IN THE MATTER OF THE *Insurance Act,* R.S.O. 1990, c I.8,
as amended, section 275

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17

AND IN THE MATTER OF an arbitration

BETWEEN:

HEARTLAND FARM MUTUAL

Applicant

- and -

THE WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL APPEARING:

Jonathan A. Schwartzman: Counsel for the Applicant, Heartland Farm Mutual Insurance (hereinafter called Heartland)

Jason H. Goodman and Jamie Pollack: Counsel for the Respondent, Wawanesa Mutual Insurance Company (hereinafter called Wawanesa)

BACKGROUND:

This matter comes before me by way of a loss transfer dispute pursuant to Section 275 of the *Arbitration Act,* R.S.O. 1990 c I.8, as amended and Regulation 664 and 668.

By way of background, this dispute arises out of a motor vehicle accident which occurred on October 27, 2016. At that time CK was driving a 2002 Ford DRW truck owned by 1906602 Ontario Inc. (hereinafter called The Company) and insured by Wawanesa. The Wawanesa vehicle was struck by a 2002 Ford pickup truck driven by FR and insured by Heartland.

FR sustained serious injuries in the accident of October 27, 2016. Heartland paid and ultimately settled FR's Accident Benefit claim.

By letter dated February 22, 2018, which included a notification of loss transfer of the same date, Heartland put Wawanesa on notice of its intention to seek loss transfer and the basis for that.

By letter dated April 9, 2019 Heartland served a Demand to Submit to Arbitration as against Wawanesa seeking 100% loss transfer based on Fault Determination Rules 12(1) and 4 of Regulation 668 R.R.O. 1990 c. I.8, pursuant to the *Insurance Act*.

Wawanesa has accepted that loss transfer applies in this case to the extent that the vehicle involved in the incident qualifies as a "heavy commercial vehicle" pursuant to Section 275 of the *Insurance Act*. However, Wawanesa claims that loss transfer is not available in the circumstances of this case on the basis that they had properly cancelled their policy prior to the date of loss of October 27, 2016, and, therefore, there was no valid insurance in place on the date of loss. As a result, Wawanesa claims that it is not liable to indemnify Heartland for benefits paid to its insured as a result of the accident.

Heartland takes the position that the policy was not properly cancelled.

The issue that has been placed before me to decide is therefore whether or not the Wawanesa policy was properly terminated on October 27, 2016. There are two aspects to Heartlands position:

1. The cancellation is not effective because the cancellation letter failed to comply with Statutory Condition 11; and,
2. Wawanesa has not established the proper grounds pursuant to the provisions of the *Insurance Act* and *Compulsory Automobile Insurance Act* to cancel the policy.

PROCEEDINGS:

The Arbitration proceeded by way of both written and oral submissions. A Document Brief, Factums, and Books of Authority were filed. In addition, counsel submitted a signed Arbitration Agreement dated October 12, 2021. Oral submissions were made on November 25, 2021 via Zoom.

ISSUE FOR DETERMINATION:

Was there a valid policy of insurance in place between The Company and Wawanesa Mutual Insurance Company on October 27, 2016?

DECISION:

For the reasons I set out below, I find that the Wawanesa policy was not properly cancelled and therefore was in full force and effect on October 27, 2016. As a result, Heartland has a right to pursue a claim for loss transfer as against Wawanesa pursuant to Section 275 of the *Insurance Act*.

FACTS:

There does not appear to be any issues with respect to the facts but rather what conclusions one might draw from them.

At the time of the accident, Heartland insured FR's pickup truck pursuant to policy number 99437A01. That policy was in effect from October 11, 2016 to October 11, 2017. A Certificate of Automobile Insurance was produced confirming the policy status.

The Wawanesa policy was originally issued to insure The Company. Lynne Walsh, a representative of Schofield-Aker Insurance Brokers, gave evidence under oath that The Company came to the brokerage as a new risk in 2013.

A Certificate of Insurance bearing policy number 7094828 was subsequently issued to The Company by Wawanesa for a policy period of November 30, 2013 to November 30, 2014. The policy was renewed twice subsequently. The last renewal of the Wawanesa policy prior to the motor vehicle accident was for the policy period November 30, 2015 to November 30, 2016.

This policy was a fleet policy and included in the listing of vehicles covered was a Ford DRW noted as vehicle number 04. This was the vehicle involved in the motor vehicle accident of October 27, 2016.

It is important to look at the communication between the broker and The Company with respect to insurance coverage over the course of the years that the policy was in effect. The evidence confirms the following:

1. From November 21, 2013 to November 26, 2013 the broker quotes from a variety of insurers in order to place the new risk. In obtaining its quotes, the broker used a form entitled "Commercial Auto Quote Submission" dated November 30, 2013. This form states that The Company's vehicles would be used to: "pickup (from warehouse) and deliver (to mechanics) of auto parts (side-mirrors, airbags, filters)".
2. On the same form there are a variety of boxes for the person applying for insurance to check-off to provide additional information with respect to their various businesses. One of these boxes included the following: "towing service". This box was not checked-off.
3. A Commercial Vehicle Supplement Form included with The Company's Ontario Application for Automobile Insurance owner's form (OAF 1) which was signed and dated

by the representative of The Company on November 28, 2013 noted the business of The Company to be "delivery of car parts." This was under Section 3 of the Commercial Vehicle Supplement form. Again, that document also had an option to check-off "towing service". It was not checked-off but rather the box "other" was checked-off with the notation "delivery of car parts". In addition, under Section 7 of the Commercial Vehicle Supplement, there is a heading "Commodities Transported". Under the list of merchandise carried, the representative of The Company has indicated that they are transporting air filters, side-mirrors, and airbags.

4. An internal document entitled "Commercial Lines Renewal Review Confirmation and Instructions" form dated November 6, 2014 was also completed by the representative of The Company. This document is similar to the ones noted above and The Company is asked to confirm its operations. Again, it is described as "delivery of car parts i.e. airbags, side-mirrors, air filters. Pickup from warehouse and delivery to mechanics".
5. A Commercial Lines Renewal Review Confirmation and Instructions completed by "GR" was signed on December 9, 2014 and indicated that there was a telephone discussion on December 3, 2014. This form provides a series of checked boxes which include a description of The Company's operations. It is confirmed that it "delivers auto parts (air filters, air bags, side-mirrors). Similar information and confirmation is provided in a signed Commercial Vehicle Supplement form dated December 7, 2015. In that document, under the "Remarks" section, it is noted "delivering car parts to auto shops. Customer used to haul personally own trailer, no longer does so".
6. In emails dated June 17 and June 26, 2016 between the broker and The Company there was a confirmation that none of The Company's vehicles were being used for anything other than the delivery of car parts.

