

**IN THE MATTER OF THE *INSURANCE ACT***  
R.S.O. 1990, C.I.8, AS AMENDED, SECTION 268 AND ONTARIO REGULATION  
283/95 AND ONTARIO REGULATION 23/10  
**AND IN THE MATTER OF THE** an Arbitration under the *ARBITRATIONS ACT*, 1991  
S.O. 1991, c.17, as AMENDED;  
**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N:

**TD GENERAL INSURANCE COMPANY**

Applicant

and

**ECHELON INSURANCE**

Respondent

**AWARD WITH RESPECT TO PRELIMINARY ISSUE**

**COUNSEL APPEARING**

Ryan Bowes, counsel for the Applicant, TD General Insurance Company (hereinafter referred to as "TD").

Stas Bodrov, counsel for the Respondent, Echelon Insurance (hereinafter referred to as "Echelon").

**BACKGROUND**

This matter comes before me by way of a priority dispute pursuant to s. 268 of the *Insurance Act* R.S.O. 1990, c. I.8, as amended, and Ontario Regulation 283/95. While the broader issue in this matter is one of priority, a preliminary issue has arisen which the parties agree should be heard before any determination of the actual priority dispute under s. 268 of the *Insurance Act*.

This case arises out of an accident that occurred on October 18, 2022. On that day, the claimant was driving a 2008 GMC Sierra which was insured by TD. The claimant was not the named insured under the TD policy. However, he applied to TD for statutory accident benefits.

Echelon insured the claimant on the date of loss. TD therefore took the position that Echelon was the priority insurer and put Echelon on notice by way of a Notice of Dispute on December 20, 2022. A Notice to Submit to Arbitration was served on May 8, 2023. Therefore, the deadline to complete the arbitration in accordance with Regulation 283/95 was up at the two-year mark on May 8, 2025. Echelon takes the position that TD failed to comply with s. 8(2)5 of Regulation 283/95 in that they did not complete the arbitration within two years. Accordingly, Echelon seeks a dismissal of the application in its entirety.

### **PRELIMINARY ISSUE**

The preliminary issue to be determined is whether this arbitration proceeding should be dismissed as it was not completed within two years of its commencement as required by s. 8(2)5 of Ontario Regulation 283/95.

### **PROCEEDINGS**

This matter proceeded by way of a written hearing. An Arbitration Agreement was submitted, signed by both parties dated May 8, 2026. In addition, the parties submitted Document Briefs which included a Motor Vehicle Collision Report dated October 18, 2022, redacted log notes of the Respondent Echelon and redacted log notes of the Applicant TD. It also included various faxes and letters between the parties and between counsel. There were no examinations under oath conducted. Both parties submitted detailed submissions and extensive case law.

### **RELEVANT LEGISLATION**

While this matter involves a priority dispute under s. 268 of the *Insurance Act* R.S.O. 1990, c. I.8, the key issue in dispute relates to s. 8(2)5 of Regulation 283/95. Sections 8(1) and 8(2) of the Regulation are reproduced below in their entirety:

"8. (1) Except as provided in this Regulation, the Arbitration Act, 1991 applies to an arbitration under this Regulation. O. Reg. 283/95, s. 8 (1).

(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:

1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.
2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.
3. Subject to paragraph 4, once a date for the arbitration is scheduled, the

arbitration must be conducted on that day.

4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.

5. Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration."

It is important to note that Ontario Regulation 283/95 sets out a complete code for the procedure by which two or more insurers are to determine disputes with respect to the priority of payment of accident benefits.

## **FACTS**

There is no dispute that TD insured the 2008 GMC Sierra that the claimant was driving on October 18, 2022. There also does not appear to be a dispute that Echelon insured the claimant on the date of loss.

According to the log notes of Echelon, on October 31, 2022 at 11:52 a.m. initial notice of the claim was provided by the claimant to Echelon. This appears to have been an error and should have been dated October 21 based on the other information in both the TD and Echelon files. An adjuster was assigned as well as a claim number: 035678014-02. The assigned adjuster attempted to call the claimant on October 31 unsuccessfully. She ultimately connected with the claimant on November 2, 2022 at 11:12 a.m. During that call with the claimant, the adjuster confirmed that the policy was in force. She secured a description of the accident which included "I/S was driving his friend's vehicle. The insured had his trailer attached to the truck. His trailer is insured with Echelon." In addition, the claimant advised the adjuster that he was on his way to a job but "not on company time." The claimant also confirmed that his passenger (the actual TD insured) had not been injured but had opened an AB file with his own insurer, TD. The claimant also confirmed with respect to WSIB that he was not in the course of his employment. He provided some description of his injuries and the nature of his self-employment: a landscaping business.

The claimant also advised the Echelon adjuster that "TD sent him AB package." The adjuster advised him that Echelon would send him an AB package and her log note with respect to this states:

"We will send him AB package and wait to see who he submits OCF-1 to will complete a priority investigation."

The note also indicates that the adjuster was advised that the claimant was single.

There then is no activity from Echelon's perspective vis-à-vis the claimant until a log note of December 7, 2022 from the assigned adjuster. She notes:

"Spoke with ABA - Krista - She will send AB package to clmt as it was not sent out following the ICQ call: will F-U in 30 days."

In the meantime, TD's AB department had also been active vis-à-vis the claimant. On October 24, 2022 the log notes indicate that an AB adjuster at TD was contacted by the claimant's father. He confirmed to TD that his son had insurance with Echelon and he provided the TD adjuster with the claims department phone number for Echelon so she could check with them. She tried calling the Echelon office but it was closed and she noted that she would try again. She called the claimant's father back to see if he had been contacted by Echelon yet and he advised he had not heard from anyone. He gave her the phone number of their broker and she also tried to contact the broker with no success. The TD adjuster is told that the claim had been reported to Echelon on October 21, 2022. He had not been given a claim number but they had advised him they will get back to him with the necessary information. The TD adjuster explained that the Echelon policy was primary. The father indicated he understood and the adjuster's note indicates "wished him well and all the best for his son's recovery."

