IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, and *ONTARIO REGULATION 283/95* THERETO;

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECHELON GENERAL INSURANCE COMPANY

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF FINANCE

(THE MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Respondent

ARBITRATION AWARD

COUNSEL:

Jamie R. Pollack and Jason H. Goodman for the Applicant

John Friendly for the Respondent

BACKGROUND:

1. Abdiraham Farah was struck as a pedestrian by a motor vehicle owned by Abdikarim Omer on May 15, 2010. An Application for payment of accident benefits under the *Schedule* was submitted on his behalf to Echelon General Insurance Company ("Echelon") a few months later. Echelon accepted his application and paid benefits to him. It then provided written notice to the Motor Vehicle Accident Claims Fund ("the Fund") of its intention to dispute its obligation to pay these benefits, on the basis that the policy that had been issued to Mr. Omer was cancelled in December 2008, well before the accident.

2. The Echelon policy was issued to Mr. Omer through a broker and provided coverage for the Dodge Caravan involved in the accident for a six-month period. Two months worth of premiums were charged to Mr. Omer's credit card at the outset, but were declined by his bank ten days into the policy period. Echelon sent a Notice of Cancellation letter to Mr. Omer the next day, purporting to cancel the policy. Echelon concedes that its attempt to cancel the policy was not in accordance with the Statutory Conditions, and therefore invalid.

3. Echelon initially argued that regardless of that fact, the policy would have lapsed at the end of its term in May 2009, well before the accident. That issue was argued as a preliminary issue, based on an exchange of written submissions. In a decision issued in December 2015, I agreed with Echelon and determined that the policy would have lapsed on its expiry in May 2009. The Fund appealed that decision. The Superior Court allowed the appeal and ruled that the policy remained in force at the time of the accident, by virtue of section 236(5) of the *Act.*

4. In this final "chapter" of the dispute, Echelon contends that the policy in question was cancelled by the insured, Mr. Omer, before the accident, and that despite the court's ruling that the policy had not lapsed at the end of its six-month term, it was therefore not in effect on the date of loss.

ISSUE:

1. Was the policy issued by Echelon to Mr. Omer "terminated by the insured at any time on request" in accordance with section 11(2) of the Statutory Conditions?

RESULT:

1. Yes, the policy was terminated by Mr. Omer in accordance with the Statutory Conditions, and was therefore not in force at the time of the accident.

THE EVIDENCE:

5. The parties filed an Agreed Statement of Facts covering the main points. Various documents were also filed, including the application for insurance and other policy documents from Echelon, the broker's notes and correspondence, and Echelon's underwriting file and rules. An "in-person" hearing was convened, at which counsel made thorough oral submissions. No *viva voce* evidence was called.

6. The above material discloses the following facts:

7. Mr. Farah was injured as a result of being struck by a Dodge Caravan that was owned by Mr. Omer. Mr. Farah was not a named insured or listed driver on any auto policy, nor was he a spouse or dependent of an insured. He submitted an application for payment of accident benefits to Echelon, and has been determined to be catastrophically impaired under the *Schedule*. The parties agree that Echelon had insured the vehicle in question at some point prior to the accident.

8. The accident occurred on May 15, 2010. The focus of the parties' submissions at the hearing, however, was on events that took place some eighteen months prior, in the first few weeks of the policy period. Echelon issued a policy to Mr. Omer with a six-month term, commencing on November 29, 2008. It was set to expire on May 29, 2009. The policy was placed through a broker, who had the authority to bind Echelon. A "down payment" of $1,014, equal to two months of premiums, was charged to Mr. Omer's credit card, but was declined by his bank on December 8, 2008.

9. As a result of the above, Echelon sent a Notice of Cancellation of the policy for non-payment of premiums to Mr. Omer the next day, by registered mail. It appears that the address on the envelope was incomplete and the letter was subsequently returned to Echelon. Echelon concedes that the purported cancellation was not in accordance with the Statutory Conditions in *Ontario Regulation 777/93*, and was therefore invalid.

