COURT OF APPEAL FOR ONTARIO

CITATION: Echelon General Insurance Company v. Unifund Assurance, 2025 ONCA 324
DATE: 20250429
DOCKET: COA-24-CV-0356

Nordheimer, Gomery and Dawe JJ.A.

IN THE MATTER OF an Arbitration under the *Arbitration Act, 1991,* the *Insurance Act*, 1990. c.I.8, as amended, and Ontario Regulation 283/95

BETWEEN

Echelon General Insurance Company

Applicant (Respondent)

and

Unifund Assurance

Respondent (Appellant)

Katherine Kolnhofer and Damien Van Vroenhoven, for the appellant

Jamie Pollack and Faiza Ikram, for the respondent

John Friendly and Andrew Choi, for the intervener, His Majesty the King in Right of Ontario as represented by the Minister of Public and Business Service Delivery and Procurement

Heard: February 27, 2025

On appeal from the order of Justice William S. Chalmers of the Superior Court of Justice, dated November 17, 2023, allowing an appeal from a decision of Arbitrator Kenneth J. Bialkowski dated December 16, 2019.

Dawe J.A.:

[1] This appeal raises a question about the proper interpretation of the regulation that governs disputes between automobile insurers over which insurer must pay Statutory Accident Benefits ("SABs") to a motor vehicle accident victim. Specifically, we must decide whether arbitrators can routinely invoke equitable principles of unjust enrichment to order that a higher-priority insurer reimburse a lower-priority insurer for money it has spent handling a SABs claim, outside of the limited circumstances where the regulation expressly provides for the reimbursement of "legal fees, adjuster's fees, administrative costs and disbursements".

[2] In the case on appeal, an arbitrator declined to order that the appellant, Unifund Assurance ("Unifund") pay the expenses incurred by the respondent, Echelon General Insurance Company ("Echelon"). The Superior Court of Justice allowed Echelon's appeal from this decision and held that Echelon was entitled to be reimbursed by Unifund. Unifund now appeals to this court.

[3] For the following reasons, I would allow Unifund's appeal and set aside the expense reimbursement order.

A. THE STATUTORY SCHEME

[4] Section 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, creates a priority scheme for determining which insurer must pay SABs to an automobile accident victim. In descending order of priority, accident victims have recourse against:

(i) Their own insurer, if they have an automobile insurance policy;

(ii) If they were travelling in a motor vehicle at the time of the accident, the insurer of that vehicle or, if they were not travelling in a motor vehicle, the insurer of the vehicle that struck them;

(iii) The insurer of any other vehicle involved in the accident; or

(iv) The Motor Vehicle Accident Claims Fund ("the Fund"), as established by the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41.

The Fund is administered by the Minister of Public and Business Service Delivery and Procurement ("the Minister"), who intervenes in this appeal.

[5] Priority disputes between different insurers are governed by O. Reg. 283/95, titled "Disputes Between Insurers" ("Regulation 283"), which was amended in 2010 by O. Reg. 38/10. This court has previously held that "the Fund is an insurer under Regulation 283": *Allstate Insurance Company of Canada v. Motor Vehicle Accident Claims Fund*, 2007 ONCA 61, 84 O.R. (3d) 401, at para. 35; *Kingsway General Insurance Company v. Ontario*, 2007 ONCA 62, 84 O.R. (3d) 507, at para. 6.

[6] Section 1 of Regulation 283 provides that:

> All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation.

[7] In summary, Regulation 283 requires SABs claimants to apply "to only one insurer." Insurers must accept any applications they receive and must begin paying benefits to the claimant, "pending the resolution of any dispute as to which insurer is required to pay the benefits": ss. 2 and 2.1.[1] If an insurer believes that some other insurer or the Fund should have priority, it must give notice within 90 days: ss. 3 and 3.1. If insurers cannot agree about who is responsible for paying the benefits, they must submit their dispute to arbitration: s. 7.

