was also inconsistent and unclear. However, he continued with his employment, full-time duties, full-time work until he voluntarily stopped employment in January of 2020.

The claimant reports that in January of 2020 he quit his job because his boss was trying to blackmail him. The claimant suggests that he had been thinking about filing a WSIB claim and his boss did not want him to. His boss told him that if he tried to make a claim that he would tell the claimant's wife that the claimant had been cheating on her. There were some text messages between the claimant and his employer that suggested the claimant had asked his employer to cover for him one night and this was the basis for the alleged blackmail.

On his EUO, the claimant advised that he stopped working in January of 2020 because his daughter had been born and his employer was accusing him of wanting time off because of his daughter being born. He also describes himself as being blackmailed. There is no independent evidence with respect to this employment issue.

Of note is the evidence of the claimant at his EUO on September 13, 2023 where his evidence is that he was not injured in the accident of August 26, 2019. His intention on filing a WSIB claim was in fact to get revenge on his employer for blackmailing him and making him fight with his ex. He stated, "It was more of making him pay so he never did it to nobody else again."

As to the ability of the claimant to sustain employment after the accident of August 26, 2019, the claimant reported that he continued to work until he quit his job in January of 2020 but he would

have been on painkillers. However, he also states that his physical pain improved and had the situation with his employer resolved itself that but for COVID he would have been able to go back to work in April doing his old job. He states that there was nothing physically to prevent him from going back but suggests there were some psychological problems preventing him from working. The claimant describes himself as being angry at everyone and angry at life. He described his job as being stressful. It is unclear from the claimant's evidence as to whether he attended any psychological treatment, although his evidence is he tried but it was hard because of COVID.

There was no medical evidence provided to me about the claimant's physical or psychological ability to work other than his own evidence. According to an independent orthopedic assessment that took place on January 14, 2021 the claimant reported to the assessor that he had last worked as a crane inspector working 50 to 60 hours per week in January of 2020 before COVID. He claims he describes getting into a work dispute and had not worked since that work dispute.

In another independent assessment with an occupational therapist on July 20, 2021 the claimant describes himself as being involved in a work-related injury in which he injures his back and neck but says he made a full recovery. In that same assessment he also reported that at the time of the accident he was working full-time as a supervisor in his father's cleaning and contracting company.

Turning to the claimant's family situation on the date of loss. As noted, he and his daughter were living in the basement of his mother's and father's home. The claimant's mother and father and his sister resided on the main floor of the house. This had been the situation for roughly nine to ten years.

The claimant's father paid the mortgage of approximately $1,300. He also covered water, gas and electricity of roughly $500 a month and cable and internet were about $100 a month.

The claimant gave his father $500 a month in cash which the father said he used towards paying mortgage or expenses. The claimant also contributed to the household groceries and paid for his own cell phone.

There is then a considerable discrepancy between the claimant's evidence and his father's evidence about other financial support.

According to the claimant, his father did the following:

- Gave him $2,000 towards the cost of the motorcycle while the claimant paid the remaining $5,000;

- Gave him $20,000 in cash in the year prior to the accident including $4,000 for the daughter's crib, money to take a trip to Spain, money for dog food and $500 a month for acupuncture treatment;

- His father gave him cash to pay for three vacations in Cuba, the purpose of which was to study Santeria and Afro-Cuban religion comparative to voodoo to help heal the claimant's back injury that he sustained in the incident in August of 2019;

- Paid all his medication bills;

- Paid everything for the claimant's daughter including gold and diamond earrings and diapers;

- Paid for the claimant's gym membership of $24 a month;

- Paid for the claimant's toiletries such as hygiene products and shampoo;

- Purchased construction stuff for him from work: gloves, vests, a hard hat;

- Bought him a "big boat" sometime before the accident.

By way of contrast, the claimant's father's evidence is quite different. The father confirms that the claimant would give him $500 a month and buy some groceries for the house, and that he would use that for the mortgage or utilities. He also agrees that that money was given to him in cash. However, prior to the accident, the father says he did not pay anything for his son. He says that other than helping him out by having the son live in the parents' home, that his father did not help him out in any other way. He denies paying any monies for holidays. He does acknowledge helping out with the daughter's expenses. He admits paying something towards the dog as it was a family pet. He says he never paid for trips to Cuba or Spain. He never bought him any work-related clothing. The father denies having the type of income that would allow him to do that.

At some point, prior to the accident, the claimant was approved to receive CERB. This was $2,000 a month. The claimant says he began receiving it in March of 2020 but there is information from the government website that suggests you could only apply for CERB in April of 2020. It might have been a retroactive payment but there is no evidence one way or the other. The claimant started to receive CERB prior to the accident and was continuing to receive CERB on the date of the accident. In order to receive this benefit the claimant would have had to attest that he had stopped working because of reasons related to COVID or being eligible for EI, regular or sickness benefits and he must have had employment or self-employment income of at least $5,000 in the 12 months prior to the date of his CERB application.

Turning now to the claimant's parents' employment background. The claimant's mother and father owned a cleaning company. The company was Galis Service Company. It is described as a commercial cleaning company that was incorporated as a numbered Ontario company.

According to the father's evidence this cleaning service provides people to clean offices. He has been operating the company since 2019.

According to the father, his son, while employed in his job in construction, rarely helped out with the company. He might run some errands such as bringing supplies. But otherwise, "he never had anything to do with the company".

If the son did run any errands then in order to run those errands to and from the job site he would drive the Mercedes. The father described the Mercedes as his son's car, but acknowledges that he had to give the car to his alleged spouse a week or so prior to the accident.

The father was clear in his evidence that the claimant never used the mother's Ford Escape and never used the father's Volkswagen Tiguan for business purposes. His evidence was that the son never even drove those vehicles.

