IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 18, as amended, and ONTARIO REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

THE WAWANANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND, and ROYAL AND SUNALLIANCE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Kevin D.H. Mitchell for the Applicant

John Friendly for the Motor Vehicle Accident Claims Fund

Jamie R. Pollack for Royal and SunAlliance Insurance Company

ISSUES:

1. Was there a valid Royal and SunAlliance Insurance Company motor vehicle liability policy in place on the 1986 GMC dump truck or associated work related vehicles at the time of the accident in question?

DECISION:

1. There was a valid policy of insurance with Royal and SunAlliance Insurance Company for the 1986 GMC dump truck and associated work vehicles at the time of the accident.

HEARING:

This hearing in this matter was held in the city of Toronto, in the province of Ontario on April 4, 2008. No viva voce evidence was heard and the matter proceeded on the basis of documents filed at the hearing.

FACTS & ANALYSIS:

This priority dispute arbitration arises out of a single motor vehicle accident that occurred on August 20, 2002. On that date Mr. Anthony Borrelli was operating a 1986 GMC dump truck when it lost control and crashed. Mr. Andrew Cina, a passenger in the vehicle was injured and claimed statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), who insured Mr. Cina's mother's personal motor vehicle. Pursuant to the provisions of the Statutory Accident Benefits Schedule, Wawanesa commenced payment of the accident benefits to Mr. Cina, however, it takes the position that at the time of the accident, the owner of the dump truck, Mr. Borrelli, had a valid motor vehicle liability with Royal and SunAlliance Insurance Company ("Royal") and that Royal should pay the accidents benefits as being higher in priority than Wawanesa. Alternatively Wawanesa takes the position that if there was no policy with Royal, the Motor Vehicle Accident Claims Fund ("the Fund") should pay the benefits as Andrew Cina was not dependant upon his mother at the time of the accident. At that this time I am only dealing with the issue of whether there was a valid motor vehicle liability policy with Royal at the time of the accident.

The applicant, Wawanesa, supported by the Fund, takes the position that there were two valid motor vehicle liability policies with Royal at the time of accident. The first being policy 15034826-A ("Legacy" policy) and the second being policy IRC 006277309 ("Huon" policy). While I will deal with the validity of each policy separately, it is beneficial to review the under lying facts of the case at this time, as the facts involving the two policies and their validity overlap.

Prior to the accident the Borelli family operated a business under the name of Giovanni General Contracting and Tropical Pools and Leisure. On or about June 26, 2000 the Borellis applied for and received a motor vehicle liability policy from Royal covering a number of vehicles used in the family business. The policy, 15034826-A was for a term of one year running from June 26, 2000 to June 26, 2001. The policy was subsequently renewed and on or about July 3, 2001, Royal issued an amendment to the certificate of automobile insurance to add the 1986 GMC dump truck, which subsequently became involved in the accident.

Wawanesa and the Fund take the position that on or about December 14, 2001, Royal issued a new policy, # IRC 006277309 to cover a 2001 Daewoo vehicle which had been leased by the Borellis. This second policy was issued because the earlier Royal software system "Legacy" would not allow at second leased vehicle with separate leasors to be insured under the same policy. The Borellis already had a Porsche automobile, which it leased, covered by the Legacy policy. According to Wawanesa, a broker, Roger R. James Insurance Brokers Limited, with the power to bind Royal, wrote the new policy. It was to cover the period from November 8, 2001 to June 26, 2002 to coincide with the policy period on policy 15034826-A. The new software system "Huon" would thus allow for multiple leased vehicles to be covered. It is Wawanesa's and the Fund's position that even if the original "Legacy" policy was cancelled the "Huon" policy remained in place and was not cancelled until after the accident.

It is Royal's position that the "Legacy" policy was cancelled prior to the accident and that there was never a valid "Huon" policy with the Borellis covering the vehicles in question.

THE LEGACY POLICY:

As mentioned above, it is the position of Royal that the "Legacy" policy was cancelled. They take the position that the Borellis, through Tropical Pools and Leisure Ltd., entered into a premium finance agreement with AIG Credit Corporation whereby the Borellis assigned any and all unearned premiums and dividends that became payable to AIG Credit Corporation and appointed AIG Credit Corporation attorney – in – fact with the authority to cancel the Royal "Legacy" policy. Royal was provided with the Notice of Agreement in September of 2001.

