IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and Ontario Regulation 283/95;

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

AND IN THE MATTER OF AN ARBITRATION,

BETWEEN:

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

Applicant

- and -

CGU INSURANCE COMPANY OF CANADA
(FORMERLY COMMERCIAL UNION INSURANCE COMPANY OF CANADA)

Respondent

DECISION

COUNSEL:

Maia L. Bent for the Applicant

Harry P. Brown for the Respondent

Jennifer Burns for the Respondent

ISSUE:

1. Was the CGU Insurance Company of Canada policy number ACN 548773 issued to Wigeh Elias, properly terminated prior to the accident of August 25, 1996?

2. Can CGU withdraw its admission with regard to the 90 day notice issue?

DECISION:

1. The policy was properly cancelled prior to the accident of August 25, 1996.

2. CGU can withdraw its admission with regard to the 90 day notice issue.

HEARING:

1. The hearing in this matter was held in the city of London, in the province of Ontario, on March 3, April 25, and September 21, 2006.

FACTS & ANALYSIS:

This priority arbitration arises out of a pedestrian/motor vehicle accident that occurred on August 25, 1996. On that date, Regina Mazur was struck while crossing a street, by a 1988 Pontiac Grand Prix automobile driven by Gloria Elias and owned by herself and her father, Wigeh Elias. Ms. Mazur did not own a motor vehicle and therefore he was not covered under a motor vehicle liability policy. Ms. Mazur was injured as a result of the accident and made a claim for accident benefits from the Motor Vehicle Accident Claims Fund ("The Fund"), which commenced paying benefits. On August 7, 2001, the Fund served a Notice of Dispute Between Insurers on CGU Insurance Company of Canada ("CGU"), claiming that Wigeh Elias had a valid motor

vehicle liability policy with CGU at the time of the accident. CGU takes the position that it had properly cancelled the policy prior to the accident and accordingly it is not responsible for accident benefits payments made to or on behalf of Ms. Mazur.

The Fund takes the position that CGU's cancellation of the policy was ineffective for the following reasons:

1. The amount owing was unclear and it failed to give Mr. Elias an opportunity to bring the premium payments into good standing.
2. The policy was terminated for reasons other then non-payment of premiums.
3. It failed to provide proper notice of the cancellation as required by section 11 of the Statutory Conditions.

To a large degree the facts and indeed the issues are overlapping, accordingly I will deal with them together.

The bare facts of the case are as follows. On July 12, 1996, CGU states that it sent a notice of cancellation by registered mail to Mr. Elias, effective July 28, 1996. Ms. Mazur was struck by Ms. Gloria Elias while driving the car covered by the CGU policy on August 25, 1996. Thus, if the policy was validly cancelled there was no coverage under the CGU policy.

In order to determine if the CGU policy was valid at the time of the accident, it is first necessary to examine the facts of the incident more closely. Prior to doing so, however, I will deal with a preliminary issue raised by the parties. Both parties take the position that the other party has the onus of proving that there was or was not a valid policy of insurance at the time of the accident. In support of the proposition that the party asserting that the policy was terminated has the onus

of proving a valid cancellation, the Fund relies on the FSCO arbitration decision in Acheampong vs. Kingsway General Insurance Company (1997) Carswell. Ont. 2866 (confirmed on appeal, 1998, Carswell Ont. 1082 (Ontario Insurance Commission); Sarnecki vs. Liberty Mutual Insurance Company, 1995 Carswell Ont. 5153 (Ontario Insurance Commission); and Desai vs. Personal Insurance Company of Canada, 2006 Carswell Ont., 4143.

In Acheampong the claimant applied for statutory accident benefits from both Kingsway General Insurance and Western Assurance. Kingsway alleged that its insurance policy had been cancelled and the issue before the arbitrator was whether there was a valid policy in effect at the time of the accident. Arbitrator Alves felt that the onus was on Kingsway to establish that the policy was validly cancelled.

In Sarnecki the injured party claimed accident benefits from Liberty Mutual, who took the position that the policy had been validly cancelled prior to the accident. Arbitrator Palmer, without reasons, simply took the position that the insurer bore the onus of proving a valid cancellation.

