

IN THE MATTER OF *the Insurance Act*, R.S.O., 1990, c. I. 8, as amended,  
AND IN THE MATTER OF *the Arbitration Act*, S.O. 1991 c. 17, as amended  
AND IN THE MATTER OF an Arbitration  
BETWEEN:

**ECHELON INSURANCE COMPANY**

**Applicant**

**and**

**COACHMAN INSURANCE COMPANY and  
ECONOMICAL MUTUAL INSURANCE COMPANY**

**Respondents**

Heard December 9, 2011

Counsel:

Chris Blom for the Applicant, Echelon Insurance Company

Harry Brown for the Respondent, Coachman Insurance Company

Nicole Simes for the Respondent, Economical Mutual Insurance Company

SCOTT W. DENSEM: ARBITRATOR

### **Introduction**

The parties retained me as Arbitrator pursuant to the *Arbitration Act*, R.S.O. 1991, and Regulation 283/95 of the *Insurance Act* to determine which of the applicant and the respondents has the highest priority to pay benefits pursuant to the Statutory

Accident Benefits Schedule (SABS) to Abdi Hassan arising out of a January 2, 2009 motor vehicle accident.

### **Factual Background to the Issues<sup>1</sup>**

Mr. Hassan was involved in an accident on January 2, 2009 while operating a 1989 Honda. He collided with a vehicle insured by Coachman Insurance and a vehicle insured by Economical Insurance. He applied to Echelon Insurance for SABS. Mr. Hassan was a named insured under Echelon's policy number A20210872. Echelon would be the highest priority insurer, except that it takes the position that it properly canceled Mr. Hassan's policy before the accident. It paid SABS to Mr. Hassan as it was required to do pursuant to Regulation 283/95, and then commenced arbitration against Coachman and Economical, the insurers of the other two vehicles involved in the accident.

Echelon settled Mr. Hassan's claim in June, 2011 for \$65,000. Including the settlement amount, a total of \$110,469.07 in SABS were paid to Mr. Hassan. There are issues arising out of Echelon's claims handling resulting in the payment of interest by Echelon in the settlement. Specifically, there is a question whether either Coachman or Economical should have to reimburse Echelon for the interest payment should either of them be found in higher priority with respect to the payment of SABS. It is not necessary for me to deal with that issue in this Award. Issues of quantum in respect of reimbursement will be dealt with, if necessary, in a separate proceeding.

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<sup>1</sup> These facts are taken from the exhibits and *facta*. They are not in dispute amongst the parties.

Echelon brings this arbitration against Coachman and Economical asserting that they are priority insurers because Echelon canceled Mr. Hassan's policy before the accident. Coachman and Economical take the position that Echelon's purported cancellation of Mr. Hassan's policy was ineffective, therefore it was still in force at the time of the accident.

Coachman and Economical have agreed that should Echelon's position prevail, Coachman and Economical are in equal priority. Therefore, Coachman and Economical will be responsible to reimburse Echelon in equal shares for the amount (either to be agreed or determined) that Echelon is entitled to receive, should Echelon be successful.

### **The Issues**

The parties have submitted the following issues to me for decision:

- 1) Was policy number A20210872 Issued by Echelon General Insurance Company ("Echelon") in force at the time of the accident on January 2, 2009?
- 2) If the answer to question 1 is no, was any other insurer in a higher level of priority than Coachman Insurance Company and Economical Mutual Insurance Company under the provisions of section 268 (2) of the *Insurance Act*?
- 3) If the answer to question 2 is no, which insurer, as between Coachman and Economical, is required to assume the claims for accident benefits on behalf of Hassan?
- 4) What is the amount of accident benefits to be reimbursed to Echelon?
- 5) What is the amount of interest to be paid to Echelon?

As indicated, issues 2 and 3 have been resolved. Counsel have agreed that for the purposes of arbitration there is no other insurer in higher priority than Coachman or Economical, should Echelon's policy cancellation position succeed. As indicated above, Coachman and Economical have agreed that should Echelon's position prevail that they are responsible to reimburse Echelon in equal shares in an amount to be agreed or determined. As is also indicated above, issues 4 and 5 will be dealt with, if necessary, in a separate proceeding.

For the purposes of this Award then, the only issue that needs to be determined is issue number 1, whether Echelon's policy was in force at the time of the January 2, 2009 accident.

## **Exhibits & Evidence**

Six exhibits were introduced into evidence at the arbitration hearing. *Viva voce* evidence was received from two witnesses. The particulars are listed below.

