IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, s 268, as amended

AND IN THE MATTER OF the *Arbitration Act*, 1991, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration between:

ECHELON INSURANCE

Applicant

And

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF PUBLIC AND BUSINESS SERVICE DELIVERY AND PROCUREMENT AND ECONOMICAL INSURANCE COMPANY/DEFINITY INSURANCE COMPANY

Respondent

PRELIMINARY DECISION

COUNSEL

Tim Gillibrand for the Applicant, Echelon Insurance (hereinafter referred to as Echelon).

Heather Kawaguchi for the Respondent, His Majesty the King in the right of Ontario (hereinafter called the Fund).

Danielle Gauvreau for the Respondent, Economical Insurance Company/Definity Insurance Company (hereinafter called Economical).

BACKGROUND

This matter comes before me pursuant to the *Insurance Act*, R.S.O. 1980 c. I8 as amended, s. 268, Regulation 283/95 as amended and a branch of the Ontario government, and pursuant to the *Arbitration Act*, S.O. 1991 c. 17 as amended.

The parties are insurers who have a priority dispute with respect to who is the priority insurer with respect to payments of statutory accident benefits to the claimant who was involved in an accident on January 12, 2023. The parties selected me on consent as their arbitrator pursuant to

Regulation 283/95.

While this is a priority dispute, technically priority is not in issue, but it is a procedural dispute.

The claimant was involved in an accident on January 12, 2023. Echelon insures the claimant's sister and he applied to Echelon for statutory accident benefits. Echelon put the Fund on notice just prior to the 90-day period under Regulation 283/95. Shortly after putting the Fund on notice, but after the 90 days, Echelon determined that Economical was in fact the priority insurer (the striking vehicle), but it was too late to put Economical on notice as the 90 days had passed.

This arbitration was commenced and a number of pre-hearings have taken place. Through the pre-hearing process, a procedural preliminary issue was identified. The Fund takes the position that Echelon failed to comply with the procedural requirements of s. 3.1(2) of Ontario Regulation 283/95 which requires Echelon to complete a reasonable investigation before proceeding with a priority dispute against the Fund, and in addition to provide to the Fund, if putting it on notice, the particulars and results of their investigations. The Fund submits that Echelon failed on all three components of the requirements of s. 3.1.

Echelon's position is it complied with all necessary requirements and that it should be permitted to proceed with the arbitration. There is also a dispute between the parties as to what flows in the event a determination is made that Echelon did not meet one or more of the requirements of s. 3.1. Economical's position on these issues is aligned with the Fund.

PROCEEDINGS

The parties filed an Arbitration Agreement dated July 30, 2025. As noted, the parties agreed on consent to appoint me as the arbitrator to resolve this dispute. I conducted a number of pre-hearings. The parties ultimately agreed to have the preliminary issue heard by way of a written hearing but with an opportunity to make oral submissions.

The parties filed extensive written submissions and as well were given an opportunity to supplement those submissions orally.

The parties submitted various documents to support their arguments as well as case law. The key documents were attached to an affidavit of Daniel Strigberger sworn on March 28, 2025 and included the following:

1. Various letters and communications between Echelon and the claimant's counsel;
2. The claimant's OCF-1 dated January 22, 2023;
3. Various log notes from the Echelon adjuster;
4. A driver's licence search with respect to the claimant;
5. Various letters and communications between Echelon and the claimant;
6. An OCF-3 Disability Certificate dated February 3, 2023;
7. Email communications with respect to scheduling an EUO;
8. Statutory Declaration from the claimant dated March 6, 2023;

9. Transcripts of the EUO of the claimant dated March 29, 2023;
10. Letter dated April 18, 2023 from Daniel Strigberger to the Motor Vehicle Accident Claims Fund;
11. Letter dated April 18, 2023 from Mr. Strigberger to the Fund;
12. Various emails in May of 2023 between Mr. Strigberger and a claims examiner for the Fund;
13. Police Report noted to be completed March 21, 2023 but dated May 3, 2023;
14. Letter from claimant's counsel to Echelon dated May 12, 2023 enclosing the Motor Vehicle Collision Report received May 11, 2023;
15. Transcripts from the cross-examination of Daniel Strigberger on his affidavit dated May 1, 2025; and
16. Letter April 14, 2024 from counsel for Echelon to Economical serving a Notice of Initiation of Arbitration.

ISSUE IN DISPUTE FOR DETERMINATION

1. Did Echelon comply with s. 3.1(2) of Ontario Regulation 283/95?
2. If it is found Echelon did not comply, what are the consequences?
3. Is the Fund entitled to a special award under s. 7(6) of Ontario Regulation 283/95?

THE FACTS

The facts are not in dispute. On January 12, 2023 the claimant was a pedestrian who was struck by a car. This occurred while he was walking in a residential neighbourhood in Simcoe, Ontario.

The claimant sustained some serious injuries including pelvic fracture, left clavicle fracture, rib fractures and fractures of the transverse process of L2-L3. He was taken by ambulance to the hospital where he remained for some time undergoing surgical treatment and rehabilitation.

At the time of the accident the claimant's sister was the named insured under an automobile policy issued by Echelon. There was no dispute that the policy was in full force and effect on the date of loss.

The claimant submitted an OCF-1 to Economical dated January 22, 2023. It was received by Echelon on January 26, 2023.

The OCF-1 indicates that the accident was reported to the police but does not provide the officer's name or badge number. It is noted to be Simcoe OPP.

The OCF-1 describes the accident as occurring when "I was ran over by a vehicle that took off unexpectedly."

Under part 4 of the OCF-1, when asked whether he was covered under any other automobile insurance policies, the claimant responded no to all, including whether he was covered under his own policy, a spouse policy, or the policy of any person upon which he may have been a

dependant.

The claimant goes on to indicate that the policy he is claiming under is "the vehicle that struck me as a pedestrian/bicyclist". There is no information given with respect to the owner of the vehicle or who the insurer is. The OCF-1 does not identify what relationship the claimant is to the Echelon policyholder to explain why the OCF-1 was submitted.

Under part 8, with respect to whether he is employed, the OCF-1 indicates "N/A". In addition, the OCF-1 confirms the birth date, the gender of the claimant, and the fact that he is single.

No Police Report was attached to the OCF-1.

Echelon opened a claim in their system on January 31, 2023. On February 1 it assigned an AB adjuster to handle the claim.

On February 1 the Echelon adjuster contacted their named insured by phone. She knew about the accident and that the pedestrian was in the hospital. She confirmed that the claimant's address shown in the OCF-1 was the same as hers and that they lived together but did not confirm what their relationship was with each other. She mentioned a lawyer who said to use her policy. She was upset and wanted to know the impact the claim would have on her policy and premium and said, "Don't process the claim under her policy." The adjuster advised her that she can call her broker and get the information from them about premium or discuss with the lawyer about her concerns.

On February 2, 2023 Echelon conducted a driver's licence search with respect to the claimant. The search came back "no record".

On February 8, 2023 Echelon received an OCF-18 dated February 3, 2023 indicating the claimant was still in hospital but preparing for discharge.

Also on February 8, later in the day, the Echelon adjuster spoke to a paralegal at the office of the claimant's lawyers. They discussed the fact that the Echelon insured was refusing to use her policy for the accident. The log note indicates:

> "Unknown - the car that collided with the pedestrian
>
> Advised they have limited information as the file is very new.
>
> Advised they requested MVA/Police Report - awaiting for copy.
>
> Confirmed that the claimant is the brother of the named insured who was living with her at the time of the accident."

The adjuster indicated in terms of moving forward that Echelon would require an AB statement or Statutory Declaration to confirm. She noted that the 90-day limitation begins on January 26, 2023 and states, "Due diligence will be done trying to identify alternate insurer."

