IN THE MATTER OF THE INSURANCE ACT, R.S.O.,
c. I. 8, as amended, s. 268 and Regulation 283/95;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION,

BETWEEN:

ECHELON GENERAL INSURANCE COMAPNY

Applicant

- and -

CGU INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Jamie R. Pollock for the Applicant

Leilah Edroos for the Respondent

ISSUES:

1. Did Echelon provide CGU with Notice of Intention to Dispute within 90 days of receiving the completed application for accident benefits, and if not, is Echelon entitled to an extension of the notice period, pursuant to section 3(2) of Regulation 283/95?

DECISION:

1. Echelon did not give notice within the 90 days of receiving the completed application for accident benefits.

2. The notice period is not extended and accordingly Echelon may not proceed with the arbitration.

HEARING:

1. The hearing in this matter was held in the city of Toronto, in the province of Ontario on February 24, April 10, June 29 and September 1, 2006.

FACTS & ANALYSIS:

This arbitration arises out of an accident that occurred on May 11, 2002. On that date Anthony Gibbs Jr. was a cyclist when he was struck by a motor vehicle insured by Echelon. Unfortunately, Mr. Gibbs suffered catastrophic injuries. Mr. Gibbs Jr. had no motor vehicle liability policy and representatives acting on his behalf subsequently applied for and received statutory accident benefits from Echelon, as the insurer of the motor vehicle that stuck him. Echelon subsequently took the position that Anthony Gibbs Jr. was a dependent of his father, Renford Anthony Gibbs Sr., at the time of the accident. It was subsequently learned that Mr. Gibbs Sr. was insured by CGU Insurance Company of Canada at the time of the accident. The actual completed application for accident benefits was received by Echelon on or about July 24, 2002 and on December 18, 2002, Echelon sent a Notice of Intention to Dispute to CGU. It would appear that the notice was not received until January 7, 2003.

CGU has taken the position that the Notice of Dispute was not received within 90 days of Echelon having received the completed application for accident benefits and furthermore that the " saving provisions" of section 3(2) of Regulation 283/95 which allows for late service of the notice in certain circumstances, ought not to be invoked in this case.

When was the completed application for accident benefits received by Echelon?

Section 3(2) of Regulation 283/95 requires that no insurer may dispute its obligation to pay benefits under section 268 of the Insurance Act unless it gives written notice within 90 days of receipt of the completed application for benefits. The date of receipt of the completed application is important with regard to when the 90 days runs, but also with regard to whether or not to extend the 90 day notice period, as section 3(2) of the Regulation requires that the insurer receiving the completed application show that the 90 days was not a sufficient period of time to make the determination that another insurer was liable, and that the insurer made reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

Both parties agreed that the formal completed application for accident benefits (OCF-1) was received in July 2002. Echelon submits that it was received on July 24 and CGU takes the position that it was received on July 19, 2002. It would appear that the application was received on July 19, 2002 by the insurance adjusting firm of Picano & Mustill on July 19, 2002. Mr. Mustill of that firm had been retained by Echelon to investigate the accident benefit and priority issues and I find that the completed form was received for the purposes of section 3 of

Regulation 283/95 on July 19, 2002. Having said that I do not think that anything rests on the difference between the two dates. The 90 day period would then expire on or about October 17, 2002.

Echelon takes the position that while the formal OCF-1 application was received in mid July 2002, the date for receipt of the completed application for accident benefits as contemplated by section 3 of Regulation 283/95 ought to be May 15, 2002. Echelon submits that by that date it had sufficient particulars in respect of the claimant and his injuries such that Echelon had, in effect, received the completed application by that date.

In support of this position they refer to a series of arbitration and court decisions which stand for the proposition that as between the insurer and the insured, a completed application does not have to be a formal completed application (OCF-1) but can be in documents which provide sufficient information to assist the insurer to identify the benefits an applicant may be entitled to. (see: Liberty Mutual Insurance Company vs. The Commerce Insurance Company (Arbitration Jones, released July 6, 2001); H'ng vs. Allstate Insurance Company (OIC file No. A96-000988); Lopez vs. Canadian General Insurance Company (OIC file No. A96-001035); Pooler vs. Guardian Insurance Company of Canada (OIC file No. A99-000592); and Ready vs. Progressive (OIC file No. A-005403).