However, on the same day the adjuster notes that even though she was aware the claimant was insured with Echelon, because she could not confirm that the claim had been reported through Echelon and because she had been told the injuries were severe, she sent out the AB package.

On October 31, 2022 another individual at TD made the following log note with respect to priority:

"The claimant was the driver of our vehicle and our named insured was the passenger. The claimant has a policy with Echelon and will be primary. We do not have the policy number and OCF-1 not received to date. We should run an AutoPlus to get the policy number for Echelon and prepare to put them on notice if the OCF-1 is returned to TDI."

The TD log notes indicate further calls were made to Echelon in order to get a claim number and adjuster's name for their records but the TD adjuster was unable to get through and reports "got stuck in a loop that would not allow me to select a department."

On November 1, 2022 the TD adjuster notes that no Application for Accident Benefits has been received and that priority will be with Echelon. She notes she is going to call Echelon again to make sure they have an AB claim set up before she closes her file.

On November 4, 2022 the TD adjuster successfully gets through to Echelon and speaks with an individual who confirms that an AB claim has been set up. The TD adjuster is given the claim number, the adjuster's name and contact information.

On November 4, 2022 the TD adjuster follows up with the claimant's father and gets an update with respect to his medical condition.

On November 10, 2022 the claimant's father calls the TD adjuster and leaves a message indicating he needs some assistance with filling in the OCF-1/OCF-6.

A log note from another individual in AB dated November 14, 2022, provides the following entry:

"Clmt has a policy with Echelon, appears claim has been opened with Echelon and AB adjuster assigned. We did receive a call from claimant's father asking for assistance completing the AB applications for claimant therefore unsure if he is clear that he should be returning the apps to Echelon and not TDI. We will continue to wait and see if the AB apps are sent to TDI and if so, place Echelon on notice."

On November 15, 2022 the TD adjuster tries to contact the father seeking his approval to assign someone to assist with discharge planning.

On December 1, 2022 the supervisor notes that TD has received a number of forms but as yet no OCF-1. They have received an OCF-2, OCF-5 and OCF-3 but they have not been completed properly. The claims adjuster is to respond to the forms advising they are incomplete. The note confirms again that priority remains with Echelon as the claimant has his own policy and therefore "we should confirm whether the OCF-1 was sent there as not included in our documents received."

At this point the log notes of TD suggest that this is going to be a catastrophic claim indicating the injuries include fractures to the ankle, shattered left leg, paralyzed right leg, spinal fracture, spinal cord damage, left hip and pelvis fracture and psychological symptoms.

On December 13, 2022 the claimant submits his OCF-1 to TD. On December 20, 2022 an adjuster from TD noted that she called Echelon Insurance and could not get through again. She Googled Echelon claims and found two fax numbers. She then faxed the Notice of Priority Dispute to both fax numbers.

Turning back to Echelon, on December 7, 2022 Echelon sent out their AB package to the claimant. The next note is December 21 when the adjuster indicated that they had received the TD Notice of Dispute on December 20, 2022. The note indicates confirmation that the OCF-1 had been received by TD on December 13. The log note indicates further "He reported AB claim to us on October 21, 2022."

I now turn to the facts subsequent to the issuance of the notice of dispute.

By letter dated December 21, 2022, Echelon wrote to TD Insurance acknowledging receipt of the notice of dispute and advising that they were going to be investigating the question of priority. They requested some information from TD including:

- A copy of the full police report
- Statement or EUO report;
- Relationship between the other occupant of the vehicle and the claimant;
- WSIB - Confirmation of the purpose of the trip on October 18, 2022;
- AutoPlus report;
- Policy coverage information;
- A completed OCF-1.

There is no reference in the TD log notes to this letter. In a log note of January 11, 2023 a TD adjuster notes that there has been no response from Echelon to date. The adjuster is to follow up to confirm whether they are accepting priority. TD also sends out another letter dated January 4, 2023 to Echelon enclosing the notice of dispute again.

The adjuster from Echelon responds to this letter via email on January 6, 2023 noting they had already received the notice of dispute and were awaiting a response to the information requested in their letter of December 21, 2022.

There is no reference in the log notes of Echelon to the email of January 6, 2023. In fact, on February 3, 2023 the TD log notes indicate again that they have not received any response from Echelon and follow-up is needed again.

The TD adjuster tries to contact Echelon on February 28, 2023. She notes the correct name of the adjuster, the correct phone number, and gets a voicemail and leaves an urgent message for her to call back.

Another phone call is made on March 16, 2023 to the same adjuster but this time the TD adjuster is unable to leave a voicemail noting again that she could not get past the company voicemail answering service directory.

This results in yet another letter going from TD to Echelon dated March 16, 2023, again enclosing the notice of dispute and commenting, "We have yet to receive a response to our notice, nor have we received a return call to our numerous contact attempts." There is no explanation as to why TD seemed to be unaware of the efforts to contact them by Echelon.

According to the TD log notes on March 29, 2023 the TD adjuster again called the same adjuster at Echelon and once again was unable to leave a message and could not get to any department.

In the meantime, the Echelon adjuster sent another letter to TD dated March 27, 2023. In this letter she outlines that they had written on December 21, 2022 and sent an email on January 6, 2023. The letter is more or less identical to the first one sent by Echelon requesting the same information.

On April 4, 2023 the TD adjuster reports she has still not heard from Echelon and calls again. Again, she is unable to get through the Echelon voicemail system and was unable to leave a message.

In a TD log note dated April 11, 2023 it is noted that Echelon has not responded to the priority notice and therefore they are going to initiate a private arbitration. There is no evidence that by April 11, 2023 TD had received Echelon's letter of March 27, 2023 or any other of their communications nor any explanations as to why.