Vehicles owned by The Company were involved in prior accidents in May and July of 2016. The Company submitted claims to its broker/insurer, Wawanesa, as a result of these accidents. Through these claims, Wawanesa became aware that The Company was allegedly using its vehicles for towing. Wawanesa claims that it is a risk that it does not insure. Lito Lao, a representative of Wawanesa, testified at his Examination Under Oath that the Wawanesa Commercial Vehicles Manual specifically states that tow trucks are not a risk insured by Wawanesa.

Mr. Lao also testified that Wawanesa's position that it did not insure tow trucks and would decline coverage was filed with the Financial Services Commission as required.

The Wawanesa underwriting log screen notes which were produced show that two cautions dated August 3, 2016 were registered in their notes. A caution note is basically a flag on a file indicating that the file needs to be reviewed. This indicated that there had been two accidents

in the previous three months that involved towing vehicles. The note further indicates that the policy is being looked at to determine whether there has been a material change in the risk.

Mr. Lao's evidence was that as a result of Wawanesa determining that The Company was operating vehicles insured under their policy for the purposes of towing that a decision was made to cancel the policy. Wawanesa's position is that they did not insure vehicles used for towing. They had not been advised that The Company was in the business of towing vehicles and accordingly it was a material change to the risk of the policy.

On August 8, 2016, Wawanesa sent a letter to The Company copied to the broker advising that the policy would be cancelled effective September 9, 2016. The full letter is reproduced below:

Wawanesa Insurance

THE WAWANESA MUTUAL INSURANCE COMPANY
Suite 100 - 4110 Yonge Street, Toronto, Ontario M2P 2B7
Website: www.wawanesa.com

August 8, 2016

Ph: 416-250-9292
Fax: 416-228-7870

REGISTRATION NO: RN 110 413 928 CA

1906602 Ontario Inc
27 Weatherby Ave
Ajax, ON L1Z 1R9

POPLN
AUG 08 2016
L. LAO

To Whom It May Concern,

Re: Wawanesa Automobile Insurance Policy # ANC 7094828

We have been notified that the use and operation of the vehicles insured under the above-mentioned policy includes towing vehicles. This is a type of use that is not written by The Wawanesa Mutual Insurance Company and therefore, this is considered a material change to the policy.

As per our underwriting criteria filed and approved by the Financial Services Commission of Ontario:

"rules for declining to issue, terminating or refusing to renew a contract"

Section A, Rule #4 a) states:

"Any Applicant/Insured or Named Operator who materially misrepresents or fails to disclose any fact as required under the approved application form."

Unfortunately, as a result of this, we must inform you that the above-mentioned policy will be cancelled effective September 9, 2016 at 12:01 a.m. based on our filed rules with the Financial Services Commission of Ontario.

Please contact your broker immediately regarding alternative arrangements for your insurance coverage.

For information regarding our customer service procedures, please refer to www.wawanesa.com

Sincerely,

UW ENT VER SHF

Ersa Romans, CIP
Commercial Automobile Underwriting Supervisor
Ontario Region

/LL
cc: Schofield Aker #7036
Phone: (905) 723-2265

CANADA POST POSTES CANADA
REGISTERED DOMESTIC
CUSTOMER RECEIPT
RECOMMANDÉ RÉGIME INTÉRIEUR
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To / Destinataire
Name / Nom
Address / Adresse
City / Prov. / Postal Code / Ville / Prov. / Code postal

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33-086 584 (14-05)

Return to me when verified

The letter purports to cancel the policy in accordance with the underwriting criteria filed and approved by the Financial Services Commission of Ontario specifically Rule 4 which states:

> "Any Applicant/Insured or Named Operator materially misrepresents or fails to disclose any fact as required under the approved Application form".

In essence, Wawanesa tells The Company that as they failed to advise Wawanesa that they were operating a business that included towing vehicles that this was a material misrepresentation and accordingly it was a grounds for cancelling the policy pursuant to the underwriting criteria filed at Financial Services Commission of Ontario.

There does not appear to be any issue that the cancellation letter was delivered. It was sent by registered letter.

There is no reference in the letter with respect to any refund of premium. It is also clear any premium refund was not sent with the cancellation letter.

The Company was entitled to a premium refund. According to the evidence, the amount was $649.00. A copy of a document entitled "Premium Refund" on Wawanesa letterhead was produced. This purported to indicate that a cheque bearing number 000596517 was issued on August 21, 2016 to The Company in the amount of $649.00.

An Affidavit was filed from Mohammed Al-Diasty, the president of The Company. The Affidavit indicates that Mr. Al-Diasty has held this position since 2016. In his Affidavit he confirms his belief that The Company never received a refund of automobile insurance premium from Wawanesa.

An Affidavit was also filed of Terra Lynn Marchak. Ms. Marchak is the supervisor in the remittance processing department at Wawanesa. She has worked for Wawanesa for 19 years and has been in a supervisory role for 8 years. She is familiar with Wawanesa's processes in mailing refund cheques.

In her Affidavit, she says that Wawanesa produces cheques in automated system batches. These cheques are printed on the premises and then inducted into the mail through a large Canada Post pick-up. Once the cheque leaves the premises it generally takes 3-5 days for delivery.

Ms. Marchak advises that when Wawanesa's cheques are printed there is a top stub portion that is connected to the refund cheque. The cheque is perforated so that the policy holders can easily remove it for deposit and keep the stub for reference. She believes that the cheque stub is proof that the refund cheque was in fact mailed.

She further verifies that Wawanesa does not include a cover letter when mailing the refund cheque.

Mr. Lao was also asked about the refund cheque. He confirmed that a cheque would be issued by the system directly to the insured and then would be mailed to them. He also confirmed that he had no evidence that in this particular case that payment was actually made or received by the insured. Mr. Lao also confirmed that in looking at the system there was no evidence that the cheque, if issued and sent, had been cashed.