[8] When an insurer who receives an application for SABs fails to comply with its obligations to pay the claimant while any priority dispute is being resolved, this is commonly referred to as "deflection": see e.g., *State Farm Mutual Automobile Insurance Company v. TD Home & Auto Insurance Company*, 2016 ONSC 6229, at para. 15. The 2010 amendments to Regulation 283 authorize arbitrators to impose sanctions on insurers who improperly deflect claims. One of these sanctions is found in s. 2.1(7), which provides:

> (7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance.

[1] Section 2 applies to claims arising out of accidents before September 1, 2010, while s. 2.1 applies to claims arising out of accidents on or after that date.

Neither the *Insurance Act* nor Regulation 283 contain any other provision that expressly authorizes arbitrators to order that one insurer pay another insurer's expenses in situations where s. 2.1(7) does not apply.

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[9] The dispute in this case arose out of a claim for benefits by a woman who was injured in July 2012 in an accident that occurred when she was riding as a passenger in a vehicle insured by Echelon. She submitted her claim to Echelon in August 2012. Because the accident occurred after September 1, 2010, her claim was subject to s. 2.1 of Regulation 283. Echelon was required by s. 2.1(6) to pay benefits to the claimant even if it believed that some other insurer stood in higher priority under s. 268 of the *Insurance Act*, pending a determination of this issue.

[10] Echelon complied with its obligations under s. 2.1 and paid benefits to the claimant, but also served a notice of dispute on Unifund, which was the claimant's father's automobile insurer. Echelon maintained that the claimant was her father's dependant. If so, this would bring her under her father's automobile insurance policy and thus make Unifund the priority insurer.

[11] The priority dispute between Echelon and Unifund eventually went to arbitration. In July 2018, Arbitrator Bialkowski released his decision finding that Unifund was the priority insurer. He ordered Unifund to reimburse Echelon for the

benefits it had paid to the claimant, as well as its costs relating to the arbitration. Unifund has not challenged these aspects of the arbitrator's award.

[12] However, the parties could not agree on whether Unifund should also reimburse Echelon for the money it had spent defending and adjusting the SABs claim before the arbitration decision shifted responsibility for the claim to Unifund. These expenses, which totalled more than $100,000, included independent adjusting fees, mediation fees, legal costs, and disbursements. In December 2019 the arbitrator released a supplemental decision in which he declined to order that Unifund reimburse Echelon for these expenses.

[13] Echelon appealed the arbitrator's denial of its expense reimbursement claim to the Superior Court of Justice. The appeal judge allowed the appeal, finding that the doctrine of unjust enrichment entitled Echelon to be reimbursed by Unifund "for those reasonable expenses that were incurred for the ultimate benefit of Unifund."

[14] Unifund now appeals to this court, having previously been granted leave.

C. ANALYSIS

[15] As the arbitrator and the appeal judge both noted in their reasons, arbitrators and lower courts have divided over whether arbitrators deciding priority disputes under Regulation 283 may routinely order one insurer to reimburse another insurer for its pre-arbitration expenses, outside of situations where s. 2.1(7) of Regulation 283 applies. The only two judicial decisions that appear to have addressed this

issue both predate the 2010 amendments to Regulation 283 that added s. 2.1: see *Zurich Insurance Company v. Co-Operators General Insurance Company* (2008), 62 C.C.L.I. (4th) 207 (Ont. S.C.); *R. v. Lombard Insurance Co. of Canada*, 2010 ONSC 1770, 100 O.R. (3d) 51.

[16] Although neither the *Insurance Act* nor Regulation 283 expressly empowers arbitrators to make expense reimbursement orders in circumstances where s. 2.1(7) does not apply, s. 8(1) of Regulation 283 makes priority dispute arbitrations subject to the *Arbitration Act, 1991*, S.O. 1991, c. 17, which authorizes arbitrators to resolve disputes "in accordance with law, including equity": *Arbitration Act, 1991*, s. 31.