Echelon supports its position by pointing out that there had been a great deal of contact between its independent adjuster Mr. Ron Mustill, and the claimant's family between the date of the accident and May 15, 2002. This included the fact that Mr. Mustill had spoken to the hospital

staff, the social worker at the hospital in charge of Mr. Gibbs' case and Mr. Gibbs' sister regarding his condition. Echelon also notes that on May 15, 2002 it created a tentative reserve in respect of Mr. Gibbs, allocating $5,000 for medical benefits, $1,500 for visitor's expenses, $500 for rehabilitation benefits and $3,000 for the cost of examinations.

Echelon also notes that it did various other acts after May 15, 2002 which would be consistent with it having received the completed application for accident benefits on that date. This included further discussions with the social worker as to Mr. Gibbs' needs on May 30, and an increase in the reserve to $487, 900 on May 30, 2002. Between that date and the receipt of the OCF-1 Mr. Mustill was also in frequent communication with Mr. Gibbs' sister and had increased the reserve by another $50,000.

While I am prepared to accept that the date of receipt of a completed application for accident benefits for the purposes of section 3 of Regulation 283/95 may in appropriate circumstances be earlier then the receipt of the actual form, I do not think that the facts of this case result in such a finding. In our case no specific request for benefits was made or paid by Echelon until August 1, 2002, after the completed OCF-1 had been received by Echelon. Up until July 19, 2002, Mr. Gibbs or his legal representative were free to choose whatever insurer they wanted to pay accident benefits, subject to having a sufficient nexus to that insurer. In light of the above, I find that for the purposes of section 3 of Regulation 283/95, the completed application was received on July 19, 2002. Accordingly, the 90 day notice period would expire on or about October 17, unless it is extended pursuant to section 3(2) of Regulation 283/95.

Should the 90 day notice period be extended pursuant to section 3(2) of Regulation 283/95?

In order to have the time for providing notice extended, Echelon must meet a two part test set out in section 3(2) of Regulation 283/95 which states:

> 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 reasonable investigations necessary to determine whether another insurer was liable within the 90 day period

The vast majority of these cases are dependent upon the facts of the individual case, and that is the situation here. The facts are critical to both parts of the test and accordingly it is necessary to review what happened prior to the receipt of the completed application as well as during and after the expiry of the 90 days.

Counsel for CGU submitted that the actions of Echelon during the period prior to the receipt of the completed application on July 17, 2002 ought not to be considered when dealing with the 90 day period, I do not agree. While some of the investigation took place prior to the formal running of the 90 days, those actions ought to be considered in deciding both parts of the test. They are critical to understanding whether the 90 days was sufficient time to make a determination and whether reasonable investigations were undertaken during the 90 days. For example, if the insurer made certain inquiries prior to the 90 days it would make little sense, all

things being equal, to simply repeat those inquires during the 90 days, simply to satisfy the test. Adjusters are busy enough with their various tasks without having to repeat tasks simply to satisfy the test. Taking into account the pre 90 day investigation is also critical in determining what is reasonable during the 90 days.

Turning then to the facts of this case, Echelon's investigations may be summarized as follows.

Echelon became aware of the accident and the significant injuries suffered by Anthony Gibbs Jr. shortly after the accident of May 11, 2002. On May 15, 2002 Echelon retained Mr. Ron Mustill, of the independent adjusting firm Picano and Mustill to handle the accident benefit and priority issues for Echelon. It is apparent from the memorandum of Mr. Jeff Coulson, the representative of Echelon responsible for the file, to Mr. Mustill of May 15, 2002, that Echelon was alert to the issues of whether Mr. Anthony Gibbs Jr. was a dependent of his father, and whether Mr. Gibbs Sr. had a car that was insured at the tine of the accident, from very early on. That memo reads, in part:

> Please handle SAB only. Please investigate priority for SAB….

The efforts made to determine if there was another insurer who might be in priority to Echelon may be summarized as follows:

On May 24, 2002 Mr. Mustill met with the claimant's father, Anthony Renford Gibbs, and his sister, Tanya Darkho, in an effort to get, among other things, pertinent insurance information.

Mr. Mustill testified at the hearing that the meeting was " awkward and brief" and that Mr. Gibbs made it clear that he did not feel that he had to give any insurance particulars regarding his own car and that he was not going to give any personal information including his drivers license number. Finally Mr. Gibbs indicated that he would not provide any insurance particulars regarding his own car or on the dependency issue until he had retained a lawyer. Mr. Mustill followed this up with a letter to the claimant's sister dated May 30, 2002. In that letter Mr. Mustill stated:

> We confirm and respect your decision not to provide particulars about your father's car insurance and the dependency issue until you have retained a lawyer. You have confirmed to the writer on May 29, 2002 that your father was in the process of hiring a lawyer. You informed the writer that you would advise us of the name and contact information of the lawyer, once retained. We would also ask that you pass on a copy of this letter to the lawyer retained and ask that he or she contact our office as soon as possible to discuss the primary insurance issue and to advise us as to whether the accident benefit application will be forwarded to Echelon or alternatively to some other insurer.