Mr. Lao also confirmed that the letter of cancellation itself was manually typed up by Wawanesa and then sent out. Once the cancellation was processed in their system that would generate the broker's copy and the cheque. There would be no other notice to the insured other than the cancellation letter. Further, in this case, Wawanesa did not make any adjustment or determination on the premium at the time of the letter.

It is also relevant to note the actual premium that was paid by The Company to Wawanesa. The total yearly premium was $11,355.71 including a service charge. Withdrawals were made directly from the bank in a monthly amount of $945.93. The premium refund reflects the monies owing to The Company for the remainder of the policy period subsequent to the date of cancellation.

Before turning to arguments made before me it is also important to summarize some of the evidence provided by Mr. Lao with respect to Wawanesa's position that a towing service is a book of business for which they decline to provide coverage.

Mr. Lao was examined on January 6, 2021. Mr. Lao is an underwriter who started working with Wawanesa in 2003 and at the time of his EUO was described as a senior commercial auto underwriter for Wawanesa. Mr. Lao's evidence was that had The Company checked-off the box on the forms referred earlier indicating that they were a towing service then Wawanesa would have declined to write the policy as they do not cover tow trucks. Mr. Lao noted that the first date of loss relevant to the tow truck issue was May 21, 2016. It was a fire loss. At that time The Company was towing a vehicle that caught on fire. Mr. Lao did not have any information as to how the vehicle was being towed or whether the vehicle that was being towed was being done for the purposes of transporting scrap metal. He confirmed, however, that a flatbed carrying a vehicle would be considered towing. He also confirmed that there was nothing in any of the documents that were provided to The Company (policy holder) that would inform them that a flatbed transporting scrap metal would be considered a towing service.

Mr. Lao also confirmed that there was no evidence that The Company was operating as a tow truck company that towed people's vehicles from the side of the road (see questions 212 and 213 of Mr. Lao's Examination Under Oath). He also confirmed that within the Wawanesa/broker's materials there was no definition given as to what a towing services would compromise.

Mr. Lao also confirmed that no inquiry was made by Wawanesa to get more details from The Company about what actual activities they were involved in. Specifically, they were not asked

whether they were working as a "towing service" by that meaning towing cars from the side of the road. However, Wawanesa's position according to Mr. Lao was that a vehicle carrying another vehicle as in the case of a flatbed would be considered towing.

Similar line of questions were responded to by Lynne Walsh, the representative of the broker. Ms. Walsh is the office manager and commercial lines manager and started with the broker in January of 2014. She confirms that the business of The Company was never presented to them as a "towing business". Her evidence was that if the broker were quoting a policy for a mechanic, a garage, or a body shop that they would ask them that if in the course of that business they would tow vehicles. However, The Company's business was the delivery of auto parts to warehouses and that does not necessarily generate pickup towing operations. She was not aware whether there was any specific questions asked of The Company about towing operations.

Ms. Walsh confirmed towing is a very difficult class to insure and it is extremely difficult to get insurance for tow truck operators.

POSITION OF THE PARTIES:

Heartland

Heartland takes the position that the Wawanesa policy was not properly cancelled and was in full force and effect on the date of the accident and therefore loss transfer is available.

The first issue that Heartland raised with respect to the cancellation is the inadequacy of the letter of August 8, 2016: the cancellation letter. Heartland does not raise any issue with respect to the delivery of the letter or the dates with respect to cancellation. Rather, Heartland points out that the letter is not in accordance with Statutory Condition 11 of Regulation 777/93 under the *Insurance Act.*

Heartland points out that under Statutory Condition 11(3) that where a contract is terminated by an insurer for a reason other than non-payment of the premium that:

> The refund shall accompany the notice, unless the premium is subject to adjustment or determination as to the amount, in which case the refund shall be made as soon as practicable.

Heartland submits that the letter of August 8, 2016 makes no reference to the premium or a refund at all. Heartland also submits that there is no evidence and in fact the evidence is to the contrary that the refund of the premium was sent with the letter of August 8, 2016. Heartland submits that the law is clear that where an insurer purports to cancel a policy mid-term that strict compliance of the Regulations and the provisions for termination must be effective. If the notice of termination does not comply with Statutory Condition 11 then the insurance contract simply remains in force. Heartland points to the wording of Statutory Condition 11 which makes it

mandatory (the word shall appears) that the premium accompany the notice of cancellation. On this point alone, Heartland submits that there has been no valid cancellation.

Heartland goes on to deal with the second part of Statutory Condition 11(3)(b) which does permit the refund to be sent out as soon as practicable where the premium is subject to adjustment or determination as to the amount. Heartland submits that there is no evidence that the premium refund to The Company of $649.00 was subject to "adjustment or determination as to the amount". Heartland submits in fact that the evidence is to the contrary and points to the Examination Under Oath of Mr. Lao who confirmed that no adjustment was required. Therefore, Heartland submits as no adjustment or determination of the amount of premium was required there was no alternative choice for Wawanesa to provide the cheque separately and at a later time from the cancellation letter.

Heartland further submits that if I find that Wawanesa could send the refund cheque later that there is no evidence that can be relied upon that the cheque was actually sent. In that regard, Heartland points to the Affidavit of Mr. Al- Diasty who confirms that he believes that The Company never received a premium refund from Wawanesa. Heartland also points to the fact that Wawanesa's own evidence is that any cheque if issued did not appear to have been negotiated at the bank.

Heartland submits that Wawanesa cannot rely on the document that has been described by Wawanesa as the "refund slip". This document is simply an indication that at some point the Wawanesa system appears to have generated a cheque on August 21, 2016 payable to The Company in the amount of $649.00. While Heartland does not argue that the system may not have generated the cheque, Heartland submits that there is no evidence that the cheque was ever sent. Heartland submits that the Affidavit of Ms. Marchak cannot be relied upon. She has no personal knowledge of whether or not the cheque was mailed to The Company. Her evidence is only with respect to the general practice of Wawanesa in terms of issuing cheques. Similarly, Heartland submits that Mr. Lao testified that there was no evidence in Wawanesa's possession that the cheque was actually sent. No cover letter was produced. No envelope was produced. There was no postal record of anything produced indicating the cheque was sent. Heartland submits that all the evidence must suggest that the cheque was not sent and this is consistent with Mr. Al-Diasty's evidence that The Company never received a policy refund.