[17] The appeal judge disagreed with the arbitrator's conclusion that the drafters of Regulation 283 had made a deliberate policy choice to limit reimbursement orders to the "deflection" cases where s. 2.1(7) applies. Instead, he followed Perell J.'s decision in *Lombard* and concluded that the equitable doctrine of unjust enrichment permits arbitrators to make expense reimbursement orders, even when there has been no deflection and s. 2.1(7) is thus unavailable.

[18] The question we must decide on this appeal is whether Regulation 283 should be interpreted as reflecting a deliberate governmental policy choice to have insurers bear any expenses they incur handling SABs claims before an arbitrator finds that a different insurer has priority. The equitable doctrine of unjust

enrichment requires an enrichment and a corresponding deprivation to have "occurred without a juristic reason": see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 40. If the arbitrator was correct to interpret Regulation 283 as limiting his authority to make an expense reimbursement order, this regulatory restriction would constitute a "juristic reason" for any resulting enrichment to Unifund and deprivation suffered by Echelon: *Kerr*, at para. 41.

[19] The proper interpretation of Regulation 283 is a question of law that is reviewable on a correctness standard: see e.g. *Wong v. Lui*, 2023 ONCA 272, 167 O.R. (3d) 92, at para. 16.

(1) Does Regulation 283 limit the application of the doctrine of unjust enrichment?

[20] Although Regulation 283 is a regulation promulgated by the Lieutenant Governor in Council, rather than a statute enacted by the Legislature, the guiding principles of statutory interpretation apply, "with appropriate modification, to the interpretation of a regulation": *Gyorffy v. Drury*, 2015 ONCA 31, 123 O.R. (3d) 721, at para. 30; see also *Allstate*, at para. 36. Accordingly, Regulation 283 "must be read in its entire context, and in its grammatical and ordinary sense, harmoniously with the scheme and object of the regulation and its enabling statute (the *Insurance Act*), and with the intention of the Lieutenant Governor-in-Council": *Gyorffy*, at para. 30.

[21] This court has previously identified the overarching goals of the priority scheme in s. 268 of the *Insurance Act*. In *Allstate*, at paras. 38-39, Laskin J.A. noted that s. 268 and Regulation 283, when taken together with the statutory creation of the Fund in the *Motor Vehicle Accident Claims Act*, "comprise an integrated legislative and regulatory scheme for the payment of accident benefits", the main purposes of which are "the prompt delivery of accident benefits to injured persons and the timely and cost-efficient resolution of disputes over who should pay those benefits." Regulation 283, in particular, is designed "to ensure that injured persons receive accident benefits promptly, despite any disputes between insurers over who should pay these benefits": *Allstate*, at para. 24; *Ontario (Finance) v. Echelon General Insurance Company*, 2019 ONCA 629, 147 O.R. (3d) 1, at para. 12. Requiring priority disputes between insurers to be resolved through arbitration rather than by the courts can also be seen as serving the legislative goal of having these disputes resolved in a "timely and cost-efficient" manner.

[22] A further important contextual factor that must be borne in mind is that Regulation 283 governs disputes between sophisticated participants in the highly regulated Ontario automobile insurance market. In *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* (2002), 58 O.R. (3d) 251 (C.A.), at para. 10, Sharpe J.A. explained:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. 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. [Emphasis added.]

[23] Section 2.1(7) of Regulation 283 requires insurers who improperly deflect SABs claims, by not complying with their obligations under s. 2.1, to "reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance." The arbitrator in the case on appeal treated the limited reach of s. 2.1(7) as significant, reasoning:

> [H]ad [the drafters] intended to allow an insurer and the Fund to recover adjuster's fees in all cases where another insurer was found in priority, and not simply where there has been a deflection, such an entitlement would have been found in the amendments of *O. Reg. 283/95* as set out in *O. Reg. 38/10*.