By letter dated February 8, 2023 Echelon wrote to the claimant setting out his potential entitlement with respect to various statutory accident benefits. The letter also requested the following pursuant to ss. 33 and 36 of the Statutory Accident Benefits Schedule:

- Your Accident Benefits Statement/Statutory Declaration;
- Complete Disability Certificate (OCF-3);
- Police Report, ambulance records and hospital records; and
- Clinical notes and records from your family doctor five years prior to January 12, 2023 to present.

The letter noted that this information must be provided by February 22, 2023.

Also on February 8, 2023 Echelon received a Disability Certificate (OCF-3) dated February 3, 2023 submitted by DMA Rehability.

Under part 3: Accident Description, the following is noted:

> "Transcribed by Joyce Sharp (OT). I forget the road. I was walking along the road (no sidewalks). I was coming up on a hill then began crossing the road. All of a sudden I was sucked under an SUV and was dragged half a block. When she stopped, I don't know if it was adrenaline but I stood up then I collapsed and do not remember anything until a day later when I woke up in Hamilton."

On February 23, 2023 Echelon sought to hire a law firm to conduct an EUO. That law firm did not respond and on March 2, 2023 Echelon hired Strigberger, Brown & Armstrong to conduct an EUO of the claimant.

By notice dated March 3, 2023 the law firm sent notice to the claimant's lawyers that an EUO would be requested with respect to priority. The claimant's counsel confirmed on March 7, 2023 that they would be available, as would be their client, for an EUO to be conducted on March 29, 2023.

In the exchange of emails between the Strigberger firm and the claimant's law firm, the claimant's lawyer noted that they had difficulty getting hold of their client and on March 17 noted, "Our client's sister has been rude/hostile to us, so we will not be exposing our team to further abuse." This was in response to a request from Mr. Strigberger's law firm that in order to firm up the date for the EUO and the availability of the claimant, that they should contact the sister and would undertake to provide the phone number.

By way of email on March 6, 2023 Echelon received the claimant's Statutory Declaration dated March 6, 2023. The Statutory Declaration noted the following:

- I am single.
- I do not have an Ontario driver's licence.
- I was unemployed at the time of the accident and not in the course of my employment

when the accident occurred;

- There were three people living in his household: himself, his sister and his sister's baby at the time of the accident;
- The claimant did not call 911 and did not call the police. He does not know who did and he was taken by ambulance to Norfolk General Hospital and later transferred to Hamilton General Hospital; and
- Notably, the Statutory Declaration did not include any information with respect to the other vehicle, the name of the driver, the name of the owner or the name of the insurer;

By letter dated March 10, 2023 Echelon wrote to the claimant noting that pursuant to s. 33 he had a duty to provide required information and still missing was:

- Police Report;
- Ambulance records;
- Hospital records; and
- Clinical notes and records of the family doctor.

The letter advised that no benefit was payable in respect of any time period during which the claimant failed to comply with the insurer's request. A copy of this was provided to the claimant's counsel.

The EUO of the claimant proceeded as scheduled on March 29, 2023. The claimant confirmed the following under oath at his EUO:

1. He was not claiming an income replacement benefit as he had not worked 26 out of the 52 weeks prior to the accident;
2. The accident occurred when he was walking to get smokes. He was hit by an SUV. He does not remember the colour as he was under the car;
3. The vehicle just hit him, he fell under it and she kept going. He was positive it was an SUV;
4. He got up after being run over and the driver got out of her vehicle and they spoke. The claimant said the person told him that she had hit him twice and she said, "Oh my God, I'm sorry, I thought you were a recycling bin.";
5. He was not sure whether she stuck around until the police came but he thinks she did as the accident happened right by her house;
6. They did not exchange any information as he was in and out of consciousness pretty much the entire time;
7. The claimant's brother-in-law's co-worker recognized him (the co-worker lives in the area). This individual called 911 and noted that they recognized the claimant from when they would pick up his brother-in-law from work;
8. His brother-in-law did not see what happened. The neighbours, however, were outside on their front lawn. He did not have the name of the neighbours or any contact information from them. He did not talk to them or anything. He does not know them;
9. The claimant's contact with these potential witnesses was that his brother-in-law works with one of them;

10. The claimant had not spoken to the police;
11. Counsel for the claimant confirmed they were not aware of any witnesses;
12. With respect to the striking vehicle, claimant's counsel advised "It's unidentified in our minds because we don't have that information, but it's - but there is a Motor Vehicle Accident Report that was reported to the police. So you'll be getting that information shortly.";
13. With respect to his relationship with his sister, the claimant reported he had lived with her perhaps "a couple of months" prior to the accident;
14. In terms of pre-accident income, while he was not employed he received ODSP or Ontario Works which he believed was about $300 per month. He also had some off-the-books jobs for cash;
15. The claimant said that nothing was preventing him from working in the year prior to the accident but nothing panned out. He had some job offers that but he had also just broken up with his girlfriend and the job offers were hard labour which he did not want to do;
16. He was not married at the time of the accident or in any relationship;
17. He was not listed on any insurance policies on the date of loss; and
18. He had secured a job just before the accident with Toyota and was expecting to be paid $25 per hour.

On April 14, 2023 Mr. Strigberger's assistant sent an email to the claimant's lawyer following up with their request for the Police Report. The claimant's counsel confirmed by reply email that they still did not have a copy but would send one out once it arrives.

The claimant's lawyer provided a summary of their efforts to obtain the Police Report through the online portal. Efforts were made on March 10, April 14 and April 18, with no results.

Mr. Strigberger's evidence in his affidavit was that as the 90 days to put the Fund on notice was on April 26, 2023 and as Echelon had still been unable to determine whether the striking vehicle was identifiable and if so covered under a valid motor vehicle liability policy, he therefore prepared a letter to the Fund dated April 18, 2023. This letter purports to comply with the requirements of 3(1) in terms of outlining the investigation and providing a summary of the key facts.

Mr. Strigberger sent out a second letter to the Fund on April 18, 2023 formally placing it on notice with respect to priority.

The first letter of April 18, 2023 noted the following:

1. The name of the claimant and the date of loss;
2. That the claimant was a pedestrian who was struck and dragged by an unidentified vehicle;
3. That he had applied to Echelon under his sister's policy claiming as a dependant;
4. That the completed OCF 1 had been received on January 23, 2023;
5. That there was no Police Report as of the date of the letter;

6. That Echelon undertook the following investigations:
    a. Reviewed specifics of the claimant's OCF 1;
    b. Statutory declaration of the claimant dated March 6, 2023;
    c. Examination under oath dated March 29, 2023; and
    d. Requested a copy of the Police Report to no avail.
7. The letter went on to indicate that during the course of the EUO the claimant confirmed he did not have a driver's licence, was not a named insured spouse or listed driver on a policy, that he was receiving Ontario works in the amount of $350 per month and had the accident not occurred, the claimant was due to start a job at Toyota;
8. Echelon took the position that the claimant was not a dependant on his sister; and
9. That they have asked the claimant's lawyer for a copy of the Motor Vehicle Accident Report in order to determine who insured the vehicle that struck the claimant but the claimant's lawyer has not received it from the police department as of the date of the letter.

No documentation was attached to this letter.

By way of email dated April 21, 2023 the accident benefit examiners at the Fund responded to Echelon. They advised that the priority investigation was incomplete. It noted that Echelon was obliged to conduct a reasonable investigation as to whether there was any other insurer who would pay in priority to the Fund before putting the Fund on notice and in addition particulars of the investigation and the results of the investigation were to be provided. The claims examiner took the position that the Echelon letter of April 18 did not comply and noted that the following documents were needed:

1. Copy of your complete underwriting file;
2. Claimant's statement, field adjuster's reports, medical reports, EUO transcripts and other relevant documentation and statements;
3. Full copy of the Police Report investigation;
4. Full details and particulars of the investigation conducted to determine what other insurer or insurers are liable to pay in priority to the MVAC Fund as required under s. 3.1(2) of the DBI Regulation;
5. Copy of the Application for Accident Benefits, OCF-1; and
6. Confirmation as to the date the Application for Accident Benefits was received.