The next ground that Heartland relies on to say that the Wawanesa policy was not properly cancelled is the purported grounds for cancellation that are set out in the letter of August 8, 2016.

Heartland points to the fact that the letter indicates that the grounds for termination are on the basis of Wawanesa's own underwriting criteria submitted and approved by the Financial Services Commission of Ontario. Heartland notes that Section 237 and 238 of the *Insurance Act* and Statutory Condition 1 of the OAP 1 provide that where a policy has been in effect for more than 60 days there are only 4 ground upon which an insurer can terminate a policy. Heartland submits

that reference must be had to those 4 grounds and not with respect to any grounds that may have been filed with respect to underwriting criteria with the Financial Services Commission of Ontario. As The Company's policy had been on effect for more than 60 days the only grounds that Wawanesa could have relied upon were:

1. That The Company gave false particulars of the automobile to the insurer's prejudice;
2. That The Company has knowingly misrepresented or failed to disclose information that was required to be provided in the Application for Insurance; or;
3. The risk has changed materially.

Heartland points out that there is no evidence that any false particulars of an automobile have been provided.

Heartland submits that the letter of August 8, 2016 simply does not set out the appropriate criteria as required under Statutory Condition 1 rather it outlines the underwriting criteria filed with the Financial Services Commission of Ontario. Specifically, it makes reference to Rule 4(a) which states: "any Applicant/Insured or Named Operator who materially misrepresents or fails to disclose any fact as required under the approved application form".

Heartland points out that the word "knowingly" misrepresents or fails to disclose as set out in Statutory Condition 1 is missing from the letter. Heartland submits that even if the word knowingly had properly been included in the letter with the proper reference that there is no evidence that The Company knowingly misrepresented information with respect to any towing services. Heartland submits that there is no evidence that The Company and/or its representatives working to arrange for insurance coverage or renewals were ever specifically told that towing in the sense of carrying a vehicle on a flatbed was ever specifically explained. There is no evidence that anybody at the broker reviewed with a representative of The Company as to whether or not the choice of checking off the box with respect to "towing services" should be considered. Further, Mr. Lao's own evidence was that he acknowledged that it is Wawanesa's position that towing includes a flatbed truck carrying a car on the back and not just towing services such as pulling vehicles that are disabled from the side of the road.

The evidence is that The Company's vehicles were being used to deliver car parts and that there was never any inquiry into whether the delivery of car parts via a flatbed or a car to be used for car parts on a flatbed would constitute towing.

In the absence of there being clear evidence that the company was aware that towing services would be a prohibited type of use for Wawanesa to cover there can be no basis for cancelling the policy on the grounds that the company knowingly failed to disclose a material fact.

The next grounds for cancellation as set out in the letter and Statutory Condition 1 is that "the risk has changed materially".

In the letter of August 8, 2016 Wawanesa says that the use or operation of the vehicles insured under their policy includes “towing vehicles”. The letter indicates that this a type of use is not underwritten by Wawanesa and therefore this is “considered a material change to the policy”.

Heartland points to the definition of “change in the risk material to the contract” found under Statutory Condition 1. These words are defined to include “any change in the insurable interest of the insured named in this contract in the automobile by sale, assignment, or otherwise…”.

Heartland submits that there has never been any material change. The insured disclosed its type of operations as understood by it at the time it entered into the contract with Wawanesa through its broker in 2014. There has been no change to its operations. It has continued to run a business that delivers car parts including air filters, side-mirrors and air bags. There is no evidence as to whether or not The Company has since 2014 transported cars for car parts on the back of its fleet vehicles for the purposes of delivery of car part. There is no evidence that sometime in or around 2016 that The Company changed its business to that of a towing service. If it had, Heartland submits that would be a material change in risk. Rather, the business has continued to operate on the same basis as it did when the policy was accepted in 2014. Therefore, Heartland submits there is no evidence of any material change in risk and accordingly the Wawanesa policy has not been properly cancelled.

Heartland points to a series of cases which indicate that it is important for insurers to indicate to insureds as what is material in terms of their policy coverage. Heartland submits that an insurer’s conduct can be relevant in determining whether or not a particular fact is material. If an insurer fails to ask a question (as in this case directly with respect to whether or not vehicles are being towed) then that may be evidence that particular insured has not in fact considered the issue to be material.

Heartland submits that an insurer who accepts a risk without requiring specific answers to relevant questions can be found to have waived that question and that risk is then determined not to be material.

Therefore, Heartland asks that an Order be made that the policy of Wawanesa was not properly cancelled for all the reasons outlined above and that there is a right to loss transfer pursuant to Section 275.

Wawanesa

It is Wawanesa's position that none of the arguments of Heartland result in a conclusion that their policy was not properly cancelled and therefore not in full force and effect as of October 27, 2016.

On the issue of the premium refund, Wawanesa submits that the fact that the refund was not referenced in the cancellation letter is not dispositive of the issue of whether the refund was provided to The Company or not.

Wawanesa points to the evidence of Mr. Lao and the Affidavit of Ms. Marchak that confirm that in practice Wawanesa did not provide a cover letter when mailing refund cheques. They point to the screenshot from Wawanesa's system that shows that a cheque was created by Wawanesa. They submit that the slip created by Wawanesa confirms that the refund was issued and paid. Even thought there is no accompanying letter or other evidence to establish that the refund cheque was actually mailed, Wawanesa submits that overall, on a balance of probabilities, the evidence supports a finding that the cheque was in fact mailed as required.

With respect to the fact that the refund payment was not negotiated and the evidence of The Company that they did not receive it, Wawanesa submits that is not relevant. Wawanesa points to the fact that the lack of proof that an insured actually received a registered letter cancelling a policy is not considered to be relevant. As long as the notice is sent out to the last known address and in accordance with the delivery requirements that is all that is needed to cancel a policy. Wawanesa submits that the same should be true with respect to the cheque. As long as there is evidence that the refund was provided in a timely manner to the insured's last known address then that is sufficient to meet the requirements of the Statutory Conditions even if the evidence is that the refund was never negotiated.

As to the requirement in Statutory Condition 11 that the "refund shall accompany the notice" in oral submissions, counsel for Wawanesa indicated that accompany does not mean it has to go with the notice of cancellation letter. As long as it is sent out within a reasonable time then that is sufficient and would meet the requirement that the refund accompany the notice.

Wawanesa also submits that if I find that the refund should have been attached to or sent with the termination notice they then submit that they fall within the exception to that. Wawanesa submits that in fact The Company's premium was subject to an adjustment or determination as to the amount and accordingly, they have the right to send out the refund as soon as practicable. They submit that the cancellation was sent on August 8, 2016 and the refund cheque was processed on August 21, 2016, and that I should accept that as the date that the cheque would have been sent out and accordingly it is made "as soon as practicable".

With respect to the issue of whether the policy was validly terminated and that the letter of August 8, 2016 set out proper grounds, it is Wawanesa's position that there were proper grounds

and that they were clearly articulated in the letter. Wawanesa submits that it is clear that The Company was involved in towing services and that had not been disclosed either at the time of the initial application or anytime thereafter. Wawanesa submits that based on its underwriting criteria submitted to the Financial Services Commission of Ontario that whether or not a proposed insured operated a towing services was something that was material to their risk and that they had declined to offer insurance for those types of businesses.

Wawanesa submits that an Applicant for insurance has a duty to disclose all material facts relevant to the application even if the insurer has not asked specific questions with respect to those facts. Wawanesa says that a fact is relevant or material if it would influence a prudent insurer in deciding whether to issue the policy. Wawanesa submits that had Wawanesa been aware that The Company towed vehicles whether behind a car or on a flatbed that it would not have agreed to provide insurance. That is supported by the fact that when they became aware of that practice through a series of reported accidents that they decided to terminate the policy.

Wawanesa submits that The Company had a duty to carefully read the questions in the application and make sure that reasonable care and reflection was put into determining their response. If The Company misrepresents a material fact or does not disclose a material fact then the insurer is entitled to void the contract.

Wawanesa points to the evidence of the broker both through their file and through the Examination Under Oath of its representative as proof that at no time did The Company advise that any of their vehicles were being used for any towing purposes. Wawanesa submits that the broker's file and indeed all the information provided to Wawanesa supports the belief that The Company, the broker, and the insurer were under the impression that all the company did was work in the business of delivering car parts.

Wawanesa submits the evidence is abundantly clear that The Company therefore gave false particulars of the use of the described vehicles. They were described to be used for delivery of auto parts and in fact there was later evidence that they were used in "towing".

Wawanesa submits that the policy was properly cancelled as there was a material change in the risk which is enumerated ground pursuant to Section 1.7.2 of OAP 1. Wawanesa had declined to insure tow trucks and had filed their position in that regard with the Financial Services Commission of Ontario as required. Therefore, on determination by Wawanesa that The Company's vehicles were being used for towing that constituted a material change in risk therefor establishing a proper ground for termination of the policy.

Wawanesa submitted a Book of Authorities with a series of cases to support the propositions and legal principles outlined above. Including:

- *DeKoning v. Vector Insurance Network (Ontario) Limited, 2009 CanLII 43644 (ONSC)*

- *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd., 2009 ONCA 388, 249 O.A.C. 234*
- *Gregory v. Jolley, 2001 CanLII 4324 (*ONCA)

ANALYSIS AND DECISION

Did Wawanesa comply with Statutory Condition 11 with respect to the refund of premium?

The relevant statutory and auto policy OAP 1 provisions with respect to this issue are Statutory Condition 11 as set out in Regulation 777/93 pursuant to the *Insurance Act*. The relevant Section is set out below:

> 11. (3) where this contract is terminated by the insurer,
>
> (a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified;
>
> (b) if the termination is for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the refund shall accompany the notice, unless the premium is subject to adjustment or determination as to the amount, in which case, the refund shall be made as soon as practicable; and.

There is no question that the termination letter of Wawanesa dated August 8, 2016 did not make any reference to a premium refund. There is also no question that any premium refund or cheque was not referenced in the letter, attached to the letter, nor sent out with the letter.

The evidence supports that Wawanesa's practice was that any premium refund would be generated on their system once the cancellation notice was sent out and it would be produced in automated system batches. The cheque would be printed on the premises and then inducted into the mail through a large Canada Post pick-up. According to Ms. Marchak once the Canada Post picked it up and the cheque left the premises that it generally took 3-5 days for delivery. Further, Ms. Marchak confirmed that Wawanesa does not include a cover letter when mailing the refund cheques.

Therefore, on Wawanesa's own evidence, clearly the refund did not accompany the notice to terminate as required under Statutory Condition 11. I do not accept counsel's argument that the word "accompany" does not mean that the refund cheque should be included with the letter. I find to the contrary. In my view, Statutory Condition 11 makes in abundantly clear that in the

circumstances where a refund is required that the refund shall be sent out with the letter of cancellation.

In the case of *Merino v. ING Insurance Company 2019 ONCA 326* the Court of Appeal clearly set out the repercussions of the failure to comply with Statutory Condition 11. The court stated:

> The scheme of the Act and its Regulations prescribed the rights and obligation of the insured and the insurer under the automobile provisions require strict compliance, and provides for an orderly and predictable set of consequences for compliance and noncompliance. For example, if a notice of termination does not comply with Section 11 of the Regulations, then the insurance contract remains in force (*Ontario (Finance) v. Traders General Insurance (Aviva Traders), 2018 ONCA 565)*.

In the decision of *CAA Insurance Company & The Personal* Insurance (decision of Arbitrator Sampliner from November 5, 2020) the question as to whether a policy was properly cancelled was in dispute. In that case, the claimant's policy was allegedly cancelled for non-payment on February 26, 2018. However, the notice of termination did not contain an address for payment of the arrears. Arbitrator Sampliner commented that under Statutory Condition 11 uses the word "shall" in terms of the delivery address as being required to appear on the cancellation notice. He commented that the use of the word shall is intended to protect the consumer and to promote maintenance of continuous coverage. He found (relying on *Merino v. ING* Supra) that the requirement to put the payment delivery address in the termination letter was essential and the failure to do so meant the cancellation was not effective. I also find that subject to what is set out below that Statutory Condition 11(3) requires that the refund accompany the notice of cancellation and that in this case it did not, and therefore that would mean the cancellation was not effective.

However, there is a second part to the Statutory Condition that allows an insurer to send out the refund cheque later (as soon as practicable) if the premium is subject to an adjustment or determination. As Wawanesa takes the positon that the premium in that case was subject to an adjustment or determination I must therefore also review that issue.

Based on the evidence before me, I find no evidence whatsoever that Wawanesa needed to adjust or determine the amount of the premium. In fact, the evidence appears to be the contrary based on the Examination Under oath of the evidence given by Mr. Lao. He confirms that no adjustment was required.

The premium was a monthly premium. The policy was being cancelled mid-term. There was no need to adjust the premium. The calculation was simple. There was no evidence put before me that some time had to be given to Wawanesa in order to make those calculations before a cheque could have been issued.

On this issue I am instructed by the decision of Justice Brown in the case of *The Ontario Minister of Finance v. Progressive Casualty 2007 Creswell ONT 2830*. In that case, the issue was whether Progressive had complied with Statutory Condition 11(3) in that the refund of premium had not accompanied the notice of cancellation. There was no dispute in the facts before Justice Brown that Progressive's letter of termination did not include a refund cheque. The notice of cancellation in that case was dated May 30, 1997. The purported cancellation date was June 18, 1997. The evidence of Progressive was that the amount of the premium had to be calculated and was sent out about 3 weeks after the notice of cancellation. While Justice Brown found that Progressive's policy had not been properly cancelled for other reasons he did accept that the refund, even though it did not accompany the cancellation notice, had not been made in accordance with the Statutory Condition.

Justice Brown made the following comments on the issue of the calculation of the premium:

> In considering whether a premium is subject to adjustment or determination, one must distinguish between two situations. Where a notice of cancellation informs an insured of the prospect of cancellation at a future date unless his account is brought into good standing and a rebate cheque accompanies the notice, it would be open to the insured to make good some or all of the arrears after he received the notice. If the insured brought the policy into good standing prior to the termination date, then the insurer would have to cancel the rebate cheque. While this might result in an administrative inconvenience, reasons of administrative inconvenience alone are not a sufficient reason to depart from the requirements the Statutory Condition 11(3)(b). There may be other situation where, at the time of the notice of cancellation is sent, the insurer cannot finally determine the applicable premium and any excess, it might require further information or need to wait the occurrence of other events before the amount of the excess premium could be determined.

The evidence before Justice Brown was that there was no other figures that the insurer was waiting for in order to calculate the refund. He therefore concluded that when the insurer was preparing the notice to cancel it had all the information it needed to calculate the refund of excess premium and no further adjustment or determination was required. It was a matter of convenience not a matter relating to the adjustment or determination of the amount of premium to be refunded that resulted in the insurer sending out the cheque later.

I find that these facts fall on all fours with the facts before me. There is no evidence that Wawanesa needed some time to calculate the premium owing. All the evidence suggests that Wawanesa had all the information it needed to calculate the refund of excess premium at the time when it was preparing its notice to cancel. It knew what the monthly payments were. It knew the date of its cancellation notice. There is no explanation other than it was a matter of convenience to Wawanesa to issue the funds later.

I feel I am bound by Justice Brown's finding in this case and even if I were not bound, I would still find that there was no evidence before me that Wawanesa needed to make an adjustment or determination as to the amount of the premium which would thus justify it not including the cheque in the letter of notice of termination.

I therefore find that Wawanesa failed to meet the requirements of Statutory Condition 11 in that they did not include the refund cheque in the letter of cancellation and that there was no evidence to support their position that they needed to make an adjustment for determination of the premium and therefore could not include it with the letter and would have to send it out later. On this ground alone the policy is not properly terminated as of the date of loss of October 27, 2016 and accordingly loss transfer would apply.

However, counsel indicated that even if I concluded on one issue that the policy was not properly cancelled that I was to also make a decision on the other issue. Therefore, I now direct my analysis and decision on the question of whether there were proper grounds to terminate the policy.

Did Wawanesa have proper ground for the termination of the policy?

Whether or not there were proper grounds to cancel The Company's policy revolves entirely around Wawanesa's claim that The Company was providing "towing services" and that information had not been provided to Wawanesa on the initial application nor any time thereafter. I accept and indeed there is no evidence to the contrary that Wawanesa does consider the provisions of "towing services" to be a risk for which they will not provide insurance. This is clear from the filings they have made at the Financial Services Commission with respect to their underwriting criteria and their declining to issue contracts to cover towing vehicles.

However, I struggle to find that there is any evidence in this case that the operations of The Company as described before me would constitute towing services. The evidence of the senior underwriter, Mr. Lao, when reviewed in its entirety suggests that he too accepts that the term "towing services" is not necessarily a clear one in terms of the information that a business is asked to provide. While Wawanesa would consider a flatbed transporting a vehicle to be towing, Mr. Lao agreed that was not explained anywhere in the various application or renewal forms that The Company in this case was asked fill in. Towing services to me seems to be a term that generally would reflect a business that owns a towing truck and provides towing services. In this case, the evidence supports that The Company did operate a tow truck company.

Further I found a dearth of evidence providing me with any detailed or clear information as to what actually The Company did in terms of "towing". I know that there were the two incidents that are referenced in the "caution" notes of Wawanesa. However, there are no details with respect to the towing circumstances. There was no evidence by way of an Examinations Under Oath or Affidavits from a representative of The Company to explain what their business was and

whether in fact it regularly actually towed vehicles or carried vehicles on a flatbed in the course of their business.

What the evidence does indicate is that this company told its broker/insurer that it operated a business that involved delivering car parts and that the parts identified included air filters, side mirrors, or air bags. There is no further information as to how those car parts were delivered but presumably they were on the pickup trucks. There is also a description that the car parts would be picked up from a warehouse and delivered to mechanics. I can easily see that in the context of this business that a car no longer driveable could conceivably be transported as car parts from a warehouse to a mechanic. I agree with Heartland where they suggest that the very nature of this company's business could on occasion include the transport of car parts/cars for parts from one location to another.

I could find nothing in any of the application forms or renewal forms that The Company were to complete that would lead them to believe that they would have to indicate that they were providing "towing services'. I also find that there does not appear to be any effort made on the part of the broker and/or the insurer to make any further inquiries with respect to the nature of this company's business and whether in light of the fact that it would be transporting car parts whether that might include carrying one of the cars from which parts were to be moved on a flatbed.

Having made those findings, where does this then take us in terms of whether or not Wawanesa had proper grounds to terminate the policy.

The first step as always is to look at the relevant legislation. Set out below are the relevant provisions of Section 237, 238 and Statutory Condition 1 of OAP 1:

> **Limitation on termination**
>
> **237** (1) If so required by the regulations and unless the insurer has complied therewith, an insurer shall not decline to issue or terminate or refuse to renew a contract in respect of such coverages and endorsements as may be set out in the regulations or decline to issue, terminate or refuse to renew any contract or refuse to provide or continue any coverage or endorsement on any ground set out in the regulations.
>
> **Non-application**
>
> (6) Subsection (1) does not apply in respect of a contract if any payment in respect of premiums payable under the contract or under any ancillary agreement is overdue or if,
> (a) the insured has given false particulars of the described automobile to the prejudice of the insurer;
> (b) the insured has knowingly misrepresented or failed to disclose in an Application for Insurance any fact required to be stated therein.

Grounds to terminate

238 (1) An insurer shall not decline to issue, terminate or refuse to renew a contract or refuse to provide or continue a coverage or endorsement, except on a ground filed with the Chief Executive Officer under this section.

1.7.2 When We Cancel Statutory Condition OAP 1

Where your policy has been in effect for up to 60 days, we may only cancel your policy for a reason that we have filed with the Financial Services Commission of Ontario.

Where your policy has been in effect for more than 60 days, we may only cancel your policy for one of the following reasons:

- non-payment of premium,
- you have given false particulars of the automobile to our prejudice,
- you have knowingly misrepresented or failed to disclose information that you were required to provide in the Application for Automobile Insurance, or
- the risk has changed materially.

1.4.1 You agree to notify us promptly in writing of any significant change of which you are aware in your status as a driver, owner or lessee of a described automobile. You also agree to let us know of any change that might increase the risk of an incident or affect our willingness to insure you at current rates.

You must promptly tell us of any change in information supplied in your original Application for Insurance, such as additional drivers, or a change in the way a described automobile is used.

1. (1) The insured named in this contract shall promptly notify the insurer or its local agent in writing of any change in the risk material to the contract and within the insured's knowledge.

(2) Without restricting the generality of the foregoing, the words,

"change in the risk material to the contract" include:

(a) any change in the insurable interest of the insured named in this contract in the automobile by sale, assignment or otherwise, except through change of title by succession, death or proceedings under the Bankruptcy and Insolvency Act (Canada);

The first ground that Wawanesa claims the policy was properly cancelled is that the claimant knowingly misrepresented or failed to disclose information that it was required to provide in the Application for Insurance. On this issue, Wawanesa claims that The Company failed to provide the details of the operations of The Company, failed to provide details of the use that the pickup trucks would be put to, and more specifically failed to advise the insurer that they were going to be conducting towing services as part of their business operations. In their Factum, Wawanesa also suggests that The Company gave false particulars of the described vehicles in that they did not advise the insurer that the described vehicles would be involved in towing. However, that does not appear to be a ground in the letter of August 8, 2016 and there is certainly no evidence before me that The Company gave "false particulars of the described automobile". In my view, that requires information that is inaccurate with respect to the ownership for type of vehicle and not necessarily to what use it may be put. However, I do review that aspect of Wawanesa's argument in the context of whether The Company knowingly misrepresented or failed to disclose information that was required in the Application for Automobile Insurance.

The first point on this issue is the fact that the letter of August 8, 2016 does not accurately state the ground for termination. It appears that the letter quotes the underwriting criteria filed with the Financial Services Commission and not the actual grounds as set out in the OAP 1. The grounds in the letter of August 8, 2016 while making reference to material misrepresenting or failing to disclose a fact that is required under the application it does not include the word "knowingly". I find that Section 273 of the *Insurance Act* and the 1.7.2 of Statutory Condition 1 requires that the grounds for cancellation are that the misrepresentation or failure to disclose information is done "knowingly". The Company's policy had been in effect for more than 60 days, and because the policy was being cancelled mid-term the insurer had a duty to provide the accurate basis of the grounds that they were terminating the policy. Further, Statutory Condition 1.7.2 provides that you can only cancel the policy based on reasons filed with the Financial Services Commission of Ontario where the policy has been in effect for only 60 days. Therefore, I find that Wawanesa could not rely on their underwriting criteria filed at the Financial Services Commission to terminate this policy but could only terminate it based on the 4 criteria set out under 1.7.2.

I find there was no evidence before me that The Company <u>knowingly</u> misrepresented or failed to disclose information that they were required to provide in the Application for Automobile Insurance. I am fully aware in coming to that conclusion of the case law that establishes that there is a heavy burden on an Applicant for insurance to fully disclose to the insurer all information relevant to the nature and extent of the risk that the insurer is being asked to assume (*Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.* Supra).

I am also aware that a material fact would be one that would influence a prudent insurer in deciding whether to issue the policy or in determining the amount of premium (*Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.* Supra).

I am also aware and accept that there is no absolute duty on the part of the insurer to ask questions of the insured to make sure they are disclosing all material facts.

However, the *Sagl* case referred to above also provides that an insurer's conduct or failure to ask questions can be evidence of whether or not they consider the issue to be material. The court in that case stated at paragraph 59:

> While the Applicant has a duty to disclose all material facts, an insurer's conduct may be relevant to the analysis of whether a particular fact is material. An Insurer's failure to ask a question may be evidence that the particular insurer does not consider the issue to be material, even if objectively, the information would have been regarded as relevant by the prudent insurer…

While this statement goes to some extent to an issue I will address later with respect to material risk it also speaks to an insurer's conduct in reviewing an initial application or a renewal. In this case, as the insurer was interpreting "towing services" as in a way broader term then Wawanesa should have considered making clearer on their application, or in their interaction with the insured or the broker when reviewing the information provided in the application.