On December 10 and 18, 2001, AIG Credit Corporation advised Royal in writing that the "Legacy" policy was cancelled in accordance with the power of attorney and given to AIG Credit Corporation to cancel the policy upon default of payment of premiums to AIG Credit Corporation. The cancellation dates were specified to be December 10 and 18, respectively. The notices both indicate that the insured and broker had been given 10 days notice of the intent to cancel.

On January 12, 2002, Royal sent formal written notice to Raffaella and Giovanni Borelli, O/A Giovanni General Contracting as well as Trachmount Glojack Leasing Ltd., and AIG Credit Corporation that the "Legacy" policy was cancelled. A return of premium in the amount of $2,459.00 was issued to AIG Credit Corporation. The notice given by Royal mistakenly gave the date of cancellation as December 28, 2001 rather than December 18, 2001 as specified by AIG Credit Corporation. In light of this error, on January 18, 2002, Royal issued a reinstatement of the certificate of automobile insurance under the "Legacy". The reinstatement was effective December 28, 2001 and to the end of the policy period on June 26, 2002. Then, on January 24, 2002, Royal advised the Borellis, Trachmount Glojack Leasing Ltd. and AIG Credit Corporation that the "Legacy" policy had been cancelled at the request of AIG Credit Corporation under the AIG Credit Corporation power of attorney. On January 29, 2002, Royal advised the broker, Roger R. James Insurance Brokers Limited in writing, that the "Legacy" policy had been cancelled effective December 18, 2001. The letter further advised that the policy cancellation, by

mistake, was effective December 28, 2001 and due to system limitations Royal had been unable to correct the cancellation to December 18, 2001. Royal advised that they were therefore issuing a manual credit for $161.00 being the premium refund for December 18-28, 2001.

It is Royal's position that the "Legacy" policy was properly cancelled by AIG Credit Corporation acting through it's power of attorney, pursuit to section 11 (2) of Ontario Regulation 777/93 which states:

"this contract may be terminated by the insured at anytime on request."

While Wawanesa suggested that AIG Credit Corporation may not had full power of attorney to effect the termination, I saw no evidence of this. There is little doubt but that AIG Credit Corporation could and did enter a valid "premium instalment contract" that gave it the power to step into the shoes of the insured. (See: Johns vs. Guarantee Company of North America, [1976] I.L.R 1-748: and J.W. Arden Logging Company vs. Fireman's Fund Insurance Company, [1964] I.L.R 1-117. As such, AIG Credit Corporation had every right to terminate the insurance contract, acting as the insured. It is important to note that section 11(2) of Regulation 777/93 imposes no restrictions upon an insured cancelling the insurance contract. This is to be contrasted with section 11 (1) of the Regulation which requires that if an insurer terminates the policy, it must give 15 days written notice of termination by registered mail or 5 days written notice personally delivered.

The notice of cancellation sent to Royal by AIG Credit Corporation states the date notice is December 18, 2001 and the effective date of cancellation is also December 18, 2001. It also states that the named insured and the broker have been notified by ordinary mail of the cancellation. Based on the evidence before me, I find that Royal received AIG Credit Corporations notice of cancellation on or before January 11, 2002.

The Ontario Court of Appeal in Larizza vs. Commercial Union Assurance Company of Canada [1990] I.L.R. 1-2608; dealt with a somewhat similar situation. In that case a financing company gave notice of cancellation on behalf of the insured to the insurer. The notice specified a cancellation date of January 4, 1983 however notice was not received by the insurer until January

10, 1983. The Court of Appeal held that the cancellation was not effective until its receipt by the insurer.

Upon the reasoning in the Court of Appeal in the Larizza to this case, the AIG Credit Corporation notice was effective as of January 11, 2002 and accordingly as of that date the "Legacy" policy was terminated.

Had Royal simply sent the appropriate premium refund, that would have been the end of the matter. However, Royal, on January 17 and 24, 2002 sent out notices the Borellis, Trachmount Glojack Leasing Ltd. and AIG Credit Corporation, formally notifying them that the policy had been cancelled. In their notice Royal specified the date cancellation as December 28, 2001 instead of December 18, 2001 as specified by AIG Credit Corporation.