[24] The appeal judge disagreed with the arbitrator's analysis and conclusion. He explained:

> The Arbitrator states that if the legislature intended to permit recovery of expenses in addition to benefits, the legislature would have specifically referred to expenses in the regulation. He concludes that the "legislative intent" of the regulation is that the priority dispute over which insurer is to pay benefits does not apply to expenses, and that each insurer is to bear its own expenses.
>
> It is my view that this is not a correct reading of *O. Reg 283/95*. The regulation refers to "all disputes" that arise when determining which insurer is required to pay benefits. One of [the] disputes that can arise in a claim to determine priority is the payment of expenses incurred in adjusting and defending the first party claim. In other words, the issue of expenses falls under "all disputes".

[25] For several reasons, I find that the regulatory language supports the arbitrator's interpretation and weighs against the competing interpretation that was adopted by the appeal judge.

[26] First, Regulation 283 does not say that "all disputes" between insurers arising out of priority disagreements are arbitrable. Rather, s. 1 of Regulation 283 merely states that all such disputes "shall be settled in accordance with this Regulation." The question we must decide in this appeal is whether ordering one insurer to reimburse another for its expenses, in situations where s. 2.1(7) does not apply, is "in accordance with this Regulation." This question can only be answered by considering and interpreting the specific regulatory provisions, after situating them in the broader legislative and regulatory context.

[27] Second, the drafters of Regulation 283 did not entirely ignore the issue of expense reimbursements. Rather, the 2010 amendments expressly require

insurers who improperly deflect SABs claims to reimburse other insurers for their resulting “legal fees, adjuster’s fees, administrative costs and disbursements”. If the drafters had meant to allow arbitrators to order reimbursement of these same expenses even in cases where there was no deflection, they could easily have said so.

[28] Third, Sharpe J.A.’s observations in *Kingsway* support the conclusion that the drafters were acting deliberately. Since “clarity and certainty of application are of primary concern” to insurers, if the Lieutenant Governor in Council had wanted to permit arbitrators to routinely make pre-arbitration expense reimbursement orders even when there has been no deflection, one would expect them to have done so explicitly, rather than leaving a gap in the regulatory scheme and hoping that arbitrators would fill this gap by invoking the doctrine of unjust enrichment.

[29] The arbitrator and the appeal judge also disagreed about whether it could be inferred that the drafters of Regulation 283 had intentionally limited expense reimbursement orders to deflection cases in furtherance of the policy goal of reducing the cost of priority dispute arbitrations.

[30] The arbitrator accepted that this was the drafters’ objective, concluding that “[t]he avoidance of this additional layer of costs provides a strong policy basis” for interpreting Regulation 283 as only permitting expense reimbursement orders in exceptional situations. He added:

> The reality of the situation is that for every priority claim whereby the insurer or the Fund is seeking indemnity (without recovery of adjusting fees), there will be priority claims that the same insurer or the Fund is ordered to indemnify benefits (without payment of adjusting fees). It should all balance out without the necessity of having to incur a second layer of costs.

The arbitrator also noted that if a priority insurer "deliberately delays the arbitration process far beyond reason to avoid the expense of adjusting the first party claim or defending it", this might be an exceptional circumstances that would justify using the doctrine of unjust enrichment to make an expense reimbursement award.

[31] The appeal judge disagreed with the arbitrator's analysis and conclusion regarding the regulatory drafters' policy goals for two main reasons. First, he objected that the arbitrator had not cited "any evidence" that making insurers bear their own pre-arbitration expenses "should all balance out", and added:

> I am not satisfied that the stated policy reason that "it should all balance out" is a valid juristic reason for not allowing a claim for reimbursement of expenses in a priority dispute. If "it should all balance out", is a valid policy consideration, there would also be no reason to have priority disputes for the payment of benefits. Presumably if one insurer is required to pay benefits because it is the first insurer to receive a completed application, it will be a non-paying insurer in another dispute.