Counsel for Echelon's response was that they felt s. 3.1 of the Regulation had been satisfied but once they received a Police Report and if it identified the vehicle involved in the accident, it would be provided.

By email dated May 1, 2023 the claims examiner for the Fund continued to maintain the position that they required the information and documents requested.

By letter dated May 12, 2023 the claimant's lawyers forwarded on to Echelon (not counsel for Echelon) a copy of the Police Report signed by the Supervisor, badge 12187 on May 3, 2023.

The Police Report noted that the report was completed on March 21, 2023 but that it was not released until May 8, 2023. No explanation for that was provided.

Counsel for Echelon received the Police Report the same day and by email dated May 12, 2023 provided a copy of the Police Report to the claims examiner for the Fund. The email noted, "If you are not prepared to act on our priority dispute notice, please assign the matter to counsel and have them contact me as soon as possible."

The Fund claims examiner responded by email dated May 16 noting that the position of the Fund remained unchanged and s. 3 of Regulation 283/95 remained not complied with. The email noted that the Police Report showed that there was a policy of insurance covering the striking vehicle through Economical and no indication that there was a charge of failure to have insurance. The Fund noted that therefore any priority dispute rested between Echelon and Economical.

On June 5, 2023 Echelon's counsel issued the Notice to Participate in Demand for Arbitration as against the Fund.

In his affidavit, Mr. Strigberger states:

1. When he provided notice to the Fund, he believed that the claimant was not likely to be an insured person under Echelon's policy or another policy. He states, "It was also based on the evidence that the striking vehicle may have fled the scene and that the claimant was unable to identify the vehicle, its driver or insurer.";
2. The Police Report was unavailable at the time Echelon placed the Fund on notice and the Police Report in fact was not available until after May 3, 2023. Therefore, the Police Report was not finalized until after the 90 days had passed;
3. At the time of placing the Fund on notice, Mr. Strigberger had the firm belief that the claimant may not be an insured person under the Echelon policy, that there were no other policies in which he would be considered an insured person, and that there was no assurance that the striking vehicle was identifiable or covered by a motor vehicle liability policy.

On his cross-examination on his affidavit, Mr. Strigberger was asked why Echelon did not put Economical on notice once they received the information that Economical insured the driver of the striking vehicle. Mr. Strigberger's response was:

> "At this point in time, we were beyond the 90 days to give Economical a priority notice, and my impression at this time would be that the Fund would receive a copy of the Police Report and then, if it wished to dispute priority against Echelon on the basis that Economical was higher in priority, then, pursuant to section 10 of the priority regulation, it was required to give Economical notice under section 10."

POSITIONS OF THE PARTIES

Before outlining the positions of the parties, it is important to set out the relevant legislation

which in this case is s. 3.1(2) set out below:

"(2) Before giving a notice to the Fund under section 3, an insurer must,

(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and

(b) provide particulars to the Fund of the investigation and the results of the investigation."

Also relevant to the parties' analysis and my decision is s. 7(6) set out below:

"(6) If the dispute relates to an accident that occurred on or after September 1, 2010, the failure of an insurer other than the fund to comply with section 2.1 or 3.1 may be the subject of a special award made by the arbitrator."

Finally, as many of the parties in their submissions have compared s. 3.1(1) of 283/95 to the duties and obligations of an insurer under s. 3(1), I will also set out those provisions 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.

3(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."

Submissions of the Fund

The Fund takes the position that Echelon failed to complete a reasonable investigation to determine if any other insurer may be liable other than the Fund, failed to provide particulars to the Fund of that investigation and also failed to provide to the Fund the results of the investigation. In other words, the Fund takes the position that Echelon failed to comply with three out of the three requirements under s. 3.1.

The Fund also takes the position that there are two potential consequences (besides costs) for Echelon's failure to comply with any one of these three requirements. The Fund submits that, having failed to comply, Echelon should not have the right to proceed with this priority dispute at all and that there should be an order dismissing the proceeding against it. Alternatively, and in

addition, the Fund claims a special award pursuant to s. 7(6).

The Fund's position is that Echelon's overall conduct goes against the purpose of the Regulation. The amendment to the Regulation, s. 3.1(1), applies to accidents that occurred after September 1, 2010 and the Fund submits that the purpose of this regulation was to provide additional protections for the Fund. It was to avoid what is known as "dumping". The Fund notes that it is the payer of last resort and references the decision of the Court of Appeal in *Ontario* (*Minister of Finance) v. Echelon General*, 2019 ONCA 629 wherein the court weighed in on the purposes of these amendments stating:

> "The investigation obligation in section 3.1 was added to protect the Fund from what is commonly known as 'dumping'. 'Dumping' occurs when the insurer receives a claim for benefits and rather than incurring the time and expense of its own priority investigation, immediately places the Fund on notice, thereby forcing the Fund to complete a reasonable investigation to determine if another insurer stands in priority."

The Fund submits that Echelon's behaviour is consistent with dumping which it alleged can also occur when the insurer paying benefits cannot or does not complete its investigations with 90 days and so "dumps" the priority dispute on the Fund under the guise that there is no other insurer to respond. The Fund submits that this is really just a tactic to bypass the 90-day time limit and is still an attempt to shift the burden of investigation and costs onto the Fund inconsistent with the purpose of the amendment to the regulation and its interpretation.

The Fund submits that with respect to all three requirements in terms of investigation and notice, that Echelon was deficient, failed to conduct a reasonable investigation, failed to conduct key enquiries and failed to provide the Fund with even the most basic information and documents in order to show the nature of its investigation and the results. I will deal with each of these three components separately.

1. **Reasonable investigation**

The Fund submits that s. 3.1(2) begins with the words: "Before giving a notice to the Fund under section 3 an insurer must". The Fund submits that this clearly establishes a requirement for a reasonable investigation to be a condition precedent before a first-tier insurer can give notice to the Fund. Therefore, if the condition precedent is not met, the notice cannot be given. As s. 10 only applies to an insurer who received notice under s. 3, then if s. 3.1 is not met, then s. 3 notice cannot be given and there is therefore no ability of the Fund to provide a s. 10 notice, in this case to Economical. Echelon submits that this interpretation provides the protection that was intended in order to avoid all aspects of dumping.

The Fund further submits that when looking at what one is required to do in order to comply with "a reasonable investigation" one must look further into s. 3.1. It requires not that there just be a reasonable investigation, but rather that that investigation be to "determine if any other insurer or insurers are liable to pay benefits in priority to the Fund". Therefore, the Fund argues that the

proof of a reasonable investigation must show what efforts were made to find another insurer, whether those efforts were reasonable and whether there could be anything else done and not simply to recite what general questions or information had been collected about the claimant in the context of a statutory accident benefit claim in general.

The Fund submits that the investigation conducted by Echelon was not reasonable. In their Factum, the Fund describes the investigation as "unfocused and not proactive enough". While they acknowledged that Echelon went through some perfunctory steps such as a Statutory Declaration, an EUO and a driver's search, that in the facts of this case these steps did not amount to a reasonable investigation as to whether there was another insurer.

