

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8 as amended  
AND IN THE MATTER OF Ontario Regulation 283/95 as amended  
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17 as amended  
AND IN THE MATTER OF an arbitration:

BETWEEN:

Echelon Insurance

Applicant

and

Federated Insurance Company of Canada

Respondent

### **AWARD**

#### **COUNSEL**

Dilenth Warakulle, counsel for the Respondent, Federated Insurance Company of Canada (Applicant in this proceeding) (hereinafter referred to as "Federated").

Daniel Strigberger, counsel for the Applicant Echelon Insurance (Respondent in this proceeding) (hereinafter referred to as "Echelon").

#### **INTRODUCTION**

This matter comes before me pursuant to the *Arbitration Act* 1991 to arbitrate a dispute between two insurers with respect to a priority matter pursuant to s. 268 of the *Insurance Act* and Regulation 283/95 as amended.

The parties have advised that prior to proceeding with the actual priority dispute, there was a preliminary matter that needed to be determined.

In a nutshell, the preliminary issue is whether or not Echelon has met the 90 day notice requirement set out in Regulation 3(1) of Ontario Regulation 283/95 by reason of the *COVID Limitation Regulation*, Ontario Regulation 73/20 (hereinafter referred to as the "Emergency Order").

This case involves a motor vehicle accident that occurred on July 21, 2020. Under Regulation 283/95 the 90 day notice required Echelon to provide the Notice of Dispute Between Insurers to Federated by November 10, 2020. The Notice of Dispute was not served until December 12, 2020. Echelon relies on the suspension of time under the Emergency Order, sections 1 and 2.

Federated seeks that the arbitration be dismissed on the grounds that notice was not provided within the 90 days as required under Regulation 283/95, s. 3(1).

## PROCEEDINGS

This matter proceeded based on written submissions as well as oral submissions. There was no oral evidence. The parties filed various Books of Documents which included:

- A transcript of the examination under oath of the claimant dated December 30, 2020
- The examination under oath of a representative of Crawford (independent adjusting company) dated March 26, 2025
- The Application for Accident Benefits dated August 6, 2020
- Various log notes from Crawford & Co. together with various emails and letters,
- The Notice to Applicant of Dispute Between Insurers dated December 11, 2020.
- Echelon, in their additional documents, also filed numerous notices from the Government of Ontario with respect to COVID-related measures including various news releases, copies of orders in counsel, all from 2020.

## FACTS

While there was no agreed Statement of Facts, the facts are not in dispute. On March 17, 2020, Premier Doug Ford declared a state of emergency for the province of Ontario under the *Emergency Management and Civil Protection Act*. This was to prevent the spread of COVID-19 and resulted in the closing of various establishments and prohibitions on community gatherings, whether public or private. This state of emergency was extended over various times.

On March 20, 2020 Ontario Regulation 73/20 was passed which suspended limitation periods and various provisions in a statute, regulation or bylaw, which set out a period of time within which certain steps must be taken in proceedings in Ontario.

The motor vehicle accident in this case occurred on July 21, 2020, early on in the COVID pandemic. The claimant was riding an uninsured motorcycle (a 2018 Yamaha) which he did not own.

The claimant applied to Echelon for statutory accident benefits. Echelon insured a 2019 Ford Ranger pickup truck.

The OCF-1 was dated August 6, 2020 and was received by Echelon on August 13, 2020.

Echelon retained Crawford & Co., an independent adjusting firm, to manage this claim on their behalf. Crawford was retained on August 14, 2020.

There is no dispute that at the time of the accident, the claimant was employed with a company called Crystal Mechanical. Crystal Mechanical had a fleet policy with Federated Insurance. The claimant was a listed driver on the Federated policy. The name insured on the Federated policy

was the claimant's uncle who the claimant confirmed in his EUO was his employer and he had been so employed with him for some five to six years prior to the accident.

The OCF-1 indicates that the claimant is pursuing a claim under his own policy. There is no reference to any other policies of insurance being available. However, he does confirm that he is employed and working with Crystal Mechanical as a plumber.

The Crawford adjuster arranged for an Autoplus to be completed. The Autoplus was received by Crawford on August 18 and clearly indicated potential coverage for the claimant as a listed driver under a valid Federated policy.

The Crawford adjuster was given approval on October 1 by Echelon to have an EUO conducted. That EUO in fact did not take place until December 30, 2020.

The Crawford adjuster sought information to confirm the claimant's employment and his earnings. On October 2, 2020 she received paystubs which confirmed employment and earnings with Crystal Mechanical from May 28 to June 18, 2020.

Absent any argument with respect to the COVID Emergency Order, Echelon had until November 10, 2020, to serve the Notice to Applicant of Dispute Between Insurers.

On December 11, 2020 the Crawford adjuster contacted the employer to confirm information with respect to the claimant. On that same day she also contacted Federated to confirm that the claimant was a listed driver under that policy.

The Notice of Dispute was served by Crawford on behalf of Echelon on Federated on December 11, 2020.

If one relies on the suspension of time under s. 2 of the COVID Emergency Order, Echelon would have until December 12, 2020 to serve the Notice of Dispute.