TD escalates the priority dispute to their legal department. Counsel are retained and there is a discussion with assigned counsel, a result of which a notice of initiation of arbitration is prepared and purported to be served on Echelon on April 24, 2023. However, while the letter identifies Echelon Insurance Company as being the recipient, it is sent care of Soloway Wright Lawyers in Ottawa. These were not lawyers for Echelon, but rather the lawyers for the claimant. The notice is dated April 24, 2023. However, although the letter is directed to the claimant's counsel, the Echelon log notes indicate that they received the notice of arbitration on May 8, 2023 and they assigned the task to their ADR department to handle the arbitration.

The notice to submit to arbitration requested that Philippa Samworth be appointed as arbitrator. A file was opened bearing file number 6951-0939 at Dutton Brock LLP and a letter was sent by the arbitrator dated May 3, 2023 to counsel for TD and to Soloway Wright Lawyers acknowledging the retainer. The file indicates that Soloway Wright Lawyers had been identified as counsel for Echelon by counsel for TD. In or around June of 2023 Echelon retained SBA Lawyers LLP to handle the priority dispute on their behalf. However, no notice was provided to the office of Arbitrator Samworth and ultimately, due to lack of communication from TD or Echelon, the file was closed on December 12, 2023.

In the meantime, communications continued between counsel for TD and counsel for Echelon. In an email of June 1, 2023 SBA Lawyers requested information with respect to the status of the accident benefit file as well as the basis of the claim being made against Echelon in priority, a copy of the certificate of insurance and the police report. As well, Echelon's counsel requested some time before the appointment of the arbitrator was agreed to. It seems counsel for Echelon were unaware that Arbitrator Samworth had already accepted the retainer and opened the file and the 30 day period to consent to the appointment of the arbitrator had passed.

By July 27, 2023 TD Insurance had not heard from Echelon confirming the appointment of the arbitrator and advised that Philippa Samworth had been appointed and asked whether Echelon was agreeable.

Echelon responded that they could not confirm whether they were agreeable to the appointment of the arbitrator and also noted that they had not yet received the information requested.

On August 22, 2023 counsel for TD provided information about the AB claim, provided a copy of the OCF-1, the payments to date, the insurance information and a copy of the police report.

Various emails suggest efforts were made to set up a call between the two counsel. On March 15, 2024 counsel for Echelon writes TD counsel asking whether they are still pursuing priority and on April 25, 2024 TD counsel responds that they are and unfortunately provides some inaccurate information as to the basis for the priority dispute, noting that the TD Insurance policy was not valid until eight days after the accident. That, in fact, was inaccurate and was clarified sometime later.

Counsel continue to exchange emails with respect to their positions. On July 5, 2024 counsel for TD suggests that if they cannot reach an agreement that she would like to move ahead with a pre-hearing. On July 6, 2024 counsel for Echelon notes that their position is that the claimant may have had regular use of the TD vehicle and therefore they may need an EUO.

On September 25, 2024, TD counsel confirms that their policy was actually in effect after the accident and notes that they would like to move forward with scheduling the EUOs on regular use. She also advises in an email the next day that the claimant and the insured (TD insured) are friends and do not reside together and asks Echelon for a rationale for the regular use argument.

Echelon's counsel responds that his understanding is that the claimant and the insured were heading to a job at the time of the accident.

On April 11, 2025 counsel for TD wrote to Echelon's counsel. It should be noted that by this time there was a new counsel for TD from the in-house department and a new lawyer at SBA took over the file. The new lawyers were counsel who argued this matter.

Mr. Bodrov wrote to Mr. Bowes on April 11, 2025 via email setting out Echelon's position and noting that an EUO of the claimant and the TD insured are absolutely necessary to investigate regular use. Echelon Insurance declined to pay any legal costs incurred by TD in association with the conducting of the EUO, taking the position that this was a normal investigative tool. Mr. Bodrov also noted that some considerable time had passed since the arbitration had been initiated with not much actually having been accomplished. He noted:

"The larger issue at this point is that TD has been wavering in its position for almost two years. Initially TD claimed that its policy was not in effect on the date of loss but subsequently agreed that it was. Once that was established and dealt with TD seemed to not acknowledge that there is a genuine need for investigation regarding regular use which appears to be TD's position now despite there being clear evidence to indicate that a regular use investigation is necessary. We are now almost two years since the demand for arbitration has been served and no action has been taken by TD to pursue this claim, appoint an arbitrator, or move the matter in any way, despite our efforts to try to move this matter along ... At this time I do not have instructions to consent to pushing the two-year period during which the arbitration must be complete and I do require your client's position on how to move this matter forward."

**On May 8, 2025, the two years to complete the arbitration was reached.**

All the remaining facts have to do with the post two-year period.

Mr. Bowes responded to the April 11, 2025 email on May 9, 2025 apologizing for the delay and noting he was seeking instructions.

Mr. Bodrov followed up a couple of times and ultimately on July 25, 2025 emailed noting that it was now two months from the initial interaction and that the two-year period to complete the arbitration had now passed. He asked whether TD was withdrawing its priority dispute and prepared to pay legal costs to Echelon.

On July 28, 2025, as a result of some communication between counsel, Mr. Bodrov confirmed that an EUO was going to be scheduled but noted "However, this is not to concede the two-year period enforcement."

The updated accident benefit file was provided on August 21. On August 25, 2025 TD conducted an EUO of the claimant but in the absence of Echelon's counsel. Mr. Bodrov had been given notice on August 21 that the EUO was being conducted.

In an email dated September 2, 2025 counsel for TD noted their position with respect to regular use based on the information provided through the EUO and asked Echelon to accept priority. The email also raised the issue of deflection ostensibly claiming "Echelon obstructed the claimant's own initial election by failing to respond to him when he first reported the accident to Echelon."