Apparently, the Royal computer system was such that is was unable to rectify this error and in an effort to solve the problem, Royal purported on January 18, 2002 to issue another certificate of automobile insurance as a "reinstatement" with an effective date of December 28, 2001 through June 26, 2002. It is not entirely clear who received a copy of the "reinstatement" policy however it is clear that the broker, Roger R. James Insurance Brokers Limited received it, as their date stamp January 24, 2002 confirms it's receipt.

In addition to the termination notice letters sent by Royal on January 12, 2002 which obviously predated the "reinstatement" and the January 24th letter, Royal also sent a letter to the broker specifically addressing the reinstatement policy. It stated:

> "Please be advised that above noted policy was cancelled as per AIG Credit Corporation request effective December 18, 2001. However by mistake policy was cancelled effective December 28, 2001. Due to system limitations we were unable to correct the cancel date to December 18, 2001. Total short rate refund should be $2620.00 based on 47% return. Previous refund is $2459.00. Therefore we are issuing a manual credit of $161.00 to agency account to adjust the amount to back date cancellation effective December 18, 2001. Sorry for any inconvenience this may have caused.

Wawanesa and the Fund take the position that the reinstatement has, in effect, created a new policy and any attempt by Royal to cancel it without formal notice by AIG Credit Corporation acting as the insured, would make it subject to the termination provisions of section 11 (1) of Regulation 777/93 (notice termination by the insurer). In other words, Wawanesa and the Fund take the position that after the reinstatement, either AIG Credit Corporation would have to give fresh notice of cancellation (acting as the insured) or Royal cancelling as the insurer, would have to give 15 days notice as required by the Regulation. Neither was done and accordingly they take the position that the policy was not cancelled and remained in effect until the time accident.

I am not in agreement with the position. In my view, AIG Credit Corporation, acting as the insured, clearly intended and did cancel the policy. It was received by Royal on January 11, 2002 and the cancellation became effective as of that date. What followed was administrative errors, which while unfortunate, and somewhat confusing, does not change the fundamental fact that the parties intended to and did in fact cancel the policy.

Counsel for the Fund in his closing submissions, raised the argument that Royal had improperly cancelled the "Legacy" policy pursuant to statutory condition 11, as Royal did not provide 15 days notice via registered mail that the "Legacy" policy was cancelled by AIG Credit Corporation. In support of their position, the Fund relied upon the Ontario Court of Appeal decision in Transportaction Lease System Inc. vs. Guarantee Company of North America, [2005] O.J.No. 5036.

In that case, Transportaction leased a motor vehicle to a Mr. Beals. As part of the lease agreement Beals obtained a policy of insurance with Guarantee Company of North America naming both Beals and Transportaction as insured. Beals subsequently put the vehicle in storage and directed the insurer to delete coverage except for fire and theft. The vehicle was subsequently damaged in an accident while being driven by Beals. Beals had failed to give proper notice of the deletion to Transportaction. The Ontario Court of Appeal held that interests of the two insured were several not joint and that one co-insured cannot unilaterally cancel or delete coverage of the other under the policy.

With respect, our case is somewhat different from the Transportaction case. In our case the interest of the leasing company, Trachmount Glojack Leasing Ltd. was limited to the 1988 Porsche 911 automobile, which had been leased by Trachmount Glojack Leasing Ltd. to the Borellis. The "Legacy" policy did not include any other leased vehicles. As noted above, the Ontario Court of Appeal decided that the rights and obligation of co-insureds under a policy of insurance are severable and not joint. The Ontario Court of Appeal stated:

> "As Laform, J.A concluded, the contract of automobile insurance is several, rather than joint, and as such, effectively creates two insurance contracts, one insuring the interest of Transportaction, and the other insuring the interests of Beals as lessee of the vehicle. Because the of the several nature of the contract provides for separate coverage of insurable interests of each co-insured, one co-insured could not delete the coverage effecting the insurable interest of each co-insured without the consent of the later."

Mr. Justice Borins went on to state:

> "I prefer to base my decision on the narrow ground that because Transportaction and Beals were separately insured, Beal's deletion of all the coverage except for fire and theft effected only his coverage and not that of Transportaction which had an insurable interest in the car."