10. The parties agree that the broker was informed of the purported cancellation on December 11, 2008. Dan Duclos from the broker's office wrote to Mr. Omer on the same day, and emailed a copy of Echelon's cancellation notice. Mr. Duclos, also advised in his email that "there are no coverages in force under the above noted policy through our office unless payment in the amount of $810.91 is made before December 23, 2008". His note ends with the statement - "We regret that this action was taken, however if coverage is required please contact our office immediately to discuss the matter". The broker's file contains a note indicating that Mr. Duclos spoke to the client on December 15, and that "he will call back ...regarding the NSF".

11. Mr. Duclos then received an email from an address identified as fa.asker@gmail.com on December 19, 2008. The parties agree that this note was sent by a friend of Mr. Omer's at his request. This message is at the crux of the parties' dispute. It states:

> *I am sorry to inform you that I will no longer be needing the insurance for my car. I put my car insurance under my dad, due to I can not afford the amount your asking for because my hours at work have been cut. Now I am paying only $160.00 which really works out for me. I just wanted to thank you for all the help you have done for me. In the future when my hours at work are back up, and when I'm 25 years of age, I do want to have my own car insurance. So I will be contacting you in the future.*

12. It appears that Mr. Duclos responded to the above note by email on December 22, 2008. He advised that –

> *This policy is being cancelled for non-payment currently and will be lapsing as of December 28. Unless you make a payment to have the policy reinstated, you will have a cancel for non-pay on your driving record, which will affect your rates in the future.*

13. The following note also appears in the broker's file, dated December 22, 2008 -

> *Echelon rec'd registered letter back from post office marked "unclaimed". Filed in their office. Note in file indicates that Dan has contacted insured by email and insured wants policy cancelled.*

This note was entered by Kim McNally at the same brokerage firm at which Mr. Duclos worked.

14. Counsel for the Fund referred to two further entries in the documents received from Echelon. One is dated December 11, 2008 and states that the policy was "reinstated and recancelled internally to clear O/S balance of $481.11". A later note dated October 25, 2010, almost two years after these events and a few months after the accident, indicates that the broker called Echelon regarding the policy, with Mr. Omer on the phone, and that they were advised by the Echelon representative that the "policy was cancelled for non-pay".

15. Finally, counsel for the Fund referred to various underwriting rules contained in a document provided by Echelon. One rule under the heading "Policy Cancellation" states that if the insured submits a request for cancellation for any reason, it "must be confirmed in writing".

RELEVANT PROVISIONS:

The following provisions are relevant to the issues before me:

Insurance Act:

> ***268(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > *2. In respect of non-occupants,*
> >
> > > *i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,*

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Reg 777/93 - Statutory Conditions - Auto Insurance:

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

(1.2) *Subject to subcondition (1.7), if the insurer gives a notice of termination under subcondition (1) for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the notice of termination shall comply with subcondition (1.3) and shall specify a day for the termination of the contract that is no earlier than,*

(a) the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or

(b) the 10th day after the insurer gives the notice, if the insurer gives the notice by personal delivery.

(2) *This contract may be terminated by the insured at any time on request.*

PARTIES' ARGUMENTS:

Echelon's submissions

16. Echelon contends that the evidence supports a finding that the policy in question was cancelled or terminated at the request of Mr. Omer, and was accordingly not in force at the time of the accident in May 2010.

17. Counsel noted that the termination of a contract of automobile insurance in Ontario is governed by section 11 of *Ontario Regulation 777/93*, known as the "Statutory Conditions". They are prescribed by the Minister of Finance and deemed to be part of every contract. He noted that sections 11(1) through 11(1.7) of the Conditions set out precise requirements for the procedure that an insurer must follow when it decides to terminate a policy – such as the method of delivery of notice (registered mail or personal delivery), the timing of delivery of the notice (thirty days before the termination date if sent by mail, or ten days if notice delivered personally) and specific details regarding when and how outstanding payments are to be made, or refunds provided. In contrast, section 11(2) – addressing the cancellation of a policy by an insured - simply states that an insurance contract "may be terminated by the insured at any time on request".