Arbitrator Samworth received a new request to open an arbitration file based on the same notice to submit to arbitration and a new file was opened, 6951-1446, and a confirming letter with respect to the retainer sent to Mr. Bowes and Mr. Bodrov on September 15, 2025. The first pre-hearing took place on October 8, 2025 at which time this preliminary issue was identified.

## **POSITION OF THE PARTIES**

It is Echelon's position that the circumstances of this case justify that TD be prohibited from proceeding with this priority dispute on the grounds that they failed to complete the arbitration within the required two-year time period.

Echelon acknowledges that the timelines set out under s. 8(2)(5) have been found to be "permissive" rather than "mandatory". This rationale flows from a line of cases primarily from Arbitrator Bialkowski but also one from Arbitrator Novick. Both arbitrators endorse the proposition that the timelines are procedural/permissive and that the failure to comply with that timeline does not result in a mandatory dismissal of the claim.

Echelon disputes that interpretation. Echelon submits that in fact the use of the word "must" in s. 8(2)(5) is not permissive but is in fact mandatory and that the prior cases have misinterpreted the use of the word "must" found in that section.

Alternatively, Echelon argues that this is a case that is exceptional in nature and therefore justifies a variation from previous case law.

With respect to the interpretation of the word "must" and the argument as to the mandatory nature of the limitation period, Echelon relies heavily on the decision of the Ontario Court of Appeal in *Kingsway General Insurance Company v. West Wawanosh Insurance Company*, 2002 CanLII 14202. In that case, the court, when commenting on the interpretations of the timelines prescribed under the regulation (not specifically the ones that are being dealt with here), stated that the regulation sets out precise and specific terms for a scheme for resolving disputes between insurers. The court noted that an insurer is entitled to rely on and assume other insurers who are sophisticated litigants are going to comply with the provisions. The court stated:

"In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases."

Echelon submits that when interpreting the word "must" under s. 8(2)(5), one must follow the interpretation outlined by the Court of Appeal in *Kingsway*. Echelon submits that in doing so, the only reasonable interpretation would be that the section is mandatory in nature in order to ensure clarity and certainty for insurers. Echelon submits that had the legislature intended this provision not to be mandatory, it would have used less mandatory phrasing than the word "must".

To that end, Echelon submits that the only reason that the two-year requirement to complete the arbitration was not met was exclusively due to the failure of TD to drive the matter forward. Echelon points to the following facts. This was a relatively simple priority dispute which did not require any extensive productions or EUOs. Echelon submits it would have been easy for TD to complete all the necessary steps of documentary exchange, completing EUOs and undertakings within the two years of May 8, 2023.

Rather, Echelon submits, TD failed to produce the records requested until August of 2023: some three-and-a-half months after commencing the arbitration.

Echelon requested an EUO in July of 2024 to be arranged by TD and it was not arranged until after the two-year period had passed.

Echelon points out that there was a lack of communication and follow-up by TD throughout the history of the claim and particularly after the notice to submit to arbitration was served. There is no reasonable explanation given by TD to explain why or how the delay occurred.

Echelon also outlines factors that should be considered by an arbitrator when determining the

appropriate result when a party to a priority dispute has failed to complete the arbitration within two years. These factors were set out in Arbitrator Bialkowski's decision of *Unifund Insurance Company v. Wawanesa Mutual Insurance Company*, Arbitrator Bialkowski, April 8, 2015 and *MVACF v. Jevco Insurance Company*, June 16, 2017. The factors are set out below:

1. Did the Respondent respond to the Notice to Arbitrate and complete its investigation in a timely fashion?
2. Was it practical to complete all the necessary steps to be in a position to complete the hearing within two years of the commencement of arbitration? Necessary steps being production exchange, EUOs, undertakings, productions from non-parties, etc.
3. Did the complexity of the dispute (number of issues, number of parties, involvement of third-tier insurers, etc.) make it practical to be in a position to complete the hearing within two years of the commencement of the arbitration?
4. Has the Respondent been prejudiced by the delay?
5. Did the Respondent advise that it required the hearing to be completed within two years or did it acquiesce to the pace of the proceeding?
6. Did the conduct of the Respondent meaningfully contribute to the hearing not being completed in two years?
7. Did the Applicant provide the Respondent with relevant documentation and priority investigation information reasonably requested in a timely fashion?

With respect to the first question, Echelon submits that it responded to the Notice to Arbitrate in a timely fashion. Counsel were appointed promptly, letters exchanged and productions requested.

With respect to the second question, Echelon submits that there was more than sufficient time between May 2023 and May 2025 to complete productions and complete the examination under oath. Echelon submits it raised the question of regular use in a timely fashion. It requested appropriate documentation. It indicated it wanted an EUO on the issue. Echelon submits TD was non-responsive and delayed the matter.

As to the third question, Echelon submits that this was not a complex dispute. There were only two parties. The only issue was regular use. There were relatively few documents to be exchanged and an EUO of the claimant was the key piece of evidence.

With respect to the question of prejudice, Echelon submits that it is significantly prejudiced as a result of this delay. Echelon argues that prejudice should be inherently inferred when a first-tier

insurer delays a proceeding. Echelon argues that it was required to maintain reserves thus undermining its financial position in the market as it had to reserve for a substantial loss. Secondly, it was not involved in the handling and the allocation of the benefits for the first three-and-a-half years of the claim which in and of itself would be prejudicial as the Echelon handling guidelines are likely different than the TD guidelines.

As to the fifth criterion, Echelon takes the position that it never acquiesced to the pace of the proceeding and made it clear that the hearing was to be completed within two years. Echelon acknowledges explicit reference to the two-year requirement was not raised until January of 2025 but that was still four months before the expiry of the two-year period and at no time did Echelon indicate that it would not be relying on the two-year timeline.

