**IN THE MATTER OF THE *INSURANCE ACT*,**
**R.S.O. 1990, c. I. 8 as amended, s. 268(2) and**
**all regulations thereto**

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17,**
**and in particular, s.23**

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N :

CERTAS DIRECT INSURANCE COMPANY

(THE PERSONAL INSURANCE COMPANY OF CANADA)

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

# DECISION WITH RESPECT TO PRELIMINARY ISSUES

## COUNSEL

Shirline Apiou
Counsel for the Applicant, Certas Direct Insurance Company

Paul J. Barnes
Counsel for the Respondent, Security National Insurance Company

## ISSUES

This Arbitration involves a priority dispute to determine which insurer stands in priority to pay statutory accident benefits to David Clarke, as a result of personal injuries sustained by him in a motor vehicle accident which occurred on November 22, 2009. The determination is to be made pursuant to Section 268(2) of the Insurance Act, R.S.O. 1990 and all regulations thereto.

The caselaw which has evolved with respect to priority disputes has given rise to terminology to identify the various insurers involved. The insurer to have first received "a completed application for benefits" is referred to as the 1st tier insurer. The insurers who are put on notice by the 1st tier insurer that they might stand in priority for the payment of accident benefits are referred to 2nd tier insurers. The insurers who are put on notice by the 2nd tier insurer that they might stand in priority for the payment of accident benefits are referred to as 3rd tier insurers.

In this case The Nordique Insurance Company of Canada (1st tier insurer and hereinafter referred to as "Nordique") has been paying statutory accident benefits to the claimant David Clarke. The preliminary issues to be determined here are issues as between the 2nd and 3rd tier insurers.

There are three issues to be determined on a preliminary basis. The first issue is whether Certas Direct Insurance Company (hereinafter referred to as "Certas") 2nd tier insurer, placed Security National Insurance Company (hereinafter referred to as "Security National"), as 3rd tier insurer, on notice within the requirements of the Disputes Between Insurers, Ontario Regulation 283/95. The second issue is whether Certas commenced it's arbitration against Security National within the requirements of the Disputes Between Insurers, Ontario Regulation 283/95. The third issue is whether the claimant, David Clarke, had a valid policy of insurance with Security National in effect at the date of this accident on November 22, 2009.

**PROCEEDINGS**

The proceedings with respect to the determination of these preliminary issues were conducted on the basis of an Agreed Statement of Facts, Joint Document Brief and written submissions.

**FACTS**

This priority dispute arises as a result of a motor vehicle accident which occurred on November 22, 2009. At the time of the accident, Mr. Clarke was the driver of 2003 Mercedes SL500 vehicle owned by his friend, Archer Khoran. On the date of loss, the Khoran vehicle was insured with Nordique (subsequently purchased by Intact) for comprehensive coverage only.

On or about December 22, 2009, Mr. Clarke submitted an Application for Accident Benefits (OCF 1) to Nordique Insurance (also know as Intact Insurance). This was faxed and received by Nordique on December 23, 2009.

The Applicant in this Preliminary Issue Hearing, Certas Direct Insurance Company, received a Notice to Applicant of Dispute Between Insurers dated January 4, 2010 from Intact Insurance on January 12, 2010. The Notice to Applicant of Dispute Between Insurers from Intact notified Certas that the Khoran vehicle only had comprehensive coverage on the date of loss. On November 16, 2010, Certas received further correspondence from Intact with respect to the Notice.

On or about December 24, 2010, counsel for Intact Insurance requested Certas to respond to its priority request or in the alternative, agree to an arbitrator for the arbitration proceedings.

On or about January 12, 2011, counsel for Certas and counsel for Intact (having purchased Nordique) agreed to Ken Biakowski as the arbitrator in these proceedings.

On or about May 2, 2011, Certas sent a Notice to Applicant of Dispute Between Insurers to Security National Insurance Company.

On or about August 16, 2011, a Pre-Hearing proceeded with Arbitrator Bialkowski. Counsel for Intact and Certas participated.

On August 16, 2011, Certas served a Notice Demanding Arbitration on Security National Insurance Company.

On September 13, 2011, the Pre-Hearing resumed with Arbitrator Bialkowski. Counsel for Intact, Certas and Security National participated.