In Desai the claimant applied for accident benefits from Personal Insurance Company of Canada which took the position that the policy had been cancelled prior to the accident. Arbitrator Lee stated, without reasons, that the onus was on the insurer to prove the policy had been validly cancelled.

CGU takes the position that the Fund is the applicant in this case and must prove its case, and according the onus is upon the Fund to show that the CGU policy was not validly terminated. It

argues that the three cases cited by the Fund involved cases where the applicant was an insured and that as between the insurer and the insured the onus is on the insurer. In our case, however, we are not dealing with an insurer/insured situation but an insurer/Fund situation. In support of its position CGU refers to the case of Chapman vs. Allstate (1994) O.I.C.D No 41, a decision of Senior Arbitrator Rotter of the Ontario Insurance Commission. In that case Allstate Insurance had insured a car owned by the separated husband of the applicant, who was killed in a motor vehicle accident. The accident occurred when the deceased was driving a car insured by Wellington. Allstate as well as the insured wife of the deceased took the position that its policy with the husband was cancelled prior to the accident. Arbitrator Rotter held that Allstate did not bear the onus of proving effective termination. She noted that in her case it was not a dispute between insurer and insured but between two insurers. In Chapman both Allstate and its insured took the position that contact had been terminated prior to the accident. In Chapman Arbitrator Rotter stated that, "neither of the parties privy to the contact of insurance seeks to assert its existence."

I am in agreement with counsel for CGU that in Sarnecki and Desai it was simply a dispute between the insurer and insured. In Acheampong, however, the dispute involved not only the insurer and the insured, but also the other insurer. Arbitrator Alves nonetheless found the onus was upon then insurer asserting the policy was cancelled.

Our case is somewhat different then that faced by Senior Arbitrator Rotter in Chapman in that one of the parties to the contract, Mr. Wigeh Elias, does seek to assert its existence.

In our case, taking into account the above, and also the issue of spoilage, which I will comment upon later in my decision, I find, for the purposes of determining whether the policy was properly cancelled, in accordance with the provisions of the statutory conditions of the Insurance Act, the onus is upon CGU.

Turning now to the facts of the case, it is necessary to first delve into the history of the relationship between Mr. Wigeh Elias and CGU and its broker, Mr. Dennis Collison.

Mr. Wigeh Elias together with his sons, George "Charlie" Elias, and Jimmy Elias, ran a produce sales and delivery business and had a fleet policy of automobile insurance with CGU going back to at least 1990. In addition, Mr. Elias carried property insurance with CGU as well as a CGL policy for his business. While Mr. Wigeh Elias was primary responsible for dealing with the insurance matters, he was assisted to some degree by his son, George, also know as "Charlie".

The Elias family dealt with CGU through a broker, Mr. Dennis Collison who worked with Patterson Insurance Brokers. During the time leading up to the accident Mr. Elias would on a number of occasion, pay by instalments. On at least two occasions, once in 1993 and again in 1994, CGU had given Mr. Elias a Notice of Termination, however upon payment of the late premiums they agreed to continue the automobile policy with Mr. Elias.

Up until 1994 CGU billed Mr. Elias directly for his policies and decisions as to payments and cancellations were made directly by CGU. Prior to the renewal of the fleet automobile policy on September 10, 1995, however, the relationship between the parties had changed. By that time CGU billed the broker directly who then had 60 days to pay CGU for the premium. It was then up to the broker, Mr. Collsion, to bill Mr. Elias and to obtain payments from him. It was up to Mr. Collison to make decisions as to when to demand payment from Mr. Elias and when to give notice of cancellation. CGU would simply follow Mr. Collison's instruction when it came to provide a notice of cancellation. It is clear from the evidence that Mr. Elias was aware of the change in the relationship by the time the automobile policy was renewed on September 10, 1995. The policy was to remain in place until September 10, 1996.

While some of the details are vague, there is no doubt but that the auto fleet policy was renewed effective September 10. 1995. Mr. Collison paid CGU and then billed Mr. Elias. As there were policies for property, business and the auto fleet, the payments sometimes became somewhat complex and the matter was further complicated by the fact that there were a number of vehicles covered by the policy some of which were used for the business and some not. The cost of the automobile policy varied depending upon the vehicles involved and the coverage required.