Echelon also submits that it did not meaningfully contribute to this matter not being heard within the two years. Echelon submits that the evidence establishes that both Echelon and its counsel were thoroughly engaged in the process and regularly prompting TD to move the matter forward.

Lastly, Echelon submits that the Applicant did not provide it with the relevant documentation and investigation in a timely fashion. Echelon submits that it and its counsel repeatedly requested for documentary records and that while some documentary evidence was received within four months of the commencement of the proceeding, the EUO was not in fact done until 2.5 years later.

Echelon's last point is with respect to the issue of deflection. While deflection is not specifically in issue here, it is a relevant fact and Echelon takes the position that TD, in fact, deflected this claim with their initial contact with the claimant on October 24, 2023. Echelon points out that the TD adjuster at that time spoke to the claimant's father and advised him that the Echelon policy was primary to the TD policy. The log note indicates, "He understood, wished him well, and all the best for his son's recovery."

Echelon submits that this should be considered when determining the consequences of the failure to meet the two-year period.

### **Position of TD**

TD acknowledges that the arbitration has not been completed within two years but argues that the dismissal of the arbitration is not a fair or proportional consequence of the alleged breach and that the prejudice to it would be overwhelming.

TD also submits that while it has been at least partially responsible for the delay, that Echelon has equally contributed to the delay. TD submits Echelon failed to complete their own timely and appropriate investigation. It acquiesced to the pace of proceedings. It did not provide fair or early notice that it would be relying on the two-year period. Further, TD submits Echelon is not prejudiced by the delay.

TD does not agree with Echelon's submissions with respect to the mandatory nature of the timeline under s. 8(2). It submits that the case law is settled, that the timeline is permissive rather than mandatory, and relies upon the same line of cases referenced by Echelon.

TD submits that this is consistent with the legislative intent of the section. If the two-year deadline were mandatory without interpretation and was imposed solely on an applicant, then a respondent insurer could strategically attempt to delay the proceedings to absolve themselves of priority irrespective of the actual merits of the claim.

TD points to the fact that the legislation provides no specific guidance as to the penalty to be imposed if the arbitration is not completed within the statutory deadline and this again is consistent with the case law interpretation to date that the two years is directory and permissive and cannot be interpreted as resulting in a mandatory dismissal.

TD references a further decision of Arbitrator Bialkowski in *Belair Insurance Company v. Northbridge General Insurance Company*, August 2, 2024. In that case, Arbitrator Bialkowski set out a number of general principles as set out below:

1. The purpose of the regulation is to ensure that priority dispute process, once initiated, is completed in a timely fashion.
2. Section 8(2) of the regulation is procedural rather than substantive.
3. The timelines (the two years) are directory and permissive rather than mandatory and apply to both parties.
4. Any penalty for the breach of the timelines rests in the discretion of the arbitrator based on the specific facts of the case before the arbitrator.
5. If a penalty is found, there must be proportionality between the breach and the consequences imposed on the breaching party.

Therefore, TD submits that any appropriate penalty for any failure on the part of the Applicant to meet the two-year time period should be by way of costs or reduction of pre-judgment interest. However, TD is also clear in its position that Echelon has also contributed to the delay and that their contribution should be considered with potential cost consequences as well.

As did Echelon, TD relies on the criteria that have been established by Arbitrator Bialkowski and Arbitrator Novick as to what factors an arbitrator should consider in determining the nature of the breach.

TD agrees with Echelon that this is not a particularly complex case. TD describes this as a priority

dispute between a third tier insurer and a first tier insurer.

With respect to whether the Applicant provided the Respondent with relevant documentation in a timely fashion, TD submits that the evidence supports prompt production from the Applicant's perspective. The first request for productions from Echelon was June 1, 2023 and it was fulfilled by TD by letter of August 22, 2023.

With respect to the scheduling of the EUO and the investigations into the area of regular use, TD's position is that Echelon contributed to the delay in taking those steps and moving that issue forward. This is primarily based on the fact that it did not raise the question of regular use until July 6, 2024. TD also submits that while the issue was raised at that time, there was never any substantive evidence provided to support those allegations.

TD points out that Echelon was clearly a first tier insurer as the claimant was a named insured under its policy. TD's only connection to the claimant was that he was in the TD vehicle on the date of loss. TD submits that Echelon failed to provide any substantive evidence in a timely fashion to support the proposition that the claimant had regular use of the TD vehicle through some employment.

TD submits that once it provided evidence to Echelon of its position vis-à-vis Echelon as a first tier insurer, that the onus then shifted to Echelon to investigate and either accept priority or produce evidence to the contrary, which it did not. In light of the shift of onus, TD submits that it was perfectly reasonable for it to refuse to proceed with the cost of completing an EUO of the claimant on the issue of regular use in the absence of any evidence to suggest that that was a viable issue. Therefore, Echelon contributed to the delay in moving the matter forward by not offering statements or documentation to substantiate the regular use issue.

TD submits that Echelon did acquiesce to the pace of the proceedings and further did not advise TD in a timely fashion of its position that it was going to be relying on the two-year period. Echelon did not advise TD of their position until 27 days prior to the two-year deadline (April 11, 2026) and TD submits that this does not constitute fair notice. TD disputes Echelon's position that there is reference made to the two-year deadline in January of 2025. TD submits the is evidence clear that the first reference to the deadline is on April 11, 2025.

TD also submits that the evidence points to Echelon acquiescing in the pace that the arbitration moved forward. At no time did Echelon demand that a pre-hearing be set. It delayed in agreeing to the appointment of the arbitrator. It delayed in requesting an EUO and providing information with respect to regular use.

TD also suggests that there was no basis for a regular use argument and that Echelon failed to investigate that issue itself. TD points to Echelon's log note of November 2, 2022. This log note indicates that the claimant spoke to the adjuster and he reports he was driving the TD insured's vehicle on the way to the job. However, he says specifically he was not on company time, was

not in the course of his employment and TD insured is noted to be a friend.

