

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act*, 1991,
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTACT INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

A W A R D

Counsel:

Shivani Mehta
Counsel for the Applicant, Intact Insurance Company ("Intact")

Kevin Mitchell
Counsel for the Respondent, Wawanesa Mutual Insurance Company ("Wawanesa")

ISSUES

This Arbitration involves a priority dispute between insurers. The issues, as set out in the arbitration agreement and as paraphrased by me, are as follow:

- (a) As between Wawanesa Mutual Insurance Company ["Wawanesa"] and Intact Insurance Company ["Intact"], which insurer is responsible to pay statutory accident benefits to Maltiben P.¹ arising out of a motor vehicle accident occurring on April 9, 2013? This issue requires me to make a determination as to whether a policy of automobile insurance issued by Intact to Rasik P. was in force at the time of the accident or whether it had been effectively and properly terminated on or about March 11, 2013. If the policy was in force, then Intact has the higher priority. If the policy was effectively and properly terminated, then Wawanesa has the higher priority.

¹ By reason of privacy concerns, all members of the P. family are referenced by their first names but not further described in this Award. The same applies to a representative of Intact produced for an examination under oath and to Wawanesa's insured, Derrick G.

- (b) If I determine that Wawanesa has the higher priority, what is the amount to be paid by Wawanesa to Intact?
- (c) What is the amount of interest owing upon the amount determined in respect of issue (b), if any?
- (d) What is the quantum of costs and which party has the burden of payment?

The legal backdrop to the arbitration arises from section 268 (2) of the *Insurance Act* which creates a priority scheme to the extent that two or more insurers may be potentially liable to pay statutory accident benefits. If there is a valid policy of insurance as between Rasik P. and Intact at the time of the accident, then Intact is the higher priority insurer as Maltiben P. is the spouse of Rasik P. and an occupant of a vehicle for which Rasik P. is the named insured. If there is no valid policy of insurance as between Rasik P. and Intact and as there is no other policy available to Maltiben P. in her status as the occupant of the vehicle, she would look to Wawanesa, being the insurer of another vehicle involved in the incident which gives rise to the payment of statutory accident benefits.

EVIDENCE and ANALYSIS:

The following documents were entered into evidence at the hearing which proceeded on a written record only:

1. Document Brief submitted by Intact consisting of two volumes and 15 tabs
2. Document Brief submitted by Wawanesa consisting of 9 tabs [including the examinations under oath of Rasik P. and Michael L., a representative of Intact, both held on July 21, 2015]
3. Written submissions from each of Intact and Wawanesa and Reply submissions of Intact
4. Books of Authorities each of Intact and Wawanesa

From the foregoing, I have determined the facts as follow. Maltiben P. was a passenger in an automobile operated by her daughter, Pooja P. and owned by her spouse, Rasik P. This automobile was involved in a collision on April 9, 2013 with an automobile owned and operated by Derrick G. Derrick's automobile was insured with Wawanesa. The critical issue for determination by me is whether Rasik's vehicle was or was not insured by Intact as at April 9, 2013.

Rasik P. had a policy with Trafalgar [a subsidiary or related company to Intact and which, for purposes of this decision, is treated as one and the same as Intact]. This policy commenced May 17, 2012 and, by its terms, would expire on May 17, 2013. The policy provided for payment to be made in three equal instalments due on May 17, August 17 and November 17, 2012. At the time of the renewal, the total amount due was \$3715. The first payment was due on May 17, 2012 was paid by credit card in the amount of \$1238.34.

Thereafter, Rasik P. implemented a number of changes to the policy which gave rise to a recalculation of the premiums due. The first change was to add his son as a driver under the policy. This gave rise to a Policy Change Notice dated June 14, 2012 such that the remaining payments increased to \$1378.33.

The next change was to add an additional vehicle to the policy. This gave rise to a Policy Change Notice dated June 20, 2012 such that the remaining payments increased to \$2092.83.

The next change was to add an additional vehicle, modify the deductibles applicable to two vehicles and reduce coverage on a 4th vehicle. This gave rise to a Policy Change Notice dated July 24, 2012 such that the remaining payments increased to \$2497.33.

The payment which was due on August 17, 2012 was not received by Intact. A written notice was sent to Rasik P. on August 22, 2012 advising that \$2497.33 was due by September 11, 2012 so as to avoid cancellation of insurance. Payment was made by Rasik P. by cheque in this amount on September 1, 2012.

