

IN THE MATTER of the Insurance Act, R.S.O. 1990, c 1.8,
As amended, Section 268 and Regulation 283/95 made under the Insurance Act;

AND IN THE MATTER of the Arbitration Act, R.S.O. 1991, G.1.7, as amended;

BETWEEN:

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

PAFCO/ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL

Jason H. Goodman of Laxton Glass LLP
Counsel for Applicant
Co-Operators General Insurance Company
(hereinafter referred to as “Co-Operators” or “Co-op”)

Andrew C. McKague of Zarek Taylor Grossman Hanrahan LLP
Counsel for Respondent
Pafco/Allstate Insurance Company
(hereinafter referred to as “Pafco/Allstate”)

ISSUE – VALIDITY OF PAFCO POLICY CANCELLATION

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act, R.S.O. 1990, c. 1.8* and *Ontario Regulation 283/95*, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, CB, with respect to personal injuries sustained in a motor vehicle accident which occurred on June 7, 2024. Such determination is dependent on a finding as to whether a policy of automobile insurance previously issued to the claimant by Pafco was validly terminated prior to the subject accident. Co-op claims that the termination for non-payment was invalid as it did not specify or differentiate between the premium owing on the policy and any administrative fee, nor did it specify an address to which the claimant could send payment of amounts due.

PROCEEDINGS

[2] The matter proceeded on the basis of document briefs, books of authority, and written submissions.

FACTS

[3] This priority dispute arises out of a motor vehicle accident which occurred on or about June 7, 2024. The claimant was the operator of a 2019 Kia vehicle owned by her boyfriend and insured by the Applicant, The Co-operators General Insurance Company (“Co-op”).

[4] On June 11, 2024, the claimant submitted her Application for Accident Benefits to Co-operators under her boyfriend’s insurance policy as an occupant of the vehicle. Co-op commenced paying benefits to the claimant.

[5] Several years earlier and prior to the subject accident in 2024, the claimant had been the named insured under a policy of insurance issued by Pafco Insurance Company (“Pafco”). The insurance policy with Pafco, bearing policy number 558374514, was with respect to a Honda Civic automobile and for policy period of March 20, 2015 to March 20, 2016 (“the Pafco Policy”). On the claimant’s examination under oath, the claimant testified that she owned that vehicle in “2014, 2015 around that time” and only had the vehicle for “maybe like a year, under two”. She stated that the vehicle was old and needed repairs that she simply could not afford. She believed that she left the vehicle at a repair shop and they “probably scrapped it”. She stated that she has not owned a vehicle since.

[6] Pafco purported to cancel the policy by way of registered letter dated June 22, 2015 (the “Notice of Termination”). This was almost 9 years prior to the subject motor vehicle accident giving rise to the accident benefits claim of the claimant. The Notice of Termination lists a termination date of “07/25/15 12:01 AM” and an amount due of “\$3,023.86” at the top of the letter, and is reproduced below as follows:

10/04/24 14:00:02 Allstate Insurance -> 19055070164 Allstate Insurance Page 004

5 58 374514 03/20	AUTOMOBILE	07/25/15 12:01 AM	\$ 3023.86
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062215

5 58 374514

P20134

CHACHE BENNETT
205-200 GARDEN ST
WHITBY ON L1N 3W4

POSTAL REG.NO.

Broker

INSURANCE HUNTER SERVICES INC.* 855-857-5927

Your insurance will terminate on the date and time stated above unless the amount required, which includes any necessary administration fees, is received in full, by certified cheque, by money order, or in cash, no later than 12:00 noon on the business day before the termination date.

Partial payments will not be accepted.

Please contact your broker immediately if you have any questions or wish to make a payment.

Notice also sent to

062215

5 58 374514

PAFCO™

NOTICE TO POLICYHOLDERS

PROVINCIAL LAWS MAKE IT AN OFFENSE TO

- OPERATE A MOTOR VEHICLE THAT IS NOT INSURED
- BE IN POSSESSION OF A FINANCIAL RESPONSIBILITY CARD RELATING TO A POLICY THAT HAS BEEN CANCELLED

YOU ARE REQUIRED TO DESTROY YOUR FINANCIAL RESPONSIBILITY CARD IF YOUR POLICY IS CANCELLED OR TERMINATED

[7] On her examination under oath, the claimant testified that she did not recall receiving any Notice of Termination. She stated that she did not recall advising her broker of any address change.

