IN THE MATTER OF the Insurance Act, R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER OF the Arbitration Act, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

and

AVIVA INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing:

Julianne Brimfield: Counsel for the Applicant, Co-operators General Insurance Company (hereinafter called Co-op)

Catherine H. Zingg: Counsel for Aviva Insurance Company of Canada (hereinafter called Aviva)

Background

This matter comes before me by way of a priority dispute pursuant to section 268 of the *Insurance Act* R.S.O. 1990, c. I.8, as amended and Regulation 283/95, as amended.

By way of general background on November 9, 2018 the claimant was driving a vehicle which had been insured by Co-op. Co-op takes the position that the policy had been cancelled prior to the accident.

The claimant submitted an OCF-1 to Co-op.

Aviva insurers Ms. MN. Ms. MN was driving another vehicle that was involved in the accident.

Co-op takes the position that their policy was properly cancelled and accordingly Aviva is the priority insurer.

The key issue before me is therefore the question of cancellation.

Proceedings:

The Arbitration proceeded by way of both written and oral submissions. A Joint Document brief was submitted (Exhibit 1) which included transcripts of an Examination Under Oath taken of the claimant as well as the relevant cancellation letters and Canada Post tracking slips, an Arbitration Agreement dated August 30, 2021 (Exhibit 2), and both counsel made written submissions and submitted Books of Authority. Finally we had an oral hearing on October 29, 2021 where counsel elaborated on their written materials.

Issue for Determination:

The Arbitration Agreement identifies the issue for determination as:

> "As between Co-operators General Insurance Company and Aviva Insurance Company of Canada which insurer is responsible to pay Statutory Accident Benefits to the claimant arising out of a motor vehicle accident occurring on November 9, 2018".

However, at the heart of this Arbitration is the following issue:

> "Was the Co-operators General Insurance Company policy properly cancelled in accordance with the *Insurance Act* and its regulations prior to November 9, 2018".

Decision:

For the reasons set out below, I find that the Co-op policy was not properly cancelled and was therefore in full force and effect on November 9, 2018 accident. Accordingly Co-op is the priority insurer with respect to the Statutory Accident Benefits payable to the claimant arising out of the accident of November 9, 2018.

Facts:

There does not appear to be any issue with respect to the facts, but rather what conclusions one draws from them.

Co-op issued a policy of insurance to the claimant bearing policy number 4000574168. It was issued for a policy period between May 19, 2018 and May 19, 2019.

Aviva issued a policy of insurance to MN bearing policy number A96426897PLA. That policy was in full force and effect on November 9, 2018.

The claimant was an immigrant with limited English language skills. His main language is Arabic.

The claimant obtained his policy of automobile insurance through an insurance broker: Adnan Bihnan of Bihnan Insurance Inc. The claimant was able to communicate with Mr. Bihnan about matters pertaining to his automobile insurance in Arabic.

The policy of insurance that the claimant arranged through Mr. Bihnan was to cover a 2017 Kia Sportage. This was the vehicle involved in the accident.

The monthly premium was $400.25. The claimant knew that the premium was taken out directly from his bank account with TD Canada Trust on a monthly basis. The premium was routinely withdrawn from that account on the 19th of each month.

On August 19, 2019 Co-op attempted to withdraw the claimant's August payment from the bank account. It was unable to withdraw the payment due to insufficient funds they tried again on August 26 and they were able to withdraw the funds. A non-sufficient funds charge of $25.00 was added to his account.

On September 19, 2018 Co-op attempted to withdraw the claimant's September payment plus the additional $25.00 fee that had been charged for a total of $425.25. Co-op was unable to withdraw the premium due to insufficient funds.

A second attempt to withdraw the funds was made on September 26, 2018 and again the funds were unable to be withdrawn as there were insufficient money in the bank account.