TD submits that Echelon had this information in November of 2022 yet failed to raise any regular use argument with TD until July 6, 2024, over one year after the commencement of the arbitration. This delay was unreasonable.

Lastly, on the issue of prejudice, TD's position is that Echelon has suffered no prejudice whatsoever. On the other hand, if this arbitration is dismissed, TD will suffer significant prejudice. TD notes that due to the delay, it has been obliged to adjust and pay for the accident benefit file pending the priority dispute. This is a case in which significant monies have been paid out with total expenses of \$110,805.17. (IRB, med rehab, attendant care, visitors and cost of exams.) TD argues it has dedicated immense resources to deal with the Applicant's claim as indicated throughout its log notes.

If this arbitration were to be dismissed, TD would suffer significant monetary prejudice both with respect to past benefits and future benefits that may be payable.

TD submits there is no actual evidence of prejudice to Echelon and one cannot simply infer prejudice based on reserves.

As to the remedy, TD submits that this is a case where the two-year period should be extended pursuant to s. 31 of the Arbitration Act and the priority dispute should be permitted to proceed on its merits. TD submits that this is not an outrageous fact situation that would justify the dismissal of the priority claim and that the case law supports that the only penalty that should be considered, if at all, is costs and/or pre-judgment interest.

However, TD's overall submission is that as the Respondent contributed equally, if not more, to the delay in this proceeding going forward and that this preliminary issue should not have been raised at all, it seeks its costs from the Respondent and that the Respondent should pay the costs of the arbitration to date.

## **DECISION AND ANALYSIS**

There is no question that s. 8(2)(5) of Ontario Regulation 283/95 was not complied with in the context of this arbitration. The section requires that unless all parties consent, that the hearing of the arbitration "must be completed within two years" after the commencement of the arbitration.

The parties agree that this arbitration was commenced by notice served May 8, 2023 and that the two-year mark to complete the arbitration was up on May 8, 2025.

To a large degree, the parties agree with the appropriate analysis to be applied to the facts to determine the nature of the breach of the regulation. Where the parties disagree is the penalty

that an arbitrator can impose for failure to comply with the regulation. Echelon argues that the arbitration should be dismissed and that that falls within the legislative interpretation of the regulation. TD argues that that is a draconian measure not consistent with legislative interpretation or policy and rather penalties such as costs or a denial of pre-judgment interest is the appropriate punishment, if any, to be rendered.

For the reasons that are set out hereafter, I find that in the circumstances of this case that it is not appropriate to dismiss the arbitration and I agree with TD's submissions in that regard.

The parties submitted several decisions that have dealt with the breaches of the timelines set out in s. 8(2)(5) of the regulation and the consequences that flow from that. It is helpful to provide a summary of those cases and the analysis of the arbitrator. It is also important to point out that to date there has been no appeal taken from any of these decisions. Therefore, I am not bound by these decisions. However, overall I agree with the conclusions and analysis in the decisions that follow and accept Arbitrator Bialkowski's most helpful approach.

The first decision is *Unifund Assurance Company v. Wawanesa Insurance* (Bialkowski, April 8, 2015). In that case, a motor vehicle accident occurred on December 7, 2010. Unifund received the OCF-1 on March 5, 2013. It conducted an EUO on June 3, 2013 and it sent out a Notice of Arbitration to Wawanesa on January 13, 2014.

There was some delay in setting up the first pre-hearing allegedly due to Unifund being non-responsive. Ultimately, the first pre-hearing was scheduled for December 19, 2014. This was well after the 120 days required under the regulation and it left only some 13 months to complete the arbitration within the two years.

Arbitrator Bialkowski noted that there had been a clear breach of the requirement to set up the pre-hearing within 120 days and no reasonable explanation had been provided. There was nothing in the conduct of Wawanesa that contributed to the delay. Arbitrator Bialkowski opined that the process set out under s. 8 is to ensure that the dispute resolution process, once initiated, moves forward and is completed in a timely fashion. He concluded that these timelines were intended to be directive and permissive rather than mandatory.

He noted several factors that led him to that conclusion. Firstly, unlike the timelines set out in s. 3 with respect to the notice of dispute and s. 7 with respect to the commencement of the dispute, s. 8 applied to both parties. Section 3 and s. 7 apply only to the Applicant. Section 8 noticeably does not say that the Applicant must complete the arbitration within two years. It provides that the parties are to complete the arbitration within two years. Therefore, it is a mutual obligation.

Arbitrator Bialkowski notes that in some cases it may be the fault of the respondents that the arbitration is not completed within two years and sometimes it may be the fault of both parties. He states, "It would be absurd to have the applicant's claim dismissed in those circumstances."

Further, he notes that s. 8 nowhere sets out a penalty for the breach of any of its timelines, whether it would be to do the pre-hearing within 120 days or to complete the arbitration within two years. This supports that the requirement is directory and permissive rather than mandatory.

Therefore, he concludes that the imposition of a penalty or consequence for the breach of the timelines is up to the discretion of the arbitrator. He notes:

"Depending on the severity of the breach, consequences could involve costs, suspension of or denial of pre-judgment interest, imposing of strict timelines for the remainder of the dispute and possibly, in the most outrageous fact situation, dismissal of the priority claim. All would depend on the circumstances of the case."

Finally, the arbitrator comments that there must be proportionality between the breach and the consequences imposed on the breaching party. In that case, as the fault lay completely with Unifund, Arbitrator Bialkowski suspended pre-judgment interest from the date the pre-hearing should have taken place to the date of his decision.

The second decision is *Motor Vehicle Accident Claims Fund v. Jevco Insurance Company* (Bialkowski, June 16, 2017). The preliminary issue in this matter was a motion brought by the respondent to dismiss the arbitration on the grounds that the arbitration hearing had not been completed within the two-year timeline under s. 8(2)(5).