- 1) Exhibit 1: Underwriting File of Echelon General Insurance Company (26 pages)
- 2) Exhibit 2: File of D.A. Kurt Insurance Brokers Limited (11 pages)
- 3) Exhibit 3: Records of Benefit Payments and Settlement (17 pages)
- 4) Exhibit 4: Document Brief, Economical Mutual Insurance Company (8 tabs)
- 5) Exhibit 5: Document Brief, Coachman Insurance Company (10 tabs)
- 6) Exhibit 6: Echelon General Insurance Company Broker Agreement (6 pages)
- 7) Exhibit 7: Excerpt from Echelon Ontario Auto Manual (1 page)
- 8) Exhibit 8: Handwritten "To Whom It May Concern" Note

9) Brian Lee, D.A. Kurt Insurance Brokers Limited

10) Abdi Hassan, SABS Claimant

## **Analysis**

The result in this case turns on who is factually and legally responsible for incorrect information concerning the address for Abdi Hassan being recorded in the OAF 1 Application for Automobile Insurance<sup>2</sup>. As will be apparent from the following review of the evidence, it appears clear that between Brian Lee, the representative of D.A. Kurt Insurance Brokers Limited, and Mr. Hassan, an error was made concerning Mr. Hassan's correct address. It also appears clear that Echelon relied on information provided to it by Mr. Lee to send a registered letter of termination for Mr. Hassan's policy to an incorrect address.

There is no dispute on the facts that Echelon sent the registered letter of termination in timely fashion so that the cancellation of Mr. Hassan's policy would be effective December 30, 2008, before the January 2, 2009 accident. The registered letter was received at the post office in time for a termination effective December 30, 2008. There is also no dispute that the letter was never received by Mr. Hassan through delivery or by being picked up at the post office. The evidence appears clear that the reason it was not received by Mr. Hassan is that it was not sent to his correct address. Indeed, the parties appear to be in agreement that the evidence establishes all of these facts.

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<sup>2</sup> Exhibit 1, page 11 ("OAF 1")

The question is; who is responsible for the error concerning the recording and miscommunication of Mr. Hassan's address? This question effectively has two parts. The first part has two possible factual results, the second of which raises the legal issue of agency.

The first possible factual result is that the error occurred because Mr. Hassan failed to provide correct information concerning his address to Mr. Lee, or he failed to point out an error concerning his address in the OAF 1 when he should reasonably have done so. If it was found that Mr. Hassan failed to provide correct information, or failed to point out to Mr. Lee incorrect information concerning his address, and that Mr. Lee made no error, then in my opinion I would have to find that Mr. Hassan would be responsible for the error concerning his address and that Echelon's cancellation of Mr. Hassan's policy was valid notwithstanding that Echelon's registered letter was addressed incorrectly.

The second possible factual result that brings the legal issue of agency into play is that Mr. Hassan provided correct information to Mr. Lee about his address, but Mr. Lee incorrectly recorded it, and subsequently communicated the incorrect information to Echelon. The legal consequences of such an error are determined by the conclusion on the issue of whether Mr. Lee was acting solely as Mr. Hassan's agent, solely as Echelon's agent, or as the agent of both Mr. Hassan and Echelon in the course of their dealings for the placement of insurance coverage.

Mr. Brian Lee of D.A. Kurt Insurance Brokers Limited ("Kurt Insurance Brokers") testified at the arbitration hearing. He has been employed by Kurt Insurance Brokers

since March 2005. I found Mr. Lee to be an earnest witness who was trying to do his best to remember events which would undoubtedly be very difficult for someone in his business to recall with precision some three years after the fact. Mr. Lee himself fairly acknowledged on cross-examination that it was difficult to remember exactly what occurred in his dealings with Mr. Hassan because he dealt with as many as 10 to 20 clients a day with questions or concerns similar to those of Mr. Hassan.

In his examination in chief Mr. Lee testified that pursuant to the Broker Agreement between Kurt Insurance Brokers and Echelon, he had authority to issue insurance binders to clients that effectively put in place insurance coverage for a period of time subject to Echelon's final approval. He explained that Kurt Insurance Brokers wrote business for six or seven insurers at that time. As a broker, he would try to find the best coverage at the most reasonable rate available for his clients, who would rely on him to do so.

Mr. Lee seemed somewhat uncertain about his initial contact with Mr. Hassan. He thought that Mr. Hassan "must have called me" and that a meeting at the Kurt Insurance Brokers offices was scheduled for December 4, 2008. He had a recollection that he quoted some information to Mr. Hassan about potential insurance coverage in a telephone conversation prior to the December 4, 2008 meeting, and that he had filled out at least some of the OAF 1 before the meeting.

With respect to the critical information in the OAF 1 concerning Mr. Hassan's address, Mr. Lee testified in chief that he obtained the 23 – 318 Patricia Avenue, Kitchener, address that appears typewritten into the OAF 1 during a telephone

conversation with Mr. Hassan, the date of which he could not remember. Mr. Hassan also provided information regarding his conviction history (which ultimately formed the basis for Echelon's cancellation of the policy). He believes that this information was obtained in the same conversation that preceded the December 4, 2008 meeting at the Kurt Insurance Brokers offices.