An instalment notice was sent to Rasik P. on October 22, 2012 advising that \$2497.33 was due on November 17, 2012.

A further change to the policy was made such that Rasik P's daughter, Pooja P., was added as a driver under the policy, the ratings were changed respecting two vehicles insured under the policy and a 4th vehicle was removed entirely from the policy. This gave rise to a Policy Change Notice dated October 25, 2012 such that the remaining payment increased to \$4430.33 and stipulating that this payment was due on November 17, 2012.

The payment which was due on November 17, 2012 was not received by Intact. A written notice was sent to Rasik P. on November 19, 2012 that \$4430.33 was due no later than November 22, 2012. Rasik P. made a partial payment in this regard by cheque in the amount of \$2497.33 which was apparently received on November 21, 2012.

On November 21, 2012, Intact issued an Account Balance Change Notice which acknowledged payment in the amount of \$2497.33 and which stipulated a new balance of \$1933. This document included a Payment Slip which specified the amount due to be \$1933 which was due on December 11, 2012.

At this point, it should be noted that the Policy Change Notice consists of two pages [presumably, printed on both sides of one piece of paper]. The lower portion of the first page has a detachable Payment Slip which is designed to be attached to a cheque or enclosed in an envelope to the extent that the reverse portion of the slip can be completed to allow for preauthorized payment or payment by credit card.

On February 5, 2013, Intact sent a registered letter to Rasik P. to inform him that the policy would be cancelled at 12:01 AM on March 11, 2013 due to outstanding premiums. The letter provides, in part, as follows:

Important: You now have two options available to you:

To prevent cancellation and ensure that you have continuous coverage, we must receive payment of \$1968 for the outstanding amount due by 12:00 noon on the business day before the above specified cancellation date. This payment amount includes the outstanding premium and any applicable interest charges, NSF fees, provincial sales tax and a \$35 policy processing fee.

If you choose not to continue your insurance coverage:

Our billing records indicate that \$6,320 is the premium for the policy you had insurance coverage, from the policy effective date policy cancellation date. Total amount owing is \$6320. The total amount you paid during the same period is \$6233.

Please pay \$87 which represents the difference between the amount owing above and the amount paid by you.

Payment can be made by money order, certified check or approved credit card. A return envelope has been enclosed.

The registered letter was signed for and received by T. P. on February 6, 2013. Rasik P. testified at his examination under oath that he has a daughter, Tina P., that she was residing with him on or about February 6, 2013 and that the signature depicted on the Canada Post Acknowledgement of Receipt appears to be the signature of his daughter, Tina P. I do not believe that Wawanesa takes any issue or serious issue with the fact that registered notice was given to Rasik P. and received by him or by a member of his household on February 6, 2013.

Rasik P. testified at his examination under oath that he did not receive and did not read or review any registered letter or any communication from Intact which notified him that his policy would be terminated. He testified that he wrote a cheque, which was not certified, dated February 15, 2013. This cheque was in the amount of \$1968. It was placed in his own envelope and was sent by regular mail on or about February 18, 2013. The transcript is unclear as to whether he did or did not attach or enclose a Payment Slip with the cheque. The cheque has the policy number clearly set out in the "memo" portion of the cheque. Rasik P. believed his policy was in full force and effect at the time of the accident involving his wife and daughter.

Intact's evidence, through the examination under oath of Michael L. and by way of production of documentation, is to the effect that the cheque was not received on or before the termination date of March 11, 2013 and, as such, the policy was properly terminated on March 11, 2013.

Michael L. was, at the time of the events which give rise to this arbitration, personal alliance auditor with Trafalgar. At the time of his examination, he held the position of personal alliance specialist/underwriter with Belair [another insurance company owned by Intact]. He gave evidence that envelopes containing cheques are opened and, if there is a policy number on the cheque or on a document accompanying the cheque, the payment would be posted to the policy within 48 to 72 hours of receipt. He testified that it is normal practice for the envelope enclosing the cheque to be scanned into the computer system. If the envelope is of a non-standard size, it will not be scanned into the system; rather, a standard, exemplar envelope pre-addressed to Intact will be scanned. If a cheque is delivered to the reception department at Intact, a computer notation is made to this effect He explained that cheques which do not have any policy number information are recorded in a "cheques not applied" database.