[8] On or about June 11, 2024, the claimant submitted an application for accident benefits (OCF-1) under the Co-operators Policy indicating in the OCF-1 that she was not covered under any other automobile insurance policy.

[9] On August 14, 2024, the claimant completed a statutory declaration noting that she,

- (a) Is not listed as a driver under any automobile insurance policy;
- (b) Does not live with anyone who holds an automobile insurance policy; and
- (c) Does not have regular access to a vehicle.

[10] The Applicant, Co-operators, delivered to the Respondent, Pafco, a Notice to Applicant of Dispute Between Insurers form dated September 10, 2024, on the same date. On March 7, 2025, Co-operators delivered a Notice of Submission to Arbitration to Pafco in relation to this priority dispute.

ANALYSIS AND FINDINGS

[11] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[12] Since the claimant was an occupant of a vehicle at the time of the accident, the following rules or hierarchy of priority with respect to payment apply:

- (i) The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;
- (ii) If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;
- (iii) *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved*

in the incident from which the entitlement to statutory accident benefits arose;

- (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[emphasis mine]

[13] The vehicle in which the claimant was an occupant was insured by Co-op, placing it at the second rung of the priority ladder above. Therefore, if it were demonstrated that the claimant remained “an insured” under the Pafco policy at the time of the accident, Pafco would stand in priority at the first rung of the priority ladder and therefore in priority.

[14] The Applicant Co-op has claimed that the policy issued to the claimant by Pafco was invalidly cancelled by Pafco for non-payment of premium and therefore remained in full force and effect as of the date of the subject accident on June 7, 2024. In response, Pafco claims that the two policies were validly cancelled and that regardless, the conduct of the parties thereafter supports a finding that there was a mutual understanding between the claimant and Pafco that the policy had been terminated.

[15] Termination of an automobile policy in Ontario for non-payment of premium, as was the case here, is governed by s. 11 of the *Statutory Conditions – Automobile Insurance, O. Reg. 777/93* which states:

Termination

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

- (a) registered mail;
- (b) personal delivery;
- (c) prepaid courier if there is a record by the person who has delivered it that the notice has been sent; or
- (d) electronic means if the insured consents to delivery by electronic means.

(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, prepaid courier or electronic means.

(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.

[emphasis mine]

[16] The jurisprudence that has developed over the years makes it clear that there must be strict compliance with the provisions for cancellation above. In *Merino v. ING Ins. Co. of Canada, 2019 ONCA 326 (C.A.)* the Court of Appeal held that the scheme of the *Insurance Act* and its regulations sets out the rights and obligations of the insured and insurer under the automobile provisions, requires strict compliance, and provides an orderly and predictable set of consequences for compliance and non-compliance. If a notice of termination does not comply with section 11 of *O. Reg. 777/93*, then the insurance remains in force. The rationale provided by the Court of Appeal was that termination and renewal provisions provide notice periods, which allow an insured person time and opportunity to obtain alternate coverage when they receive notice that their policy is to be terminated or not renewed. While it is well-established that the cancellation provisions must be strictly construed, the jurisprudence is equally clear that strict compliance does not require absolute perfection. In *Conway v. Judgment Recovery, (N.S.) Ltd., 1990 Carswell NS 262, 111 N.S.R. (2d) 414*, it is noted that the requirement does not necessarily mean that “every punctuation mark and capitalization in the notice of termination must be correct”.

[17] The Applicant Co-op has claimed that there were two deficiencies in the Notices of Cancellation sent to Pafco’s insured. Such alleged deficiencies are denied by Wawanesa. The alleged deficiencies claimed are:

- The notice did not specify or differentiate between the premium amount owing and the administrative fee, if any
- There was no address in Ontario set out for the delivery of payment.

[18] In response, Pafco has claimed that their Letter of Termination was not deficient and that regardless, the claimant and Pafco had a mutual intention to treat the policy as at an end and was therefore no longer in force some nine years later.

