

**IN THE MATTER OF the *Insurance Act*, R.S. O. 1990, c. I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c17, as amended
AND IN THE MATTER OF an Arbitration**

B E T W E E N:

ECHELON INSURANCE

Applicant

and

ZENITH INSURANCE COMPANY

Respondent

DECISION ADDENDUM

COUNSEL

Counsel for the Applicant, Stanislav Bodrov
Strigberger Brown Armstrong LLP
(hereinafter referred to as “Echelon”)

Counsel for the Respondent, Jennifer McGlashan
Zuber & Company LLP
(hereinafter referred to as “Zenith”)

ISSUE: COSTS

[1] In the context of a priority dispute pursuant to s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and *Ontario Regulation 283/95*, the ultimate issue before me was to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Holly Opeloyeru, with respect to personal injuries sustained in a motor vehicle accident which occurred on July 9, 2020. As a preliminary matter, the Respondent Zenith brought a motion to dismiss the priority claim of the Applicant Echelon on the basis that it breached the legislative timelines governing priority disputes in the province of Ontario, namely *O. Reg 283/95 – Disputes Between Insurers*. Zenith claims that Echelon did not provide notice of the dispute within 90 days of having received a completed application for accident benefits in breach of s. 3 of *O. Reg 283/95* (“90 day issue”) and for not completing the arbitration within 2 years following commencement of the arbitration in breach of s. 8(2)5 of *O. Reg. 283/95* (“2 year issue”). The issues require consideration of the

impact of what has been referred to as the *COVID Limitation Regulation*, namely *O.Reg. 73/20*, on these time requirements. In a written decision dated February 15, 2024 it was ordered that the priority claim of Echelon be dismissed on the basis that notice of the dispute was not provided with 90 days of having received a completed application for accident benefits. Zenith was unsuccessful on its claim that the priority claim be dismissed on the basis that the arbitration was not completed within 2 years of the commencement of the arbitration. Submissions with respect to the responsibility for costs were requested in the event that the parties could not come to an agreement on the issue. Prior to submissions being received the decision was appealed.

LAW WITH RESPECT TO COSTS

[2] The *Disputes Between Insurers* legislation deals with the issue of costs. Section 9 (1) of *O. Reg. 283/95* states:

9. (1) Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. *O. Reg. 283/95*, s. 9 (1).

(2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*. *O. Reg. 283/95*, s. 9 (2).

[3] Section 54 of the *Arbitration Act 1991*, S.O. , c. 17 sets out the general principals with regard to an award of costs in an arbitration:

Costs

Power to award costs

[54. \(1\)](#) An arbitral tribunal may award the costs of an arbitration. 1991, c.17, s.54 (1).

[4] The established jurisprudence confirms that the Arbitrator or Judge has a broad discretion with respect to the issue of costs and that the factors set out in Rule 57.01(1) of the Rules of Civil Procedure may be considered, which include:

1. The principle of indemnity including, where applicable, the experience of the lawyer for the party entitled to the costs, as well as the rates charged and the hours spent by that lawyer;
2. The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
3. The amount claimed and the amount recovered in the proceeding;

4. The complexity of the proceeding;
5. The importance of the issues;
6. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
7. Whether any step in the proceeding was improper, vexatious or unnecessary; and
8. Any other matter relevant to the question of costs.

POSITION OF THE PARTIES

[5] At risk of oversimplification, it was the position of Zenith that it was successful in having the priority dispute of Echelon dismissed and ought be awarded 100% of its partial indemnity costs plus assessable disbursements.

[6] It was the position of Echelon that there was actually mixed success on the motion to dismiss. Not only was there mixed success, but Echelon claims that the “two-year issue” was frivolously raised and that Echelon refused to engage in reasonable settlement discussion with respect to the issue of costs. On this basis, Echelon has claimed that each party should bear its own legal costs, or in the alternative, that Zenith be entitled to at most 30% of its partial indemnity costs.

ANALYSIS AND FINDINGS

[7] On the facts of the case before me, I see three components to the costs determination. There was the legal work completed by counsel for Zenith leading up to the preliminary issues motion including an analysis of the issues involved in the priority claim brought by Echelon, preparation for an examination under oath of the claimant’s mother where she failed to attend, as well as the preparation and participation in two pre-arbitration conferences. The second component involved the part of the motion to dismiss based on the “90 day issue”. The third component involved the part of the motion to dismiss based on the “two-year issue”.

[8] Zenith was unsuccessful in its motion to dismiss on the basis that Echelon did not complete the arbitration within two years of having commenced the arbitration. I cannot find that the issue was frivolous, but given the fact that the two-year issue was only raised after the deadline had passed and given the jurisprudence already in existence it was certainly not as

contentious as the “90 day issue” which required consideration of the *COVID Limitation Regulation O. Reg. 73/20* and the jurisprudence as to its impact on legislative time requirements.

[9] Given the mixed success on the motion to dismiss outlined above, I exercise the discretion provided to me by Section 54 of the *Arbitration Act 1991, S.O. , c. 17* to award Zenith two thirds of its partial indemnity costs plus full assessable disbursements the amount of which is to be agreed upon or assessed following completion of the appeal herein.

[10] Given Zenith’s overall success in having Echelon’s priority claim dismissed, I find that Echelon is to pay the Arbitrators account.


REVISED ORDER

[11] On the basis of the findings aforesaid I hereby order that:

1. The priority claim of Echelon be dismissed;
2. Echelon is to pay Zenith two thirds of its legal costs on a partial indemnity basis to be agreed upon or assessed, plus its full assessable disbursements;
3. Echelon is to pay the Arbitrators account;

DATED at TORONTO this 22nd)

day of April, 2024.)

A handwritten signature in blue ink, appearing to read 'K. Bialkowski', is written over a horizontal line. The signature is cursive and somewhat stylized.

KENNETH J. BIALKOWSKI
Arbitrator.