

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

BETWEEN:

ECHELON INSURANCE COMPANY

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

DECISION

Appearances:

Daniel Strigberger: Counsel for the Applicant, Echelon Insurance Company (hereinafter called Echelon)

Sarah E. Scott: Counsel for the Respondent, Dominion of Canada General Insurance Company (hereinafter called Dominion)

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991, to arbitrate an issue between the above noted insurers with respect to a priority dispute pursuant to Section 268 of the *Insurance Act* and Regulation 283/95.

By way of background this claim arises out of a motor vehicle accident that occurred on October 31, 2020. The claimant was operating a rental vehicle insured by Dominion when it was involved in an accident. Echelon insured the claimant's personal vehicle. Echelon received the Application for Statutory Accident Benefits but took the position that Dominion was the priority insurer claiming that the vehicle that the claimant was an occupant in on the date of loss had been rented in excess of 30 days.

The parties selected me as their Arbitrator, on consent, and the matter proceeded to a hearing on January 24, 2022. No viva voce evidence was called. The parties filed a Document Brief which included the following:

1. Transcripts from the Examination Under Oath of the claimant taken September 29, 2021;
2. Pact rental agreement No. 5184;
3. Pact rental agreement No. 5264;
4. Motor Vehicle Collision report with respect to the accident of October 31, 2020;
5. Application for Accident Benefits of the claimant;
6. Notice to Applicant of Dispute between Insurers; and,
7. Notice to Participate and Demand for Arbitration dated March 29, 2021.

Both parties also filed a Factum, a Joint Book of Authorities, as well as a signed Arbitration Agreement dated January 23, 2022

Issues in Dispute:

While the Arbitration agreement broadly identified the issue in dispute as being one of priority between Echelon and Dominion, the actual issue for my determination is as follows:

“Is the claimant deemed to be a “named insured” under the policy issued by Dominion to Pact rental pursuant to Section 3(7)(F)(ii) of the *SABS* as a result of her having being an occupant of the vehicle, in an accident, that was being rented for a period of more than 30 days at the time of the accident”.

Facts:

The facts are not in dispute.

The claimant had been involved in an accident in July of 2020. As a result of that accident the claimant’s vehicle; a 2014 Infinity truck was damaged and required repairs. Echelon insured the Infinity under policy number 32215823-2.

As the claimant’s car was being repaired she required a rental. Initially, Echelon paid for her rental but that coverage expired so the claimant had to arrange to pay for her own car rental. The claimant decided to seek a rental vehicle that was more modestly priced.

On August 29, 2020, the claimant rented a Nissan Altima from Pact Auto Rental. The vehicle bore licence plate number BRCC991.

Dominion insured Pact Auto Rental under policy number ABL-3093235. The claimant signed a rental agreement with Pact Auto Rental. She signed the agreement on August 29, 2020 and the Agreement was number 5184. The agreement indicates that at the time she took the vehicle on

August 29, 2020 that there were 81357 kilometers on the vehicle. The first page of the contract was put into evidence. The contract does not indicate any time period for the rental.

According to her EUO, the claimant struggled with her finances and accordingly arrangement for the payment of the rental vehicle was that she was to come in from time to time when able to do so and make payments. The claimant said that there was no schedule that was set down for her have to make the payments. She would be contacted by someone from Pact who would tell her what her balance was and she would advise when she would come in to make another payment.

The claimant says that she would go in no more than every 2 weeks, likely when she was getting paid from work and would give them cash or a cheque.

The claimant's evidence was that during this time she had no idea as to when her own personal vehicle's repairs would be completed.

On October 19, 2020, the claimant went into Pact to make a payment on the rental. At this point, she had been renting the Nissan continuously since August 29, 2020.

Although her memory of this event was poor, the claimant believed that when she was in making a payment that she was asked to sign another rental agreement. She confirms that at no time did anyone from Pact advise her as to a specific date that she needed to bring the vehicle back in.

On October 19, 2020, the original rental agreement (number 5184) had added to it that the vehicle had been brought back in on that day and that the kilometers on the vehicle was 84115.

On October 19, 2020, the claimant signed another rental agreement bearing number 5264. The vehicle she was renting was the Nissan Altima bearing license plate number BRCC991. The kilometres were indicated as 84115. This agreement, like the first agreement, did not show any date that the agreement ran for or any date that the vehicle was required to be returned. Therefore, the claimant left Pact Auto Rental on October 19, 2020 after having made a payment towards the car rental with the same car she had been renting since August 29, although she had signed a new rental agreement.