The evidence of the claimant at his EUO was that he did not have online banking. He had no formal process in place to confirm whether he had sufficient funds in his account to make his premium payment. The evidence suggests that the claimant took no active steps in the circumstances to make sure that there was enough money each month in his account. A review of his TD statements show not only the previous unavailability of funds in August, the lack of funds for September but in addition that his account was significantly overdrawn.

As a result of the inability to withdraw the funds for the premium, Co-op decided to terminate the policy. On October 1, 2018 Co-op sent a letter to the claimant via registered mail advising his policy was going to be cancelled due to non-payment of the premium. The termination letter was sent to the claimant by registered mail to his last known address as listed on his renewal: 703-365 Grandravine Drive in North York. On his Examination Under Oath the claimant confirmed that was his correct address and he had been living there for about a year prior to the accident.

The Canada Post tracking slip was produced and it shows that the letter was processed on October 4, 2018 and a notice card was left at the claimant's home on October 5, 2018. The card advised the claimant when and where he could attend to pick up the letter. There is no dispute that the claimant never picked up the letter and it was ultimately returned to Co-op as unclaimed on October 31, 2018.

The claimant testified at his EUO that he did not receive the notice letter from Co-op. He also claims he never received a notice asking him to pick up registered mail in or around October of 2018.

According to the claimant the first time he was aware that he did not have any insurance coverage was when he called Mr. Bihnan to tell him about the accident and was told by the broker that he does not have any coverage.

According to notes and records produced from the broker on or about October 2, 2018 a representative from Bihnan Insurance also attempted to call the claimant to advise him that the withdrawals had not gone through due to insufficient funds. As the insured did not answer they left him a voicemail message.

At no time prior to the motor vehicle accident did the claimant take any steps to pay the outstanding premium.

The key fact in this case is the actual letter that was sent out to the claimant and it is reproduced in its entirety below.

the co-operators
A Better Place For You®

BIHNAN INSURANCE INC
203 MAIN ST N
BRAMPTON ON L6X 1N2

Co-operators General Insurance Company

Registered Mail

CPC Tracking Number Numéro de repérage de la SCP
RW 360 697 105 CA

SPEC 3523 V6

[redacted]

October 1, 2018

Dear: [redacted]

Re: Billing Account No.: [redacted]
Automobile Insurance Policy No.: [redacted]

We are writing to let you know that your banking institution was unable to process your payment.

In accordance with the Statutory Conditions of your policy, we must advise that coverage under your policy will cease to be in effect at 12:01 a.m., 30 days following the date of this letter.

To avoid cancellation, payment in the amount of $454.09 must be received by noon on the business day prior to the date of the cancellation. Payment can be made by certified cheque, cash or money order. Service fee(s) of $75.00 is included in this amount.

If you have any questions regarding this letter, please contact your Financial Advisor, BIHNAN INSURANCE INC, at 905-866-6203 for more information.

Sincerely,

The Co-operators

VEHICLE LIST:
2017 KIA TRUCK/VAN SPORTAGE LX 4DR AWD KNDPMCAC3H7105311

- PREM801

Position of the parties:

Co-op

Co-op takes the position that while there may be some minor deficiencies with respect to their letter of October 1, 2018, that it is compliant with the *Insurance Act*, Ontario Regulation 777/93, and Section 12(1) of the Compulsory Automobile Insurance Act R.S.O. 1990 c, 25.

The three areas of deficiency that are relied upon by Aviva are:

1. Co-op failed to specify a proper date for termination in accordance with the Regulation;
2. Co-op failed to specify where payment of the outstanding premium was to be made; and,
3. The payment requested in the cancellation letter was unclear.

With respect to the issue as to where the payment was to be made, Co-op points to the top left hand corner of the letter that was sent to the claimant. There it is set out clearly the address of Bihnan Insurance Inc. at 203 Main Street North, Brampton, Ontario with a postal code of L6X 1N2. Co-op also points to the portion of the letter that states:

> "if you have any questions regarding this letter, please contact your Financial Advisor, BIHNAN INSURANCE INC, at 905-866-6203 for more information".

