IN THE MATTER of the *Insurance Act,* R.S.O. 1990,

AND IN THE MATTER of Ontario Regulation 283/95,
made pursuant to the *Insurance Act*

AND IN THE MATTER of the *Arbitration Act,* 1991,
RSO 1991, c. 17

AND IN THE MATTER of an Arbitration

BETWEEN:

ECHELON GENERAL INSURANCE COMPANY

Applicant

-and-

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

REASONS FOR DECISION

APPEARANCES	Mr. Chris Blom MILLER THOMSON LLP 5800 - 40 King St. West Toronto, ON M5H 381	For the Applicant Echelon General Insurance Company
	Mr. Mark Donaldson DUTTON BROCK LLP 1700 - 438 University Avenue Toronto, ON M5G 2L9	For the Respondent Co-operators General Insurance Company

OVERVIEW

1. In the Province of Ontario, persons injured in car accidents have had access to varying forms of statutory "no fault" accident benefit coverage for several decades. These benefits are governed by what is now Part VI -Automobile Insurance of the *Insurance Act* R.S.O. 1990, c. I. 8, as amended, and its regulations.

2. As of June 22, 1990, a significant enhancement to those benefits was legislated into effect. Formerly modest accident benefits coverage [1] was greatly enhanced while certain restrictions were imposed on the right to sue for tort damages. The legislative intent was, amongst other items, to ensure that car accident victims could have relatively simple and expeditious access to what are now called Statutory Accident Benefits.

3. Unfortunately, the "simple" part of this objective is sometimes illusive from the perspective of automobile insurers.Amongst issues occasionally troubling insurers is the order of priority between them to pay the benefits in certain circumstances.

4. The issue before me is just such a "priority dispute" between two insurers over which one must respond first to a claim by Mr. Kenneth Fleming for certain statutory accident benefits following injuries he suffered in a car accident.

[1] "Modest" is sometimes a relative term. To illustrate by way of example, the maximum weekly loss of income benefit available immediately before the new legislation was $140. A more robust $600 weekly was brought into effect upon implementation of Ont. Reg. 672 and with options ranging up to $1,050 weekly if so chosen at the time of buying the policy.

5. Mr. Fleming, is potentially covered under more than one automobile owner's policy, depending on whether one or two owner's policies were in force at the time of his accident.

6. I heard this case sitting as a sole Arbitrator, under a consensual appointment at the request of counsel for the parties to an Arbitration Agreement executed in August of 2015.

7. The hearing proceeded at Toronto on October 9, 2015 and was confined to oral argument based on each party's factum, brief of authorities, transcript and other documentary evidence filed with me (listed in Appendix "A" to these Reasons). These filings were received after certain procedural steps including examination of witnesses under oath, documentary productions and other inquiries, all as previously agreed to in pre-hearing teleconferences with counsel. I am indebted to both counsel for their professionalism throughout and for the efficiency with which the case was ultimately argued where it might have otherwise taken longer.

FACTS

8. The Applicant, Echelon General Insurance Company ("Echelon") insured a car owned by MS Trista Mitts. The Respondent Co-operators General Insurance Company ("Co-operators") insured a van originally owned by Mr. Fleming.

9. There is no dispute that the Echelon owner's policy was in force at the relevant time, covering Ms Mitts' car, which Mr. Fleming was driving. The parties disagree, however, about the status of the owner's policy issued to Mr. Fleming by Co-operators.

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[2] I will from here on use the term "owner's policy".

10. To understand the context of this disagreement requires a review of Mr. Fleming's historic dealings with Co-operators and its local agent after an earlier car accident, as well as the conduct of Co-operators after Mr. Fleming's first and second car accidents.

Mr. Fleming's 2000 Ford Windstar and his first car accident

11. The undisputed cumulative historical record of evidence before me shows that Mr. Fleming was insured under an owner's policy issued by Co-operators bearing policy no. 505661595 (the "Co-operators Policy")[3]. The Co-operators Policy was in place from November 19, 2009 forward and was issued as an owner's policy to cover Mr. Fleming and his 2000 Ford Windstar.

12. On August 19, 2011, Mr. Fleming was involved in his first car accident while driving his 2000 Ford Windstar. Co-operators assessed his vehicle to be a "total loss".

13. Records show that after his first car accident, Mr. Fleming used the rental replacement vehicle coverage under the Co-operators Policy. On September 7, 2011[4], it appears there is no dispute Mr. Fleming received a payout for the total loss of his 2000 Ford Windstar, the same day he returned the rental car.

14. Mr. Fleming answers to questions under oath at page 34 of his transcript show he did not need a car as his father drove him to and from work on a daily basis:

> Q. Okay....So you...I appreciate you work in construction. So, is your dad in the same business.

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[3] The record also shows he apparently had a short "gap" in coverage for non-payment of premium under a previous Co-operators policy with a different policy number. Given the later history, this fact is irrelevant for present purposes.

[4] September 7, 2011 is a significant date for what Co-operators did some 18 months later, and some three months after Mr. Fleming's second accident.

A: Yes, I got him a job there not long after I started with them, so-

Q: I see. So, you would always be working on the same job sites.

A: Yes.

Q: So your dad would normally pick you up and take you to work and bring you home?

A: He had to go by my house every day to work anyway, so - …

15. He asked Mr. Blatherwick, the local agent for Co-operators, to hold him covered while he looked for a replacement car. His answers to questions at transcript pages 31-34 show Mr. Fleming was undecided, but in the end never did buy another car:

Q. And did you deal with Co-operators or Brent Blatherwick for the property damage stuff?

A. I'm pretty sure it was the agent, Brent Blatherwick.

Q: Okay. And did the agent- well, what did the agent tell you after your Windstar was -was destroyed in the first accident about your coverages?

A: I can't really remember exactly. I know I signed a form there and I can't remember any details from that, so --

Q: Okay. Did you sign that form when you got the cheque for the Windstar.

A: I think so. I'm not 100% positive on that, but –

Q: Okay, was there any discussion about leaving your policy available in case you bought a replacement vehicle?

A: Yes, there was.

Q: And who did you- who was that discussion with?

A: I'm not exactly sure of the name of the person I was talking to.

Q: Okay- was the discussion face-to-face or was it over the phone?

A: No, it was face-to-face.

Q: And did it take place at the agent's office?

A: Yes.

Q: Okay. So it could have been someone else other than Brent?

A: Yes.

Q: Okay.