Failure to Differentiate Between Unpaid Premiums and Administrative Fees

[19] Co-op has claimed that the termination of the Pafco policy was invalid as not meeting the requirements of the Statutory Conditions as set out of above. They have claimed that the Notice of Termination does not specify or differentiate a separate amount for the administration fees from premium amounts due, but simply set out an amount due.

[20] Co-op has referred to the decision in *Definity Insurance Company v. Allstate Insurance Company et. al*, 2024 ONSC (hereinafter “*Definity*”), where Justice Chalmers was called upon to review an arbitrator’s finding that a notice of termination was invalid because it failed to set out two distinct amounts for the amount owing on the contract at the time of the notice and the amount owing for administration fees.

[21] The arbitrator at first instance had noted that part (a) of section 11(1.3) of Ontario Regulation 777/93 required the notice to contain specifics as the amount due under the contract, and part (b) required the notice to contain specifics as to any administration fee being charged by the insurer. He found that, although the notice of termination included the amount in part (b), which is the contract amount plus the administrative fee, it did not set out the amount in part (a), which was the amount of the premiums due but unpaid as of the date of notice. Because of this, the arbitrator found that the notice of termination failed to meet the “essential elements” of the statutory condition and was therefore invalid. He reasoned that there was no way for the insured to determine whether the administration fee exceeded the amount approved under Part XV of the Act, pursuant to section 11(1.3)(b) of Ontario Regulation 777/93.

[22] Justice Chalmers upheld the arbitrator’s decision, and stated as follows:

“I am of the view that the breakdown as between the amount owing on the contract and the total amount including administration fees, is not a minor or non-essential requirement. If, in the notice of termination, the insurer does not provide the breakdown, the insured will not know whether the total amount includes excessive and unreasonable administration fees. To properly determine whether the amount that is to be paid to avoid termination is reasonable, the insured must know the administration fee component of the total amount owing”.

[23] In the case at hand, The Notice of Termination states that the insured must pay the amount required of “\$3023.86” and specifically states that this amount includes “any necessary administration fees”. The Notice of Termination does not specify or differentiate a separate amount for any administration fees from premium amounts due.

[24] According to Co-op, the court in *Definity* clearly states that differentiating the administrative fees from the premium amount due is an essential requirement of subsection 11(1) of Ontario Regulation 777/93, and that a failure to do so renders the notice of termination invalid. This decision has since been relied on in *Co-Operators General Insurance Co. v. Aviva/Elite Insurance Co., Re*, 2024 (Arbitrator Bialkowski - June 26, 2024), where the arbitrator justified once more the requirement for a breakdown, stating “It is the only way an insured can determine whether the administration fee being charged does not exceed the amount approved under Part XV of the *Insurance Act*.”

[25] Co-op has claimed that since the jurisprudence is clear that the termination provisions will and must be strictly applied a failure to differentiate between unpaid premium and administration fees as in Pafco’s Notice of Termination makes their attempt at cancellation invalid as not meeting the requirements of the Statutory Conditions. As a result, Co-op has claimed the Pafco policy was therefore in full force and effect as at the date of the subject accident.

[26] In response, Pafco has referred to the decision in *Gore Mutual Insurance Company v. Lombard General Insurance Company of Canada et al* (Arbitrator Bialkowski - June 21, 2010). In that decision it was held that the absence of an administration fee in the notice is not fatal to the validity of the notice where there is no evidence that an administration fee was being charged. In that case the notice simply read “amount due under the contract \$193.33”. It is noted that this is slightly different from the wording used by Pafco in the case before me where it was stated “Your insurance will terminate on the date and time stated above unless the amount required, which includes any necessary administration fee, is received in full”.