Co-op takes the position that is more than sufficient information to direct the claimant that the amount owing of $454.09 can be sent to the broker with whom he has dealt with exclusively in relation to his policy and with whom he is familiar and who also speaks Arabic. Not only is the address provided but also the phone number.

Co-op also submits that the Statutory condition does not specify where in the notice letter the address must be located. In fact the Regulation only requires that the address be included. Co-op relies on the decision in *Economical Mutual Insurance Company and Wawanesa et al* a decision of Arbitrator Bialkowski dated February 8, 2011. They point out that in that case a policy was found to be validly terminated where the letter instructed the insured person to contact their broker about payment options and included the phone number and address. Arbitrator Bialkowski notes in that case although the wording was not as clear as it could have been an insured person reading the notice of cancellation would reasonably have concluded that the policy could be reinstated by contacting the broker for payment options. Co-op submits that their letter meets that criteria.

With respect to the amount set out in the letter, Co-op submits that it is improper for Aviva to be raising this issue as the first time Co-op became aware of this as a basis for improper cancellation was in their submissions. It was never raised in the multiple pre-hearings. There had never been any explanation asked for what that amount was and nor has any EUO been

conducted of a representative of Co-op. While it is true that this specific issue on cancellation was not mentioned in the pre-hearings, I find that the overall issue of proper cancellation was always in dispute and that there was no limitation put on Aviva as to the basis upon which they disputed the proper cancellation.

As to the explanation, Co-op notes that the premium owed of $400.25 included auto insurance and a property policy. The amount of the auto insurance was $379.09 and when you add in the $75.00 charges for insufficient funds (3 efforts to withdraw monies) that came to $454.09. Therefore, the amount set out was clearly based on the claimant's understanding of what his auto insurance premium was and the previous advice that he had received of there being 3 $25.00 insufficient funds fees being charged.

As to the final issue raised by Aviva on the proper date of notice it is important to set out Section 11(5) and 11(1.2) (a) of the Statutory Conditions.

Section 11 (1.2) (a) which states that a cancellation for non-payment is effective:

> "the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail".

Section 11(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.

The argument made by Aviva is that the Co-op letter refers to the coverage under the claimant's policy ceasing to be in effect "at 12:01 a.m., 30 days following the date of this letter". The Regulation requires that it be 30 days from the <u>date the insurer gives notice</u> and not 30 days from the date of the letter.

Co-op acknowledges that if one had to follow the exact letter of the Regulation that on a technical basis the letter of October 1, 2018 does not make reference to "the date of notice".

Co-op identifies the essential elements from Statutory Condition 11 to be:

1. That the letter show the amount due together with any administrative fee sought;
2. The date on which the termination is to take place;
3. That the insured has the right to avoid termination by paying the amount outstanding and the administration fee by noon on the day before the date the termination is take place.

Co-op relies on Arbitrator Bialkowski's decision in *Gore Mutual Insurance Co. v. Lombard General Insurance Co. of Canada and Motor Vehicle Accident Claims Fund* (a decision of June 21, 2010).

Co-op submits that a standard of perfection is not required in a notice of termination. Co-op submits that the insurer does not have to set out the <u>exact</u> wording of Section 11 of the

Regulation in order for it to be valid as long as those essential elements noted above have been otherwise complied with.

More importantly, Co-op relies on upon the decision in *Clapp v. Travelers' Indemnity Co.*, [1931] O.J. No. 505 a decision of the Ontario Court of Appeal. Co-op submits that case establishes that where a cancellation notice is delivered in less than the prescribed time that it can "ripen" into an effective cancellation on the expiry of the required time period for delivery.

In this particular case, the Canada Post information confirms that the letter was processed on October 4. In accordance with Section 11 and 12 of the Statutory Condition the claimant was deemed to have received the letter on October 5, 2018. Co-op points out and it is not disputed by Aviva that it is not relevant the claimant never received the letter.

