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

ECHELON INSURANCE COMPANY Applicant

and

COACHMAN INSURANCE COMPANY Respondent

AWARD

COUNSEL APPEARING

Alysha D. Bayes, counsel for the Applicant, Echelon Insurance Company (hereinafter called Echelon).

Jennifer Cosentino, counsel for the Respondent, Coachman Insurance Company (hereinafter called Coachman).

INTRODUCTION

This matter comes before me as a private arbitrator pursuant to the *Arbitration Act* 1991 and the *Insurance Act* R.S.O. 1990 c. I8 as amended and Regulation 283/95 to arbitrate a dispute as to which of two insurers is obliged to pay statutory accident benefits to the claimant as a result of a motor vehicle accident that took place on November 22, 2022.

The parties selected me as their arbitrator on consent and an arbitration agreement was submitted by the parties dated July 3, 2024. The hearing in this matter proceeded by way of a written hearing only. It included an Agreed Statement of Facts, a Joint Document Brief, submissions as well as various Books of Authority.

By way of background, on November 22, 2022 the claimant was involved in a motor vehicle accident. At the time of the accident the claimant was a backseat passenger in a vehicle travelling on Highway 401 westbound when it was involved in a rear-end collision. She submitted an OCF-1 to Coachman. Coachman did not respond to the OCF-1 and the claimant subsequently submitted an OCF-1 to Echelon. Under both OCF-1s she claimed that the insurer to whom she

was applying were the insurers of a 2015 Kia Forte. Echelon commenced paying statutory accident benefits and commenced these priority proceedings as against Coachman.

These events have resulted in numerous issues between the parties including but not limited to issues of deflection, cancellation and obligation to respond to an OCF-1.

The Arbitration Agreement sets out in a very broad fashion the issue for me to determine being "to determine all matters in dispute between the parties arising out of the priority dispute". However, each of the insurers in their various submissions set out the issues they felt were before me.

According to Echelon the following are the issues for my determination:

1. Was Coachman obliged to respond to the OCF-1?

2. Did Coachman's failure to respond to the OCF-1 constitute "deflection"?

3. Is Coachman's ostensible policy cancelled relevant to the issues at hand?

4. What are the consequences that flow from Coachman's deflection of the claimant's OCF_1?

Coachman in its submissions raises some additional issues:

1. Did Echelon provide valid notice of the priority dispute?

2. Is an insurer obligated to respond to an OCF-1 when the claimant is not "an insured person" under s. 3.1 of the Statutory Accident Benefit Schedule?

3. Irrespective of whether any notice of cancellation sent by Coachman was valid or not, was there a mutual intention between the claimant and Coachman that the coverage would no longer continue under the Coachman policy?

Both parties raise issues with respect to costs.

FACTS

The parties did provide an Agreed Statement of Facts. I set out the relevant portions of the Agreed Statement of Facts below and as well any additional facts that I have found as a result of my review of the Joint Document Brief.

On November 22, 2022 after the claimant was involved in the motor vehicle accident she obtained legal representation. She provided her legal rep with a "pink slip" indicating a policy of insurance with Coachman.

Coachman did provide insurance to the claimant for a 2015 Kia Forte under policy X75101553-5 covering a policy period of July 26, 2021 to July 26, 2022. The claimant was the named insured under that policy.

According to the pink slip that formed part of the Joint Book of Documents, that policy was renewed as the pink slip indicates coverage from July 26, 2022 to July 23, 2023 thus encompassing the date of the motor vehicle accident of November 22, 2022.

By letter dated August 31, 2022 Coachman advised the claimant that her payment made on August 26, 2022 had been returned by the financial institution. The letter indicates that the claimant was on a monthly pay plan and that it had now been suspended.

The letter advised that the claimant's policy would be cancelled for non-payment effective at 12:01 a.m. on October 3, 2022. The relevant portions of the letter are set out below but it is important to note that in the top right-hand corner of the letter are the words "registered."

The claimant's payment options are noted to be:

> "1. Pay $490.52 which includes your return payment and may include a returned payment fee, before September 26, 2022 and we will reinstate your monthly pay plan. Once payment is received regular scheduled withdrawals from your bank account will resume and your insurance policy will remain in effect.
>
> 2. Wait to pay until after September 26, 2022. Your monthly pay plan will remain suspended and then you will be required to submit payment in the amount of $931.02 before October 3, 2022. This includes the outstanding returned payment of August 26, 2022 plus may include a returned payment fee, as well as a September 26, 2022 payment. Once payment is received regular scheduled withdrawals from your bank account will resume and your insurance policy will remain in effect."

The letter indicates that certified payment methods are shown on the reverse side of the letter. Four different certified payment methods are outlined including credit card, debit, online banking, certified cheque, money order or cash or debit payment made through the broker.

The letter further indicates:

> "Even if you do not want to maintain your insurance policy, you are required to pay $171 for the time your policy was in effect which includes any returned payment fees. Choosing this option means your policy will be cancelled effective 12:01 a.m. on October 3, 2022."

The letter provides the broker's name and telephone number. The letter does not indicate an address for either Coachman or for the broker.

