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

PRELIMINARY ISSUE DECISION

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”)

PRIORITY DISPUTE ISSUE :

IMPACT OF THE COVID LIMITATION REGULATION *O. REG. 73/20* ON THE TIME REQUIREMENTS OF *O. REG. 283/95 – DISPUTES BETWEEN INSURERS*

[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 is 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 brings this 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* 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.* 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.

PROCEEDINGS

[2] The matter proceeded on the basis of document briefs, books of authority and both written and oral submissions. There was no oral evidence. Oral submissions were completed on January 29, 2024.

ANALYSIS AND FINDINGS

[3] The Respondent Zenith brings this motion to have the arbitration proceeding brought by Echelon dismissed for failing to complete the arbitration hearing within 2 years of the commencement of the arbitration process as set out in *s. 8(2) of O. Reg. 283/95* and for not providing Zenith with a Notice of Dispute within 90 days of having received the claimant's OCF-1 Application for Accident Benefits as set out in s. 3 of the *Regulation.* The analysis requires consideration of the COVID Limitation Regulation *O. Reg 73/20.*

A. BREACH OF S. 3 OF *O. REG. 283/95* - 90 DAY NOTICE REQUIREMENT

[4] I will firstly deal with the issue of whether Echelon has met the 90-day notice requirement set out in s. 3 of *O. Reg 283/95* by reason of the application of the *COVID Limitation Regulation O.Reg. 73/20.*

[5] S. 3 of O. *Reg. 283/95* states the following:

> *"3. (1) 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.*

(2) An insurer may give notice after the 90-day period if,

(a) 90-days was not a sufficient period of time to make a determination that another insurer or insurers is liable under Section 268 of the Act; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period."

[6] The facts with respect to this issue are as follows:

a. On July 9, 2020, the claimant, Holly Opeloyeru ("claimant") was a passenger in a single vehicle accident operated by Chevon Grannum and insured by Echelon.

b. The claimant through her counsel submitted a signed OCF-1 dated August 17, 2020 to Echelon via email and it was received on same date. Echelon also received accident benefit claims from four other claims arising from this accident.

c. On August 20, 2020, *O. Reg. 457/20* was passed revoking *O. Reg 73/20 (The COVID Limitation Regulation)* as of September 14, 2020.

d. On September 1, 2020, Crawford & Company (Canada) Inc. ("Crawford"), advised it was assigned to handle the accident benefit claim of Holly Opeloyeru on behalf of Echelon and denied it received a complete Application for Accident Benefits (OCF-1) on August 18, 2020. Crawford requested further information that it alleged was not included in the OCF-1. Counsel for the claimant re-submitted the OCF-1 with the additional information on September 2, 2020.

e. The claimant in her OCF-1 indicated that she was 19 years old at the time of the accident. She also reported that she was attending Sheridan College since September 2019 in the Social Service Worker program and provided the anticipated completion date of April 2021. The application also indicated that the claimant had not been employed in the 52 weeks preceding the subject motor vehicle accident. The claimant further reported in her OCF-1 that she was living in a house located at 32 Sestina Court, Brampton, Ontario, L6P 5L7.

f. The normal 90 day notice period would end either November 16, 2020 or December 1, 2020 depending on a finding as to when a completed application was received. Regardless, notice was not provided until December 8, 2020.

g. There is no evidence before me as to any attempt to obtain a signed statement from the claimant or information from her counsel with respect to priority issues and specifically financial dependency in the immediate period following receipt of the OCF-1.

h. On September 21, 2020 the independent adjusters advised Echelon that the claimant Opeloyeru appeared dependent on a parent or guardian and requested authority to complete an examination under oath (EUO) of the claimant.

i. On October 16, 2020 the independent adjusters received instructions from Echelon to proceed with an examination under oath of the claimant. The independent adjusters referred the matter to counsel. Following an exchange of emails, it was

agreed that the EUO would proceed on December 3, 2020. It is clear from the email exchange that the EUO was to deal with the priority issue. The EUO proceeded on December 3, 2020 where the claimant testified that she was fully financially dependent on her mother. Later that day, claimant's counsel provided the insurance particulars with respect to the claimant's mother. The information was provided to the independent adjusting firm and an Autoplus Gold report was sought in order to determine whether the claimant's mother insured an automobile at the time of the accident. The report arrived the next day indicating that the claimant's mother was insured by Zenith.

j. On December 8, 2020, Crawford on behalf of Echelon, delivered the Notice of Priority Dispute on Zenith via fax. Here, Crawford on behalf of Echelon confirmed receipt of the OCF-1 on August 18, 2020, and advised that as per its investigation, the claimant was dependent on her mother Tracey Lynn Sharron, who was the named insured under Policy No. 8087734 with Zenith and it appeared priority rested with Zenith. Included with the letter was a copy of the Auto Plus Gold Report, only.

k. On December 15, 2020, Zenith confirmed receipt of the Notice to Applicant of Dispute Between Insurers and requested further information from Crawford c/o Echelon. The productions requested by Zenith included:

i. "Copy of the motor vehicle accident report
ii. Copy of any statement or investigation gathered from the claimant Holly Opeloyeru and Echelon Insurance Company
iii. Any material you are relying on to establish that priority rests with Zenith Insurance
iv. Any investigation into the circumstances surrounding the accident and the parties involved.
v. Copy of completed OCF-1 duly stamped by Echelon/Crawford Insurance".

l. On March 5, 2021, Zenith followed up with Crawford c/o Echelon in further to its email of December 15, 2020, for productions requested, as per the immediate above. On March 8, 2021, Crawford responded and enclosed a copy of the motor vehicle accident and OCF-1. Crawford advised that it would follow-up with its counsel for the statement under oath. On April 6, 2021, Crawford forwarded Zenith a copy of the transcript of the claimant's EUO.