By May of 1996, it would appear that the auto policy had been largely paid for, however, there were changes to the vehicle coverage. On June 5, 1996 Mr. Collison sent invoices to Mr. Elias indicating that monies were owing on the fleet policy, after taking into account the policy changes. Mr. Collison indicated at the hearing that the invoices were sent by way of registered mail with an accompanying letter demanding payment and indicated that the policy would be cancelled if payment was not made. Based on the testimony of George Elias as well as Mr.

Collison, and the invoice of June 5, 1996, I am satisfied that the changes to the auto policy were negotiated prior to June 5, 1996 and that on that date, invoices were sent covering the changes. Mr. Wigeh Elias, prior to his death, does not appear to have been questioned about receipt of those invoices and any letters that accompanied them. I am satisfied based on the evidence of Mr. Collison, who I found to be a honest and forthright witness, that the invoices and accompanying letter were sent to Mr. Elias and they were received. Unfortunately, the file that would contain a copy of the letter accompanying the invoices was subsequently destroyed, well after Mr. Collison left Patterson Insurance Brokers. I am satisfied that the letter indicated that payment was in arrears and that if payment was not forthcoming the policy would be cancelled.

Mr. Collison testified that once he sent the June 5, 1996 invoices and letter he diarized the matter ahead to call Mr. Elias in the event that he had not yet received payment.

Mr. Collison had still not received payment by July 3, 1996 and forwarded a note to Ms. Eva Schneider of CGU to cancel the auto policy for non-payment of the premium. Ms. Schneider testified at the hearing that she received the instruction from Mr. Collison and that on July 12, 1996 she requested a cheque for the return of the premium being $466.20, including taxes. She also prepared and signed the notice of cancellation letter, dated July 12, 1996 which indicated the policy would be cancelled 15 days from the day following receipt of the letter at the post office of which it was addressed.

Mr. Collison, having not heard from Mr. Elias followed up with what he called a "courtesy call" on or about July 2, 1996. Mr. Collison indicated that he advised Mr. Elias that the premium had not been received and that the policy would be cancelled if he did not receive payment that day.

Mr. Wigeh Elias had unfortunately died prior to this hearing however he gave evidence under oath prior to his death wherein he did acknowledge receiving a telephone call from Mr. Collison in July 1996. According to Mr. Elias, Mr. Collison advised him that he was cancelling the policy because Mr. Elias was $1,800 arrear on his property insurance policy. Mr. Collison, according to Mr. Elias, demanded full payment that day. Mr. Elias claims that he offered to have his son George deliver a cheque to him the next day but Mr. Collison said this was unacceptable.

Mr. George Elias testified at the hearing and indicated that his father relayed the conversation that he had with Mr. Collison to him and instructed George to takes a cheque to Mr. Collison's office the next day. George Elias says that he did so but that when he offered the cheque to him, Mr. Collison refused to accept it and indicated that the policy had been cancelled. There was no further communication between CGU/Mr. Collison and Mr. Elias prior to the accident. George Elias testified at the hearing that after being turned down by Mr. Collison, he and his father attempted to obtain automobile insurance elsewhere, however they did not do so until after the August 25, 1996 accident when they did so through Southland Insurance.

NOTICE OF CANELLATION:

The Fund takes the position that CGU is estopped from relying on the cancellation of the policy by its actions. The essence of its position is that CGU/Collison had, prior to the cancellation,

allowed Mr. Elias to bring his payments up to date and it could not, therefore, suddenly insist upon strict enforcement of the cancellation and not give him a reasonable opportunity to make payment.

I have some difficult with the Fund's position. To begin with it should be noted that it was CGU that had allowed Mr. Elias to bring the payments into good standing after sending a notice of cancellation rather than Mr. Collison. The situation had changed once Mr. Collison paid CGU rather than Mr. Elias. This distinction, alone, would not sufficient to find against the Fund's position, however, I find as a fact Mr. Collison did sent the invoices on June 5, 1996, along with a registered letter requesting payment. In addition, I find as a fact that CGU did send the notice of cancellation on July 12, 1996. That notice was acknowledged by Mr. Elias to have been received prior to the accident, and indeed would have had to have been received prior to July 24, 1996, as the cheque that accompanied the notice letter was cashed on that date.

Most importantly, I find as a fact that Mr. Collison did call Mr. Elias on or about July 2, 1996 as a "courtesy", not having received payment of the account. While Mr. Wigeh Elias testified under oath that he offered to pay Mr. Collison the next day, Mr. Collison denied that any such offer was made. It does not make sense to me that Mr. Collison would agree to receive the money the day of the call but not the next day. Mr. Collison indicated that if such a proposition had been made to him, he would have passed the offer along to CGU for their approval. Mr. Collison would gain financially by agreeing to the reinstatement and as a businessman it would only make sense for him to want it be reinstated.

Mr. Elias, in his earlier testimony said that Mr. Collison wanted to cancel the policy because approximately $1,500 was owing on the property policy. I note that the property policy was not in arrears at the time of the accident. While the CGL policy may have been in arrears at the time of the cancellation, Mr. Wigeh Elias was very clear that it was the property policy that Mr. Collison claimed was in arrears and wanted payment on. George Elias confirmed that this is what his father told him that Mr. Collison demanded. While Mr. Wigeh Elias may have been a simple person, I do not accept that he did not know the difference between a property policy and the CGL policy. Both Mr. Wigeh Elias and Mr. George Elias had been involved in handling the insurance for many years and it would be reasonable that they would know the difference between the two types of policies. Mr. George Elias suggested at the hearing that there had been a fire claim on one of the properties owned by Mr. Elias in 1995. After that George Elias stated that the relationship with Mr. Collison had soured and that he felt Mr. Collison did not wish to insure Mr. Elias thereafter. The difficulty I have with this position is that the property policy was continued through 1996, when it was eventually cancelled for non-payment of premium.

After considering all the evidence, I come to the conclusion that the most likely version of what happened is that Mr. Elias simply did not have the money to maintain the insurance policy at that time. Mr. Elias did not place automobile insurance on his fleet until on or about August 27, 1996. Accordingly, he knew from July 2, 1996 that he was going to be without insurance for motor vehicle fleet that he used for his business and yet he waited for almost eight weeks to get new insurance. Even taking into account the notice period, Mr. Elias still went for a month without insurance. This simply does not make sense to me unless money for the payments was a problem. Mr. Wigeh Elias testified prior to the hearing that he closed the business during the period when there was no insurance. George Elias testified that they kept the business going but

that they used vehicle owned by cousins etc. The discrepancy between their two positions gives me some difficulty.

I am reinforced in my views that the real reason for not paying for the insurance was a lack of funds by examining the computer log notes of the broker at Southland Insurance Broker filed at the hearing. The note, which was entered on August 26, 1996, could not be altered once entered and stated:

> Sunday August 25, 6:45p.m. Wigeh Elias called my home asking to see me right away. When I arrived Wigeh, Jimmy, Kathy and George were there. Wigeh informed me that Gloria Have (sic) been involved in a auto accident in London causing injury.
>
> Thursday August 15 I quoted a price for insurance and Wigeh said no it was too expensive and left, I had not spoke (sic) with him prior to today. Wigeh, George, Kathy all ask that all back date a policy. I said that we could provide insurance for the day we write it. No back dating. At time of the accident approximately 1p.m. August 25, Jimmy informed me he tried to purchase insurance Friday but I wasn't in. My hours Fri 7:30 a.m. – 7:15 p.m. no messages.

I note that the offices of Southland Insurance were essentially across the road from Mr. Elias' premises. It seems odd, if money were not an issue, that he would have waited so long to get insurance and reject a quote from Southland given some 10 days before the accident. This is especially true given that the insurance was for vehicles he used in his business.

Another basis for CGU being estopped from enforcing the cancellation policy, in the Fund's submission, was the wording at the bottom of the invoice of June 5, 1996, which stated:

> ….premium are due on the effective date of the policy. A service charge of 2% per month (24% per annum) is applicable to all overdue accounts. Please make cheques payable to: Patterson Insurance Brokers Ltd.

This , in the fund's submission is at best vague and misleading. If taken in isolation, I might agree with their position. The statement " premiums are due on the effective date of the policy" would not make sense if referring to just the initial renewal date of September 10, 1995. However, the evidence was there were changes made to the fleet policy during the term of the policy. The invoice form was a general one and based on all the evidence, I conclude that the invoice of June 5, 1996, along with the accompanying letter would make it clear that the monies were now owing. There is no evidence to suggest that this note confused Mr. Elias. Furthermore, any possible confusion would have been eliminated when the notice of cancellation was received.