The case involved a collision that occurred on November 20, 2012. The claimants applied to the Fund. The Fund sent a priority dispute notice to Jevco on June 15, 2013 and the arbitration was initiated by letter dated February 13, 2014. The two-year limitation would have expired on February 12, 2016. Arbitrator Bialkowski was not appointed until June 27, 2016. At the first pre-hearing on July 15, 2016, counsel for Jevco noted the expiry of the two years and raised the preliminary issue.

Clearly, based on the facts, there was a breach of the regulation on the part of the Fund. The arbitrator pointed out that while the overall obligations under s. 8 applied to both parties, that it is the primary obligation of the Applicant to move the matter forward as, for the most part, they are the one that controls the pace of the proceeding. However, in considering any penalty, the conduct of the respondent is also important.

The arbitrator points to delay being caused by the Fund as it was unwilling to share information critical to Jevco's assessment of priority and its investigation into possible defences. For example, it declined to produce the accident benefit file or investigation that had been conducted into the priority dispute. Other issues included delays in setting up EUOs and appointing counsel.

The arbitrator noted that there was no reasonable explanation provided by the Fund to explain

why everything was delayed. There was also every reason to believe that had the Fund chosen to do so, the matter could have been moved along and the hearing meaningfully completed within two years of the commencement of the arbitration.

Arbitrator Bialkowski concluded that despite what appeared to be a significant delay, given that the conduct of Jevco was a contributing factor and Jevco's inability to establish any prejudice, that the penalty should not include a dismissal of the claim. He allowed the claim to proceed on its merits. The Fund was to pay Jevco's costs and no interest was payable beyond February 12, 2016 in the event the Fund was successful in its priority argument.

In the decision of *Belair v. Northbridge* (*supra*) (Bialkowski, August 2024) the arbitrator was asked to make a decision as to the consequences that would flow to the applicant for their failure to complete the arbitration within two years. The same issue that is before me.

The motion was brought by Northbridge, the respondent. In that case, a motor vehicle accident took place on December 29, 2020. The Notice of Dispute was served by Belair on April 12, 2021 and the Demand to Submit to Arbitration on April 4, 2022. Therefore, the two years was up on April 4, 2024.

The arbitrator was retained on April 18, 2022. The pre-hearing was completed. The facts show multiple adjournments for various reasons, mostly at the request of Northbridge. Efforts were made to set up EUOs in 2022 and 2023 as well as collect missing productions.

On April 2, 2024, days before the expiry of the two-year mark, Northbridge raised for the first time the two-year issue and that they were not consenting to extending the time. Northbridge brought the motion. Arbitrator Bialkowski dismissed the motion, finding that Northbridge had contributed to the delay, but that there was also no positive move by Belair to move the matter along. He pointed out that Belair could have brought a motion. As a result, there were no consequences to Belair other than that tight timelines were going to be imposed by the arbitrator. Costs of the motion were noted to be in the cause.

Arbitrator Bialkowski set out seven factors to look at to determine the appropriate penalty for a breach of the regulation and whether a dismissal would be appropriate or not. These are the same seven factors that were set out and can be found under Echelon's submissions.

The last decision from Arbitrator Bialkowski is *Allstate Insurance Company of Canada v. Gore Mutual Insurance Company and the Motor Vehicle Accident Claims Fund* (Bialkowski, July 24, 2017). In this case, an accident occurred on December 26, 2013 when two snowmobiles hit a tree. One snowmobile was insured by Gore and the other one was uninsured. Allstate insured the parents. One driver sustained fatal injuries and the other was a passenger.

The facts are somewhat complicated with respect to the involvement of Allstate and the issue of dependency and the fact that Gore only insured one snowmobile and not the second snowmobile

and it was unclear as to whether there was any contact between the snowmobiles.

Allstate served a Notice to Participate and Demand for Arbitration on November 18, 2014, Arbitrator Bialkowski was appointed in January 2015, and the first pre-hearing took place July 30, 2015. Only the issue of dependency was identified. A hearing was then scheduled for dependency for May 1, 2017 noting that it was beyond the two-year time limit. However, the parties consented to a five-and-a-half month extension.

However, at a pre-hearing on September 13, 2016, counsel for Gore raised the issue as to whether their snowmobile was "involved in the incident" and that that was an issue for a priority determination.

As a result, the arbitration did not proceed in May 2017 and a preliminary issue was raised as to whether Gore could pursue an arbitration on the question of the involved vehicle and the fact that the arbitration was now not completed within the two-year requirement.

Arbitrator Bialkowski noted that the regulation is permissive and gives the arbitrator authority to extend timelines where the situation warrants and to impose a penalty proportional to the breach.

He noted that the priority dispute involved just under \$100,000 and that that would be a sizable loss to Gore if the matter were not allowed to proceed.

The arbitrator held there had been a breach of s. 8(2)(5) but that technically the arbitration date could have been set before the expiry of the two-year limitation period had Gore identified the involved vehicle issue at an earlier stage. He found it was unreasonable for Gore not to have identified that issue and raised it at an earlier pre-hearing.

However, he felt there should be some penalty for the breach but that was not a bar to proceeding. He concluded the penalty ought to be payment by Gore of any interest beyond November 18, 2016 and that the breach be considered with respect to any award for costs.

Having carefully reviewed the decisions noted above, I am of the view, like Arbitrator Bialkowski, that s. 8(2)(5) is procedural rather than substantive and that the timelines set out are directory and permissive rather than mandatory. While I appreciate that the section uses the word "must", it is notable that it does not use the word "shall" as we see in s. 3 and s. 7. In those latter sections, a punishment for failure to comply is clearly set out which includes losing the right to proceed with an arbitration. If the legislature had intended that failure to complete an arbitration within two years should always result in a dismissal of the arbitration, in my view the regulation would have provided for that. I agree with Arbitrator Bialkowski that dismissal of the arbitration is an option available to an arbitrator to consider. However, it is not mandatory. For a case to warrant dismissal, it would have to be the most exceptional circumstances and I do not find that there are any exceptional circumstances here.