m. On May 12, 2021, Zenith advised Crawford that it was not accepting priority because the OCF-1 was received August 18, 2020 and it was sent outside of the 90-days (21 days to be exact) regarding priority. Further, Zenith again requested a copy of the original OCF-1 with the date of the receipt and stamped by Echelon Insurance and Crawford Co. On May 12, 2021, Zenith further advised Crawford that it reviewed the OCF-1 sent by the claimant's counsel on September 2, 2020 and *"still the 90-day period to notify Zenith was December 1, 2020."* Notice had been provided December 8, 2020.

n. On July 21, 2021, counsel for Echelon delivered a Notice to Participate and Demand for Arbitration in accordance with section 268 of the *Insurance Act, R.S.O. 1990, c.* I.8 as amended, Ontario Regulation 283/95, and the *Arbitration Act, 1991.*

o. On January 27, 2023 Echelon retained Arbitrator Bialkowski for this matter.

p. On March 8, 2023 Zenith, by way of its counsel, requested a copy of the complete Accident Benefits file as well as a copy of the property damage and investigation files including, but not limited to, any of the following:

- *Statements of its insured and/or of the claimant;*
- *Statutory declarations of the claimant;*
- *Any investigative reports containing licence plates of vehicles located at the claimant's home;*
- *Correspondence between Echelon, including its independent adjuster and of its counsel to the claimant and/her counsel requesting information of financial dependency and of any other insurers; and*
- *Log notes of Echelon and/or of Crawford.*

q. The first pre-hearing in this matter occurred on April 18, 2023. Zenith followed up again for the complete AB file on April 18, 2023 and June 5, 2023. The initial payment summary was provided by Echelon on May 9, 2023. The AB file was produced on June 5, 2023. An updated AB file was produced on August 23, 2023. An updated payment summary was produced on August 24, 2023. Despite demands, it would appear that Echelon has failed to produce its log notes or investigation file to Zenith. At no time was a motion for production brought by Zenith.

r. A review of Echelon's AB file indicates that the independent adjusting firm that it retained was actively dealing with the treatment plans and claims presented by the claimant during the period following receipt of the revised OCF-1 on September 2, 2020. The Echelon AB file indicates that priority was identified as an issue at an early stage of the claim.

[7] It is clear that the accident benefit claims herein were submitted during the Covid epidemic crisis. An Emergency Order, *O. Reg. 73/20* and often referred to as the *COVID Limitation Regulation*, had been issued by the Ontario government on March 16, 2020 to deal with timelines for "limitation periods" and timelines for "steps in a proceeding". Sections 1 and 2 of the *COVID Limitation Regulation, O.Reg. 73/20,* provided as follows:

"1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended, and the suspension shall be retroactive to Monday, March 16, 2020. O. Reg. 73/20, s. 1; O. Reg. 258/20, s. 1.

2. 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. O. Reg. 73/20, s. 2; O. Reg. 258/20, s. 2."

[emphasis mine]

[8] The *COVID Limitation Regulation O. Reg. 73/20* was in force from March 16, 2020 to September 14, 2020. The subject motor vehicle accident occurred on July 9, 2020. The 90 day notice period would normally end either November 16, 2020 or December 1, 2020 depending on a finding as to when a completed application was received. Regardless, notice was not provided until December 8, 2020. Therefore, it matters not as to which of the OCF-1's is said to be a completed application. What matters is whether the *COVID Limitation Regulation* suspended the start of the notice requirement from the date of having received the completed application for accident benefits to September 14, 2020. If it did, then notice was not required until December 13, 2020 with Echelon's notice of December 8, 2020 satisfying the 90 day notice requirement. If not, Echelon's notice would be out of time and the claim ought be dismissed.

[9] It is important to note that arbitrators and judges have consistently and strictly enforced the 90-day rule. The 90-day rule is meant to encourage insurers to properly investigate priority issues in an expedient manner and to be proactive about these disputes. This requirement also allows the insurer ultimately responsible to pay benefits to take carriage earlier rather than later. If notice is not provided within 90 days there is a savings provision as set out in s. 3(2). The following are some key points from the jurisprudence about how section 3(2) operates as set out in the decision of Perell J. in *Liberty Mutual Insurance Company v. Zurich Insurance Company* 2007 *CanLII 54080 (ON SC):*

> - *There is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.*
> - *Section 3(2) is to operate strictly, because an insurer is entitled to know at an early stage that it will be managing and be responsible for the payment of benefits.*
> - *It is important to determine the significance of the facts from the perspective of the insurer; because it is its predicament or circumstances that is the measure of whether there was sufficient time.*
> - *While factually interrelated and connected by the general principles that govern section 3(2), the two pre-conditions of that section are mutually exclusive. The onus on the insurer seeking to give notice after 90-days is to establish both preconditions. In other words, the conclusion that the insurer undertook reasonable investigations and did not make a determination within 90-days does not by itself lead to the conclusion that 90-days is not a sufficient time. Similarly, a conclusion that 90-days would not have been sufficient for a determination does not relieve the onus on the insurer to show that it made reasonable investigations.*

- *The circumstances of each case must be examined to determine whether 90-days was not a sufficient time for the determination.*
- *Evidence that there was an available means by which the insurer could have made a determination within the 90-day period is relevant but not in itself determinative of whether 90-days was a sufficient time. The means available to make a determination is just one factor among others to be considered about the sufficiency of the 90-day period.*
- *Even if an insurer were shown within the 90-day period to have had access to the information needed to make a determination that another was obliged to pay the benefits, the insurer might still be able to show that in all the particular circumstances, the 90-day period was not sufficient time. While proven impossibility of finding the information within 90-days may justify a longer period, the identification with hindsight of an overlooked or unused possibility of finding the information within 90-days does not categorically preclude a longer period being justified.*
- *An insurer seeking to deliver a notice after 90-days must show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90-days to make a determination about whether to issue a notice to a particular insurer.*
- *Section 3(2)(a) is directed toward the ability of the insurer to gather the necessary facts to make a determination within 90-days.*
- *The cooperation or non-cooperation of the accident victim or the insured and any advertent or inadvertent misrepresentations of information are relevant but not in themselves determinative of whether the insurer had sufficient time.*
- *There may be other factors that are relevant to determine whether the 90-day period was a sufficient time, but the issue remains whether those factors make the 90-day period insufficient in any particular case.*
- *What the insurer knew and did not know, what the insurer did and did not do, and what the insurer could and could not do in the particular circumstances are all relevant factors to the determination of whether the insurer had sufficient time to make a determination that another insurer is obliged to pay the benefits.*
- *Some factors arbitrators consider are the completeness and accuracy of the application form, the cooperation provided by the interested parties, the number of potential insurers, and the press of other demands on the adjuster's time.*
- *If the insurer shows that it actually was impossible to make a determination within 90-days, then it will have satisfied the onus of showing that 90-days was not a sufficient time for a determination.*
- *The insurer is required to make a reasonable investigation, but perfection is not required and there should be recognition that adjusters are extremely busy handling more than one complex matter at the same time.*
- *An insurer may have greater difficulty meeting the onus of justifying an extension when it did not employ obvious or readily available means that had a reasonable likelihood of finding the information it needed, even when the insurer satisfies the onus of showing that it made reasonable inquiries.*

[10] Zenith has claimed that the 90 day notice requirement set out in *O. Reg. 283/95* was not a "limitation period" and therefore not governed by section 1 of the *COVID Limitation Regulation* where there would be a mandatory suspension of the time requirements. The 90 day notice requirement was, according to Zenith, a "step in the proceeding" and governed by section 2 of the Covid Limitation Regulation, with any suspension of time to be subject to the discretion of the decision maker in the proceeding. Zenith has claimed that the discretion ought be exercised where it has not been demonstrated that the late notice was impacted by Covid. Zenith claims that in the case herein there is simply no evidence to suggest that Covid impacted Echelon's ability to deal with the accident benefit claim of Opeloyeru or, more importantly here, the priority issue.

[11] In support of its position Zenith relies on the decision of *Echelon Insurance v. Pafco Insurance Company (Arbitrator Bialkowski - May 15, 2023).* The decision also involved a priority dispute where it was claimed that the 90 day notice period was suspended by reason of the COVID Limitation Regulation. It was found that section 1 of the *O. Reg 73/20* did not apply to the facts of the case as the 90 day notice requirement was not a "limitation period" and that the discretion referred to in s. 2 of the COVID Limitation Regulation O. Reg 73/20 ought be exercised in circumstances where there was no evidence that Covid impacted the parties ability to provide notice within 90 days. In reaching this conclusion, the Arbitrator followed a line of cases outlined in paragraphs 23 – 29 of his decision. The Arbitrator found that although the accident benefit claim of the claimant was adjusted throughout the initial 90 day period following receipt of the OCF-1, no steps were taken to investigate the priority issue during the 90 day time frame nor was any evidence adduced showing that any priority investigation was impacted by the Covid pandemic. The Arbitrator dismissed the priority claim of the Applicant insurer. The Arbitrator wrote at paragraph 30:

> *"On the basis of the jurisprudence aforesaid, I am satisfied that it must be determined whether the late notice provided by Echelon to Pafco was connected in some way to the impact of Covid. I am satisfied on the basis of the jurisprudence provided that were challenged, there must be a connection between the delay in providing notice and the impact of Covid, otherwise the discretion provided by section 2 of the Covid Limitation Regulation ought to be exercised. As Justice Casullo stated in Elson (supra) "these are challenging times, and we are all adapting to our new normal […] While access to our courts has been circumscribed, the wheels of justice have not ground to a halt. Litigation is not 'on hold,' and litigants are expected to move their matters forward".*

[12] On the basis of this jurisprudence set out above, Zenith claims that this Arbitrator ought exercise his discretion and that the priority claim of Echelon ought be dismissed with costs by reason of its breach of s. 3(1) of *O.Reg. 283/95* and its failure to meet the requirements of the savings provision in s. 3(2) of the *Regulation.*

[13] In response, Echelon claims that it gave Zenith a priority dispute notice on December 8, 2020 and within 90 days of September 14, 2020 – being the date the COVID limitation freeze expired. In other words, the period to provide notice was extended by the provisions of the *Emergency Management and Civil Protection Act O.Reg. 73/20*. For ease of reference, s.1 of O. Reg. 73/20 stated:

> **Limitation periods**
>
> 1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended, and the suspension shall be retroactive to Monday, March 16, 2020. O. Reg. 73/20, s. 1; O. Reg. 258/20, s. 1.
>
> **Period of time, steps in a proceeding**
>
> 2. 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.

[14] Echelon claims that to interpret s.1 of O. Reg. 73/20 and the phrase “limitation period” as it applies to the 90-day notice limitation on s.3, the arbitrator must interpret O. Reg. 73/20 as being remedial and should give s.1 and the term “limitation period” a fair, large, and liberal interpretation. *The Legislation Act, 2006*, S.O. 2006, c. 21 provides:

> **Rule of liberal interpretation**
>
> 64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

> **Same**
>
> (2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

[15] Echelon claims that giving the term “limitation period” under O. Reg. 73/20 a fair, large, and liberal interpretation as possible, ensures the attainment of its objects – to keep people at home on an emergency basis. In pursuing this goal, Echelon claims that the arbitrator must avoid a strict and narrow interpretation of the term “limitation period” – especially if doing so bars Echelon from disputing priority.

[16] Echelon claims that because the term “limitation period” is not defined, the arbitrator should interpret the term in this matter by attaching significant weight to how the industry and arbitrators/judges have historically described the 90-day period as being a “limitation period”.

[17] Echelon has submitted that I, as arbitrator, in previous decisions as in *Unifund Assurance Company v. Wawanesa Mutual Insurance Company* (April 8, 2015) have noted that the time periods prescribed by s.8(2) of O. Reg. 283/95 were procedural in nature, while the periods prescribed by s. 3(1) (the 90-day limitation) and 7(3) (the one-year limitation to commence arbitration), were substantive. In other words, there is a clear distinction made between procedural time periods (i.e. conducting a pre-hearing within 120 days of appointment of an arbitrator or completion of arbitration within two years of commencing an arbitration) and limitations periods that would have a substantive effect on a party’s ability to seek recourse (i.e. the 90-day notice provision being a complete bar to arbitration).

[18] It was conceded by counsel for Echelon that there are no decisions that directly proclaim that the 90-day period is a limitation period; however, Echelon has claimed that priority arbitrators and courts have characterized and repeatedly referred to the period prescribed at s.3 of O. Reg. 283/95 as a “limitation period”. Echelon has provided several examples. In *Ace v Security National (*Arbitrator Bialkowski – March 11, 2011) specifically described the notice provision in s.3(1) as a limitation period:

> At risk of oversimplification, it appears that what I must determine is whether the limitation period set out in Section 3(1) of the Regulation begins to run with receipt of the Application for Accident Benefits (OCF-1) or whether it begins to run from the date that the insurer receives a "functionally adequate" application for benefits, which would include sufficient detail for it to determine whether another insurer might stand in priority.

[19] In *Allstate v Belair (*Arbitrator Bialkowski – April 25, 2013) similarly described the notice period as being a limitation period:

> On July 19, 2010, Allstate gave notice to Belair of a dispute between insurers with respect to priority in regard to the payment of accident benefits to Tortolo. According to my calculations this was 21 days beyond the 90 day limitation.

[20] In *Aviva v Intact* (Arbitrator Bialkowski – February 27, 2018) referred to the 90-day notice period as a limitation period:

> respect to priority. This was arranged at an early stage but the original date scheduled was cancelled and a further date arranged for May 5, 2016, which was just 12 days prior to the expiry of the 90 day limitation. I find that Aviva ought to have anticipated a possible no show or the claimant not having information regarding insurance at the scheduled Examination Under Oath. An investigator ought to have been retained to proceed with an investigation if

[21] In *Dominion of Canada v The Personal* (Arbitrator Bialkowski – March 19, 2018) referred to the 90-day time limit as a limitation period citing Justice Perell's court decision:

> [41] On November 1, 2001 (about an month after the expiry of the notice period), an investigator attended at the father's home, where they discovered that the father had a vehicle and that the claimant was a dependent on his father. On December 12, 2001, Liberty sent its notice to Zurich with respect to this priority dispute, which was just a little over two months past the limitation period.

[22] The same description was made by the Arbitrator in *Security National v Intact* (Arbitrator Bialkowski – May 18, 2018):

> [58] Intact advised TD on August 25, 2015 that the Notice of Dispute was received outside of the 90 day limitation period and the accident benefits claim will be closed. TD provided to Intact on January 6, 2014 a Demand to Submit to Arbitration.

[23] Echelon has submitted that other arbitrators have also consistently referred to the s.3 provision as a limitation period. In *Ontario (Finance) v Kingsway* (Arbitrator Densem – January 25, 2012) referred to Justice Perell's superior court reasoning (to be discussed shortly) when interpreting the application of the s.3 limitation period:

> police report. Like this case, the issue for determination was when an OCF 1 application should be considered complete to start the 90 limitation period under 3 (1). As noted by Justice Perell, other cases did not deal with that issue. They were concerned with when something other than an OCF 1 application could trigger the commencement of the 90 limitation period in 3 (1).

[24] In *RSA v Dominion* (Arbitrator Sampliner – July 12, 2017) the arbitrator explicitly cited the Ontario Court of Appeal in *ING v State Farm*, observing that the court in that case resolved the issue of whether a completed application was submitted, and in the course referred to the period as a limitation period:

> form constitutes a "completed application" triggering commencement of the *Regulation's* limitation period, except in rare circumstances.[2]

[25] Echelon has submitted that Ontario courts and justices at the Superior Court level and the Court of Appeal level have also consistently referred to the 90-day time period described in s.3 of O. Reg. 283/95 as a "limitation period".

[26] In *Lombard v Saskatchewan*, 2002 CanLII 28519 (ON SC), Justice Speigel specifically described the 90-day period as a limitation period, when assessing the applicability of the provision:

> [39] I would not allow Lombard to rely on a limitation period for a Notice that should never have been the responsibility of the MVACF or SGI to give. Lombard should have dealt with the claim and given the Notice.

[27] In *Dominion v Certas*, 2009 CanLII 37348 (ON SC) Justice MacDonnell similarly describes the obligations of an arbitrator when considering if the "limitation period set forth in ss.3(1) does not apply":

> [25] In my view, both the arbitrator and Certas misconceive the effect of ss. 3(1) and (2) of the *Priority Regulation*. The *Regulation* does not state "that the Arbitrator must decide if the time for giving notice will be extended". Rather, it provides that in the circumstances set out in ss. 3(2), the 90-day limitation period set forth in ss. 3(1) does not apply. If there is a dispute with respect to whether those circumstances exist, the issue is referred to an arbitrator. When that occurs, the arbitrator is not called upon to exercise a discretion but rather to decide if ss. 3(2) has been complied with. That is, the task of the arbitrator is not to decide whether the 90-day limitation period for disputing priority should be extended but rather whether it applies at all. If the arbitrator decides that ss. 3(2) has been complied with, an insurer may dispute priority, not because the time for so doing has been extended but because no time limit is applicable.

[28] When assessing whether a completed application was submitted to trigger the commencement of the limitation period, in *ING v State Farm*, 2009 CanLII 45850 Justice Strathy repeatedly described the 90-day period as a limitation period:

> [38] I agree with the Arbitrator that it would be ironic and unfortunate if the interpretation of "completed application" under s. 2 of the Regulation, which is intended to encourage good claims-handling, were held to apply to s. 3 of the Regulation, so as to penalize good claims-handling. Yet that would be the effect of the appellant's submission in this case. Should I follow the appellant's submissions, an insurer that makes a prompt and thorough investigation of the claim, or who pays some interim and incontestable expenses, could find the 90-day limitation period triggered even though it has not received an OCF-1 form. That insurer would be in the invidious position of not knowing whether the limitation period had begun to run.

[29] Citing Justice Strathy's decision above, Justice Perell in R. v. Lombard Insurance Co. of Canada 2010 ONSC 1770 (CanLII) had a similar task of assessing the applicability of the 90-day period and the commencement of the limitation period. Justice Perell echoed Justice Strathy's reasoning and came to the same conclusion using the same verbiage:

> [64] This solution provides a consistent interpretation of what amounts to a completed application, namely, an application that completes its purpose of providing the essential information for an insurer to assume its obligations and to exercise its rights. Under this solution, an insurer would not be able to delay making payments if it had sufficient information for that purpose, but paying benefits would not trigger the running of the 90-day limitation period, much in the same way that paying benefits did not trigger the running of the 90-day limitation period in ING Insurance Co. of Canada v. State Farm Insurance Companies.

[30] Similarly, in *Ontario (Finance) v Pilot Insurance*,2010 ONSC 5361 Justice Cummings explicitly referred to s.3 time limits as a limitation period, also citing Justice Perell earlier decision:

> [29] The case law recognizes that receipt of an application may be "functionally adequate" so as to be treated as a "completed application" for the purpose of paying benefits under s. 2 while not being "functionally adequate" so as to be treated as a "completed application" under s. 3 for the purpose of triggering the 90 day limitation period to exercise its legislated rights to determine the priority obligation as between competing insurers.

[31] In *Intact v Federated Insurance Company of Canada*, 2013 ONSC 6868, Justice DiTomaso was asked to consider the applicability of s.3(1) of O. Reg. 283/95. Justice DiTomaso explicitly described the 90-day period found at s.4 of O. Reg. 283/95 as a "limitation period":

> [100] The purpose of *Ontario Regulation* 283/95 is to avoid confusion and prejudice in disputes between insurers. The limitation period found in s.3 of the Regulation was enacted to allow and encourage insurers to deal expeditiously with their disputes.[10]

[32] When assessing the applicability of the saving provision within s.3, Justice Lederer in Ontario (Minister of Finance) v. Echelon, 2018 ONSC 4550 (CanLII) also described the 90-day period as a "limitation".

[33] In *ING v TD Insurance 2010 ONCA559 (CanLII)*, the Ontario Court of Appeal referred to the 90-day period as a "limitation period", confirming Justice Strathy's reasoning from his decision cited earlier:

> [70] I share Strathy J.'s view, expressed at para. 44 of his reasons, that the interests of the insurance industry favour certainty in the meaning of a "completed application" as it is that which triggers the commencement of the limitation period. However, I also agree with Strathy J. when he says that while normally a completed application will mean an application in the OCF-1 form, there will be those "relatively rare cases" in which because of "waiver, estoppel, delay or deflection", an insurer who has not received an OCF-1 form is to be treated as the first insurer for the purposes of s. 2. As I have already explained, the findings of the arbitrator, as affirmed on appeal in the present case, justify treating ING as the first insurer in the present case. Disposition

[34] Although the issue in dispute was whether an insurer may resile from their acceptance of priority, the Ontario Court of Appeal in Ontario (Finance) v. Echelon General Insurance Company 2019 ONCA 629 (CanLII) again referred to the 90-day period in s.3 of O. Reg. 283/95, while describing the circumstances of the argument being put forward, as a limitation period:

[35] Echelon relies heavily on this court's 2002 decision in *West Wawanosh*, which involved whether the limitation period in s. 3(1) of the Regulation could be avoided in light of a subsequent change in jurisprudence interpreting the relevant statutory provisions. Sharpe J.A. stated, at para. 10:

[35] In short, in all of the decisions above referred to me by Echelon, arbitrators and judges have from time to time described the 90-day notice period as a limitation period. As a result, Echelon claims that it would be unreasonable and unfair to interpret the phrase "limitation period" in s.1 of O. Reg. 73/20 in a manner that is inconsistent with all the cases that describe the 90-day notice period as a limitation period. Doing so would fly in the face of sections 64 and 65 of the *Legislation Act*, 2006 which sets out the rule for liberal interpretation.

[36] On the basis of the submissions of both parties it is clear that it is necessary for me to determine whether the 90-day time requirement for notice in s. 3 of *O. Reg. 283/95* is a "limitation period" where time extensions are mandatory or a "step in the proceeding" where time extensions are discretionary. The only jurisprudence dealing with that specific issue in the context of a priority dispute in the Covid era is *Echelon v. Pafco* (Arbitrator Bialkowski – May 15, 2023). In that case, the Arbitrator considered whether the 90-day period prescribed in s.3 was a "limitation period", in assessing the applicability of O. Reg. 73/20. The Arbitrator relied on a 2001 Superior Court decision, which predates all decisions cited above, wherein Justice Nordheimer stated that "the 90-day period would be more accurately described as a notice period and not as a limitation period". The arbitrator concluded that the 90 day notice requirement was a "step in the proceeding" and not a "limitation period" as contemplated in the Covid Limitation Regulation *O.Reg. 73/20.* The arbitrator then went on to exercise his discretion to find that the 90 day period for notice in the priority dispute ought not be extended as the Applicant insurer did not take any reasonable steps to identify another insurer that might stand in priority within the 90 days and in a situation where it was clear that the accident benefit claims of the claimant were being adjusted throughout the period. The priority issue had simply not been identified by the handling adjuster. There was no evidence adduced to demonstrate that Covid restrictions prevented an analysis of the priority issue during the 90-day period.

[37] It must be noted that the Arbitrator in *Echelon v. Pafco (supra)* did not have the benefit of the jurisprudence excerpts as provided by counsel in this proceeding as outlined in paragraphs 18 - 34 above.

[38] There are clearly numerous judicial and arbitral decisions where the 90-day notice requirement has been referred to in passing as a "limitation period". However, the issue in

those cases was not whether the 90-day notice requirement was technically a “limitation period” as opposed to a “procedural deadline or step in the proceeding”. The only arbitral case dealing with that specific issue is that of *Echelon v. Pafco (supra)* where the arbitrator made reference to the only judicial comment where a distinction was made between a “notice period” and a “limitation period”. The Arbitrator relied on the decision of Nordheimer J. in *State Farm Mutual Insurance Company v. Ontario (Minister of Finance) (2001) 53 O.R. (3d) 436* where the court stated that “the 90 day notice period would be more accurately described as a notice period and not as a limitation period”. The issue in that case was not whether the 90 day notice requirement was a limitation period or not, so the comment of Nordheimer J. was obiter but reflective of a view ultimately shared by the arbitrator in *Echelon v. Pafco (supra).* However, the *State Farm v. Ontario (supra)* decision of Nordheimer J. clearly sets out that there should be strict compliance with the notice requirements of s. 3 of *O. Reg. 283/95.*

[39] On the evidence and submissions advanced in this proceeding, I find that the 90-day notice requirement set out in s. 3 of O. Reg. 283/95 was not a “limitation period” but rather a “step in the proceeding”. As a result, the suspension of time is not mandatory but discretionary. In my view, a “limitation period” is the period of time within which an action or proceeding must be commenced. *The Limitations Act 2002*, S. O. 2002, applicable to court proceedings, makes no reference to notice requirements in statutes but simply the time within which an action must be commenced. I am satisfied that the reference to “limitation periods” in the jurisprudence advanced by Echelon in paragraphs 18 through 34 above are references to a limitation period for the provision of notice as opposed to the time within which the claim must be initiated.

[40] I have considered the submission of Echelon that the COVID Limitation Regulation is remedial and should be given a fair, large and liberal interpretation, but that must be weighed against the basic principal of statutory interpretation that words in a statute must be given their ordinary and natural meaning. In this case and in my view, the ordinary meaning of “limitation period” is the time within which an action or proceeding must be commenced. Furthermore, I do not see the 90-day notice period set out in s. 3(1) as a limitation period as there exists the savings provision of s. 3(2) which extends the notice requirement beyond 90 days where it can be demonstrated that 90 days was not sufficient to identify another insurer that might stand in priority and that reasonable investigations were conducted during the 90-day period. Simply not providing notice within 90 days is not necessarily fatal to the claim providing that the requirements of the savings provision are met.

[41] I find support for my finding in the only other priority decision that I am aware of dealing with the impact of *O. Reg. 73/20* on the timelines set out in *O. Reg. 283/95*, namely *Co-operators Insurance Company v. Security National Insurance Company (Arbitrator Samworth - February 7, 2023).* In that proceeding, each insurer accepted that *O. Reg. 73/20* distinguished between a limitation period and a notice period and that the Notice of Dispute would fall within the discretionary suspension. Arbitrator Samworth writes:

> "As I read Regulation 73/20 and particularly section 2, a decision maker was given authority to suspend any period of time within which certain steps or notices should be given or not to suspend it."

[42] I find that the 90-day notice of s. 3 of *O. Reg. 283/95* was not a "limitation period" but rather a "step in the proceeding" therefore governed by discretionary provisions of s. 1(2) of the Covid Limitation Regulation, *O.Reg.73/20.*

[43] I must now deal with s.1(2) of the COVID Limitation Regulation and whether my discretion ought be exercised with respect to the 90-day notice requirement in the case before me. Admittedly, the facts herein are different from the facts in *Echelon v. Pafco (supra).* In that case, the priority issue was not identified at all despite the fact that the OCF-1 indicated that the claimant's marital status was shown on the OCF-1 as "separated". This ought to have raised questions as to whether her spouse had valid automobile insurance, which if it were the case would put such insurer in priority. An investigation into marital status was not conducted until more than 5 months after having received the OCF-1. Simply stated, a priority issue was not identified nor was there any priority investigation conducted during the crucial 90 day period. In the case at hand, Echelon immediately identified a priority issue. The OCF-1 indicated that the claimant was a 19 year old student who had not worked in the 52-week period pre-accident. The "financial dependency" issue was obvious in those circumstances. There is no evidence that Echelon sought additional information as to financial dependency from the claimant or her counsel. Echelon did take steps to complete an EUO of the claimant. Unfortunately, that was not completed until a few days after the expiry of the 90 day notice period. It would appear that Echelon proceeded on the assumption that the *Covid Limitation Regulation* automatically extended the time for the 90 day notice to 90 days beyond September 14, 2020, the day the Covid Limitation Regulation was suspended. However, since that time a number of judicial and arbitral decisions emerged essentially finding that the time for a step in the proceeding ought only be extended on the basis of the *Covid Limitation Regulation* if it could be demonstrated that Covid impacted the parties ability to complete the "step in the

proceeding" in a timely fashion as set out in the legislation applicable to the particular dispute. The decisions dealing with the issue of discretion include:

2092317 Ontario Inc. (c.o.b. Grabba Pizza) 2020 CanLII 73264

Elson v. Polyethics Industries Inc. 2020 ONSC 4335

Bandhu v. Ontario (Minister of the Attorney General) 2021 HRTO 274

Bock v. Madani 2020 ONSC 3756

Jonas et al. v. Elliot et al. 2020 ONCA 542

[44] In the following paragraphs I will summarize the findings in the jurisprudence set out above.