On November 14, 2011, the Pre-Hearing resumed with Arbitrator Bialkowski. Counsel for Intact, Certas and Security National participated. It was agreed that a Preliminary Issue Hearing would proceed between Certas as Applicant and Security National as Respondent.

Security National insured Mr. David Clarke under a policy of automobile insurance no. 71177527. The policy of automobile insurance was initially purchased with Security National commencing February 20, 2007 for a one year term and renewed for February 20, 2008 to February 20, 2009. On August 22, 2008, a modification was registered on his policy for a change in territory.

On October 1, 2008, Security National sent a letter to Mr. Clarke by registered mail notifying that the policy was being terminated for non payment of the premium effective October 16, 2008. The letter states that following cancellation, there was an outstanding balance of $213.48 and to pay this immediately.

On or about October 16, 2008, the policy of automobile insurance was cancelled for non payment of premium.

On October 17, 2008, Meloche Monnex (previously Security National) wrote further to Mr. Clarke regarding an outstanding amount of $213.48 after the cancellation of his policy and requested payment as soon as possible to bring his account up to date.

On November 19, 2008, Meloche Monnex (previously Security National) wrote further to Mr. Clarke regarding his cancelled policy and requested payment of the outstanding balance failing which his file would be submitted to their collection agency.

## ANALYSIS AND FINDINGS

### 1. Did Certas (2nd tier insurer) place Security National (3rd tier insurer) on notice within the requirements of the Disputes Between Insurers, Ontario Regulation 283/95?

As a result of injuries sustained in the November 22, 2009 motor vehicle accident, David Clarke submitted an Application for Accident Benefits (OCF-1) to Intact on or about December 23, 2009. Intact placed Certas on notice of its intention to dispute priority on or about January 12, 2010 (within the 90 day period required under Section 3 of Ontario Regulation 283/95 – Disputes Between Insurers). Certas then served a Notice of Dispute Between Insurers on Security National on or about May 2, 2011 (nearly 16 months after being served with Intact's initial notice). Certas served Security National with Notice Demanding Arbitration on or about August 16, 2011, some 19 months after being put on initial notice by Intact.

The Respondent Security National takes the position that Certas did not comply with the notice requirements of the Disputes Between Insurers (Ontario Regulation 283/95) as notice was provided well beyond the 90 day requirement as set out in the said regulation.

The relevant portions of Ontario Regulation 283/95 – Disputes Between Insurers – is set out as follows:

> **3.** (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.
>
> **10.** (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers.
>
> (2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).
>
> (3) The dispute among the insurers shall be resolved in one arbitration.

The Applicant Certas takes the position that there is no requirement of a 2nd tier insurer to place a 3rd tier insurer on notice within 90 days as is the clear obligation of a 1st tier insurer to place a 2nd tier insurer on notice within 90 days.

Although the Respondent Security National takes the position that the law with respect to this issue is unsettled, I beg to differ. I believe that this issue was thoroughly canvassed in Wawanesa v. Peel Mutual and Economical Mutual Insurance Company (Arbitrator Samis, January 28, 2011 and June 21/11). In that case, Economical took the position that Peel Mutual did not follow the proper procedure to assert a priority claim against Economical Insurance, specifically with respect to the 90 day limit to provide written notice under Section 3(1). Arbitrator Samis held that the procedural requirement for the 1st tier insurer to give the initial notice to other insurers under Section 3(1) of the Regulation does not apply to 2nd tier insurers. He also held that the time limit under Section 3 to provide notice to other insurers does not apply in Section 10 of the Regulation. I am of the view that Wawanesa v. Peel Mutual and Economical Mutual Insurance Company (supra) is directly applicable to the issue before me. In both his original and supplemental decisions arbitrator Samis outlines the information and sources of information available to a 1st tier insurer that would not necessarily be available to a 2nd tier insurer and the burden that a 90 day limit to provide notice would impose on a secondary insurer.

