CITATION: Echelon General Insurance Company v. Her Majesty the Queen, 2016 ONSC 5019
COURT FILE NO.: CV-1000403308
DATE: 20160811

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ECHELON GENERAL INSURANCE COMPANY Applicant/Respondent	*Jason Goodman*, for the Applicant/Respondent
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE Respondent/Appellant	*John Friendly*, for the Respondent/Appellant
	HEARD: August 2, 2016

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] This appeal from the preliminary award of Arbitrator Novick dated December 10, 2015, is brought by Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance. The Minister administers the Motor Vehicle Accident Claims Fund in the public interest as the "payer of last resort" pursuant to the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41. The respondent to the appeal, the Echelon General Insurance Company, issued the automobile insurance policy in question (the "Echelon Policy").

[2] The parties put an issue before the Arbitrator to be determined as a preliminary matter, based upon an Agreed Statement of Facts. The issue was whether the Echelon Policy had lapsed or expired prior to the date of an accident in which a claimant was injured.

[3] This issue required the interpretation and application of s. 236 of the *Insurance Act*, R.S.O. 1990, c. I.8. Section 236 places certain notice obligations on insurers regarding the renewal or non-renewal of a contract of insurance, and provides that the contract of insurance remains in force until the insurance company has complied with its notice obligations.

[4] The Arbitrator decided that the Echelon Policy expired prior to the accident in question despite s. 236. The Minister appeals from the Arbitrator's decision, submitting that the Arbitrator erred in law in her interpretation and application of s. 236. I agree.

Background

[5] On May 15, 2010, Mr. Abdiraham Farah (the "claimant") was involved in an accident. He was a pedestrian and was struck by a motor vehicle owned by Mr. Abdikarim Omer.

[6] The Echelon General Insurance Company had insured Mr. Omer for the vehicle that struck the claimant. The Echelon Policy was initially purchased for the period commencing November 29, 2008. It had a six-month term.

[7] On December 9, 2008, about ten days after the policy commenced, Echelon sent Mr. Omer a letter that purported to cancel the Echelon Policy due to nonpayment of a premium. The parties have agreed for the purposes of this proceeding that Echelon's attempt to cancel the Echelon Policy was invalid.

[8] Echelon received no response to its December 9, 2008 letter and there was no further communication between it and Mr. Omer. Thus, Echelon did not give any other notice to Mr. Omer regarding the Echelon Policy.

[9] The accident took place on May 15, 2010, about a year after the six-month policy term. Echelon then received an application for accident benefits on behalf of the claimant. In the arbitration, Echelon seeks reimbursement for the amounts it paid to the claimant.

[10] The claimant was not covered by any other automobile insurance policy on the date of the accident.

Arbitrator's decision

[11] The Arbitrator concluded that the Echelon Policy expired at the end of the six-month term and was therefore not in force at the time of the accident. She therefore found that the Fund was obliged to reimburse Echelon.

[12] The Arbitrator found that the Echelon coverage did not remain in place despite Echelon's failure to comply with the notice requirements of s. 236 of the *Insurance Act*. The Arbitrator reached this conclusion even though s. 236(5) expressly provides that "[a] contract of insurance is in force until there is compliance with [the s. 236 notice provisions]."

[13] The Arbitrator agreed that the legislative intention behind s. 236 was for insurers to bear the risk of an improperly cancelled contract. However, she found that the intention was not to extend coverage into perpetuity, with no offer and acceptance or premiums being paid. She found that very clear language would be required to do so, but did not explain why s. 236 was not clear in her view.

Analysis

[14] This appeal is properly characterized as an appeal on a question of law. The standard of review is correctness.

[15] The appellant Minister submits that the arbitrator erred in her interpretation of s. 236 of the *Insurance Act*. That section provides as follows:

> 236. (1) If an insurer does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms, the insurer shall,
>
> (a) give the named insured not less than thirty days notice in writing of the insurer's intention or proposal; or
>
> (b) give the broker, if any, through whom the contract was placed forty-five days notice in writing of the insurer's intention or proposal.
>
> (2) Subject to subsection (4), a broker to whom an insurer has given notice under clause (1) (b) shall give the named insured under the contract not less than thirty days notice in writing of the insurer's intention or proposal.
>
> (3) Notices given under subsections (1) and (2) shall set out the reasons for the insurer's intention or proposal.
>
> (4) Where, before a broker is required to have given notice to a named insured under subsection (2), the broker places with another insurer a replacement contract containing substantially similar terms as the expiring contract, the broker is exempted from giving notice under subsection (2).
>
> (5) A contract of insurance is in force until there is compliance with subsections (1), (2) and (3).
>
> (6) This section does not apply to prescribed types of contracts in prescribed circumstances. [Emphasis added.]

[16] I find that s. 236 is clear. Echelon failed to give notice of renewal or non-renewal as required by s. 236(1). Under s. 236(5), the Echelon Policy remained in force at the time of the accident. This conclusion is in keeping with accepted principles of statutory interpretation and it is not displaced by the cases put forward, none of which deal squarely with the issue in any event.

Statutory interpretation

[17] The proper approach to statutory interpretation is well-accepted. As set out in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

[18] Section 236 imposes a mandatory obligation on insurers to give certain notices, including notice of non-renewal. Section 236(5) provides, in turn, that the contract of insurance is in force until there is compliance with this notice obligation. The wording of the notice obligation and the consequences for failure to give notice are clear, in the grammatical and ordinary sense.

[19] In this case, the insurer submits that it does not bear the consequences of giving no notice because the policy had expired on its terms by the time of the accident. The insurer submits that the notice obligations only apply during the term of the policy. This interpretation is contrary to the plain words of the section.

[20] Under Echelon's interpretation, all an insurance company needs to do is wait until after the term of the policy and it can entirely avoid the obligations and consequences of s. 236. It could avoid the obligation to give notice of non-renewal. It could avoid the consequences of a failure to do so. This defeats the statutory requirement that an insurance company take steps (beyond the terms of the contract itself) to draw to the attention of an insured that an insurance policy is not being renewed. The insurer cannot simply rely on the policyholder having entered into the contract and therefore agreed to its term.

[21] The notice obligations required by s. 236 make it clear that it is not sufficient to simply rely on the term of the policy itself and termination under ordinary contract law. If that was sufficient, the legislatively-required notice of non-renewal would be unnecessary.

[22] An invalid notice of cancellation does not relieve from this problem. If the policy was not properly cancelled, it was in force and notice of renewal or non-renewal was required.

[23] Section 236 does allow for exceptions under s. 236(6). However, s. 236(6) does not apply in this case. There is no exception based on the term of the insurance policy in question.

[24] The consequence of a failure to give notice is expressly prescribed by the legislation in s. 236(5). The contract is in force until notice is given. Section 236(5) ousts the common law of contract under which an insurance policy may otherwise expire on its own terms.

[25] This interpretation is consistent with scheme and purpose of the *Insurance Act* and related legislation. Section 236 was introduced in 1990 as part of a group of reforms to Ontario's compulsory automobile insurance regime: *Insurance Statute Law Amendment Act*, S.O. 1990, c. 2, s. 47. As put in *Matheson v. Lewis*, 2014 ONCA 542, 121 O.R. (3d) 641, at para. 36, the compulsory automobile insurance regime "is clearly intended to protect innocent victims of automobile accidents from having no means of seeking damages from persons who might have caused those damages without having the protection of automobile insurance." The *Compulsory*

Automobile Insurance Act, R.S.O. 1990, c. C.25, s. 2(1) prohibits an owner of a motor vehicle from operating it on a highway "unless the motor vehicle is insured under a contract of automobile insurance."

[26] The additional notice obligations introduced as part of the 1990 reforms are consistent with the objectives of a compulsory insurance regime. The s. 236 notice provisions facilitate continuity of insurance by requiring that insurance companies take additional steps to draw to a policyholder's attention that their policy is about to lapse, and by providing that the insurance remain in force until the notice obligation has been fulfilled.

[27] The Arbitrator indicated that, under the Minister's interpretation, the policy would continue in perpetuity. On the contrary, under s. 236 the policy continues only until the insurance company discharges its statutory notice obligations. The obligation on insurance companies to give notice is not onerous, and the risk of non-compliance with the notice obligation falls expressly on the insurance company. The insurance company bears the risk if it makes a mistake in the notice process, as may have occurred here given the invalid notice of cancellation. Insurance companies are in the position to decide what processes they will put in place to minimize mistakes and thus mitigate their risk.

[28] The Arbitrator also said that, under the Minister's interpretation, the policy would remain in force without the payment of premiums. On appeal, the Minister submitted that the insurer remained entitled to the payment of premiums when a policy was continued in force under s. 236(5). The Minister relied upon s. 134 of the *Insurance Act* in this regard. It provides that once a policy has been delivered, the contract is binding on the insurer as if the premium had been paid, and provides under subsection (2) that the insurer may sue for unpaid premiums. This section was not drawn to the attention of the Arbitrator. However, even if this section does not apply, s. 236(5) unambiguously places the risk of non-compliance on the insurance company.