[27] In *Co-Operators General Insurance Co. v. Aviva/Elite Insurance Co (supra)*, as referred to me by the Applicant herein, the arbitrator did state that “for a Notice of Cancellation to be valid and where an administration fee is being charged, each amount must be set out separately. It is the only way an insured can determine whether the administration fee being charged does not exceed the amount approved under Part XV of the *Insurance Act*.” However, in that decision there was no evidence that an administration fee was being charged. It was held that only where an administration fee is being charged must the two amounts have to be set out separately. It was noted that determination of whether an administration fee was charged could easily be determined in a priority dispute by way of production of the underwriting / brokers file or an examination under oath of an adjuster from the insurer. The cancellation notice was not invalidated on the basis of a failure to set out premium due from any administration fee being charged, but invalidated on the basis for failure to provide the payment options required by the Statutory Conditions.

[28] In the appellate decision in *Definity (supra)*, referred to me by the Applicant and where the cancellation was found to be invalid, there was evidence that an administration fee was charged, yet not set out separately from the total amount due, making it impossible for the insured to determine whether the administration fee was in accordance with those approved under Part XV of the *Insurance Act*. This is clearly distinguishable from the facts before me.

[29] In the case before me, there is no direct evidence that the amount sought by Pafco included an administration fee. The wording used that “the amount due, which includes any necessary administration fee” might raise the possibility that an administration fee may have been charged. I find that the onus of proving that an administration fee was charged and that the amount was not set out separately from the amount of premium due rests with the Applicant Co-op. As I have earlier stated, if an administration fee was charged it could easily have been ascertained from production of the underwriting file or an examination under oath of a Pafco adjuster. I therefore cannot find that Pafco’s Notice of Cancellation was invalid for failure to set out separately unpaid premium due from any administration fee in circumstances where there exists no evidence that an administration fee was charged.

Failure to Specify Address to Deliver Payment

[30] Co-op has claimed that the Notice of Termination herein does not provide an address where the claimant could pay the outstanding premiums to avoid cancellation of the Pafco policy.

[31] Subsection 11(1.3) of *Ontario Regulation 777/93* requires that a notice of termination for non-payment of premiums shall state that the contract will not be terminated if the insured person delivers the amount due plus any administration fee "to the address in Ontario that the notice specifies" by 12:00 noon the day before the termination date.

[32] In *Allstate Insurance Company v. Ontario (Minister of Finance)*, 2020 ONSC 830 (hereinafter "*Allstate*"), Justice Davies was called upon to review an arbitrator's finding that a notice of termination sent by the insurer, Allstate Insurance Company, was invalid because it failed to include an address where the insured person could pay the amount due in order to avoid termination of the policy.

[33] In *Allstate*, the notice of termination stated that the insured must pay the amount outstanding through his Allstate representative, Brantford Commons Agency, to avoid termination of his policy. The notice contained a phone number for the Brantford Commons Agency but did not provide an address where the payment could be delivered to avoid the termination of the policy.

[34] Allstate Insurance Company argued that the provision of an address in Ontario where the past due amount is to be delivered is not an "essential element" of a valid termination notice. The arbitrator at first instance rejected this position, concluding that the absence of an address for the delivery of the amount owing is a significant defect in the notice that "meaningfully detracts from its purpose to directly supply necessary information". Justice Davies agreed with the arbitrator's conclusion, stating that it was consistent with the plain meaning of the regulation and consistent with the remedial nature of the legislation and its purpose.

[35] Justice Davies upheld the arbitrator's finding that the Notice of Termination was invalid due to the absence of the delivery address. Justice Davies stated the following:

“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.”

[36] In the case at hand, the Notice of Termination states, “Please contact your broker immediately if you have any questions or wish to make a payment” and lists the broker’s name and phone number as “INSURANCE HUNTER SERVICES INC.* 855-857-5927”. The Notice of Termination does not provide an address for the delivery of the outstanding premiums to avoid cancellation of the Pafco policy just as was the case in *Allstate* (supra).

[37] In *Allstate*, Justice Davies accounted for the fact that the notice of termination included the phone number of the agency to whom the payment of the outstanding premiums could be delivered. Nevertheless, Justice Davies clearly found that it was the inclusion of an address for the delivery of the outstanding premiums is an essential requirement of subsection 11(1) of Ontario Regulation 777/93, and that a failure to do so renders the notice of termination invalid.