The Fund lists the following deficiencies:

1. Echelon did not ask the claimant's sister about the financial arrangement between she and the claimant which would have gone to the dependency issue;
2. It did not ask the sister about any other insurance;
3. It made no attempt to get a statement from the sister;
4. Echelon made no attempt to get a statement directly from the claimant prior to the EUO;
5. Echelon did not ask the claimant to provide specific information that could have been used to assess priority. For example, they suggest Echelon should have sent the claimant an email or letter with a series of priority-related questions; and
6. The Statutory Declaration that was received did not seek the appropriate or adequate information as to address what other insurers may be liable. Specifically, it did not address or include any information and Echelon made no attempt to follow up to determine:
    a. The identity of the third party driver or vehicle;
    b. Where the accident occurred, on what street;
    c. If the claimant spoke to the police;
    d. If the other driver spoke to the police;
    e. If there was an incident report or name of the police officer;
    f. If there were any witnesses; and
    g. If the driver stayed at the scene or if this was a hit and run.

The Fund submits that the above steps were obvious and reasonable steps to take prior to conducting the EUO, but Echelon failed to do so.

The Fund also notes that the claimant's evidence at the EUO was that the accident happened as the driver was reversing out of a private driveway and that one of the neighbours who recognized the claimant after the incident knew the claimant's brother-in-law. Despite being aware of that information, Echelon did not:

1. Seek the brother-in-law's name or contact information in order to get the neighbour's name and address so the neighbour could be asked for the driver's name and address;
2. Request the Ambulance Call Report which should show where the claimant was picked up from (as the claimant did not remember what street he was on);

3. Ask the claimant where he was coming from, where he was going and what route he took in order to determine the location; and
4. Retain an investigator to try and obtain further information from the witness, the brother-in-law, Simcoe OPP or to obtain the Police Report.

The Fund submits that Echelon really only did two things with specific reference to priority and that was to ask claimant's counsel to provide them with the Police Report on a number of occasions and conduct an EUO. The Fund alleges that Echelon's plan was just to wait for the Police Report and then dump the claim on the Fund while it waited.

The Fund also points to other areas of investigation that Echelon failed to undertake. They were aware that the OCF-1 identified that the accident was reported to the Simcoe OPP but there was no evidence that Echelon made any attempt to try to find the Police Report or get a copy of it themselves. There was no evidence that the adjuster asked the claimant or his representative for an incident report number or get a consent from the claimant to obtain a copy of the report.

The Fund notes that the Police Report indicates it was completed on March 21, 2023 but not signed by the supervisor until May 3, 2023 and therefore it is unknown whether the report could have been made available to Echelon earlier or signed earlier if Echelon had made efforts to get it directly themselves.

Lastly on this point, the Fund points to the fact that Echelon did not put Economical on notice immediately on being provided with the Police Report and then relying on s. 3(2) which allows the insurer to serve a notice after 90 days if 90 days was not a reasonable time period to investigate. Rather, the Fund alleges that this is evidence of Echelon's intention all along to avoid the 90-day limitation argument, dump priority on the Fund and let them do the work and add Economical.

In terms of the interpretation of this section and the condition precedent argument, the Fund submits that the ordinary and grammatical sense of the word "must" should be looked at. The Merriam-Webster dictionary defines "must", *inter alia*, as:

1. Be urged to: ought by all means to;
2. Be commanded or requested to;
3. Be determined to;
4. Be required by law, custom or moral conscience to.

Based on this and there being no other interpretation of the word "must" in any statutory accident benefit case law, the Fund argues that the word "must" should be interpreted to mean that this was a mandatory requirement before an event can take place and that failure to complete the mandatory requirement means that the party failing in that obligation cannot proceed with any next steps which would in this case prohibit them from putting the Fund on notice and pursuing their priority dispute.

2. Echelon failed to provide particulars to the Fund of its investigation.

On this point, the Fund's position is that the regulation requires detailed particulars and not broad strokes. The Fund submits that by definition the word "particulars" means details. The Fund submits that this does not mean that an insurer can just provide the theory of their case, a list of what documents were reviewed, reasons why they denied priority or a list of facts that maybe they consider relevant. Rather, the purpose of providing the particulars is to allow the Fund to assess:

1. The case;
2. If there is any other investigation that needs to be done; and
3. Whether there is a legitimate necessity for it to respond and accept priority at an early stage.

In order for this to happen, the particulars need to be fulsome.

The Fund alleges that the particulars provided by Echelon do not meet any of these goals and in fact are designed to confuse or mislead the Fund.

The Fund alleges that the letter of April 18, 2023 uses the term "unidentified vehicle" deliberately in a manner to mislead the Fund into believing that this accident occurred with an unidentified vehicle as defined under s. 265(2) of the *Insurance Act*. The statement in the April 18 letter from Echelon that the claimant was a pedestrian struck by an unidentified vehicle suggests that this is a claim where it has been determined that neither the driver nor the owner of the vehicle has been identified, not that they have just not yet been ascertained, as in fact was the case here.

The Fund submits that while Echelon could hold a theory that the vehicle may have fled the scene and may be unidentifiable and that no one would know until you got the Police Report, that it was still required to give evidence of that theory. It was still required to give particulars of its investigation and it failed to do so.

The Fund notes that the letter of April 18 does not include anything about the striking driver and vehicle. There is no mention of the EUO evidence that the driver stayed at the scene, that it was a woman who spoke to the police, and that while it was being referred to as an unidentified vehicle by Echelon's counsel, that was only because they did not have the information yet to identify it, but that that information was expected.

Therefore, the Fund's position is that Echelon failed to provide the needed particulars of its investigation and this should prohibit it from proceeding with this dispute.

3. Echelon failed to provide the results of the investigation

Here the Fund alleges that the results of an investigation must mean "the outcome" of the investigation. The Fund submits that this section of the regulation requires two things:

1. That you let the Fund know the outcome of the investigation; and
2. You provide the actual documentation and evidence that was gathered during the

investigation.

The Fund suggests that this means that Echelon was required to let them know that it had not yet identified another insurer, but the driver of the striking vehicle spoke with the police, and that the Police Report may identify the driver, owner and insurer. Further, Echelon was also required to provide the Fund, at the very least, with:

1. A copy of the OCF-1;
2. Copies of all its driver licence searches or other searches with respect to other potential insurers;
3. The Statutory Declaration; and
4. The EUO transcript.

These were not provided, nor were any particulars provided that would have been found within those documents. To make matters worse, the Fund submits Echelon thereafter refused to provide the investigation documents after the Fund had requested them and prior to the commencement of this arbitration proceeding.

The Fund points out that it was not provided with any of the following:

1. Claimant's date of birth;
2. Claimant's address;
3. If the claimant had a spouse;
4. If the claimant had any children;
5. If an Autoplus or driver's licence search had been done; and
6. If the claimant had ever worked in the year pre-accident.

This, the Fund alleges, prevented it from assessing the case, making a determination on priority, and determining if it needed to conduct its own investigation, all of which was contrary to the intent and purpose of the amendment to Regulation 283/95 under s. 3.1.

Special Award

With respect to the special award, the Fund submits that s. 7(6) permits an arbitrator to require an insurer to fully reimburse the Fund for benefits paid for which the insurer was responsible in addition to cost of investigation, legal fees and ordering any sanctions that the arbitrator may have found to be warranted (*Ontario (Minister of Finance) v. Echelon*, *supra*). The Fund therefore submits it is entitled to a special award but does not provide any particulars in its submissions.

<u>Submissions of Economical</u>

Economical adopts the submissions of MVACF. In addition, Economical suggests that one should review the case law relating to s. 3(1) as to what is a reasonable investigation within the 90-day period.

Economical submits that there is a heavy onus on the insurer who is requesting that they be permitted to serve a notice after 90 days to establish that the investigation was reasonable and that it could not have been done within the 90-day period.

Economical submits that an insurer cannot passively sit and wait for a Police Report to arrive and suggest that they have complied with their investigatory obligations. Economical referenced a number of decisions in support of that position, all of which relate to s. 3(1) and not 3.1 of Regulation 283/95.