With respect to the use of the claimant's parents' vehicles for the purposes of business, the father's evidence was that neither the Escape nor the Volkswagen were used for the purposes of the cleaning company. These were their personal cars. The vehicle that was used for business purposes was a Dodge Caravan. It had been insured with Wawanesa but was no longer insured with it on the date of the motor vehicle accident. It was an uninsured vehicle. The father's evidence was in any event that the claimant never drove the Dodge Caravan. The evidence of the father was:

> "He never touched our car because he had his own car, so he never drove our cars."

With respect to the circumstances after the alleged spouse took the Mercedes, the father's evidence was that the claimant did not drive any car. Rather, the claimant's mother or the father would drive him where he needed to go. Again, the father’s evidence was that his son never drove any of the parents' vehicles.

A review of the father's evidence also suggests that other than a few errands, that even after stopping work in January of 2020 that the son had relatively little to do with the cleaning business and would not be described as an employee of the business. The father's evidence did not support that the claimant was a "supervisor" of the father's cleaning business as suggested in the OT report.

Once again, the son's evidence is inconsistent with the father's. He says that he would drive "their cars" here and there. His father might say to him that he cannot go and pick up an employee so could he go and pick them up. The claimant has a specific memory of being in the mum's Ford Escape but the memory suggests that the mother was driving and the claimant was a passenger.

The son suggested that he would help out his dad "here and there". His father might say, "I'm stuck downtown, could you drive the car and go and sign some papers or pick up some keys?" He admits he was not paid for doing any of this. When asked how often you may help his father out, the claimant's evidence was:

> "Maybe once or twice a month I'd say. Not too much. Just whenever he would get stuck and needed some help."

There is also some suggestion that in the evenings he may help his father with the bookkeeping. However, at best the claimant's evidence on that point was more like a time when he and his father would sit together while his father did bookkeeping and have some social time. Occasionally the son might help out due to the father's language issues.

The claimant's evidence on what cars were used for which purposes in terms of business versus personal was not particularly helpful. He said that one of their vehicles was used as a company vehicle but when asked which of the vehicles, he seemed to be unclear.

Lastly, to add to the confusion in the inconsistent evidence in this case is the difference between the father's and the son's evidence with respect to the two different addresses shown on the various policies of insurance.

The claimant was asked about the address in Lefroy (the address on the alleged spouse's policy - Certas) and on the Echelon policy. According to the son, this was a property his father purchased and that his father would go back and forth between the two houses. He says his father had moved into that address and would stay there on weekends. Apparently that had happened sometime in 2019.

The claimant suggested that he too would go to Lefroy and might stay there overnight. He says he would go there sometimes to work with his father or just to be with him and that it was probably a 50/50 split between the Lanyard address and the Lefroy address. He had no idea when his father purchased the property in Lefroy.

On the other hand, the claimant's father said he never lived at the Lefroy address and he did not even know what it was. He said he was not familiar with 1250 Peelar Crescent and he has never lived there. His evidence was that from 2011 to date he has lived exclusively at 123 Lanyard Road.

The claimant's father also gave some evidence with respect to the claimant's physical and psychological state prior to the accident of July of 2020. The father says he was totally independent. He did not have any mental health issues. He did not rely on his father or his mother for any support. He did not need any help in taking care of himself.

I now turn to a summary of the parties' positions with respect to each issue and my decision on that issue.

SPOUSE

The relevant provision under the *Insurance Act* on this issue is Section 3 of the Act which defines spouse as having the same meaning under part VI of the *Insurance Act*. Section 224 of the Act defines spouse as two persons who:

> "(a) are married to each other,
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or
> (c) have lived together in a conjugal relationship outside marriage,
> (i) continuously for a period of not less than three years, or
> (ii) in a relationship of some permanence, if they are the parents of a child."

The position of Echelon is that while they acknowledge that the marriage between the claimant and his alleged spouse was not compliant with the *Marriage Act* and that no marriage licence was issued, that they were still spouses under s. 224(b) of the Act. Echelon submits that the claimant and his "spouse" wanted to be married and entered into a religious ceremony on the understanding that they were getting married. Echelon also submits that this was a good faith marriage even though the ceremony itself did not strictly conform to the requirements of the legislation.

Wawanesa takes no position with respect to the spousal issue other than relying on Echelon's submissions.

Certas' position is that there was no spousal relationship at the time of the accident and that the circumstances and the facts of this case do not fall within the definition of spouse under the *Insurance Act*.

Certas points to the fact that this couple were only in a relationship of at most a year. They had only lived together with the claimant's parents for about three months. They split up permanently in March of 2020.

As to the ceremony that was performed at the home of the "spouses" parents in April of 2019, Certas' position is that this was not a marriage that was entered into in good faith on the part of the claimant. Certas submits that the claimant's evidence was clear that he felt compelled to participate in this ceremony which he described as a conversion as otherwise his child would not have been accepted by the mother's parents.

Certas points to the evidence of the claimant where he made some very disparaging remarks with respect to the nature of the ceremony. The claimant referenced it as one which "to me it didn't mean nothing".

Echelon points to the decision in *Lalonde v. Agha*, 2021 ONCA 561 (CanLII) as a case where a similar marriage ceremony was accepted by the court but in very different circumstances. In that case, the parties participated in a religious marriage ceremony in Tennessee. The ceremony took place at a mosque. The husband was a practising Muslim and his wife-to-be had converted to Islam about a year earlier. The ceremony was solemnized by the mosque's Iman and witnessed by other members of the mosque. The evidence of the couple was not only that they considered themselves to be legally married, but up until the separation they had lived as husband and wife for many years in Ontario, had three children together and had purchased the matrimonial home. While that case dealt with issues relating to the breakup of those two individuals' relationship, the court did conclude that under s. 31 of the *Marriage Act* that their marriage would be deemed a valid marriage as it had been solemnized in good faith and was intended to be in compliance with the *Marriage Act*.