18. Counsel submitted that a fundamental principle of statutory interpretation is that the only reliable indicator of the Legislature's intention is the meaning of the legislative text, and if its meaning is clear, it should be the sole admissible evidence of legislative intent. He cited the Supreme Court of Canada's decision in *Ontario v. C.P. Ltd.* [1995] 2 S.C.R. 1028 in support of this contention. He contended that the email sent on behalf of Mr. Omer to the broker advising that "I will no longer be needing the insurance for my car" constitutes a clear "request" by the insured to terminate the contract, and satisfies the simple requirement in section 11(2) of the Statutory Conditions. He argued that no further steps were required to be taken to effect the termination of the policy.

19. Mr. Pollack cited various cases in which courts have considered provisions with the same language as appears in Statutory Condition 11(2), and have determined that notice provided by an insured to terminate a policy can be provided by whatever mode the insured chooses, either to the insurer directly or to an agent of the insurer. (*Ashe v. Peace Hills General Insurance Company* 2007 (Alberta Prov Ct.) 244 CanLii, *Bell v. Economical Mutual Insurance Co.* 1981 CarswellOnt 1329 (Ont. Co. Ct.), *Stevenson & Hunt Insurance Agencies Ltd. V. MacDonald* 1978 CarswellOnt 1493). He stated that I

am bound by these decisions, and noted that despite not being obliged to do so, Mr. Omer did provide his notice to the broker in writing.

20. Finally, counsel noted that Echelon's underwriting rules and the broker's agreement filed provide the broker with authority to bind the company, and to accept information on behalf of the insurer, and that Mr. Omer's request to the broker to cancel the policy constitutes notice to Echelon.

Fund's submissions

21. Counsel for the Fund submitted that in order to qualify as a "request" to cancel the policy, it must be shown that Mr. Omer initiated the cancellation, and that his communication in doing so was clear and unequivocal. His request must be accepted by the broker, and communicated to the insurer. Counsel contended that none of the above requirements were satisfied in this case, and that I must therefore conclude that the policy remained in effect at the time of the accident.

22. Mr. Friendly contended that the email sent on behalf of Mr. Omer and relied on by Echelon (reproduced above) is not a request to cancel the policy, but rather, a response to the cancellation notice that the broker forwarded to him. He submitted that Mr. Omer's note must be viewed against the broader background of Echelon having taken steps to cancel the policy, and that when the whole paragraph is considered, it is clear that it is simply an acknowledgement that the policy is being cancelled, and a statement that he cannot afford the payments required to re-instate it.

23. Counsel referred to the broker's response to the email sent on behalf of Mr. Omer that the "policy is being cancelled for non-payment", and argued that this clearly indicates that Mr. Duclos did not consider Mr. Omer's statement to be a request to cancel the policy. He noted that there is no mention of this alleged request to cancel the policy in any of the records filed. He submitted that this documentary exchange constitutes the best evidence of what occurred during the key period, and must be considered closely.

24. Mr. Friendly referred to an entry in Echelon's records in October 2010, a couple of years after these exchanges took place, indicating that when the broker called to inquire about the policy, he was told that the policy was "cancelled for non-pay". Counsel contended that having taken this position for many years, it is disingenuous for Economical to now rely on a note received from the insured to argue that the contract was terminated in this manner.

25. Mr. Friendly acknowledged that the language in section 11(2) of the Statutory Conditions is simple and does not require an insured to take many steps to cancel a contract. He argued, however, that if a communication is being relied on to end a legal relationship, it must have certain hallmarks of certainty. He contended that the "request" relied on by Echleon in this instance does not, and that the cases referred to by Mr. Pollack suggest that the courts require something more certain than an email sent by a friend, who is alleged to be communicating on an insured's behalf.

26. Counsel also noted that the Echelon underwriting rules require that a request submitted by an insured to cancel the policy be "confirmed in writing". While he acknowledged that the Statutory Conditions do not contain this requirement, Mr. Friendly suggested that the broker would have been familiar with this rule, and that if he had understood that Mr. Omer was requesting that the policy be cancelled, he would have asked him to sign a document to this effect.