The accident occurred on April 9, 2013. There are log notes maintained by Intact to the effect that Pooja P. called Intact on April 10, 2013 and informed Intact she had been involved in a motor vehicle accident on April 9, 2013. Intact advised Pooja P. that the policy had been cancelled for nonpayment of premiums as at March 11, 2013.

Intact processed a cheque from Rasik P. on April 10, 2013 in the amount of \$1968. This was the cheque described above. It was posted to the policy on or about April 11, 2013. On or about April 29, 2013, Intact issued a refund cheque in the amount of \$1881 to Rasik P. [retaining \$87 on account of the premium owing to March 11, 2013 when the policy was terminated so far as Intact was concerned].

The question or issue for determination by me is whether it is more likely than not that Rasik P. posted the cheque on February 18, 2013 such that the cheque was received but misplaced by Intact only to be discovered and processed on April 10, 2013 [one day following the accident in question]. Even if I find this to be the more probable scenario, I must determine whether an uncertified cheque satisfies the terms stipulated by Intact in the registered letter of February 5, 2013.

The parties chose to proceed with the transcripts of examinations under oath rather than producing the witnesses for examination and cross-examination. This is certainly their prerogative. While this creates some challenges for me when it comes to making a determination on credibility, it does not make the task impossible. I reject the evidence of Rasik P. as incredible for the following reasons:

- (a) The cheque was in the amount of \$1968. This was exactly the amount stipulated in the termination letter of February 5, 2013. Rasik P. testified that he did not receive or read or review this letter. This was not the amount stipulated in the Account Balance Change Notice dated November 21, 2012 in the amount of \$1933. The difference, being \$35, is described in the termination letter of February 5, 2013 as a "policy processing fee".
- (b) Rasik P. testified that he did not receive or read or review the termination letter. The timing for the preparation of his cheque makes this highly doubtful. The insurer requested the balance of the premium due in the amount of \$1933 on November 21, 2012. Why did Rasik wait for almost 3 months before preparing and posting his cheque? This strains the elasticity of belief.
- (c) Perhaps most significantly, if I accept the evidence of Rasik P., I must conclude that through happenstance, coincidence or otherwise, a cheque posted on or about February 18, 2013 with the policy number clearly written on the face of the cheque was misplaced, misfiled or misidentified by Canada Post and/or Intact only to be fortuitously discovered and processed by Intact on April 10, 2013 [one day after the accident and after Pooja P. had been informed that the policy had been terminated for nonpayment of premiums]. This strains the elasticity of belief to and beyond the breaking point.

I find, for the reasons indicated, that Rasik P. had not paid the required premium of \$1968 by 12:00 noon on the business day before March 11, 2013 such that the policy was properly and effectively cancelled at 12:01 AM on March 11, 2013. I fully appreciate that the evidence discloses that Rasik P. had, at all material times, sufficient funds in his bank account to cover the amount of the cheque. This fact and the other evidence relied upon by Wawanesa does not cause me to come to an opposite conclusion.

If I am wrong in relation to the foregoing analysis such that it is determined on appeal that the cheque was received in advance of March 11, 2013 or, alternatively, that Intact has failed to discharge its burden of proof in relation to the issue before me, I must determine whether delivery of an uncertified cheque allows Rasik P. to avoid cancellation of the policy effective March 11, 2013 [such that the policy was in force at the time of the accident of April 9, 2013 in which case Intact would have the higher priority to respond to the claims of Maltiben P.].

At this juncture, I reproduce the portion of the cancellation letter of February 5, 2013 for convenient reference.

Important: You now have two options available to you:

To prevent cancellation and ensure that you have continuous coverage, we must receive payment of \$1968 for the outstanding amount due by 12:00 noon on the business day before the above specified cancellation date. This payment amount includes the outstanding premium and any applicable interest charges, NSF fees, provincial sales tax and a \$35 policy processing fee.

If you choose not to continue your insurance coverage:

Our billing records indicate that \$6,320 is the premium for the policy you had insurance coverage, from the policy effective date policy cancellation date. Total amount owing is \$6320. The total amount you paid during the same period is \$6233.

Please pay \$87 which represents the difference between the amount owing above and the amount paid by you.

Payment can be made by money order, certified check or approved credit card. A return envelope has been enclosed. [Emphasis added]

The parties are in general agreement as to the law applicable to cancellation of a policy of automobile insurance. Automobile insurers have a statutory right to unilaterally terminate policies. This statutory right is unique, very restricted and must be exercised strictly by the insurer.