Certas points out that there is no similar evidence in this case and indeed the evidence is quite distinguishable.

DECISION ON SPOUSAL ISSUE

I agree with the submissions of Certas in this case and I conclude that the ceremony that was conducted at the alleged spouse's home was not a marriage that was entered into in good faith by the claimant. It clearly did not meet the requirements of the *Marriage Act*. There was no marriage certificate produced from the ceremony itself. There was no evidence before me of anyone else who attended the ceremony to counter the evidence of the claimant who clearly seemed to feel he was compelled to go through with this process so that his child would be recognized by the mother's parents. The evidence of the claimant seemed to me to be abundantly clear that he did not want to be married, did not consider this a proper marriage ceremony and that there was no evidence that he entered into it "in good faith".

I also find that this relationship did not result in a spousal status based on s. 224(C)(ii) of the *Insurance Act*. While this couple certainly lived together in a conjugal relationship outside marriage for a few months and had a child together, there is no evidence that one could describe this as a relationship of **some permanence**. This couple was together for less than a year. By the time the motor vehicle accident happened, the couple had separated. The separation was a particularly difficult one with the claimant forcibly hospitalizing his spouse in a psychiatric ward under a Form 2.

On the evidence, I therefore find that the claimant was not in a relationship of some permanence with his alleged spouse, albeit they were parents of a child, and therefore they do not qualify as spouses under s. 224 of the *Insurance Act*.

Accordingly, Certas' policy that insured the claimant's girlfriend with respect to the Mercedes Benz does not provide accident benefit coverage to the claimant on the date of loss as he was

not a named insured under that policy nor the spouse of the named insured nor a dependant of the named insured.

REGULAR USE

The relevant provision with respect to this issue is s. 3(7)(f) of the Statutory Accident Benefits Schedule. That provision is set out below:

> "(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;"

The question in this case is whether the 2017 Ford Escape insured by Echelon with the named insured being the claimant's mother and father was provided to the claimant for his regular use. The second issue is whether or not the 2016 Volkswagen Tiguan insured also under the Wawanesa policy but also insured under the Echelon policy with the named insured being the father only was provided to the claimant for his regular use.

On this issue, Echelon and Wawanesa make joint submissions, both taking the position that there is no evidence that the claimant was provided regular use of either of these vehicles. Even if there was evidence of any regular use. Their position is that that vehicle was not made available to the claimant by a corporation, unincorporated association, partnership or sole proprietorship or other entity. In addition, Echelon and Wawanesa submit that even if there was regular use and that it was made available by a corporation, that there was not regular use "at the time of the accident".

Echelon and Wawanesa submit that the only vehicle that could qualify as being made available by a corporation for regular use was the Dodge Caravan. While there is no corporation, partnership or proprietorship that is insured under either the Wawanesa or the Echelon policy, both parents had a cleaning business that was called Galis Service Company which was incorporated as a numbered Ontario company.

The evidence of the claimant's father was that his son never drove the Dodge Caravan. The father's evidence, in fact, is that the claimant never drove the Volkswagen or the Ford Escape.

Echelon and Wawanesa submit that for there to be regular use it does not have to be frequent or exclusive but there must be some use (*Continental Casualty Company v. Sovereign General Insurance Company*, Arbitrator Bialkowski, decision June 3, 2013).

Wawanesa and Echelon submit that the question here for my decision turns on whether any of the vehicles insured under a commercial policy for the Galis Service Company was available for the claimant's use on the day of the accident and whether he had used that vehicle at some point prior to the accident.

Wawanesa and Echelon submit that there is no evidence of regular use. Based on the father's evidence, there was no use at all of the Tiguan and the Escape by the claimant.

Wawanesa and Echelon submit that the claimant's own evidence falls short of establishing regular use. If you accept the claimant's evidence, he says he would drive his mother's vehicle "here and there". Most of the times he used his mother vehicle, she would be in the car with him. He describes using his father's vehicle only in cases of family emergencies.

Therefore, these insurers submit that the first part of the test is not met as the claimant did not have regular use of the vehicles.

Wawanesa and Echelon also submit that there is no evidence that the vehicle was being made available to the claimant "on the day of the accident". These insurers submit that regular use must be available "at the time of the accident" in order for the deemed named insured provisions to be activated. Echelon makes reference to the following cases:

1. *ACE/INA Insurance v. The Co-operators General Insurance*, 2009 CanLII 13625
2. *Chieftain Insurance v. Federated*, Scott Densem, Arbitrator, October 31, 2012
3. *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110

Wawanesa and Echelon submit that it is not enough that the vehicle was being made available to the claimant for regular use at some time periods, but that it would also have to be made available for his regular use at the time of the accident. While this does not require that the claimant be actually in the vehicle at the time of the accident, there must be evidence that had the claimant chosen to use the commercial vehicle, that it would have been available to him. For example, in the *ACE v. Co-operators* decision of Justice Belobaba (*supra*), the question that His Honour raised was not whether the car would be available to the claimant when he went back to work the next day, but was it being made available to him at the time of the accident when he was off work and on his way downtown in a friend's car?

Wawanesa and Echelon submit that there is no evidence to support that either the Tiguan or the Escape were made available to the claimant at the time of the accident. The evidence of the father is to the contrary.

Wawanesa submits that it would be speculative to conclude that these vehicles were physically available to the claimant let alone available for his use on the day of the accident. He was clearly not accessing his parents' vehicles when he was riding an uninsured motorcycle at the time of the accident.

Echelon and Wawanesa also submit that neither of these two vehicles insured under their policies were being made available for the claimant's use by "a corporation". If there is any evidence that the Dodge Caravan was being made available for the claimant's regular use, which was the only vehicle that the claimant's father acknowledged was being used for business, then that is really irrelevant as that vehicle was not insured under any of these policies.