In reaching this decision, I have considered the comments of Arbitrator Jones in State Farm v. Lloyd's of London, et al. (January 2002), which would suggest that a 2nd tier insurer has the same notice obligations as a 1st tier insurer, but point out that his comments were obiter in that his ultimate decision did not turn on the analysis of that issue. I prefer the analysis of Arbitrator Samis in Wawanesa (supra)

The Respondent Security National argues that if one were to accept Arbitrator Samis' reasoning, a 3rd tier insurer could possibly be put on notice by a 2nd tier insurer some ten to

fifteen years after the 2nd tier insurer's receipt of the Notice of Intention to Dispute. On a practical level, this is unlikely to happen. No insurer wants to be saddled with the obligation of adjusting or paying benefits to a claimant when some other insurer might stand in priority. On a practical level, insurers will complete an investigation as quickly as possible, once put on notice by a 1st tier insurer, to determine if some other insurer stands in priority. The burden of having to adjust a claim and pay benefits is sufficient motivation to an insurer to determine whether another insurer stands in priority at the earliest possible date. The delay here of 16 months is, in my experience involving priority disputes, an anomaly and that 2nd tier insurers normally place potential 3rd tier insurers on notice as quickly as possible so as not to be saddled with the obligation to adjust and pay benefits while investigating whether another insurer stands in priority. If the legislators had intended a 90 day notice requirement on 2nd tier insurers it could easily have used specific working of such obligation in s. 10 of Ontario Regulation 283/95 as set out above.

Furthermore the threat of a time limitation to commence arbitration by the 2nd tier insurer would likely motivate the 2nd tier insurer to complete its investigation as quickly as possible and avoid the hypothetical absurdity suggested by the Respondent in the paragraph above.

Simply stated, I do not find that a 2nd tier insurer is bound by the 90 day notice requirement imposed by s. 3 of Ontario Regulation 283/95.

**2. Did Certas (2nd tier insurer) commence it's arbitration against Security National (3rd tier insurer) within the requirements of the Disputes Between Insurers, Ontario Regulation 283/95?**

The Respondent Security National takes the position that Section 7 of the Disputes Between Insurers, O. Reg. 283/95, creates a one year time limitation to commence arbitration from the date Certas first received the Notice to Dispute from the insurer paying benefits pursuant to s. 2. Certas received notice from the insurer paying benefits pursuant to s.2 (Nordique) on January 12, 2010. Security National states that Certas had until January 12, 2011 to commence its arbitration proceeding as against Security National. In fact, the arbitration proceeding as against Security National was not commenced until August 16, 2011, allegedly seven months post-limitation.

Section 7 of the Regulation states:

> **7.** (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed. O. Reg. 38/10, s. 8.
>
> (2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insured person. O. Reg. 38/10, s. 8.
>
> (3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3. O. Reg. 38/10, s. 8.

> (4) Despite subsection (3), the arbitration may be initiated by the Fund at any time before or after the expiry of the time limit set out in subsection (3) if the Fund is paying benefits in respect of an accident that occurred on or after September 1, 2010. O. Reg. 38/10, s. 8.
>
> (5) No insured person is entitled to initiate or participate as a party to an arbitration under this section if the insurer paying benefits is the Fund. O. Reg. 38/10, s. 8.
>
> (6) If the dispute relates to an accident that occurred on or after September 1, 2010, the failure of an insurer other than the Fund to comply with section 2.1 or 3.1 may be the subject of a special award made by the arbitrator. O. Reg. 38/10, s. 8.

In support of its position, the Respondent relies upon the decision of Pilot Insurance Co. v. Royal & SunAlliance Insurance Co. of Canada, 2006 Carswell Ont. 1048. This was a decision of Justice Belobaba on appeal from a private arbitration decision of Arbitrator Stephen Malach. In this case, Zurich had received an Application for Accident Benefits in April 2001 and served Notice of Dispute on Pilot on June 25, 2001, also advising Pilot of potential alternate coverage under a spousal policy. After investigation and before Pilot commenced arbitration Zurich satisfied itself that it stood in priority to the Zurich policy. Pilot willingly took over carriage of the claimant's accident benefit claim on October 30, 2001 and served a Notice of Dispute on Royal & SunAlliance (who held the spousal policy) on November 6, 2001. Pilot subsequently initiated arbitration proceedings on Royal & SunAlliance on October 24, 2002, more than a year after Pilot had been served with the initial notice of intention to dispute by Zurich. Justice Belobaba overturned the decision of Arbitrator Malach and held that the Pilot arbitration was time-barred, not having been commenced within one year from the date that the insurer paying benefits under Section 2 first gave notice under Section 3. Applying the reasoning of Justice Belobaba in Pilot to the present fact situation, Certas had until January 12, 2011 to initiate an arbitration against Security National, but did not do so until seven months later.