Mr. Lee testified that Mr. Hassan attended at the Kurt Insurance Brokers offices on December 4, 2008 at 11: 11 AM (Mr. Lee was making use of his file for this detail – see Exhibit 2). The majority of the OAF 1 had already been completed in preparation for Mr. Lee's office meeting with Mr. Hassan. Mr. Lee testified that he read the completed OAF 1 to Mr. Hassan, and asked him if there was anything incorrect in what he had read. He stated that he did not have to make any changes to the information he had received from Mr. Hassan. He did not ask Mr. Hassan to read the OAF 1.

Mr. Lee was questioned concerning other documents that appear in Exhibit 1, and that formed part of Mr. Hassan's application for insurance to Echelon as submitted by Kurt Insurance Brokers. He was asked about the Pre-Authorized Cheque Authorization Form<sup>3</sup>. He stated that he thought that the handwriting on the form with respect to the identity of the bank (Canada Trust), the account number and the date was Mr. Hassan's, but he could not remember. Mr. Lee said that the other handwriting on the form was not his. This other handwriting included a printed version of Mr. Hassan's name, his address, and his signature. It is to be noted that the address shown for Mr. Hassan in this document is 23 – 352 Patricia Avenue, Kitchener. I would also note however that digits "52" appear to have been written over something underneath

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<sup>3</sup> Exhibit 1, page 21



them. It looks like the digit under the “2” is the number “8”. There is no evidence as to when, if any alteration was actually done to the document, or by whom. In any event, the parties conducted the hearing on the basis that the 23 – 352 address was on the document when it was submitted to Echelon Insurance by Kurt Insurance Brokers.

Mr. Lee issued to Mr. Hassan a temporary liability insurance card that was valid for one month, pending approval of the OAF 1 by Echelon. In response to questioning by counsel for Echelon Mr. Lee indicated that he thought he was acting as Mr. Hassan’s agent when he issued the temporary liability card. He arranged to have the OAF 1 and accompanying documents sent by courier to Echelon.

Mr. Lee’s examination in chief was concluded with a review of a Communication Tracking document in the Kurt Insurance Brokers File.<sup>4</sup> This document indicates that as of January 14, 2009 Kurt Insurance Brokers had in their file the address of 23 – 318 Patricia Avenue, Kitchener, for Mr. Hassan. On this date that information was to be corrected to reflect an address change for Mr. Hassan to 23 – 352 Patricia Avenue, Kitchener. By this time Mr. Hassan was to receive a refund of premium because of the policy cancellation. An attempt to send a refund cheque to 23 – 318 Patricia Avenue, Kitchener was unsuccessful and this is what gave rise to the need for an address change.

On cross-examination Mr. Lee’s uncertainty about his initial contact with Mr. Hassan was more apparent. He stated that he did not recall when he received the initial telephone call from Mr. Hassan regarding an insurance quote. He also stated that he

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<sup>4</sup> at page 7

was not certain that he filled out portions of the OAF 1 before Mr. Hassan's office visit based on information received from Mr. Hassan in the phone call. Significantly, he could not remember when he received the information that he had placed into the OAF 1 concerning Mr. Hassan's address. He conceded that it could have been received in the telephone call with Mr. Hassan before the meeting, or he could have obtained it during the meeting on December 4, 2008 at his office.

In an important exchange Mr. Lee acknowledged that his information gathering was at least in part being done on behalf of Echelon Insurance, as well as Mr. Hassan. He agreed that Echelon relies on its brokers to get information from prospective insureds. Echelon did not meet with prospective insureds with respect to policy applications.

Mr. Lee acknowledged that Mr. Hassan provided him with three additional documents at the December 4, 2008 meeting. Mr. Lee photocopied two of these documents<sup>5</sup> for later submission to Echelon Insurance as part of Mr. Hassan's insurance application. Each of these documents contained different addresses for Mr. Hassan. One of these documents was the Ontario Ministry of Transportation Permit – Vehicle Portion, and the Permit – Plate Portion. This document showed an address for Mr. Hassan of 607 – 1243 Queens Boulevard, Kitchener Ontario.<sup>6</sup> Mr. Hassan confirmed in his evidence that this was his first address when he came to Canada. He had not changed it with the Ministry, but he had not lived there in some time.

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<sup>5</sup> He copied the vehicle license and driver's license documents

<sup>6</sup> See Exhibit 1, page 24

The second document provided to Mr. Lee at the December 4, 2008 meeting was Mr. Hassan's Driver's License. Mr. Hassan's Driver's License contained the address, 2 – 318 Patricia Avenue, Kitchener Ontario.<sup>7</sup> Mr. Hassan confirmed that the 2 – 318 Patricia Avenue address was an address he lived at subsequent to the 607 – 1243 Queens Boulevard address, but he was not living there at the time of his meeting with Mr. Lee. As with the vehicle/plate document, he had not updated his address with the Ministry of Transportation.

Some details concerning the third document, the Preauthorized Cheque Authorization Form, are unclear. Based on the evidence it does not appear that Mr. Hassan would have had a copy of this document in his possession prior to the December 4, 2008 meeting at Mr. Lee's office. Neither Mr. Lee nor Mr. Hassan suggested this in their evidence. Therefore, I conclude that this form was completed during the meeting at Kurt Insurance Brokers. I note that the Pre--Authorized Cheque Authorization Form is just part of what is required for an insurance applicant to arrange automatic premium deduction from his bank account. The applicant must also provide a void sample cheque.