Further, the claimant was not employed by Galis Service Company. There is no evidence that he was doing anything other than odd jobs for his parents. There is no evidence that he was being paid by Galis. Even if there was any evidence that these vehicles were being made available to the claimant, then they were being made available through his parents as individuals and not by the corporation.

Wawanesa, in support of their position that neither the Tiguan nor the Escape that were insured on their policy were "company vehicles" points to the policy itself. This was a standard OAP-1 and these two vehicles were described as passenger vehicles and not commercial vehicles. The Tiguan was described as a passenger vehicle for commuting purposes while the Ford Escape was listed as a passenger vehicle for pleasure purposes. The new car that had been added the day of the accident (the Ford Transit) was listed as a commercial vehicle for business purposes but it had only been added July 3, 2020, the date of loss and therefore there can be no argument that that vehicle had ever been made available to the claimant.

Wawanesa submits that therefore s. 3(7)(f) cannot apply as a vehicle was not being made available to the claimant by a corporation but only by an individual if indeed it was being provided for his regular use at all.

Wawanesa also points to the fact that the claimant, until a week before the accident, drove the Mercedes Benz. It was only in the week prior to the accident when he had to give it back to his alleged spouse. This therefore is consistent with the claimant having his own vehicle to drive and not needing access to any of his parents' vehicles.

Certas takes the position, on the other hand, that the claimant was provided either the Escape and/or the Tiguan for his regular use and that as such he is a deemed named insured in accordance with s. 3(7)(f)(i) of the SABS.

With respect to Wawanesa, Certas submits that the Wawanesa policy was a commercial auto policy and as the Tiguan, Ford Escape and Ford Transit were all listed on that policy, that they are therefore commercial vehicles. Certas submits that the fact that the claimant's parents use the Escape and Tiguan for personal use is irrelevant.

Certas submits that commercial insurance policies have a higher premium as they are looking at factors with respect to higher risk and that is relevant in the determination of priority.

Certas submits that whether the claimant was formally employed by the business is not relevant to the analysis. Certas submits that the deemed insured regular use provision is silent on whether

the claimant is required to be an "employee" of the business. Rather, all that is required is that the automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity.

Certas submits that in order for there to be regular use it should not be erratic but it does not have to be constant. As long as there is some pattern of use, that will be accepted as regular use.

Certas notes the following evidence in support of their position that the claimant had regular use:

1. The claimant gave evidence he drove his parents' vehicles to run errands and take care of tasks for business including checking job sites and the facilities of clients.

2. He would drive his parents' vehicles when helping with errands such as bringing supplies to them and/or cleaning the cars.

3. He would drive his father's vehicle when his father asked him to do so as a favour.

4. He has a specific recollection of driving the Ford Escape on the day of the accident to pick up a friend and a recollection of being in the car with his mother on other occasions.

Certas also points to the fact that prior to this accident the claimant's father was in the process of getting the claimant his own vehicle through the company. Allegedly the claimant was on his way to pick out his new car when he instead took the motorcycle and got involved in the accident. Although it is not clear, presumably this car was the one that was added to the Wawanesa policy. Certas argues that this is evidence of prior regular use and provision of a company vehicle.

Certas refers to the decision of Arbitrator Cooper an *Intact Insurance Company v. Old Republic Insurance Company*, January 5, 2016. In that case Arbitrator Cooper found that regular use includes "periodic, routine, ordinary or general use" as opposed to "irregular or out of the ordinary or special". In that case, Arbitrator Cooper noted that cases where individuals have been found not to be regular users of a vehicle arise where the characterization of the use is described as "irregular at best and out of the ordinary". Certas submits that the claimant's use of the Escape and Tiguan did not fall within that description.

Certas also relies on that case with respect to their position that the claimant did not have to have actual physical use of the vehicle at the time the accident occurred but only to have evidence that that vehicle could have been available to him. The *Intact v. Old Republic* (*supra*) decision was appealed and Justice Goldstein upheld Arbitrator Cooper's decision that where the claimant was not actually driving the vehicle on the date of loss, that he could still be found to have regular use at the time of the accident (*Intact Insurance Company v. Old Republic Insurance Company*, 2016 Carswell ON 7645). Justice Goldstein relied on Justice Belobaba's decision in *ACE v. Co-operators* (*supra*). He noted that while actual use of the vehicle may be evidence of availability at the time of the accident, that availability does not necessarily require actual use. In the *Intact v. Old Republic* case, the claimant was not in the vehicle at the time the accident

occurred. However, he had authority to go to his employer's lot at the time of his choosing. He could pick up the keys to a vehicle and sleep in it the night before he was required to drive. In that case, the claimant was employed by a company and listed as a driver on the business fleet's insurance policy.

Certas therefore submits that the evidence of the claimant establishes sufficient regular use to meet that portion of the test. Certas submits that as these two vehicles were listed on the Wawanesa policy together with a commercial vehicle, that that would establish that vehicles owned by a commercially incorporated family business insured under commercial policies should therefore be considered company vehicles for the purposes of the deemed insured provisions. Certas submits the claimant does not need to be employed by the company in order to be provided regular use. Finally, Certas submits regular use at the time of the accident is established here irrespective of the fact that the claimant was not in the vehicle on the date of loss.

DECISION

On this issue I agree with Echelon and Wawanesa. I find that the claimant was not provided regular use of either the Tiguan or the Escape. I also find that these were not commercial vehicles or company vehicles. I also find that the claimant did not have regular use of the vehicle "at the time of the accident". Finally, I also conclude that even if I am wrong on the above, that regular use was not provided to the claimant of these vehicles by a corporation, unincorporated association, partnership, sole proprietorship, or other entity. If he did have regular use, it was personal use provided by his parents who are individuals.