According to the Certificate of Insurance on or about October 17, 2022 the claimant entered into a new policy of insurance with Echelon with an effective date of October 18, 2022 and an expiry date of October 18, 2023. The policy covered the 2015 Kia and bore policy number X400030521. There is no dispute that the Echelon policy was in full force and effect and that the claimant was a named insured on that policy on the date of loss of November 22, 2022.

On January 9, 2023 the claimant's legal representative faxed an OCF-1 (Application for Accident Benefits), Authorization and Direction to Coachman. The letter references the proper policy number and provides the name of the claimant. The OCF-1 under part 4 indicates that the application is being made based on the claimant's own policy with Coachman. She advises that she is the named insured under that policy and that the vehicle insured is the Kia Forte. The OCF-1 is signed by the claimant and dated January 9, 2023.

Coachman did not respond to the OCF-1. Coachman did not communicate in any way with the claimant or her counsel. Coachman did not send out an accident benefit package to the claimant.

Having received no reply from Coachman, the claimant's representative faxed an OCF-1 and Direction and Authorization to Echelon on March 21, 2023. The letter is dated March 15, 2023. The OCF-1 is signed March 15, 2023. It is identical to the one sent to Coachman other than it identifies the Echelon policy under part 4.

Echelon accepted the application and commenced paying statutory accident benefits.

On or about April 20, 2023 a representative of Echelon took a written statement from the claimant. Her legal rep was present during this statement. The claimant advised:

> "When I retained my legal representation, I provided them with an incorrect policy document (pink slip). The one I provided to them is for my insurance company I had prior to being insured by Echelon Insurance Company under policy number X400030521. As a result of this my legal representative submitted a claim to Coachman Insurance Company on January 9, 2023. My legal representative has confirmed the fax delivering the 10-page document was completed on January 9, 2023. My legal representative also confirmed they have not received any response from Coachman Insurance about the submitted Application for Accident Benefits OCF-1 form. … We have since received a response to the Application for Accident Benefits OCF-1 from Echelon Insurance Company but no response from Coachman Insurance Company. … Coachman Insurance Company has not provided any response to the Application for Accident Benefits OCF-1 form to date. I have not received any correspondence from Coachman Insurance Company, this includes but not limited to phone call, letters, e-,mail text messages etc."

On June 6, 2023 Echelon sent a letter to Coachman via fax advising that it took the following position:

1. Coachman was the first insurer to receive the completed application and as a result Coachman should have commenced payments to the Applicant, investigate priority and then put any other insurer on notice as appropriate.

2. By not responding to the claimant's application, Coachman had failed its obligations under both the SABS and Regulation 283/95.

3. The letter is "a formal demand for arbitration". "We hope that it will not be necessary to pursue arbitration however, to preserve our rights to pursue this matter, we are now issuing a formal demand for arbitration in respect of this priority dispute."

The letter from Echelon to Coachman also included a copy of the original fax by the claimant's representative to Coachman including the OCF-1 that had been sent on January 9, 2023.

By e-mail dated June 27, 2023 a senior adjuster at SGI Canada wrote to the Echelon representative with respect to the June 6 letter. The e-mail advised:

> "As discussed today, 'the claimant' was aware of her active policy with Echelon Insurance as of October 18, 2022 following her cancellation at Coachman Insurance. So she was well aware of who her insurer was when she was involved in this accident on November 22, 2022, a month following her policy inception with Echelon.
>
> We are unaware of the reasons why she/her legal representative chose to send a fax to an incorrect insurer knowing she had an active policy with Echelon for the date of loss.
>
> We are not in a position to accept priority at this time."

By letter dated June 28, 2023 Echelon served the Notice to Applicant of Dispute Between Insurers on the claimant's legal representative. This document indicated Echelon's position that Coachman was obliged to respond to the OCF-1 as it was the first insurer to receive an Application for Accident Benefits and its failure to do so constituted a deflection. Echelon advised it would be commencing an arbitration. There is no evidence that this letter and/or the Notice to Applicant of Dispute Between Insurers was served on Coachman.

On June 28, 2023 counsel for Echelon issued a Notice of Commencement of Arbitration and Appointment of Arbitrator which set out in detail Echelon's position vis-à-vis Coachman. Included in the Notice to Commence Arbitration was a statement by Echelon that they took the position that their letter of June 6, 2023 constituted written notice in accordance with s. 3(1) of Regulation

283/95. Echelon denied that it was obliged to use any specific form to provide notice of a priority dispute to the other insurer.

PARTIES' SUBMISSIONS

Echelon

It is Echelon's position that Coachman was obliged to respond to the OCF-1 sent by the claimant's legal representative to them on January 9, 2023.

Echelon points to s. 2.1(6) of Regulation 283/95 which states:

> "The first insurer that receives a completed application for benefits from the Applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits."

Echelon submits that Coachman is an insurer and that it received an OCF-1 from an "Applicant" and accordingly Coachman was obliged to respond.