Although neither Mr. Lee nor Mr. Hassan testified specifically on the point, it would seem reasonable to conclude that Mr. Hassan did to provide a void sample cheque to Mr. Lee either at the December 4, 2008 meeting or thereafter. I base this conclusion on the fact that there was no suggestion in either the documentary or *viva voce* evidence that Mr. Hassan's application was incomplete because it failed to include a void sample cheque.

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<sup>7</sup> See Exhibit 1, page 25

I am not certain that anything turns on the matter of the void sample cheque, but if the cheque contained an address for Mr. Hassan this would have been further evidence of address information, either correct or incorrect, provided by Mr. Hassan to Kurt Insurance Brokers.

On cross-examination Mr. Lee acknowledged that he submitted the three documents that I have described to Echelon Insurance as part of Mr. Hassan's insurance application. He was asked whether given the fact that the three documents contained three different addresses he sought to clarify with Mr. Hassan which of the three addresses should be noted as his contact address with respect to his automobile insurance. Once again I thought Mr. Lee replied honestly in answering this question by saying that in a situation where there were different addresses for an applicant on documents that were going to be submitted to the prospective insurer it would be "*a routine job*" to clarify it, but he did not recall whether he did so in this case.

On re-examination Mr. Lee stated that he would expect Echelon to use the address in the OAF 1 to communicate with the insured.

Mr. Hassan testified that he came to Canada on April 4, 2007. English is his second language. He has a grade 12 education from Ethiopia. He studied English in an ESL language school for a year after coming to Canada. When asked about his facility with English he stated that he is "okay now".

Mr. Hassan testified without the aid of an interpreter. Although his English was heavily accented I thought that he understood the questions and was able to give responsive answers.

In his examination in chief Mr. Hassan stated that he went to Kurt Insurance Brokers with his friend, "Eskinder" on December 4, 2008. He had spoken with Mr. Lee on the telephone approximately 2 months before to inquire about getting automobile insurance.

It was Mr. Hassan's evidence that he provided his full name, birthdate, and his 23 – 352 Patricia Avenue, Kitchener, address to Mr. Lee at the December 4, 2008 meeting at the offices of Kurt Insurance Brokers. He was told that he had to pay his first and last month's payment for the insurance. He gave Mr. Lee cash for those payments and received a receipt.

In the documentary evidence at Exhibit 5, Tab 1, there is a statement from Mr. Hassan given February 11, 2009. The statement was signed by Mr. Hassan and witnessed by one Mohamed Ali. In the statement Mr. Hassan says the following:

When I went to get the insurance at D.A. Kurt I initially inquired about the cost of the insurance, maybe 2 months before I actually bought the insurance. At that time, I was living at 318 Patricia Avenue. By the time I actually went to get the insurance I had moved to 352 Patricia. When I took the insurance I told the broker I was living at 352 Patricia Avenue because the address they had when I got the quote was 318 Patricia. The broker said not to worry about it, that he would change the address.

Mr. Hassan's testimony at the arbitration hearing did not provide this much detail of these events. He was not examined or cross-examined on the statement. I am nevertheless satisfied that the statement, especially since it was given very close in time to the events, is a reliable record of Mr. Hassan's recollection of what took place. I think

the statement helps explain how the incorrect information about Mr. Hassan's address ended up in the OAF 1.

At the hearing Mr. Hassan was directed to the three documents previously described that contain different addresses and he confirmed that the Ministry of Transportation documents were provided to Mr. Lee at the meeting. It was not clear from his evidence whether the Preauthorized Cheque Authorization Form was completed during the meeting but as I have indicated, that was my impression from his evidence and Mr. Lee's evidence.

With respect to this document he identified the signature on it as being his signature. He confirmed that the printed name and address information is in his handwriting. He went on to say that the Name of Bank information, "Canada Trust", and the "Account Number" information was also in his handwriting. I pause here to remark that although I am no handwriting expert the latter two pieces of information do not appear to me to have been written by the same hand as the printed name, and address information. Without additional evidence however, there is really nothing further that can be said about this.

Mr. Hassan explained that the 607 – 1243 Queens Boulevard, Kitchener address on the Ministry of Transportation vehicle/plate documents was his first address when he came to Canada and he had not changed it with the Ministry.

He was shown the OAF 1 and asked about the typewritten address in it of 23 – 318 Patricia Avenue, Kitchener. He said that the apartment number, "23" was his correct new apartment number (he was previously living in apartment 2) at the time of

the December 4, 2008 meeting, but that "318" was the wrong building number. The correct building number was "352".

