IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 s. 268 and Ontario Regulation 283/95 as amended by Regulation 38/10
AND IN THE MATTER of the *Arbitration Act*, 1991, S.O. 1991 c.17

BETWEEN

ECONOMICAL INSURANCE COMPANY

Applicant

and

THE COMMONWELL MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Andrew C. McKague, counsel for the Applicant, Economical Insurance Company (hereinafter referred to as Economical).

Dylan Crosby, counsel for the Respondent, The Commonwell Mutual Insurance Group (hereinafter called Commonwell).

INTRODUCTION

This priority dispute comes before me pursuant to the *Insurance Act* s. 268, Regulation 283/95 and the *Arbitration Act* 1991 c. 17 as amended. The parties appointed me as arbitrator on consent.

This is a dispute as to which of Economical and Commonwell are responsible for paying statutory accident benefits to two claimants: (1) The owner and operator of a 2004 Acura; and (2) a passenger in that vehicle. The priority dispute arises out of an accident that occurred on October 5, 2022.

These claimants were involved in a single-car collision when the vehicle they were in crossed over a number of lanes of traffic on the Gardiner Expressway and struck a barrier ultimately resulting in various injuries. Economical insured the 2004 Acura but only when it was being operated as an Uber and it is agreed it was not being operated as an Uber at the time of the accident. The claimant driver/owner did not have any personal insurance on the vehicle. The claimants applied to Economical for statutory accident benefits and Economical is presently paying.

Commonwell insures a Dodge Ram pickup that was pulling a 28 foot white trailer. The white trailer was insured by Chubb. The pickup was also proceeding on the Gardiner Expressway in or around the area when this accident occurred.

Economical takes the position that Commonwell is the priority insurer as its insured was "involved" in the incident of October 5, 2022.

This dispute therefore involves a determination as to whether the Commonwell vehicle was "involved" in the incident that resulted in the claim for statutory accident benefits by the two claimants.

PROCEEDINGS

The arbitration proceeded in writing. The following documents were filed:

1. Arbitration Agreement dated May 6, 2025
2. Motor Vehicle Accident Report with respect to the accident of October 5, 2022
3. Transcripts of the examination under oath of the claimant driver dated January 23, 2023
4. Transcripts of the examination under oath of the claimant passenger dated January 12, 2023
5. Transcripts of the examination under oath of the owner and operator of the pickup truck dated June 25, 2024
6. Agreed Statement of Facts (8 pages): undated
7. Factums of the parties
8. Each party filed a Book of Authorities

ISSUE TO BE DETERMINED

Was the Commonwell pickup truck involved in the incident from which the entitlement to statutory accident benefits arose?

FACTS

The Agreed Statement of Facts was lengthy. I will not reproduce it here but below I provide a summary of the relevant facts that I have determined both from the Agreed Statement of Facts and the other evidence placed before me, particularly the transcripts.

The subject accident took place on Wednesday, October 5, 2022 at approximately 9:12 pm in the westbound lanes on the Gardiner Expressway West 345 metres east of its intersection with Grand

Avenue in Toronto.

The claimant driver was the owner of a white 2004 Acura TSX insured by Economical. At the time of the accident, he had the claimant passenger in his vehicle. These two individuals were friends.

It is agreed that Economical only insured the Acura when the vehicle was being operated as an Uber. The claimant driver was working for Uber but the Uber app was not on at the time of the accident.

It is also agreed that the claimant owner/driver did not have any personal insurance on his vehicle and therefore, as it was not being operated as an Uber on the date of loss, the Economical insurance does not attach to the Acura.

Commonwell insured a 2022 Dodge Ram pickup truck. The owner of that vehicle was operating the pickup truck on the date of loss. It was pulling a white trailer that was 25 ft long and 8 or 9 ft tall. The trailer was owned by 979650 Ontario Ltd. and was insured by Chubb Insurance pursuant to policy no. 79973029. 979650 Ontario Ltd. was owned by a friend of the owner of the pickup truck.

On the day of the accident, the claimant driver had stopped work between 8:00 or 9:00 pm and was located downtown when his friend (the claimant passenger) phoned him and asked for a ride home. The claimant driver picked up his passenger and agreed to take him home which resulted in the Acura entering onto the Gardiner Expressway.

The Acura was proceeding westbound on the Gardiner in the fast lane (far left). Both the driver and the passenger testify that they missed one, if not two exits (the Lakeshore exit and the Kingsway exit 3). According to the driver it was because there was too much traffic.