In the interim, on May 27, 2002 Mr. Mustill obtained a report from the Insurance Search Bureau of Canada using the name "Rumsford Anthony Gibbs". Mr. Mustill indicated that he had guessed at the spelling of the name as Mr. Gibbs would not provide the information. The search indicated that the Ontario Ministry of Transportation had no records in respect of this individual.

Echelon then retained Neilson and Associates- Investigators Inc. to attempt to obtain particulars regarding Mr. Gibbs. They contacted the Ministry of Transportation and learned the proper spelling of his name and his drivers license number. With this information Mr. Coulson conducted an Auto Plus search using the name " Renford Gibbs" and the driver's license

number. The search indicated that Mr. Gibbs had previously had automobile insurance policies with Pembridge, Kingsway, Allstate, Pafco and State Farm. The report indicated that Mr. Gibbs most recently renewed his insurance with Pembridge on February 20, 2001.

On the same day, Mr. Coulson placed calls to Pembridge, Kingsway and Parknes Insurance Brokers and was advised that they had no records of a valid policy as of the date of the accident.

Around the end of May, 2002, Mr. Mustill made phone calls to Echelon's tort adjuster on the file, Mr. Tom Eddy, to determine whether he had any insurance particulars that might be relevant to the accident benefit priority situation. Mr. Eddy apparently had no relevant information. On July 2, 2002 Mr. Mustill spoke to the claimant's sister Tanya, who advised that the family has not yet retained a lawyer but would do so shortly and that Tanya would look into her father's insurance situation. On July 18, 2002 Mr. Coulson's log note indicates that Mr. Mustill had spoken to Tanya and that she would provide the license plate number of the vehicle driven by her father. She also advised that the family had retained a lawyer, Mr. James Vigmond of the firm Oatley,Vigmond.

On July 18, 2002, Ms Patricia Norris of Mr. Vigmond's office, wrote to Mr. Mustill confirming their conversation of the same date. In the letter she agreed "to attempt to obtain any license plate which may be registered to Mr. Renford Gibbs for the purpose of an insurance search. This request had been made by you under section 33 and we will attempt to provide this information to you in due course."

Mr. Mustill's file notes indicate that during his telephone conversation with Ms. Norris, she indicated that Mr. Gibbs had a car but no insurance.

On July 24, 2002, Echelon received the claimant's OCF-1 form. The form completed by Ms. Norris on behalf of the claimant does not indicate that Renford Gibbs had an automobile liability policy at the time of the accident. Mr. Mustill did not hear back from Mr. Vigmond's office regarding Mr. Gibbs' insurance and so Mr. Mustill called Mr. Vigmond's office on August 6, 2002 and spoke to Ms. Hyde who had replaced Ms. Norris and reminded her that they were still waiting for the information.

On October 7, 2002 Mr. Mustill received a letter dated October 3, 2002 from Ms. Hyde, who stated:

> We were finally able to obtain Renford Gibbs' insurance information. It is as follows:
> CGU
> Agent is Timmerman Insurance (905) 564-8100
> Policy # C44338
> 1988 GMC Safari
> Effective Date: March 8, 2002.
> Mr. Gibbs states that he had no insurance at the time of the accident as his payment had lapsed.

Mr. Mustill testified at the hearing that he telephoned Timmerman Insurance, the insurance broker listed in Ms. Hyde's letter, on or about October 18, 2002 to confirm that Mr. Gibb's policy with CGU had not been in forced at the time of the accident. Unfortunately there was very little, if any, documentation to support Mr. Mustill's contention that he contacted the broker. Mr. Coulson's file notes contain an undated note regarding a CGU policy effective

March 8, 2002 with Timmerman's telephone number and a note " Mustill to contact broker at CGU".

Mr. Mustill's interim fee breakdown does not document any such phone call with Timmerman. More importantly Mr. Mustill's report # 7 to Echelon dated October 21, 2002 or just a few days after the phone call, makes no reference to Mr. Mustill having contacted Timmerman. His report does, however, state:

> We are not sure whether you have the facilities to search the insurance history of Renford Gibbs to determine if the policy from CGU which was effective March 8, 2002 was cancelled prior to the accident of May 11, 2002. If not, we should have a private investigator make the appropriate inquiries with CGU. In light of the importance of the possible cancellation of insurance, I am somewhat surprised that there was no reference to a purported phone call to Timmerman. I also note that while Mr. Mustill testified that on October 18, 2002 he emailed a confirmation of his telephone conversation with Timmerman, no copy of the email was filed at the hearing.