A: Yeah, I never seen him too often, so--

Q: Okay. And that discussion about leaving the policy open in case you bought a replacement vehicle--

A: Yes?

Q: --do you remember anything beyond that?

A: I know there was a time period that was mentioned; I can't remember how long, and they said it'd have to be cancelled after that period.

Q: Okay. So there was a time period, and they said if you want to find a new van or a new car --

A: Yes

Q: -- you have to do it by X date?

A: Yes. And I can't remember the time period.

Q: Okay. Did you subsequently get in touch with the agent's office and say, you know what, I'm not going to buy a van or another car?

A: I don't believe so. Like, even at the time of the accident, I was still looking for another vehicle, but--

Q: Okay. So it was just kind of left hanging whether you were going to replace it; you didn't tell them that you weren't going to buy another vehicle?

A: I still was undecided. Like, I still wanted a vehicle, I just didn't end up getting one.

Q: Okay. And why didn't you?

A: I already had my dad drive me back and forth to work so I didn't really need a vehicle at the time.

16. Ironically, other evidence suggests he finally found one shortly before his second car accident. But for his second car accident, he might have discovered without incident that he was still paying premium for the Co-operators Policy.

Co-operators Policy administration after the first car accident

17. In an examination under oath, the transcript evidence of Ms Lintott, an underwriter for Co-operators confirms that, in the normal course, Co-operators had a standing practice

of leaving its coverage on an owner's policy open for a brief period after a total loss to allow a policyholder time to purchase a replacement vehicle.

18. For reasons which remain unexplained, it appears Co-operators did not follow its usual standing practice. The underwriter also admitted the Co-operators Policy would respond in various scenarios involving a vehicle other than the 2000 Ford Windstar.[5]

19. The underwriter also conceded the *effect* of the continued premium payments in their system was to continue the Co-operators Policy in force through automatic renewals processed on each anniversary of the original November 19, 2009 inception date. It appears after Mr. Fleming's first car accident a renewal was processed on November 19, 2011 and repeated again on November 19, 2012. Because the premium had been paid monthly from Mr. Fleming's bank account on an automatic debit or withdrawal basis, absent some step in the system to cancel it, the Co-operators Policy remained in good standing until well after Mr. Fleming's second car accident.[6]

20. Co-operators properly concedes it continued to receive automatic withdrawals for payment of premium from Mr. Fleming's bank account.

21. I must add that, from the transcript, it appears Mr. Fleming was blissfully unaware of this fact and had not realized Co-operators was still receiving the monthly withdrawals from his bank account until after his second car accident as is evident in the following excerpt from transcript pages 34-35:

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[5] Counsel took the underwriter through a few scenarios involving a newly acquired automobile, or if Mr. Fleming was driving his friends' car. See transcript pages 21-24, questions 104-110 and questions 115-120.

[6] This was canvassed with the underwriter by counsel at transcript pages 18-21, questions 84-92 and 99-104.

Q: So, at the time of your 2013 accident, as far as you were aware, you didn't have a policy with Co-operators?

A: Yeah, I didn't think it was still going. I didn't know they were still taking money out of my account, so --

Q: Okay. And you mentioned taking money out of your account. I guess you were on a ... pre-authorized payment?

A: Yes.

Q: And at some point did Co-operators refund the money they had taken out of the account?

A: Yes.

Q: Do you know roughly when that was?

A: It was after the accident?

Q: After the 2013 accident?

A: Yes .

Mr. Fleming's second car accident and the "priority" issue

22. On January 16, 2013, Mr. Fleming was in his second accident while driving Ms Mitts' car, which we know was covered under the Echelon owner's policy. He suffered serious injuries[7] and applied to Echelon for statutory accident benefits. If there were no other relevant facts, there would be no dispute about priority.

23. Here, however, we must recall that Co-operators showed on its system the Co-operators Policy as fully paid up and in good standing on January 16, 2013, the day of Mr. Fleming's second accident. Based on the record before me, it appears clear an inquiry with Co-operators made at the time of the second accident would have shown on the face of their records they had an in-force owner's policy listing Mr. Fleming as a named insured.

[7] Apart from other evidence, Echelon's Document brief includes, at Tab 2, a disability certificate completed by Dr. R. Pokrupa, a neurosurgeon at Kingston General Hospital. At Part 5 the doctor describes Mr. Fleming suffered, amongst other problems, facial and basal skull fractures. A description of the accident apparently provided by Ms Mitts is appended showing injuries included a chipped left pelvic bone, collapsed left lung, broken sinus cavity, broken upper jaw and associated symptoms.

24. Echelon disputes priority, contending Mr. Fleming was a named insured under a valid owner's policy issued by Co-operators in force on the day of his second accident.

25. As mentioned, "simple" is sometimes the illusive part in statutory accident benefits administration for insurers.

26. We will see the record shows Co-operators took certain steps after Mr. Fleming's second car accident to correct the apparent administrative error introduced after the total loss payment processed as a result his first car accident.

Administration of the Co-operators Policy after the second car accident

27. In due course, Echelon's investigation led it to learn of the Co-operators Policy still in force and covering Mr. Fleming. Echelon instructed its appointed adjusting firm to deliver a Notice to Applicant of Dispute Between Insurers, which was sent on February 13, 2013, [8] prompting Co-operators to start an investigation.

28. Co-operators learned that because of an inquiry made by Ms Mitts on January 21, 2013, five days after the second accident, the local agent for Co-operators discovered Mr. Fleming's 2000 Ford Windstar covered by the Co-operators Policy had not been owned by Mr. Fleming since it was rendered a total loss after his first accident in August of 2011. For reasons unexplained, the monthly automatic withdrawals continued in force on the system even after Mr. Fleming returned the rental vehicle on September 7, 2011.

[8] This is in evidence in Echelon's Document brief at Tab 5

29. Co-operators had undertaken to provide a printout of certain system notes reflecting the dialogue between Ms Mitts and the local agent for Co-operators but these were not produced in time for this hearing.

30. However, what we do have is what the underwriting witness read, apparently verbatim during her examination under oath, from her laptop which had those system notes downloaded for the purpose.