As the cancellation letter references the date of October 1, if you rely on the wording of the letter then 30 days after October 1 would mean the cancellation date is October 31, 2018.

Co-op submits that the cancellation notice therefore ripened into an effective cancellation 30 days after the deemed date of delivery. This means that with October 5 being the deemed date of delivery that the cancellation was effective at the latest by November 5, 2018 well in advance of the accident date of November 9.

Co-op also relies on subsequent cases that have followed the Clapp decision including *Barzo v. Lanari,* 2012 ONSC 2327.

Lastly, Co-op speaks to the position of Aviva that one must be cognisant of the fact that the claimant was unsophisticated, may not have spoken a great deal of English and did not have online banking. Co-op submits that this is irrelevant. Whether or not a policy is properly cancelled cannot be determined by a look at each individual's sophistication. The purpose of Statutory Condition 11 is to ensure that any insured is provided with the appropriate information necessary to avoid cancellation. An individual's inability to speak English, the awareness of their financial sophistication or their understanding of insurance is not relevant to that determination.

Turning now to the position of Aviva.

Aviva

Aviva submits that Co-op failed to provide a proper notice of cancellation and that the 3 criteria outlined earlier were not in compliance with the Regulation and therefore the policy was not properly terminated and it was in place on the date of loss.

Aviva points to consumer protection and the Compulsory Automobile *Insurance Act* requiring insurers to provide their consumers with adequate notice and clear instructions on how to maintain insurance policy coverage before a cancellation can take effect. Aviva points to the fact

that the claimant was an immigrant with limited English language skills and this was someone who needed the protection offered by the Regulation.

Aviva also points to the fact that the claimant on his Examination Under Oath clearly showed difficulties dealing with insurance and banking mainly because of his limited understanding of English and that he relied very much on the Arabic speaking employee at his insurance broker.

On the issue of where to send the outstanding premium, Aviva points to Section 11(1.3) which says that a notice of termination for non payment of premium shall include the following information:

> iii. That the contract will not be terminated if the insured person delivers the amount due plus any administrative fee to the address in Ontario that the notice specifies…

Aviva submits that there was no address specified in the notice.

Aviva submits that just having the broker's address in the top left hand corner of the top of Co-op's letter does not meet that requirement. Aviva also submits that there is no specific direction in the letter to tell the insured that if they wish to bring their policy into good standing that the funds set out should be sent to that address. Further, Aviva points out that there is no indication in the letter as to whether the funds should even be payable to Co-op or to the broker or indeed to some other entity. In that case simply giving an address for the broker does not meet the requirements. Further, there is no address given in the letter at all for Co-op so the claimant is not offered an opportunity to send the funds to Co-op directly.

Aviva submits that the case law in this area makes it clear that an insurer is going to be held to a high standard and must be in strict compliance with Regulation 777/93 when it attempts to terminate the policy. This is consistent with its consumer protection aspect. Aviva relies on the decision of *Allstate Insurance Company v. HMQ* 2020 ONSC 830. In that case Justice Davies concluded that the plain language of Regulation 777/93 makes it clear that the termination notice must include the address to which the insured person must deliver the amount owing. Further, Justice Davies concluded that when an insurer decides to unilaterally cancel a policy mid-term, they must demonstrate that they complied with the statutory condition including the provision of an address in Ontario where the amount owing can be sent to avoid the pending termination.

Further, Justice Davies held that while a standard of perfection is not required in the notice of termination that the failure to provide an address is not simply a case of a minor typographical error. In that particular case the insured had been directed to pay the amount due to the agency and the address of the agency was not included at all. Nor was there any evidence that the amount owing could have been paid at the address on the envelope which set out Allstate's head office address.

With respect to the amount of premium owing of $454.09, Aviva submits that it is confusing. Aviva submits that the premium owed was normally $400.25 so there is simply no explanation as to why $454.09 had been set out. At the time Aviva completed its submissions they were not aware of the reply evidence of Co-op which set out that explanation. This is consistent with Co-op's position that this issue had not been raised previously and no information had been sought to provide any explanation. Aviva argues as well that when the fees for the NSF cheques are noted at $75.00 it makes it even more confusing as to why $454.09 is being claimed back.