[32] Second, the appeal judge accepted Echelon's argument that it would not significantly increase costs to let insurers routinely litigate the issue of expense reimbursements during priority dispute arbitrations. He stated:

> Echelon argues that an analysis of what expenses are reasonable is no more onerous than any of the other determinations that a private arbitrator is called upon to make in a priority dispute. I agree. As a practical matter, insurers are not in the business of wasting money or incurring unnecessary expenses in defending first party claims. In most circumstances the reasonableness of the expenses will not be a significant issue.

[33] Echelon adopts the appeal judge's reasoning on both arguments, and additionally notes that since different insurers deal with different volumes of SABs claims, and since the expenses associated with different claims can vary, making insurers bear their own pre-arbitration expenses will not necessarily "balance out" for every insurer.

[34] The appeal judge also relied on a separate policy argument that he found supported allowing arbitrators to routinely make expense reimbursement orders. He noted that there is a "risk of mischief if an insurer is not entitled to claim expenses from the priority insurer", since this would make it "in the interests of the priority insurer to delay its involvement until after the first insurer as incurred adjusting and legal fees". The appeal judge disagreed with the arbitrator's suggestion that this risk could be dealt with by making expense reimbursement orders when there has been deliberate or unreasonable delay, stating:

> It seems to me that instead of undertaking an analysis of the intention of the priority insurer or whether the insurer acted deliberately or unreasonably in not assuming responsibility, the preferable approach is to simply require reimbursement of expenses that the paying insurer was not required to incur because the expenses

> were incurred by the first insurer. This would take away any incentive for the insurer in priority not to assume responsibility for the claim. It would also avoid a hearing to determine the reasonableness of the priority insurer in denying priority.

[35] Considered in isolation, both of the competing policy objectives identified by the arbitrator and the appeal judge are ones that plausibly could have been in the minds of the persons who drafted Regulation 238. However, our task when interpreting Regulation 283 is to try to identify why the Lieutenant Governor in Council drafted the regulation as it did. It is not this court's function to decide what would be the best policy or reassess the wisdom or fairness of the Lieutenant Governor in Council's policy choices.

[36] In my view, the available indicators in this case all support the arbitrator's conclusion that the Lieutenant Governor in Council intentionally chose to limit expense reimbursements to the deflection cases to which s. 2.1(7) applies. It is also plausible that it made this choice because, as the arbitrator concluded, it believed it would reduce the length and cost of priority arbitrations. If the Lieutenant Governor in Council had been trying to implement the competing policy objective that the appeal judge found "preferable" – that is, letting lower-priority insurers routinely recoup their pre-arbitration expenses, in order to remove higher-priority insurers' incentive to delay taking responsibility for SABs claims – one would again expect the Lieutenant Governor in Council to have gone about this directly, by

making express provision in the regulation for arbitrators to make expense reimbursement orders even when there has been no improper deflection.

[37] The arbitrator and the appeal judge also disagreed about the fairness of making insurers routinely bear their own pre-arbitration expenses. However, the issue on this appeal is not, as the appeal judge put it, whether "the stated policy reason that 'it should all balance out' is a valid juristic reason for not allowing a claim for reimbursement of expenses in a priority dispute." If the regulation as drafted does not authorize arbitrators to make routine expense reimbursement orders, it is the regulation itself that would provide the juristic reason for any resulting enrichment and deprivation, not the underlying policy objective.

[38] I also do not accept the appeal judge's argument that if the drafters had been trying to reduce costs, and if they had believed that any unfairness would even out in the long run, they would have done away with the priority scheme altogether. The priority scheme was established by s. 268 of the *Insurance Act*, not by regulation. The legislature has evidently decided that it is better on balance to have priority rules for determining which insurer must pay SABs claims, even though this predictably results in disputes and litigation between insurers. The persons who drafted Regulation 283 were obliged to work within the confines of this legislative policy choice.