With respect to whether or not the claimant was provided regular use of the Tiguan or the Escape, I find the evidence does not support that he was provided regular use of these vehicles. The claimant had access to the Mercedes that he had purchased in his wife's name. The evidence was clear from the father that that was his primary, if not exclusive vehicle. He continued to have access to that vehicle until roughly a week prior to the motor vehicle accident. The father's evidence was that the claimant did not use either the Tiguan or Escape ever. Even if I take the claimant's evidence at face value that he used the vehicles from time to time to assist his parents, I do not find that that reaches the threshold of establishing regular use.

I also find that the Tiguan and Escape were not commercial vehicles as submitted by Certas. The Wawanesa policy clearly rates both vehicles as Type 1: personal use. The named insureds under the two policies are individuals (the parents) and not the cleaning company, Galis. While the Wawanesa policy may be described as a commercial policy in that the Ford Transit cargo van was rated as a commercial vehicle, I do not find that that results in the policy being solely a "commercial policy". Rather, this was a policy that provided coverage to three vehicles, two of which were rated for personal use and one of which was rated commercial. The commercial vehicle was only placed on the Wawanesa policy on the date of loss and had never been made available for the claimant's regular use prior to his motor vehicle accident.

Similarly, the Echelon policy which insured the 2016 Volkswagen Tiguan is not a policy in a

company name but is in the father's name. While the policy indicates that the vehicle is being driven to and from work, it is also noted to be 7 km and that the annual kilometres driven is 12,000. The fact that a vehicle is driven to and from work does not elevate that to be a company vehicle or a commercial vehicle. The father's evidence is in fact to the contrary and that this was his personal vehicle and it was the Dodge Caravan that was used for work purposes.

Having concluded that neither of the Tiguan nor Ford Escape were being made available for the claimant's regular use, it therefore follows that I also conclude that it was not available for his regular use "on the day of the accident".

I also find that even if I am wrong with respect to the issue of regular use that there was no evidence put before me upon which I could conclude that if the claimant had regular use, that the vehicle was being "made available by a corporation, unincorporated association, partnership, sole proprietorship or other entity". There was no evidence that the parents' cleaning company made either of these vehicles available for the claimant's regular use. The corporation was not the named insured under the policy. The vehicles were not owned by the corporation. The father's evidence was these were personal vehicles. I find if there was any regular use, then the vehicles were being made available by an individual, the claimant's parents, and that that does not meet the requirements of s. 3(7)(f). I carefully reviewed the case law submitted by both parties. There was not a great deal of difference in terms of the approach of the relevant law to apply. This was a fact-driven case and on the facts there is no evidence of regular use that would bring into play s. 3(7)(f). Therefore I find that the Wawanesa policy and the Echelon policy do not respond to the claimant's accident benefit claim based on the regular use argument.

DEPENDENCY

Certas takes the position that the claimant was principally dependent (at least 51% dependent) on his parents at the time of the accident. Certas submits that the proper timeframe to assess dependency is six months prior to the motor vehicle accident. Certas argues that at that point the claimant's physical pains from his work-related accident in 2019 prevented him from working effective January 2020. In addition, he was psychologically unable to work in that timeframe.

Certas submits that in the six months prior to the motor vehicle accident the claimant was unable to work, was earning no income, had no source of income and had no earning capacity.

Certas points to the fact that the claimant lived with his parents who paid for the mortgage of $1,400 per month. Either the claimant or his sister would use their parent's credit or debit cards to purchase groceries for the household. The claimant's parents were financing a car for him through their company which was the deal that was due to close on the date of the accident. The claimant's evidence was that his parents paid his phone bills and purchased his toiletries.

The claimant gave evidence that his father gave him more than $20,000 in the year leading up to the accident and that his father paid for everything for the claimant's daughter, including clothing, diapers and a crib in addition to $12,000 in legal fees to dispute his claim for custody of

his daughter.

With respect to the CERB, Certas submits that the evidence is unclear as to when he started receiving CERB and suggests there is unclear evidence as to how much he received.

Certas relies on the 2020 Market Basket Measure for North York for a two-person family (the claimant and his daughter) which the statistics produced by Certas indicate is $35,162. 51% of this is $17,932.62. Certas submits that there is no evidence that in the six months prior to the motor vehicle accident that the claimant had access to those type of funds and therefore must have been dependent on his parents. Certas submits that effective January 2020 when the claimant ceased his employment that he was wholly financially dependent on his parents and unable to work due to his prior injuries.

Certas acknowledges that there are some inconsistencies between the claimant's evidence and his father's. Certas submits that the claimant's evidence should be preferred for the following reasons:

1. The father was not of clear mind to provide his best recollection at the time of his examination under oath.

2. The father's evidence took place four years after the accident while the claimant's EUO took place a few months after the accident.

3. The claimant had better knowledge of his financial dependency and his physical and emotional status at the time of his EUO than his father did.

Therefore, Certas submits that the claimant's EUO evidence is more reliable than his father's and should be afforded more weight.

Wawanesa did not make any specific submissions with respect to dependency, relying on the submissions of Echelon who insured the father on the date of loss.

Echelon's position is that the claimant was financially independent on the date of loss. He had a demonstrated ability to work full-time and that he was still capable of working full-time on the date of loss. He chose to cease his employment in January of 2020 for reasons unrelated to his physical or psychological ability to maintain employment and had an ongoing significant earning capacity and ability to support himself up until the time of the motor vehicle accident. Echelon submits that the time period to determine dependency should be one year pre-accident.