The insurer's statutory right to unilaterally terminate an automobile insurance policy is provided for in a Statutory Condition 11 of Ontario Regulation 777/93 made under the *Insurance Act*. I have reproduced this section in its entirety but this issue turns on subsection 1.3 of section 11. Moreover, I have emphasized phrase in subsection 1.3 which gives focus to the dispute between the parties.

Termination

11. (1) Subject to section 12 of the Compulsory Automobile Insurance Act and sections 237 and 238 of the Insurance Act, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract.

(1.1) If the insurer gives a notice of termination under subcondition (1) for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the notice of termination shall terminate the contract no earlier than,

- (a) the 15th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or*
- (b) the fifth day after the insurer gives the notice, if the insurer gives the notice by personal delivery.*

(1.2) Subject to subcondition (1.7), if the insurer gives a notice of termination under subcondition (1) for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the notice of termination shall comply with subcondition (1.3) and shall specify a day for the termination of the contract that is no earlier than,

- (a) the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or
- (b) the 10th day after the insurer gives the notice, if the insurer gives the notice by personal delivery.

(1.3) A notice of termination mentioned in subcondition (1.2) shall,

- (a) state the amount due under the contract as at the date of the notice; and
- (b) state that the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, **payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs**, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the business day before the day specified for termination.

(1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that the insured is permitted to pay the premium under the contract in instalments, the amount due under the contract as at the date of the notice shall not exceed the amount of the instalments due but unpaid as at the date of the notice.

(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specifies, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

(1.6) If the full amount payable under clause (b) of subcondition (1.3) is paid by the time and in the manner that the notice specifies, the contract shall not terminate on the day specified for termination and the notice shall have no further force or effect.

(1.7) If, on two previous occasions in respect of the contract, the insurer has given a notice of termination mentioned in subcondition (1.2) and the full amount payable under clause (b) of subcondition (1.3) has been paid by the time and in the manner that the notice specifies and if a non-payment again occurs of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract and subcondition (1.1) applies to the notice, instead of subcondition (1.2).

(2) This contract may be terminated by the insured at any time on request.

(3) *Where this contract is terminated by the insurer,*

- (a) *the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified;*
- (b) *if the termination is for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the refund shall accompany the notice, unless the premium is subject to adjustment or determination as to the amount, in which case, the refund shall be made as soon as practicable; and*
- (c) *if the termination is for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract and if subcondition (1.7) does not apply to the termination, the refund shall be made as soon as practicable after the effective date of the termination.*

(4) *Where this contract is terminated by the insured, the insurer shall refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time, but in no event shall the short rate premium for the expired time be deemed to be less than any minimum retained premium specified.*

(5) *For the purpose of clause (a) of subconditions (1.1) and (1.2), the day on which the insurer gives the notice by registered mail shall be deemed to be the day after the day of mailing.*

(6) *All references in this condition to times of day shall be interpreted to mean the time of day in the local time of the place of residence of the insured.*

Wawanesa takes the position that the choice of words utilized by Intact, in its termination letter of February 5, 2013, is permissive and not exhaustive. The letter provides that payment can be made by money order, certified cheque or approved credit card. Wawanesa submits that the choice of the phrase "can be made", rather than use of the phrase "must be made" or "shall be made", gave Rasik P. the option to pay by uncertified cheque which he did.

The Cambridge Online Dictionary defines "can" as, inter alia, "to be able to"; "to be allowed to". The Merriam-Webster Online Dictionary defines "can" as, inter alia, "to be enabled by law, agreement, or custom to" or "to have permission to". Dictionary.com defines "can" as, inter alia, "to be able to; have the ability, power, or skill to", "to have the power or means to", "to have the right or qualifications to".

While I accept that one could interpret the word "can" as permissive, the use of this word in the cancellation letter of February 5, 2013 seems, at least to me, to explicitly set out the forms of payment viewed as acceptable by the insurer to avoid cancellation of the policy. One must recall the language used in subsection 1.3 of Statutory Condition 11 which provides, in part, that the payment shall be "payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs". In the case before me, the insurer chose to delete the option of payment in cash but to add payment by approved credit card. It kept the payment options of money order and certified cheque. The letter of February 5, 2013 appears clear and unambiguous when it stipulates the forms of payment which will be acceptable to the insurer.