The claimant was then involved in an accident in the Nissan Altima on October 31, 2020. This was 63 days after August 29, 2020, when the claimant initiated her rental through Pact. The motor vehicle accident report confirms that the vehicle involved in the accident was owned by Pact Auto Rental insured under the Dominion policy and was a Nissan Altima bearing license number BRCC991.

Legislative and Policy Provisions:

Section 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 provides a cascading allocation as between insurers with respect to priority.

Both Echelon and Dominion agree that the relevant provision here is Section 268(2)(5.2), which is reproduced below:

“If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant”.

Also relevant to this priority dispute is what is known as the “deemed named insured” provisions of Ontario Regulation 34/10: Section 3(7)(f)(ii), which is reproduced below:

- (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
 - (i) the insured automobile is being made available for the individual’s regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or
 - (ii) the insured automobile is being rented by the individual for a period of more than 30 days

Parties Positions:

Echelon

Echelon argues that the rental vehicle insured by Dominion was, on the date of loss of October 31, 2020, “being rented by the claimant for a period of more than 30 days”. Echelon argues that the claimant rented the Nissan Altima on August 29, 2020 and the accident occurred October 31, 2020. She continued to rent that vehicle over the course of those 63 days. Accordingly, she had rented the vehicle for more than 30 days.

Echelon submits that the second rental agreement of October 19, 2020, is irrelevant and does not start the 30 day time period running again.

Echelon argues that it is the number of days to the date of loss that a person rents the vehicle that are relevant and not the contractual terms as between the claimant and the rental company. Echelon submits that it is not the terms of a rental agreement that dictates the time for rental but rather the actual time the vehicle is in the possession of and rented by an individual.

In this case, the claimant rented the same vehicle for 63 days. The entering into a new rental agreement on October 19, 2020, did not change the fact that she continued to rent that vehicle. Accordingly, Echelon seeks an Order that the claimant was a deemed named insured under the Dominion policy and as she was an occupant of that vehicle on the date of loss, priority rests with Dominion.

Dominion

Dominion's position is that one must look to the contract and not just to the fact that the same vehicle was rented for a period in excess of 30 days. Dominion submits that on October 19, 2020, the claimant entered into a new rental agreement and that the 30 day period must run from that date forward. Dominion admits that the first rental agreement was for an excess of 30 days. That agreement ran from August 29, 2020 to October 19, 2020. However, the accident did not occur within that time period.

On October 19, 2020, a new rental agreement was entered into and when the accident occurred on October 31, 2020, that agreement had not been in place for 30 days. Dominion submits that the first rental agreement was no longer in force on the date of the accident of October 31, 2020 and as the second rental agreement had only been in place for 12 days the 30 day requirement was not met. Dominion asks me to find that the claimant was not a deemed named insured under the policy insuring the Pact rental vehicle and therefore they are not the priority insurer.

Decision and Analysis:

I find that Dominion is the priority insurer in the circumstances of this case. I find that the claimant rented the Pact rental vehicle for 63 days, and, therefore, the vehicle had been rented for more than 30 days on the date of loss of October 31, 2020.

I agree with Echelon that the practical approach to determining whether a vehicle has been rented for 30 days or more should be based on the actual number of days that an individual has rented the vehicle and not on the terms of the rental contract. In this particular case, the rental contract that the claimant signed with Pact did not have a specific term of rental within the contract itself. The first contract the claimant signed had no specific date upon which the vehicle had to be returned, nor had any defined term for rental. The same is true with respect to the second contract. However, even if the rental agreement had specified a time period for the contract (for example specifically only allowed the rental agreement to run for 29 days) I would still have found in the circumstances of this case that the claimant had rented the vehicle for more than 30 days.

The claimant picked up the Nissan Altima on August 29, 2020, and continuously drove it until October 31, 2020. The claimant continuously rented that vehicle during that same time. In my view, the signing of a new rental agreement on October 19, 2020, did not change, in any way, the fact that the claimant had been renting that vehicle since August 29, 2020.

I agree with Echelon that an Arbitrator should look at the number of days the rental vehicle was with the claimant at the time of the accident and not the number of days stipulated on a rental agreement, if any. I agree with Echelon that this is consistent with the plain and ordinary meaning of the rental provisions under Section 3(7)(f)(ii) of the Schedule.

Both Dominion and Echelon referred me to 2 cases on the issue of rental vehicles and the interpretation of Section 3(7). The first case is *Guarantee Co of North America v ACE INA Insurance Co*, 2014 CarswellOnt 19209. This is a decision of Arbitrator Novick from October 10, 2014.