Counsel for the Fund also suggests that the statement " a service charge of 2% per month (24% per annum) is applicable to overdue accounts" suggests that there is no need to pay immediately and that there would simply be a service charge for the payment. Again, if taken in isolation, I might agree. However, when taken with the accompanying letter and subsequent cancellation letter I do not agree. Simply by stating that there would be a late charge does not preclude a party from cancelling for non-payment. As long as appropriate notice if given, the insurer may choose to no longer accept a further late charge and they may cancel the policy. Based on my findings above, sufficient notice was given.

REASONS FOR TERMINATIONS:

Section 12 of the Compulsory Automobile Insurance Act, R.S.O. 1990, c. 25, as amended, limits the insurer's rights to cancel a policy for four grounds, including the insured's failure to pay to premium. It is this reason that CGU states it used to cancel the policy. As indicated above, the Fund takes the position that the real reason for the termination was that there had been a fire loss claim in 1995 and therefore Mr. Collison did not want to insure Mr. Elias any longer.

Alternately, Mr. Collison wanted full payment for the property premiums which, accordingly to George and Wigeh Elias, Mr. Collison had demanded full payment for. If either of these were the true reason for the cancellation then I would agree with the Fund's position. For reasons I have already given, I did not accept that the cancellation was for those reasons. The property policy was not in arrears and indeed was kept in place until later, when it was eventually cancelled for non-payment of the premium. Furthermore it would be against Mr. Collison's economic interest to cancel the policy for those reasons.

THE CANCELLATION-NOTICE REQUIREMENTS:

The Fund takes the position that CGU did not comply with the notice requirements for an insurer cancelling a motor vehicle liability policy. Those requirements are set out in what was then section 11 of the Statutory Conditions of Ontario Automobile Policy Form 1, which states:

> (1)subject to section 12 of the Compulsory Automobile Insurance Act and section 237 & 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 personally delivered…..

> (5)the 15 days mentioned in sub condition (1) of this condition begins to run on the date following receipt of the registered letter at the post office to which it is addresses.

Mr. Collison testified at the hearing that on July 3, 1996 he sent a note to Eva Schneider at CGU requesting that Mr. Elias' motor vehicle policy be cancelled for non-payment of premiums. A copy of that note, on Patterson Insurance Broker Limited letterhead states, in part:

> …….PLS cancel <u>now</u> for non-payment. Client owes $900.
> PLS send <u>registered</u> letter
>
> Dennis

Ms. Eva Schneider testified at the hearing. Ms. Schneider worked for CGU primarily in the underwriting department since the early 1970's and retired from there in 1998. At the time of the cancellation she a senior underwriter in their North York office. Ms. Schneider testified that while she had no independent recollection of this matter, by reviewing the paperwork she acknowledged receiving the note from Mr. Collison dated July 3, 1996. Ms. Schneider testified that she would then fill out the requisition form for the notice of cancellation letter while obtaining the correct dollar amounts from the computer screen. Ms. Schneider would then prepare the requisition form for the refund cheque. After the requisitions were done, the typing department prepared the notice of cancellation letter and envelope and the accounting department prepared the cheque. The letter and cheque are then provided to Ms. Schneider who signs the notice letter on the same day as it is dated. It is then given to the mail department the same day. Copies of the requisition forms as well as a copy of the notice of cancellation letter and cheque were filed as exhibits at the hearings. The forms and letter are dated July 12, 1996 and the letter is signed by Ms. Schneider.

On cross examination, Ms. Schneider conceded that she herself did not mail the letter and therefore cannot say definitively that it was sent on that date, but she did state that it was her practice to send it on the same day as the letter was dated, because the 15 day notice was based on that date as well as the refund cheque. She testified that if the letter was not sent on that date the mail department was to advise them and she had not been so advised.

Mr. Yasada Persaud testified at the hearing. He worked as a mail clerk in the same CGU office as Ms. Schneider at the time of the cancellation. While he had no direct knowledge of this particular letter, he testified as to the process in place in the mailroom at the time. He testified that the internal mail was picked up four times per day and letters that were to go by registered post were taken to the post office at 4:00 p.m. each day. If a letter were received by the mailroom after 3:45 p.m. it would be returned to the sending employee.