Applying the approach set out by the Ontario Court of Appeal in Transportaction, even though, AIG Credit Corporation did not receive the consent of Trachmount Glojack Leasing Ltd. to cancel the "Legacy" policy that failure would only effect Trachmount Glojack Leasing Ltd.'s interest in the Porsche part of the contract. The failure to obtain the consent of Trachmount Glojack Leasing Ltd. does not effect the validaty of the insurance on the GMC dump truck and

other vehicles on the "Legacy" policy. In light of the above, Royal's "Legacy" policy was properly terminated vis a vis , the Borellis and the non leased vehicles.

THE HUON POLICY:

As mentioned above, the Borellis' in November 2001 wanted to add a second leased vehicle a Daewoo, to their motor vehicle liability policy. The original Royal operating system, "Legacy", however, would not allow more than one leased vehicle on the legacy style policy. Accordingly another policy was created, being IRC 006277309 (the "Huon" policy). The policy was to run from November 8, 2001 to June 26, 2002 being expiry date as the "Legacy" policy. It is alleged by Wawanesa and the Fund that this policy was in effect at the time of the accident and covered the 1986 GMC dump truck that was involved in the accident. Royal takes the position that the truck was not covered by that policy at the time of the accident.

The question of whether the truck was covered by the "Huon" policy is largely factually based, and while there is agreement on some of the facts, there is a factual dispute in some areas. Accordingly, it is necessary to go into the facts of this matter in some detail.

Wawanesa and the Fund take the position that the Borellis did in fact arrange coverage for the truck on the "Huon" policy. In support of this position they maintain that on April 11, 2002 Roger R. James Insurance Brokers Limited issued five pink motor vehicle liability insurance cards with respect to the "Huon" policy and faxed to them to the Borellis at 905-264-6948. One of the pink slips was for the truck. A copy of the fax was filed at the hearing. It shows that two pages including the slip for the truck were faxed to the above number. Counsel for Wawanesa points out that the fax number is very close to the telephone number of the Borellis as set out in a Notice of Loss dated November 2001, being 905-264-6946. Counsel for Wawanesa also filed a letter from the Borellis' solicitor wherein he indicated that his clients' file reflected that the Borellis fax number was 905-264-6948, although the exact date as to when such a fax number

was operational was unknown. The mere fact that the solicitor's letter indicates this does not, of course, mean that it is correct.

Wawanesa also filed in support of its position a fax from the broker to Royal, allegedly sent April 17, 2002, dated the previous day, requesting that it add a number of vehicles to the "Huon" policy. Further faxes with similar requests for various vehicles were allegedly sent from the broker to Royal on June 8 and 12, 2002. Royal has denied receiving any of the faxes. Counsel for Wawanesa points out, however, that the of June 8, 2002 requests the addition of a Porsche to policy, effective June 5, 2002 and an amended certificate was issued for June 5, 2002. Counsel for Royal points out, however, that the Royal underwriting file reflects that a phone call between the broker and Royal underwriting took place during that time frame and that the addition of the Porsche could have been done by telephone rather than fax.

The April 16, 2002 fax included, on page 2 of the fax, a request to place the dump truck on the policy. This document was particularly controversial between the parties as not only did Royal maintain that it did not receive it, but its format differs somewhat from page one of the fax.

As further evidence of an intent to provide coverage, Wawanesa filed copies of pink slips with respect to the "Huon" policy covering from June 26, 2002 to June 26, 2003 issued by the broker and covering, among other vehicles, the vehicle in question. Copies of the pink slips were found in the broker's file, although there is no evidence that they were actually received by the Borellis. Counsel for Royal points out that the pink slips were actually found in the broker's file and that after the accident it was not a copy of the "Huon" policy that was produced, at the scene. Counsel for Royal also points out that the Borellis never paid the premium for the coverage on the truck, and submit that this is further evidence that there was no intent to cover the truck.

While the evidence is somewhat suspect, I am of the view that there does appear to have been some intention on the part of the broker to cover the truck in question. The broker clearly intended to fax pink slips including one for the truck on April 11, 2002. This, combined with the other supportive evidence leads me to the conclusion that there was an intent by the Borellis, communicated to the broker to cover the truck.

It is conceded by Royal that the broker had the power to bind Royal. Accordingly, since I have found that the broker showed an intent to cover the vehicle in question, there was a valid policy of motor vehicle liability insurance with Royal covering the truck in question at the time of the accident.

In the event that the parties cannot agree with regard to the issue of cost I may be spoken to.

Dated at Toronto, this _____ day July 2008.

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M. Guy Jones

Arbitrator