I find that each of the parties has contributed to the delay in moving this matter forward. While I agree with Arbitrator Bialkowski that it is the primary responsibility of the Applicant, and indeed they have accepted that responsibility, there is certainly an obligation on the Respondent not to just sit back and wait for the two-year period to pass.

In this case, turning to TD first with respect to fault for the failure to complete the arbitration, TD acknowledges that it is partially to blame. It recognizes it did not pursue a pre-hearing. There was some delay in moving the matter forward and in responding to various communications. While productions were provided, it took a few months and would not be described as prompt or timely. When there is only two years to complete an arbitration, in my view the parties have a duty to ensure that there are responses to productions and scheduling EUOs in a timely and co-operative fashion. As the Court of Appeal pointed out in *Kingsway v. West Wawanosh (supra)*, the parties to these arbitrations are sophisticated and do this regularly and are aware of what their duties and obligations are. With respect, there can be no reason that relevant documents not be exchanged promptly, issues be identified promptly and EUOs be scheduled.

As both the parties agree, this was not a complex case. The only issue was regular use. Neither party provided a reasonable explanation for why productions and EUOs on that issue could not be done within the two-year time period.

I also note that TD was not co-operative with the scheduling of the EUO on regular use. It initially declined to agree that the EUO was appropriate and ultimately accepted that, but not until it was too late. Irrespective of a party's view of the likelihood of success of the other party's argument, it is clear that each party has a right to pursue whatever investigative tools are available to them. The key tool is the EUO and while Echelon could have pursued that under the *Arbitration Act*, particularly if the claimant was their own named insured, the regulation does provide for the Applicant to schedule the EUO.

For all those reasons, I find that TD contributed to the delay in failing to get this matter moved to a hearing within the two years.

However, Echelon does not come to this arbitration with clean hands. It is of some considerable concern that Echelon received notice from their own insured on October 21, 2022 advising of the accident, assigning an adjuster and assigning a claim number, but no OCF-1 was sent out until December 7, 2022.

In addition, the Echelon adjuster spoke to the claimant on November 2, 2022 and was told that he was not in the course of his employment when the accident occurred. He advised the adjuster he was on his way to a job with a friend but he was not on company time.

Echelon therefore had information in November of 2022 which raised a possibility that the issue of regular use should be investigated. There is no evidence that Echelon did anything to

investigate that issue.

The evidence is clear that Echelon would be the priority insurer unless they were successful in arguing that the claimant had regular use of the TD vehicle on the date of loss. There is no explanation as to why Echelon did not make its own investigations into this issue at some point subsequent to November 2, 2022. They did not take a statement from their insured.

In the letters that Echelon sent to TD after receipt of the notice of dispute there is no mention of the regular use issue. They simply note they are investigating priority and request documents.

Even after counsel are appointed, it is not until July 6, 2024 that counsel for Echelon advises that their position is that the claimant may have regular use of the TD vehicle. This despite a number of requests from TD's counsel for Echelon to advise as to why they were disputing priority.

Also relevant is the fact that Echelon declined to agree to the appointment of an arbitrator until well after two years after the notice proposing Arbitrator Samworth was sent out. Counsel for TD asked counsel for Echelon whether they would agree to the appointment in July of 2023 and were advised that they could not yet agree to the appointment of the arbitrator. There is no explanation provided. There is no other arbitrator proposed and again it is more than two years later before Echelon agrees to the appointment of the arbitrator.

Therefore, vis-à-vis the seven factors that Arbitrator Bialkowski has set down, I conclude that the Respondent did not complete its own investigation in a timely fashion and did not respond to the request to appoint the arbitrator in a timely fashion.

I also conclude that the conduct of the Respondent meaningfully contributed to the hearing delay.

In addition, I conclude that the Respondent did not advise in a timely fashion that it was going to rely on the fact that the hearing should be completed within two years. I find it did acquiesce to the pace of the proceedings at least up until some 27 days before the two-year limit passed. The email of Echelon's counsel on April 11, 2025 was the first notice that TD had that Echelon may not be consenting to extending the two-year period.

Lastly, on the issue of prejudice, I find that Echelon has not presented any evidence that it will be prejudiced if this matter proceeds forward. I find that prejudice cannot be inferred in the circumstances of this case. There must be solid evidence of prejudice and not simply the assumption that delay will somehow or other result in prejudice. There was no evidence before me with respect to the setting of reserves and how that may affect the business of the Respondent. I agree with TD that the Applicant will be the one to have significant prejudice in the event that this arbitration was not allowed to proceed.

Therefore, I am dismissing the motion of Echelon. TD has the right to proceed with its arbitration.

As both parties contributed to this delay and, in my view, as this was a case that did not warrant bringing this motion, neither party will be awarded costs. The costs of the arbitrator with respect to this motion only will be split 50/50 by the two parties.

In addition, I find that TD, if successful in their priority dispute as against Echelon, will not recover pre-judgment interest between May 3, 2025 and the date of this decision.

Finally, I will be scheduling a pre-hearing shortly and we will be laying down tight timelines to ensure that this arbitration is completed by the end of this year.

## **ORDER**

I hereby order that this motion be dismissed and that the failure to complete the arbitration within two years of the commencement of the arbitration does not preclude the arbitration from proceeding.

I order that TD and Echelon split the costs of the arbitration fees in relation to this motion on a 50/50 basis. No party will recover any legal costs with respect to this motion.

I order that in the event TD is successful in the priority dispute, that pre-judgment interest will be suspended between May 3, 2025 and the date of this decision.

DATED THIS 17<sup>th</sup> day of September, 2026 at Toronto.



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Arbitrator Philippa G. Samworth

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