27. Mr. Friendly suggested that it is not clear from the underwriting rules filed whether Mr. Duclos had the authority to "unbind" Echelon, and suggested that Mr. Omer was required to communicate his request to terminate the contract to Echelon directly. He submitted that in any event, if notice to the broker was sufficient, and if Mr. Duclos had considered the email he received on behalf of Mr. Omer to be a request to cancel the policy, he should have communicated this to Echelon, in order for it to be valid.

28. Counsel cited the decision in *Candito v. Nmezi* (2016) ONCA 293 (CanLii) in which the Court noted that after an insured requested that her policy be cancelled, the

insurer sent her an Acknowledgment of Cancellation Request indicating the effective date of the cancellation. He submitted that this confirms that even though a request by an insured to cancel a policy need not be in writing, the practise in the industry is to issue a written document that the insured is asked to sign, specifying the end date of the policy, and that Mr. Duclos' actions in this case should be considered with that in mind.

Reply submissions

29. In response to the Fund's argument that there is no reference in the documents filed to Mr. Omer having requested that the policy be cancelled, Mr. Pollack pointed to the December 22, 2008 note in the broker's file reproduced above stating – "Echelon recvd the reg letter back from post office marked 'unclaimed'. Filed in their office. Note in file indicates that **Dan has contacted insured by email and insured wants policy cancelled".** He argued that this is a complete answer to the Fund's arguments that the broker was not aware of Mr. Omer's request to terminate the policy.

30. Counsel for Echelon also noted that the phrase "at any time" contained in section 11(2) is very broad, and is not restricted in any way. He submitted that if I accept the Fund's argument that Mr. Omer could not have requested a policy to be terminated that had already ceased to exist, I would be effectively reading in a limitation that was not present in the provision. Mr. Pollack also submitted that the contract would still technically have been in force in any event at the time that the email was sent on behalf of Mr. Omer, noting that section 11(1.2) of the Statutory Conditions requires that an insurer provide thirty days notice to an insured that it intends to cancel the contract for non-payment of premiums.

ANALYSIS & FINDINGS:

31. This proceeding has been ongoing for over five years, with the issue of whether the Echelon policy was in force at the time of the accident involving Mr. Farah approached from different angles. While the decision to address each issue separately may have seemed expedient at one point, the reality of proceeding in this manner has led to a long and fragmented process. It also means that I am now required to review

communications that were exchanged nine years ago with a different lens than was likely used by the parties at the time.

32. Echelon commenced this arbitration on the basis that it had cancelled the policy in question before the date of loss. It eventually acknowledged that its attempt to do so was invalid about six months before this hearing. In the meantime, the parties agreed to arbitrate the question of whether the policy "lapsed" at its expiry, stipulating that Echelon's attempt to cancel it was invalid for the purpose of the arguments exchanged. I found that the policy had lapsed on its expiry, but Justice Matheson of the Superior Court overturned that ruling and determined that the policy continued in force.

33. A pre-hearing was then convened to discuss how to proceed further in the wake of that finding. When counsel for Echelon confirmed that his client was prepared to concede that it had not cancelled the policy in accordance with the Statutory Conditions in *Reg 777/93,* the focus shifted to Echelon's contention that the policy was not in force on the date of loss as a result of Mr. Omer having made a request that it be cancelled prior to that date. A second Statement of Agreed Facts was filed, along with the documents identified above, addressing that question.

34. The result of all of this is that for the first time in the more than five years that I have been involved with this matter, I now turn my attention to section 11(2) of the Statutory Conditions and consider whether its requirements have been met. While that is the only issue that remains to be decided, I must consider the facts related to whether Mr. Omer's actions constitute a "request" to terminate the contract against the broader background of all that took place in November and December of 2008, including the steps taken by Echelon.

35. The Fund argues that the evidence indicates that there was no 'meeting of the minds' between the parties, and that the email sent by Mr. Omer's friend on his behalf is not a "request" to terminate the contract. He contends that if it does constitute such a

"request", the broker did not consider it to be so and did not act on it, as he was required to do.