Lastly, It is Aviva's position that the letter of October 1 misinformed the claimant that his insurance coverage would cease "30 days following the date of this letter" when the regulation required it to "specify a day for the termination of the contract that is no earlier than the 30th day after the insurer gives notice if the insurer gives notice by registered mail".

Aviva submits that Co-op's letter does not make reference to the 30th day after the insurer gave notice but rather the 30th day following the date of the letter. This is not in compliance, Aviva submits, with the Regulation.

Aviva argues that the cases relied upon by Co-op with respect to the "ripening" of the cancellation depend on the insured having at least received notice of some kind even though it is late. Aviva submits that the claimant never received notice therefore the "ripening" concept cannot apply. Further, Aviva submits that the "ripening" argument should not apply where there is an extremely short time frame between the alleged ripening and the date of the accident. In this particular case, Aviva argues that the improper cancellation arguably came into effect on November 5 and with an accident date on November 9 that is a very short time period and accordingly the "ripening" theory should not be applicable. Aviva points to the fact that the claimant in his EUO described himself as being "shocked" when he learned of the purported cancellation.

Aviva submits that Co-op is to be held to a high standard and that they have not strictly complied with the provisions of Regulation 777/93 and accordingly the cancellation should be held to be improper and that the policy was in full force and effect on November 9.

Decision and Analysis:

The *Compulsory Automobile Insurance Act* R.S.O. 1990 Section 12(1) provides that a contract of insurance that has been in effect for more than 60 days can only be terminated for one or more of the following reasons:

> 12 (1) (1) Non-payment of, or any part of, the premium due under the contract or of any charge under any agreement ancillary to the contract.

There does not appear to be any dispute in this matter that the basis for Co-op's efforts to terminate the claimant's contract of insurance was in compliance with Section 12(1) subsection

1 in that there had been a non-payment of the premium as a result of the insufficient funds in his bank account.

Under the Statutory conditions made pursuant to the *Insurance Act* R.S.O 1990 c18 Regulation 777/93 Section 11 provides that in order to terminate a contract of insurance pursuant to Section 12 of the *Compulsory Automobile Insurance Act* the insurer has some choices. They can send a notice of termination either by personal delivery or by registered mail. In this case there is no issue that a letter was sent to the claimant by way of registered mail. Further, there is no argument that even though the claimant did not ever actually receive the letter that makes the notice ineffective.

Section 11(1) (1.2) sets out the timing with respect to the notice of termination when the reason for the termination is non-payment of premium. That section also provides that the notice of termination shall comply with subsection 1.3.

Subsections 1.2 and 1.3 are reproduced below:

> (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.

Before turning to an analysis of how I find the letter does not meet the provisions above, it is helpful to look at the relevant case law.

Arbitrator Bialkowski in the decision *Economical Mutual Insurance Company and Wawanesa Mutual Insurance Company* (supra) held that in order for a letter of termination to be effective that there must be strict compliance of that letter with the Regulation to the extent that the "essential elements" of the legislative requirements are set out in the notice. He found that there were three essential components to Statutory Condition 11. They are:

1. The amount due together with any administrative fee being sought;
2. The date on which the termination is to take place; and,
3. That the insured can avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination is to take place.

Arbitrator Samis in the case of *Economical Insurance Group and Wawanesa* decision May 7, 2014 noted that the issue of the adequacy of unilateral termination notifications for automobile insurance has been before the courts and Arbitrators many times over the years. He noted that the right to unilaterally terminate a contract mid-term is an unusual right. Therefore it must be treated as such and therefore such a right must be exercised in accordance with the Statutory Conditions that accompany it. He noted that courts and Arbitrators have consistently held that an insurer seeking to rely on such a unilateral cancellation must be in compliance with the Statutory Conditions. However, he did point out that the case law also supports and recognizes that there can be some minor imperfections or inadequacies in the communication.