31. Since this is evidence upon which Co-operators acted, I reproduce it here, taken from pages 26 and 27 of the underwriter's transcript:

> Q. As best you know today, is this the first notice the Co-operators had of the accident involving Mr. Fleming?
>
> A. That is- there was some notes- just let me check. February 13, 2013. We do have notes under a policy that we just- the advisor was told that he was in an accident on January 21, 2013.
>
> Q: Is that the extent of the notes or do they go on and discuss anything else?
>
> A: They do go on and discuss other things.
>
> Q: What do they discuss?
>
> A: They discuss that they -that Trista – came in to insure a vehicle and in discussion with her, found out that Ken's policy was still active on a vehicle he no longer had. And that there shouldn't have been a policy in place.
>
> Q: Was there further information about what happened to that vehicle?
>
> A: That it was involved in an accident in 2011.
>
> Q: Do we have the precise date of the accident?
>
> A: Yes, the date of loss.
>
> Q: September 8?
>
> A: September- Sorry, August 19, 2011.
>
> Q: What else do the notes discuss, if anything?
>
> A: Just says that the policy was never- do you want me to read the whole thing?

Q: Yes, if you don't mind. Yes.

A: Okay. "Ken purchasing a 2013 Fiesta. Got into accident with girlfriend's policy [sic] before picking up the Fiesta, girlfriend insured with our office, Echelon policy, Ken in ICU due to injuries,Trista wants to do vehicle change to able to get to work. Trista informed me that there is no vehicle on his policy and that he should not have had an active policy. She states that he asked for policy to stay active for a month or two after the August 11, 2011 claim. Cheque was paid. Policy never cancelled. Client never called back in". ...

32. Upon learning there was no vehicle to associate with the Co-operators Policy after September 7, 2011, Co-operators processed what it deemed a request for cancellation, effective September 8, 2011. Co-operators also refunded all premium withdrawn from Mr. Fleming's bank account from that date forward, with interest.

33. No evidence has been produced to show how this cancellation was communicated to Mr. Fleming.

34. Mr. Fleming confirmed that Co-operators was, without his knowledge, still taking money out of his account. As noted above, there is no explanation for why Co-operators did not follow its usual protocol for cancelling Mr. Fleming's coverage once the rental vehicle was returned on September 7, 2011.

35. What seems clear is that, once it learned of the situation after Mr. Fleming's second accident, Co-operators processed a refund of premium with interest.[9]

36. If this had happened at any time before Mr. Fleming's second car accident, there might not be a dispute.[10]

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[9] At pages 27-28 of the underwriter's transcript, the local agent's system notes as read into the record go on to show he called a Co-operators underwriter who apparently advised they "will want to cancel the policy back to the claim date" so he was to make no changes until hearing further and that they might want to "research the situation first."

[10] I say "might" deliberately. As Echelon's submissions summarized below make clear, it contests the sufficiency of the cancellation steps Co-operators in fact took. If correct, arguably the Co-operators Policy remains in force to this day.

37. For the purpose of recording the chronology of facts, however, there appears to be no dispute that Co-operators simply refunded the amounts withdrawn from Mr. Fleming's account. It did not send Mr. Fleming an explanatory letter or if it did so, neither it nor Mr. Fleming were able to produce a copy in time for this hearing. Co-operators cannot show it delivered written notice of cancellation.

38. In any event, there is no dispute that Co-operators took these steps only after Mr. Fleming's second car accident, the one for which he claims statutory accident benefits and for which Echelon disputes priority.

39. Echelon's counsel submits the Co-operators documents produced at and marked as an exhibit to the underwriter's examination under oath make clear the premium payments were received both before and after the date of Mr. Fleming's second car accident. Counsel for Co-operators takes no issue with this characterization.

40. Counsel for Co-operators also properly concedes there is no documentary evidence that Co-operators at any time executed a statutory cancellation of the Co-operators Policy. Mr. Fleming has no memory of any specifics following his first car accident and, although he vaguely recalls receiving some paperwork, he cannot now locate any documents evidencing a cancellation.[11]

[11] Mr. Fleming's transcript at page 28, questions 199-202, suggests he recalls receiving cancellation documents after his first accident. However, when I asked about this evidence during the hearing, counsel for Co-operators advised he has no other documentary evidence to support this apparently mistaken recollection. To the contrary, Co-operators' records show a consistent monthly withdrawal of premium payments for Mr. Fleming, uninterrupted through from inception in November of 2009 until April of 2013.

41. As the transcript excerpts above show, Mr. Fleming gave no verbal instructions to the local agent for Co-operators after returning the rental vehicle and before his second car accident.

ISSUES

42. Under the Arbitration Agreement, my task is to determine all matters in dispute between the parties "arising out of a priority dispute" and, on a preliminary basis, I am charged with the task of answering the following questions set out as part of paragraph 2 of the Arbitration Agreement:

a) Was the policy of insurance bearing no. 505661595 issued by the Respondent to Fleming (the "Policy") in force at the time of the accident which took place on January 16, 2013?

b) Did the Policy provide coverage for accident benefits at the time of the accident of January 16, 2013?

c) Was the Respondent the priority carrier for the purpose of the claim for accident benefits on behalf of Fleming under provisions of s. 268 of the *Insurance Act* in relation to the claims for benefits following the accident of January 16, 2013?

43. Put more simply, in the normal course the parties would ask me to rule on whether or not the Co-operators Policy responds in priority to the Echelon owner's policy for Mr. Fleming's statutory accident benefits claim.

44. Before deciding the priority issue, however, given the history outlined above and the position Co-operators asserts based on it as outlined below, I must first determine the preliminary issue of whether or not the Co-operators Policy was in effect for this purpose.

45. In oral argument, counsel agreed that if I find the Co-operators Policy was in force on the date of Mr. Fleming's second car accident, then Co-operators is the priority carrier for paying benefits under sub-section 268 (5) of the *Insurance Act.*

POSITION OF THE PARTIES

46. Was the Co-operators Policy in force for Mr. Fleming's second car accident?

Echelon's Position is "Yes"

47. Echelon submits the Co-operators Policy including statutory accident benefits coverage was in force at the time of Mr. Fleming's second car accident. Echelon contends Co-operators was not entitled to retroactively cancel the policy to September 8, 2011. To do so would be contrary to public policy. In argument, counsel also submitted there is a sound contract-based reason for refusing to give the cancellation retroactive effect.

48. Echelon submits, based on the uncontradicted documentary and transcript evidence, my fact finding should lead to the uncontroversial legal conclusion the Co- operators' Policy was in force.