[45] It was affirmed by the Vice-Chair of the Ontario Labour Relations Board in *2092317 Ontario Inc. (c.o.b. Grabba Pizza)* (2020) CanLII 73264 that "the exercise of discretion under O. Reg. 73/20 still must be weighed in the circumstances of each case".

[46] In *Elson v Polyethics Industries Inc 2020 ONSC 4335*, Justice Casullo of the Superior Court declined to allow an extension of time under section 2 for the defendant to deliver its Affidavit of Documents and Schedule "A" productions using the discretion not to allow the suspension of time provided by section 2 of the *Covid Limitation Regulation*. Casullo J. found that there was not sufficient evidence to demonstrate that the pandemic prevented the CEO of the company to attend at their business locations to review files and gather documentation. The continuing operation of the companies was taken into account. Casullo J. noted that "these are challenging times, and we are all adapting to our new normal […] While access to our courts has been circumscribed, the wheels of justice have not ground to a halt. Litigation is not 'on hold,' and litigants are expected to move their matters forward".

[47] In *Bandhu v. Ontario (Ministry of the Solicitor General)* (2021) HRTO 274, the Ontario Human Rights Tribunal refused to allow certain amendments that would be statute-barred by section 45.9(3) of the *Human Rights Code* on the basis of the pandemic or the *Covid Limitation Regulation*. The tribunal reasoned that the applicant "has been actively engaged in litigation during the pandemic" and had "no other information to indicate that he had a pandemic-related need to suspend time limits in the circumstances of this case". As such, the Tribunal exercised its discretion pursuant to s. 2 of the *Covid Limitation Regulation* holding that the late amendment was not allowed as the delay had nothing to do with Covid.

[48] In *Bock v Madani* 2020 ONSC 3756, Justice Bale of the Superior Court exercised his discretion under section 2 of the Covid Limitation Regulation. Notably, Bale J. found that there was "no evidence of any connection between the Covid-19 pandemic and the defendants' default under the mortgage," among other factors considered in whether to allow an ongoing suspension of the period of time in which to provide the defence.

[49] In *Jonas et al. v. Elliot et al 2020 ONCA 542* the Ontario Court of Appeal granted an extension to perfect an appeal where the evidence demonstrated a relationship between the delay and the impact of Covid. Pepall J. stated that in March 2020, due to the COVID-19 emergency, limitation and procedural time limits were suspended. Pepall J. considered the communication issues arising between co-counsel for the moving parties due to challenges associated with the COVID-19 pandemic, limited cellular capacity and Wi-Fi and granted the time extension.

[50] On the basis of this jurisprudence I feel bound that in the absence of evidence that Covid impacted the ability of Echelon to identify a priority issue and provide notice within 90 days, I must conclude that notice was not provided in a timely fashion. As I have indicated, arbitrators and judges have consistently and strictly enforced the 90-day rule. Even if there are equitable circumstances that might warrant an extension in this case, it remains my view that the Court of Appeal in *Kingsway General Insurance company v. West Wawanosh Company (2002) CanLii 14202 (ON CA)* applies even to the unique circumstances of this case and that arbitrators should not look to creative interpretations, carve out judicial exceptions, or look at the equities of particular cases. I am satisfied that in the circumstances of this claim 90 days was not an insufficient period of time to identify another insurer that might stand in priority and that it was unreasonable to not have gathered information as to financial dependency or complete EUO's in that time frame. Accordingly, Echelon has not satisfied the requirements of the savings provision of s. 3(2) of *O. Reg. 283/95* with regard to the 90-day notice. The breach of the s. 3 notice requirements leads to a dismissal of the priority claim.

B.. FAILURE TO COMPLETE ARBITRATION HEARING WITHIN 2 YEARS ISSUE

[51] Zenith claims that the priority claim of Echelon ought be dismissed on the basis that the arbitration hearing itself was not completed within 2 years of the commencement of the arbitration. The Notice of Arbitration was served July 21, 2021. Two years would have the

arbitration hearing having to be completed by July 21, 2023. It has yet to be completed. Section 8(2) of O. Reg. 283/95 – Disputes Between Insurers provides:

> 8(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:
>
> 1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.
>
> 2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.
>
> 3. Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.
>
> 4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.
>
> 5. **Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration. O. Reg. 38/10, s. 9.**
>
> [emphasis mine]

[52] Zenith claims that consent to complete the arbitration hearing beyond 2 years was never provided and that no reasonable explanation has been provided for the delay. Zenith further claims that there is no evidence that Covid was a factor for delaying the time requirement for completion of the arbitration hearing as set out in s. 8(2) of *O. Reg. 283/95.*

[53] In response, Echelon claims that there were legitimate reasons for the delay in moving this arbitration forward. Furthermore, Echelon asserts that Zenith did not communicate the need or its desire to complete the arbitration within 2 years until after the period expired. Echelon claims that Zenith's conduct throughout indicates that it acquiesced to the pace of the proceeding. Echelon claims that any delay has not resulted in any actual prejudice to Zenith. They claim that s. 31 of the Arbitration Act provides the Arbitrator with jurisdiction of extend the timelines set out in s. 8(2) of *O. Reg. 283/95* and that such jurisdiction ought be exercised in the circumstances of this proceeding. Section 31 provides:

> **Application of law and equity**
>
> **31** An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies. 1991, c. 17, s. 31.