Economical also submits that Echelon delayed in their efforts to investigate this claim. Economical in its submissions sets out the dates in the Echelon log notes when there is activity with respect to priority and days when there is not. Out of the 90-day period that expired on April 26, 2023, it is noted that there are 77 days of inactivity. Economical also notes that on the actual day that the deadline expired there is no log note and the next one is not made until May 1, 2023, five days beyond the expiry date.

Position of Echelon

Echelon's position is that it conducted a reasonable investigation with respect to whether another insurer stood in priority other than the Fund and that the clear result of that investigation was that there was only one potential insurer, and that was the insurer of the striking vehicle. However, despite best efforts, information as to the owner and the driver of that vehicle was not available, the claimant himself did not know as he had been transported from the scene by ambulance, and for some reason there was a delay in securing the Police Report. Echelon submits that there was no other reasonable avenue of investigation to determine the identity of the striking vehicle driver, nor to determine who its insurer was other than securing the Police Report.

Echelon submits that it had no assurance that the striking vehicle would even be identified once the Police Report was released so that it was reasonable with the 90-day period approaching on April 26, 2023 to put the Fund on notice on April 18, 2023. Echelon submits that this is not a situation of "dumping".

Echelon argues that the Fund's submissions with respect to their interpretation of 3.1(1) and (2) is far too onerous with respect to the first tier insurer. Echelon submits that if I were to accept the Fund's argument, that essentially it means that the "reasonable investigation" means one that leads to a "airtight conclusion".

Echelon submits that a reasonable investigation is not one of perfection. Echelon submits that by the time it put the Fund on notice, it had sorted out "the entire landscape of the priority dispute" other than the issue of the striking vehicle and with respect to that, it was handcuffed by the fact that the Police Report had not been released.

Echelon submits that the reality of priority disputes is that sometimes the first tier insurer will simply not be able to identify a proper insurer despite conducting a reasonable investigation, and that there will be circumstances where that information may be expected and/or may come to

light at a later time. In those circumstances it is reasonable, and in fact necessary, to put the Fund on notice within the 90-day period even though the Fund may not ultimately be the highest ranking insurer.

Echelon submits it if I find that they failed to comply with s. 3.1 in terms of its reasonable investigation, that I should not interpret the regulation as then prohibiting the first tier insurer/Echelon from continuing to pursue the priority dispute. Echelon submits that the regulation does not set out any such consequences and compares the wording under s. 3.1(1) with 3(1). Further, Echelon submits that the regulation specifically provides for the consequences of a failure to comply with s. 3.1, and that is the discretionary power for an arbitrator to order a special award. Echelon submits, and I quote from their Factum:

> "The legislature clearly gave consideration to the consequences of a breach of section 3.1. Had it intended such harsh consequences as nullifying a section 3 notice or barring an arbitration, the legislature would have stated this in the regulation."

Echelon also takes the position that its letter of April 18, 2023 to the Fund provided the necessary particulars of its investigation and the results of its investigation sufficient to satisfy the regulatory requirement. Echelon submits that there is nothing in the regulation that specifically requires the first tier insurer to provide copies of things such as EUO transcripts, Statutory Declarations, nor the types of documents that were requested by the Fund in their communication with Echelon after being put on notice, such as an underwriting file.

Echelon further submits that the requirement to provide particulars is not a requirement to give all of the evidence that the insurer has collected with respect to priority, but rather to highlight the key facts.

Did Echelon conduct a reasonable investigation?

Echelon submits that in determining the meaning of a reasonable investigation that one should not assume that a reasonable investigation under s. 3.1(2)(a) has the same meaning as a reasonable investigation under s. 3(2). Echelon submits that these sections serve two different purposes and therefore should be interpreted differently.

The reasonable investigation requirement in s. 3(2)(b) is coupled with the requirement in s. 3(2)(a) that 90 days was insufficient time for the first tier insurer to locate other insurers. S. 3(2) extends a pseudo limitation period and therefore arbitrators and courts have applied it strictly. Therefore, case law relating to whether a reasonable investigation was made within the 90 days is not applicable to an analysis of a reasonable investigation in the context of the Fund.

Echelon submits that a reasonable investigation referred to in s. 3.1(2)(a) only exists to defer the dumping conduct. Echelon submits that the section is intended to defer a first tier insurer from casually sending out notices to the Fund without making any efforts to determine if priority rests elsewhere.

Echelon references the Court of Appeal decision in *Ontario (Minister of Finance) v. Echelon* (*supra*) wherein it states that dumping occurs when an insurer does not incur the time and expense to do its own priority investigation and immediately places the Fund on notice. Echelon distinguishes this from what occurred here and suggests that the Fund is wrong in suggesting that an insurer who does conduct investigations of its own, spends time and money of its own and then puts the Fund on notice as the 90 days approaches and it still has not been able to finalize its investigation, does not constitute a dumping.

Echelon submits that s. 3.1(2)(a) is not tied to extending a limitation period but rather is merely a preliminary safeguard to ensure that insurers do not send notices to the Fund simply as a matter of course to avoid carrying out their own investigations.

Echelon acknowledges that in one of the few cases dealing with s. 3.1(2)(a), the arbitrator did suggest that the interpretation of a reasonable investigation in both these sections should apply equally. This was the decision in *The Dominion of Canada General Insurance Company v. AXA Insurance Company*, Arbitrator Ken Bialkowski, March 31, 2014. However, Echelon submits that the arbitrator did not undertake a substantive analysis of the respective provisions in reaching his conclusion and therefore this case provides minimal guidance on what the scope and assessment of a reasonable investigation is under 3.1(2)(a).

Despite Echelon's position with respect to the different analyses of these two sections and that s. 3.1(2) sets a lower bar for what constitutes a reasonable investigation, it suggests it is helpful to consider what arbitrators and courts have said as to what a reasonable investigation is under s. 3(2)(b). Echelon notes that the general legal principles applicable to assessing reasonable investigation are:

1. This must be a fact-specific enquiry;
2. The investigation must be reasonable but that is not the same as perfect. The fact that in retrospect other investigations might be helpful does not mean the investigations which were undertaken fail to meet the test of reasonableness;
3. In assessing reasonableness and the timeliness of investigation, one should recognize that insurance adjusters manage numerous complex files and should not be held to a standard of perfection;
4. Where there is limited, reliable information available, minimal investigative efforts may still be considered reasonable; and
5. If the claimant or their representative provides misleading or inaccurate information, this can support a reasonable investigation.

Echelon relies on the following decisions in relation to these general legal principles:

- *Dominion of Canada General Insurance Company v. Certas Direct* [2019] O.J. No. 2971;
- *Federated Insurance Company of Canada v. CGU Insurance Company of Canada* (Arbitrator Malach, September 2, 2003);
- *Coseco Insurance Company v. Lombard Insurance Company* (Arbitrator Guy Jones, June 3,

2024);

- *Ontario (Minister of Finance) v. Co-operators General Insurance Company*, Arbitrator Robinson, February 22, 2002 affirmed in *Ontario (Minister of Finance) v. Co-operators General Insurance Company*, 2002 CanLII 36477 OSC.