Mr. Hassan confirmed that he did not read the OAF 1 after it was completed, he simply signed it. In his Exhibit 5, Tab 1 statement Mr. Hassan confirmed that the temporary liability card Mr. Lee gave him showed his address as 23 – 318 Patricia Avenue. While Mr. Hassan was not asked at the hearing whether he questioned this incorrect address one might reasonably infer from the part of his statement I have quoted earlier that he did not have to be concerned about it because he had been told that Mr. Lee would correct his address. I think this is made even more plausible by the fact that Mr. Hassan appears to have been unconcerned, perhaps naïvely so, that there were different addresses for him on Ministry of Transportation Documents, his Driver's License, and the Preauthorized Cheque Authorization Form.

Counsel for Echelon clarified the details concerning the various addresses for Mr. Hassan on cross-examination. Mr. Hassan explained that the 607 – 1243 Queens Boulevard, Kitchener, address was his first address when he moved to Canada in April, 2007. In June, 2008, he moved to the 2 – 318 Patricia Avenue, Kitchener, address that appears on his Driver's License. In September, 2008 he moved to the 23 – 352 Patricia Avenue, Kitchener, address that appears in the Preauthorized Cheque Authorization Form.

He testified that he provided the vehicle/plate ownership document, and his Driver's License to Mr. Lee and Mr. Lee typed the information into the OAF 1 at the December 4, 2008 meeting. He did not read the completed form, he just signed it. He

relied on Mr. Lee to act in his best interests in selecting an appropriate insurer and placing insurance for him.

There are probably a number of ways that the incorrect information concerning Mr. Hassan's address could have ended up in the OAF 1. In determining what happened I must be cautious to draw only inferences reasonably available from the evidence, and avoid speculation.

In my opinion, I think it is a reasonable inference to draw from the evidence that Mr. Lee erred in recording Mr. Hassan's address information in the OAF 1 by mixing up the information from the documents, or by forgetting to change Mr. Hassan's building number to 352 from 318 despite having been advised of the new building number and new apartment number by Mr. Hassan at the December 4, 2008 meeting. Mr. Lee appears to have recorded the correct new apartment number, 23, in the OAF 1 and in the temporary liability card.

In support of my conclusion I start with the observation that both Mr. Lee, at least initially, and Mr. Hassan say that address information was provided by Mr. Hassan to Mr. Lee and a telephone call before the December 4, 2008 meeting. Mr. Lee could not recall when the telephone call took place. Mr. Hassan said both in his statement and in his hearing evidence that the telephone call took place approximately 2 months before the December 4, 2008 meeting.

According to his statement, at the time of the telephone conversation Mr. Hassan was living at 2 – 318 Patricia Avenue, Kitchener. By the time of the December 4, 2008 meeting, Mr. Hassan had moved to 23 – 352 Patricia Avenue, Kitchener. It



would make no sense for him to have told Mr. Lee that he was living at 23 – 318 Patricia Avenue, Kitchener since Mr. Hassan never had any such address. It seems much more likely to me that Mr. Lee was given the 2 – 318 address by Mr. Hassan in their telephone call, and that he received the information about the new unit number, 23, and new building number, 352, from Mr. Hassan at the meeting on December 4, 2008. When Mr. Lee came to insert the information into the OAF 1, he somehow mixed the new unit number with the old building number. It would be easy enough to do given the different address that had been previously mentioned, and the different addresses on the documents that he may have been working from in addition to what Mr. Hassan was telling him.

There is also no evidence in the exhibits that Mr. Lee was given the 23 – 318 Patricia Avenue, Kitchener, address to put into the OAF 1. It is significant that the “23 – 318” numerical part of the address Mr. Lee typed into the OAF 1 does not appear in that combination in any of the three documents that were submitted to Echelon along with the OAF 1.

All of Mr. Lee’s evidence on how and when he obtained the information that he put into the OAF 1 was admittedly uncertain given the amount of time that has passed and the number of customers he would deal with daily. Mr. Hassan’s evidence at the hearing and in his statement given very shortly after the events was that he gave Mr. Lee his new address information during the meeting. In his statement, Mr. Hassan indicated that when he told Mr. Lee at their meeting about his new 23 – 352 Patricia Avenue address Mr. Lee told him that he would make the necessary change.

It is possible that this discussion about making an address change occurred when Mr. Lee read the completed OAF 1 to Mr. Hassan, and Mr. Hassan noticed the error in the address. Mr. Hassan testified that he did not read the completed OAF 1. It will be remembered however, that Mr. Lee's evidence was that he read the OAF 1 to Mr. Hassan, he did not offer it to Mr. Hassan so that he could read it himself.

Mr. Hassan's hearing testimony and the information recorded in his statement is consistent that he spoke with Mr. Lee approximately 2 months before the December 4, 2008 meeting. Technically, it could be suggested that this would place the telephone call in the early part of October, 2008. Mr. Hassan told counsel for Echelon on cross-examination that he had moved to the 23 – 352 Patricia Avenue address in September, 2008. The conclusion that could be drawn from this is that Mr. Hassan would have already moved to the 23 – 352 Patricia Avenue address by the time of his telephone call with Mr. Lee.