[39] When Regulation 283 was introduced in 1995, it was meant to address a specific problem created by the s. 268 *Insurance Act* priority scheme: namely, "[t]he historic refusal of insurers to pay benefits before their liability had been established through litigation": *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382, 151 O.R. (3d) 78, at para. 34. As Laskin J.A. noted in *Allstate*, at para. 23, Regulation 283 "was passed after consultation with the insurance industry." The Lieutenant Governor in Council did not have the option of reversing the legislature's decision to have a priority scheme in the first place. It could nevertheless have concluded that it would be good policy to try to reduce the cost of priority dispute arbitrations by limiting the issues that could be litigated.

[40] I also do not accept Echelon's argument, which the appeal judge adopted, that the Lieutenant Governor in Council would not have been concerned about the cost of litigating expense reimbursements because disputes over this issue are likely to be "no more onerous" than any of the other decisions arbitrators are called on to make when resolving priority disputes between insurers. Even if this were true, the drafters of Regulation 283 could still have decided that it would lower the cost of arbitrations to take this one issue off the table. Again, our task is not to assess the wisdom or fairness of this policy choice, but to decide whether it explains why the drafters only expressly provided for the reimbursement of pre-arbitration expenses in the deflection cases to which s. 2.1(7) applies.

[41] I also agree with Unifund that there is no assurance that disputes between insurers over expenses will always be straightforward. For example, insurers may disagree over whether it was reasonable for an insurer to have spent money on external adjusting fees, investigations, or mediations. A higher-priority insurer may contend that it gained no benefit from these expenses, and thus was not "enriched", because it would not have incurred them had it been handling the SABs claim itself. Even if the appeal judge was right in his assumption that disputes between insurers over the reasonableness of expenses will be rare, it does not follow that the Lieutenant Governor in Council could not have decided that it would still reduce costs, and thus ultimately lower the price of automobile insurance, to make these disputes non-arbitrable in those cases where they do arise.

[42] Considering all of these factors together, I conclude that the balance tips in favour of interpreting Regulation 283 as reflecting a deliberate regulatory policy choice to have insurers ordinarily bear their own pre-arbitration expenses, unless there has been improper deflection of a SABs claim.

[43] It is difficult to imagine that the persons who drafted Regulation 283, in close consultation with insurance industry participants, did not realize that insurers who comply with s. 2.1 of the regulation will often spend money administering SABs claims that are eventually found to be the responsibility of a different insurer. If the Lieutenant Governor in Council had meant to let lower-priority insurers routinely

claim reimbursement for these expenses in priority dispute arbitrations, it would have been easy to have provided for this expressly in the regulation.

[44] Instead, when Regulation 283 was amended in 2010, the Lieutenant Governor in Council added a new provision that specifically makes these expenses reimbursable in deflection cases, as a sanction for insurers' non-compliance with their s. 2.1 obligations. At a minimum, the 2010 amendments demonstrate that the Lieutenant Governor in Council was aware that insurers commonly incur "legal fees, adjuster's fees, administrative costs and disbursements" during the pre-arbitration period. The Lieutenant Governor in Council's decision to single out deflection cases for special treatment strongly implies that they did not expect arbitrators to routinely make reimbursement orders in other cases.

[45] Importantly, the persons who drafted the 2010 amendments can also be presumed to have been aware of this court's statements eight years earlier in *Kingsway*, at para. 10, regarding the proper interpretive lens for viewing Regulation 283, in which "clarity and certainty of application are of primary concern", and where "there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases." This makes it especially unlikely that the Lieutenant Governor in Council intended to let arbitrators invoke general equitable principles to make expense reimbursement orders on a case-by-case basis, even when there has been no improper deflection and s. 2.1(7) thus does not apply.

[46] Finally, this interpretation of Regulation 283 can be understood as reflecting a deliberate choice by the Lieutenant Governor in Council to give priority to the policy goal of reducing the length and cost of arbitrations, even if this creates some potential for unfairness in particular cases. As counsel for the Minister points out, any unfairness to some insurers is mitigated by the fact that the premiums for automobile insurance are set at a level that is meant to allow insurers both to recoup their adjustment expenses and make a reasonable profit.