[38] The Respondent in the *Allstate* proceeding claimed that Section 11(1.3) of *Ontario Regulation 777/93* does not require a notice of termination to list a phone number. It requires a notice of termination to list a delivery address. Justice Davies further held that the onus is on the insurer to strictly comply with the statutory conditions required by subsection 11(1) of Ontario Regulation 777/93 if it wants to unilaterally terminate an insurance policy mid-contract.

[39] Therefore, Co-op has claimed that the jurisprudence makes it clear is that the termination provisions will and must be strictly applied therefore invalidating Pafco’s Notice of Termination for not setting out an address for delivery of payment to avoid termination.

[40] I find that an address for payment of the amounts due to be an essential element required in a valid Notice of Termination. I find that Pafco’s Notice of Termination to have been invalid as not meeting the requirements of the *Statutory Conditions* and *O. Reg. 777/93* in that regard.

Was there a mutual intention for the Pafco policy to end ?

[41] The Applicant Co-op claims that as a result of the fact that the Pafco policy was not properly cancelled, it remained in force through to the date of the subject motor vehicle accident. Therefore, at the date of loss, the claimant was “an insured” under the Pafco policy, placing Pafco at the first rung of the priority ladder and in priority to Co-op which insured the vehicle in which the claimant was an “occupant”.

[42] The position taken by Co-op finds support in the appellate decision of *Echelon General Insurance Company v Her Majesty the Queen, 2016 ONSC 5019 (CanLII)* where it was held by Matheson J., that where an insurer’s Notice of Termination is invalid, coverage will continue until such time as the policy is properly cancelled or the insured is served with a Notice of Non-renewal and will not simply lapse upon expiration of its term. In *Echelon* the policy was issued with a 6-month term. A termination letter was sent to the insured 10 days after the policy’s inception. The termination letter was invalid as it did not comply with the Statutory Conditions. The Claimant was in an accident more than one year after the 6-month policy term expired. The Arbitrator at first instance had found the policy came to an end at the end of the 6-month term. On appeal, the Honourable Justice Matheson held that the policy remained in effect until the insurer properly cancelled the policy or sent a Notice of Non-Renewal in accordance with s. 236 of the *Insurance Act*. As neither had been done, Justice Matheson held that the Echelon policy remained in effect at the time of the accident.

[43] Co-op has claimed that Pafco at no time properly cancelled its policy with the claimant nor sent a Notice of Non-Renewal. As a result, Co-op claims that the Pafco policy remained in effect at the time of the subject accident some 9 years following the attempted termination.

[44] In response, the Respondent Pafco has claimed that even if the Notice of Cancellation was defective, as I have found here, the policy was no longer in effect as there was a mutual intention on the part of Pafco and its insured to treat the policy as at an end.

[45] To many, the fact that an invalidly cancelled policy would continue in perpetuity in the absence of service of a Notice of Non-Renewal or properly worded cancellation letter might seem harsh. For example, an insurer could be exposed to claims even decades after an invalid cancellation, during which period of time it had not collected a premium. This might well be considered an “absurd result”. More recently, jurisprudence has established that a

court could look at circumstances that could support a finding that there was a mutual understanding that the insurance contract would be at an end despite an invalid cancellation.

[46] This line of cases was initiated by the Ontario Court of Appeal's decision in *Ontario (Finance) v. AXA/Elite Insurance Company*, 2018 ONCA 809. In that case, the claimant had taken out a policy of motor vehicle liability insurance with a 6-month term March 29, 2010 - September 20, 2010. A purported termination letter was sent to the claimant effective September 20, 2010. The termination letter was found to be invalid. However, the claimant had proceeded to obtain insurance for the vehicle with another insurer. That new policy was properly cancelled shortly thereafter. The claimant was then injured in a motor vehicle accident on December 29, 2011, and presented an accident benefit claim to the Fund. The Fund claimed that the Elite policy was still in full force and effect as the Notice of Cancellation was invalid and a Notice of Non-Renewal was never served on the claimant as required by s. 236(5) of the *Insurance Act*. The Fund relied on the decision of Matheson J. in *Echelon (supra)*. The Arbitrator at first instance found on the facts that there was a mutual intention on the part of the parties to end the contract, evidenced by the insured going out and obtaining insurance from another insurer, and determined that s. 236(5) did not extend coverage in the circumstances. The Fund appealed the Arbitrator's decision. The appeal judge allowed the appeal concluding that s. 236(5) "ousts the common law with respect to the lapsing of policies" and coverage continued until proper Notice of Non-renewal was served on the insured. Elite sought and obtained leave to appeal to the Ontario Court of Appeal. The Ontario Court of Appeal held that a court could look to other circumstances to demonstrate that there was a mutual understanding that the policy was at an end.

[47] Van Rensburg J.A. of the Ontario Court of Appeal in *Ontario (Finance)*, writing on behalf of the majority, stated at paragraph 59:

"Section 236(5) may well oust the common law that a policy will lapse when it is not renewed, but it does not preclude the consideration of other circumstances that may have arisen and brought the policy to an end. In my view, this is a reasonable interpretation that does not undermine the policy behind s. 236(5) to ensure continuous coverage."

[48] Van Rensburg J. noted that after receiving notice of cancellation from Elite, the claimant proceeded to obtain insurance with another insurer. She found that the parties shared a mutual intention that the Elite policy would not continue, and the relationship ended. She found that they conducted themselves in reliance of a termination, and the Elite policy

was no longer in force despite the invalid cancellation. Van Rensburg J.A. made it clear that the court's findings were consistent with the modern approach to statutory interpretation:

[64] Second, this conclusion is consistent with the modern approach to statutory interpretation, including the presumption against absurd results. A literal interpretation of s. 236(5), applying it to all cases where s. 236(1), (2) or (3) are not complied with, without consideration of the factual context, would lead to absurd results. It would keep a policy alive indefinitely even where an insured subsequently receives a valid notice of cancellation (authorized by other provisions within the insurance legislative scheme) or the insured has chosen to terminate and replace the policy.

[65] The appeal judge was willing to accept the potentially indefinite continuation of insurance coverage when a defective notice is given on the basis that the risk of non-compliance with notice provisions should rest with the insurer who has the means to avoid the risk. The underlying concern here is that the insurer will accept the consequences of its own mistake by providing ongoing coverage, where the result would otherwise be an interruption in coverage.

[66] In the present circumstances, the defective notice was followed by conduct that led the claimant to obtain a new policy. Because of the operation of s. 236(5), there was no interruption in coverage until the claimant cancelled that policy. The parties would never have intended that, once the Elite policy was replaced, Elite would continue to cover the claimant -- with the corresponding obligation to pay premiums: see *Insurance Act*, s. 134. This interpretation would not interfere with the detailed regime respecting insurers' rights to terminate or to refuse to renew auto insurance policies, designed to avoid any gap in coverage in a compulsory insurance scheme.

[67] For these reasons, I would uphold as reasonable the arbitrator's decision that the Elite policy was no longer in force on December 29, 2011, when the accident occurred, and that as such, Elite was not required to provide the claimant with statutory accident benefits.

[emphasis mine]

[49] Simply stated, the Court of Appeal has held that the parties can bring the policy to an end by their conduct even in circumstances where the notice of termination was invalid.

[50] More recently, in *Pafco v. Gore Mutual, Intact, and Jevco* (Arbitrator Novick – July 12, 2023), the Arbitrator at para. 50 called the Court of Appeal's decision in Ontario (*Finance*) v. *AXA/Elite Insurance (supra)* a “*real game changer*”, because the court essentially accepted that consideration of other circumstances that may have brought the policy to an end should be considered, and a policy does not necessarily stay in force perpetually. In the priority dispute case before Arbitrator Novick, the claimant obtained a policy with Intact. A few premium payments were missed. A Notice of Cancellation was served but found to be invalid because of not providing the option to pay arrears in cash. However, arrears were later

brought up to date and the policy reinstated. The claimant then changed insurers and obtained a policy with Jevco. There were arrears in premium payment. A cancellation notice was sent and found to be invalid. Some 6 months later and having paid the arrears, Jevco accepted a new insurance application from the claimant. The policy was renewed once, then cancelled by the insured when he sold the vehicle. The Arbitrator found that the parties' actions clearly indicated a mutual intention to terminate coverage and the policies were not in effect on the date of accident, despite the fact that the notices of cancellation sent by Intact and the first Jevco policy did not comply with all the mandated requirements. By obtaining the second Jevco policy and ultimately initiating the termination of that policy, as he had sold the vehicle, was sufficient to show the mutual intention to treat that second Intact policy and the first Jevco policy as being at an end.