The driver decided to take the Islington exit and then to proceed up to Eglinton Avenue where he planned to drop his passenger off.

Both the claimant driver and passenger gave evidence that in or around the time the driver commenced his lane change to the right in order to get to the Islington exit, that they felt a bump or a hit on the fender of the Acura. If this event did occur, that vehicle has never been identified.

The driver claims that as a result of this vehicle hitting his fender, that he lost control of the Acura and he was sent flying across the highway. This vehicle is described as a blackToyota Camry.

The Acura ends up crossing four lanes of traffic and then appears to hit a barricade. Shortly after the impact, a sea of small glass and dust blew back across the highway. The driver and the passenger in the Acura sustained injuries.

Turning now to the actions of the pickup truck and the trailer. The owner of the pickup truck had driven it to downtown Toronto in order to pick up her friend's trailer. She did this as a favour to her friend and had not been paid to do so. She then planned to drive the trailer from downtown Toronto to her property in Mansfield where her friend typically would store the trailer.

The pickup driver was alone in her vehicle. She was travelling on the westbound lanes of the Gardiner Expressway somewhere between Islington Avenue and Kipling Avenue when the accident occurred. She says she was travelling in lane 2 which is the lane directly beside the left lane.

She reports seeing a motorcycle pass her on her right side in lane 3 that was travelling very fast. She then saw a white car in her passenger side mirror that was behind her and also appeared to be travelling at a high rate of speed.

She then looked in her driver's side mirror and saw a black vehicle behind her in lane 1 (the far left lane) that was approaching quickly.

A short period later she saw the white car now travelling in lane 1 beside the black car. She did not see the white car (Acura) move from lane 3 to lane 1. Both of these vehicles appeared to be in lane 1, although she thinks one of them might have been driving on the shoulder. These two vehicles maintained this awkward position as they drove past her but then the black vehicle pulled ahead of the white vehicle.

When the white vehicle was at least 200, maybe 300 ft in front of her and still in lane 1, it suddenly turned to the right and crossed all four lanes of traffic and then disappeared into a wall or “something”.

Almost immediately after this the black vehicle, which was still in lane 1, turned to the right, also crossed all four lanes of traffic and stopped safely on the shoulder.

The pickup driver kept driving straight in lane 2 while all this was happening. As she passed the black car, which was stopped on the right-hand shoulder, she saw the driver of the black vehicle exit his car and run back toward where the white car had crashed.

The driver of the pickup said that when the white car left the highway it hit a barricade and when this happened a sea of small glass and dust flew back across the highway. She believes the debris included glass because it was reflective.

She slowed down to some extent after the white car crashed but was still moving through the glass and dust in lane 2. She could not avoid the debris.

Her evidence was that she could feel the debris hitting her truck and windscreen, and it felt like driving through a hailstorm.

The driver of the pickup truck did not stop at the scene of the accident as she saw other vehicles had pulled over. She did call 911 shortly after the accident and was told that it had already been reported but that she should pull over when it was safe to do so and call back to advise if there was any damage to her vehicle.

The pickup driver exited the Gardiner Expressway at Highway 427 and drove northbound. She exited Highway 427 at the first exit and drove to a parking lot. She examined the pickup truck and did not see any damage. She called and advised the police of that and then drove home.

The next morning the pickup driver went out to unhook the trailer and noticed damage to the passenger side of the trailer. She describes this as "pit marks". She sent pictures of this damage to the owner of the trailer and then later spoke to him on the phone. He asked her to file a police report so that he could make a property damage claim. She did so and reported to the police that the accident had caused damage to the trailer.

Neither the claimant driver nor the claimant passenger recall seeing the 2022 Dodge Ram prior to the accident.

The driver of the vehicle describes that after they were hit they went through a guardrail, then a brick wall, and then became airborne, landed in a tree, and ultimately hit a building.

The passenger claimant gave evidence that when they wanted to change lanes to go to the right, that somebody was tailgating them in the right lane and there was someone in front of them. The driver decided to use the emergency lane. The passenger told him not to but he did anyway. He then says that they hit bumps on a part of the Gardiner and ended up losing control.

According to the driver of the pickup, there were only seconds between the white car passing her, losing control and veering off the highway before it hit the barricade. She describes the accident as "all happens so quickly".

The pickup driver did not report the accident to her insurance company as there was no damage to the truck.