It must be emphasized however that the date of Mr. Hassan's move to the 23 – 352 Patricia Avenue address was not identified with precision and Mr. Hassan did say that his telephone call with Mr. Lee took place "approximately" two months before the December 4, 2008 meeting. If I were to find that Mr. Hassan had already moved at the time of his telephone call with Mr. Lee then I would have to conclude that he deliberately gave Mr. Lee an out of date, incorrect address during their telephone call. I can see no reason on the evidence before me why Mr. Hassan would be motivated to do that. He was looking to get information about purchasing automobile insurance when he contacted Mr. Lee so one would expect that he would provide Mr. Lee with accurate information in all respects. I think the better explanation is that the two month time

estimate was truly “approximate”, and that the telephone call between Mr. Hassan and Mr. Lee took place while Mr. Hassan was still living at 2 – 318 Patricia Avenue, Kitchener.

I accept Mr. Hassan’s recollection as recorded in his statement that when he first contacted Mr. Lee he was residing at 2 – 318 Patricia Avenue, and that by the time he met with Mr. Lee he had moved to 23 – 352 Patricia Avenue. It certainly would not make sense that Mr. Hassan would verbally give Mr. Lee incorrect address information on purpose either in a telephone call or at the December 4, 2008 meeting.

Therefore, for these reasons I think it is reasonable to conclude that the address recorded for Mr. Hassan in the OAF 1 is an erroneous combination of Mr. Hassan’s 2 – 318, and 23 – 352, Patricia Avenue, Kitchener addresses, accidentally created by Mr. Lee. In completing the OAF 1 somehow Mr. Lee used the building number from the June, 2008 address, and the apartment number from the September, 2008 address. One can see how that could easily happen given the similarities in the numbers, particularly when the address on Mr. Hassan’s license also contained the “318” building number and “2” for his apartment number, which is only one digit removed from the “23” apartment number that Mr. Lee inserted into the OAF 1.

The fact that Mr. Lee acknowledged it would be “*a routine job*” for an insurance broker to make sure that the insured’s address information was consistent and correct before any application documents were submitted to the prospective insurer reinforces my conclusion that the error in recording Mr. Hassan’s address in the OAF 1 should be attributed to Mr. Lee, and hence Kurt Insurance Brokers.

Having concluded that Mr. Lee of Kurt Insurance Brokers is responsible for the error in recording and transmitting Mr. Hassan's address information in his insurance application to Echelon, I must now deal with the legal consequences of that error as they may be determined by the law of agency.

Echelon's position is that even if Kurt Insurance Brokers made the error in recording Mr. Hassan's address in the OAF 1, Mr. Lee was acting as agent for Mr. Hassan in taking information from him for the purposes of making application for insurance. He was not acting as agent for Echelon. Echelon was entitled to rely upon the information provided to it by Kurt Insurance Brokers. If Mr. Hassan's address was incorrect as stated in the OAF 1, Echelon's registered letter of cancellation sent to the incorrect address was nevertheless valid because Mr. Hassan must bear the consequences of the error made by his agent.

In support of this position Echelon relies upon the law as stated in *Blanchette v. C.I.S Ltd.*<sup>8</sup> A representative of the insurer met with the applicant for insurance at the applicant's farm. The answers to certain questions in the application form were filled in by the insurer's representative based on information received from the applicant. The applicant signed the form without reading it. A question with respect to prior losses was incorrectly answered. A couple of days later the applicant requested additional coverage. The insurer's representative spoke to the applicant by telephone. Answers to two questions relating to tractors to be insured were filled in by the insurer's representative. One of the answers constituted a material misrepresentation. Once

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<sup>8</sup> [1973] S.C.R. 833, ("*Blanchette*")

again the applicant did not read the application after it had been completed by the insurer's representative, nor did he re-sign the application.

A loss occurred involving a tractor and the company denied liability under the policy on the basis that there never was a contract of insurance, there was only an application prepared by the insurer's representative who was acting as the agent of the applicant, not the insurer in completing the application, which application contained misrepresentations of material facts.

The trial judge allowed recovery under the policy but the Saskatchewan Court of Appeal reversed the decision. I am not persuaded that the Supreme Court of Canada's decision, which reversed the Court of Appeal and ordered a new trial, supports Echelon's position in the circumstances.

Justice Pigeon, writing for the majority, considers an earlier English statement of the law of agency applicable to these cases found in *Newsholme Bros v. Road Transport and General Insurance Co.*<sup>9</sup>, preferring instead a more contemporaneous statement from the English Court of Appeal in *Stone v. Reliance Mutual Insurance Society Ltd.*<sup>10</sup>

Justice Ritchie, who, it should be noted, was in dissent, quoted the rule in *Newsholme* as stated by Scrutton, L.J.:

If A gets someone – C – to fill up the form for him before he signs it, it seems to me that C in doing so must be the agent of A who

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<sup>9</sup> [1929] 2 K.B. 356, ("*Newsholme*")

<sup>10</sup> [1972] 1 L1,LR, 469, ("*Stone*")

has to make the proposal, not of B who has to consider whether he will accept it.

The first point of distinction Justice Pigeon emphasizes is that the insurer's representative was not a mere soliciting agent, he had authority to bind the insurer and that in and of itself created an agency relationship between the representative and the insurer. It was not simply a matter of submitting a proposal with someone helping the applicant fill out a form. The agent was permitted to create a contract and one existed from the moment that the agent bound the risk.

Justice Pigeon quotes the following passage from the judgment of Lord Denning in *Stone*:

... It seems to me that the agent by his conduct impliedly represented that he had filled in the form correctly and that he needed no further information from her (the applicant). Relying on this implied representation, she signed the form which he put before her later the policy was sent and she paid the premiums

what then is the legal position? It is quite clear that, in filling in the form, the agent here was acting within the scope of his authority, he said: 'it is company policy that I should put the questions, writing down answers.' This distinguishes the present case from *Newsholme's* case, where the agent had no authority to fill in the proposal forms: and it was held that he was merely the amanuensis of the proposer.

Justice Pigeon concludes that the law as stated by Lord Denning should apply to the facts in *Blanchette* because, "... *The evidence is clear that it was part of the agent's duty to fill the application form... The company is therefore precluded from relying on an erroneous answer written by its agent*"

Echelon also relies on *Pearce v. Transportation Fire & Casualty Co.*<sup>11</sup> in that case Todd, an insurance agent confirmed contents coverage for the plaintiff, Pearce, with the defendant insurer, Transportation Fire & Casualty. No policy was ever issued by Transportation. The agent admitted that he was responsible to the plaintiff and the argument was whether Transportation had to pay the plaintiff because the agent had ostensible authority to bind the risk. Todd had been arranging insurance matters for the plaintiff for about 20 years. The plaintiff expected Todd to act in his best interests in placing insurance. Todd filled in the application for insurance for the plaintiff and signed it for him.

On these facts the court had no difficulty in concluding that Todd was acting as the plaintiff's agent in placing insurance coverage. The court concludes as well however, that in doing so Todd was also acting as agent for Transportation. In my opinion the case is authority for the most current view of the law of agency as it applies to insurance. The court states, "...*It is not unusual that an insurance agency be in fact an agent for both the insured and the insurer*". Transportation argued that Todd did not have binding authority and therefore could not create a contract on its behalf. The court rejected that argument and found that Todd did in fact have binding authority. In the end the court concluded that Transportation was required to pay the loss to the plaintiff.

The current state of the law of agency as it applies to insurance is stated in the widely recognized insurance text, *Brown and Menezes, Insurance Law in Canada*. As an example, the law as stated therein has been approved of in *The Government of Saskatchewan v. Mountain Pacific Transport Ltd. and Lane Chilson; Saskatchewan*

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<sup>11</sup> (1978) 18 O.R.(2d) 569, Ont. Dist. Ct. ("*Pearce*")

*Government Insurance, Highway Agencies Ltd. et al, Third Parties*.<sup>12</sup> Briefly, the relevant facts for the purposes of the discussion of agency law are that Highway Agencies, an insurance broker who was in the business of obtaining policies for clients from licensed insurance companies, had been retained by Mountain Pacific to obtain excess insurance for some of its equipment. Highway agencies placed a policy with Saskatchewan Government Insurance ("SGI") containing an exclusion that negated the coverage Mountain Pacific was seeking.

One of the issues for determination was whether Highway Agencies was the agent of Mountain Pacific or SGI. The court cited the following passage from the Saskatchewan Court of Appeal's decision in *Piggot Construction (1969) Ltd. v. Saskatchewan Government Insurance Office*<sup>13</sup>:

In the course of a single transaction an insurance agency will perform a number of acts. Some may be done at the instance of, and as agent for, the insured. Others will be performed on behalf of, and as agent for, the insurer. The agency's role may be a dual one: it may at once be both agent for the insured, in relation to one or more of its acts, and for the insurer, in relation to others. Brown and Menezes, *Insurance Law in Canada* (1982), p. 43, para. 3:2:5, comments on this as follows:

*it is now trite law that an agent can be an agent of both contracting parties. The person acting for the insured in making and forwarding an application for insurance could be acting for the insurer in receiving information regarding a change in risk. However, this concession to realism does not eliminate the difficulties associated with the role of agents in insurance; it merely redirects the inquiry.*

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<sup>12</sup> 1994 CanLII 5126 (SK QB) ("*Mountain Pacific*")

<sup>13</sup> (1986) 2 W.W.R. 530 ("*Piggot*")



*Instead of having to determine whether the insured or insurer should bear the entire burden consequent in relying on an agent, the question becomes which of the two should bear the consequences of a particular act or acts by that agent.*

The court went on to conclude in *Mountain Pacific* that Highway Agencies had a written agency agreement with SGI that authorized it to solicit applications and issue binders on behalf of SGI, and to deliver policies and receipts for premiums, and to collect premiums. The court found that Highway Agencies was acting as agent for SGI when it contracted with Mountain Pacific.