Echelon does not disagree with Certas that the test for dependency is whether the claimant received more than 50% of his financial needs from someone other than himself. If he is able to meet 51% of his financial needs then he would not be considered principally dependent for financial support on others. *Echelon v. Liberty Mutual* (Samis, May 7, 1999) affirmed *Liberty Mutual Insurance Company v. Federation Insurance Company*, Ontario Divisional Court,

September 15, 1999 and [2000] O.J. No. 1234, Court of Appeal.

Echelon also points to the *Federation* case (*supra*) as support for their position that in certain cases a person's capacity to earn is the most relevant criterion to be considered by a decision maker.

With respect to the timeframe for determining dependency, Echelon points to *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLII 37956 (Ontario Court of Appeal where the court specifically directed arbitrators to look at the dependency relationship during a "period of time that fairly reflects the status of the parties at the time of the accident".

Echelon submits that nothing changes in the claimant's relationships with his parents over the 12 month window prior to the accident. He continued to live in the basement of his parents' home. He continued to pay his father $500 per month. While he had resigned from Form X Echelon submits that there was nothing to stop the claimant obtaining new work noting he had demonstrated an ability to work full-time (40 hours per week at $38 per hour) up until January of 2020 when he ceased his employment voluntarily. Echelon submits that if you calculate his earnings at 40 hours per week x $38 per hour for 52 weeks, his earning capacity would be $72,960. If you then look at his earning capacity for 24 weeks (July 2019 to the time of his resignation in January 2020), then his income capacity would be $36,480 in the year prior to the accident.

With respect to his earning capacity from January of 2020 to the time of the accident, Echelon disputes Certas' position that the claimant was physically or psychologically unable to work.

Echelon points to the claimant's evidence at his EUO that he left Form X due to a dispute with his employer and that he had only launched the union dispute because his employer had threatened to "blackmail" the claimant by telling his wife that he was cheating. The work incident occurred on August 26, 2019 and Echelon notes that the claimant was able to work his usual full-time hours until January of 2020 when he stopped. At his second EUO Echelon notes that the claimant advised he did not stop work because he was unable to work due to his injuries but because his employer was blackmailing him and accusing him of taking time off as his daughter had been born.

In addition to the earnings the claimant had up until January of 2020 Certas also points to the fact that the claimant was receiving CERB which was a standard amount of $2,000 every four weeks. Echelon submits that that was for March of 2020 and that he was still receiving it at the time of his first EUO.

With respect to the evidence that the claimant's father provided significant funding to the claimant, Echelon submits that I should not accept the claimant's evidence on that point. Echelon notes that the father is a middle-aged immigrant running a cleaning business who on his own EUO indicated he did not have the type of income to fund the things that his son had suggested.

Specifically, he denied funding vacations to Cuba, providing significant funds of cash or in fact any significant funding whatsoever other than admitting that he did help out with the crib for the claimant's daughter and pay for dog food although the latter was because the dog was a family pet.

Echelon agrees with Certas that the evidence between the claimant and his father in many areas is largely irreconcilable. However, Echelon submits that I should accept the father's evidence and not the claimant's. Echelon points to other inconsistent evidence from the claimant giving as an example his inconsistent evidence given to the occupational therapist that he was working as a full-time supervisor at his father's cleaning company.

Echelon also submits that the father's evidence should be preferred as he is an impartial witness with no vested outcome with respect to the priority dispute and his testimony was given after his son's accident benefits claim had resolved on a full and final basis.

Lastly, with respect to the claimant's needs, Echelon relies also on the Market Basket Measure but submits that the relevant statistics is with respect to a single-person household in Toronto in 2020 and not a two-person household. The MBM for a single-person household in 2020 was $23,153. Therefore, if the claimant earned more than $11,576.50 during the relevant time period, he would have had income sufficient to cover 51% of his needs.

Echelon submits that while they acknowledge there is no concrete evidence pertaining to the claimant's actual earnings in the pre-accident period, that the evidence is clear he worked full-time as a crane operator until at least January of 2020 which would give him a pre-accident income of $36,480 which would result in him being able to fund 165% of his needs.

Echelon therefore asks that I find that the claimant was not principally dependent for financial support on the claimant's father

DECISION AND ANALYSIS

I find that the claimant was <u>not</u> principally dependent for financial support on his father on the date of loss.

The Statutory Accident Benefits Schedule defines a dependant as "someone who is principally dependent for financial support" at the time of the accident.

There is a long line of cases that have set out the test for financial dependency. This is commonly known as the 51% rule. To be principally dependent for financial support the individual must receive more than 50% of his financial needs from someone other than himself. If the individual is able to meet 51% of his financial needs, then he cannot be principally dependent for financial support on others. (*Federation v. Liberty Mutual* (*supra*))

The seminal decision of the Court of Appeal in *Miller v. Safeco Insurance Company of Canada*, 48

O.R. (2d) 451 appeal dismissed by the Court of Appeal (1985) 50 O.R. (2d) 797 sets out the criteria that arbitrators have been instructed to consider when determining dependency. The criteria are:

1. The amount of the financial dependency;
2. The duration of the dependency;
3. The financial or other needs of the claimant;
4. The ability of the claimant to be self-supporting.

The Court of Appeal directs that the general standard of living within the family unit should not be considered.

With respect to the relevant time period to assess dependency, I agree with Echelon that the one year prior to the motor vehicle accident best represents the period of time that reflects the status of the parties at the time of the accident. In order to determine the earning capacity of the claimant at the time of the accident, I find that the one year period is relevant to reflect his earning capacity at that time and that that analysis should not be limited to the six months pre-accident. If I were to accept Certas' submissions on this point it would mean that the claimant's significant earning capacity as reflected by his employment with Form X, from which he voluntarily chose to withdraw in January of 2020, would not be considered. I find that that is critical and relevant evidence in determining the claimant's ability to earn on the date of loss.