On the bottom of the copy of the cheque requisition form completed by Ms. Schneider is a copy of the post office receipt. The date is marked 12-11-96. The Fund submits that this date may be an error, the onus is on CGU to show that it complied with statutory condition 11 and that it has therefore failed to do so. If the Canada post receipt was all that I had before me, I might well agree with the Fund's position. However there was additional information provided at the hearing. Mr. Elias, in his sworn evidence prior to the hearing stated that he had received the termination letter. In addition, Gloria Elias testified at the hearing that she had been advised by her father prior to the accident that the insurance had been cancelled and she should drive the car until new insurance has been obtained. Finally a copy of the cancelled cheque was filed during

the hearing. It clearly indicates that it was issued on July 12, 1996 and it was cashed in Lemington on July 24, 1996, within the 15 day period and well before the accident.

In all the circumstances I conclude that the Canada post date was most likely an error and rather then 12-11-96, is should have said 12-7-96. While I accept that the provisions of statutory condition 11 have to be strictly complied with, I am satisfied on all the evidence that appropriate notice was given.

SPOILATION

The Fund takes the position that CGU has failed to produce certain documents and that this amounts to spoilage and to the extent the documents are not available it should be construed against CGU. More specifically CGU apparently lost its file and the Patterson Insurance Broker's file was destroyed. The documents that were available for the hearing were apparently in possession of the solicitors in the tort action.

Lindsay Morden an independent insurance adjusting firm retained by the Fund, did write to CGU on December 27, 1996 and advised them that Ms. Mazur had been injured in the accident and that an accident benefits act claim was being made. The adjuster wrote:

> Please confirm that you do have a valid policy enforced, and should this not be the case we would appreciate receiving your documentation as to when the policy was cancelled or expired.

Mr. Collison wrote back to the Lindsay Morden firm on April 8, 1998 indicating the policy was cancelled on July 28, 1996 for non-payment and apparently attaching the request for cancellation.

An action was apparently commenced by Ms. Mazur on August 4, 1998 and CGU was added as a third party on January 26, 1999. A Notice of Dispute Between Insurers pursuant to Regulation 283/95 was served on CGU on August 7, 2001 and on July 9, 2002 a Notice of Arbitration was issued.

It is indeed unfortunate that Mr. Collison's file was not available for the hearing. Mr. Collison testified that he had searched through his records and had no more documentation. He stated that in October 1998 he had left Patterson Insurance Brokerage and had become a partner in Alliance Insurance Brokers. He indicated that when policies were cancelled the files stayed with the brokerage firm. Mr. Paul Taylor, an accountant who had served as an accountant for Patterson Insurance testified on behalf of CGU. While he was called primary to testify regarding various entries regarding Mr. Elias' account, he provided information regarding the missing files. Mr. Taylor indicated that the old files had been stored in the basement of the Patterson offices. In 1999 Patterson merged with two other brokerages. The building that housed Patterson was then rented out to tenants and the files were apparently taken to the landfill disposal site. It is unfortunate that the records were destroyed, however, I am satisfied that this was done inadvertently. I also note that what was originally requested was confirmation as to whether there was as valid policy with CGU and documentation in that regard. The information was provided. The most important documentation that was missing really related to the real reasons

for the termination and the conversation of early July between Mr. Collison and Mr. Elias. I note that the suggestion that the real reason for termination being other then for failure to pay the premiums was not made until relatively recently and well after the file was destroyed.

Spoliation raises a rebuttable presumption that the evidence was unfavourable to the party who destroyed it. See: Cheung vs. Toyota Canada Inc. (2003) O.J. No. 411. Even when spoliation is found to have occurred, however, it is within the discretion of the judge or arbitration to determine what the appropriate remedy is.

As I have already indicated, I am satisfied that the destruction of the documents was inadvertent. To the extent the destruction of the documents raised any rebuttable presumption I am satisfied that an adequate answer has been provided and the inference has been rebutted.

In light of all the above, I find that the motor vehicle liability policy in question was properly cancelled.