Echelon submits that it conducted a reasonable investigation as evidenced by the following:

1. The OCF-1 indicated the claimant had been hit by an unknown vehicle which took off unexpectedly. The claimant's lawyer advised they had been unable to obtain the Police Report. It was therefore reasonable for Echelon to believe that the striking vehicle may not be one that could be identified or that if identified was insured;
2. Investigations were done to determine whether any other insurance policies were available to the claimant including a driver's licence search, a Statutory Declaration and an EUO;
3. These investigations showed that the claimant did not have any policies available to him;
4. With respect to dependency, the claimant's testimony, information in his OCF-1 and his Statutory Declaration supported that he was not dependent upon Echelon's insured which would therefore place the Fund in highest priority subject to confirmation that there was an identifiable striking vehicle that was insured;
5. At the EUO, the claimant had no information as to where the accident took place, the make or model of the vehicle, identity of the driver or owner, or whether the striking vehicle was insured;
6. Efforts to make enquiries of Echelon's insured, the sister, showed that she was difficult with the adjuster on the phone and rude and hostile to claimant's counsel, and did not want the claim to be processed under her policy; and
7. The Police Report, when it was ultimately received, was actually dated and signed off by the supervisor subsequent to the 90-day period and therefore the report would not have been available prior to putting the Fund on notice.

Echelon responded to some of the critiques the Fund had with respect to Echelon's investigation.

1. With respect to the fact that Echelon did not ask the sister about her financial relationship and other information about the dependency issue, Echelon notes that they secured some information from claimant's counsel and as well directly from the claimant by way of EUO prior to giving notice to the Fund. In addition, the claimant's sister was resistant and difficult to be dealt with and it is speculative whether she would have provided any helpful or truthful information;
2. With respect to Echelon not obtaining a statement from the claimant or any effort to do so, Echelon submits that this point is moot as it obtained a Statutory Declaration from the claimant and an EUO, all prior to giving notice to the Fund. Echelon submits that the Fund's critique is focused on the method of investigation rather than the investigation actually conducted;
3. The Fund complains that there is no evidence that Echelon ever mentioned priority to the claimant or his representative and did not ask for specific information that would have

helped to assess with priority. Echelon submits that the EUO was conducted specifically with respect to priority only and whether or not the word priority was mentioned is irrelevant to the efforts and investigation to gather information and the information ultimately secured;

4. The Fund complains the Statutory Declaration did not seek appropriate or adequate information to address whether any other insurers are liable nor were appropriate questions asked with respect to this on priority. Echelon submits that in fact these questions were asked at the EUO and to the extent that they are missing from the Statutory Declaration, it is still irrelevant as a reasonable investigation was conducted through the EUO. Echelon sought the services of two separate law firms in an effort to address priority by way of the EUO and this investigation was completed before the Fund was put on notice;
5. The Fund submits that there were other investigations Echelon could have taken after obtaining the EUO evidence but failed to do so in order to determine the identity of the driver and if the driver was insured. This included contacting the brother-in-law to get his name and contact information in order to get the name and address of the neighbour so that the neighbour could be asked for the driver's name and address, to request the Ambulance Call Report which may show where the claimant was picked up from, ask the claimant where he was coming and going from and what route he took, and to retain an investigator to get that information from witnesses, brother-in-law or the police. With respect to this, Echelon submits that these steps are highly speculative and whether they would have resulted in any information with respect to the address of the driver, the name of the driver, the involved vehicle or the insurer of the vehicle is even more speculative. The claimant's lawyer had an interest in determining the identity of the striking vehicle as much as Echelon did and clearly they were actively checking for the Police Report in the police portal. This was clearly unsuccessful as the final report was not approved until after the 90-day deadline. Echelon submits that the Fund's critique is retrospective and holds Echelon to an unreasonable standard.

Echelon submits that the Fund's critiques are about the methods and not about the actual steps taken and the results achieved. Echelon submits that the Fund's highly critical approach of its investigation in hindsight seeks to hold an insurer to a standard of perfection when the standard is reasonableness.

Echelon submits that the only information it did not have before placing the Fund on notice was the Police Report which was reasonably the only likely source to identify the driver and owner of the vehicle and whether it was insured. Echelon submits an insurer should not be expected to call the police and try to force the police to issue a report.

Echelon therefore submits that however one interprets s. 3.1(2)(a), that it satisfied the requirements that it made a reasonable investigation and the Fund's position would hold a first tier insurer to a standard of perfection which is not required.

With respect to what happens if I find that Echelon breached s. 3.1, its submission is that that

does not prevent it from continuing to pursue this arbitration.

Echelon submits that the requirement for a reasonable investigation is not a condition precedent to providing notice under s. 3, but rather only goes to whether there is an argument for a special award.

Echelon relies on the decision of Arbitrator Bialkowski in *Dominion v. AXA* (*supra*), where Arbitrator Bialkowski rejected the proposition that the effect of rendering s. 3 notice to the Fund is invalid if there is a breach of s. 3.1. Arbitrator Bialkowski stated:

> "No bar to proceeding with an arbitration exists in the event of a breach of section 3.1 in my view rather as arbitrator simply have a discretion whether to make a special award in appropriate cases."

Echelon submits I should follow Arbitrator Bialkowski's decision and conclude that there is no bar to proceeding with this priority dispute, even if I conclude that reasonable investigations were not conducted.

Content of Echelon's Notice Letters: Did Echelon provide particulars of its investigation and the results of its investigation as required under 3.1(2) (b)

On this issue, Echelon submits that they provided all the key particulars and relevant facts that were needed in order to advise the Fund the status of the priority investigation, what efforts had been made, what investigations had been done, and the key points to be drawn from that. While Echelon acknowledges the letter was concise, that does not mean it does not meet the requirements of s. 3.1.

Echelon submits that the letter makes it clear what Echelon's position was in terms of priority vis-à-vis dependency. The letter clearly outlines the investigation and conclusions that there is no other source of insurance coverage other than the striking vehicle. It provides the key facts with respect to that and confirms that at the time of putting the Fund on notice, the striking vehicle remains unidentified and the police report is outstanding.

While the Fund takes the position that the letter lacks particulars, it has not been able to point to any specific particulars that would have made a material difference for the Fund's ability to investigate and locate the insurer of the striking vehicle at the time of Echelon's notice. The Fund did do an Autoplus search, but that was not done until the police report was received.

With respect to the Fund's position that the notice letter lacked an explanation of the results of the investigation, Echelon submits that the Fund is conflating the term "results" with "definitive conclusion". At the time Echelon wrote its letter to the Fund, it was unable to say with any certainty as to whether the striking vehicle was or was not insured. It outlined what investigation had been done into that and what still remained to be done.

Echelon argues that if the purpose of this regulation is to prevent dumping and allow the Fund to

assess whether that is occurring, that the information provided by Echelon in its correspondence more than satisfies that need.

As to the Fund's position that various documents should have been provided with the letter and then provided after a request had been made for it, Echelon's position is that there is nothing in the regulation that suggests there should be a substantive exchange of documents between the parties in order to satisfy Regulation 3.1. It is to be noted that the two parties exchanging this information are potentially going to be adversaries in a priority dispute.

Echelon submits that substantial production of documents such as requested by the Fund (the underwriting file, field adjuster's reports, medical reports) are not routinely produced at this stage and in this case were not relevant to the issue of "dumping".

Rather, Echelon submits the wording of 3.1(2) suggests that the insurer should summarize its findings and does not require it to provide the type of documentation that might later be ordered pursuant to the *Arbitrations Act* which governs an arbitration conducted under Regulation 283/95.

Echelon submits that 3.1(2) at this stage is only dealing with notice requirements to the Fund, which is a preliminary step in a priority dispute. There is no burden of proof, as there will be an arbitration. There is no obligation for the first tier insurer to essentially prove its case with its notice letter.

Therefore, Echelon submits that it complied with the requirements of 3.1(2). To find otherwise, Echelon submits, would result in placing a overly burdensome and impractical requirement on the first tier insurer with respect to the contents, particulars and documentary disclosure in this initial notice letter to the Fund.

If I conclude that Echelon did not comply with the requirements of s. 3.1(2), Echelon's position is that such a breach does not result in a bar to Echelon being able to proceed with this priority dispute.