Echelon cites a number of cases which support the notion that as long as there is some nexus between the Applicant and the insurer to receive the first OCF-1, that they are obliged to accept the OCF-1 and commence paying benefits subject to the later priority dispute. Echelon submits that as long as the claimant chose that first insurer to send their application to based on the non-arbitrary belief that the insurer provided coverage on the relevant vehicle, that that is sufficient to require that insurer to accept the application and commence paying benefits (see *Zurich Insurance Co. v. Chubb Insurance Co. of Canada*, 2015 SCC 19 where the Supreme Court of Canada upheld the dissenting reasons of Justice Juriansz in 2014 ONCA 400). Echelon also relies on the arbitration decision of *Co-operators General Insurance Company v. Economical Mutual Insurance Company*: decision Arbitrator Samworth, September 9, 2022. In that case the claimant had submitted a pink slip to Economical. Economical wrote and advised that there was no such policy. In fact, the pink slip was fraudulent. The arbitrator concluded that despite the fraudulent nature of the pink slip and the fact that there was no actual policy with Economical, that it was still obliged to respond to the OCF-1 in accordance with Regulation 283/95.

Echelon submits that the evidence is clear and there is no dispute that Coachman did not respond in any way to the applicant's OCF-1.

Echelon therefore submits that Coachman deflected the OCF-1 and having done so an appropriate penalty should be made against Coachman in accordance with the Regulation. Echelon points to s. 2.1(7) of Regulation 283/95 which states:

> "An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and

> disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance."

Echelon also takes the position that the Coachman policy was, in any event, not properly cancelled prior to the date of loss and therefore was in full force and effect on the date of loss. Echelon points to the following failures in the Notice of Cancellation:

1. There was no evidence provided that the letter had been sent via registered mail such as a tracking number or receipt.

2. While the cancellation letter references a potential administration fee, it does not identify the administration fee, whether it is being charged or not or the amount of the fee contrary to statutory condition 11(1.3) of Ontario Regulation 777/93.

3. The cancellation notice does not contain an address to which payment may be sent again contrary to statutory condition 11.

4. The cancellation date set out in the letter of October 3, 2022 at 12:01 a.m. is inconsistent with the payment demand to take place before September 26, 2022 and also fails to outline the requisite deadline of "noon the business day before the cancellation date" again as required under s. 11 of Regulation 777/93.

Echelon submits that s. 11 of Regulation 777/93 is mandatory. It submits that the case law is clear that if the notice of termination does not meet the requirements that are set out in the Regulation that that termination is ineffective and the policy remains in full force and effect pending proper cancellation (see *Echelon Insurance Company v. HMQ* 2016 ONSC 5019, *Definity Insurance Company v. Allstate Insurance Company and Gore Mutual Insurance Company* (preliminary decision Arbitrator Bialkowski October 6, 2022 affirmed on appeal 2024 ONSC and *Allstate Insurance Company v. HMQ*, 2020 ONSC 830 (Justice Davies)).

Echelon submits that as the Coachman policy therefore remained in full force and effect, that it is the priority insurer under s. 268 of the *Insurance Act* as it received the first OCF-1 and failed to dispute its obligations to pay in accordance with Regulation 283/95.

In regard to the latter, Echelon submits that s. 3(1) of Regulation 283/95 requires an insurer disputing priority to give written notice within 90 days of the receipt of the completed application for benefits to every insurer who it claims is required to pay under that section. As Coachman failed to put Echelon on notice and dispute priority in accordance with the Regulation, it can now no longer take the position that priority should rest elsewhere.

Echelon submits that whether it is as a result of the deflection by Coachman and/or the fact that their policy was not properly cancelled and it failed to commence the priority dispute, that Coachman should be found to be obliged to pay statutory accident benefits to the claimant and to reimburse Echelon. Echelon points to the decision of the Court of Appeal in *Kingsway General*

Insurance Company v. Ontario, 2007 ONCA 62. In that case, the court noted that s. 2 of Regulation 283/95 is critically important to ensure that persons injured in car accidents receive their statutory accident benefits in a timely fashion and without having to be caught in the middle of a dispute between two insurers over which one should pay. The court stated:

> "Insurers cannot avoid their obligation under section 2 by claiming that another insurer should pay or that an insurance policy was cancelled shortly before the accident. If they could deny an application for accident benefits on either of these grounds, section 2 would be rendered meaningless."

Echelon submits that Coachman should not be allowed to "shirk its obligations: under Regulation 283/95 and that an appropriate remedy for its deflection is to require Coachman to administer the accident benefit file.

Coachman

Coachman takes the position that this is not a case of deflection. Rather, Coachman submits that the claimant in this matter did not meet the *prima facie* requirement that they qualified as an insured person under s. 3(1) of Regulation 283/95 nor did they meet the definition of an insured person under the Statutory Accident Benefit Schedule. Coachman submits that if the claimant is not an insured person under their policy then there is no obligation for them to accept the OCF-1 and therefore there can be no deflection.

Coachman submits that it is abundantly clear that their policy was cancelled on August 31, 2022 prior to the motor vehicle accident. Coachman submits that whether the policy is or is not properly cancelled is irrelevant in the terms of this priority dispute. Coachman points to the fact that the claimant entered into a new contract of insurance with Echelon in October of 2022 well before the motor vehicle accident thus confirming a mutual agreement that the Coachman policy had been cancelled.

In these circumstances Coachman submits that where a claimant is not an insured person under their policy at the time of the accident and where they held valid insurance elsewhere and had clearly severed their relationship, that the Regulation cannot be interpreted to suggest there is an obligation for Coachman to accept an OCF-1, begin to administer benefits and move through the priority dispute process.

Coachman submits that there was a clear meeting of the minds between Coachman and the claimant that the policy was terminated irrespective of whether the cancellation met the requirements of the legislation. Coachman submits that even if the policy was not properly cancelled, that case law does not support that the policy would continue to exist indefinitely in circumstances where a claimant has clearly elected to insure themselves elsewhere.

Coachman relies on the decision of the Court of Appeal in *Ontario (Finance) v. Elite Insurance Company*, 2018 ONCA 809 and the subsequent decision following the Court of Appeal decision

of Arbitrator Shari Novick in *Pafco Insurance Company v Gore Mutual Insurance Company* (released July 12, 2023).

In the *Ontario v Elite* (*supra*) decision the claimant was injured in a motor vehicle accident. Elite had insured the claimant under an automobile policy for a six-month term which had then been renewed with the second six-month term ending on September 20, 2010. The accident occurred on December 29, 2011.

The Elite policy required policyholders to install a device in their car to record driving behaviour. The claimant was advised a number of times that if he failed to install and register the appropriate device his policy would be cancelled. The claimant never installed the device.

The claimant was sent a letter by registered mail notifying him his policy would be cancelled effective September 20, 2010. On September 30, 2010 the claimant obtained insurance from AXA for the same car that had been insured under the Elite policy. The AXA policy was also cancelled prior to the motor vehicle accident.

The claimant applied to the Fund and the Fund put both Elite and AXA on notice. Ultimately, the arbitration revolved around whether the Elite policy was in force on the date of the motor vehicle accident and AXA did not continue to participate. Section 236(5) of the *Insurance Act* was one of the key provisions reviewed by the court which states:

> "A contract of insurance is in force until there is compliance with subsections (1), (2) and (3)."

The issue for the court was whether the Elite policy lapsed at the end of the six-month term irrespective of whether it was properly cancelled and/or whether the conduct of the claimant in obtaining a new policy would bring the policy to an end by virtue of the mutual agreement of the parties.

The court concluded in the circumstances of that case that the arbitrator was correct in concluding that the policy was cancelled by virtue of the mutual agreement of the parties. Coachman seeks to argue that the facts of this case and the rationale apply here and that as the claimant voluntarily entered into a new policy with Echelon prior to the motor vehicle accident, that I should find that the Coachman policy was effectively cancelled by mutual agreement of the parties.

As noted, Coachman also relies on the decision of Arbitrator Novick in *Pafco v. Gore*. In that case the claimant was a pedestrian hit by a car on February 3, 2020. The car was later determined to be insured by Gore. However, Intact and Jevco had both insured the claimant prior to the accident but took the position their policies had been properly cancelled.

Jevco and Intact in that case both agreed that they insured the claimant at one time but denied that their policies were in force on the date of loss. The question for the arbitrator was whether

the policies had been properly cancelled.

The Intact policy had been cancelled on October 14, 2014 for non-payment. There were actually two Jevco policies. One cancelled August 11, 2016 for non-payment and a second policy which the insured himself had requested be cancelled.

The arbitrator concluded that the Intact policy had not been properly cancelled and that the first Jevco policy had also not been properly cancelled as required by Regulation 777/93.

Coachman in this matter points to Arbitrator Novick's comments at paragraph 50 where she states:

> "I quote at length from the above decision because in my view it is a real 'game changer'. The Court of Appeal essentially stated that while section 236(5) of the Act ousts the operation of the common law regarding when and how policies may lapse, it does not preclude a consideration of other circumstances that may have brought the policy to an end. Justice van Rensburg has clearly signaled that the fact that an insured has obtained a new 'replacement policy' is a significant fact to consider, and that it satisfies the underlying policy concern of coverage being continued when an insurer's attempt to cancel or not renew a policy does not comply with the requirements in the statutory condition."

Arbitrator Novick goes on to point out that the majority of the Court of Appeal in the *Ontario v. Elite* case set out that their conclusion was consistent with a modern approach to statutory interpretation noting that it would be an absurd result to have a literal interpretation of s. 236(5) without looking at the surrounding facts as it could result in keeping coverage alive indefinitely in a situation where a policy had later been validly cancelled by the insurer or the insured had chosen to terminate the policy and replace it with coverage under a different contract.

Arbitrator Novick went on to take the position that with respect to both the Intact policy and the Jevco policy, that the party's actions indicated a mutual intention to terminate coverage under those policies and therefore neither policy was in effect on the date of loss.

Coachman states that the fact the claimant entered into a new policy with Echelon prior to this accident supports a mutual intention that their policy was cancelled irrespective of whether it met the requirements of the Regulation and I should therefore find that the Coachman policy was not in full force and effect on the date of the accident.

Coachman also submits that even if I find that this is a case of deflection, that that should not result in a finding by an arbitrator that the deflecting insurer should have a permanent responsibility to administer and pay the accident benefits claim. Coachman submits that even if I find that they have deflected, I must go on to determine whether or not they are actually the priority insurer and if they are not then the claim should remain with the correct insurer. In this case, if the policy was properly cancelled then irrespective of any deflection I would have to

conclude that Echelon was the priority insurer and therefore they should continue to administer and pay the accident benefit claim.

Coachman submits it has not been provided with valid notice with respect to this priority dispute. Coachman takes the position that it was not a deflecting insurer and therefore it does have the right to rely upon whether or not Echelon provided it with proper notice under Regulation 283/95. Coachman does acknowledge that there is case law to suggest that if it were a deflecting insurer then it could not rely on some of the defences under Regulation 283/95 as against the Applicant.

Coachman takes the position that the letter of June 6, 2023 was not a valid notification to it of Echelon's intention to pursue a claim for priority as required under Regulation 283/95. As I understand it, Coachman argued that a proper Notice of Dispute to Applicant should have been served on Coachman as well as on the claimant and failure to do so means that Echelon does not have the right to pursue this claim as against Coachman and the arbitration should be dismissed on that basis.

ANALYSIS AND FINDINGS

While the facts in this case are relatively straightforward and undisputed, the issues are complex and findings on one issue are interdependent on conclusions with respect to other issues. Having worked my way through the excellent submissions of the parties, the complexity of the case law and the legislation, my ultimate conclusion is that Coachman is the priority insurer on the grounds that the policy was not properly cancelled prior to the date of loss. I also find Coachman deflected the application for accident benefits and various consequences flow from that.

1. <u>Was Coachman obligated to respond to the OCF-1 and if so, was its failure to respond to the OCF-1 a deflection?</u>

It is my finding that Coachman received the first completed Application for Accident Benefits when it was faxed to it by claimant's counsel on January 9, 2023 and that Coachman was obligated to accept the OCF-1 and commence paying benefits to the claimant with the right to initiate a priority dispute under Regulation 283/95.

Section 2.1(6) of Regulation 283/95 was set out earlier. That section is clear that the first insurer who receives a completed application from an Applicant <u>shall commence paying benefits required under the Schedule pending any priority dispute</u>.

I agree with Echelon that there was a more than sufficient nexus between the claimant and Coachman to require Coachman to respond. The claimant had a policy of insurance with Coachman which had covered the time period of July 26, 2022 to July 26, 2023. She had a pink slip confirming that. While Coachman had tried to cancel the policy by their letter of August 31, 2022 for non-payment, that did not negate the nexus between the claimant and Coachman. The claimant or her legal counsel's choice to send the OCF-1 to Coachman was not arbitrary albeit it

was under the mistaken belief that that was the appropriate policy to send their application to. The Supreme Court of Canada in *Zurich v. Chubb* (*supra*) made it quite clear when upholding the dissenting decision of Justice Juriansz that as long as the claimant's choice as to where to send their application was not random or arbitrary and there was some nexus, that that then required that insurer to commence paying statutory accident benefits.

In the *Zurich v. Chubb* case, that proposition applied even though the Chubb policy was in fact not a motor vehicle liability policy. Justice Juriansz noted that it was the overriding public policy of the priority dispute regulation to ensure timely delivery of benefits to people insured in car accidents in Ontario. Justice Juriansz quotes Justice Laskin from the case *Kingsway General Insurance Company v. Ontario Minister of Finance*, 2007 ONCA 62 where he stated, "I am inclined to agree … only in the most extreme cases where the connection with the insurer is totally arbitrary should the insurer refuse to pay." I note that as Justice Laskin pointed out in *Kingsway v. Ontario* (*supra*) that if an insurer could avoid their obligation under s. 2 by claiming that their policy had been cancelled shortly before the accident and thus deny an application for accident benefits that s. 2 of Regulation 283/95 would be rendered meaningless. This is critically important to make sure that insured people are not prejudiced by being caught in the middle of a dispute.

I therefore find that in this case there was a more than sufficient nexus between Coachman and the claimant and that as her choice was not random or arbitrary that Coachman had an obligation to accept the OCF-1 and commence paying benefits. The Regulation makes reference to the "Applicant". I find that there is no requirement that the individual be an insured person under the insurer's policy at the time the application is made in order for the insurer to be obliged to respond. This again would render s. 2 to be meaningless. Any argument as to whether that individual is an insured person under the contract is designed to be the subject matter of a priority dispute.

The facts show that Coachman not only did not accept the OCF-1 but they did not respond in any way to the document they had received through the legal representative of the claimant. They made no effort to contact the claimant, send a letter, make a phone call or even call up her counsel to say they were not accepting the application. With respect, this is unacceptable behaviour on the part of an insurer considering their obligations under the priority Regulation. Even if Coachman was intending to take the position that the claimant was not an insured under their policy, there should have been some sort of response to the claimant. This clearly constituted a deflection for which there should be an appropriate penalty which I will address at the conclusion of these reasons.

2. <u>Did Echelon provide valid notice of the priority dispute, and if it did not, can Coachman rely on that breach?</u>

Coachman acknowledged in its submissions that the law is clear that a deflecting insurer cannot rely on defences set up in Regulation 283/95 as against an insurer that has accepted the OCF-1 and administered the accident benefit claim.

In this case, Coachman argues that the written notice (letter of June 6, 2023) is not proper written notice to Coachman as required under the Regulation. Coachman submits it should have received the same notice that was delivered to the Applicant in the prescribed form.

While industry practice suggests that more often than not insurers put each other on notice using the "Notice to Applicant of Dispute", I agree with Echelon that the Regulation does not specifically require that that document be used insurer to insurer but that the Regulation makes it clear that that document is to be provided to the insured. It is a matter of consumer protection as that document clearly outlines to the insured that this is a priority dispute as between two insurers which will not affect his or her entitlement to benefits and what their various rights may be in terms of the priority dispute. I find that the letter of June 6, 2023 that was sent to Coachman by Echelon provides all the necessary information to properly put Coachman on notice as required by the Regulation.

Even if I am wrong and Echelon was required to provide the same notice to Coachman that it provided to its insured, I have concluded that in this case Coachman deflected the first OCF-1. Therefore, I also find, and Coachman does not seem to disagree in terms of their submissions, that having found to be a deflecting insurer it cannot rely upon any technical defences or irregularities under Regulation 283/95 with respect to the priority dispute initiated against it by Echelon.

This is consistent with the decision of Arbitrator Jones in *Liberty Mutual Insurance Company v. Commerce Insurance Company* (July 2021). I do note that that decision was upheld by Justice Lissaman (2001 Carswell Ont 4710). In the *Liberty v. Commerce* case a pedestrian was struck by a car that was insured by Liberty. Commerce insured the pedestrian's spouse. The pedestrian applied to Commerce sending in the appropriate OCF-1. There were some communications between Commerce and the claimant but essentially between December 1996 and July 1998 nothing happened. Commerce did not accept the application nor did it make any payments. As a result, the claimant's lawyer sent another OCF-1 to Liberty. Commerce then took the position that as they had now submitted their OCF-1 to Liberty that effectively they were withdrawing the application as far as Commerce was concerned. Liberty then commenced a priority dispute and Commerce took the position that Liberty was out of time.

Arbitrator Jones stated:

> "I have considerable difficulty with Commerce, having failed to comply with the law and having acted in a way as to unnecessarily delay the payment of accident benefits to the injured party to now turn around and argue that they still ought not to pay due at very best to a technical argument that they themselves have ignored. To accept Commerce's position would be to violate both the spirit and the intent of the Regulation. It would simply encourage insurers to comply with the law in the hope that the injured party will go elsewhere to get benefits."

Justice Lissaman agreed with Arbitrator Jones's conclusions that as Commerce received the first completed application for benefits it should have responded. It failed it to do so. It then did not serve a Notice of Dispute within the 90-day period as required under s. 3 of Ontario of the Regulation and accordingly it had no right to argue that Liberty failed to serve the Notice of Dispute in time. In this case the arbitrator's order finding Commerce as the priority insurer in the circumstances was upheld.

In this case, I find that Echelon commenced its priority dispute as required under the Regulation and further that as Coachman deflected the first application, that it cannot now argue based on some technicality that Echelon does not have a right to pursue a priority dispute as against it.

3. Was the Coachman policy properly cancelled?

I find that the Coachman policy was not properly cancelled as it failed to meet numerous requirements of statutory condition 11(1.3) of Ontario Regulation 777/93.

The starting point is s. 237(1) of the *Insurance Act* which states as follows:

> "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 coverage 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 grounds set out in the Regulation."

Section 11(1.3) of Ontario Regulation 777/93 is as follows:

> "11(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 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 offence notice 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."

Echelon in their submissions pointed to a number of failures in Coachman's cancellation notice that resulted in non-compliance with statutory condition 11(1.3). These included (a) the failure

to provide evidence that the letter was sent by registered mail, (b) the failure to identify the administrative fee being charged (or not) and providing no mechanism for the claimant to determine whether the administrative fee complied with part XV of the *Insurance Act*, (c) not providing an address to which payment can be sent, and (d) failure to provide the proper cancellation date and time.

Having carefully reviewed the letter sent by Coachman to the claimant, I am satisfied that there are numerous deficiencies that would render the letter non-compliant with s. 11(1.3). In particular, I find that the letter is not clear with respect to whether an administrative fee is being charged and if so what that amount is. I also find that the letter fails to give the claimant any address as to where to send the payment should he choose to pay, for example, by certified cheque or money order. While that option is provided to him, the letter does not provide the address of Coachman nor does it provide the address of the broker. I also find the information set out in the letter as to the date and timing that the claimant has to make his payments is quite unclear. I agree with Echelon that it does not comply with s. 11(1.3).

In reaching that conclusion, I have taken into consideration numerous cases that have dealt with this issue. I reviewed *Definity Insurance Company v. Allstate Insurance Company and Gore Mutual Insurance Company*, a decision of Arbitrator Bialkowski dated October 6, 2022. In that case, Justice Arbitrator Bialkowski concluded that the notice of cancellation did not provide the specific amount clearly indicating what amount is due under the contract and what, if any, administration fee is being charged. He held that that was an essential element of a notice of termination under s. 11(1.3) of Regulation 777/93 and that having failed to comply with an essential element that the policy was therefore in full force and effect on the date of the motor vehicle accident.

This matter was appealed and heard by Justice Chalmers (2024 ONSC (February 22, 2024)) and Arbitrator Bialkowski's decision was upheld. Justice Chalmers agreed that the clear wording of the Regulation required that the notice set out the two amounts (amount owing on the contract and the administrative fee) and that the failure to do so resulted in the policy not being properly terminated and therefore it could be accessed for the purpose of the priority dispute and statutory accident benefits.

On the issue of including an address for the purposes of making a payment, I reviewed the decision of Justice Davies in *Allstate Insurance Company v. Ontario (Minister of Finance)*, 2020 ONSC 830. The question for Justice Davies was whether a notice of termination was invalid under 11(1.3) of Ontario Regulation 777/93 where the notice of termination did not include an address where the insured person could deliver the unpaid premiums and administrative fee.

Justice Davies held that the plain language of the Regulation requires the termination notice to include the address to which the person can deliver the amount owing to avoid the termination of their policy. In this particular case, the policy was being cancelled mid-term.

Justice Davies noted that for an insurer to rely on a unilateral cancellation of a policy mid-term,

they must demonstrate that they complied with the statutory condition including the provision of the address where payment can be made. He held, "This interpretation is consistent with the plain language of the Regulation. It is also consistent with the purpose and policy rationale of the Regulation."

Justice Davies noted that while a standard of perfection is not required in the notice of termination, that the lack of an address is not a mere minor typographical error. The claimant in that case had been directed in the notice to provide payment to the broker "Brantford Commons Agency" but there was no indication in the notice of termination of that address.

Having found that the Coachman policy was not properly terminated, I move on to the argument put forward by Coachman that whether or not the policy was properly terminated is irrelevant as there was a mutual agreement as between the claimant and Coachman to terminate the policy. On this issue, Coachman relies heavily on the decision of the Court of Appeal in *Ontario (Finance) v. The Elite Insurance Company*, 2018 ONCA 809 and the application of that case to a priority dispute by Arbitrator Shari Novick on July 12, 2023. For reasons that follow, I find that the decision of the Court of Appeal and the application by Arbitrator Novick are distinguishable on the facts.

In the case before me, Coachman had a policy of insurance with the claimant covering the time period of July 26, 2022 to July 23, 2023. Therefore, on the date of loss of November 22, 2022, absent a proper cancellation of the policy, the policy was still in full force and effect and had not lapsed. That is quite a different factual scenario than the one in the *Ontario v. Elite* decision and the *Pafco v. Gore* decision considered by Arbitrator Novick (*supra*).

In the *Ontario v. Elite* case the claimant entered into a policy of insurance with Elite for a six-month term from September 20, 2009 to March 20, 2010. The policy was then renewed for a second six-month term which ended September 20, 2010. The accident occurred on December 29, 2011. The Elite policy was described as an "autograph" policy which required the policyholders to install a device in their car to record their driving behaviour. A policyholder was required to register online to receive the device. The claimant in that case never registered online, never received the device and never installed the device. The evidence was clear that he was well aware that that was an obligation under his policy and that if he did not install the device by September 2010 in that second six-month term, that his policy would be cancelled.

Elite then sent the claimant a letter in August of 2010 setting out that as of September 20, 2010 they would no longer be able to provide automobile insurance due to his failure to register on the internet and receive the data-transmitting device.

The claimant did not pursue any further coverage with Elite after September 20, 2010 and on September 23, 2010 he obtained insurance from AXA on the same car that had been insured under the Elite policy.

The Court of Appeal was asked to consider whether the non-renewal notice that Elite had sent

out in August of 2010 effective September of 2010 was or was not defective and if defective, whether that meant the Elite policy remained in full force and effect up to December of 2011 when the accident occurred.

The relevant provision considered by the Court of Appeal was s. 236(1) of the *Insurance Act*. Section 236(1) deals with an insurer and its obligations when "it does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms." Section 236 does not deal with cancellations. Section 238 of the *Insurance Act* deals with cancellation of a policy mid-term in accordance with Regulation 777/93.

The court held that it was not the intent of s. 236(5) to allow a contract of insurance to remain indefinitely in full force and effect where an insurer does not comply with the provisions with respect to notice of non-renewal or to vary the terms of the contract. The court stated:

> "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 section 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. 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."

My reading of the decision of the Court of Appeal is that it did not intend to change the law with respect to the requirement that an insurer comply with Regulation 777/93 in order to provide an effective notice of termination but rather intended to deal with the situation where the policy period had lapsed prior to the motor vehicle accident taking place and the insured had replaced that policy with a new one clearly indicating a recognition of the lapsed nature of the policy despite the defective notice.

In my view, this analysis does not apply to the situation before me. To suggest that it did would be to conclude that the terms and conditions for an insurer to terminate a policy with their insured as set out under s. 11(3.1) of the Regulation to be meaningless. Such an interpretation would encourage insurers to provide notices of termination that were non-compliant with the Regulation on the assumption that the insured would go and get coverage elsewhere. In the case before me, the Coachman policy, if not properly terminated, would have remained in full force and effect.

The facts before me do not involve a policy that had lapsed either six months or years prior to the motor vehicle accident. The policy period covered the timeframe within which the accident occurred and accordingly I conclude that the many years of case law both amongst arbitrators and judges with respect to the strict requirements of an insurer to meet their obligations under the Regulation when cancelling contracts still remains good law. If that policy is not properly cancelled (as opposed to a non-renewal) during its term, then in my view that policy continues

until there is a proper cancellation.

I did review carefully Arbitrator Novick's decision in *Pafco v. Gore*. I reviewed the details of that case in summarizing the submissions of Coachman. It is important to note that the Intact policy in that case had been cancelled for non-payment on October 14, 2014 and the motor vehicle accident occurred July of 2023. The Jevco policy had been cancelled August 11, 2016. Arbitrator Novick noted at paragraph 50 that in her view the decision of the Court of Appeal from *Ontario v. Elite* was a real "game changer". She noted that the Court of Appeal in that case had concluded that while s. 236(5) of the Act ousts the operation of the common law as to when and how policies may lapse, that it does not preclude a consideration of other circumstances that may bring the policy to an end. One of those circumstances is whether the insured has obtained a new replacement policy. With the greatest of respect to Arbitrator Novick, if she was intending to find that the Court of Appeal's decision would in essence eliminate the need for an insurer to comply with the Regulation to properly terminate the insured's policy and the effect of the failure to properly terminate being that the policy continues in full force and effect, then I disagree with Arbitrator Novick. However, the facts in her case were very different from the facts in this case. In her case, the policy period of the two insurers for which a claim was being made as against priority had long expired before the date of loss. In this case, the policy period of the Coachman policy fell within the date of loss. I therefore conclude that the Coachman policy was not properly cancelled and that the failure to meet the requirements of Regulation 777/93 means that the policy remained in full force and effect on November 22, 2022 when this accident occurred.

4. <u>What result flows from the finding that the Coachman policy was not properly cancelled?</u>

Having concluded that Coachman's policy was not properly cancelled on the date of loss, it follows that the Coachman policy must therefore respond to the claimant's request for statutory accident benefits. I have already found that as Coachman received the first OCF-1, that it was obliged to respond to the claimant and pay the claimant benefits in accordance with the Regulation. It could then dispute its priority vis-à-vis Echelon under s. 3(1) of the Regulation. However, Coachman did not accept the first application. It did not put Echelon under notice of a priority dispute and therefore failed to comply with the priority dispute process set out under Regulation 283/95.

The issue is really not which of these insurers should assume the payment of the benefits to the claimant based on s. 268 but rather whether Coachman should be obliged to take over the handling of this claim from Echelon and pay Echelon past benefits on the basis of its deflection. Section 2.1(7) of Regulation 283/95 sets out the "penalty" a deflecting insurer may face. The section provides that if the insurer does not comply with its obligation to "pay now dispute later" that it shall be required to reimburse the insurer for any legal fees, adjusting fees, administrative costs or disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance.

In the Court of Appeal decision of *Wawanesa Mutual Insurance Company v. Lombard Canada*,

2010 ONCA 383 the court noted that where an insurer has breached s. 2, that while that is a serious matter that deserves sanction, that such a breach does not "result in an insurer automatically being required to pay benefits to the claimants forever." Coachman in my view committed a serious breach of s. 2 of Regulation 283/95. Not only did they not accept the OCF-1 despite the clear nexus with the claimant, they failed to even communicate that position to the claimant. In my view, such conduct warrants a penalty. I therefore find that Coachman is obliged to pay to Echelon its costs of this arbitration and any adjuster's fees, administrative costs or disbursements that have been incurred to date.

Further, I find that Coachman must reimburse Echelon for any benefits paid to the claimant to date and that it now has the obligation to respond to the claimant's ongoing claim for accident benefits.

Section 2.1(6) of Regulation 283/95 states:

> "The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay benefits."

Coachman received the first completed application. Coachman is not entitled to dispute whether or not it was the priority insurer under s. 268 of the *Insurance Act* as it failed to provide the appropriate notice to Echelon. Accordingly, I find that Coachman is in essence the priority insurer in view of the improper cancellation and deflection.

COSTS

The costs of the arbitrator are payable by Coachman in these circumstances as are the legal fees of Echelon in relation to this arbitration. If the parties cannot reach agreement on those costs in the next 60 days, they can let me know and we will schedule a costs hearing.

DATED THIS 4th day of February, 2025 at Toronto.

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Arbitrator Philippa G. Samworth
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