I also note that on November 19, 2002, Mr. Coulson prepared a worksheet, summarizing, among other things, the priority situation in anticipation of a claims committee review. That worksheet indicates:

> CGU policy Mustill to contact broker…has vehicle…owns # of vehicles.

There is nothing in the note to indicate that Mr. Coulson was aware, as of that date, that Mr. Mustill had contacted the broker. The note and the evidence reviewed above suggests that contact had not been made with the broker.

Mr. Mustill testified at the hearing. I found him to be at times vague in his testimony, as well as combative and argumentative. In the absence of documentation I am not prepared to accept that contact was made with Timmerman. I will discuss the implications of this later in my decision.

Returning to the efforts made by Echelon to determine if there was another insurer in priority, as mention above, Echelon held a claims committee meeting on November 19, 2002. At the meeting it was decided that:

> There is a question on priority in that it must be verified that his father, whom he may have been dependent on, did not carry insurance. Our checking to date has verified that he did not have insurance on any vehicles which he owned. However, we want it in writing from the 21 year olds' lawyer that this is in fact the case.

On December 16, 2002, Mr. Mustill and Mr Coulson had a telephone discussion to review the priority issue. Mr. Coulson's notes indicate:

> Disc. Mustill- to call CGU a.s.a.p. re: ins. Renford Gibbs, prior 1/3/02

On December 17, 2002 Echelon requested a further Auto Plus search which revealed the CGU insurance, bearing policy #10254153 covering Mr. Renford Gibbs and indicated that it was in place at the time of the accident.

Mr. Coulson testified at the hearing that on December 17, 2002, Mr. Gibbs had attended at Echelon's office to pick up a cheque after dropping his son off for treatment on the way. Mr. Coulson concluded that Renford Gibbs was still driving and accordingly did a further Auto Plus

search which revealed the CGU policy. It is to be noted that this was a totally different policy number from the one mentioned in the letter from the claimant's counsel.

At the hearing, counsel for CGU challenged Echelon's reason for doing the further Auto Plus search, suggesting that it was done in response to the claims committee meeting and subsequent meetings rather than Mr. Gibbs attending at Echelon on December 17, 2002. In any event, Mr. Coulson upon receiving the Auto Plus search contacted CGU underwriting and confirmed that the policy with Mr. Gibbs was in place at the time of the accident. He then sent a fax to Mr. Mustill, instructing him to immediately delivery a Notice of Intention to Dispute Priority.

On December 18, 2002 Mr. Mustill mailed the notice, by regular post, to:

> CGU Group Insurance
> 4950 Yonge Street
> Toronto, ON M2N 6K4

The notice was not received by CGU until January 7, 2003. CGU's office at 4950 Yonge Street had apparently been closed two years prior to the notice being sent. While that was the case, I note that the Bell Business Centre still listed CGU Insurance Company of Canada, Surety Small Contractors Division as being located at 4950 Yonge Street as of the date of this hearing. While counsel for CGU submitted that the delay of approximately three weeks was caused by Echelon mailing the notice to the wrong address, I am satisfied that the delay, if any, was not material and is not fatal to any claim by Echelon for relief pursuant to section 3(2) of Regulation 283/95.

Having reviewed the facts in considerable detail, it now remains to determine whether Echelon meets the two part test to extend the time for service of the Notice of Dispute. The onus is on Echelon to show that 90 was not sufficient time to determine that another insurer was liable and it made the reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

The original completed application was received on July 19, 2002 and therefore the 90 days expired on or about October 17, 2002.

Echelon submits that it carried out a detailed and thorough investigation and that it was faced with a lack of cooperation by Mr. Gibbs, at very least, and a negligent misrepresentation by him as to whether or not he had insurance at the time of the accident, if not an outright falsehood. There is no doubt but that one can take into account whether the insurer was misled by an insured when determining whether the notice period should be extended or not (see Primmum Insurance Company vs. Aviva Insurance Company of Canada (2005) O.J. No 1477.)

CGU submits that Echelon should have, at very least, followed up on the letter from the claimant's lawyer of October 3, 2002 which stated that Mr. Gibbs advised that his insurance with CGU had lapsed for non-payment of premiums. Had they followed up with the broker, Timmerman Insurance or CGU, they would have learned, according to CGU, that there was a policy in place at the time of the accident. The letter in question was received by Echelon on October 7, 2002 allowing approximately 10 days before the expiry of the notice period, to make further inquiries to confirm Mr. Gibbs's statement. In support of their position they cite the case

of AXA Insurance Company vs. Co-operators Insurance Company, (unreported decision of arbitrator Jay Rudolph, upheld on appeal by Mr. Justice Nordheimer dated May 3, 2001, court file # CO-CV-191314). In that case AXA had investigations under way as to whether there was any other insurer that might be in priority. Co-operators however advised AXA that the Co-operator's policy had lapsed prior to the accident. AXA did nothing further for more than a year, when it received new information that suggested Co-operator's policy was in force at the time of the accident. AXA then served a late Notice of Dispute. Mr. Justice Nordheimer, in upholding the arbitrator's decision noted that AXA could have challenged Co-operator's position earlier and had not. He concluded that:

> It had the opportunity to do so but chose not to avail itself of the opportunity. Instead it took the information that it had regarding the respondent's policy and did nothing more. In my view section 3 of the Regulation places the burden on the insurer who intends to dispute its liability to take a more proactive approach to the issues and that the appellant having failed to do so cannot now invoke the exception provided for in section 3(2) to extricate itself from that effect of that decision.

While I agree with Mr. Justice Nordheimer's general statement, I do not take it to be an absolute statement covering all situations. Each case is factually different. In the AXA case, it would appear that AXA did very little, if anything, other then accept Co-operator's statement at face value. In our case Echelon had made considerable efforts to attempt to locate another insurer. It had made repeated requests of the claimant's family and their lawyer. It had received assurances from the family's lawyer's office that it would attempt to get the information. They had conducted two Auto Plus or license searches, albeit one under the wrong name as Mr. Gibbs Sr. had not provided the spelling of his name. The second search was, however, in his name and did not reveal the CGU policy. Echelon followed up with a number of the companies that had

shown up on that search to confirm that the policies were no longer in existence at the time of the accident. It had been told on at least one occasion over the phone by the family's lawyer's assistant that Mr. Gibbs had no automobile insurance at the time of the accident. This, of course, was followed up by the letter of October 3, 2002 which gave the CGU policy particulars and the name of the insurance agent and confirmation that Mr. Gibbs stated that he had no insurance at the time of the accident as his payments had lapsed.

These facts do, in my view, make it somewhat different then the AXA case. The key issue is whether, as CGU suggests, Echelon should have followed up with Timmerman or CGU after getting the letter on October 7, 2002. Certainly, with the benefit of hindsight, they would probably have learned that the CGU policy was still in place during the time of the accident. The problem with examining these cases in hindsight is that with such hindsight most potential insurers would have been found. One must remember that the test involves what a reasonable adjuster would have done in the circumstances. The test is not one of perfection. Adjusters are extremely busy people dealing with a multitude of complex issues and deadlines. This must be taken into account when applying the test. CGU points out that Echelon followed up with the various insurers that were named in the first Auto Plus search to confirm that there was no insurance with them and suggest that Echelon should have done the same after receiving the October 3, 2002 letter. It also points out that there were discussions between Mr. Mustill and Mr. Coulson regarding contacting Timmerman to confirm that the policy was not in place at the time of the accident.

At some point an insurer has the right to accept the information that it has been given and not dig further, unless further information comes to its attention. In this particular case Echelon had already obtained an Auto Plus search which had come up negative as well confirmation by Mr. Gibbs that his policy had lapsed. This certainly puts the case outside the ordinary and makes it reasonable to consider an extension of time. I am troubled, however, by what I have found to be a failure to follow up with Timmerman. I am also troubled by the fact that there was confusion on the part of Mr. Mustill as to when the 90 day period ran. He testified that in his view time did not start to run until:

> "We have information that there is another policy which was in effect at the time. So I don't really begin measuring the time or worrying about it, until I have information that another policy exists which is valid."

Mr. Coulson, in his worksheet notes suggests that actions must be taken "prior to 01/03/02" (sic) there was no particular reason given for that date, however I do note that it would be 90 days from the October 3, 2002 letter advising of the CGU policy. In light of this, one is left with the impression that Echelon was under an incorrect assumption regarding the running of the 90 day period.

Taking all the above in account, I am of the view that, on balance, Echelon should have contacted Timmerman or CGU prior to the running of the 90 day period. Had that been done Echelon may well have determined that CGU was still insuring Mr. Gibbs at the time of the accident. Accordingly, I am not prepared to extend the notice period. Accordingly the arbitration cannot proceed.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated at Toronto this _____ day of March 2007.

_____

M. Guy Jones
Arbitrator