36. It is clear that Echelon intended to cancel the policy when it received notice that the initial payment for the premiums charged was declined. Its initial attempt to send the required Notice of Cancellation was unsuccessful, but a copy of the notice was subsequently sent by the broker by email on December 11, 2008. On December 19th, a note is sent from the "fatah asker" address on behalf of Mr. Omer advising "I am sorry to inform you that I will no longer be needing the insurance for my car". Mr. Duclos then responds (on the Monday following) that the policy is being cancelled for non-payment and "will be lapsing as of December 28".

37. It is these communications that are at the crux of the parties' dispute. While we have the benefit of the exchanges being in writing, the language used is somewhat awkward and the messages do not reveal a clear responsive flow. Echelon contends that the email from "fatah asker"'s account dated December 19, 2008 is clear enough to constitute a request to terminate the contract. The Fund argues that it is deficient in many respects. The message in question must only be considered against the requirement set out in section 11(2) of the Statutory Conditions. While a request to terminate the policy must be clear, I find that the simplicity and lack of detail reflected in section 11(2) suggests that any simple statement along those lines will suffice.

38. The question then becomes – does the email set out above clearly indicate a desire by Mr. Omer to end the policy "at any time on request"? I find that it does. The phrase "at any time" is very broad and imposes no temporal limit. Mr. Friendly contended that it must be interpreted to mean at any time during the life of the contract, and that as Echelon had already allegedly cancelled the policy, Mr. Omer's request was not valid. I do not agree with this proposition. I accept Echelon's two-fold submission that (1) no such constraint exists in the provision so I should not read one in, and (b) in any event, the email sent on Mr. Omer's behalf was sent prior to the date that the contract would

have terminated at Echelon's instance, if it were valid, given the notice requirements in section 11(1.2) of the Statutory Conditions.

39. The next question is whether the language in the email is clear enough to constitute a "request" to terminate the policy. Again, I find that it is. The words in section 11(2) are clear and simple, and are in stark contrast to the detailed requirements imposed on insurers who wish to cancel contracts issued. This flows from the public policy concerns underlying the compulsory automobile insurance scheme. Counsel for the Fund contends that the email message should not be read as a request to cancel the policy, but merely as a statement that Mr. Omer could not afford to pay the amount required to re-instate the coverage. I do not agree. The note begins with the statement – "sorry to inform you that I will no longer be needing the insurance for my car". It does not say "I understand that you are warning me that my coverage will end, but I cannot pay the amount of $810.91 that Echelon is requesting". Rather it states explicitly that the coverage discussed is no longer needed.

40. The note goes on to say that he cannot afford the amounts requested and that when his hours of work increase in the future, he expects he will want his own policy and will be back in touch. This provides an explanation as to why he no longer requires the coverage, but that commentary follows the clear initial statement that Mr. Omer no longer wants the coverage under the Echelon policy.

41. I find that this note meets all of the requirements set out in section 11(2) and constitutes a "request" to terminate the contract. The fact that it may have been triggered by a demand from Echelon to pay the amounts requested or face the cancellation of the policy is of no consequence. Again, the absence of any provision in the Statutory Conditions circumscribing what is required from an insured when the insurer takes the first step in cancelling a policy, leads me to conclude that the phrase "at any time" in section 11(2) may include a time after the insurer has initiated cancellation.

42. Mr. Friendly emphasized that the broker did not treat the email as a request to cancel the contract. I agree that Mr. Duclos' response to the email sent is puzzling, as it does not directly acknowledge Mr. Omer's request or statement that he no longer requires the coverage. For reasons that were not shared with me, neither party called Mr. Duclos to testify at the hearing. As a result, the answer to why he responded in the manner that he did will never be known.

43. I am therefore left to consider the documentary evidence filed. As noted above, an entry in the broker's file dated December 22, 2008 from someone named Kim McNally states that there is a note in the file indicating that "Dan has contacted insured by email and insured wants policy cancelled". I can only assume from this note that whether or not Mr. Duclos took Mr. Omer's statement to be a request to terminate the policy, someone else at the brokerage was made aware of the request and noted it in the file. In any event, I am not persuaded that once the requirement in section 11(2) is satisfied, the fact that the broker or insurer may not acknowledge it necessarily leads to the conclusion that it is of no effect.

44. Mr. Friendly further contended that Echelon's underwriting rules required that Mr. Duclos communicate the request to cancel the insurer. He referred to a passage in the section on "Agents or Brokers Binding Authority" in those rules which states –

> *Agents and brokers are required to submit for all risks a fully completed and signed application, accompanied by the full estimated premium, and where agreed, motor vehicle report (all operators), previous loss history report (all operators). All applications / endorsements / changes must be mailed or faxed to the underwriting unit within (3) business days from the time coverage is bound.*

45. I find that this refers to the requirements at the time coverage is bound by the broker. It does not require a request to cancel the contract to be communicated to Echelon in order to be valid. The case law in the area confirms otherwise. In *Ashe v. Peace Hills General Insurance, supra,* and *Bell v. Economical, supra,* the courts considered provisions with the same wording as that in section 11(2) of the Statutory Conditions. In *Bell,* Justice Killeen directly refutes the argument that the insured can only terminate

coverage by providing direct notice to the insurer. He states that the provision in question afforded the insured in that case with the right to terminate the contract –

> *…by virtually any method open to his ingenuity, whether by writing, by word of mouth or otherwise and, unlike the modes open to the insurer, the insured is not required to give his notice directly to the opposite party to the contract. Thus it is surely open to the insured to give his notice – by whatever mode he elects- to an agent of the insurer.*
>
> (at para.29)

46. I am bound by this interpretation, which is consistent with the established case law in the area regarding the role of an insurance broker as an intermediary in the formation, alteration, renewal and termination of insurance contracts, The Fund did not present any case law to challenge the contention that in this case, where the broker had clear authority to bind Echelon and was its legal agent, notice of an intention to terminate the contract presented to the broker was insufficient and must be communicated directly to the insurer. The two decisions filed by the Fund (*Larizza v. Commercial Union Assurance Co. of Canada* (1990) 68 D.L.R. (4th) 460 and *Musca v. Wawanesa Mutual Insurance Company* [2004] I.L.R. 1-4290 (Alta. QB)) concern the timing of a cancellation initiated by an insured taking effect, rather than how or to whom the request to cancel must be provided to.

47. For the reasons set out above, I find that the contract issued by Echelon to Mr. Omer was terminated at his request in accordance with section 11(2) of the Statutory Conditions on December 19, 2008, and was therefore not in force at the time of the accident. Echelon is therefore not the "insurer of the automobile that struck the non-occupant" under section 268(2)2(ii) of the Act and Mr. Farah's recourse for payment of accident benefits is to the Fund under section 268(2)2(iv).

ORDER:

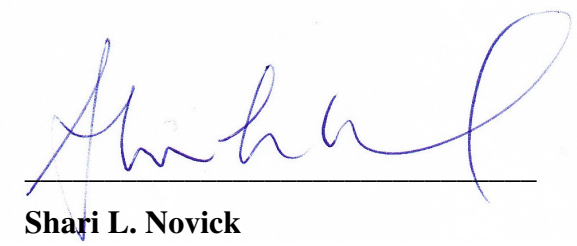
I hereby order the Fund to reimburse Echelon for the benefits it has paid to Mr. Farah and on his behalf pursuant to the *Schedule* to date, subject to any arguments counsel may raise regarding the reasonableness of payments made.

If Mr. Farah's accident benefits claim remains open, the Fund shall also take over the adjusting of Mr. Farah's claim. I leave it to counsel to work out the necessary arrangements in that regard. I remain seised of the matter in the event that there are any difficulties in implementing my findings.

COSTS:

As the successful party, Echelon is entitled to recover its costs of this proceeding on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, they may contact me and a teleconference will be convened to discuss the matter.

DATED at TORONTO, ONTARIO this __29th _DAY OF NOVEMBER, 2017.



Shari L. Novick
Arbitrator