CITATION: Echelon General Insurance Company v. Ontario (Minister of Finance) 2018 ONSC 5029
COURT FILE NO.: CV-15-543260
DATE: 2018/08/23

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT, 1991, S.O. 1991, c. 17

AND IN THE MATTER OF THE MOTOR VEHICLE ACCIDENT CLAIMS ACT, R.S.O. 1990, c. M.41

AND IN THE MATTER OF A DISPUTE BETWEEN INSURERS UNDER O.REG. 283/95, AS AMENDED MADE UNDER THE INSURANCE ACT, R.S.O. 1990, c. I.8

BETWEEN:	)	
Echelon General Insurance Company	)	*Jamie R. Pollack* for the Applicant
Applicant	)	
– and –	)	
Her Majesty the Queen in Right of Ontario, as Represented by the Minister of Finance (The Motor Vehicle Accident Claims Fund)	)	*John Friendly* and *Martina Aswani* for the Respondent
Respondent	)	
	)	**HEARD**: August 15, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Insurance Act*[1] and the *Arbitration Act*,[2] the Minister of Finance appeals

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[1] R.S.O. 1990, c. I.8.

from an arbitration award dated November 29, 2017 made by Arbitrator Shari Novick.

[2] Pursuant to the *Motor Vehicle Accident Claims Act*[3], the Minister of Finance administers the Motor Vehicle Accident Claims Fund. When there is no automobile insurer responsible to pay compensation to a person injured in an automobile accident in Ontario, the Accident Fund provides compensation. The Accident Fund is the payor of last resort, and it is not liable if compensation is payable under any policy of insurance.[4]

[3] In the case at bar, in a priority dispute, the Arbitrator concluded that the Accident Fund and not Echelon General Insurance Company was liable for the statutory no-fault accident benefits (SABs) of Abdiraham Farah, a pedestrian who was seriously injured when he was struck by a vehicle owned by Abdiraham Omer.

[4] For the reasons that follow, the Minister's appeal is dismissed.

B. Relevant Statutory Provisions

[5] The relevant provisions of the *Insurance Act* are s. 268 (2) which state:

> *Liability to pay*
>
> (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.

[6] Section 11, which is set out below, is the relevant provision of *Ont. Reg.* 777/93 (Statutory Conditions – Automobile Insurance):

> *Termination*
>
> 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

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[2] 1991, S.O. 1991, c.17.
[3] R.S.O. 1990, c. M.41.
[4] *Minister of Consumer and Commercial Relations v. Employers Mutual Liability Insurance Company of Wisconsin*, (1980), 28 O.R. (2d) 397 (C.A.).

> 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.
>
> (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 the notice; and
>
> (b) state that the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the business day before the day specified for termination.
>
> [...]
>
> (2) This contract may be terminated by the insured at any time on request.
>
> [...]

C. Facts

1. The Termination of the Automobile Insurance Policy

[7] In the fall of 2008, Mr. Omer contacted Dan Duclos of Thomson Jemmett Vogelzang, an insurance broker, to obtain automobile insurance for his automobile, and on November 29, 2008, Echelon issued a standard owner's motor vehicle insurance policy to Mr. Omer. The policy had a six-month term ending on May 29, 2009.

[8] On December 8, 2008, Mr. Omer's credit card down payment of $1,014 for the premium payable on the policy (two months' premium) was declined by his bank.

[9] On December 9, 2008, Echelon sent a Notice of Cancellation for non-payment of premium by registered mail, with the cancellation to take effect on December 28, 2008. The parties now agree that Echelon's attempt to cancel the policy was invalid and ineffective.

[10] On December 11, 2008, Echelon advised the broker that the insurance policy had been cancelled, and that day, Mr. Duclos, of the insurance broker, wrote Mr. Omer, as follows:

> Dear Karim,
>
> Echelon General Insurance Company recently sent you a registered letter informing you that the above policy has been cancelled due to non-payment of premium as your credit cared was declined.
>
> This letter serves as a further notice to you that there are no coverages in force under the above noted policy through our office unless payment in the amount of $481.11 is made before December 24, 2008. Coverage ceases at 12.01 a.m. on December 28, 2008.
>
> We regret that this action was taken, however if coverage is required please contact our office immediately to discuss the matter.

[11] After the letter to Mr. Omer was sent, it was determined that the correct reinstatement sum was $810.91, and on December 12, 2008, Mr. Duclos sent the following email message to Mr. Omer:

> Dear Karim:
>
> Echelon General Insurance Company recently sent you a registered letter informing you that the above policy has been cancelled due to non-payment of premium as your credit card was declined.
>
> This letter serves as a further notice to you 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, 2006. Coverage ceases at 12.01 a.m. on December 28, 2008.
>
> We regret that this action was taken, however, if coverage is required please contact our office immediately to discuss the matter.

[12] On December 19, 2008, Mr. Duclos received the following reply email from Mr. Omer:[5]

> 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 [the circumstance that] I cannot afford the amount your [sic] asking for, because my hours at work have been cut. Now I am paying only $160, 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.

[13] The email exchange continued, and on December 22, 2008, Mr. Duclos sent the following email message to Mr. Omer:

> I was able to locale the policy with Echelon. 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.

[14] Following Mr. Duclos' December 22, 2008 email message, the following note was placed in the insurance brokerage firm's records on 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.

[15] Approximately, seventeen months then passed until May 15, 2010, almost a year after the six-month term of Mr. Omer's policy had passed, when Mr. Farah, a pedestrian, was struck by Mr. Omer's vehicle.

[16] At the date of the accident, Mr. Farah was not covered by any other automobile insurance policy.

[17] Mr. Farah made an application for Statutory Accident Benefits ("SABs") and Echelon began paying the SABs for Mr. Farah's injuries arising out of the motor vehicle accident involving Mr. Omer's vehicle.

[18] On October 29, 2010, disputing its liability to pay the SABs, Echelon delivered a Notice of a Dispute Between Insurers to the Accident Fund.

[19] The parties did not resolve the dispute and on March 5, 2015, Echelon commenced an arbitration under the *Arbitration Act*, in accordance with Ont. Reg. 283/95 under the *Insurance*

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[5] Mr. Omer send the email message using the email account of a friend.

Act. Echelon asserted that its insurance policy was not in effect at the time of the accident and therefore the Accident Fund was liable to reimburse it for the SAB payments and to assume responsibility for future payments. .

[20] In the arbitration, although Echelon had originally asserted that it had cancelled the policy for non-payment of premiums, on a motion for a preliminary ruling from the Arbitrator, Echelon asserted that the policy had expired at the end of the six-month term (May 2009) and was not in force at the time of the accident (May 2010).

[21] On the preliminary ruling, the Arbitrator agreed, and she held that the Accident Fund was obliged to reimburse Echelon. The Arbitrator found that the Echelon's coverage did not remain in place notwithstanding its failure to comply with the notice requirements of s. 236 of the *Insurance Act*. The Arbitrator reached this conclusion even though section 236 (5) of the Act expressly provides that a contract of insurance is in force until there is compliance with the notice provisions of the Act.

[22] The Minister appealed the Arbitrator's preliminary ruling. Justice Matheson granted the appeal and ruled that the insurance policy continued in force and did not lapse at the end of the policy-term because of Echelon's failure to abide by the non-renewal provisions in section 236 of the *Insurance Act*.[6]

[23] The matter returned to arbitration because Echelon continued to deny responsibility for the SAB payments.

[24] The arbitration resumed and Echelon asserted that pursuant to section 11(2) of *Ont. Reg.* 283/95, on December 19, 2008, the insurance policy had been "terminated by the insured at any time on request".

2. The Arbitrator's Decision

[25] On the resumed arbitration, the Arbitrator agreed with Echelon's argument with the result that the payment of SABs became the responsibility of the Accident Fund under s. 268(2)2(iv) of the *Insurance Act*.

[26] The Arbitrator concluded that Mr. Omer's email to the insurance broker was "a request" to terminate the automobile insurance policy in accordance with section 11 (2) of *Ont. Reg.* 283/95, and that the policy had effectively been terminated and was not in force at the time of the accident.

[27] The analysis portion of the Arbitrator's decision is set out below:

> 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.

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[6] *Echelon General Insurance Company v. Her Majesty the Queen*, 2016 ONSC 5019.

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 fatahasker 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 reinstate 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 [to] 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. Q.B.) 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. Orner was terminated at his request in accordance with section 11 (2) of the Statutory Conditions on December 9, 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 nonoccupant" 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).

[28] The Minister submits that the Arbitrator's decision is not defensible in respect of the facts and law and ought to be overturned on appeal.

D. Discussion

1. Standard of Review

[29] The standard of review from an arbitrator's decision in a priority dispute between insurers is the standard of reasonableness.[7]

[30] In *Dunsmuir v. New Brunswick*,[8] the Supreme Court of Canada described the reasonableness standard as follows:

> [A] court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] A reasonableness standard of review affords deference to an arbitrator with specialized expertise when he or she is applying his or her home statute, and a reasonableness standard accepts as reasonable a decision that falls with the range of possible and acceptable outcomes that are defensible on the facts and the law.[9] If the arbitrator's decision is reasonable, it is not open to the reviewing court to substitute its own view of a preferable outcome.[10]

[32] An arbitrator's decision is unreasonable where the decision is incompatible with the applicable legal principals or inconsistent with the evidence or where it is it is inconsistent with

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[7] *Intact Insurance Co. v. Allstate Insurance Co. of Canada*, 2016 ONCA 609 at paras 53-54; *The Dominion of Canada General Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 2018 ONCA 101 at para 33.
[8] 2008 SCC 9 at para. 47.
[9] *Dunsmuir v. New Brunswick*, 2008 SCC 9; *The Dominion of Canada Insurance Company v. State Farm Mutual Automobile Insurance Company*, 2018 ONCA 101.
[10] *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.

proper statutory interpretation and derived from a desired outcome.[11]

[33] An arbitrator's decision is unreasonable where the arbitrator asks the wrong question, fails to undertake the proper analysis, misapplies the underlying legal principles, or ignores or misunderstands the evidence.[12]

[34] An arbitrator's decision is unreasonable if it frustrates the purposes and policies of the legislative scheme being interpreted or applied by the arbitrator.[13]

2. The Minister's Submissions

[35] The Minister submits that the Arbitrator's decision was unreasonable for five reasons, four of which are interrelated.

[36] First, the Minister submits that the Arbitrator's decision was unreasonable because she concluded that Mr. Omer requested a termination in circumstances where Echelon had already allegedly cancelled the policy; i.e., ineffectively cancelled the policy. In this regard, the Minister submits that the Arbitrator's analysis was unreasonable because the Arbitrator analyzed Mr. Omer's email with no consideration being given to the invalid notices sent by Echelon, and she overlooked or ignored the fact that Echelon advised Mr. Omer that the policy had already been terminated. The Minister submits that the Arbitrator's decision was unreasonable because it was unreasonable to interpret Mr. Omer's email message by overlooking the context that the broker had already advised Mr. Omer that his policy was cancelled effective December 28, 2018. The Minister submitted that recognizing that Mr. Omer had made a request to terminate in these circumstances was inconsistent with the consumer protection aspects of the automobile insurance regime because it exposed the insured to a cancelation for non-payment on the driving record that would affect his or her insurance rates in the future. Further, the Minister submits that the Arbitrator also overlooked Echelon's own internal logs and subsequent confirmation that indicated that the policy was terminated for non-payment of premium with no comments regarding a request by Mr. Omer to terminate the policy.

[37] Second, the Minister submits that the Arbitrator's decision was unreasonable because she erred by failing to find that Echelon did not meet the onus of proving that Mr. Omer made a clear and unequivocal "request" to terminate the policy. The Minister submits that Mr. Omer's email message did not clearly, distinctly and unambiguously convey that he was trying to cancel his policy. The Minister submits that Mr. Omer was not cancelling but was simply responding to the broker's previous e-mail and indicating that he could not afford to reinstate the policy Echelon had cancelled.

[38] Third, the Minister submits that the Arbitrator's decision was unreasonable because it was unreasonable for the Arbitrator to interpret paragraph 1.7.1 of Automobile Policy (OAP 1), which states that "you may cancel your insurance any time by advising us," to mean that "us"

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[11] *Canada (Attorney General) v. Mowat*, 2011 SCC 53 at para. 64.
[12] *Intact Insurance Company v. Allstate Insurance Company of Canada* 2016 ONCA 609 at para. 65; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29.
[13] *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29.

means the insurance company or an agent of the insurance company when the agent insurance broker does not forward the request to the insurer.

[39] Fourth, the Minister submits that the Arbitrator's decision was unreasonable because the decision frustrates the purposes and policies of Ontario's Compulsory Automobile Insurance Scheme.

[40] Fifth, the Minister submits that the Arbitrator's decision was unreasonable because Echelon should be estopped from relying on Mr. Omer's request to terminate, because for eight years, Echelon's position in the arbitration proceedings was that it properly cancelled the insurance policy for non-payment of the premium.

3. Was the Arbitrator's Decision Reasonable or was it Unreasonable?

[41] In my opinion, none of the Minister's submissions establishes that the Arbitrator's decision was unreasonable. In my opinion, the Arbitrator made no error of omission or of commission in her treatment of the evidence. In my opinion, her analysis was a reasonable analysis of the law and the facts and her conclusion was reasonable and consistent with the statutory scheme under the *Insurance Act* and *Motor Vehicle Accident Claims Act*. Her decision was also consistent with the case law that had determined the effectiveness of an insured's request to terminate an automobile insurance policy.

[42] With the exception of the estoppel argument, the generalization of the Minister's submission is that the Arbitrator's decision was unreasonable because: (a) she failed to extract the proper meaning of the word "request" in accordance with the principles of statutory interpretation, where context and purpose play an active and predominate role; and (b) she failed to extract the proper meaning of the word "request" in accordance with the case law that has interpreted the meaning of request under the *Insurance Act*.

[43] There is, however, no merit to the Minister's submissions. The reasons for decision of the Arbitrator demonstrate that she was acutely aware of the unique factual circumstances or context of the issues to be decided.

[44] The unique factual circumstances were that there was a May 2010 motor vehicle accident involving a pedestrian when the only possibly available insurance coverage to provide SABs was arguably not available exposing the Accident Fund to liability because: (a) the policy had purportedly been cancelled or terminated in December 2008 by the insurer for non-payment of premiums; (b) the policy had purportedly been cancelled or terminated in December 2008 at the request of the insured; (c) the policy had lapsed in 2009 in accordance with its temporal duration; or (d) the policy had been cancelled or terminated for some or all of reasons (a), (b) and (c).

[45] In reaching her decision, the Arbitrator did not ignore the factual and legal context for determining whether an effective request to terminate had been made by Mr. Omer. Further, the very experience Arbitrator was aware of the policy and purpose imperatives of the SAB scheme and the role of insurers and of the Accident Fund.

[46] The Arbitrator was also aware that the prolonged and bifurcated arbitration proceeding was influencing the self-serving positions being taken by the insurer and by the Accident Fund.

[47] Without ignoring the factual context of the interpretative issue in the case, the Arbitrator came to the reasonable conclusion that the language in Mr. Omer's email message was clear enough to constitute a "request" to terminate the policy. That reasonable conclusion was supported by the case law.

[48] In contrast, the Minister's submissions were designed to read into section 11 (2) of *Ont. Reg.* 283/95 a variety of constraints, restrictions, or tests for finding that the insurance contract "may be terminated by the insured at any time on request".

[49] It was reasonable for the Arbitrator to reject these constraints, restrictions, or tests proposed by the Minister, who, for instance, submitted that Mr. Omer could not make a request after the insurer had allegedly (i.e., ineffectively) cancelled the policy. If accepted as being the correct interpretation of what constitutes an effective request, the Minister's submission would lead to the bizarre and unreasonable outcome that the insured's request to terminate is nugatory if the insurer has already made an improper termination of the contract. The Minister provides no sensible reason why the insured's rights to terminate should be constrained by an insurer's improper termination.

[50] In this regard, in its factum, the Minister submits that it was "frankly unreasonable unreasonable for the Arbitrator to find that Echelon's illegal behaviour was irrelevant in interpreting a scheme that is specifically designed to protect insureds' cancellation rights and protect entitlements for innocent victims of car accidents". In my opinion, however, the Arbitrator was not "frankly unreasonable", and Echelon's behavior can hardly be described as illegal; "ineffective" is the more appropriate appellation.

[51] And, in any event, be it and illegal or ineffective termination, Echelon's conduct was not being ignored by the Arbitrator. It would be Mr. Omer's rights to cancel that would be ignored if those rights depended on whether or not the insurer had already illegally (or legally for that matter) purported to cancel the policy.

[52] And the Arbitrator's decision, whichever way it went would not harm the entitlements of innocent victims of car accidents because, one way or the other, the injured pedestrian in this case was protected and was receiving his SABs.

[53] It would be the Minister's interpretation of "request" that would create ambiguity and undermine the operation of the SABs regime.

[54] Notwithstanding the Minister's arguments, the Arbitrator's decision does not run contrary to the consumer protection nature of the automobile accident insurance scheme. That scheme does not involve the consumer-insured jumping through hoops when he or she makes a request to terminate an insurance policy, nor does that scheme disqualify a consumer-insured from making an enforceable request because his or her insurer has purported to have already cancelled the policy.

[55] There was nothing unreasonable about the Arbitrator's decision that Mr. Omer's email message to the insurance broker was notice to the insurer. The insurance broker is the agent of the insurer and notice to the agent is notice to the principal.

[56] In the case at bar, the Arbitrator referred to *Bell v. Economical Mutual Insurance Co.*,[14] where Justice Killeen rejected the argument that the insured can only terminate coverage by providing direct notice to the insurer, stating as follows:

> [Section 11(2) of the Statutory Conditions] does not similarly limit the right of the insured to terminate the contract but, rather, appears to afford to the insured the right to terminate 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.

[57] The case law establishes that while a rigorous standard is imposed on insurers in effecting a termination of an automobile insurance policy by a formal Notice, there are no formal requirements on an insured who may effect a termination by making a request at any time to the insurer or the insurers agent: orally in person; orally by telephone; or in writing with or without a signature.[15] There is no requirement that the insured's request by acknowledged by the insurer.[16]

[58] Finally, there is no merit to the Minister's estoppel argument that Echelon cannot rely on Mr. Omer's request to terminate the insurance policy, because it was only after six years of a priority dispute between Echelon and the Accident Echelon, that Echelon abandoned its other arguments that there was no applicable insurance policy.

[59] It is unfortunate that the parties decided to arbitrate the issues of the priority dispute in a bifurcated fashion because that prolonged the arbitration and as the Arbitrator observed "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", but there is no basis in how the arbitration proceeded to assert an estoppel binding Echelon to any particular position. There was no representation or misrepresentation by Echelon and the Ministry did not detrimentally rely on Echelon taking any particular position.

[60] It is simply unfortunate that the resolution of the priority dispute approaches the tenth anniversary of Mr. Omer's email message requesting a termination of the insurance policy.

E. Conclusion

[61] For the above reasons, the Minister's appeal is dismissed.

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[14] [1981] O.J. No. 2483 at para. 29 (Co. Ct.).
[15] *Stevenson & Hunt Insurance Agencies Ltd. v. MacDonald* (1978), 20 O.R. (2d) 281 (Small Claims Ct.); *Bell v. Economical Mutual Insurance Co.*, [1981] O.J. No. 2483 (Co. Ct.); *Budd v. Personal Insurance Co. of Canada*, 2000 CarswellOnt 5282 (FSCO); *Ashe v. Peace Hills General Insurance Co.*, 2007 ABPC 244.
[16] *Pritchard v. Rideau Insurance Services Ltd.* [1999] O.J. No. 2731 (S.C.J.), aff'd [2000] O.J. No. 2548 (C.A.); *Zurich Canada v. Fortin*, 2003 [2003] O.J. No. 28 (C.A.); *Desai v. Personal Insurance Co. of Canada*, 2006 CarswellOnt 4131 (FSCO).

[62] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Echelon's submissions within twenty days of the release of these Reasons for Decision followed by the Minister's submissions within a further twenty days.

Perell, J.

Released: August 23, 2018

CITATION: Echelon General Insurance Company v. Ontario (Minister of Finance) 2018 ONSC 5029
COURT FILE NO.: CV-15-543260
DATE: 2018/08/23

ONTARIO
SUPERIOR COURT OF JUSTICE

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

REASONS FOR DECISION

PERELL J.

Released: August 23, 2018