Echelon submits that the only available remedy is the special award under s. 7(6). This is consistent with Arbitrator Bialkowski's decision in *Dominion v. AXA* (*supra*) where Arbitrator Bialkowski rejected the proposition that a breach of s. 3.1 would have the effect of rendering s. 3 notice to the Fund invalid and argues that the same is true with respect to s. 3.1 (2).

DECISION AND ANALYSIS

There are very few cases where arbitrators have opined on the interpretation and purpose of s. 3.1(2). Arbitrator Bialkowski has weighed in on this issue in his decision of *Dominion v. AXA* from March of 2014. I have carefully reviewed the wording of the relevant sections, Arbitrator Bialkowski's decision and the other case law provided by the various parties. As will be set out in the reasons that follow, I have concluded that Echelon has complied with s. 3.1(2).

There is no dispute with respect to the purpose of the implementation of sec. 3.1(2) of Regulation 283/95.It was to prevent insurers from offloading their responsibilities and the cost associated with doing a proper priority investigation and placing that responsibility and cost on the Fund.

Both parties made reference to the purpose of these legislative changes to avoid "dumping". In my view, dumping occurs when an insurer fails to make appropriate efforts and incur the needed expense to properly investigate a priority dispute within the 90 days and chooses instead to simply put the Fund on notice and then leave it up to the Fund to complete investigations and bring in any other insurers in accordance with s. 10 of the Regulation. In order to enforce this anti-dumping provision, there had to be some method to have an insurer who chose to put the Fund on notice to establish that this was not a situation of dumping, but one in which there was a real possibility that the Fund may ultimately be responsible for the payment of statutory accident benefits. Therefore, the Regulation required an insurer to conduct reasonable investigations into other insurers before putting the Fund on notice, and to provide the Fund with reasonable particulars of that investigation so the Fund could be sure that they were not a victim of dumping.

I do not believe that it was the intent of this Regulation to establish an onerous requirement on a first tier insurer to conduct its investigations and to be satisfied that the Fund was definitively the priority insurer prior to putting them on notice. As Echelon noted, this would almost require a standard of perfection, and I find that the regulation simply does not support that.

The Regulation refers to "reasonable" investigations. It does not say that there must be evidence that those investigations are conclusive and that the first tier insurer provide proof that there is no other insurer who would stand in priority to the Fund.

Clearly, the Regulation requires that the first tier insurer put the Fund on notice within the required 90 days under s. 3(1). Therefore, the insurer has 90 days to complete the reasonable investigations and if at the time the 90 day period is approaching and there is no other insurer identified as a result of those reasonable investigations as the 90 days approaches, then in my view the Regulation allows the first tier insurer to put the Fund on notice, even if it is possible that there may be an insurer identified later through information developed post-90 days. In my view, there is no obligation on the first tier insurer to establish conclusively prior to giving notice to the Fund that there are no other possible investigations that they could do prior to the 90 days in order to determine the availability of other insurance. Again, the word in the legislation is "reasonable".

I agree with Arbitrator Bialkowski in *Dominion v. AXA* (*supra*) wherein he noted that what constitutes a reasonable investigation of priority will depend on the facts of each case. Based on the facts of this case, I find that this was not a situation of dumping but rather a situation where Echelon found itself unable to identify the owner, driver or insurer of the striking vehicle, or to even conclusively find out whether there was any insurance available for that vehicle and accordingly, with the 90 days approaching, it was reasonable, and in fact appropriate, to put the Fund on notice.

I now turn to each of the three aspects of the regulation that the Fund argued Echelon had not met.

1. **<u>Reasonable Investigations</u>**

While Arbitrator Bialkowski felt that an analysis of reasonable investigations under 3.1(1) would take into consideration the same legal principles, law and approach as a review of reasonable investigation under 3(1), I do not agree wholly with that statement. While certainly the law and principles that have been applied by arbitrators in determining what reasonable investigations are within the 90 day period for a first tier insurer under s. 3 is helpful, I find, as submitted by Echelon, that the strict onus that has been applied to the first tier insurer under s. 3(1) analysis is not applicable under s. 3.1(2).

The purpose of this provision in the Regulation is to discourage insurers from dumping priority disputes on the Fund when they have not properly investigated the issues themselves.

The 90 day period under ss. 3(1) and 3(2) is to make sure that any insurers who may stand in priority to the first tier insurer receive notice in a timely fashion.

Under s. 3(1) an insurer is prohibited from disputing its obligation to pay benefits on a priority basis unless it has given the written notice within 90 days to any other insurer who it claims may be required to pay under that section.

Section 3(2), however, allows an insurer to give notice after the 90 day period if 90 days was not sufficient to make that determination and that they made reasonable investigations. There is some similarity between this latter provision and what I have referred to as the Fund reasonable investigation. However, it should be noted that there is a harsh result if the first tier insurer does not give notice within the 90 days and is unable to establish that it made reasonable investigations. Echelon described this as a pseudo limitation period and I do agree with that characterization. As an insurer is essentially requesting that a limitation period not be relied upon, then there is a heavy onus for them to establish the level of investigation conducted in order to waive the limitation period. That is not the case with respect to a reasonable investigation relating to the Fund.

However, despite seeing some difference from an interpretive perspective between these two sections, I still find that the approach taken by arbitrators and courts in analyzing a reasonable investigation under 3(2) is of assistance here. The following principles drawn from the cases outlined by Echelon on the s. 3(2) 90 day issue support the following principles that I apply to my analysis of this case:

1. While the investigation must be reasonable, that does not mean it has to be perfect;

2. While there may be evidence that other investigations could have been done that would have been helpful, that does not mean that the investigation actually undertaken does not meet the test of reasonableness;

3. When looking at reasonableness, one should recognize that adjusters manage numerous files and should not be held to a standard of perfection;

4. If there is misleading or inaccurate information provided, this can be considered when looking into whether an investigation is reasonable.

In this particular case, within the time period prior to putting the Fund on notice, Echelon had done the following:

1. Received an OCF-1 that did not identify an officer's name or badge number, described the accident as occurring when the claimant was run over by a vehicle that took off unexpectedly, confirmed that the claimant was single and not a dependant, and then provided inaccurate information as to the basis upon which he was applying to the Echelon policy;

2. The adjuster attempted to have a conversation with its insured (the sister) who declined to provide information about her relationship with the claimant and clearly did not want the claim to be processed under her policy;

3. They conducted a driver's licence search for the claimant and it came back no record;

4. The adjuster contacted the claimant's legal representative a number of times and was told that they were trying to get hold of the police report, they did not know who the driver and owner or insurer of the vehicle was, and efforts to talk to the sister of the claimant would not continue as she was hostile;

5. Received a Statutory Declaration from the claimant on March 6, 2023;

6. Conducted an EUO on March 29, 2023.

In my view, these were appropriate and reasonable investigations that one would expect a first tier insurer to do in order to determine whether there were any other insurers available before putting the Fund on notice. Echelon was able to confirm through these investigations that the claimant did not have a driver's licence. He was not a named insured under any other policy. He was not married. He had only lived with his sister for a couple of months and was receiving money from Ontario Works, and that he was capable of working in the year prior to the accident but nothing panned out. He had a job with Toyota and was going to start after the accident. He knew the vehicle that struck him was an SUV and that the driver got out of the vehicle and she was a woman, but he had no other information about her.

A review of this information supports Echelon's position that it was unlikely the claimant was dependent upon their insured and that other than the striking vehicle, there was no other insurer

who would likely be the priority insurer.

I note that the Fund suggests other avenues of investigation that should have been done to establish a reasonable investigation. To try to get a statement from the sister, get a statement from the claimant at an earlier time or send out priority dispute questions to him, or try to find out the name of the brother-in-law in order to get the name of the neighbour and see if they had the name of the driver of the car. I agree with Echelon that these are all speculative. There was no evidence presented to suggest that had the brother-in-law been contacted, that he would have knowledge of the name of the neighbour and that even if he did, that that neighbour took the name of the driver, her address and/or her insurance information. I agree with Echelon that the Fund seems to be preoccupied with the form of the investigation rather than the results of the investigations that were done.