49. The evidence in support of Echelon's position includes at least the following:

a. Co-operators' system screen print-outs show and Mr. Fleming's testimony confirms a series of monthly withdrawals processed on the Co-operators Policy until the refund of premium was processed in April of 2013.[12]

b. Mr. Fleming never called to instruct the local agent for Co-operators to cancel the Co-operators Policy before his second accident.

c. Co-operators offers no evidence of steps taken to effect a statutory cancellation before the second car accident.

d. The Co-operators Policy was therefore "left open" after Mr. Fleming's first car accident as an owner's policy even though he no longer owned a car.[13]

50. Echelon submits, on these facts, there is no doubt and I should therefore find that Co-operators, like Echelon, had an "in force" owner's policy covering Mr. Fleming on the date of his second car accident.

51. This is significant because, if I so find, as counsel agree and I review separately below, the legal effect under the legislative scheme is to require Co-operators to respond to Mr. Fleming's claim in priority to Echelon.

52. Echelon also argues a statutory cancellation must be construed strictly with the onus of proving a proper cancellation on the insurer seeking to rely upon it – in this case,

[12] As listed in Appendix "A" to these Reasons, Co-operators' underwriting documents were marked as Exhibit "A" to the underwriter's examination under oath taken on July 28, 2015 in these proceedings and which Echelon filed as part of its Document brief. Page 1of that document shows various entries consistent with the underwriter's testimony.

[13] While it was not available at the hearing, counsel for Echelon expected to run an ownership search to confirm who owned the 2000 Ford Windstar at the time of the second car accident. Not much turns on this, in my view, for reasons outlined below.

Co-operators. As I review below, the jurisprudence on this strict approach seems unassailable. Echelon's counsel puts it concisely this way in his Statement of Fact and Law at page 5, para. 23:

> The cancellation of the policy effective September 8, 2011 was communicated through Trista Mitts. She was not the insured. No letter was delivered to Fleming to explain this. [Reference omitted]

53. Co-operators properly concedes it did not take the steps necessary for a statutory cancellation, even after the second car accident in April of 2013.

54. Echelon also says there was no material change in risk, an issue the underwriter raised during her examination under oath to explain in part the basis for retroactively cancelling the Co-operators Policy and returning Mr. Fleming's premium.[14]

55. In summary, Echelon argues the purported cancellation of the Co-operators Policy was not requested by Fleming and so does not qualify as a policyholder-requested cancellation. Nor was it done by statutory cancellation before Mr. Fleming's second accident. Therefore, the Co-operators Policy must be found to be in force at the time of Mr. Fleming's second car accident.

56. Echelon relies on a few arbitration rulings, a trial court ruling and perhaps most persuasively on one appellate court decision. These are submitted as examples of strict requirements for statutory cancellation and also to show even a deliberate misrepresentation or non-disclosure is not, at law, a proper basis for denying coverage or

[14] As counsel's questions to this witness pointed out, since there was an absence of a vehicle under the policy, in fact the risk was arguably lower to the insurer than if there had been a vehicle. See underwriter's transcript at pages 38-39, questions 201-207 and with the hypothetical of a replacement vehicle which might breach underwriting rules being an exception at pages 40-41, questions 214-217.

attempting to void the owner's policy from the beginning to deem it did not exist. In argument, counsel put particular emphasis on the decision of a five-member panel of the Court of Appeal in *Campanero v. Kim*[15] for the proposition that where an insurer has issued "an instrument" that purports to be an owner's policy, it cannot validly argue the policy is void from the beginning because of a deliberate misrepresentation about the ownership of the car insured.

57. While *Campanero* dealt with the liability portion of coverage under an owner's policy, Echelon points out if the policy is not void from the beginning for that purpose, it could not be void from the beginning for any other purpose, including for statutory accident benefits coverage.

58. Echelon argues *Campanero* supports its position by analogy, whether based upon public policy or on a strictly contract-based approach to coverage interpretation. In either case, when construed in the context of relevant statutory provisions in the *Insurance Act,* absent properly proven cancellation, the legislature has clearly taken away a car insurer's ability to go off coverage for liability purposes. Such policies must continue to make statutory accident benefits coverage available, subject to restrictions not relevant here.

59. Echelon argues the overriding objective of the Statutory Accident Benefits scheme is to deliver those benefits promptly and to ensure that they are, in fact, delivered. In this context, public policy says it is not enough for an insurer to say the policyholder or claimant can go elsewhere.

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[15] {1998) 41 O.R. {3d) 545, [1998] O.J. No. 3518 (C.A.)

60. Echelon properly concedes the arbitration decisions and the *Campanero* case all flow from policyholder efforts to deceive an insurer. However, Echelon argues the same public policy should apply similarly to this case where it appears there was a mistake or at least no effort taken by either Mr. Fleming or Co-operators to properly cancel the policy.[16]

61. In any event, Echelon argues Co-operators had no right to retroactively cancel the Co-operators Policy by simply refunding Mr. Fleming's premium with interest.[17]

62. In summary, Echelon contends Co-operators did what the Court of Appeal confirms the statute does not allow it to do for liability coverage and what arbitral jurisprudence concludes cannot be done for statutory accident benefits coverage under an owner's policy. Since statutory accident benefits coverage forms a part of the standard owner's policy in Ontario, it must follow that Co-operators cannot avoid a claim for that coverage. To permit this would thwart the legislative intent and public policy as well as the statutory and contractual obligation under the owner's policy issued.

Co-operators' Position is "No insurable interest means no policy in force"

63. In both his written material and oral argument, counsel for Co-operators starts from a slightly different place and for a different purpose. Although he was vague in his memory, Mr. Fleming's evidence is that at some point after the time extended to him

[16] During argument I asked hypothetically what would have happened if Ms Mitts had been uninsured and Mr. Fleming had gone to "The Fund" as insurer of last resort. Counsel advised that after the same investigation Echelon made, The Fund would pay benefits but tender a priority dispute to Co-operators.

[17] During argument I raised a concern about Mr. Fleming possibly being obliged now to repay the refunded premium if I found the Co-operators Policy to be in force for all purposes. Both counsel advised me Co-operators has no recourse for the return of that payment or for deducting it from any benefits owed to Mr. Fleming in future.

following his first accident, he expected (and recalls being told) the Co-operators Policy would be cancelled.

64. That the Co-operators Policy was not cancelled was a "breakdown of communications".

65. Co-operators concedes Mr. Fleming took no steps to cancel his policy or verbally advise Co-operators he would not be replacing the 2000 Ford Windstar. [18]

66. Leaving aside whether Co-operators had a misunderstanding flowing from the local agent's failure to follow up with Mr. Fleming, counsel properly concedes Co-operators continued to withdraw monthly premium amounts from Mr. Fleming's account through a renewal in 2011, a further renewal in 2012, and up until the policy status came to the attention of underwriters after Mr. Fleming's second car accident.