On the issue of the standard of perfection, the decision of Justice Davies in *Allstate Insurance Company v. HMQ* 2020, ONSC 830 is helpful. In that case a legal question had been raised as to whether the notice of termination was invalid if it did not include the address to where the insured person was to deliver the unpaid premiums and administration fees should they have wished to reinstate their policy. Justice Davies held that the plain language of the Regulation requires that the termination notice include the address to which the insured person must deliver the money owing in order to avoid the termination of the policy.

In the case before Justice Davies the Notice did contain a phone number for the agency but did not provide the address where the payment could be delivered to avoid the termination of the policy. The envelope in which the notice was sent did include a return address for Allstate's head office in Mississauga. Justice Davies stated:

> "While a standard of perfection is not required in the notice of termination, this is not a case of a minor typographical error in the address provided. Allstate failed entirely to include an address for Brantford Commons Agency, where Mr. Miller was directed to pay the amount due. There is no evidence that Mr. Miller could have paid the amount past due at the address on the envelope for Allstate's head office rather at Brantford Commons Agency as the notice directs".

The case before me is about whether or not the three issues raised by Aviva where there is imperfect compliance with the Statutory conditions are significant enough either singularly or jointly to warrant a conclusion that the policy was not properly cancelled. As I have indicated earlier, in my view, the letter of October 1, 2018 was insufficient to result in a proper termination of the claimant's policy.

Issue #1

The first issue is the failure of Co-op to specify the address in Ontario where the claimant was to send his cheque, money order, or cash should he want to reinstate his policy or avoid termination.

The Regulation specifically provides that the notice must specify an address in Ontario to which the monies should be sent.

The letter of October 1, 2018 in the body of the letter makes absolutely no reference to where the certified cheque, cash, or money order can be sent. In the paragraph referencing the payment, there is no reference to whether it should be sent to Co-op or whether it should be sent to the broker.

The letter does indicate that if there are any questions that the claimant should contact his financial advisor and it does provide his phone number. However, there is no suggestion in the letter that the funds should be sent to the financial advisor. One must keep in mind that the manner of payment by this claimant for his auto insurance premium was by direct withdrawal from his bank account. Therefore, it would be a new circumstance for him to make payment by way of a certified cheque, cash, or money order. The records show that the direct withdrawals from the bank account were done by Co-op and not by the broker.

Co-op argued that the Statutory Condition does not direct where the address must be located in the letter but only that the address must be included. While I agree with that statement, I do not find that the information in the letter was clear and straightforward and that the claimant would know where he should be sending the certified cheque in the circumstances of this case.

While I appreciate that the address of the broker is shown at the top left hand corner of the letter, it is shown directly above the address of the claimant. In looking at the letter I read that as to indicate that was another addressee of the letter. In other words, this same letter had gone to both the claimant and to his insurance broker. There was nothing to connect the payment of the monies owing under the contract to the address at the top left hand corner. A sensible reading of this letter in my view results in no direction whatsoever to the claimant as to where he should send his certified cheque, cash, or money order. The letter is from Co-op and no address is given for Co-op either. Following the case law as noted above, I find that the failure of Co-op to clearly indicate in their notice the address in Ontario to which the money order, cash,

or certified cheque is to be sent is more than an imperfect compliance with the Regulation but is a non-compliance.

I find that this case is on all fours with the decision of Justice Davies in the *Allstate* case (supra). The onus is on Co-op to strictly comply with the Regulation if it wants to unilaterally terminate an insurance policy mid-contract. In my view it failed to do so in this case. I therefore find that in addition to the three essential components found by Arbitrator Bialkowski in his decision *Economical & Wawanesa* (supra) that based on Justice Davies comments that there is a fourth essential element. The fourth essential element is that the notice must specify the address in Ontario to which the cash, money order, or certified cheque is to be sent to.