[51] Of importance, Arbitrator Novick also indicated that the Court of Appeal's ruling in *Elite v. AXA (supra)* was broad enough to apply in circumstances where the insured is aware that the policy is no longer in effect. Arbitrator Novick writes at paragraph 34:

“Given the decisions above, it is clear that the act of obtaining a replacement policy after receiving a flawed notice of termination will not be the only factor that can be considered when determining whether there is a mutual intention to terminate the earlier policy. In my view, the Court of Appeal's ruling in *Elite v. AXA* is broad enough to apply in circumstances where the insured does not obtain a replacement policy , but takes some other step that clearly signals that she or he is aware that the policy is no longer in effect.”

[emphasis mine]

[52] The most recent appellate decision dealing with this issue is that of *Gallagher v. Todish et al, 2023 ONSC 4894 (CanLII.)* It demonstrates the extent to which conduct of the insured impacts the determination as to whether a policy remains in force. Todish had an automobile policy with Pafco. In September of 2014, her premiums were in arrears and a Notice of Cancellation forwarded to her. A couple of months later and well after the termination date set out in the Notice of Cancellation, Todish was involved in an accident. She proceeded to phone her broker to ask what would be required to reinstate her insurance. When she was told the amount, she told the broker she did not have the funds to pay. Although the wording of the earlier Notice of Cancellation was found not to comply with the requirements of the *Statutory Conditions*, Madam Justice J. Cameron stated that, Todish understood her policy had been cancelled because of her call for an insurance quote on the date of the subject accident could be considered in her analysis as to whether there was a

policy in existence at the time of the accident. The appellate Jud found that the Pafco policy was no longer in effect.

[53] The facts in the subsequent case of *Co-operators General Insurance Company v. Aviva/Elite and Certas (Arbitrator Bialkowski – June 2025)* were similar to those in *Gallagher v. Todish (supra)*. The insured received at least two previous cancellation notices in 2015 and 2018 from Aviva, including several reminder letters with the same instructions and brought his account into good standings on those two occasions, demonstrating his understanding of the process and what he needed to do to bring his account into good standing. However, at the time of an April 2019 cancellation letter, the subject vehicle had already been sold 4 months earlier on December 8, 2018, and there was no need for him to pay for the annual premium for the following year's coverage. The examination under oath evidence of the insured indicated that he had no intention whatsoever to renew the policy, or more importantly, no intention to make the required payment of \$138.00 – irrespective of what methods or options for payment were set out in the Cancellation Letter. As he explained at the examination, he had “*no further need to renew the policy*”, and “*policy continued until it was due and I did not renew it. Or I may have said to Lant ‘The Vehicle is sold.’*” It was found that the insured clearly understood the Cancellation Letter, and that he was able to make payment and bring his account into good standing, but did not want to do so. This is not a situation where he was deprived of knowing that one of the acceptable payment methods existed. He also knew that the policy was cancelled because he told Aviva that he sold his car and had no need for the policy. At no point did he challenge or dispute the termination on his own behalf. The Arbitrator was satisfied on the basis of the documentary productions that there was communication by email between the claimant and broker, as evidenced by the broker's log note, sufficient to conclude that the vehicle had been sold, there was no need for further insurance, and that the relationship between insured and insurer had come to an end. It would appear that the broker having been advised that the vehicle had been sold, treated this as a cancellation at the “Insured's Request”, as later evidenced by the Autoplus notation that the Elite policy had been cancelled at the “Insured's Request”. The Arbitrator also considered the fact that the insured no longer had an “insurable interest” in the vehicle previously insured by Aviva as the vehicle had been sold long before the date of the subject accident.