The Motor Vehicle Accident Report identifies two vehicles with respect to this accident. The first is the white Acura and the second is the pickup truck. The pickup truck is noted as having been driven away by the owner but that there was indirect damage from the debris. The report does not appear to specify whether the damage was to the pickup truck or to the trailer. However, the description as to how the accident occurred and the picture does not seem to include the pickup truck.

RELEVANT LEGISLATION

The key legislation here is s. 268(2) of the *Insurance Act* which is always the starting point of any priority analysis. This provision sets out a cascading hierarchy of priority to assist insurers and

injured parties to determine where to apply for statutory accident benefits. The relevant portion for the purpose of this decision is set out below:

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

1. In respect of an occupant of an automobile,

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

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

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

The parties agree that neither the driver nor passenger involved in this incident have an insurer that they can access for statutory accident benefit under subparagraphs i and ii above.

Therefore the relevant statutory provision to be considered in this decision is subparagraph iii and whether the driver or the claimant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose. In this case, that is Commonwell as the insurer of the pickup truck.

SUBMISSIONS OF THE PARTIES

Both counsel agree that the starting point to determine whether a vehicle is involved in the accident is to consider the five criteria set out by Arbitrator Lee Samis and upheld by Her Honour Harriet Sachs (Justice Sachs's decision is unreported) in the case of *Dominion of Canada General Insurance Company v. Kingsway Insurance Company*. Arbitrator Samis's decision was August 23, 1999 and the unreported decision of Justice Sachs of the Ontario Superior Court of Justice was released January 11, 2000. While this case involved a loss transfer claim, both parties agree that the criteria set out below by Arbitrator Samis is applicable to a determination of an "involved" vehicle in terms of a priority dispute.

The five criteria are:

1. Was there contact between the vehicles?

2. The physical proximity of the vehicles.

3. The time interval between the actions of the vehicles.

4. The possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another.

5. Whether it is foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants.

While both parties agree that these five criteria are the place to start, they differ in terms of their submissions with respect to whether all criteria must be present and the application of the criteria to the facts of this case.

Submissions of Economical

Economical acknowledges that the argument in this case is whether the pickup truck was involved in the incident. If the pickup truck was involved then Commonwell is the priority insurer. If the pickup truck was not involved then Economical acknowledges that the claims remain with it.

Economical submits that the case law establishes that the plain and ordinary meaning of the word "involved" is quite broad (see *Allstate Insurance Company of Canada v. Gore Mutual Insurance Company of Canada and the MVACF*: decision of Arbitrator Bialkowski, June 6, 2018).

Accepting that the meaning is broad, Economical argues that contact between the insured person and the automobile that caused the injury and the insured automobile may not be necessary (see *Allstate v. Gore* (*supra*)). Economical says a determination of whether a vehicle was involved is a purely fact-based enquiry.

Economical submits that with respect to the causal relationship factors set out by Arbitrator Samis, that the Court of Appeal has ruled that causation between the actions of the alleged involved vehicles and the collision itself is not in fact required to satisfy this part of the test. Economical referenced the decision of the Court of Appeal in *Ontario (Government and Consumer Services) v. Gore Mutual Insurance Company*, 2023 ONCA 433.

Therefore, Economical submits that is not necessary that a finding be made in this case that the pickup truck contributed in any way to the ultimate collision that the Acura was involved in. Also, Economical submits that there is similarly no need for there to have been any contact between the pickup truck and the Acura.

Economical argues that the pickup truck was in close physical proximity to the Acura at the time this incident occurred. It further argues that the accident was in a close time interval between the actions of the vehicles on the roadway. In other words, the Acura coming in front of the pickup truck, going into the barricade on the roadway and then the debris that struck the trailer and the pickup truck all took place within a short period of time. Economical also submits that it was foreseeable that the actions of the Acura could have resulted in damage to the pickup truck or its occupant. The fact that it did not damage the pickup truck but only damaged the trailer is not relevant and actual physical damage is not a necessary component to being "involved" in an

accident.

Economical submits that the pickup truck driver's account of the incident establishes that it was an involved vehicle. Economical points to the driver's description that she "drove through a sea of debris" and that she felt debris hit her vehicle to the point that she was concerned and pulled over to see if there was any damage to the pickup truck.