NOTICE OF INTENTION TO DISPUTE BETWEEN INSURERS AND THE RIGHT TO WITHDRAW AN ADMISSION

As noted above, the Fund received a completed application for accident benefits on or about October 23, 1996. In January, 1997 the Fund or its agent contacted CGU inquiring as to the existence of insurance coverage for the motor vehicle. CGU advised that the policy had been terminated for non-payment of premiums prior to the accident.

On August 7, 2001, the Fund served a Notice of Dispute Between Insurers and issued a Notice of Arbitration on July 9, 2002. At the onset of the arbitration process CGU put the Fund's alleged failure to put CGU on notice with n 90 days of receiving the completed application for accident benefits form, as required by section 3 of Regulation 283/95, in issue.

The parties agreed to deal with the issue of whether Regulation 283/95 applied to the Fund by way of a separate hearing but still part of this arbitration. Prior to that occurring, however, the Ontario Superior Court of Justice released its decision in Kalinkine vs. Ontario (Superintendent of Insurance), holding that Regulation 283/95 did not apply to the Fund and therefore the Fund was not bound by the 90 day notice provision. The decision was appealed to the Ontario Court of Appeal and on December 17, 2004 the Court of Appeal upheld the lower court's decision in Kalinkine.

Relying upon the Kalinkine decision, counsel for CGU withdrew the notice issue from the arbitration on or about September 9, 2004.

The Ontario Superior Court of Justice addressed the applicability of Regulation 283/95 to the Fund on two subsequent occasions in 2005; Allstate vs. NAC (2005) 78 O.R. (3rd) 492 and Kingsway vs. Ontario (Minister of Finance) [2005] O.J. No. 266.

Both cases were bound by Kalinkine. Both decision were then appealed to a special five member panel of the Ontario Court of Appeal.

The appeals were heard on June 13, 2006, and the decisions were released on January 31, 2007.

Shortly after hearing that the Court of Appeal was going to convene the five member panel to reconsider the issue, CGU, on March 1, 2006, reasserted its notice defence in its Factum of that date. At commencement of our arbitration, prior to any evidence being heard, CGU reasserted its intent to rely on the notice defence, in the event that the five member Court of Appeal panel reversed Kalinkine and found the Fund was bound by the notice provisions of 283/95.

On January 31, 2007 the Ontario Court of Appeal released its decision in Allstate vs. Kingsway in essence reversing Kalinkine and finding that the Fund was bound by the notice provisions of Regulation 283/95. These decisions were released after evidence on the substantive issues in this arbitration was finished, but prior to my having rendered my decision. Accordingly I am not yet functus in this matter.

The issue before me is whether CGU can withdraw what it submits is an admission of law. CGU submits that it may do so as a matter of right on an admission of law. The Fund on the other hand takes the position that this particular case involves a question of both mixed fact and law, and in such cases, the Fund argues that the admission cannot be withdrawn without the leave of the court. The Fund further argues that even if it were an admission of law alone, the admissions cannot be withdrawn without satisfying certain criteria.

In dealing with the question whether the withdrawal of the admission is one of law or mixed fact and law, I am satisfied that it is an admission of law that is being withdrawn. While there may

be a subsequent factual issue as to whether the "saving provisions" of Regulation 283/95 should be invoked to allow for late service of the Notice of Dispute , that would simply be based on the evidence that may come out at a later point, if I allow the withdrawal of the admission. What is really being put forward by CGU, in my view, is a withdrawal of an admission of law. CGU had originally put forward a defence based on a point of law. The Court of Appeal in Kalinkine appeared to decide that as a matter of law, the notice provisions in Regulation 283/95 did not apply. It is clear that CGU withdrew its defence based on the Court of Appeal's decision in Kalinkine.

The Fund also takes the position that even if it were a question of law alone, CGU must first satisfy certain criteria, in order to obtain leave to withdraw the admission. In support of this position the Fund relies upon Transamerica Life Insurance Co. of Canada vs. Canada Life Assurance Company (1995) O.R. (3rd) (Gen. Div.) and Gould vs. Ariss Health Ltd et al (1979) 27 O.R. (2nd) 291(H.C.J.). Those cases as well as Sampson & McNaughton Ltd vs. Nicholson et al (1984) 46 O.R. (2nd) 339 (H.C.J.) all deal with withdrawal of an admission arising in the context of a party's motion of application to amend pleadings pursuant to the Rules of Civil Procedure. Those cases dealt with the admission of a fact. The provisions of the Rules of Civil Procedure regarding the amendment of pleadings are not applicable to the withdrawal of the admissions regarding law-see: Canada (Attorney General) vs. Rainone Construction Ltd. [2003], O.J. No. 6088.