67. Counsel also properly concedes underwriters only became aware of the situation by happenstance after the second car accident. Ms Mitts, whose car Mr. Fleming was driving in his second car accident, happened to place her owner's policy with Echelon through the same brokerage which acted as local agent for Co-operators.

68. After Mr. Fleming's second car accident, it appears she went in to inquire if she could move the Echelon coverage from her now damaged car to a car which Mr. Fleming had purchased and expected to pick up at a dealership the day after the second accident. Mr. Fleming's injuries apparently suffered in the second car accident left him hospitalized in Kingston. Therefore, when Ms Mitts attended at the agent's office, Mr. Fleming was not

[18] In written materials, Co-operators goes further to suggest Mr. Fleming was in breach of certain policy conditions by failing to do so. This position is addressed further below.

there to represent his own interests when it became apparent the Co-operators Policy was still in force.[19]

69. In Mr. Fleming's absence, it appears Ms Mitts advised the local broker/agent that Mr. Fleming did not have a vehicle and had not intended to have the Co-operators Policy continue in force after his first accident in 2011. This is at least inferred from the excerpt of system notes recorded in Co-operators' system which the underwriter read into the record as part of her evidence under oath quoted above.

70. Co-operators points to sub-section 8(10) of the owner's policy which states:

> Who May Give Notice and Proofs of Claim
>
> 10. Notice of claim may be given and proofs of claim may be made by the agent of the insured in case of absence or inability of the insured to give the notice or make the proof, such absence or inability being satisfactorily accounted for or, in a like case or if the insured refuses to do so, by a person to whom any part of the insurance money is payable.

71. Co-operators argues this policy wording permitted Ms Mitts to act as Mr. Fleming's agent while in attendance at the local broker/agent's office after the second car accident.

72. As noted above, Co-operators concedes that, on the underwriter's evidence, Co-operators would have extended coverage even in the absence of a replacement vehicle to associate it with, for at least 21 days after Mr. Fleming returned his rental vehicle.[20] As described by the underwriter, the protocol for Co-operators envisages a further telephone call with the policyholder if a replacement car is not purchased with the 21-day period.

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[19] Between Mr. Fleming and Ms Mitts, they apparently had only the one car. This made it somewhat imperative that Ms Mitts have access to a car that was insured, since hers was now damaged. I infer this circumstance and her property damage claim explain her post-accident attendance at the broker/agent's office.

[20] As mentioned above, Echelon's counsel questioned on this in response to the material change in risk explanation. Again, see underwriter's transcript at page 28, questions 136-140.

During this phone call, Co-operators receives the policyholder's verbal instruction to cancel the policy and then does so.[21]

73. Again, Co-operators concedes no such telephone discussion took place with Mr. Fleming after his first car accident in 2011.[22]

74. In argument counsel for Co-operators confirmed his argument for a valid cancellation of the Co-operators Policy boils down to a combination of:

a. Ms Mitts acting as Mr. Fleming's agent to retroactively instruct the local agent on Mr. Fleming's insuring intent after the first accident; and

b. Mr. Fleming's receipt of a cheque for the total loss removing his insurable interest in the 2000 Ford Windstar after his first car accident.

75. In fairness, however, Co-operators also submits in its written materials that certain conditions of the owner's policy required Mr. Fleming to advise Co-operators of "any significant change in his status as a driver, owner or lessee of a vehicle or with respect to any change in ownership" and any "change in the insurable interest" in his car.[23]

76. Co-operators also submits once it was clear Mr. Fleming had been incorrectly classified as a risk, the owner's policy required it "to make the necessary correction and refund any premium overpayment with interest".[24]

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[21] See the underwriter's transcript at page 29, questions 143-147.
[22] See the underwriter's transcript at pages 29-31, questions 149-159.
[23] Co-operators' Factum at p.7, paras. 34 and 36, citing to the owner's policy at ss. 1.4.1, 1.4.2, 8(1) and 8(2).
[24] *Ibid.* at p.8, para. 37, citing to the owner's policy at ss.8(2) at (1) and (2).

77. Finally, Co-operators submits the owner's policy permits Mr. Fleming to request a cancellation "at any time", and this also triggers a requirement to refund excess premium "as quickly as possible".[25]

78. In short, Co-operators argues for a retroactive policyholder-requested cancellation supported by lack of insurable interest in the only vehicle covered under the Co-operators Policy, calling in aid Mr. Fletcher's reporting obligations for any change of this risk and Co-operators own refund of premium obligations under the owner's policy.

79. On the issue of no insurable interest, Co-operators relies on an arbitrator's decision of December 6, 2000, upheld in an unreported handwritten endorsement on appeal to the Superior Court of Justice, styled *Pembridge Insurance Company v. Liberty Mutual Insurance Company.*[26]

80. Co-operators concedes the *Pembridge* case is not quite the same as the one before me. However, the Co-operators Policy should be treated as not existing at the time of Mr. Fleming's second accident in the same way the learned arbitrator treated the owner's policy at issue in that case.[27]

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[25] */d.,* para. 39 citing to the owner's policy at ss. 8(11) at (2) and (4).

[26] The 23-page arbitration decision was issued at Toronto by Arbitrator Bruce R. Robinson and the appeal endorsement was authored by Mr. Justice B. Wright.

[27] Arbitrator Robinson makes this finding in at least two different places in his decision. First, at page 19, he states:"... I find on the facts of the present situation that there was no policy with regard to Mr. Green and Pafco Insurance Company as of December 24, 1998". Secondly, at page 21, after quoting from a Directors Delegate decision on appeal, he states: "I agree with his comments, however, there must be a motor vehicle liability policy in place and I find, on the facts of this particular case, no such policy existed".

81. The lack of insurable interest flowed from the factual circumstances in the record before Arbitrator Robinson in *Pembridge* where, once the policyholder had surrendered his damaged car for $500, his insurable interest in the car ceased. At the risk of over-simplification, the learned Arbitrator concluded, once the keys and ownership papers were handed over to the owners of the scrapyard, the named insured had no insurable interest left in the car and so there could be no policy in force to cover a non-existent insurable interest. Similarly here, Co-operators submits, Mr. Fleming's insurable interest ended when he returned the rental and picked up his cheque on September 7, 2011.

82. Co-operators argues Mr. Fleming's breach of a policy condition by failing to advise that he was not replacing his car caused Co-operators to not cancel the policy as would normally have been its protocol.