[29] I note one further argument that was raised for the first time at the hearing of this appeal. Echelon submitted that the notice of cancellation that it sent to its policyholder could satisfy the requirement to give notice of non-renewal. However, that notice was entitled "NOTICE OF CANCELLATION – AUTOMOBILE", and its contents referred to Echelon's decision to discontinue coverage effective one month after its commencement because a premium had not been paid. On its face, it is not a notice of non-renewal at the end of the six-month term of the Echelon Policy. It does not satisfy the obligation to provide notice of non-renewal.

[30] The Echelon policy was not effectively canceled. In turn, Echelon had a mandatory obligation to give notice of renewal or non-renewal under s. 236(1), and on the agreed facts it did not do so. The Echelon policy therefore remained in force at the time of the accident in question by virtue of s. 236(5). The Arbitrator erred in law in concluding otherwise.

Case authorities

[31] Both parties have put forward various case authorities in support of their position. Although none of the authorities expressly address the interpretative issue before the Arbitrator,

both the Arbitrator and Echelon relied on certain authorities and I therefore deal with them briefly here.

[32] The decision of the Supreme Court of Canada in *Patterson v. Gallant*, [1994] 3 S.C.R. 1080 is the main focus of the respondent's position. The Arbitrator acknowledged that *Patterson* was not determinative yet focused on it as well.

[33] The *Patterson* decision arose from different facts. In contrast to the case before me, a written offer to renew was given in *Patterson.* The issue was the significance of a "two-step" renewal process through which the insurer provided a "pink slip" along with its offer. The Court considered whether the pink slip was, itself, a policy, even though the insured had not responded to the offer of renewal. The Court concluded that the pink slip was not a policy, and because the offer to renew was clear and was not accepted, the policy lapsed and came to an end at its expiry date: *Patterson*, at p. 1090. The insurer was not required to separately cancel the policy: *Patterson*, at pp. 1095, 1096. The Court stated that in the context of automobile insurance, each renewal represented a new contract, requiring evidence of a further offer and subsequent acceptance, as well as consideration.

[34] As well as its different facts and issue, the *Patterson* case arose under a different legislative regime. It was an appeal from Prince Edward Island, which did not have the equivalent of Ontario's s. 236(5). It was not disputed that legislation could override the common law of contract: *Patterson*, at p. 1093. However, there was no P.E.I. legislation that did so.

[35] In its decision, the Supreme Court of Canada expressly allowed for the possibility that legislation could have an impact on its decision. The Court stated as follows at pp. 1095-1096:

> In the absence of legislation to the contrary, which does not exist in this case, a lapsed policy does not need to be formally terminated. [Emphasis added.]

[36] Thus, although the Court noted at p. 1089 that the common-law principles of offer and acceptance can be altered by legislation, there was no legislation to be considered in that case.

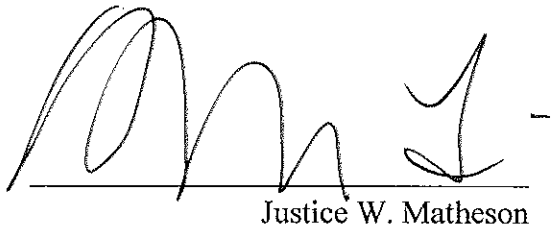
[37] Echelon relied on three other decisions in support of its position. The first is *Pomarico v. Petrovic* (2006), 36 C.C.L.I. (4th) 279 (Ont. S.C.), a case which is factually similar to *Patterson.* Notice of renewal was sent by the insurer, along with follow-up correspondence when the insured did not reply to the offer of renewal. When the dispute arose about whether the policy was in force at the time of an accident, the insured relied on the "pink slip" that was enclosed with the offer of renewal. The Court followed *Patterson.* No mention was made of s. 236, perhaps because the insurer had fulfilled its obligation to give notice under s. 236(1) and s. 236(5) would therefore not be engaged.

[38] The other two cases relied upon by Echelon are both arbitration decisions in which notice of cancellation was given but determined to be invalid: *Certas Direct Insurance Company and Security National Insurance Company*, February 2, 2012 (Arbitrator) and *The Economical Insurance Group and Wawanesa Insurance*, May 7, 2014 (Arbitrator). In both cases, the

Arbitrator relied on *Patterson*, but made no mention of its exception for legislation and no mention of s. 236 of the *Insurance Act*. To the extent that these decisions are put forward for the proposition that s. 236 does not apply after the term of the policy in question, they appear to be wrongly decided on the facts noted in the reasons for decision. However, it seems likely that s. 236 was not even put forward for consideration since it is not mentioned in either decision. These authorities do not adequately support the Arbitrator's decision.

Conclusion

[39] The appeal is therefore granted. In accordance with the agreement between the parties, the appellant, as the successful party, shall have its costs fixed at $5,000 inclusive of disbursements and any applicable taxes.



Justice W. Matheson

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