[54] There exists several arbitral decisions dealing with the impact of a breach of the timelines set out in s. 8(2) of *O. Reg. 283/95*. In each case, the priority dispute was <u>not</u> dismissed. Zenith has not provided any jurisprudence to the contrary.

[55] In *Unifund v Wawanesa* (Arbitrator Bialkowski – April 8, 2015) made a distinction between the s.8 requirements and the 90-day/one year limitation periods set out in ss. 3(1) and 7(3), respectively. Namely, the latter are substantive requirements, while the former are procedural ones. The Arbitrator decided that the timelines set out in s.8(2) are directory and permissive rather than mandatory.

[56] Arbitrator Novick agreed with the reasoning of Arbitrator Bialkowski in *Pafco v Wawanesa*, (Arbitrator Novick – November 22, 2016) by confirming that the timelines of s 8(2) are procedural rather than substantive and that they are intended to be permissive rather than mandatory. The penalty for non-compliance rests at the discretion of the arbitrator.

[57] The same reasoning was also applied by in *Allstate v Gore Mutual* (Arbitrator Bialkowski – July 24, 2017). Notably, in that case, in the course of granting the relief sought, the Arbitrator specifically referenced that the responding insurer did not provide evidence of "actual prejudice" and proceeded to dismiss the Respondents' motion to dismiss for not having completed the arbitration within the timeline set out in s. 8(2) of *O. Reg 283/95.*

[58] This reasoning was again confirmed by in *MVACF v Jevco* (Arbitrator Bialkowski – June 16, 2017). and further factors were described when considering the relief that ought to be granted for a breach. The Arbitrator set out the following factors that should be considered:

A. Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?

B. Was it practical to complete all necessary steps (production exchange, completion of Examinations Under Oath, obtain satisfaction of undertakings provided, obtain co-operation and production of documents from non-parties, etc.) to be in a position to complete the hearing within two years of the commencement of the arbitration?

C. Did the complexity of the dispute (number of issues, number of parties, involvement of 3rd tier insurers, etc.) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?

D. Has the Respondent been prejudiced by the delay?

E. Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?

F. Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?

G. Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?

[59] I have reviewed the details as to how this arbitration proceeded. Notice to Arbitrate was served on July 22, 2021. By August, Zenith had appointed counsel. It was agreed that an examination under oath (EUO) of the claimant's mother was required to assess financial dependency. Counsel agreed to postpone the appointment of an Arbitrator to avoid triggering the time limits prescribed by s. 8(2) of *O. Reg. 283/95*, namely the conducting a pre-fearing within 120 days. I suspect that it was thought that the expense of an Arbitrator might be avoided if the EUO of the claimant's mother clarified the issue allowing the parties to resolve the priority dispute. There were delays in scheduling the EUO. It was initially arranged for January 5, 2022 but adjourned several times. It was finally set for November 4, 2022 but claimant's mother failed to attend. It was determined that a Summons would be required. The Arbitrator was appointed January 27, 2023. The claimant's mother was served with a Summons. The claimant's mother was unavailable on the date selected and ultimately re-arranged for July 25, 2023. The claimant's mother failed to attend. I do not believe that her examination has yet been completed.

[60] I am satisfied that it was reasonable to initially hold off the appointment of an Arbitrator in hopes of obtaining evidence from the claimant's mother by way of examination under oath that might lead to a resolution of the claim without incurring such cost. On the evidence before me, I am of the view that blame for the delay in obtaining the evidence of the claimant's mother cannot be placed on one party or the other. Much had to do with the lack of co-operation of the mother of the claimant in attending an EUO. In normal circumstances, accountants are not retained to deal with financial dependency until all EUO's have been completed. Furthermore, I cannot help but find that Zenith acquiesced in the pace of the proceeding and did not raise the 2 year issue until the period had passed. Such acquiescence was in my view tantamount to consenting to the pace that the arbitration was proceeding.

[61] I am not satisfied that there was any actual prejudice to Zenith. Zenith claims that it now cannot place any other insurer on notice for this loss should such insurer be identified in the course of this proceeding. In my view, no such prejudice exists as the jurisprudence supports a finding that there is no time limit to adding a 3rd tier insurer to the process. That issue has been dealt with in the following cases:

- *Wawanesa v. Peel Mutual (Arbitrator Samis – January 28 & June 11 2011)*

- *Certas v. Security National (Arbitrator Bialkowski – February 2, 2012)*
- *Economical v. MVACF (Arbitrator Densem – January 7, 2015)*
- *Co-operators v. Perth (Arbitrator Bialkowski – February 3, 2015)*
- *Allstate v. State Farm (Arbitrator Bialkowski – December 19, 2016)*
- *Scottish & York v. Zurich (Arbitrator Bialkowski – October 1, 2019)*

[62] Therefore, if Echelon should identify another insurer that might stand in priority it will not be barred from involving such 3rd tier insurer in the present dispute.

[63] As for Zenith's contention that here was prejudice in Echelon's failure to provide log notes or investigation file, I find that no such prejudice exists as there has never been a motion for productions.

[64] Although the arbitration hearing was not completed within 2 years of the commencement of the arbitration, the circumstances set out above call for the exercise of the discretion provided by s. 31 of the *Arbitration Act* and a finding that the arbitration ought proceed had it not been for Echelon's failure to provide a Notice of Dispute within 90 days of having received a completed application for accident benefits from the claimant.

ORDER

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

1. The priority claim of Echelon be dismissed;

The parties are to provide costs submissions by email within 10 days of the Order herein.

DATED at TORONTO this 15th)
day of February , 2024.)

KENNETH J. BIALKOWSKI
Arbitrator