[47] I accordingly conclude that the appeal judge erred in his interpretation of Regulation 283. I would allow Unifund's appeal, set aside the appeal judge's expense reimbursement order, and restore the decision of the arbitrator finding that Unifund is not obliged to reimburse Echelon for its pre-arbitration expenses in this case.

[48] In his reasons, the arbitrator suggested that expense reimbursement orders might properly be made on the basis of unjust enrichment when there are "special circumstances". Echelon does not suggest that there are any special circumstances in this case. However, it argues that introducing this carve-out would undermine the policy goal of reducing the cost of arbitrations, since it would encourage insurers to litigate the question of whether special circumstances exist. The question of whether Regulation 283 should be interpreted as implicitly barring arbitrators from invoking equitable principles even in exceptional cases is best left to be decided in an appeal where this issue actually arises.

(2) Concerns raised by the Fund

[49] The Minister intervened in this appeal to argue that regardless of how Regulation 283 is interpreted in the context of disputes between ordinary insurers, when the Fund is a party to a priority dispute arbitration it should be entitled to recoup its pre-arbitration expenses, which must otherwise come out of the public purse. The Minister's concern arises because of a previous arbitration decision by Arbitrator Bialkowski, rendered a few months before his decision in the case on appeal, in which he adopted the same interpretation of Regulation 283 but declined to carve out any special rules for expense reimbursement claims by the Fund: *Ontario (Minister of Finance) v. Dominion of Canada*, Arbitrator Bialkowski, October 2, 2019. The Minister notes that a different arbitrator in another case had previously ordered an insurer to reimburse the Fund for its expenses on the basis that there were "special circumstances": *Ontario (Minister of Finance) v. Lombard General Insurance Company*, Arbitrator Robinson, August 14, 2009.

[50] In my view, it would not be appropriate for us to decide the issue raised by the Minister in the context of an appeal where the Fund is not a party, and where the issue thus does not squarely arise. However, I would observe that even though this court has found the Fund to be an "insurer" within the meaning of Regulation 283, it has also held that one of the purposes of the regulation is to protect public resources by "ensur[ing] that the Fund is the funder of last resort": *Ontario (Finance) v. Echelon*, at para. 14. As Lauwers J.A. noted in *Ontario (Finance) v.*

Echelon, at para. 15, “while the Fund is intended to be treated as an insurer for many purposes, the Regulation, as amended by O. Reg. 38/10, contains substantial protections for the Fund.” Accordingly, nothing in these reasons should be taken as deciding, one way or the other, whether Regulation 283 can or should be interpreted as permitting the Fund to recoup its pre-arbitration expenses, either through arbitration or in the courts, in cases where some other insurer is ultimately found to have priority over a SABs claim.

[51] I would also note that if the Minister believes that it would be in the public interest to permit the Fund to routinely claim reimbursement of its expenses in priority dispute arbitrations, the Minister can always seek to have the Lieutenant Governor in Council amend Regulation 283 to expressly provide for this.

D. DISPOSITION

[52] I would accordingly allow the appeal and set aside the appeal judge’s order directing that Echelon is entitled to be reimbursed by Unifund “for those reasonable expenses that were incurred for the ultimate benefit of Unifund.”

[53] With respect to costs, the appeal judge awarded Echelon costs of the first-level appeal in the amount of $5,000 all inclusive, payable by Unifund. The parties have agreed that costs of the appeal in this court should be fixed at $10,000 all inclusive. I would accordingly set aside the costs order in the court below and grant

Unifund its costs of both appeals in the amount of $15,000 all inclusive, payable by Echelon.

Released: April 29, 2025 “I.N.”

“J. Dawe J.A.”
“I agree. I.V.B. Nordheimer J.A.”
I agree. S. Gomery J.A.”