In her EUO, the Crawford adjuster confirmed that the Autoplus received on August 18 provided the information that the claimant was a listed driver under the Federated policy. When asked why she did not put Federated on notice at that time, she answered that "because at that point we do not necessarily put policies on notice within the first couple of days of getting a claim, we still investigate the claim to determine if there are any other policies because if they are ...".

She goes on further to explain that if there are any other insurers that may be put on notice as a result of further investigation, they want to include everyone when the Notice of Dispute goes out. She stated, "we don't send out multiple notices and we ... take our time to do more of an investigation, not just based on one document received".

The Crawford adjuster also gave evidence on her EUO that on September 22, 2020 she received an email from someone at Crawford which stated:

"Priority search re COVID-19 EXT for Priority Deadline frozen from March 16, 2020 retroactively until September 14, 2020."

The Crawford adjuster indicated that she understood this to mean that the 90 day clock under Regulation 283/95 was extended until September 14, 2020.

Her evidence on this point was "We were of the understanding that the limitation periods and deadlines extended due to the Emergency Act."

The Crawford adjuster also gave evidence that she knew that she had until mid-December, based on this extension, to provide the Notice of Dispute. That is the reason that she did not put Federated on notice at any earlier time. She stated that the delay between August 18, 2020 and December 11, 2020 (the day she called the employer) did not have anything to do with the COVID pandemic itself aside from the extension under the Emergency Order.

A Crawford log note was produced dated December 11, 2020. The log note is from the Crawford adjuster and notes:

"90 day deadline was November 10, 2020, without considering the extension for the COVID-19 emergency order, however emergency order froze priority timeline from March 16, 2020 to September 14, 2020. Deadline with extension is December 12, 2020."

The log note then goes on to indicate that "NOD referred to Federated on December 11, 2020".

Included in the materials was a letter from Crawford to Federated and the claimant's counsel dated December 11, 2020 enclosing the Notice of Dispute between insurers. This was faxed at 3:46 p.m. on December 11.

## **RELEVANT LEGISLATION**

Before turning to the parties' submissions, it is helpful to set out the regulatory provisions that the parties rely upon for their respective positions.

Section 3(1) of Regulation 283/95 sets out that no insurer can commence an arbitration with respect to priority without first notifying the other insurer of its intention within 90 days of receiving a completed Application for Accident Benefits. This is subject to saving provisions set out in s. 3(2). These provisions are set out below:

"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 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."

Also relevant is the time period set out under Regulation 283/95 when an insurer must serve or commence its arbitration. Section 7(3) of that regulation is set out below:

- "(3) The arbitration may be initiated by an insurer or by the insured no later than one year after the day the insurer paying benefits first gives notice under section 3."

I now turn to the Emergency Order:Ontario Regulation 73/20. It provides the following.

### **Limitation Periods**

- "1. Any provision of any statute, regulation, rule, bylaw 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.
- 2. Any provision of any statute, regulation, rule, bylaw 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 March 16, 2020."

## **SUBMISSIONS OF THE PARTIES**

### **Federated**

Federated submits that the 90 day notice period expired on November 10, 2020. Service of the Notice of Dispute on December 11, 2020 is outside the 90 day period and therefore Echelon has lost its right to pursue its priority dispute against Federated.

Federated argues that the only reason that the Notice of Dispute was issued after November 10, 2020 is because Crawford believed that the 90 day period had been extended under Regulation

73/20 during the pandemic. Federated points to the fact that the adjuster for Crawford acknowledged that there were no pandemic-related issues that prevented Crawford from issuing the notice. Crawford had in its possession, long before November 10, the necessary information in order to put Federated on notice (the Autoplus and paystubs) and that there was nothing with respect to the pandemic (inability to go to the office, business closed, employees sick, etc.) that prevented Crawford from serving the Notice of Dispute.

While Federated accepts that 2020 was a challenging time due to Covid, it also submits that there is case law to support that just because there were challenging times does not mean that litigation would grind to a halt and that litigants were not expected to move their matters forward (See *Elson v. Polyethics Industries Inc.*, 2020, Ontario SC 4335 and *Co-operators Insurance Company v. Security National Insurance Company*, Arbitrator Samworth, February 7, 2023).

The Federated argument boils down to three main issues:

1. The notice period under 3(1) of Regulation 283/95 is not a "limitation period" and therefore s. 1 of the Emergency Order does not apply to Echelon. Federated acknowledges that if the notice period is a limitation, then s. 1 would be applicable and the notice would have been served in time.
2. The applicable section under the Emergency Order is s. 2. Federated submits that the notice requirements under s. 3(1) of Regulation 283/95 are "a step in the proceeding". Federated submits that I should exercise my discretion and lift the suspension.
3. If s. 2 of the Emergency Order applies as this is a step in the proceeding, then Federated submits that Echelon must establish that the reason for not serving the Notice of Dispute was due to COVID-related matters. In other words, due to COVID Echelon was unable to serve the Notice of Dispute within the timelines. Absent proof that it is a COVID-related inability to serve the Notice of Dispute within the 90 days, then the exercise of my discretion should be in favour of Federated.

#### 1. **The 90 day notice period is not a limitation period**

Federated submits that a plain reading of s. 3(1) of Regulation 283/95 establishes that the 90 days is a notice period and not a "limitation period". It sets up a condition precedent to pursuing a priority dispute that makes no reference to commencing a proceeding and does not establish a timeline for commencing a proceeding. That in fact is established under s. 7.

Federated also submits that s. 3(1) must be read together with 3 (2) of the priority regulation. The latter functions as a saving provision and allows an insurer to serve notice more than 90 days where they can establish that the 90 day period was insufficient to carry out a reasonable investigation into priority and that a reasonable investigation was undergone within the 90 day period.

Federated submits that the combination of these two sections establishes that the 90 day notice period is not a limitation because it does not constitute an absolute bar for proceeding with the priority dispute. Federated relies on the Court of Appeal decision in *Bannon v. Thunder Bay (City)*, 2000 CanLII 5708. Federated points to the fact that the court in that case held that a notice period that established a bar to the action was akin to a limitation period. Federated submits that there as there is a saving provision under s. 3(2) that the failure to serve within 90 days is not an absolute bar.

Federated also relies on the decision of Justice Nordheimer then of the Superior Court in his decision *State Farm Mutual Automobile Insurance Company v. Ontario (Minister of Finance)*, 2001 53 O.R. (3d) 436. Federated points to paragraph 12 of the Decision where Justice Nordheimer stated:

"The 90 day period would be more accurately described as a notice period and not as a limitation period. "

Federated also points to the line of cases including *Kingsway General Insurance Company v West Wawanosh Insurance Company*, 2002 58 O.R. (3d) 251 where the courts have noted that the parties to priority disputes are sophisticated and experienced and that there is little room for creative interpretation of the priority regulations. In the *West Wawanosh* case Federated also points to the fact that the Court of Appeal referred to the 90 day period as a notice period and not a limitation period.

Lastly on this point, Federated relies on two decisions from Arbitrator Bialkowski where he concluded that the 90 day notice period under 3(1) was not a limitation period and therefore s. 1 of the Emergency Order was not applicable but rather s. 2 was (see *Echelon v. Zenith*, Arbitrator Bialkowski, February 15, 2024 and *Echelon Insurance v. Pafco Insurance*, Arbitrator Bialkowski, May 15, 2023).

## **2. Exercising discretion under s. 2 of COVID Emergency Order**

In argument, Federated conceded that s. 2 of the Emergency Order provides an arbitrator with the right to exercise their discretion to either maintain the mandatory suspension of time set out under s. 2 or to lift the suspension.

Federated submits that in this case I should lift the mandatory suspension as Echelon has not provided the necessary evidence to establish that the failure to serve the notice within the relevant time period flowed from COVID-related matters.

On this issue, Federated again relies on *Kingsway v. West Wawanosh* pointing out that I should avoid exercising any general discretion to grant relief from an adherence to the 90 day notice rule. The courts have pointed out that this should be strictly interpreted as insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records.

Federated also relies on the decision of Justice Ducharme in *Primum Insurance Company v. Aviva Insurance Company of Canada*, 2005 CanLII 11975. Justice Ducharme directed in that case that the parties should be held to a strict compliance with respect to the requirements of Regulation 283/95. As sophisticated and experienced participants in the insurance industry, insurers can assume and rely on strict compliance with the 90 day rule.

Federated points out that in this case Echelon is not arguing that the 90 day notice period was insufficient for it to take the necessary steps to conduct an investigation into priority. In other words, Echelon is not relying on s. 3(2) of Regulation 283/95: the saving provisions.

Further, Federated points out Echelon is not arguing that there was anything specific about the COVID pandemic between August of 2020 and December of 2020 that prevented it taking the necessary steps to conduct its investigation and serve its Notice of Dispute before November 10, 2020. Rather, it simply relies on the fact that Crawford was operating on the assumption and belief that the notice period had been suspended based on the Emergency Order and that is reason enough to support its position that the suspension of time should not be lifted.

In support of their position that this is simply not enough, Federated again relies on the two decisions of Arbitrator Bialkowski referred to above. Arbitrator Bialkowski in those cases agrees to lift the mandatory suspension under s. 2 and found that the insurer had failed to serve the Notice of Dispute within the required 90 days.

In both cases Arbitrator Bialkowski concluded that in order for the mandatory suspension to be maintained under s. 2, there must be evidence that the reason for the delay in serving the notice was due to COVID-related matters.

Arbitrator Bialkowski rejected what he described as a general argument that the pandemic was a chaotic or challenging time and that that should be sufficient for him to maintain the mandatory stay. Arbitrator Bialkowski described these as "a series of bald and general allegations that the pandemic was 'chaos' or challenging or 'difficult' or hard or resulted in issues." Arbitrator Bialkowski found more is required to maintain the stay.

Federated also relied on a series of decisions (unrelated to priority disputes) that Arbitrator Bialkowski had also considered. In each of these the court or tribunal found that a step in the proceeding should stay suspended if it could be demonstrated that COVID impacted the party's ability to complete the step in a proceeding in a timely fashion. Those cases are set out below:

- *2092317 Ontario Inc. (c.o.b. Grab A Pizza)*, 2020 CanLII 73264
- *Elson v. Polyethics Industries Inc.*, *supra*
- *Bandhu v. Ontario (Solicitor General)*, 2021 HRT0 274
- *Bock v. Madani*, 2020 ONSC 3756
- *Jonas et al. v. Elliot et al.*, 2020 ONCA 542

Federated says that Echelon had sufficient information to place another insurer on notice and possessed the experience, knowledge and resources necessary to understand the distinction between a notice period and a limitation period and to act accordingly, and failed to do so. Federated requests that I find that:

1. Echelon did not meet its notice obligations under s. 3(1) of Regulation 283/95;
2. Section 3(1) of Regulation 283/95 does not establish a "limitation period" and that the notice period was therefore not caught by s. 2 of Regulation 73/20; and
3. Echelon did not make reasonable investigations necessary to determine another insurer was liable within the 90 day notice period and its investigation was not impeded by the COVID-19 pandemic and therefore I should exercise my discretion pursuant to s. 2 of Regulation 73/20 to lift the mandatory suspension of the 90 day notice.

### **Echelon**

Echelon takes the following position with respect to this matter:

1. The notice period in s. 3(1) of Regulation 283/95 is a limitation period and therefore s. 1 of the Emergency Order should apply and the arbitrator has no discretion to lift the stay;
2. If the notice period is not a limitation period but a step in the proceeding, I should then exercise my discretion under s. 2 of Regulation 73/20 and not lift the mandatory stay and leave the 90 day time period suspended, thus allowing Echelon to pursue priority against Federated.

Echelon submits that one has to look at this case in context. On March 17, 2020 a state of emergency was declared. The Emergency Order was extended on numerous occasions in April, May, June and July of 2020. Although the province was undergoing a reopening in the third quarter of 2020, on December 21, 2020 the Ontario government implemented a further province-wide shutdown and restrictions came back into effect.

It was in the context of this background that Regulation 73/20 was issued on March 20, 2020 to temporarily suspend limitation periods and notice periods retroactively to March 16, 2020. Echelon submits that the suspension of limitation periods and notice periods was unprecedented and there is little or no case law in the past to assist in interpreting how the Emergency Order was intended to be applied.

#### **1. Is the 90 day notice a limitation period?**

Echelon submits that the 90 day notice period under s. 3(1) of Regulation 283/95 is in fact a limitation period and falls within s. 1 of the Emergency Order. Echelon submits in interpreting the meaning of a limitation period under s. 1 of Regulation 73/20 one must use applicable statutory

interpretation principles as set out in s. 64 of the *Legislation Act* 2002. This requires one to look at the legislation and interpret it as remedial and give it fair, large and liberal interpretation as best ensures the attainment of its objects.

Echelon submits the term limitation period should be interpreted within its full context using the ordinary and grammatical meaning that aligns with the structure, purpose and intent of Parliament. Therefore I should avoid a strict, narrow and technical interpretation of the term limitation period keeping in mind that the purpose of the COVID Emergency Order was to keep people at home and slow the spread of COVID by closing non-essential workplaces and restricting social gatherings.

Echelon's first argument relies on the Court of Appeal's decision in *Bannon v. Thunder Bay (City)* (*supra*). There the Ontario Court of Appeal described a similar notice under the *Municipal Act* to be a "limitation period within a limitation period". Echelon relies on the following extract from *Bannon*:

"The notice requirement in section 284(5) is not, strictly speaking, a limitation period. The limitation period (three months) is found in section 284(2) of the Act. The notice requirement is however akin to a limitation period in that failure to comply with the section constitutes a bar to the action just as failure to commence the action within the limitation period constitutes a bar. The notice requirement also promotes the same interests served by limitation periods. It prompts the plaintiff to pursue the claim diligently, affords the defendant an opportunity to make time in the investigation of the incident giving rise to the action and allows the defendant to proceed with its affairs secure in the knowledge that it will not face claims for which notice was not given as required by the statute ... A statutory provision requiring notice of the claim has aptly been described as 'a limitation period within a limitation period'."

Echelon submits that the notice period under Regulation 283/95 is similar to that under the *Municipal Act* and I should consider it as "a limitation period within a limitation period" such that s. 1 of the Emergency Order should apply.

Echelon submits that the 90 day notice under Ontario Regulation 283/95 does bar an otherwise meritorious priority dispute of proceeding forward if notice is not given within the 90 day period.

Echelon also submits that the term "limitation period" is not a defined term. Echelon suggests that I should consider how the 90 day notice deadline under Regulation 283/95 has traditionally been described by arbitrators and judges. Echelon, in its Book of Authorities, submitted numerous cases wherein courts or arbitrators have referred to the 90 day notice period as a "90 day limitation". For example:

- *Allstate Insurance Company of Canada v. Belair Insurance Company*, Arbitrator Bialkowski, April 25, 2013
- Arbitrator Densem in *Ontario (Finance) v. Kingsway General Insurance Company*, January

25, 2012

- Justice Speigel in *Lombard Canada Inc. v. Saskatchewan Government Insurance*, 2002 CanLII 28519
- Justice MacDonnell in *Dominion of Canada General Insurance Company v. Certas Direct Insurance Company*, 2009 CanLII 37348. There were many other examples provided by Echelon.

Echelon argues that routinely courts and arbitrators have referred to the 90 day notice period as a limitation period and that I should accept that description as an implicit recognition that it was not a step in a proceeding but rather a limitation period.

Echelon also addressed the two cases of Arbitrator Bialkowski: *Echelon v. Pafco (supra)* and *Echelon v. Zenith (supra)*. With respect to the *Echelon v. Zenith* case, Echelon advises that that matter is under appeal.

Not surprisingly, Echelon argues that I should not follow Arbitrator Bialkowski's finding in those cases that the notice period under Regulation 283/95 is not a limitation period.

Echelon submits that in Arbitrator Bialkowski's first decision, *Echelon v. Pafco*, the arbitrator relied on Justice Nordheimer's decision in *State Farm v. Ontario (supra)* and that the sections relied upon were obiter as Justice Nordheimer was not being asked to determine whether the notice period was a limitation period. With respect to both decisions, Echelon submits that Arbitrator Bialkowski failed to conduct or engage in any purposeful or contextual analysis of whether s. 1 of Regulation 73/20 froze the 90 day clock. Rather, he applied a very technical meaning to the term limitation period without any contextual analysis, thus the reason for the appeal.

Echelon submits that if you do a contextual and purposeful analysis, one would conclude that a freeze on the 90 day notice period, based on it being a limitation period, was a reasonable mechanism to achieve a specific outcome. That is to have as many people stay home as possible without risking the adverse impacts of a missed limitation. In the context of s. 3 of Regulation 283/95, Echelon submits it would make sense that the legislator froze the 90 day notice to give the insurance industry time to adjust to the new reality of investigating priority during COVID lockdowns or to avoid scheduling in-person meetings to investigate priority.

Echelon therefore asks that I find that the 90 day notice period is in fact a limitation period and Echelon can avail itself of the stay under s. 1 of the Emergency Order.

## **2. Should the arbitrator exercise their discretion under s. 2 and decline to lift the mandatory stay?**

Echelon's submission is that the facts of this case do not support any justification or rationale for the arbitrator to exercise their discretion and to lift the mandatory stay resulting in Echelon to be unable to continue with this priority dispute.

Echelon submits that this case is not about whether Echelon could have or should have done a better investigation of priority or whether their investigation into priority was reasonable. Echelon submits that the notice period was frozen and that Echelon had no statutory obligation to serve its Notice of Dispute before December 12.

Echelon argues that it was not unreasonable for Crawford and Echelon to believe that the 90 day period was frozen and that there was no obligation to serve the notice prior to December 12. In their Book of Documents, Echelon included an article entitled "COVID-19 Ontario Suspends Limitation Periods and Procedural Deadlines." The article is dated March 22, 2020 and was written by Guneev Bahinder and W. Brad Hanna (McMillan). This article appears to be posted on their website.

In the article, the authors note that the Emergency Order does not provide any discretion with respect to the limitation period suspension but the suspension of procedural deadlines is subject to the discretion of the court, tribunal or decision-maker. They state, "Despite this discretion, procedural deadlines should be considered suspended, unless otherwise directed."

They go on to say, "Parties are also temporarily relieved from complying with procedural deadlines as stipulated in legislation such as the Rules of Civil Procedure unless ordered otherwise. For instance, if a party was served with a claim on March 10, 2020 the 20 day period for the delivery of the Statement of Defence stopped running on March 16, 2020."

Mr. Strigberger also points to an article he himself wrote called "Hickory Dickory Dock COVID-19 Stopped Our Clock". This was with respect to loss transfer and priority disputes dated March 23, 2020. Mr. Strigberger noted in that article that if an insurer received a completed Application for Accident Benefits on or after March 16, 2020, that the 90 day notice deadline under s. 3 of Regulation 283/95 is suspended.

Lastly, Echelon enclosed an article from the law firm Aird Berlis dated June 8, 2020 entitled "What's My Limitation Period Again? Update on the Suspension of Limitation and Time Periods During the COVID-19 Crisis." This article was written by Dillon Collett and John George Pappas. In this article, the authors suggest that the practical effect of the Emergency Order on time periods is similar to the impact on limitation periods, namely the remaining number of days left to run in a time period that began before March 16, 2020 will pause and recommence once the declared emergency has ended or the order expired. Likewise, a time period that would ordinarily begin running based on an event or condition that occurred after March 16, 2020 will not begin to run until the declared emergency has ended or the order expired.

The authors note that the ordered suspension of time periods and proceedings is subject to the discretion of the court, tribunal or decision-maker responsible for the proceeding. They give an example. The Ontario Labour Relations Board provided a notice to the community indicating that it would exercise its discretion not to suspend the time periods applicable to its own proceedings. The authors noted that likewise a judge seized of a matter may require a party to adhere to a procedural timetable. Therefore, the article suggests that lawyers who have pre-trials, case

conferences or hearings coming up should be prepared to explain to the court why COVID has prevented them from fulfilling their obligations.

Echelon submits that considering the above and the requirement to give remedial and liberal interpretation to regulations, that it was not unreasonable for Crawford and Echelon to believe that the 90 day period was frozen and that there was no obligation for them to serve the notice of dispute prior to December 12 due to the mandatory suspension of the notice period under s. 2 of the Emergency Order.

Echelon notes that the Labour Relations Board specifically chose to exercise their discretion and not rely on the mandatory suspension but FSRA, who is responsible for automobile insurance and its regulations, and the Licence Appeal Tribunal did not issue such a notice. Therefore, prior to the sending out of their notice in this case, there was no proceeding nor any tribunal that had directed the insurers with respect to priority or loss transfer cases that the mandatory suspension under s. 2 would be lifted.

Echelon submits that an arbitrator exercising their discretion under s. 2 of this regulation should not be contingent on whether COVID actually delayed Echelon's notice, but rather based on the broader contextual understanding of the time period and the unprecedented impact of COVID. The regulation specifically set out a mandatory suspension for steps in the proceeding and Echelon was entitled to rely upon that, as was Crawford, and to now penalize an insurer who acted prudently, cautiously and in accordance with the law would be inequitable and unfair.

### **ANALYSIS AND DECISION**

#### **(a) Is the 90 day notice under s. 3(1) of Regulation 283/95 a "limitation period"?**

I agree with Arbitrator Bialkowski that the 90 day notice period under s. 3(1) of Regulation 283/95 is not a limitation period even if it is similar to one.

I carefully reviewed all of the decisions referred to by Echelon where judges and arbitrators have from time to time referred to the 90 day notice period as a limitation period. I note, as did Arbitrator Bialkowski, that none of those decisions when reviewed in detail actually involved a requirement that the court or arbitrator decide whether or not the notice period was a limitation period. Rather, they were using that terminology in the context of some other dispute and seemed to use the terms interchangeably. Federated submitted cases where only the term notice was used. I find there is no conclusion that can be drawn from these decisions that assists in judicial or arbitral direction as to whether the notice period is a limitation period.

The two helpful decisions are Arbitrator Bialkowski's in *Echelon v. Pafco (supra)* and *Echelon v. Zenith (supra)*.

I find that the comments of Justice Nordheimer in *State Farm v. Ontario (supra)* to be helpful. While his comments were obiter, I agree with Arbitrator Bialkowski that his comments that "the

90 day notice period would be more accurately described as a notice period and not as a limitation period" to be instructive although not definitive on the issue.

I have also carefully reviewed the decision of the Court of Appeal in *Bannon v. Thunder Bay (supra)* relied on by both parties. That case involved a plaintiff bringing a claim against the City alleging they had slipped and fallen as a result of the negligence of the City in maintaining sidewalks. While the plaintiff in that case brought their action within the required three months under the *Municipal Act*, the plaintiff had not given the required seven days' notice. It is important to note that the seven days' notice under the *Municipal Act* is absolute and that there are no saving provisions as there are under section 3 of Regulation 283/95. The court says that the notice requirement is not strictly speaking a limitation period. Rather, a three month limitation period is found in a different section. However the notice period is described as "akin to a limitation period" as failure to comply with the section constitutes a bar to the action just as failure to commence the action within the limitation period constitutes a bar. The court describes the statutory provision as a "limitation period within a limitation period".

Federated relies on this case in support of their position that the notice period under the priority regulation is not absolute and therefore cannot be compared to that under the *Municipal Act*. Echelon relies on it as supporting its position that if a notice period is akin to a limitation period (a limitation period within a limitation period), then it should be read together as constituting a limitation period.

I find that Court of Appeal case distinguishable from the one before me. Clearly the notice provision in the *Municipal Act* was an absolute bar to the claimant having the right to bring her action. In fact, the court points out the apparent unfairness of an absolute bar when there were clear explanations as to why the plaintiff had been unable to serve her notice within that seven days. However, the *Municipal Act* did not speak to any saving provisions. If you did not provide notice within seven days, you were out.

Under Regulation 283/95 there are saving provisions. While failure to provide notice can be a bar to bringing an action, the insurer does have the right to seek to "save itself" by showing that 90 days was not a reasonable time period to investigate and identify another insurer and also to support that by showing that they did conduct a reasonable investigation within that timeframe. Therefore the 90 day notice period does not act like a limitation period as it is not an absolute bar to being able to proceed.

I agree with Arbitrator Bialkowski and specifically his findings in the *Echelon v. Zenith* case that the s. 3 notice period is not a limitation period but rather a "step in the proceeding". Therefore, I find that s. 1 of the Emergency Order does not apply to the circumstances of this case or to the notice period under s. 3 of the priority regulation as it only applies to limitation periods.

I find that the 90 day notice is a step in the proceeding and that s. 2 of the Emergency Order is applicable.

In doing so, I have considered the submissions of Echelon that the COVID Emergency Order should

be given a fair, large and liberal interpretation as it is remedial in nature. However, I agree with Arbitrator Bialkowski where he noted that the fair and liberal interpretation must be weighed against the basic principles of statutory interpretation and that the words must be given their ordinary and natural meaning. In my view, a limitation period is not one where a failure to provide notice within 90 days is not necessarily fatal to the claim providing the saving provisions under s. 3(2) are met.

**2. Should I exercise my discretion and decline to lift the stay under s. 2 of the Emergency Order?**

With respect to this issue I part from Arbitrator Bialkowski and follow my own path in my interpretation of this regulation and what is required to be shown in order to exercise my discretion.

Most importantly, s. 2 of the Emergency Order provides:

"Any step must be taken in any proceeding in Ontario, including any intended proceedings, **shall**, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended."