As noted, I have no evidence before me as to what The Company thought the Application for Insurance and the reference to towing and services mean. I take the question that was posed in the case of *Stuart & The Canada Life Assurance Company [1999] O.J. 2842* a decision of Justice Misener and make use of it in the context of this claim. In the Stuart case, Mr. Stuart was deceased and the issue is whether or not he was entitled to money from his Canada Life policy. Canada Life alleged that Mr. Stuart did not disclose the relevant information in his application as he did not identify his condition on ulcerative colitis as a "disease of the intestines or the rectum". The court in determining Mr. Stuart's obligation to disclose facts within his knowledge stated:

> "I simply pose the following questions – assuming that he (Stuart) carefully read question number 3 in the application for mortgage life insurance and carefully searched his recollection, would an ordinary, reasonably, intelligent Canadian with Mr. Stuart's medical history…"

I ask here "would an ordinary, reasonably, intelligent Canadian operating a business such as The Company in this case reasonably believe that they should advise the insurance company that they were conducting a business that operated towing services?" I conclude the answer to that is no and therefore there are no grounds supportable on the facts of this case for Wawanesa to terminate the policy on the basis that the insured <u>knowingly</u> misrepresented or failed to disclose information in their Application for Automobile Insurance.

The last grounds on which Wawanesa say they properly cancelled the policy is that there was a material change in risk and that the insured failed to notify the insurer of that change. The letter of August 8, 2016 does make reference to this grounds of termination. The letter advises The Company that Wawanesa has been notified that the use or operation of the vehicles insured under their policy includes towing vehicles and this is a type of use not underwritten by Wawanesa. Accordingly, Wawanesa advises that "this is considered a material change to the policy". While the wording is not identical to that set out in the OAP 1, I do not find that there is any issue with referencing a material change to the policy as opposed to "the risk has changed materially". The question is whether the use of the vehicles for towing was material and whether there was a change in the risk. I accept the evidence put forward by Wawanesa that a business that operated as a towing service was material and that it was a risk they would not cover. That is certainly true with respect to vehicles that are used to tow disabled vehicles. I also have no evidence to the contrary that Wawanesa's position as set out by Mr. Lao did not also include other businesses that towed vehicles including placing a vehicle on a flatbed would be a use of a vehicle that would not be covered by Wawanesa. This is consistent with a long line of cases that is concluded that a fact is relevant or material to the insurer if it would influence a prudent insurer in deciding whether to issue a policy and in determining the amount of the premium (see *Pereira v. Hamilton Township Farmers Mutual Fire Insurance Company 2006 CanLII 12284 ONCA,* paragraph 65).

However, while the fact that a company may be conducting towing services is material to the risk, as noted earlier, I do not have any evidence that satisfies me that this company was in fact conducting towing services as would be understood in the general context as opposed to the specific context that Wawanesa claims, I do not find that the risk in this case ever **changed**. The evidence, in fact, is to the contrary. This business has consistently reported that it operates as a company that transports various automobile parts from one location to another. There is no evidence to suggest that the use of the pickup trucks insured under the Wawanesa policy changed from the time of the application up until the notice of termination. No evidence was led to establish the insured company changed the nature of its operations at some point after this policy was entered into to start conducting "towing services" whether they be of the more traditional kind or the type that Wawanesa declines to underwrite as well. The only evidence is that that there were 2 instances prior to the termination of the policy where Wawanesa has notes that there were incidents involving "towing". No evidence was led about the nature of this "towing".

Wawanesa referred me to the Superior Court decision in *DeKoning v. Vector Insurance Network (Ontario) Limited,* Supra. I reviewed this case carefully and found that the principles to be drawn from this case were more supportive of Heartlands position in this case than Wawanesa particularly with reference to the material change in risk question. In that case, the automobile policy had already been entered into and been in place for some time. Ms. DeKoning had added her grandson as an occasional driver in July of 2001. In 2002 Ms. DeKoning became aware of her grandson's offences and his license suspension. Ms. DeKoning did not tell Vector or (Wawanesa the insurer) about this information. Wawanesa took the position that the suspension of the

grandson's driving privileges and his *Highway Traffic Act* offences were material change in risk and Ms. DeKoning should have notified Vector/Wawanesa.

Justice Howden found that it was not a material change in risk and that this was partly due to the insurer's conduct. The court stated as follows:

> "within the overall legislative objectives of the Insurance Act and the underlying principle of good faith as the law has developed now, what is relevant to the prudent insurer in assessing risk and changes thereto and having the benefit of a full underwriting department, is not communicated in an understandable way to the consumers so that they must know the extent of the obligations they must meet. In this case Ms. Shelby said that Wawanesa used the general rules and in particular clause 13(b) to conclude that it would not have renewed the policy as of June 29, 2002 if it had known of Brian's convictions. That document was not made know to anyone outside Wawanesa's employment, nor is it deemed to be known to consumers, nor does it make grammatical sense in any event".

Similarly in this case, Wawanesa's underwriting rules relating to their position that they will not insure vehicles that are involved in the business of towing services was not communicated in any way to the insured company. If it was there was no evidence before me with respect to that.

Therefore, I conclude that while it may have been a material risk to Wawanesa whether or not a business whose vehicles they were going to insure were operating a towing business or not is material there is no evidence here that information was communicated to the named insured. There is further no evidence that the nature of The Company's business **changed** from the inception of the policy up to the date of termination. I therefore conclude that there were no grounds for Wawanesa to terminate The Company's policy based on a material change in risk.

ORDER:

I find that the Wawanesa policy was in full force and effect on October 27, 2016 and had not been properly cancelled at that date. Accordingly, Heartland may pursue a claim for loss transfer as against Wawanesa under Section 275 of the *Insurance Act* with respect to monies paid to FR arising out of his impairments sustained in the motor vehicle accident of October 27, 2016.

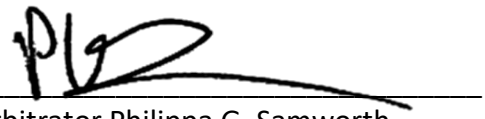
COSTS:

The Arbitration Agreement provides that the costs of the Arbitration including the Arbitrator's fess, expenses, and disbursements shall be determined in the sole discretion of the Arbitrator.

As Heartland has been entirely successful on all issues in this Arbitration, I find that Wawanesa is responsible for the costs of the Arbitration; specifically the Arbitrator's fess, expenses, and disbursements. With respect to the legal costs as between the two parties, if counsel are unable

to work out an agreement with respect to legal costs then I would ask that they notify me within 60 days and we will arrange a costs hearing to determine both responsibility with respect to the costs of the Hearing as well as the quantum of those costs.

DATED THIS 19th day of January, 2022 at Toronto.



Arbitrator Philippa G. Samworth
DUTTON BROCK LLP