Counsel for Wawanesa made a number of submissions regarding the law applicable to an insurer's statutory right to unilaterally terminate the insurance contract. I agree with those submissions such that:

- (a) Courts and arbitrators have tended to observe the requirements of the insurer's notice of termination very closely and construe them strictly against the insurer.
- (b) Where an insurer purports to terminate an automobile insurance policy, the onus is on the insurer to prove that its purported termination complied with the applicable Statutory Conditions.²
- (c) Statutory Condition 11 (1.3)(b) is a consumer oriented provision that gives the insured the opportunity to continue coverage, regardless of the insurer's intention.³
- (d) Several "essential elements" have been identified which must be included in a termination notice in order for an insurer to satisfy Statutory Condition 11.

In my view, the "essential elements" as required by Statutory Condition 11 are as follows:

1. *The amount due, together with any administration fee being sought;*
 2. *The date on which the termination is to take place; and*
 3. *That the insured has a right to avoid termination by paying the amount outstanding and the specific administration fee by noon on the day before the date on which the termination is to take place.*⁴
- (e) A termination notice must be clear and straightforward, so as to allow an ordinary person to intelligibly appreciate the nature and import of the notice.⁵

Counsel for Intact notes that Arbitrator Bialkowski, in the decision referenced above [*Gore v. Lombard*], does not include the method of payment as an "essential element" to be strictly followed by the insurer. Counsel further notes that Arbitrator Samis found that language used in a termination letter which was perhaps not quite as strong as desirable but which was certainly close to the message satisfied the "essential elements" test set out by Arbitrator Bialkowski.⁶

I find the cancellation letter of February 5, 2013 sent by registered mail by Intact to Risek P. was sufficiently clear and unambiguous and in compliance with Statutory Condition 11 such that Risek P. could have avoided cancellation of the insurance policy if, and only if, he paid the outstanding amount of \$1968 in one of the forms stipulated by Intact, namely, by money order, certified cheque or approved credit card. Risek P. did not do this. It matters not that he had

² *Dick v. Allstate Insurance Company of Canada*, 1976 Carswell Ont. 425 (Sup. Ct. J.), at para. 17, as cited in *Ontario Minister of Finance v. Progressive Casualty Insurance Co.*, 2007 Carswell Ont. 2830, at para. 59.

³ *Gore Mutual Insurance Co. v. Lombard General Insurance Co. of Canada and Motor Vehicle Accident Claims Fund* [*Gore v. Lombard*], Arbitration Award of Arbitrator Bialkowski dated June 21, 2010.

⁴ *Gore v. Lombard*, supra

⁵ *Prior v. Dominion*, FSCO Award of Arbitrator Bayefsky dated November 6, 2008, FSCO A07-001147

⁶ *Economical Mutual Insurance Company v. Wawanesa Mutual Insurance Company, Certas Direct Insurance Company, Unifund Insurance Company and Motor Vehicle Accident Claims Fund*, Award of Arbitrator Samis dated May 7, 2014.

sufficient funds in his bank account to cover the cheque. The insurer was within its rights under the statutory condition to stipulate the method of payment.

CONCLUSION

I find that policy of automobile insurance originally issued by Intact to Risek P. on May 17, 2012 was cancelled effective 12:01 AM on March 11, 2013. As a result, Wawanesa has the higher priority to respond to the statutory accident benefit claims of Maltiben P. arising from the motor vehicle accident of April 9, 2013.

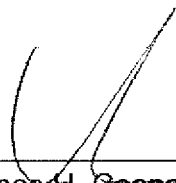
I remain seized of this matter to address the following issues:

- (a) What is the amount to be paid by Wawanesa to Intact?
- (b) What is the amount of interest owing upon the amount determined in respect of issue (a)?
- (c) What is the quantum of costs and which party has the burden of payment?

I am obliged to counsel for their thoughtful and comprehensive written and oral submissions.

I will hold this matter in abeyance for 45 days to allow counsel to try to work through the foregoing issues. Thereafter, I will render my account in accordance with the terms of the arbitration agreements which govern this matter and convene an arbitration teleconference to work through procedure and logistics so that I can make determinations on the issue or issues that remain outstanding and unresolved.

Dated at Toronto this 5th day of January, 2016.



Vance H. Cooper, Arbitrator