I interpret this section as establishing that any step in any proceeding which would include the 90 day notice under the priority regulation is suspended from March 16, 2020 to September 14, 2020 unless the court or tribunal or other decision-maker responsible for the proceeding chooses to exercise their discretion to remove the suspension. Therefore, unless I choose to exercise my discretion to lift the suspension, it remains in place on a mandatory basis pursuant to s. 2.

Much of the submissions before me suggested that my discretion was to impose the stay as opposed to lifting the stay. I do not read the section in that fashion. This is an important interpretive issue. It means that anybody reading s. 2 on a plain language interpretation would assume that any step in a proceeding was stayed during the relevant time period unless somebody applied or chose to lift it.

I therefore find that it was perfectly reasonable for Echelon and Crawford, based on a reading of this section, to assume in this particular case that absent any such order or directive from a tribunal or otherwise, that they had until December 12, 2020 to serve the Notice of Dispute.

There is no dispute that neither the government, FSRA, nor the Licence Appeal Tribunal nor any other tribunal issued a notice like the Labour Relations Board did to give notice to stakeholders or users of the system that s. 2 of the Emergency Order would not be relied upon and that a discretion was being exercised to lift the otherwise mandatory stay. Again, this means that Echelon and Crawford, up until December 12, 2020, had every reason to believe that the requirement to serve the 90 day notice in this case was stayed or suspended in accordance with s. 2 of the Emergency Order.

Echelon has been very clear in its submissions that it is not taking the position that they were

unable to complete their investigations within a certain time period due to COVID, such as an inability to get information due to office closures. They have been quite clear that the only reason they did not serve their Notice of Dispute on November 10 was their belief that that notice period was stayed.

This is made clear by the evidence of the Crawford representative at her EUO and the log notes from Crawford reflecting the directive that they received about the 90 day limitation period in September of 2020 and the calculations that the adjuster herself did assuming that the extension of time was applicable to their case.

Arbitrator Bialkowski in his decisions of *Echelon v. Pafco (supra)* and *Echelon v. Zenith (supra)* focused on the reasons that the insurer gave for their failure to serve notice within the 90 day time period and their reliance on s. 2 of the Emergency Order. This focused on whether the failure to do so was purely related to COVID or not. Arbitrator Bialkowski found in each case that there was insufficient evidence before him to suggest the delay was "due to COVID" and therefore he exercised his discretion to lift the stay which then resulted in the insurer being unable to proceed with their priority dispute.

I do not agree with Arbitrator Bialkowski that there is some requirement for me to exercise my discretion that the "delay" in serving the notice was because of some COVID-related inability to investigate or serve the notice.

I note that the cases relied upon by Arbitrator Bialkowski were all 2020 cases (with the exception of one which was from early 2021). All these 2020 cases dealt with proceedings that were ongoing at the time that the Emergency Order was in place. In each case, somebody sought permission from the court or the tribunal to lift the mandatory stay with respect to the steps in the proceedings so that they could move forward with the litigation. These were in proceedings that were already in existence. Notice was given to the other party in each case that there was going to be a request that the non-COVID timelines were going to be relied upon. In the context of that, the court and tribunals heard evidence as to whether the responding party had an inability to follow the otherwise mandated timelines because of COVID-related issues. For example, could somebody prepare their Affidavit of Documents and serve it within the time required under the rules. There was no evidence that COVID prevented the person from collecting the documents, signing the documents or sending the Affidavit of Documents and accordingly the court ordered that the regular timeframe for that step in the proceedings be maintained.

I find the context of this priority dispute to be quite different. I set out below my summary of some of these of these s. 2 Emergency Order cases to outline the distinguishing features:

1. *Elson v. Polytechnics*: This was argued in writing on July 14, 2020. The plaintiff was asking the court to exercise its discretion under s. 2 of Regulation 73/20 and order the defendant to deliver its Affidavit of Documents and Schedule A productions. The court noted the defendant has been continuing operating throughout the emergency as it is an essential business. There was nothing in the material to suggest that arrangements could be made

safely for the CEO to attend and review files, gather documentation and sign the affidavit. The court found that litigation was not on hold and in the spirit of co-operation they should move the matter forward and the court exercised their discretion under the regulation.

2. Ontario Labour Relations Board, *2092317 operating as Grab A Pizza*: In this case it is important to note that it is the Ontario Relations Board who exercised its discretion in advance and by notice to the community on March 23, 2020 that the board was choosing not to suspend the time period for which steps must be taken in its proceedings. This decision of the board was made on September 28, 2020. The board ultimately concluded that in the circumstances of the case it would not dismiss the application for failure to do the necessary steps in the proceeding despite the prior notice of the board as do otherwise would be to suggest that the notice was interpreted to mean the board determined not to suspend the time in every application which would thus fetter its discretion.
3. *Bock v. Madani*, Justice Bale, June 16, 2020: This case dealt with whether or not the defendant was required to serve its Statement of Defence within 20 days after the service of the Statement of Claim. The plaintiff brought a motion asking the court to exercise its discretion to require that the defendant deliver the Statement of Defence in accordance with the Rules of Civil Procedure notwithstanding the suspension of time under s. 2 of the Emergency Order. The court exercised its discretion analyzing the reasons that the defendant offered for its an inability to file a Statement of Defence within time. The court found there was no evidence of any connection between the COVID-19 pandemic and the defendant's default under the mortgage or any evidence of detriment that would result if the court were to require that the Statement of Defence be delivered within the required time period. The court therefore lifted the suspension in that case.
4. *Jonas v. Elliot*, Court of Appeal, Justice Pepall, August 26 2020: The appellant's action against the respondent had been dismissed in January of 2020 on a summary judgment motion. Notice of the appeal was served in February. On July 16 the parties received a notice to dismiss for delay noting that the appeal was to have been perfected by August 4. Appellant's counsel sought an extension from counsel for the respondents and it was refused. The court held that the motion should be allowed. The court noted that given the challenges presented by the COVID-19 pandemic, the justice of the case called for the granting of the extension. The court was given evidence that due to the COVID-19 emergency, limitation and procedural timelines were suspended and as such the moving parties did not perfect their appeal.