83. Support for this is found in Co-operators' system notes which show that, although Mr. Fleming does not recall it, on September 7, 2011 he apparently did ask that the policy remain in place because he would be replacing the vehicle "soon" -a representation made when he came to pick up his total loss cheque for the value of the 2000 Ford Windstar.

84. From this, I infer Co-operators is arguing I should find the risk classification was "nil" as Co-operators would not issue a non-owner's policy. Mr. Fleming owned no car after he picked up his total loss cheque and so there should be no policy in force.

Echelon's Reply is "Yes, absent a proper agency and proper cancellation"

85. Echelon argues that, to the extent Co-operators relies on any policy breach based on misrepresentation, it has the burden of proof and has led no evidence. Leaving aside

whether or not Mr. Fleming was adequately aware of his duty to report on the non-purchase of a replacement vehicle, Echelon argues the misrepresentation had to be material. On the evidence of Co-operators' underwriter, there was no materiality to the change in risk.

86. Answering Co-operators' reliance on sub-clause 8(10) of the owner's policy, Echelon points out this wording does not quite do what Co-operators argues for since (a) it is addressing only Notices of Claim or Proof of Loss, and (b) on the facts, Ms Mitts is not a proper deemed agent since she is not person to whom proceeds are payable from any part of the Co-operators Policy in this case.

87. Addressing the *Pembridge* arbitration decision upheld at the Ontario Superior Court, Echelon makes two evidentiary points.

88. First, Echelon notes the facts can be distinguished since there was adequate evidence of cancellation.[28] By contrast, Co-operators produces no such document in evidence here before me.

89. Second, Echelon notes the evidence of the insurer in that case was that it would not cover, and would have cancelled coverage, if it learned there was no vehicle associated with the policyholder. That is not quite the evidence before me as the underwriter admitted Co-operators would extend coverage where no vehicle was in place for up to 21 days after paying out on a total loss.

[28] See *Pembridge* at the top of page 11, where Arbitrator Robinson quotes from a cancellation letter which was in evidence before him.

90. More fundamentally, Echelon's counsel draws a distinction in the approach taken by the learned Arbitrator (and by extension the learned Judge of the Superior Court) on the one hand and the Court of Appeal in the *Campanero* decision on the other.

91. In the *Pembridge* case, the learned Arbitrator (and learned appeal judge) were persuaded by arguments based upon insurable interest on the facts before them. It does not appear that Arbitrator Robinson was referred to the *Campanero* decision for consideration of any public policy or contract formation concerns.

92. By contrast, the 5-member panel in *Campanero* was looking to the legislative evidence of public policy as construed through Ontario's standard owner's policy wording, reinforced by the statute under which that form is authorized.

93. This, Echelon argues, is reinforced by an interpretation of sub-section 268 (2) 1.i. and by the hypothetical questions put to the underwriter under oath to demonstrate that "an automobile" really means "any automobile" within reasonable underwriting guidelines. On this basis, Echelon submits the *Pembridge* case was simply wrongly decided.

ANALYSIS

94. Our appellate courts have consistently instructed lower courts (and by necessary inference private arbitrators applying the law) that any coverage analysis under an insurance contract, must like any other contract, start with the relevant wording.[29]

[29] See, for example, *Hanis v Teevan,* 2008 ONCA 678, at para. 22: "The relationship between an insured and an insurer is contractual and must be governed primarily by the terms of the relevant policy of insurance. The insurer's obligations are found first and foremost in the policy."

95. However, this presupposes there is a relevant contract in place.

96. The "contract formation" issue, from Co-operators' perspective, is key since if there is no contract in force between Co-operators and Mr. Fleming at the time of his second car accident, there is no priority issue to dispute.

97. My analysis begins with a review of the relevant legislative scheme for priority disputes, as this is the framework within which the parties operate and within which this arbitration is conducted. I then review the contract formation issue and conclude with my finding.

98. Throughout these Reasons, I have mentioned counsel concessions and I repeat, for the casual reader, that these were most helpful in focusing argument, narrowing issues and ultimately aiding in my deliberations after the hearing.

99. However, I hasten to caution these concessions were proper and should not be construed as signaling weakness in a position, or an inappropriate abandonment of a client's interest. Rather, this was professional conduct expected of experienced lawyers.

The Legislative Scheme for priority dispute resolution

100. As mentioned at the outset of these Reasons, the legislature has in place a statutory dispute resolution process for priority issues when they arise between insurers.

101. Under the legislation, if the Co-operators Policy is in force, resolving the priority between insurers becomes a relatively simple two-step process.

102. First, if both policies are in effect, both insurers are implicated under Section 268 (2) 1 i. of the *Act* which provides in relevant part as follows:

> **(2) Liability to Pay -** The following rules apply for determining who is liable to pay statutory accident benefits:
>
> **1.** In respect of an occupant of an automobile:
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured, ...[30]

103. During argument, I asked for clarification of what "an automobile" means. Echelon submitted, as used in the phrase "an automobile in respect of which the occupant is an insured", it should be construed, on the evidence before me, to mean "any automobile", not just one that might be specified under the Co-operators Policy.[31]

104. Co-operators contends this is of no moment if, as it argues, Mr. Fleming no longer had any insurable interest to cover after the total loss of the 2000 Ford Windstar in the first car accident, since by retroactive cancellation the Co-operators Policy was not in effect at the time of the second car accident.

105. I asked for clarification of positions under this section of the *Act* as it was not immediately apparent if concessions were being made to narrow the issues. Counsel responded helpfully.

106. Counsel agreed that, if I find the Co-operators Policy was in force, then at the first step of analysis, both Co-operators and Echelon are responding at the same level of priority under sub-section 268 (2) 1 i.

107. To resolve the priority dispute requires a second step under sub-sections 268(4) and (5) by putting priority on the policy under which Mr. Fleming is a "named insured" -the

[30] The balance of this paragraph and sub-section addresses priority for other scenarios irrelevant to this Arbitration.
[31] Here, counsel refers to the underwriter's concession under oath that the Co-operators Policy covers not just a listed vehicle but also extended coverage for other non-owned vehicles as well.