Lastly, Economical submits that the decision of the Court of Appeal in *Minister v. Gore* (*supra*) is binding and that I am obliged to follow that decision. Economical points to the decision of Justice Myers who heard the initial appeal from the decision of Arbitrator Bialkowski and overturned that decision (Her Majesty the Queen in Right of Ontario as represented by the *Minister of Finance v. Gore Mutual Insurance*, 2022 ONSC 3188). In that decision, Justice Myers commented that it is appropriate to apply some "rough justice" in determining priority disputes under s. 268 of the *Insurance Act* with specific reference to who is an involved insurer. Economical relies on Justice Myers's comments at paragraph 58 set out below:

> "It was not the arbitrator's role to apply his sense of the fair allocation of the priority payment obligation on insurers. The statute has set the priority ladder which Perell J. noted may well be pragmatic rather than focused on high-minded principles steeped in equitable concepts of justice. The Statutory Accident Benefits Schedule is largely just an administrative payment scheme."

Economical submits in paragraph 10 of their Factum:

> "In light of the binding decision in *Minister v. Gore*, Economical respectfully submits that the focus of the enquiry in the within case should be upon the temporal, spatial and participatory factors outlined by Justice Myers and adopted by the Court of Appeal. Moreover, this exercise is to be conducted with recognition that involvement is a vague term and requires only a sufficient nexus with reference to those factors. Neither exactitude nor reliance upon 'high-minded principles steeped in equitable concept of justice are required'."

Submissions of Commonwell

As noted earlier, Commonwell agrees that the starting point to determine whether the pickup truck was involved in the incident on October 5, 2022 is to look at the five criteria set out by Arbitrator Samis in the *Dominion v. Kingsway* case (*supra*). However, Commonwell's position is that all five criteria are in play and must be looked at by the arbitrator in order to determine whether the pickup truck was involved.

Commonwell also argues that one must look at the definition of insured person set out in the Statutory Accident Benefits Schedule in order to determine this issue. On that point, Commonwell submits that the definition of insured person in the Schedule is "a person who is involved in an accident involving the insured automobile". Commonwell submits that this

incorporates the definition of accident which under the SABS requires that the use or operation of the automobile directly causes an impairment or directly causes damage. As the pickup truck had no involvement in the events that resulted in the injuries to the driver and his passenger, these two individuals therefore cannot qualify as insured persons under the Commonwell policy.

On this issue, Commonwell relies on the decision of Arbitrator Manji in the Ontario Insurance Commission decision of *Janousek v. Halifax Insurance Company*, 1998 ONICDRG 8 (CanLII) and the decision of Justice Perrell in *Seetal v. Quiroz*, 209 CanLII 92114 (ONSC).

In the *Janousek v. Halifax* case, Commonwell notes that this was a priority dispute that involved an accident when a pedestrian was hit by an uninsured car that resulted in dropping her into the roadway. That uninsured vehicle then crossed the street where it struck a fence made of concrete and metal. There were three cars parked behind the fence which were struck by the debris from the fence. The arbitrator concluded in that case that the three parked cars were not involved in the incident. Arbitrator Manji, in that case, noted that the parked cars played no role in the incident in which the use or operation of an automobile caused injuries to Mr. Janousek. Therefore, she concluded that the parked cars were not drawn into the accident or embroiled in the accident and therefore were not involved.

In the *Seetal v. Quiroz* decision, Justice Perrell agreed with the decision in *Janousek* and noted that it was easy to determine that the parked cars were not involved due to the significant separation in time, place, and participation of the unoccupied vehicles. Justice Perrell noted that the accident itself had been completed before the uninsured vehicle struck the fence causing the debris from the fence to then strike the parked cars.

Commonwell submits that I should apply the same reasoning in this case.

Turning back to the five criteria outlined by Arbitrator Samis, Commonwell makes the following submissions. With respect to whether there is contact between the vehicles, Commonwell acknowledges that it is common ground that there was no contact between the pickup truck and the Acura prior to or during the accident. Commonwell submits it is not enough to suggest that the "sea of debris" that the driver of the pickup truck reports driving through constitutes contact. Firstly, Commonwell suggests that there is no clear evidence that that debris actually came from the vehicle (Acura) as opposed to from the barricade. Commonwell also submits that even if the pickup truck drove through small amounts of debris that came from the Acura, that making contact with small pieces of debris is not the same thing as vehicle-to-vehicle contact. In regards to the latter, Commonwell relies on the decision of Arbitrator Bialkowski in *Economical v. Wawanesa/Wawanesa v. Economical*, Arbitrator Ken Bialkowski, February 8, 2011.

In that case, two vehicles were involved in an accident on one side of the road as a result of which debris struck and damaged another vehicle on the opposite side of the road. Arbitrator Bialkowski concluded there was no contact between the two vehicles on the one side of the road and the vehicle on the other side of the road. Commonwell therefore submits that in this case the first criteria with respect to whether there was contact between the vehicles was not met and

further, Commonwell suggests that this criteria must be met.

On the issue of the physical proximity of the vehicles, Commonwell submits that other than the fact that the two vehicles were travelling in the same direction on the same roadway when this incident occurred, that there was no relevant physical proximity of the vehicles at the time of the accident. When the accident occurred, the Acura crashed through the barricade on the far side of the highway beside the shoulder and came to rest off the highway. In contrast, the pickup truck was on the second lane when it drove through the debris allegedly from the Acura. Commonwell submits that these two events did not occur on the same location on the highway. While the Acura and pickup truck were travelling in the same direction before the incident started to occur, they were not doing so when the incident actually occurred and therefore the physical proximity test is not met.

Commonwell also submits that the time interval between relevant actions test is not met. Commonwell submits that this factor is not concerned with the amount of time that passes between two events but rather the time interval between the relevant actions of the two vehicles. Commonwell submits there are no decisions that have attempted to define what "relevant action" is for the purposes of this factor. Commonwell submits at the very least a relevant action is one which has some direct or indirect impact on some other vehicle and that did not occur in this place and therefore the concept of time interval arguably does not even come into play.

Commonwell submits that there must be a causal relationship Commonwell agrees that the pickup truck would not have driven through the sea of small debris if the Acura had not crashed into the barricade on the side of the road. However, Commonwell submits that this does not satisfy the "causal relationship" factor. Commonwell submits that this factor considers the actions of one vehicle and the subsequent actions of another vehicle. Commonwell submits there must be a possibility that the action of one vehicle caused the subsequent actions of another vehicle. In this case, being struck by small pieces of debris is not any action that the pickup truck took as a result of the accident with the Acura. Rather, it was simply and only as a result of the impact of the Acura with the barricade and that the pickup truck driver did not alter or change their actions at all. For example, the pickup truck did not change its course of travel, veer off the road, go into a skid, or in any other way change its progress along the road.

On this issue, Commonwell also submits that the causal relationship between the actions of the one vehicle and the subsequent actions of another must also form part of the incident or accident in question and not just its aftermath. Commonwell suggests that driving through a cloud of small pieces of debris does not form part of the incident as it did not result in damage to the pickup truck, or the Acura, or the occupants of the Acura.

Lastly, on the criteria of foreseeable harm, Commonwell submits that in order for this criteria to be met, that a vehicle must do something that directly or indirectly results in harm or injury to its occupants or to a pedestrian. In other words, there must be a cause and effect. The second element is, was that harm or injury a foreseeable consequence of the vehicle's actions? Commonwell's interpretation of the foreseeable harm issue is based on a number of decisions

from Arbitrator Bialkowski including *Aviva and Wawanesa and Gore*, September 25, 2019, *Belair Direct v. Zurich*, May 2, 2017, *Intact Insurance v. Zurich Insurance*, December 6, 2021, and *Minister of Finance v. Intact Insurance*, October 5, 2021. In each of these cases, while the facts are considerably different and some are priority and some are loss transfer, Arbitrator Bialkowski analyzes in terms of the foreseeability issue as to whether the actions that resulted in the injury were foreseeable by the participants. Commonwell submits that in this case, there was no action on the part of the pickup truck that resulted in any injury to the driver or passenger of the Acura. Therefore the foreseeability principle is not applicable as there was never any harm and therefore you never even get to the second part of the test of determining whether that harm was foreseeable as a result of the actions taken.

Commonwell therefore submits that as none of the five *Kingsway* factors are satisfied in this case, I should conclude that the pickup truck was not "involved" in the incident from which the entitlement to statutory accident benefits arose.

ANALYSIS AND DECISION

For the reasons that I outline below, I agree with Economical that the pickup truck insured by Commonwell was "involved" in the incident that gave rise to the claim for statutory accident benefits brought by the driver and passenger of the Acura.

I agree with Economical that I am bound by the decision of the Court of Appeal in *Ontario v. Gore*, *supra*. In that case, the court made it clear that making causation a part of determining priority when looking at whether a vehicle is or is not involved in an incident is not part of the test. Commonwell's argument that the pickup truck was not involved in the incident of October 5, 2022 is to a significant degree premised on the argument that there must be a causal link between the injuries sustained by the claimants and the use or operation of the pickup truck. I find that the Court of Appeal in *Ontario v. Gore* (*supra*) specifically concluded that there did not have to be a causal factor.

I will review the three levels of decision in that case to set out a clear background as to my reasoning in this case and then go through the five criteria set out by Arbitrator Samis and provide my findings on each criteria.

***Allstate v. Gore*, decision of Arbitrator Bialkowski, June 6, 2018**

The facts of this case are important. This was a priority dispute with respect to a snowmobile accident that occurred on December 26, 2013. The ultimate question was whether the snowmobile insured by Gore on the date of loss was a vehicle "involved in the incident."

There were two snowmobiles travelling one behind the other. The first was operated by Christopher and the second by Casey. These were two brothers. Christopher had a passenger on his vehicle. Both Christopher and Casey were pronounced dead at the scene.

The lead snowmobile was Christopher's and it was not insured. This snowmobile collided with a fallen tree on the trail it was travelling on. The Gore snowmobile, which was trailing Christopher's snowmobile, also struck the tree. There was no evidence that the two snowmobiles were in contact with each other. The issue was therefore whether Gore, as the insurer of the second snowmobile, or whether the Motor Vehicle Accident Claims Fund stood in priority with respect to the claims of Christopher and his passenger. Arbitrator Bialkowski concluded that Gore was not a vehicle involved in the incident. Arbitrator Bialkowski concluded that for the snowmobile to be involved, not only did there have to be proximity in time and space but there must be "some link or nexus between the actions of the operator of the alleged 'involved' vehicle to the injuries sustained by the claimants". Arbitrator Bialkowski noted that the injuries sustained by the occupants of the lead snowmobile would have occurred whether or not the vehicle insured by Gore was following or not and whether it hit the tree or not. He therefore concluded that the involvement of the Gore vehicle was "too remote" with regard to the injuries sustained by the claimants. Arbitrator Bialkowski also stated:

> "I am of the view that in a priority dispute where there is an absence of contact between the vehicles, there must be some action on the part of the driver of the alleged 'involved' vehicle that caused or contributed to the collision giving rise to the injuries sustained by the claimants. There was no causal connection on the facts before me, just as there was no causal connection between the parked cars and the injuries sustained by the claimant in the priority dispute in Janousek."

Lastly, in looking at the relevant criteria set out by Arbitrator Samis, Arbitrator Bialkowski noted there was an absence of a causal relationship between the actions of the driver trailing the snowmobile contributing to the collision that gave rise to the injuries sustained by the claimant. There was no evidence to suggest that the actions of the driver following the vehicle in any way contributed to the collision of the lead snowmobile with the fallen tree. Therefore, the Gore vehicle did not participate in the incident and absent a causal connection, could not be an involved vehicle.

***Her Majesty the Queen in Right of Ontario v. Gore*, 2022 ONSC 3188, Justice Myers**

MVACF appealed the decision of Arbitrator Bialkowski to a single judge of the Superior Court and the matter was heard by Justice Myers. Justice Myers concluded that the Gore snowmobile was involved in the incident and allowed the appeal. In doing so, Justice Myers spent some time discussing how to interpret s. 268 of the *Insurance Act*. He noted that this is a first payment allocation system among sophisticated insurers. It is not based on fault. It is not based on equity among the injured claimants. He notes that where there are two or more insurers liable under s. 268 of the *Insurance Act* that the tiebreaker falls to the "unfettered and arbitrary discretion of the claimants and not to some overriding equitable principle".

Justice Myers stated that in looking at s. 268 that the steps in its ladder are not to be interpreted with an imaginative approach or to strain to provide some form of equity amongst insurers in particular cases. Rather, this is to be interpreted based on its plain meaning to provide certainty,

clarity, and predictability so an insurer can model their obligations and plan their businesses accordingly.

In reaching his conclusion, it is important to note that Justice Myers carefully considered the decision of Arbitrator Manji in *Janousek v. Halifax* (*supra*) and Justice Perrell's decision in *Seetal v. Quiroz*. Justice Myers pointed out that while Arbitrator Manji concluded that the parked cars were not involved in the accident, she also noted that an insured automobile can be involved in "in an accident" even though that automobile may not have caused the accident directly or indirectly. Arbitrator Manji noted that contact between the insured person or the automobile that caused the injury and/or contact between the insured automobile may not be necessary in order for it to be involved in the accident.

Justice Myers also noted and agreed with Justice Perell's comments that the word "involved" is vague and is particularly dependent on the facts of each case. Therefore, Justice Myers carefully considered the two cases that were relied upon in this matter by Commonwell.

Justice Myers concluded that Arbitrator Bialkowski had run afoul of the Court of Appeal's admonition to avoid creative interpretations or carving out judicial exceptions to deal with the equities of a particular case. He stated:

> "It is not the arbitrator's role to apply his sense of the fair allocation of the priority payment obligation on insurers … The arbitrator was required to interpret the plain and ordinary meaning of the words used by the Legislature in its assessment of the fair allocation of priority responsibility for the payment of statutory accident benefits."

Justice Myers noted that the arbitrator had "engrafted" a requirement that the injuries must be caused or contributed to by the accident and therefore there must be causation or fault for the claimant's injuries in order to get into the no-fault payment priority ladder. Rather, the arbitrator should have focused on the "mere involvement in the broader incident" and Justice Myers suggested that is how one is directed by the statutory language.

Justice Myers at paragraph 63 clearly sets out the lack of relevance of a causal link in a priority dispute:

> "The arbitrator engrafted a fault criterion into the priority ladder because he could not help but think that the legislature meant to limit insurers' payment obligations to those whose insured vehicles caused or contributed to the injuries. Why? The statute does not mention fault or causation in section 268(2)(i) at all. This is neither a loss transfer nor a tort law determination of the ultimate responsibility for the accidents. Subparagraph 268(2)(1)(iii) uses the word 'incident' rather than accident. The insured vehicle does not need to be involved in an accident at all. Recall that an accident is an incident in which injuries are caused. So for the purposes of (iii), there needs only be an incident i.e. some event, occurrence or happening. Moreover, involvement is a

vague term that involves proximity or nexus in time or place."

Justice Myers finishes up his decision noting that in some circumstances there will be cases where the factual nexus or link between the insured vehicle and the claimant may be too remote to conclude that the insured vehicle was involved. However, that was not the case in the matter before Justice Myers and he found Gore to be the priority insurer based on its involvement in the incident.

***Ontario (Government and Consumer Services) v. Gore Mutual Insurance Company*, 2023 ONCA 433**

Gore appealed Justice Myers's decision to the Court of Appeal and their decision was rendered on May 31, 2023. The decision of the court was unanimous. The Court of Appeal agreed with Justice Myers. The Court held that the arbitrator had made causation part of the test that he was to apply and that that was a legal error that affected the result the arbitrator reached and therefore his decision remained overturned.

Gore argued before the Court of Appeal that even if the arbitrator made statements about causation that were legally incorrect, that his decision had not turned on their statements but rather on the facts of the case. Gore argued that on his factual findings the arbitrator concluded that the involvement of the Gore snowmobile was too remote in order to meet the involved test. Gore argued that the uninsured snowmobile was the first to strike the tree, there was no contact between the snowmobiles and finally that the uninsured snowmobile would have hit the tree limb whether or not the Gore snowmobile was present or not. Gore argued that these facts, irrespective of applying the causation test, were such that it should be concluded there was not a sufficient nexus to establish that the Gore vehicle was involved. The Court of Appeal disagreed and concluded that the temporal, spatial, and participatory factors were sufficient to conclude that there was involvement.

I now turn to an analysis of the five factors set out by Arbitrator Samis with respect to which each party made various submissions on the issue of "involved".

1. Whether there was contact between the vehicles

There is no doubt that in this case there was no contact between the pickup truck and the Acura. However, as directed by the Court of Appeal in *Ontario v. Gore*, I conclude that there is no requirement that there must be contact between the two vehicles and that it is only one factor for consideration.

There was some considerable argument in the parties' Factum about the "transmission of force" theory in terms of the issue of contact between the two vehicles. To put it succinctly, Economical argued that if I found that there had to be contact between the two vehicles, that the debris coming from the Acura that struck the windscreen of the pickup truck that was heard striking the pickup truck by the driver had been transmitted to the pickup truck by the force of the Acura's

contact with the barrier, and that was sufficient to establish contact. Commonwell disagreed, arguing that the transmission of force theory did not apply in this case and in any event there was no evidence that it was actually debris from the Acura that struck the pickup truck. Further, there was no damage to the pickup truck.

As I find that actual contact between the Acura and pickup truck is not necessary to establish involvement, I do not need to make any decision on the transmission of force argument.