As can be seen from the summaries of the above-noted cases, all of them dealt with matters that were in the middle of a proceeding during the COVID suspension and parties sought the court or tribunal to lift the stay relating to steps in the proceedings in order to keep matters moving forward. I draw from these cases that the intention of this section was to allow parties to apply to a tribunal or a court with respect to a proceeding or intended proceeding during the time

period of March 16, 2020 to September 14, 2020 to lift the stay that was in place preventing steps of proceedings to be moved along in a timely fashion and the court or tribunal could exercise their discretion to do so depending on the merits of the circumstances. I find that these cases are not helpful in determining whether I should exercise my discretion in a retroactive manner as I am being asked to do here.

Therefore, I beg to differ with Arbitrator Bialkowski in his decision of *Echelon v. Pafco (supra)* at paragraph 30 where he states that based on the jurisprudence (outlined above) that he is satisfied that it must be determined whether the late notice provided by the insurer was connected in some way with the impact of COVID. I disagree with Arbitrator Bialkowski that there must be a connection between the delay in providing notice and the impact of COVID otherwise the discretion under s. 2 should not be exercised. I find that my discretion in the case before me is not limited in such a fashion.

Even if it were a necessary consideration for my discretion that the failure to provide the notice within the 90 days was in some way related to COVID, I would conclude in this case that there was such evidence. Echelon has been quite clear that the only reason they did not send out their notice within the 90 days was because of their belief that the *Emergency Order* had suspended the time period to do so. It was a mandatory suspension. The log notes confirmed their belief and the adjuster from Crawford confirmed that that was the reason she did not serve the Notice of Dispute before November 11.

Clearly, the decision not to serve their notice before November 10 was all about COVID regulations. While it may not have had anything to do with the actual ability to serve the notice such as whether the office was open, whether somebody may get infected by COVID or some other such consideration, the legislation that they were relying upon was a purely COVID-driven piece of legislation. I find there to be overwhelming evidence that Echelon did not serve its Notice of Dispute in this case because of COVID-related considerations to do with their understanding (which I might point out was accurate) with respect to the effect of s. 2 of the Emergency Order.

I also agree with Echelon that it would be patently unfair for Echelon to be unable to pursue its priority dispute against Federated in these circumstances.

Lastly, I note that Federated relied on a decision of mine in *Co-operators v. Security (supra)*. Federated pointed to the fact that in that case I declined to permit Co-operators to proceed with an arbitration due to the failure to commence the arbitration within one year of the service of the Notice of Dispute. I made some comments in that case with respect to the purpose behind the Emergency Order and the fact that there were a number of cases that held that COVID should not prevent litigation moving forward and that the pandemic did not in fact bring the wheels of justice to a halt. I have commented on those cases above and I note that the facts in *Co-operators* was quite distinguishable from the facts here. In the *Co-operators* case, the Notice of Dispute was served within the 90 days but the arbitration was not issued within a year of the service of the Notice of Dispute. Rather, Co-operators chose to wait, arguing that the time had been suspended for the service of the 90-day notice and that they could rely on an extended time period. In this case, the Notice of Dispute was served outside the 90 days.

I therefore conclude that this is not a case in which the facts, in my view, support me exercising my discretion to lift the mandatory stay with respect to the step in this proceeding requiring the service of the Notice of Dispute within 90 days of the receipt of the OCF-1. I conclude that the stay remains in effect and the time is extended by virtue of s. 2 of the Emergency Order to December 12, 2020, and accordingly service of the Notice of Dispute on December 11, 2020 is valid.

### **ORDER**

I order that the notice of Echelon under s. 3(1) of Ontario Regulation 283/95 was timely due to the 90 day suspension pursuant to s. 2 of Ontario Regulation 73/20 and Echelon has the right to proceed forward with its priority dispute as against Federated.

### **COSTS**

As Echelon was entirely successful in their argument, I find that the costs of the arbitration, including any related disbursements, is payable by Federated. Similarly, I find that Federated is obliged to pay the legal costs of Echelon on a partial indemnity basis. I am not going to fix the amount of costs but if the parties have any difficulty with respect to agreeing on costs, I can be contacted and a further pre-hearing will be scheduled.

DATED THIS 7<sup>th</sup> day of October, 2025 at Toronto.



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Arbitrator Philippa G. Samworth  
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