In further support of their position, the Fund cite Sopinka et al "The Law of Evidence in Canada" Second Edition, (Butterworth Canada, 1999), which states:

> 19.2 A formal admission may be made by a statement in the pleadings or by failure to deliver pleadings; (2) by an agreed statement of facts filed at the trial; (3) by an oral statement made by counsel at trial or even counsel's silence in the face of statements made to the trial judge by the opposing counsel with the intention that the statement be relied on by the judge; (4) by a letter written by a party's solicitor prior to trial; or (5) by a reply or a failure to reply to a request to admit facts. A formal admission of fact, as distinct from an admission of law, cannot be withdrawn except with leave of the court or the consent of the party in whose favour it was made. An admission relating solely to a question of law, on the other hand, may be withdrawn at anytime, even in the Court of Appeal. Leave to withdraw an admission should not be granted, however, unless: (1) the admission was made clearly without authority by mistake or under duress; (2) there exists a triable issue concerning the admitted facts; and (3) there will be no prejudice to the party in to whose favour it was made. An inadvertent statement of fact by counsel in opening may be withdrawn if retracted before it has been acted upon. The discretion of the court ought to be warily exercised and usually on terms.

Various cases are cited in support of the above. It is the essence of the Fund's position that CGU must therefore meet a three part test:

1. The admission was made clearly without authority, by mistake or under duress;
2. There existence a triable issue concerning the admitted fact and
3. There will be no prejudice to the party in whose favour it was made.

If this were the test to be applied in this case, I am satisfied that criteria two and three would be met. There is certainly a triable issue in whether the notice provisions of section 283/95 should apply and whether the saving provisions therein should be invoked.

With regard to prejudice, I note that the Fund received the initial application for accident benefits in October 1996 and did not put CGU on notice until August 2002 almost 6 years later. CGU then put a notice issue forward from essentially the commencement of the arbitration in 2002

until after the Kalinkine decision in 2004. I am of the view that CGU would meet the third criteria of the test.

With regard to the first criteria, made without authority, by mistake or under duress, if this criteria were to apply to withdrawal of the admission of law, I do not think CGU would have satisfied that criteria.

After carefully reviewing Sopinka's statement regarding the withdrawal of the admissions, and the case law presented, I am of the view that admissions of law can be withdrawn as a matter of right with possible cost consequences depending upon the circumstances.

CGU has submitted 4 cases which are helpful in this situation.

In Highley vs. Canadian Pacific Railway Company [1929] O.J. No. 92, the defence had admitted as a matter of law, that the plaintiff was entitled to reply upon the defendants sounding the whistle at a public crossing. The Ontario Court of Appeal held that as the admission referred to a point of law and not to fact, the defence was entitled to change its mind without reservation.

In Henderson vs. Tudhope (1930)65 O.L.R. 238, the trial court had not been aware of an amendment to the Highway Traffic Act and therefore counsel for the defendant made an admission of law. The Court of Appeal held that the admission of law could be withdrawn.

In Re: Baty [1959] O.R. 13-21, counsel at the hearing made an admission that an estate legacy was not barred and later sought to withdraw that admission. The Court if Appeal held that as it was an admission of law it could be withdrawn without applying any criteria.

The law in this area was more recently reviewed in Canada (Attorney General) vs. Rainone Construction Limited [2003] O.J. No. 6088. In that case, the Attorney General in its pleadings had initially said that it was not relying on certain statutes, but subsequent legal research determined that certain statutes could apply and the Attorney General moved to withdraw the admission. The court held that the Highley, Henderson and Re: BRADY were still binding and good law. The court allowed the withdraw of the admission of law without any necessary criteria.

I am satisfied that the withdrawal of the admission in this case is on an issue of law and should be allowed to be so withdrawn. As a result, there would be a further hearing on the notice issue,

subject, of course, to any submission the counsel wish to make in light of my finding on the substantive issues made in this case.

Dated at Toronto this _____ day of August 2007.

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M. Guy Jones
Arbitrator