

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8 AND REGULATION 664**

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

GORE MUTUAL INSURANCE COMPANY

Plaintiff

- and -

**LOMBARD GENERAL INSURANCE COMPANY OF CANADA
and MOTOR VEHICLE ACCIDENT CLAIMS FUND**

Defendants

**AWARD WITH RESPECT TO PRELIMINARY ISSUE
REGARDING EFFECTIVE POLICY TERMINATION**

COUNSEL

Arthur R. Camporese – Camporese, Sullivan, Di Gregorio
Counsel for the Applicant, Gore Mutual Insurance Company

Lee Samis – Samis & Company
Counsel for the Respondent, Lombard General Insurance Company of Canada

Jennifer Chapman – Brown, Beattie, O'Donovan LLP
Counsel for the Respondent, Her Majesty the Queen in Right of Ontario (MVACF)

ISSUE

Gore Mutual Insurance Company (“Gore”) brings this loss transfer application seeking indemnity for benefits paid to the claimant, Jason Claybourne, from the Respondent Lombard General Insurance Company of Canada (“Lombard”) or the Motor Vehicle Accident Claims Fund (“MVACF”). Gore claims that its policy of motor vehicle liability insurance issued to Jason Claybourne, was terminated by letter dated January 29, 2007, long before Claybourne was involved in a snowmobile accident on March 5, 2007, while operating an uninsured snowmobile. The sole issue before me at this time is the determination of whether Gore’s purported letter of termination dated January 29, 2007 was legally sufficient to result in a termination of Gore’s insurance obligations under policy A1198484.

FACTS

A policy of motor vehicle liability insurance bearing policy number A1198484 was issued to the claimant, Jason Claybourne, for the policy period May 16, 2005 through May 16, 2006. The policy was subsequently renewed for the policy period May 16, 2006 through May 16, 2007. It is alleged that monthly withdrawal payments in November 2006 and January 2007 went NSF. On January 29, 2007, Gore purported to terminate policy A1198484 by forwarding a letter by registered mail to Jason Claybourne. A copy of Gore's purported termination letter is appended to this decision.

Jason Claybourne sustained injuries in a collision on March 5, 2007 while operating an uninsured snowmobile and presented a claim for accident benefits to Gore. In this loss transfer proceeding, Gore is seeking reimbursement from the Respondents Lombard and MVACF.

LAW

An insurer's statutory right to unilaterally terminate an automobile insurance contract is provided for in Statutory Condition 11 of Ontario Regulation 777/93, made pursuant to the Insurance Act as set out here:

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.

ANALYSIS AND FINDINGS

The Applicant Gore takes the position that its termination letter of January 29, 2007 was effective compliance with Statutory Condition 11, as set out above, and that its policy was

therefore no longer in force at the time of Jason Claybourne's snowmobile accident on March 5, 2007.

The Applicant Gore takes the position that the notice of cancellation complied with the time requirements set out in the Statutory Condition, namely that the cancellation would come into effect on the 30th day after the insurer gives notice, namely March 2, 2007. Gore takes the position that although the notice of cancellation did not specify at what time of day the cancellation would crystallize, case law establishes that the insured would have the benefit of the entire day of March 2, 2007, with cancellation taking effect as of midnight. The Applicant Gore relies upon the decisions of Larizza v. Commercial Union Assurance Co. of Canada (1990) O.J. No.592 (C.A.) and Nuvo Electronics Inc. v. London Assurance (2000) O.J. No.2241 (S.C.J.) in this regard.

The Applicant Gore acknowledged that the said notice of cancellation did not specify that the insured could pay the amounts outstanding in cash or by money order, or certified cheque...delivered to the address specified in the notice, not later than 12:00 noon on the business day before the day specified for termination, but contends that the cancellation notice sent to Claybourne implied that the policy may be reinstated with the insurer's consent and clearly outlined the sum which remained outstanding. The Applicant Gore alleges that absolute, strict compliance with the Statutory Condition is not required in order for an insurer to engage the unilateral termination provisions. The requirement that an insurer affirmatively comply with the Statutory Conditions does not necessarily mean that "every punctuation mark and capitalization in the notice of termination must be correct". The requirement is one of "effective compliance". The Applicant Gore relies on the decision of Conway v. Judgment Recovery (N.S.) Ltd. 1990 CarswellNS 262, 111 N.S.R. (2d) 414, in this regard.

The Applicant contends that its letter of January 29, 2007 constituted "effective compliance" with Statutory Condition 11.

In response to the arguments advanced by Gore, Lombard and MVACF take the position that there must be strict compliance with Statutory Condition 11 for the termination to be effective. They point out that Section 11 (1.3) includes the word "shall" and outlines two essential elements of the notice of cancellation:

Termination

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(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.

In support of their position, the Respondents rely on the following three decisions:

1. London & Lancashire Fire Insurance Co. v. Veltre, (1918), 56 S.C.R. 588, 1918 CarswellOnt 6;
2. Lumbermens Mutual Casualty Co v. Stone, [1955] S.C.R. 627, [1955] 4 D.L.R. 167;
3. Prior v. Dominion of Canada General Ins. Co., 2008 CarswellOnt 7241, FSCO Arb., Arbitrator Bayefsky.

In London & Lancashire Fire Insurance Co. v. Veltre, (1918), 56 S.C.R. 588, 1918 CarswellOnt 6, the Supreme Court of Canada dealt with the purported cancellation of a fire policy by way of a letter forwarded by registered letter to the insured. At page 9 of the decision, Justice Anglin indicated that the “power of cancellation must, no doubt, be strictly exercised”. Justice Brodeur states at page 11 of the decision:

“The right which the company possesses to cancel a valid contract is contrary to the ordinary rules affecting contractual relations. If the legislature intended to avoid the necessity of a tender being made personally, they would then have so provided in the clearest of language.”

The Respondents argue that this case stands for the proposition that the power of cancellation must be strictly exercised.

In Lumbermens Mutual Casualty Co v. Stone, [1955] S.C.R. 627, [1955] 4 D.L.R. 167, the Supreme Court of Canada, dealing with the purported cancellation of an automobile policy of insurance, once again indicates that the conditions must be “exactly complied with”. Mr. Justice Rand states at page 635 of the decision the following:

“No doubt, apart from statutory provisions, if the parties to a contract of insurance for a definite term, the premium for which is paid in advance, choose to do so they may agree that the insurer may cancel the policy and leave the insured without protection although neither the notice of cancellation nor the unearned premium to which he is entitled are received by him and he remains, to the knowledge of the insurer, in ignorance of the fact that the policy has ceased to be in force. But conditions in the contract having such an effect must be exactly complied with by the insurer if it seeks to take advantage of them. If such conditions are ambiguous they will not be construed in favour of the insurer whose words they are. This follows from s.1019 of the Civil Code, which gives statutory force to the maxim verba chartarum fortius accipiuntur contra proferentem.”

In Prior v. Dominion of Canada General Ins. Co., 2008 CarswellOnt 7241, FSCO Arb., Arbitrator Bayefsky, in dealing with the purported cancellation of an automobile policy by way of registered letter, at paragraph 58 states the following:

“As is evident from this version of the legislation, and consistent with my finding on the nature of the notice required under the earlier version, termination of a policy can only be effected on the basis of clear and straightforward notice (as to the timing of the termination, the amount due on the policy and the circumstances under which the insured can avoid termination).”

On my review of the case law before me, 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 CarswellNS 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.

Arguably, the Gore letter of January 29, 2007 sets out the amount due under the contract, namely \$193.33. It does not set out any administration fee that is outstanding. I do not find this fatal. The absence of an administration fee would simply be construed as indicated that Gore is not seeking an administration fee over and above the amount actually outstanding. Arguably the Gore letter of January 29, 2007 is defective as it does not set out the time of day that the termination is to take place, but only the date. I do not necessarily find this fatal in light of the decisions of Larizza v. Commercial Union Assurance Co. of Canada (1990) O.J. No.592 (C.A.) and Nuvo Electronics Inc. v. London Assurance (2000) O.J. No.2241 (S.C.J.). Most importantly though, Gore’s purported letter of termination does not contain words that would advise the insured that he had a right to avoid the termination by making payment in the form set out in Statutory Condition 11 (1.3) (b). On the contrary, Gore’s purported letter of termination would indicate that termination could only be avoided with the consent of the insurer. This is not correct. It completely contradicts the statutory requirements in Statutory Condition 11 which allows the insured the right to avoid termination, without consent of the insurer, upon payment of the amounts outstanding and the specified administration fee. I find that the “essential element” of advising the insured of its right to avoid cancellation and the steps to be taken to accomplish that is fatally missing.

The predecessor to Statutory Condition 11 read as follows:

“11. (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 fifteen days notice of termination by registered mail or five days written notice of termination personally delivered.”

Effective June 1, 2005, Statutory Condition 11 was revoked and replaced with the version set out at pages 2 and 3 of my decision. 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. Clearly the Ontario legislature made the insurer's requirements to provide the insured with a notice of termination for non-payment of premium more explicit and even stricter.

The evidence before me clearly establishes that an "essential element" of the legislative requirement is missing from Gore's purported letter of cancellation and hence, any argument as to which party had the onus of proof is irrelevant.

It would appear to me that Gore had not amended its standard notice letters to reflect the consumer protection initiatives embodied in the amendments to Statutory Condition 11 by the time it sent its letter to Mr. Claybourne in January of 2007. While its letter may have resulted in an effective termination of the policy under the pre-June 2005 legislative scheme, it fell far short of meeting Gore's more stringent obligations under the legislation scheme that was in effect at the time the January 29, 2007 letter was sent.

For the reasons above, it is clear that Gore's failure to strictly comply with the notice of termination requirements as specified in Statutory Condition 11 (1.3) (b) renders its purported cancellation of the subject policy ineffective.

ORDER

I hereby order that the Gore policy issued to Jason Claybourne and Teresa Mitchell as policy no. A1198484 was not effectively terminated and was in full force and effect on March 5, 2007.

I will reserve my decision with respect to costs until the final disposition of this loss transfer dispute.

DATED at TORONTO this 21st)
day of June, 2010.)

KENNETH J. BIALKOWSKI
Arbitrator