With respect to the financial needs of the claimant, I agree with Echelon that the proper statistic in these circumstances would be the Market Basket Measure for a single person living in Toronto in 2020 which is $23,153. At the time of the accident the claimant was single albeit he did have a daughter. His alleged spouse had been asked to leave the home and there was no intention for her to return. The legislation directs an arbitrator to consider dependency in the context of the person making the claim for statutory accident benefits and not looking at others who may reside with or even be dependent upon the claimant himself. As I found in my decision of *Motors Insurance Corporation v. York Fire & Casualty Insurance Company* (Samworth, December 24, 2009) in estimating the needs of the claimant and whether or not the claimant could live independently, that the expenses and needs of a child should not be included in that calculation. I find that to be the case here and that the needs and expenses of the claimant's daughter are not relevant to determining whether the claimant was principally dependent for financial support on his father. Therefore, the relevant statistics are of an individual in Toronto.

I now turn to the question of the claimant's ability to support himself/his earning capacity. There is no doubt that the claimant was not working effective January of 2020. However, not working does not mean you do not have any earning capacity.

The claimant had been financially independent for at least two years prior to the motor vehicle accident. He had a demonstrated ability to be fully and actively employed as a crane operator for half of the year preceding the accident. He had taken a course to upgrade his credentials in the year prior to the accident. Although there was no evidence before me of his actual earnings

such as tax returns, there did not appear to be any dispute that the claimant had a significant earning capacity as a crane operator or swamper. The claimant's evidence was that as a swamper he could have earned somewhere between $36 and $38 per hour. He also gave evidence that his earnings could be somewhere between $28 and $38 per hour. Echelon suggested that one take the $38 per hour and allow that for 40 hours a week for 52 weeks of the year, that his earning capacity would be $72,960. Alternatively, Echelon submitted that if you take the 24 weeks from July 2019 to January 2020 on the same basis, his earning capacity would be $36,480. Even if one takes the lower rate at $28 per hour for a year, the earning capacity is $58,240 for a full year and $26,880 for the 24 week period. In addition, I accept the evidence that the claimant was receiving CERB and was likely receiving it from April to the date of loss which would indicate income of $6,000 in the second half of the one year timeframe that I have chosen to look at in terms of dependency.

I therefore find that the claimant had a considerable earning capacity on the date of loss and that he had the capability of being self-sufficient. The only question that arises is whether the claimant's alleged injuries from the incident in August of 2019 were such that he was prevented from working from January 2020 up to the date of the accident and what effect that might have on any finding of his earning capacity. Arbitrator Ken Bialkowski, in the decision *Belair Direct Insurance Company v. Certas Home & Auto Insurance Company* (decision December 6, 2021) addressed the question of earning capacity. In the case before Arbitrator Bialkowski he found that the claimant was not seriously looking for work and that he was fully capable of working a full-time job had he chosen to do so. He noted that there was no evidence the claimant had applied for a job in the year preceding the accident and that before he left his full-time employment (two years prior to the accident) the claimant had been earning $30,000 per year. In that case, Arbitrator Bialkowski concluded that the failure to maintain employment was a matter of motivation rather than an inability. However, he did comment on the relevance of physical ability to earn in a dependency analysis. Arbitrator Bialkowski stated at paragraph 39:

> "In most cases involving the issue of financial dependency and earning capacity, there is evidence of physical disability, a mental disability, or involvement of alcohol or drug addiction."

I agree with Arbitrator Bialkowski that if there was some evidence of a physical, mental or other impairment that would prevent somebody from actively looking for work or being employed, that that should be taken into consideration.

However, in this case on the evidence I find that the claimant was an able-bodied individual who was both physically and psychologically capable of looking for and maintaining employment. I set out below my reasons for that conclusion.

As counsel for both Echelon and Certas noted, the claimant's evidence on his ability to work was inconsistent. I agree with Echelon that the father's evidence was probably more reliable. Even if I accepted the claimant's evidence, I did not find that there were any clear facts to support Certas' position that the claimant was unable to work either from a physical or psychological

perspective as of January of 2020.

Firstly, we know that the claimant maintained his full-time employment as a crane operator from the date of the incident in August of 2019 up until some date in January of 2020. There was no medical evidence submitted that would provide any support for any impairments during that time. I find it hard to accept that if the claimant was physically and psychologically capable of working in the immediate aftermath of the incident of August of 2019 that some five months later he suddenly became incapable of working. There were no clinical notes and records submitted. While the claimant reported that he got acupuncture and/or chiropractic treatment, there were no invoices submitted and no records from any of those service providers.

In his second EUO the claimant was quite direct in his evidence that he was not injured in August of 2019. He acknowledged from a physical standpoint he could have worked as a swamper or a carpenter from April of 2020 up to the time of the accident. Rather, it seemed the overwhelming evidence was that the claimant stopped work voluntarily in January of 2020 because his employer was trying to blackmail him to stop taking time off work due to the birth of his child. His employer reportedly was going to tell the claimant's “wife” that he had been cheating on her. In response, the claimant then decided that he would pursue some union grievance and to get compensation as a means of revenge.

With respect to his psychological injury, again there were no medical records provided to support any psychological impairment. There was not even a copy of the work incident filed to establish the nature of the work injury.

By way of contrast the claimant's father, with whom the claimant lived and clearly interacted fairly regularly, was quite clear that he was not aware of any physical or psychological reasons that prevented his son from working.

I agree with Echelon that the claimant had the means and resources to provide for himself from his own earnings in the year prior to the accident or had the capacity to earn sufficient funds to meet his own needs. Even if one accepted the claimant's evidence as opposed to his father's that he was given gifts such as trips to Spain, three vacations to Cuba, money for a motorcycle and buying the claimant a boat, I find that these are more in the nature of the general standard of living within the family unit. These do not reflect any needs on the part of the claimant but rather "wants".