I am satisfied that Echelon conducted more than reasonable investigations to determine whether any other insurer would respond to this claim, and it was clear that the only potential insurer was that of the striking vehicle. There was no other viable source of information other than the Police Report. It is of some considerable importance that the Police Report was not only not available prior to the 90 days passing, but on the face of it confirms that it was not released until the supervisor signed off on May 3, 2023. Echelon, immediately on being provided with the Police Report, sent it to the Fund.

On the facts that have been presented to me, I do not see what other reasonable investigations Echelon could have done prior to putting the Fund on notice. If the claimant's counsel could not get hold of the Police Report, then there is simply no evidence that Echelon could have done any better had it tried to contact the Simcoe OPP.

I agree with Arbitrator Bialkowski's analysis in *Dominion v. AXA* that reasonable enquiries would include:

- Did the claimant have his own policy of insurance?
- Was he listed on someone else's policy?
- Was he the spouse of someone with an auto policy?
- Was he dependent on someone with an auto policy?
- Did he have regular use of another vehicle with insurance?
- Did the driver of the uninsured vehicle have personal coverage?
- Were there other involved vehicles that may be insured?

A review of Echelon's investigations suggests that they made enquiries into each of these categories, received responses that confirmed there was no insurance available and that the only other potential source was the still unknown, unidentified striking vehicle with no information that even if identified, that there was insurance coverage.

Therefore, I find that Echelon conducted reasonable investigations.

I also agree with Arbitrator Bialkowski in the *Dominion v. AXA* case (*supra*) that had I found that

there had not been reasonable investigations, that I would not conclude that this prohibited Echelon proceeding with the priority dispute.

I agree with Arbitrator Bialkowski that the only remedy authorized in the priority regulation where the first tier insurer has failed to conduct a reasonable investigation prior to putting the Fund on notice is the right of an arbitrator to make a special award under 7(6). However, as I find that there were reasonable investigations in these circumstances, the special award does not arise.

2. **Did Echelon's notice letters comply with s. 3.1(2)(b)?**

Section 3.1(2)(b) has two parts to it. Firstly, it requires the insurer giving notice to the Fund to provide particulars to the Fund of its investigation. It then also requires that the insurer provide the results of that investigation.

I have already noted that I have found that Echelon's letter of April 18, 2023 complies with the regulation. I pause here to note that certainly Echelon could have provided documents with the letter of April 18, but I agree that the regulation does not speak to that. I certainly find that it would have been helpful and appropriate for counsel for Echelon when asked by the Fund to provide, at the very least, copies of the OCF-1, the transcript of the EUO and the Statutory Declaration of the claimant. However, their failure to do so with their initial letter of April 18, 2023 is not fatal to their claim. I do encourage counsel who are reviewing this decision to carefully consider the advantages of relevant documentary disclosure at an early stage, particularly in cases such as this. While I appreciate that the more extensive documents sought by the Fund, such as the underwriting file, field adjuster's notes and medical reports would be considered overreaching and have little, if any, relevance to the priority determination, the request for the OCF-1, the Statutory Declaration and the transcript of the EUO, all of which were referred to in the letter of April 18, was not unreasonable.

Turning to the letter itself. It clearly identifies that the claimant was a pedestrian who was struck by an unidentified vehicle. I see no issue with the categorization of that vehicle as unidentified. The Fund suggested that that was misleading and that it was an effort to establish a definition of an unidentified vehicle as set out under the *Insurance Act*. I do not see that interpretation as warranted. The vehicle that hit the claimant was unidentified.

Echelon clarified that the claim to them had been based on the sister's policy as a dependant and that Echelon took the position that the claimant was not a dependant and provided two relevant facts: he was receiving Ontario Works at $350 and had the accident not happened, he was going to start a job at Toyota.

Echelon confirmed that the claimant did not have a driver's licence. He was not a named insured, spouse or listed driver under any other policy. In support of those particulars, Echelon advised that the information had been collected through three main sources of investigation: the OCF-1, the Statutory Declaration and the EUO.

Therefore, particulars were provided in sufficient detail for the Fund to be satisfied that standard

investigations such as a Statutory Declaration and an EUO had been conducted. The conclusions of those were set out indicating there were no other identifiable policies.

The letter also made clear that there was no Police Report. It had been requested through the claimant's lawyer and they had not received it as of the date of notice of April 18, 2023.

I am unsure what other particulars were needed in order to satisfy the Fund that this was not a case of dumping. Again, that is the purpose of this section of the Regulation.

The Fund suggests that Echelon should have provided information that the EUO indicated that the driver stayed at the scene and spoke to the police. That fact is really irrelevant as that information did not result in Echelon being able to identify the driver, owner or insurer of the vehicle. There was nothing Echelon or the Fund could do with respect to that information other than wait for the Police Report. It was clear from Echelon's letter that they considered this to be an area of ongoing investigation, as indeed did the claimant's counsel.

The Fund's main argument appears to revolve around the failure of Echelon to provide its documents with the letter. While I have commented on the fact that that certainly would be helpful, I agree with Echelon that it is not mandated by the regulation and it does not mean that the letter itself does not disclose sufficient particulars of the investigation and the results of the investigation for the Fund to be satisfied of the type of priority situation they are dealing with, what they may need to do, and more specifically that they are not faced with a case of dumping.

It is worth remembering that the avoidance of dumping is to ensure that the first tier insurer expends its funds on investigations and clearly Echelon did that in this case. Other than conducting an Autoplus report, once the Police Report was received, the Fund expended no further monies, or at least there was no evidence of their incurring any costs other than the legal costs that ultimately resulted when it became clear that despite Economical appears to be the priority insurer in this case, that this matter had to move forward to an arbitration.

I also conclude that if I had found that Echelon's letter did not meet the requirements of 3.1(2), that this would also not have prohibited Echelon from proceeding with its priority dispute but would have opened up the opportunity to make a special award. Failure to comply with s. 3.1, whether it is with respect to the reasonable investigation, the particulars of the results of the investigation does not prohibit a first tier insurer from pursuing its priority dispute against the Fund. It does open up that insurer to a potential special award claim.

DECISION

In response to the three issues noted for my determination, my conclusion is as follows:

1. Echelon complied with s. 3.1(2)(a) and (b) of Ontario Regulation 283/95 paragraph;

2. As Echelon did comply, there are no consequences;

3. As Echelon complied, the Fund is not entitled to a special award under 7(6) of Ontario Regulation 283/95.

COSTS

The Arbitration Agreement provides that both the costs of the arbitrator and the legal costs are to be determined by me taking into account the success of the parties, the conduct of the proceedings, and any principles generally applied to litigation before the courts in Ontario.

Echelon has been successful in all aspects of this arbitration, at least dealing with the preliminary issue. Accordingly, the legal costs and the costs of the arbitration are to be borne by the Respondents.

Economical chose to align itself with the Fund and make submissions in support of the Fund's position, but overall was not the key player in this procedural dispute. Accordingly, I apportion the responsibility to pay the legal costs and the arbitrator costs as between the Fund and Economical at 75% the Fund and 25% Economical.

I have not fixed legal costs. If the parties are unable to reach agreement on that, then we will schedule a costs hearing.

This means that the arbitration will now proceed on the main issue of priority. Counsel will be contacted to schedule a further pre-hearing date to set up the next stage of the proceedings.

DATED THIS 16th day of December, 2025 at Toronto.

____

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors
800-150 York Street
TORONTO ON M5H 3S5