Issue #2

With respect to the issue of the amount of the premium owing as well as the administrative fee being confusing, I do not find that the manner in which the information about the payment set out in the letter is contrary to any provision of Regulation 777/93. Section 11(1) (1.3) of that Regulation states that the notice must state the amount due under the contract as of the date of notice and set out the amount of the administrative fee. It does not require anything further than that. The amount owing under the contract was $454.09 on the date of the letter. That is the amount set out in the letter of October 1, 2018. It clearly indicates that a service fee of $75.00 is included in that amount. That complies with the requirement that the administration fee must be set out.

Further, the letter gives the claimant an option to call his financial advisor at the brokerage should there be any confusion about the amount he needs to pay. There is nothing that I can see in the regulation that requires a breakdown as to how the amount owing as of the date of the notice of termination is to be set out. The Regulation simply requires the amount due under the contract as of the date of notice. Therefore, I am satisfied that on that issue Co-op was compliant with the Regulation and that issue alone would not be sufficient to find that the termination of the contract was not effective.

Issue #3

The last concern raised by Aviva is the requirement that the notice of termination shall terminate the contract no earlier than the 30th day after the insurer gives notice if the insured gives notice by registered mail. Aviva argues that the letter of October 1, 2018 does not comply with this part of the Regulation as the letter of October 1, 2018 tells the claimant that the termination of the contract will be 30 days after the **date of this letter** and not 30 days after the insurer gives notice. This therefore means that the letter does not comply with the requirements of the Regulation.

The question here then is whether the statement in the letter of October 1, 2018 that the contract is cancelled effective 30 days following the date of this letter as opposed to 30 days following the date of notice is fatal to the cancellation notice. Once again, it is clear that a

standard of perfection is not required in a notice of termination. Further, I agree with Arbitrator Bialkowski in *Gore v. Lombard* (supra) that an insurer is not required to set out the exact wording contained in the Regulation in the termination notice in order for it to be valid. Rather, one must focus on whether the essential elements that are required by the Regulation are contained within the letter. Arbitrator Bialkowski also says in this decision that in his view the Regulation does not require that every punctuation mark and capitalization in the notice of termination must be correct.

Therefore, the question is whether the essential element: "the date on which the termination is to take place" was set out in the letter.

In my view it was clear to the claimant that his policy would terminate on October 31, 2018 unless he made the appropriate payments. This clearly gave to the claimant the essential information as to when his policy would terminate. I find that the essential elements of the Regulation as to when the termination would take place was set out in the notice.

The question then becomes whether the fact that date is not compliant with the Regulation (it should have been 30 days from the date of notice) is fatal to the effort to cancel.

Both parties agree that the letter itself provides for a cancellation date of October 31, 2018.

If the letter had stated that the notice of cancellation was 30 days after the date of notice then the date would have been 30 days following the date under the Regulation that the claimant was deemed to receive the notice. Even though the claimant never picked up his letter, he is deemed to have received the letter on October 5, 2018 pursuant to Sections 11 and 12 of Ontario Regulation 777/93 (Section (11)(5) specifically). This section provides that the day on which the insurer gives the notice by registered mail shall be deemed to be the day after the day of mailing. Aviva argues this would take the date to November 5, 2018. Co-op agrees that would be the effective cancellation date. That date is prior to the motor vehicle accident of November 9, 2018.

This then brings us to the argument advanced by Co-op with respect to the concept of a "ripening" of the cancellation.

This flows from the decision of the Court of Appeal in *Clapp v. Travelers'* (supra). In that case the notice of cancellation of the automobile insurance policy in issue was required to give the insured person 15 days notice in writing of the cancellation by registered mail. However, the notice given was actually 13 days. It was argued that the cancellation ripened into an effective notice once the 15 days actually expired (relying on a decision on *London v. Lancashire Fire Insurance Company v. Veltre* (1918) 56 S.C.R. 588, 1918 CanLII 4. The Court of Appeal in the *Clapp* decision confirmed the application of the "ripening of the cancellation". The accident in the *Clapp* case occurred on August 28, 1929. Whether one took the date that the policy was actually cancelled per the notice or the proper 15 days had the notice been compliant, both occurred prior to the motor vehicle accident and accordingly the court held that the cancellation ripened by virtue of

the fact the individual had not chosen to reinstate his policy by way of payment prior to either cancellation date or prior to the accident.

This decision was followed in *Barzo v. Lanari* a decision of Justice Hackland [2012] O.J. 1736. This again involved a claim that an automobile insurer had not validly terminated the policy because of the dates set out in the notice of cancellation. Also in that case the facts showed that the insured had never attempted to pay the premium up until the date of the motor vehicle accident. The accident itself occurred more than one month after the date of termination specified in the notice letter. Accordingly, Justice Hackland held that:

> "even if the notice of termination was short served, by the time the accident occurred the notice had "ripened" or become effective as the court held in *Clapp*."

I find that the *Barzo* case is on all fours with the facts in this case.

I was also referred to the decision of Justice Brown in *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada,* 2007 CANLII 15475 (ON SC). In that case the cancellation notice issued by Progressive was in dispute as to whether it properly cancelled the policy of the claimant. This was a priority dispute. The notice that was sent out by Progressive in that case dated May 30, 1997 specified that the insured was to pay the amount due by June 18, 1997 or the policy would cancel. It was argued that the cancellation notice was invalid because it would result in giving the insured less than the 15 days notice required by the Statutory Condition relevant to this particular cancellation.

Justice Brown referred to the decision of the Court of Appeal in *Clapp* and noted that it stood contrary to the submissions that were being made by the Fund to support that the termination notice was ineffective. Justice Brown pointed out that the Court of Appeal held that where the notice of cancellation was delivered less than 15 days before the day named on the notice for its cancellation that the notice would ripen into effective notice of cancellation once the 15 days after delivery had expired. As the Progressive notice would be come effective on June 22, 1997 and the motor vehicle accident occurred on August 11, 1997 the cancellation was therefore effective.

Consistent with all the cases noted above I therefore find that the Co-op notice ripened into effective notice of cancellation on the expiration of 30 days after October 5, 2018.

I also find that there is no case law to support Aviva's argument that the "ripening" of the cancellation should not apply in the circumstance of this case because the claimant never attempted to pay the premium and because the insured did not actually receive the notice. I agree with Co-op that submission would fly in the face of established case law that confirms a person need not actually receive the notice of cancellation as long as it is sent to the correct address (see *Economical & Wawanesa* Arbitrator Samis (supra) and *Ontario v. Progressive* (supra)).

Therefore of the three issues that have been raised by Aviva, I find that the only one that results in the cancellation notice not meeting the requirements of the Regulation is the failure of Co-op to specify in the notice the address in Ontario to which the money order, cash, or certified cheque is to be delivered to.

Award

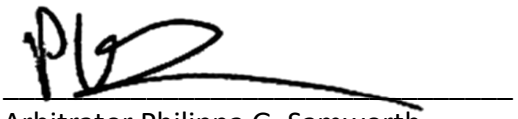
I therefore find that the policy of Co-op was not properly cancelled and was in full force and effect on November 9, 2018 and accordingly Co-op is the priority insurer with respect to any Statutory Accident Benefits payable to the claimant in this case.

Costs:

The Arbitration Agreement provides that the costs of the Arbitration shall be in the discretion of the Arbitrator. The quantum of costs is to be determined by the Arbitrator in the event that there is any dispute between the parties.

As Aviva was successful in this matter I find that the costs of the Arbitrator and the legal costs with respect to the Hearing are payable by Co-op. I make no decision with respect to the quantum of these costs but if the parties are unable to agree they can request a further pre-hearing so we can set down a costs hearing.

DATED THIS 14th day of December, 2021 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP