IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
s.275 and REGULATION 664;

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO (THE MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Respondent

DECISION

COUNSEL:

Steve Malach for the Applicant

Helmut Brodmann for the Respondent

ISSUES:

1. Was there a valid motor vehicle liability policy on the Emmanuel Brisson automobile at the time of the accident in which Ms. Melanie Chartrand was injured?

DECISION:

1. There was no valid motor vehicle liability policy in place at the time of the accident and accordingly the Motor Vehicle Accident Claims Fund is responsible for paying accident benefits to or on behalf of Ms. Chartrand.

HEARING:

This arbitration was held in the City of Ottawa, in the Province of Ontario, on January 26 and 27, 2005 and July 5, 2006.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on May 21, 1999. On that date, a Ms. Melanie Chartrand was a passenger in a vehicle owned and operated by Mr. Emmanuel Brisson, which was involved in an accident. Ms. Chartrand was catastrophically injured and initially applied to the Co-operators General Insurance ("Co-operators") for statutory accident benefits under a policy of automobile insurance on a motor vehicle owned by her father, Mr. Daniel Chartrand, being policy # 2648806. She was entitled to benefits under that policy only if she were found to be a dependent of her father at the time of the accident. At an earlier hearing I determined that she was not a dependent of her father at the time of the accident and therefore was not entitled to statutory accident benefits under that policy. Co-operators, having received the first completed application for accident benefits has been paying accident benefits to and on behalf of Ms. Chartrand, however, on September 24, 1999 Co-operators served a notice of intention to dispute upon the Motor Vehicle Accident Claims Fund ("The Fund"), taking the position that the policy of insurance issued by Co-operators to Emmanuel Brisson had been terminated prior to the accident. The Fund takes the position that Co-operators did not properly terminate the policy and therefore Co-operators is responsible for payment of the accident benefits.

By the conclusion of the hearing, it became apparent that there were two main issues to be determined in order to decide if the Co-operators' policy with Mr. Brisson had been properly terminated.

1. Was the notice of termination sent to the appropriate address? and,
2. Did Co-operators comply with Section 11(3) of Regulations 777/93 (providing a refund of application premium when terminating the policy?).

I will deal with each issue individually.

WAS THE NOTICE OF TERMINATION SENT TO THE APPROPRIATE ADDRESS?

The termination of motor a vehicle liability policy is governed by Section 11 of Regulation 777/93, which states:

> **11.** **(1)** Subject to Section 12 of the Compulsory Automobile Insurance Act and Sections 237 and 238 of the Insurance Act, this contract may be terminated by the insurer giving to the insured 15 days notice of termination by registered mail or 5 days written notice of termination personally delivered.
>
> **(2)** This contract may be terminated by the insured at anytime on request.
>
> **(3)** Where this contract in terminated by the insurer,
>
> (a) The insurer shall refund the excess of premium actually paid by the insured over the proportioned premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified; and
>
> (b) The refund shall accompany the notice unless the premium is subject to adjustment or determination as to the

amount, in which case, the refund shall be made as soon as practical.

(4) Where this contact is terminated by the insured, the insurer shall refund as soon as practical the excess of premium actually paid by the insured over the short rate premium for the expired time, but in no event shall the short rate premium for the expired time be deemed to be less then any minimum retained premium specified.

(5) The 15 days mention in sub-condition (1) of this condition begin to run on the day following the receipt of the registered letter at the post office to which it is addressed.

The first issue to be addressed is whether or not Co-operators sent the notice of termination to the appropriate address. Pursuant to Section 12 of Regulation 777/93, Co-operators would have had to send the notice by registered mail to Mr. Brisson's last post office address as notified to the insurer.

In order to determine if Co-operators complied with this requirement, it is necessary to examine the facts leading up to the sending out the notice of termination to Mr. Brisson.

Mr. Brisson had dealt with the Philippe Ryan & Associates insurance brokerage firm to obtain both motor vehicle and property insurance with Co-operators for some time prior to the accident of May 21, 1999. Mr. Brisson was a mechanic prior to the accident and had a number of vehicles insured by Co-operators over the years. The vehicle involved in the accident was, a 1991 Suzuki Sidekick jeep. It is the position of Co-operators that they sent notice of termination to Mr. Brisson on March 1, 1999 effective March 21, 1999. Notice was by registered mail sent to 1266 St. Jacquess Street, Embrun, Ontario. Unfortunately, due primarily to the passage of time, it would appear that most of the original documentation with regard to the termination has been destroyed and accordingly, the documents had to be recreated, using computer data. While

this is obviously not the ideal situation, I am satisfied that the computer records provide us with an adequate reconstruction of what was done in this case.

Ms. Laura Parcells testified on behalf of Co-operators. She had been an employee of Co-operators for approximately 15 years prior to her retirement in 2000. She worked out of the Peterborough office of Co-operators during the time in question and was involved in the underwriting of policies as well as the termination of policies. She testified that in early 1999 a motor vehicle record search concerning Emmanuel Brisson was forwarded to her. By reviewing her computer "notepad" entries she essentially testified as follows. Upon reviewing Mr. Brisson's drivers record, she realized that it showed that Mr. Brisson's license was suspended for the non-payment of fines. As Co-operators does not insure unlicensed drivers, this would constitute in material change of risk and be grounds for termination of the policy. Accordingly, on February 10 1999, Ms. Parcell's wrote to Mr. Brisson, advising that the search had shown that his license had been suspended for an unpaid fine and that they require proof of payment of the fine by February 25, 1999. The letter, according to Ms. Parcells, would have been sent to 1266 St. Jacques Street. Ms. Parcell's testified that when sending letters to insurers she would get their address from the computer customer screen.

As there was no response received by Co-operators, on March 1, 1999 Ms. Parcells sent Mr. Brisson a registered notice of termination letter advising that "all coverage will cease effective 12:01a.m., 15 days following the receipt of this letter at the post office to which it is addressed". This letter according to Ms. Parcells would have been sent to 1266 St. Jacques Street, Embrun, Ontario.

Ms. Parcells testified that she would have again obtained the address from the customer screen. Ms. Parcells further testified that after the letter was typed it would have been taken to the post office in Peterborough. A list of registered letters from Canada Post dated March 1, 1999 shows the post office number RT 082 414 868CA for the registered letter to Mr. Brisson. Ms. Parcells computer notes indicate that on March 23, 1999 the registered letter was returned to Co-operators unclaimed. The return of the unclaimed registered letter is supported by the filing of a Canada Post office "items delivered bill" at the hearing. This document is dated March 23, 1999

and indicates that it was returned, unclaimed. The registered letter was then forwarded to the broker's office (Philippe Ryan & Associates) and Ms. Parcells, on March 23, 1999 made arrangements within her office to have the Brisson policy terminated effective March 23, 1999, by sending the instructions to the pay plan section of Co-operators. The physical act of terminating was completed on March 26, 1999, effective March 21, 1999.

Subsequent to the accident, Co-operators hired an investigator, Mr. Andre Belanger, to obtain information from Canada Post as to what happened to the termination letter after it was taken to Canada Post by Co-operators. His two reports were filed at the hearing. His reports indicate that 1266 St. Jacquess Street has a postal box in Embrun and once a registered letter is received, a card is placed in the postal box. After 5 days, if the letter is not claimed, a second notice card is placed in the box. ten days after the second notice, if the letter is still not picked up, the letter is returned to the sender. The presence of the postal box for 1266 St. Jacques Street was confirmed by Mr. Donald Longtin, who was called by Co-operators as a witness. Mr. Longtin lived with Mr. Brisson for some of 1998 and 1999.

Ms. Patricia Bowles was also called as a witness for Co-operators. Ms. Bowles has been an employee of Co-operators for approximately 23 years in the area of underwriting. She had knowledge of the termination of policy procedures at Co-operators as well as an understanding of their computer operating systems. She confirmed, by way of explaining the computer printouts, Ms. Parcells testimony as to how the termination occurred. Ms. Bowles also testified that Mr. Brisson insured a property at 60 Main Street, Avonmore, Ontario with Co-operators during the time in question. Ms. Bowles testified at some length regarding the customer detail screen in place during the time in question. She indicated that a copy of the screen, as it existed in February and March of 1999 was not printed up, since it is automatically purged after 2 years and was not requested during that time frame. Accordingly, we do not have absolute proof that the termination letter was sent to 1266 St. Jacques Street. Ms. Bowles addressed this in her testimony. She pointed out that there is still a copy of the return of premium cheque that was sent by Co-operators to Mr. Brisson after the termination, dated April 6 1999. The cheque is made out to Mr. Brisson at 1266 St. Jacques Street, Embrun. Ms. Bowles testified that the address on the cheque would be taken form the customer screen. Accordingly, unless the

customer screens were changed between March 1 and April 6 1999, the registered termination letter would have been sent to the same address. Ms. Bowles testified that from her review of the file there was nothing in it to suggest that there had been an occurrence which would have led to a change in the customer screen during that time frame.

Despite vigorous cross-examination, the witnesses maintained their position that the termination letter would have been sent to 1266 St. Jacques Street. While there were other addresses associated with Mr. Brisson, including 60 Main Street (the property he insured with Co-operators) and 1 Promenade Cartier, I am satisfied on a balance of probability that the notice of termination was sent to 1266 St. Jacques Street, Embrun, on March 1, 1999 and was returned, unclaimed, by the post office on March 23, 1999. I am particularly persuaded in arriving at this conclusion by the fact that the reimbursement cheque was clearly sent to 1266 St. Jacques Street and there is nothing to indicate the personnel screen would have changed between March 1 and April 6, 1999.

Although I have found that the registered termination notice was sent to 1266 St. Jacques Street, the question still remains as to whether this was Mr. Brisson's "latest post office address as notified to the insurer", as required by Section 12 of Regulation 777/93. At the hearing, a great deal of time was spent dealing with Mr. Brisson's residence at the time of the termination. The evidence in this regard was somewhat confused. Most of the confusion arose from the various statements and answers given by Mr. Brisson as to his whereabouts. At his examination for discovery in this matter held on November 20, 2003, Mr. Brisson testified that he lived at Promenade Cartier from the last week of October until the middle of November 1998 and then moved to 1266 St. Jacques Street. He also testified at the examination for discovery as follows:

> **Q**: Now, you were working at Auto-Tech in January, February and March of 1999?
>
> **A**: Yes.
>
> **Q**: You were living at St. Jacques as you told me at that time?
>
> **A**: Yes

At the hearing, Mr. Brisson testified that he was living at 60 Main Street, Avonmore, Ontario since the beginning of May 1999 and before that at 1266 St. Jacquess Street for approximately six weeks. This would mean he was at 1266 St. Jacques Street from approximately May 1999.

Interestingly, a Co-operator's Home Guard Policy Endorsement Application signed by Mr, Brisson dated May 13, 1999 filed at the hearing, has Mr. Brisson's address as 60 Main Street, Avonmore and his former address as 1266 St. Jacques Street. May 13, 1999 is the date that the Co-operators' broker Mr. Philippe Ryan, testified that Mr. Brisson met him and told Mr. Ryan that he was then moving to Avonmore.

Mr. Brisson gave a signed statement on June 29, 1999, at which time he stated:

> I lived at 60 Main Street in Avonmore, Ontario. I have been living there since the beginning of May 1999. Before that I was living at 1266 or 1260 St. Jacques Street in Embrun….I moved to Avonmore on the first of May this year.

To add to the confusion, the Co-operators' "vehicle pre-insurance instruction form" dated March 5, 1999 indicates his address as Promenade Cartier, Embrun, Ontario. To further confuse matters, Mr. Brisson testified that despite living at various locations he always used 60 Main Street, Avonmore as his mailing address.

In fairness to Mr, Brisson, he did move about a fair deal in the time frame leading up to the termination and the hearing was more then 6 years after the termination, so Mr. Brisson's lack of clarity to his residence on March 1, 1999 is somewhat understandable. Mr. Brisson, under cross-examination at the hearing, explained his apparent new found memory regarding his residence as of the termination date by saying he had been speaking to his friend Donald Longtin a few day prior to his testifying at the hearing on January 27, 2005. He testified that as a result of speaking to Mr. Longtin, with whom he had been living with in 1998 and 1999, he, Mr. Brisson, was now clear that he was living at Promenade Cartier until the end of March 1999 and then moved to 1266 St. Jacques Street briefly.

Curiously, when Mr. Longtin testified at the hearing, he stated that he had lived with Mr. Brisson at Promenade Cartier until late January or early February 1999 and then they both moved to 1266 St. Jacques Street until May 1999. Mr. Longtin testified that he was sure about these dates as he and his spouse, Kimberly, had separated in January 1999. Kimberly, Mr. Longtin and Mr. Brisson had been living at Promenade Cartier at the time. Immediately after the separation, Mr. Longitn and Mr, Brisson had moved to 1266 St. Jacques Street where, according to Mr. Longtin, Mr. Brisson stayed until May 1, 1999.

Despite rigorous cross-examination, Mr. Longtin remained firm in his view that Mr. Brisson was living at 1266 St. Jacques Street from late January or early February until May 1999. I found Mr. Longtin to be a very straightforward and credible witness. He had no apparent reason to colour his testimony in any way. Curiously, Mr. Brisson testified that it was Mr. Longtin who had refreshed his memory to the point where Mr. Brisson, at the time of the hearing, decided that he was living at 60 Main Street, Avonmore at the time the termination letter was sent. This is odd, in that Mr. Longtin clearly testified to the contrary. To the extent that the testimony of Mr. Brisson and Mr. Longtin differ, I prefer that of Mr. Longtin.

Mr. Brisson's credibility was further eroded, in my view, by his testimony as to meetings and conversations he had with representatives of the Philippe Ryan & Associates insurance brokerage.

Lynn Gendron, Jeff Mann and Philippe Ryan, all of the Philippe Ryan & Associates insurance brokerage firm, testified on the behalf of Co-operators. Lynn Gendron testified in a straightforward fashion. She indicated that she received the returned, unclaimed registered termination letter on or about March 25, 1999. She phoned Mr. Brisson and advised him that his policy had been terminated as his license was suspended and she needed a copy of a paid fine receipt. She testified that she told him that his insurance was not valid.

Mr. Gendron met with Mr. Brisson on March 31, 1999, when he attended at her office and he gave him the registered letter and told him he was not insured and should not drive. Mr. Brisson

left and paid his fine. He then returned to the Ryan & Associates and met with Mr. Jeff Mann, who was covering for Ms. Gendron, who had gone out. Mr. Brisson gave him the receipt for the paid fine. Mr. Man testified that he told Mr. Brisson that he had no insurance coverage and would have to apply for coverage with Echelon.

Mr. Mann also testified that Mr. Brisson called him on April 7, 1999 to see if he could transfer the refund owing by Co-operators toward the Echelon policy, but he was told that he could not.

Mr. Philippe Ryan also testified. He stated that he met with Mr. Brisson on May13, 1999 to deal with insurance on his property at 60 Main Street in Avonmore. At that time Mr. Ryan testified that he told Mr. Brisson that he had no auto insurance coverage. Mr. Brisson denied that Ms. Gendron gave him the registered letter. He denied that she told him he was no longer insured. He also denied being told by Mr. Mann and Mr. Ryan that he had no auto insurance.

Ms. Gendron and Mr. Mann testified in a straightforward and credible fashion. Mr. Mann is no longer employed at the Ryan & Associates firm and would have no particular reason to colour his evidence. Mr. Ryan came across in a more aggressive and confrontational manner and clearly had some interest in the position that he was taking. To the extent that Mr. Brisson's evidence differs from that of Ms. Gendron and Mr. Mann, I prefer that of Ms. Gendron and Mr. Mann. I find that Ms. Gendron did give him the registered letter and both she and Mr. Mann advised him that he no longer had a valid auto policy with Co-operators.

The fact that Mr. Brisson knew prior to the accident that his policy had been terminated does not relieve Co-operators from having to cancel the policy in accordance with the provisions of regulation 777/93. The facts as set out above do, however, gravely affect Mr. Brisson's credibility and reflect negatively upon his testimony as to where he was living at the time of the termination. In light of all the above, I find that 1266 St. Jacques Street, Embrun was the correct address, and Co-operators sent the registered termination letter to that address.

THE REFUND CHEQUE

As noted above, Section 11(3) of Ontario Regulation 777/93 deals with the proper method of terminating motor vehicle insurance policies. That section specifics:

> Where this contract is terminated by the insurer,
>
> (a) the insurer shall refund the excess of premium actually paid by the insurer or the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less then any minimum retained premium specified; and
>
> (b) the refund shall accompany the notice unless the premium is subject to adjustment or determination as to the amount, in which case, the refund shall be made as soon as practicable.

As previous noted, the notice of termination letter was sent on March 1, 1999 and accordingly pursuant to Section 11(3) of Regulation 777/93 any necessary refund cheques should have been sent with the notice letter, unless the premium was "subject to adjustment or determination as to the amount." The refund cheque in the amount of $348.33 was not sent until April 6, 1999. It was cashed by Mr. Brisson on May 26, 1999.

The Fund took the position that the premium was not "subject to an adjustment or determination as to the amount" and therefore should have accompanied the notice of termination. In support of this proposition they called Mr. Frank Szirt of Insurance Project Consultants as an expert witness. Mr. Szirt has had involvement in the motor vehicle insurance industry dating back to 1965, when he started out with Traveller's Insurance Company. While most of his work has been in underwriting he has held other positions, including President and Chief Executive Officer of Old Republic Insurance Company of Canada. Most recently he has been a consultant to the insurance industry, providing opinions, primarily in the underwriting field. Mr. Szirt was called to give expert evidence as to the meaning that the phrase "unless the premium is subject to

adjustment or determination as to the amount" has developed within the insurance industry. Mr. Szirt testified that in his experience, refunds do not accompany the termination letter in situations such as fleet policies, where there are a number of vehicles covered by the policy and there may be additions or deletions to the policy during the term of the policy. It is also applicable where the premium is based on the number of miles driven during the life of the policy. In these circumstances the appropriate premium and therefore refund, cannot be determined until the conclusion of the policy and it is therefore difficult to determine.

In Mr. Szirt's view, in cases of fixed premium, there really is no need for an adjustment. All that is required is the date that the policy takes effect, the cancellation date, and the cost of the policy. With this information the amount of the refund can be easily calculated and the cheque sent with the notice of termination.

While Mr. Szirt has considerable experience in underwriting and with commercial fleet policies, his experience with what is often referred to as the "monthly pay-plan" method of premium payment was extremely limited. His exposure to this type of premium payment, which is how Mr. Brisson was paying, would appear to be limited primarily to his time at Traveller's Insurance Company between 1965 and 1975, during which time Traveller's apparently had a rudimentary monthly payment plan. Mr. Szirt had little or no exposure to monthly payment plans beyond that. He has not developed such plans or done terminations under such plans, or taught courses or developed policies for terminations of such plans. Accordingly, I am not prepared to give great weight to his views with regard to the phrase as it relates to monthly payment plans.

Ms. Laura Parcells and Ms. Patricia Bowles gave evidence with regard to the monthly pay-plan, and how the termination refund was handled. They testified that Mr. Brisson was a pay-plan policyholder, which meant that the premiums came out of his bank account on a monthly basis. Both witnesses testified as to the system Co-operators has for sending refund cheques to pay-plan policyholders. Once the decision is made to terminate the policy, a calculation must be done to determine the amount of the refund, if any. Although this might seem to be a very simple matter, it is complicated somewhat by the fact that the premiums are to be deducted from the policy holders bank accounts on a monthly basis and that it takes some time for the premium

payments to clear the bank. Thus, if a premium payment is in the process of clearing the bank, Co-operators does not know until it has cleared that they have actually received the monies. In this particular case, the draws came out on the 24th of the month. The cheque did not clear the bank until after March 1, 1999, and therefore it was unclear at the time of termination whether Mr. Brisson's payment would be honoured by the bank. It is to be noted that Mr. Brisson on a previous occasion had had his deduction not honoured by the bank.

Ms. Parcells testified that on March 23, 1999 she reviewed her file and noted that the registered letter had been return unclaimed. She then made a referral within her office to cancel the policy effective March 21, 1999. The referral was to a person in the pay-plan area to effect the cancellation. The cancellation was then carried out on March 26, 1999 effective March 21, 1999. The refund cheque was not generated until April 5, 1999, dated April 6, 1999. The reason for the delay was the difficulty in determining the amount of the refund. With the draw coming out on the 24th, and this was only 2 days before the cancellation because the payment had not cleared the bank Co-operators could not issue the cheque until they were sure the money cleared the bank. Accordingly, the matter was diarized ahead 10 days to be sure the monies had cleared the bank. The refund cheque was then issued on April 5 and made out to Mr. Brisson on April 6, 1999. As noted above, Mr. Brisson cashed the cheque on May 26, 1999.

Mr. Szirt, in his testimony, expressed the view that insurers were reluctant to forward the refund cheques with the notice of termination as the insured often responded to the registered letters and put their policies in good standing and therefore the policies were not terminated. To have issued the refund cheques and then cancel them if the policy is put in good standing would create administrative difficulties for the insurance companies. Ms. Bowles testified that most recipients of the registered termination letter would comply with a request that had been sent earlier and termination could often be avoided.

Failure to send a refund cheque with a notice of termination for reasons of administrative convenience alone is not a sufficient reason to fail to comply with the provisions of Section 11(3) of Ontario Regulation 777/93. One must, however, take into account the practical realities of the pay-plan system of premium payments. Based upon the evidence before me, I am satisfied in the

circumstances, the refund was "subject to determination as to the amount". I am also satisfied that the refund was made as soon as practicable. While Counsel for the Funds suggested that the issue of waiting for the monies to clear the bank might have been avoided if termination had occurred on a different date, there is no such requirement in the Regulation that the insurer do so.

In light of the about, I am satisfied that Co-operators properly terminated the insurance policy with Mr. Brisson, and thus there was no valid motor vehicle liability policy in place at the time of the accident. Accordingly the Motor Vehicle Claims Fund is responsible for payment of the accident benefits to or on behalf of Ms. Chartrand.

In the event that the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated at Toronto, this _____ day of September 2006.

_____

M. Guy Jones
Arbitrator