The Applicant Certas submits that an arbitration was commenced within the appropriate time frame. On the basis of the Agreed Statement of Fact, Certas received Notice of Dispute on January 12, 2010. On the basis of the Agreed Statement of Fact, counsel for Certas and counsel for Nordique agreed to arbitrate on January 12, 2011. Certas claims that the arbitration had already been initiated and Security National was brought into the existing arbitration pursuant to Section 10 of the Regulation, when Certas forwarded its Notice of Dispute to Security National on or about May 2, 2011. In other words, Certas merely joined Security National to the existing arbitration when it served its Notice of Dispute and had no obligation to initiate a separate arbitration.

The facts of the present case are distinguishable from those in Pilot Insurance Co. v. Royal & SunAlliance Insurance Co. of Canada (supra) . In Pilot there was no previous arbitration that had been commenced. The 1st tier insurer Zurich resolved it's differences with the 2nd tier insurer Pilot amicably without the need of an arbitration. Pilot, on a strict interpretation of the Regulation by Justice Belobaba, had one year from the date that the insurer paying benefits under section 2 (the insurer to have first received a completed application for benefits) gave Notice of Dispute pursuant to s. 3 to commence an arbitration and it did not. The facts in the case before me are different. On the Agreed Statement of Facts an arbitration was commenced in a timely fashion between the 1st and 2nd tier insurers. In my view the "Notice Demanding Arbitration" served by Certas (2nd tier insurer) on Security National (3rd tier

insurer) on or about August 16,2011 merely added them to the existing arbitration. Section 10(3) of Regulation 283/95 makes it clear that "the dispute among the insurers shall be resolved in one arbitration".

I find that the arbitration proceeding of Certas as against Security National is not time-barred.

**3. Did Mr. David Clarke have a policy of insurance with Security National that was in effect as of the date of the accident of November 22, 2009?**

The Applicant Certas takes the position that as of the date of this accident (November 22, 2009), David Clarke had in place a valid policy of motor vehicle liability insurance with Security National, as their purported cancellation of the policy for non-payment of premium is not in accordance with the requirements of the statutory conditions set out in the policy.

Statutory 11 of the Statutory Conditions Regulation, Ontario Regulation 777/93 states:

> *Statutory Conditions – Automobile Insurance,* O. Reg. 777/93.
>
> 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 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.
>
> (1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that

the insured is permitted to pay the premium under the contract in installments, the amount due under the contract as at the date of the notice shall not exceed the amount of the installments due but unpaid as at the date of the notice.

(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specifies, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

(1.7) If, on two previous occasions in respect of the contract, the insurer has given a notice of termination mentioned in subcondition (1.2) and the full amount payable under clause (b) of subcondition (1.3) has been paid by the time and in the manner that the notice specifies and if a non-payment again occurs of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract and subcondition (1.1) applies to the notice, instead of subcondition (1.2).

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

(3) Where this contract is terminated by the insurer,

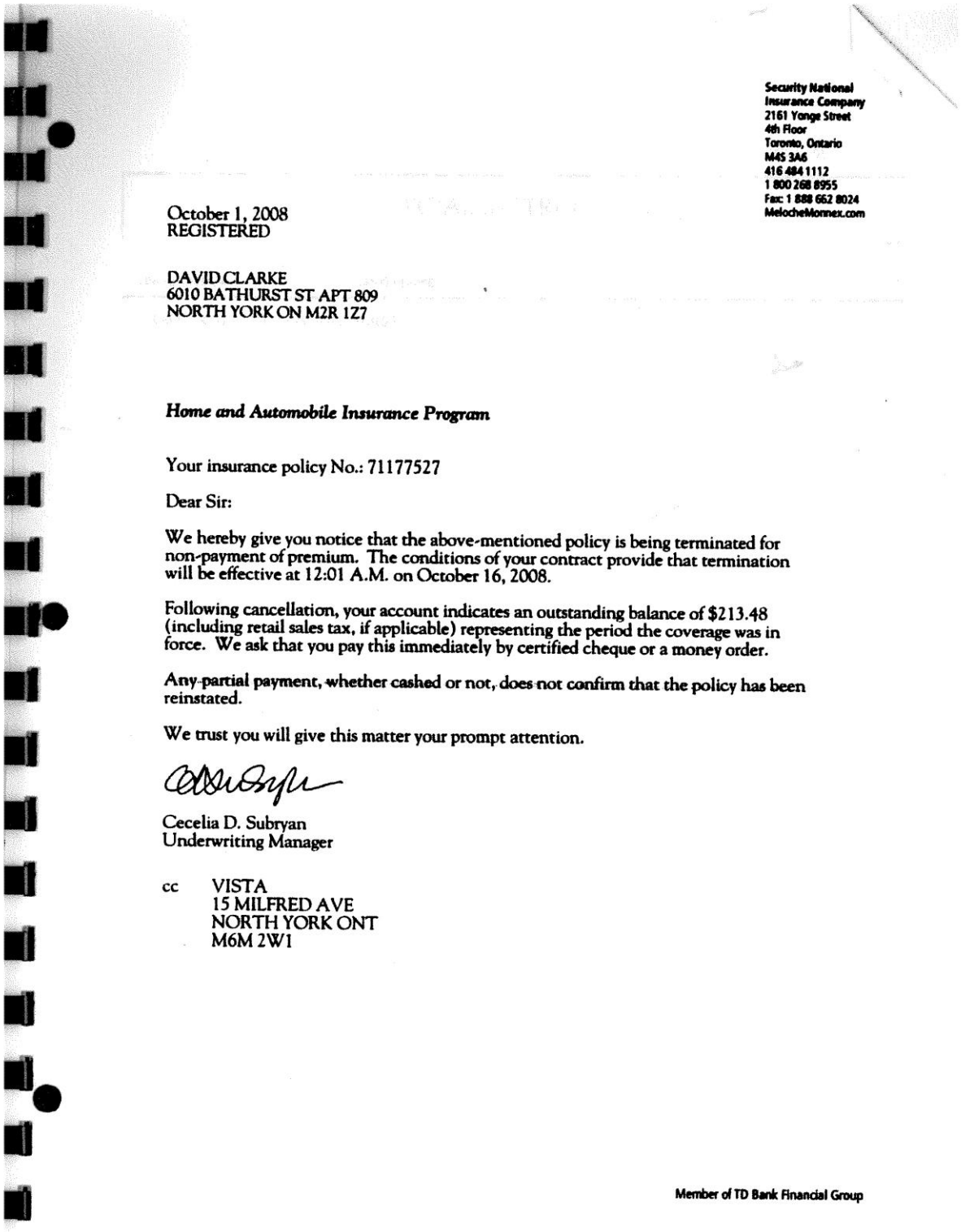
(a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but in no event shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified;

(c) if the termination is for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract and if subcondition (1.7) does not apply to the termination, the refund shall be made as soon as practicable after the effective date of the termination.

(5) For the purpose of clause (a) of subconditions (1.1) and (1.2), the day on which the insurer gives the notice by registered mail shall be deemed to be the day after the day of mailing.

(6) All references in this condition to times of day shall be interpreted to mean the time of day in the local time of the place of residence of the insured.

The following is the purported cancellation letter, dated October 1, 2008, sent by registered mail to David Clarke by the Respondent Security National:



Security National
Insurance Company
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M4S 3A6
416 484 1112
1 800 268 8955
Fax: 1 888 662 8024
MelocheMonnex.com

October 1, 2008
REGISTERED

DAVID CLARKE
6010 BATHURST ST APT 809
NORTH YORK ON M2R 1Z7

***Home and Automobile Insurance Program***

Your insurance policy No.: 71177527

Dear Sir:

We hereby give you notice that the above-mentioned policy is being terminated for non-payment of premium. The conditions of your contract provide that termination will be effective at 12:01 A.M. on October 16, 2008.

Following cancellation, your account indicates an outstanding balance of $213.48 (including retail sales tax, if applicable) representing the period the coverage was in force. We ask that you pay this immediately by certified cheque or a money order.

Any partial payment, whether cashed or not, does not confirm that the policy has been reinstated.

We trust you will give this matter your prompt attention.

Cecelia D. Subryan
Underwriting Manager

cc VISTA
15 MILFRED AVE
NORTH YORK ONT
M6M 2W1



I find that Security National's cancellation letter was defective in many ways and did not meet the legislative requirements. I have dealt with this issue in two prior decisions:

1. Economical v. Wawanesa, Unifund and MVACF (Arbitrator Bialkowski, February 8, 2011);

2. Gore Mutual v. Lombard and MVACF (Arbitrator Bialkowski, June 21, 2010).

In these decisions, I outline legislative history with regard to the requirements of an effective cancellation letter in the context of non-payment of premium. I point out that the legislative requirements changed effective June 1, 2005 to its present wording. The new wording appears to have included a consumer-oriented provision set out in statutory condition 11(1.3)(b), to give the insured an opportunity to continue coverage, regardless of the insurer's intention to cancel. Clearly, the Ontario legislature made the insurers' requirements to provide the insured with a Notice of Termination for non-payment of premium more explicit and even stricter than had previously been the case.

I am satisfied that for a letter of termination to be effective, there must be strict compliance to the extent that the "essential elements" of the legislative requirements are contained in the notice letter. I accept the proposition set out in Conway v. Judgment Recovery (N.S.) Ltd., 1990 Carswell NS 262, 111 N.S.R. (2d) 414, that the requirement does not necessarily mean that "every punctuation mark and capitalization in the notice of termination must be correct", but I do believe that the "essential elements" of legislative requirements must be for the termination to be effective.

In my view, the "essential elements" as required by Statutory Condition 11 are as follows:

1. The amount due, together with any administration fee being sought;

2. The date on which the termination is to take place; and

3. That the insured has a right to avoid termination by paying the amount outstanding and the specified administration fee by noon on the day before the date on which the termination is to take place.

The cancellation letter of October 1, 2008 did not provide the proper date that the termination was to take place, nor did it clearly advise the insured of his right to avoid termination by payment of a specified outstanding amount and a specified administration fee by noon on the day before the date on which the termination was to take place. I find that an effective cancellation did not take place.

Despite the aforesaid finding, I nevertheless find that there was not a Security National policy of motor vehicle liability insurance in effect as of the date of the accident on November 22, 2009. Although the letter of cancellation did not meet the legislative requirements, I find that the policy itself expired on February 20, 2009. The Clarke policy was initially purchased for a one year period, from February 20, 2007 to February 19, 2008. It was subsequently renewed for a second year, effective February 20, 2008 to February 19, 2009. It was not renewed thereafter. The subject accident occurred on November 22, 2009.

In Patterson v. Galant (1994) 3 S.C.R. 1080, the Supreme Court of Canada considered the law regarding a proper renewal of an insurance policy and found that automobile insurance was not a continuous policy from year to year, but rather a situation where a "separate and distinct contract comes into existence at each renewal". The Supreme Court underscored

this point by stating that “each renewal represents a new contract with its own offer and acceptance”.

The Supreme Court further held in Patterson that it was only necessary for the insurer to terminate or cancel insurance in accordance with a statutory condition when there was a binding insurance policy in place. Mr. Justice Major, writing for a unanimous court, explained this point by stating “where the policy simply expires because of non-payment of the renewal premium, no formal termination procedure needs to be followed by the Applicant”.

The direction of the Supreme Court of Canada on this point was subsequently followed by Madame Justice Baltman in Pomarico v. Petrovic (2006) O.J. No.1153. Justice Baltman agreed that it was unnecessary “for an insurer to terminate or cancel…alleged insurance in accordance with the Insurance Act when the policy expires due to non-payment of renewal premium. A lapsed policy does not need to be formally terminated”.

I have not been provided with any caselaw by Certas to suggest that the decisions in Patterson and Pomarico are distinguishable from the present fact situation.

I find that there was not a valid Security National policy of insurance in effect as of the date of the subject accident.

**ORDER**

On the basis of the findings aforesaid, I hereby order that:

1. Certas is the priority insurer as between Certas and Security National;

2. Certas pay Security National its costs of this Arbitration with respect to preliminary issues on a partial indemnity basis;

3. Certas pay the costs of the Arbitrator with respect to the arbitration of these preliminary issues.

DATED at TORONTO this 2nd )

day of February, 2012. )

KENNETH J. BIALKOWSKI
Arbitrator