Co-operators Policy – as is evident from the wording which provides in relevant part as follows [with my comments in square brackets to give context]:

> **(4) Choice of Insurer-** If, under subparagraph i… of paragraph 1... of subsection (2), a person [here, Mr. Fleming] has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer [here, either Echelon insuring Mr. Fleming as an occupant/driver of Ms Mitts' car or Co-operators if Mr. Fleming is also insured by it] from which he or she will claim the benefits.
>
> **(5) Same-** Despite subsection (4), if a person [again, Mr. Fleming] is a named insured under a contract evidenced by a motor vehicle liability policy [here, if I so find, the Co-operators Policy], the person shall claim statutory accident benefits against the insurer under that policy.

108. In the result, if I find the Co-operators Policy was in force:

a. At the first step, Mr. Fleming, as the occupant of Ms Mitts' car, would have "recourse against" both Echelon (as an insured driver with permission) and Co-operators as the insurer of "an automobile in respect of which" Mr. Fleming was “an insured” under sub-item 268(2) 1.i, and

b. At the second step, this priority would be resolved under sub-clauses 268(4) and (5) because Mr. Fleming is a "named insured" under the Co-operators Policy and so that policy ranks ahead of the Echelon owner's policy.

Was the Co-operators Policy cancelled effective back to September 8, 2011?

109. Now to consider the contract formation issue Co-operators raises in this case.

110. Counsel for both parties concur that there are only two methods for properly cancelling an owner's policy in Ontario: (1) at any time, by the policyholder's verbal or written request for cancellation, or (2) by the insurer formally cancelling the policy in

accordance with the statutory requirements, including a letter from the insurer notifying the policyholder of the cancellation and returning any unearned premium.

111. Here, Co-operators contends the evidence supports the first option: it asserts the Co-operators Policy was retroactively cancelled at Mr. Fleming's request through his agent Ms Mitts. Counsel agreed with my suggestion during argument that this might also be looked at as a case of mutual mistake – Mr. Fleming mistakenly believing the Co-operators Policy was cancelled at some point after his first car accident and Co-operators mistakenly not following up through its local agent after a period of time called for in its standing practice or protocol in such situations.

112. In the absence of legislation and an overriding public policy which informs the current scheme of car insurance in Ontario, there is a certain attraction and some merit to the position Co-operators takes here.

113. Whether we call it a miscommunication (really a "non-communication") between Mr. Fleming and Co-operators, or a mutual mistake, there is arguably no good purpose served in forcing two parties who had no intent to extend coverage beyond a reasonably short period after the first accident to be parties in a bargain they neither wanted nor knew about.

114. To be sure, Mr. Fleming received the value for his premiums paid up to the return of the rental vehicle in September of 2011 following his first car accident.

115. Co-operators had no reason to continue processing automatic withdrawal of monthly premium payments after this time – Co-operators states these should have been

stopped with a follow up inquiry to Mr. Fleming under its standing practice or protocol, but for some unexplained reason, this did not happen.

116. Echelon's position in argument and its written material is that to allow Co-operators to retroactively cancel the Co-operators Policy would violate public policy in a way which is not permitted even for deliberate deception cases.

117. But what public policy, Co-operators asks by inference, is served by forcing Mr. Fleming to be bound by the Co-operators Policy neither party wanted nor expected in this case?

118. In other non-statutory and less regulated areas of insurance, this position would be given some credence. Remedies of rectification, voiding from the beginning, equitable fairness by mutual mistake and other legal tools might come to the aid of the parties to an unwanted contract in such circumstances. A stranger to that contract would arguably have little or no standing to contest the issue.

119. However, as Arbitrator I am required to consider the issue (which effectively decides the priority dispute) in the context of a statutory scheme of car insurance which is, to put it mildly, highly regulated.

120. I agree with Echelon that the Co-operators Policy was at least an "instrument" purporting to be an owner's policy and although Co-operators argues in its responding factum that Mr. Fleming was in breach of various conditions requiring him to report a material change of risk permitting it to treat the policy as the equivalent of void from the

beginning (in this case, as I understand the argument, from September 8, 2011), this was not strenuously pursued in oral argument.

121. The breach of condition for material misrepresentation argument also seems counterintuitive if, as the evidence appears to show, the change in risk was not in fact material at all. The Co-operators received premium payments for a risk of virtually "nil" – the contract wording required it to refund premium where Mr. Fleming was incorrectly classified. But the void from beginning remedy is meant to address situations where the underwriter has been prejudiced by an *increase* or alternatively a change in risk outside of underwriting appetite. The common law permits this remedy where the evidence shows a reasonable underwriter would have either increased premium or declined to write the risk.

122. At best, Co-operators can say it would have rejected the risk as it did not intend to underwrite non-owner's policies. The problem is, this is contradicted on its own standing practice or protocol. Co-operators had the onus to follow up to confirm a cancellation – and simply didn't. This can hardly be laid at Mr. Fleming's feet as a breach. His evidence suggests he was simply told the policy would be cancelled after a period of time passed.

123. More fundamentally, however, the facts in this case point to a disconnect within the internal and agency communication systems Co-operators had for its own protocol. It already had the information it needed in its own records to act on for follow up (it had given Mr. Fleming his total loss cheque and he had returned the rental vehicle).

124. Co-operators cannot in this context be heard to say Mr. Fleming was in breach – through the local agent, it already knew there was a temporary coverage extension.

Unless told otherwise, its own records should have showed Mr. Fleming did not own a replacement car.

125. Nor can I ignore a five-member panel of the Court of Appeal in *Campanaro*, where, at para. 19, they state the issue before them as follows:

> It is common ground in both cases before us that the named insured knowingly misrepresented that he was the owner of the insured motor vehicle. The misrepresentations were contained in the signed written application. ... the question to be determined in these appeals is whether, in actions brought against State Farm ... by the injured third party plaintiffs, State Farm is precluded by the provisions of s. 258(5) from defending the two actions on the basis of the named insureds' misrepresentation about ownership.

126. The panel concluded State Farm could not set up a void from the beginning defence to coverage based on a misrepresentation. For the panel, Osbourne, J.A. as he then was stated at para. 50 in relevant part as follows:

> For reasons that I will set out shortly, I do not think that an insurer issuing an instrument that purports to be a motor vehicle liability policy can validly defend a s. 258(1) action on the basis of any misrepresentation by the named insured, including a misrepresentation about the ownership of the insured vehicle .... Thus, State Farm cannot defend the claims made against it on the basis of the misrepresentation about ownership by the named insured in either action.

127. If this holds for a knowing misrepresentation, surely it must also for an unknowing one. Cancellation of an owner's policy is also governed by statute. Echelon points out this requires certain steps. Co-operators properly concedes those steps were not taken.

128. Pausing here for a moment, however, I am not persuaded such a cancellation, even if done correctly in April of 2013, would have sufficed for the purpose Co-operators contends - that is, a *retroactive* cancellation.

129. Echelon has included in its materials the case of *Kahlon v Safeco Insurance* Co. *of America.*[32] There, the presiding justice set out the various requirements which, amongst other items, required certain advance notice to the policyholder – 5 days if delivered in person, 15 days if delivered by registered mail. This requires strict compliance and proof where challenged.

130. Echelon's material also included Arbitrator Palmer's decision in *Sarnicki v Liberty Mutual Fire Insurance* Co.[33] which cited to the *Kahlon* case. *Sarnicki* involved a purported cancellation which would have disentitled the claimant to statutory accident benefits and again the learned arbitrator concluded strict compliance was required to effect such a cancellation. To similar effect is Arbitrator Manji's decision two years later in another statutory accident benefits denial case which Echelon includes in its materials. The denial was based on a purported statutory cancellation and on facts more sympathetic to the insurer than we have here.[34]

131. Assuming for the sake of argument Co-operators had taken the formal steps required in April of 2013, I do not see a basis in the statute, policy wording or in any case law or arbitral jurisprudence put before me for deeming such a cancellation to be retroactive. The lack of authority on point is not surprising since this would negate the requirement of advance notice to Mr. Fleming. Absent a specific exception to the legislated cancellation scheme, I find there is no basis upon which Co-operators could retroactively cancel an owner's policy in Ontario.

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[32] [1985] O.J. No. 1771 (Dist. Ct.)
[33] [1995] O.I.C.D. No. 195.
[34] *Herrara v Wawanesa Mutua/Insurance Co,* [1997] O.I.C.D. No. 112 (Insurer's premium refund cheque to broker not strictly complying with requirement to send premium refund directly to policyholder to effect statutory cancellation).

132. But of course, Co-operators does not contend it retroactively cancelled the policy. Rather, it argues, through the device of Ms Mitts' agency, combined with a lack of insurable interest in the 2000 Ford Windstar, that Mr. Fleming did so.

133. The problems here are many, but boil down to one of evidence. I agree with Echelon's reply argument: the policy wording relied upon to found the agency argument does not support Co-operators. Ms Mitts was not in the category of persons authorized to act and in any event the clause appears confined by its terms to post-loss claim related rather than pre-loss underwriting related issues.

134. Leaving aside the wording problem, there was no evidence before me to confirm on a common law basis that Ms Mitts had in fact or even ostensibly been authorized on Mr. Fleming's behalf to retroactively request a cancellation of the Co-operators Policy. From the record before me I infer her goal in going to the local agent was simply to transfer her existing coverage with Echelon to another vehicle. At best, she might have been an agent for Mr. Fleming to the extent of putting her coverage on the "Fiesta" he was apparently supposed to pick up at the dealer the next day. One can imagine some mischief in other circumstances if retroactive cancellation authority could be presumed without confirmation from the principal.

135. Finally, Mr. Fleming did not suggest in his own evidence that he wanted the policy retroactively cancelled or even that he wanted this done at the time shortly after his first accident. At best, he appears to have forgotten about it altogether, assuming Co-operators would deal with it.

136. On balance, while I have some sympathy for the plight of Co-operators, I am not persuaded the public interest or the insurance industry which provides owner's policies to cover that public are served by creating a category of phantom owner's policy which exists by mistake at the time of an accident but is retroactively deemed not to exist.

137. From a contract language perspective, there is simply no basis in the statute or in the owner's policy wording cited to justify a deemed retroactive cancellation. Nor is there a reasoned basis for concluding Mr. Fleming was in breach of his reporting obligations or for concluding Ms Mitts was authorized to act as his agent to retroactively comply with any breach. While Co-operators is to be commended for acting promptly to refund the premium in this case, I also note the owner's policy requires this step in any event.

138. The statutory scheme of priorities has as its apparent purpose a relatively simple process to determine which insurer is on first for statutory accident benefits under an owner's policy. The scheme is undermined if, as here, the targeted insurer can avoid responsibility, just as, by analogy, the legislation mandating compulsory car insurance on an absolute liability basis would be undermined if such defences were permitted to defeat innocent victims' claims against an owner's policy insurer *(Campanaro).*

139. From a public policy perspective, if I were to accept Co-operator's argument for a retroactive cancellation request by agency in this case, other creative arguments might come forward in other cases less benign than this one. Given the clear trend in the arbitral jurisprudence for cases involving arguably more sympathetic facts from an insurer's perspective, I do not see where I have room to chart a different course on the record

before me here. The miscommunication or non-communication in evidence here is no different as a systemic problem for the insurer than other circumstances involving imperfect cancellation in the cases discussed above.

140. While arguably no public policy is served on the specific facts of this case (Mr. Fleming receives his benefits regardless of which insurer is on first and will not be required to repay the premium refunded to him), the broader integrity of the system is at issue. This suggests that where, as here, an insurer's protocol or standing practice has failed, it is up to that insurer, as a participant in the car insurance market, to address it for the next case.

141. The system is otherwise rendered less "simple", defeating one of the legislative objectives of the scheme.

CONCLUSIONS

142. I conclude the Co-operators Policy was in effect at the time of Mr. Fleming's second accident and must respond in priority to Echelon for his benefits claim.

143. In accord with s. 8 of the Arbitration Agreement, costs on a partial indemnity scale are payable by Co-operators as the unsuccessful party.

144. If counsel are unable to agree on costs, the same s. 8 requires me to assess them and in that event, I would be grateful to receive costs submissions keeping the following length restrictions and timetable in mind:

a. Echelon's written submission of not more than two pages (with a Bill of Costs or Costs Outline attached in support) no later than November 13th, 2015;

b. Co-operator's written response of not more than two pages (with any responding Bill or Outline attached in support) by November 20th, 2015.

145. However, if counsel confer and agree schedules do not permit compliance with the timelines requested above, I would be prepared to modify them upon joint request.

DATED at Toronto Friday, October 30, 2015

Marcus B. Snowden

Appendix "A"

Filed on Behalf of the Applicant Echelon:

1. Arbitration Brief;
2. Document Brief;
3. Transcript of Heather Lintott, Underwriter with Co-operators General Insurance Company;
4. Exhibit "A" to Ms. Lintott's examination- underwriting documents rec'd from The Co-operators.

Filed on Behalf of the Respondent Co-operators:

1. Respondent's Factum;
2. Respondent's Document Brief.