I therefore conclude that the claimant was not principally dependent for financial support on his father (or parents in the broader sense). Just relying on his actual earnings for the 24 weeks leading up to January of 2020 together with $6,000 from CERB the claimant had more than 51% available to meet his statistical needs of $23,153. During the relevant time period, I find the claimant earned more than $11,576.56 which would mean he would have sufficient income to cover 51% of the costs of his statistical needs. I also find that the claimant had the earning capacity from January 2020 and onwards to provide sufficient income to cover 51% of the costs of those statistical needs.

I therefore conclude that the claimant was not principally dependent for financial support on his parents and therefore neither the Echelon nor the Wawanesa policy would respond to the claimant's accident benefit claim on the basis of dependency. I now turn to the final issue in dispute.

LIMITATION ISSUE

This issue is one between Echelon and Certas only.

Certas takes the position that with respect to the policy issued to the claimant's alleged spouse, that Echelon did not serve the Notice to Applicant of Dispute Between Insurers within the required 90 days.

The claimant submitted his OCF-1 to Echelon on July 16, 2020. The 90 day limitation to put another insurer on notice as required under Regulation 283/95 as amended s. 3(1), the notice must be given within 90 days of receipt of a completed application to benefits. Section 3(1) is reproduced below:

> "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."

The deadline for Echelon to put other insurers on notice was October 14, 2020.

The first examination under oath of the claimant was completed on September 16, 2020.

Echelon served a Notice to Applicant of Dispute Between Insurers on Certas Home & Auto Insurance Company with respect to policy no. XC296923. This was the policy with respect to the striking vehicle. The notice was received by Certas on October 2, 2020 and Certas acknowledges that that notice was within the 90 day deadline.

On December 10, 2020 Echelon served a further Notice to Applicant of Dispute Between Insurers on Certas Direct Insurance Company with respect to policy no. D4585893. This was the policy with respect to the spouse.

Certas therefore claims that with respect to the policy relating to the alleged spouse that Echelon missed the limitation period and therefore any claim is statute barred.

Echelon argues that Ontario Regulation 73/20 (limitation periods: a flexible response to COVID-19) extended the time with respect to the 90 day limitation period under Regulation 283/95. Echelon submits that Ontario Regulation 73/20 provides that any limitation period that began running between March 16, 2020 and September 13, 2020 was extended by 183 days. Echelon therefore takes the position that when you apply the extension under Regulation 73/20, that the

90 day deadline to put another insurer on notice therefore was extended to December 12, 2020. Therefore, their notice was timely.

Further, Echelon argues that Certas was on notice of the claim as it had already received a Notice of Dispute from Echelon with respect to the striking vehicle. Arguably this constituted "written notice to an insurer". In other words, notice to Certas Home & Auto Insurance Company with respect to the striking vehicle constitutes notice to Certas Direct Insurance Company with respect to the alleged spouse's vehicle. Alternatively, there is no prejudice in the circumstances.

Technically, as I have found that the alleged spousal policy does not respond to this priority dispute as I concluded the claimant was not a spouse of the named insured under that Certas policy, this matter is moot. However, considering the complexities of this case and the multiple arguments being made for priority on numerous bases, I think it is important to render a decision on this issue.

I conclude that Ontario Regulation 73/20 s. 2 applies to extend the limitation period under Regulation 283/95 as outlined by Echelon. The wording of s. 2 in my view contemplates a notice period such as that under Regulation 283/95 as well as limitation periods. The relevant section is set out below:

> "Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended, and the suspension shall be retroactive to Monday, March 16, 2020."

I therefore find that the Echelon notice to Certas with respect to the alleged spouse's policy was timely.

AWARD

As I have concluded that neither the Echelon policy, Wawanesa policy nor the Certas policy with respect to the alleged spouse, would respond to the Applicant's accident benefit claim. It therefore falls to Certas Home & Auto Insurance Company with respect to the policy XC296923 that insured the striking vehicle. There being no coverage through Echelon or Walwanesa or the alleged spouse's policy, the result is that the striking vehicle stands in priority pursuant to s. 268 of the *Insurance Act*. I therefore find that Certas is the priority insurer with respect to the claim for statutory accident benefits in this matter arising out of the accident of July 3, 2020.

The parties did not address any issues with respect to quantum and I remain seized of this matter if there is a quantum dispute. If so, we should schedule a further pre-hearing.

COSTS

The arbitration agreement submitted by the parties sets out that legal costs will be determined by the arbitrator taking into account the success of the parties and the offers to settle the conduct of the proceedings and principles generally applied in litigation before the courts of Ontario.

The agreement provides, with respect to the costs of the arbitration, that they will be apportioned as determined by the arbitrator also taking into account the success of the parties, offers to settle, conduct of the proceedings and principles generally applied in litigation before the courts of Ontario.

In this case, there is no clear winner. Echelon was unsuccessful in their arguments that the Certas policy for the alleged spouse should respond. Certas was unsuccessful in their argument that the Echelon and Wawanesa policies should respond. Wawanesa, which had originally been let out of this arbitration by Echelon and was brought back in by Certas, perhaps is the one party who had complete success in this matter.

Certas was successful in its defence that the spousal policy would not cover but was unsuccessful in its positions with respect to dependency, regular use and the limitation period.

I am hesitant to make an award of costs without the parties having an opportunity to make submissions with respect to whether any costs should be payable or how costs should be split between the various parties, if at all. To that end, I am going to give counsel 90 days to see if they can reach an agreement with respect to costs. If they are unable to reach an agreement then we will schedule a pre-hearing to set up a costs hearing process.

The same is true with respect to the quantum of costs. If the parties cannot agree on quantum of costs then that will be the subject matter of our costs proceeding.

DATED AT TORONTO July 31st, 2025.

_____

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