[54] In the decision in *HMK v. Travelers (Arbitrator Bialkowski – June 12, 2025)*, the arbitrator found the cancellation notice of Travelers to be invalid as it did not provide the option to make payment by “cash or money order or certified cheque”. However, the arbitrator went on to find that the facts of the case before him made it clear that the parties had a mutual understanding that the Travelers policy was no longer in force. In that case, the insured had received cancellation notices on two previous occasions with wording identical to the cancellation notice in question. On both occasions she contacted the broker and brought her premiums up to date. Following the subject Notice of Cancellation, the insured made no attempt to contact the broker. A few days later, she was stopped by the police and charged with operating a vehicle without insurance. The claimant made no attempt to contact Travelers or the broker as one would think would be the case if the individual thought that she/he did have insurance. The subject accident occurred some 6 months later. The arbitrator was satisfied that the conduct of the parties supported a finding that there was a mutual understanding that the policy was at an end when the subject accident occurred.

[55] In the most recent decision in *The Co-operators Insurance Company v. Wawanese Mutual Insurance Company (Arbitrator Bialkowski – February 10, 2026)* it was also held that the cancellation letter sent to Wawanese’s insured did not meet the requirements of O.Reg. 777/3 but that the policy was no longer in force as conduct of the insured made it clear that the claimant understood that he was no longer insured by Wawanese at the time of the accident. The claimant had not made premium payments for 5 years. He had made no inquiries or attempts to have his insurance reinstated during those 5 years. He did not report the accident he was in to Wawanese. He made his accident benefit claim to the insurer of the vehicle he was an occupant. In his OCF-1 sent to Co-op, he noted he had no policy of insurance of his own. It was held that there was a mutual understanding that he was no longer insured by Wawanese at the time of the accident .

[56] I take from the *Ontario (Finance), Pafco, Gallagher, Co-operators* and *HMK* cases highlighted above that the conduct of an insured indicating a mutual intention to terminate coverage or circumstances signalling that the insured was aware that his or her policy was no longer in effect can be considered in determining whether a policy was still in force at the date of a subsequent accident.

[57] There are several factors in the case before me to also conclude that there was a

mutual intention to terminate Pafco coverage and that the Pafco policy was no longer in effect at the time of the subject accident. The subject accident occurred some 9 years after the Notice of Termination was sent to the claimant. During that 9-year period, she did not make any insurance premium payments. During that 9-year period, there is no evidence that she made inquiries of Pafco as to the status of her insurance with them or made any attempt to re-instate coverage. In fact, the evidence suggests she no longer had a vehicle to insure. On her examination under oath, she stated that she owned the subject Honda Civic in “2014, 2015 around that time” and that she only had the vehicle “maybe like a year, under two”. She also stated that the vehicle at that time was very old and needed repairs that she simply could not afford. She just left the vehicle at the repair shop and they “probably scrapped it”. She stated that she has not owned a vehicle since. On her examination under oath, when discussing the termination letters that she was unaware of being sent, she stated “maybe I had already gotten rid of the vehicle”. In any event, after her involvement in the subject accident in which she sustained injury, she did not contact Pafco. She presented her accident benefit claim to the insurer she was an occupant, namely Co-op. In the OCF-1, she stated the she was not covered under any other automobile policy nor was she listed as a driver of any automobile insurance policy. I am satisfied on the evidence overall that the conduct of the parties, as set out above, clearly indicate a mutual intention to terminate coverage and an understanding that the Pafco policy was no longer in force at the time of the subject accident. I therefore find that Co-op is the priority insurer.

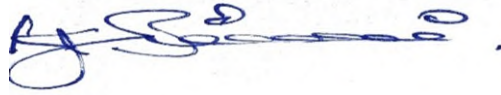
ORDER

On the basis of my findings aforesaid, I hereby find that:

1. The priority claim of Co-op is dismissed;
2. Co-op is the priority insurer;
3. Co-op is to pay Pafco the legal costs with respect to this arbitration on a partial indemnity basis;
4. Co-op is to pay the Arbitrator's account.

DATED at TORONTO this
4th day of May, 2026.

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KENNETH J. BIALKOWSKI
Arbitrator