2. Physical proximity of the vehicles

I find that the pickup truck and the Acura were in clear physical proximity during the course of this incident. As noted by Justice Myers, it is not the word "accident" that appears in s. 268 of the *Insurance Act* but rather the word "incident". This suggests a much broader spectrum than the word "accident". It is the accident that must cause the injury to the claimant in order to establish an entitlement to statutory accident benefits. It is the involvement in the "incident" that establishes priority. In this case, the pickup truck and the Acura were at one point side by side in a lane. Further, the Acura swerved in front of the pickup truck in order to cross over four lanes. Lastly, whether it was debris from the barrier or debris from the Acura or both, the pickup truck had to drive through a sea of debris within seconds of the actual collision between the Acura and the barrier. I do not see how there can be any closer physical proximity of the vehicle's absent actual contact. I therefore conclude that criterion 2 has been met.

3. Time interval between the relevant actions of the two vehicles

I do not agree with the interpretation offered by Commonwell with respect to this provision. As noted by Justice Perrell and Justice Myers, I am not to apply a sense of fair play or equity in my analysis of the priority provisions. I am not to provide creative interpretation or carve out judicial exceptions. The whole incident, as a result of which these two claimants sustained injuries, took place within seconds. While there was no reactive action on the part of the pickup truck driver, I interpret the decision of the Court of Appeal in *Ontario v. Gore* to specifically find that there does not have to be any specific action on the part of an involved vehicle. The snowmobile in that case did nothing that caused or contributed to the injuries of the claimant. Its action was simply to continue driving and ultimately ending up hitting the tree. In this case, the pickup truck simply continued driving on its designated path, ultimately meeting that sea of debris. I find that this criteria is to deal with events that occur not within the action of the incident itself, but some significant time later. I therefore find in this case that criterion 3 has been met.

4. Possibility of a causal relationship between the actions of one vehicle and the subsequent actions of another

I agree with Commonwell that the pickup truck did nothing to cause or contribute to the injuries of the two claimants. However, consistent with the decision of Justice Myers as upheld by the Court of Appeal, I conclude that that is not a required component for a vehicle to be involved. As Justice Myers pointed out, the priority regulation in s. 268 makes no reference at all about fault

or causation. Justice Myers stated, "The insured vehicle does not need to be involved in an accident at all." He specifically finds there only needs to be an incident, event, occurrence, or happening.

I find that the pickup truck was part of the event or incident of October 5, 2022 and I do not agree with Commonwell that I should be superimposing the causation requirement into my priority determination.

I did review the decisions provided by Commonwell from Arbitrator Bialkowski that I listed earlier, and all these predated the decision of the Court of Appeal and therefore I did not find them to be of any assistance.

5. Was it foreseeable that the actions of one vehicle might directly cause harm or injury to another vehicle and its occupants?

As Commonwell points out, and I agree with Commonwell, the foreseeability criterion is based in a fault or causation analysis. In order to determine if something was foreseeable, I agree with Commonwell that you have to look at whether one vehicle's actions caused harm or injury to another vehicle. If those actions did cause harm, then you go to the next stage to determine whether it was foreseeable.

One must remember that when this criteria was created by Arbitrator Samis, he was looking at a loss transfer matter and ultimately went on to conduct an analysis with respect to the fault chart.

I find that the Court of Appeal decision in *Ontario v. Gore* has essentially eliminated the foreseeability criteria as a factor to look at in a priority dispute when one is determining whether or not a vehicle was involved. This indeed seems to be the direction that was given by Justice Myers as upheld by the Court of Appeal.

There was no action on the part of the Commonwell pickup truck that caused or contributed to the Acura colliding with the barrier. However, as pointed out earlier, that does not mean that the pickup truck was not involved in the broader incident, and indeed I have concluded it was.

AWARD

As I have concluded that the pickup truck was an automobile involved in the incident that gave rise to the claim for statutory accident benefits, I therefore conclude that Commonwell is the priority insurer pursuant to s. 268 of the *Insurance Act* with respect to the two claimants (driver and passenger of the Acura).

COSTS

According to the Arbitration Agreement, if the Respondent is unsuccessful then the Respondent is obligated to pay the costs of the arbitration and the legal costs of the Applicant. As Economical

has been completely successful in this matter, I therefore conclude that Commonwell is responsible for paying the costs of the arbitrator, any arbitration costs including disbursements, and Economical's legal fees. While the Arbitration Agreement suggests I am to fix costs, I decline to do so at this time. If counsel are unable to agree on costs, they may contact me and we will schedule a costs hearing.

DATED THIS 7th day of July, 2025 at Toronto.

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Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors

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