The facts of that case are quite different from the facts in this case. In the rental agreement signed by the Applicant in that case she was obliged to return the car by a specific date. She rented the vehicle on December 3 and was required to return the car by December 10. The evidence was that she needed to rent the car for a longer period of time as her own car had not yet been repaired. Accordingly, the return date of the vehicle was extended to December 20, to December 28, and ultimately to December 30. The vehicle, however, was not returned to the rental company on December 30. The car was discovered on the rental lot in a damaged condition when the location reopened on the morning of January 3. The accident in that case had occurred on January 1. It was argued that the vehicle was rented for more than 31 days as the rental contract was signed on December 3 and the vehicle was not checked back in until January 3 when it was found on the lot. The evidence was that the rental company had a practice of rewriting its rental contracts every 30 days in order to keep them within the definition of short-term rentals. Therefore, it was argued before Arbitrator Novick that the parties had never intended for the claimants rental to extend beyond the standard 30 day contract, and, accordingly, she should not be found to be a deemed a named insured under the rental policy. Arguments were made before Arbitrator Novick that there were two possible interpretations of the relevant Statutory provisions. One was for an Arbitrator to ask how long the car had actually been rented for on the day of the accident. The second was to consider what the party's intentions were and to look at the contract regardless of the number of days that had accrued by the date of the accident.

Arbitrator Novick decided the case on the basis that the accident occurred on January 1 and the claimant had rented the vehicle on December 3. Therefore the accident occurred on the 29th day of the rental and the plain reading of Section 3(7) it could not be said that at the time of the accident the insured automobile was being rented for "a period of more than 30 days".

In reviewing Arbitrator Novick's decision it would appear that she adopts the position argued here by Echelon and looked at the actual rental of the vehicle and not the time period of the contract.

The second decision referred to me by counsel was *Optimum Insurance Company v Royal & Sun Alliance Insurance Company and The Dominion of Canada General Insurance Company*, a decision of mine from February 5, 2015. The facts on that case are quite different than the facts here. However, Dominion points to the following statement I made in that decision:

“There was no evidence, documentary, or oral to suggest that the Routes Car Rental only provided the rental vehicle to Mr. Fiorica for 30 days at a time. There were no new rental agreements entered into and if it was Routes' intention to only rent the vehicle for less than 30 days each time there should have been a new rental agreement at the end of each 30 day period or some other agreement between Routes and Mr. Fiorica to establish that”.

Dominion submits that those comments opened up an interpretation that if a rental company required a renter to enter into a new contract every 29 days in order to maintain its short-term rental status that in those circumstances a claimant who was involved in an accident involving a rental vehicle even though they had been driving it for more than 30 days would never be found to be a deemed named insured.

I carefully reviewed my decision in the *Optimum* case and nowhere in that case do I draw a conclusion that that was an interpretation that I felt was appropriate of Section 3(7)(f)(ii). I was merely commenting on the available evidence for my consideration.

I find that the terms of the rental contract do not have any bearing on whether “at the time of the accident the insured automobile is being rented by the individual for a period of more than 30 days”. It is the time the vehicle is actually rented that is relevant not the terms of the rental agreement. In this case, there is no dispute that the claimant rented the Nissan Altima on August 29, 2020, and continuously rented that vehicle until the accident of October 31, 2020. I agree with Echelon that the new rental agreement entered into on October 19, 2020, did not change that fact. I find that in interpreting the deemed named insured provisions relating to rental vehicles that an Arbitrator should look at the number of days the rental vehicle was with the claimant as of the date of the accident and not the number of days stipulated in a rental agreement. Indeed in this case no days were even stipulated in the rental agreement.

Therefore, I find that Dominion is the priority insurer with respect to the payment of Statutory Accident Benefits to the claimant arising out of the accident of October 31, 2020.

Award:

At the time of the accident, the claimant was a deemed named insured under the policy of Dominion of Canada General Insurance Company pursuant to Section 3(7) (f)(ii) and as she was an occupant of that vehicle on the date of loss pursuant to Section 268(5.2) of the *Insurance Act*, Dominion of Canada General Insurance Company is the priority insurer.

Costs:

I reviewed the Arbitration Agreement with respect to the Award of the Arbitrator, the expenses of the Arbitration, and the legal costs.

As Echelon was entirely successful in this Arbitration, I find that the costs of the Arbitrator are payable by Dominion.

Under paragraph 2 of the Arbitration Agreement it provides that legal costs are to be determined by me considering the success of the parties, any offers to settle, the conduct of the proceedings, and the principles generally applied in the litigation before the courts of Ontario.

I am not aware of any offers to settle. If counsel are unable to reach agreement on legal costs, then I would ask that they contact me so we can schedule a pre-hearing for the purposes of setting down a costs hearing.

DATED THIS 31st day of January, 2022 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP