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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PEMBRIDGE INSURANCE COMPANY

Applicant

- and -

MVACF

Respondent

AWARD

COUNSEL APPEARING

Andrew C. McKague for the Applicant, Pembridge Insurance Company (hereinafter called "Pembridge").

Sharon Warden for the Motor Vehicle Accident Claims Fund: Respondent (hereinafter called "the Fund").

BACKGROUND

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

By way of general background, this claim involves an accident that occurred on April 19, 2021. The claimant was operating an electric bike at Bay and Gerrard Street in Toronto when he was struck by a 2009 Dodge Avenger. The claimant sustained various injuries in this accident and applied to Pembridge for accident benefits.

Pembridge had previously insured the 2009 Dodge Avenger but takes the position that his policy was cancelled for non-payment effective December 5, 2020.

The claimant did not have access to any other insurance coverage and therefore Pembridge takes the position that the Fund is the priority insurer.

The key issue before me is therefore whether or not the Pembridge policy was properly cancelled on December 5, 2020.

PROCEEDINGS

The arbitration proceeded by written submissions. A Joint Document Brief was submitted which included an Application for Insurance, a letter to the Pembridge insured dated October 28, 2020, the Notice of Cancellation for Non-Payment of Premium from Pembridge to its insured dated December 5, 2020 as well as an AutoPlus Report, some underwriting notes and files and the Canada Post tracking record.

The parties also submitted an Arbitration Agreement executed on November 2, 2023.

ISSUE FOR DETERMINATION

Both parties agreed that the issue for my determination is whether the Pembridge policy was effectively terminated on or about December 5, 2020 at 12.01 a.m.

DECISION

For the reasons set out below I find that the Pembridge policy was not properly cancelled and therefore was in full force and effect on April 19, 2021 when the accident occurred. Accordingly, Pembridge is the priority insurer with respect to the statutory accident benefits paid to the claimant arising out of that accident.

FACTS

There is no dispute with respect to the facts.

On June 9, 2017 an application for automobile insurance was made by Mr. A-M to Pembridge through his broker, May McConville, Omni Insurance. Coverage was bound and Pembridge issued policy no. 258527009 for the policy period commencing June 12, 2017 to June 12, 2018. The only vehicle insured on this policy was the 2009 Dodge Avenger that was involved in the accident of April 19, 2021.

The application for automobile insurance indicates that the premiums were to be paid monthly. The withdrawals started July 16, 2017 and would be taken out on the 16th of each month from a bank account with the National Bank of Canada.

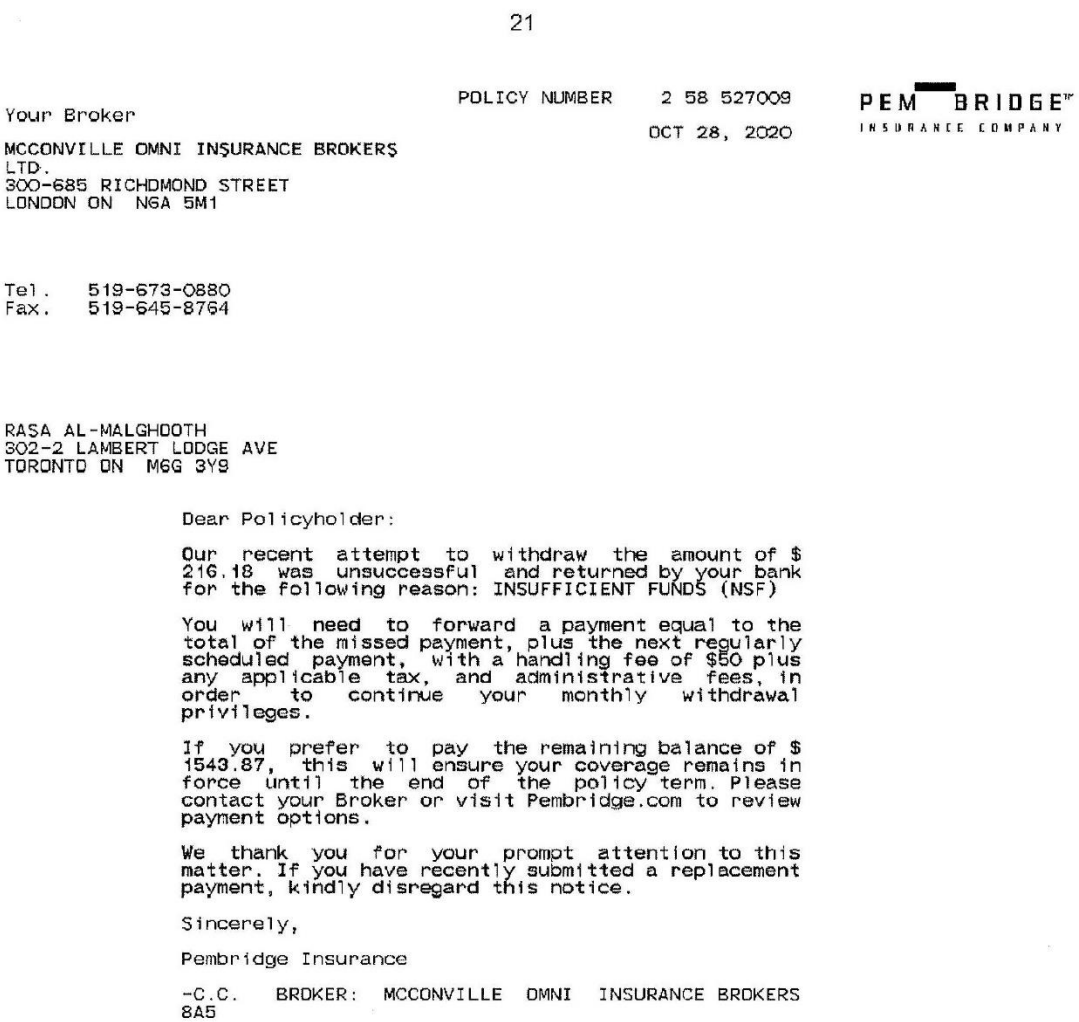
The underwriting file indicates that the Pembridge policy was renewed three times subsequent to June 9, 2017 with the last renewal covering a period from June 12, 2020 to June 12, 2021. For that renewal, the total policy premium was $2,561.

The Pembridge documents indicate that in addition to the premium, the insured was also charged a service fee of 1.30% which was added to the policy premium which brought the total amount payable under the policy to $2,594.25.

The total amount owing was payable over a period of 12 monthly installments which started on May 16, 2020 and each installment was in the amount of $216.18. On October 28, 2020 Pembridge sent its insured a letter that was copied to the broker advising that they had

recently attempted to withdraw the amount of $216.18 from the bank and it had been returned by the bank noting there was insufficient funds.

A copy of that letter of October 28, 2020 is reproduced below and you will find that letter at Tab B of the Joint Book of Documents.



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Your Broker

MCCONVILLE OMNI INSURANCE BROKERS LTD.
300-685 RICHDMOND STREET
LONDON ON N6A 5M1

Tel. 519-673-0880
Fax. 519-645-8764

POLICY NUMBER 2 58 527009
OCT 28, 2020

PEMBRIDGE INSURANCE COMPANY

RASA AL-MALGHOOTH
302-2 LAMBERT LODGE AVE
TORONTO ON M6G 3Y8

Dear Policyholder:

Our recent attempt to withdraw the amount of $ 216.18 was unsuccessful and returned by your bank for the following reason: INSUFFICIENT FUNDS (NSF)

You will need to forward a payment equal to the total of the missed payment, plus the next regularly scheduled payment, with a handling fee of $50 plus any applicable tax, and administrative fees, in order to continue your monthly withdrawal privileges.

If you prefer to pay the remaining balance of $ 1543.87, this will ensure your coverage remains in force until the end of the policy term. Please contact your Broker or visit Pembridge.com to review payment options.

We thank you for your prompt attention to this matter. If you have recently submitted a replacement payment, kindly disregard this notice.

Sincerely,

Pembridge Insurance

-C.C. BROKER: MCCONVILLE OMNI INSURANCE BROKERS 8A5

Notably, the letter indicates that the policyholder is told that not only do they have to forward the missed payment plus the next regularly scheduled payment, but in addition they are to forward a handling fee of $50 plus applicable tax and administrative fees in order to continue their monthly withdrawal privileges.

The policyholder is given an alternative to pay the remaining balance of the premium which totalled $1,543.87.

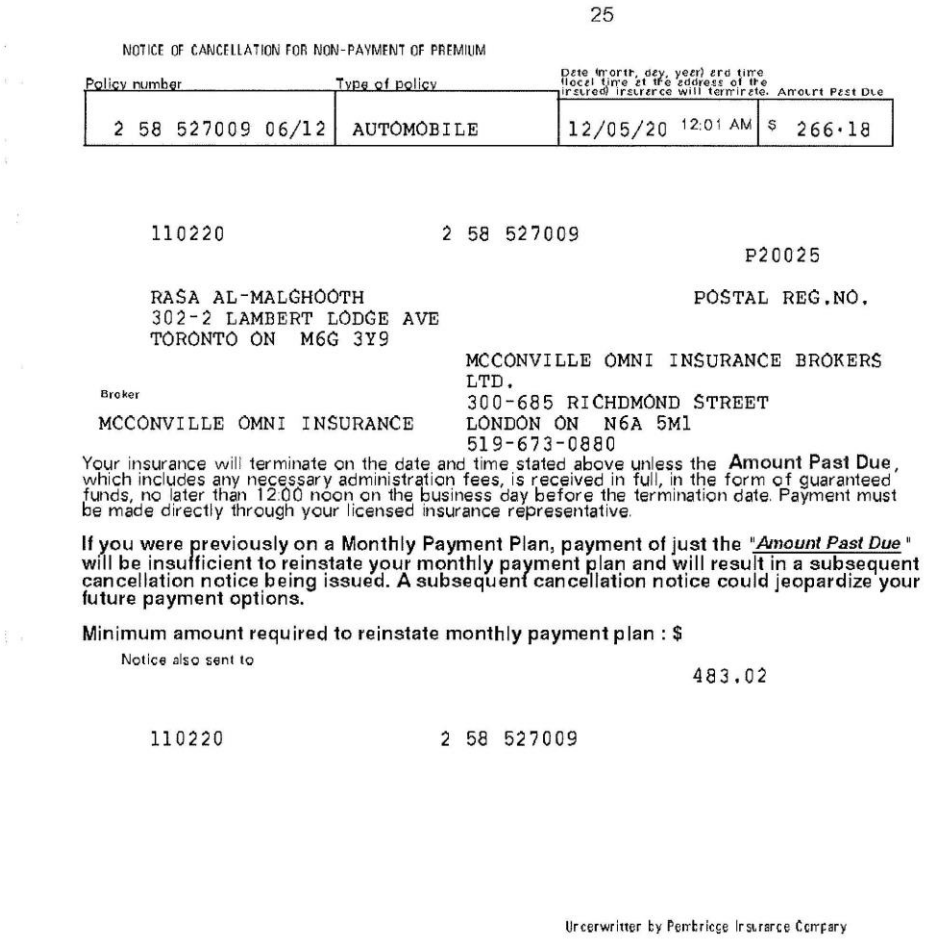
The evidence is clear that the policyholder did not send in any money or arrange for any payments in response to the letter of October 28, 2020.

On November 2, 2020 Pembridge delivered a Notice of Cancellation for Non-Payment of

Premium by registered mail to the policyholder's known address. Efforts were made to deliver the letter and were unsuccessful. The letter was never picked up.

The cancellation letter is reproduced below. The portions of the cancellation letter that are in dispute in terms of whether they are sufficient or not relate to the advice to the policyholder as to what should be paid in order to reinstate the policy. At the top righthand corner of the letter the amount to be paid is noted as $266.18 and it must be received no later than 12 noon on the business day before the termination date. The termination date is noted as December 5, 2020. The letter notes:

> "Your insurance will terminate on the date and time stated above unless the AMOUNT PAST DUE, WHICH INCLUDES ANY NECESSARY ADMINISTRATION FEE IS RECEIVED IN FULL, IN THE FORM OF GUARANTEED FUNDS NO LATER THAN 12 NOON ON THE BUSINESS DAY BEFORE THE TERMINATION DATE."



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NOTICE OF CANCELLATION FOR NON-PAYMENT OF PREMIUM

Policy number	Type of policy	Date (month, day, year) and time (local time at the address of the insured) insurance will terminate.	Amount Past Due
2 58 527009 06/12	AUTOMOBILE	12/05/20 12:01 AM	$ 266·18

110220 2 58 527009

P20025

RASA AL-MALGHOOTH
302-2 LAMBERT LODGE AVE
TORONTO ON M6G 3Y9

POSTAL REG.NO.

Broker
MCCONVILLE OMNI INSURANCE

MCCONVILLE OMNI INSURANCE BROKERS LTD.
300-685 RICHDMOND STREET
LONDON ON N6A 5M1
519-673-0880

Your insurance will terminate on the date and time stated above unless the **Amount Past Due**, which includes any necessary administration fees, is received in full, in the form of guaranteed funds, no later than 12:00 noon on the business day before the termination date. Payment must be made directly through your licensed insurance representative.

If you were previously on a Monthly Payment Plan, payment of just the "*Amount Past Due*" will be insufficient to reinstate your monthly payment plan and will result in a subsequent cancellation notice being issued. A subsequent cancellation notice could jeopardize your future payment options.

Minimum amount required to reinstate monthly payment plan : $

Notice also sent to

483.02

110220 2 58 527009

Underwritter by Pembrioge Insurance Company

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

The letter does not distinguish between the amount of the premium that is to be paid and the amount of administration fees but lumps that amount together indicating the combined payment needed is $266.18.

RELEVANT STATUTORY LEGISLATION

The key legislative provisions relating to the issue before me is the *Insurance Act* and specifically Statutory Condition 11(1.3) and (1.4). Statutory Condition 11(1.3) states as follows:

> "A notice of termination mentioned in subcondition (1.2) shall
>
> (a) state the amount due under the contract as of the date of 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 noon on the business day before the day specified for termination."

Section 11(1.4) states:

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

These statutory conditions are found under Ontario Regulation 777/93 of the *Insurance Act*.

POSITION OF THE PARTIES

<u>The Fund</u>

The Fund takes the position that the notice of cancellation is not effective because a lump sum was provided of $266.18 rather than separating out within the notice the amount due under the contract as of the date of notice and then the amount of the administration fee.

The Fund submits that the regulation requires that these two amounts be set out separately as required under s. 1.3(a) and 1.3(b). The section is mandatory referencing the word "shall".

The Fund relies on the decision of Arbitrator Bialkowski in *Definity Insurance Company and Allstate Insurance Company and Gore Mutual Insurance Company* released October 4, 2022 and upheld on appeal by Justice Chalmers on February 22, 2024 (see court file no.

CV-22-00690425-0000). The Fund submits that that case is on all four with the one before me and that I am bound by Justice Chalmers' decision.

That case also involved one where the policyholder and the insurer agreed that the premiums would be paid in monthly installments. The notice of termination referenced the amount to be payable as "$837.01" (which includes all applicable fees). It did not delineate between the amount owing on the contract or the policy and any administration fees. The Fund relies on paragraph 24 of Justice Chalmers's decision which I set out below:

> "I am of the view that based on the clear wording of s. 11(1.3) and (1.4) of the Statutory Conditions, the notice must set out two amounts: the amount owing on the contract at the time of notice, and the amount owing on the contract plus the administration fees. Part (b) goes on to state that the administration fees must not exceed the approved amounts."

The Fund also relies on Justice Chalmers's conclusions that the breakdown is between the amount owing on the contract and the total amount including administration fees that is to be provided in the cancellation notice is not a minor or non-essential requirement. In order for the policyholder to properly determine what amount is payable to avoid termination, they must know the administration fee component of the total amount owing.

Therefore the Fund argues Pembridge did not properly cancel the policy and the policy remained in effect on the date of loss.

Position of Pembridge

Pembridge acknowledges that its notice of cancellation did not set out how the $266.18 was split as between the monthly amount owing and any administration fee. However, Pembridge submits that its case is distinguishable from *Definity v. Allstate* (*supra*) based on the letter that was sent to the policyholder dated October 28, 2020 shortly before the cancellation notice.

Pembridge points out that this letter clearly indicated that there was a $50 handling or administrative fee that was owing. The policyholder was aware that the monthly amounts being withdrawn from the bank were $216.68 per month and therefore would have known when they received their notice of cancellation that the $216.18 would have been made up of the amount of their monthly premium plus the $50 charge referenced in the letter of October 28, 2020.

Pembridge submits that based on the facts of the case before me it would be reasonable to conclude that the policyholder or a reasonable person in the policyholder's place would therefore know precisely the amount required to maintain coverage inclusive of administration fees as of the date of the notice of cancellation for non-payment of premium. Each of the essential elements had been provided to them when one reviewed both the cancellation notice and the previous letter.

Pembridge submits that Justice Chalmers opened up this argument in his decision in paragraphs 29 and 30 where reference is made as to what a "reasonable person" would know when they receive the notice. Arbitrator Bialkowski in his initial decision had referenced a reasonable person and Pembridge argues that Justice Chalmers agreed that one could examine what a reasonable person would know in order to determine whether the notice was valid. Justice Chalmers at paragraph 30 of his decision states:

> "Without a breakdown between the amount owing in installments as of the date of notice and the administration fee, a 'reasonable person' receiving the notice would not know the amount of the separate administration fee and whether the fee exceeded the approved amount."

Pembridge submits that in the case before me a reasonable person would know just that very information when you review both the letters of October 28, 2020 and the notice of cancellation for non-payment dated November 2, 2020.

Reply of the Fund

The Fund submits that Justice Chalmers made it clear that the notice of cancellation including the breakdown between the amount owing on the contract and the total amount owing including the administrative fee was not a minor and non-essential requirement. Further, the Fund submits Justice Chalmers did not suggest that this information could be contained in other correspondence or other documents.

Rather, the Fund submits in reviewing Justice Chalmers's decisions he made it clear that this information must be included in the actual Notice of Termination.

The Fund submits that to conclude otherwise would allow an insurer to skirt the strict statutory requirements of a valid notice of cancellation as set out in ss. 11(1.3) and 1.4) by relying on other correspondence or documents that may or may not have been sent or received by the insured as they would not have the requirements of delivery by registered mail.

The Fund relies on the decision of Justice Davies in *Allstate Insurance Company v. Ontario (Minister of Finance)*, 2020 ONSC 830 CanLII. The Fund relies on the following under paragraphs 31 and 32:

- Cancellation notices are intended to be one-stop sources for information to avoid termination.

- An effective cancellation notice is required to be clear and unambiguous.

- If one approved a practice of not including information required in the regulation then that could result in reducing an insurer's incentive to comply with the provisions.

REASONS AND ANALYSIS

I agree with the submissions by the Fund. I believe I am bound by the decision of Justice Chalmers in *Definity v. Allstate* (*supra*). The facts of that case are on all fours with the case before me. Further, I do not agree with the submissions of Pembridge that in determining whether a notice of cancellation meets the relevant criteria under the regulation that I can take into consideration other correspondence such as the letter of October 28, 2020.

The cases submitted by both parties make it clear that in looking at a notice of termination and whether or not an insurer has complied with the relevant provisions of the regulation that a standard of perfection is not required (See *Allstate Insurance Company v. Her Majesty the Queen*, Justice Davies (*supra*).

However, while a standard of perfection is not required, for example, in the case of minor typographical errors, the case law otherwise makes it clear that the essential elements as set out in the regulation must be included in the termination notice. While each case may stand on its own facts, ultimately an arbitrator must have recourse to the wording of the regulation and to determine whether those essential elements were included in the notice of cancellation.

In his decision of *Definity v. Allstate*, Arbitrator Bialkowski concluded that one of those essential elements under s. 11 (1.3) of Statutory Condition Ontario Regulation 777/93 required the notice of cancellation to contain specifics as to both the amount due under the contract and any administration fee being charged by the insurer. In the case before Arbitrator Bialkowski, the cancellation notice stated,

> "To reinstate your policy and ensure you have continuous coverage we must receive full amount of $837.01 (which includes all applicable fees) in cash …"

Arbitrator Bialkowski pointed out that there was no breakdown for the insured to show that the unpaid premium totalled $802.01 and that there was an additional charge for an NSF amount of $35.

Arbitrator Bialkowski held that NSF fees were administrative in nature and constituted an "administration fee" and therefore had to be separately identified in accordance with the regulation and this in his view was an essential element.

Arbitrator Bialkowski noted that while such a finding was harsh that many of the decisions with respect to cancellation notices might seem harsh. However the regulation was there for a reason and designed to ensure that the policyholder had the necessary information to determine what needed to be done in order to reinstate a policy.

Justice Chalmers agreed both with the result of Arbitrator Bialkowski and his analysis. He noted (see paragraph 22) that the onus is on the insurer to strictly comply with the statutory condition if it seeks to unilaterally terminate an insurance policy in mid-contract.

Justice Chalmers stated (paragraph 21) that the cancellation letter must include the essential elements that were set out in s. 11 (1.3) and while that does not mean every punctuation mark or capitalization in the notice of termination must be correct, it does mean that the

essential elements of the legislative requirements must be there for the termination to be effective.

Justice Chalmers concluded that the wording of s.s 11 (1.3) and (1.4) of the statutory conditions were clear in their requirement that the cancellation notice must set out the two amounts: the amount owing on the contract at the time of notice and the amount of the administration fee.

At paragraph 37 Justice Chalmers states,

> "I am of the view that the breakdown is 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."

Despite the creative argument of Pembridge concerning what a reasonable insured might surmise from both the letter of October 28, 2020 and from the notice of cancellation, I find that Justice Chalmers makes it clear that it is the notice of termination that must include this information. I agree with the Fund that to allow otherwise would be contrary to the case law and the wording of the regulation itself. I agree, as Justice Davies stated in *Allstate v. Ontario* (*supra*) that the cancellation notice is to be the one-stop source of information and not multiple letters or communications between the insured and insurer.

As the facts of this case are, in my view, indistinguishable from the facts in *Definity v. Economical*, I am bound by Justice Chalmers's decision and I conclude that the cancellation notice of Pembridge did not meet the requirements of s. 11 (1.3) and (1.4) of Regulation 773 and accordingly the Pembridge policy remained in full force and effect and is the priority insurer for the claimant with respect to the accident of April 19, 2021.

COSTS

The arbitration agreement provides that if the applicant is unsuccessful then the applicant will pay to the respondents its costs of the arbitration and will also be responsible for the costs of the arbitrator, and I so find.

If the parties cannot agree on the amount of costs then I would ask them to contact me and we can schedule a costs hearing.

DATED THIS 19th day of July, 2024 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors
1700 – 438 University Avenue
TORONTO ON M5G 2L9