In dealing with the question of which of Mr. Hassan or Echelon Insurance should bear the consequences of the error by Mr. Lee in recording Mr. Hassan's address in the OAF 1, It is important to examine the nature of the relationship between Mr. Hassan and Kurt Insurance Brokers, as well as the relationship between Kurt Insurance Brokers and Echelon Insurance.

Counsel for Echelon submitted that the evidence demonstrates the relationship between Mr. Hassan and Kurt Insurance Brokers was such that Kurt Insurance Brokers was Mr. Hassan's agent for the purposes of placing insurance coverage. He emphasized that Mr. Hassan relied entirely upon Kurt Insurance Brokers to place insurance coverage for him that would provide him the best coverage for the best price. He trusted them to act in his best interests. In this respect to Mr. Hassan was not concerned with the identity of the company with which the insurance might be placed.

I agree with the submissions of Echelon's counsel. I think the evidence supports the conclusion that Mr. Lee at Kurt Insurance Brokers was acting as Mr. Hassan's agent in placing insurance coverage with Echelon.

The inquiry does not stop there, however; one must also look at the relationship between Kurt Insurance Brokers and Echelon Insurance to determine the agency question. In my opinion the evidence is clear that Kurt Insurance Brokers was also the agent of Echelon Insurance.

The first point to be made is that the arbitration evidence confirmed Kurt Insurance Brokers had authority to bind Echelon to insurance coverage by issuing insurance binders and temporary liability cards. The courts have held that this is an important factor in determining whether a broker is acting as an insurer's agent in any particular case.

Secondly, in applying the *Brown and Menezes* criteria of deciding which of the insured or the insurer should bear the consequences of a particular act by the agent, it is significant in this case to have regard to Exhibit 6, which is the Broker Agreement between Kurt Insurance Brokers and Echelon.

In general, there is no doubt that the agreement confirms the purpose of the relationship as being to develop automobile insurance business through the mutual efforts of Echelon and Kurt Insurance Brokers as partners. Schedule B to the agreement reads as follows:

## Objective

The purpose of this contingent profit commission schedule is to foster the development of profitable Personal and non-fleet Commercial Automobile business by sharing the profits generated on such business through the mutual efforts of you, our broker partner and us at Echelon.

Most importantly, in considering who should bear the consequences of Mr. Lee's error in recording Mr. Hassan's address I find the following terms of the Broker Agreement to be very significant<sup>14</sup>:

### 2. ECHELON AGREES TO

... (ii) Contact any person Echelon insurers or who has applied for insurance to:

... 2) verify any information related to the person

### 3. BROKER AGREES TO:

(ii) Reasonably ensure that all applications are fully completed and contain accurate information

In my opinion, there is no doubt that the Broker Agreement confirms the importance to Echelon of their agent, Kurt Insurance Brokers providing it with accurate information in any applications for insurance. This would include, I suggest, not just matters important to assessing the premium such as vehicle details and driving record, but also information important for the delivery of policy related communications.

The Broker Agreement also confirms that Echelon acknowledges the importance to it of having accurate personal information for its insureds to the point that

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<sup>14</sup> Underlining is the arbitrator's emphasis

it agrees with its broker that it will contact any applicants for insurance to verify the applicant's personal information.

I would pause here to observe that had Echelon and Kurt Insurance Brokers complied with the terms of their own agency agreement, the error in Mr. Hassan's address in the OAF 1 would probably have been discovered in time to prevent the problems that have ensued.

In deciding whether Echelon or Mr. Hassan should bear the consequences of the error made by their mutual agent, regard must be had to the specific facts of the case. This is not a situation where information material to assessing the insurability of Mr. Hassan was not disclosed to the agent, or was materially misrepresented by Mr. Hassan. In fact, it was on the basis of information disclosed in the application that Echelon wished to cancel the policy. Mr. Hassan had been truthful and accurate in the information that he disclosed to Kurt Insurance Brokers, including in respect of the information concerning his address. It was Mr. Lee's mistake in recording the address that led to the problems.

It was Echelon's wish that the policy be terminated, and to effectively do that it needed to comply with the Statutory Conditions in the *Insurance Act*. The cases are clear that where an insurer wishes to terminate an automobile policy it must strictly comply with the Statutory Conditions to make a valid termination. One of those conditions is that the insurer must send the notice of termination to the insured's latest post office address as notified to the insurer.<sup>15</sup>

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<sup>15</sup> See Statutory Condition 12, Ontario Regulation 777/93

In my opinion, it would be exceedingly unfair to find that there had been a valid termination of Mr. Hassan's policy where a registered letter of termination was sent to the wrong address in circumstances where the insured has made no error in providing information to the agent, while both the agent, and the insurer who seeks to terminate the policy have failed to comply with the terms of their agency agreement.

In my view facts of this case fit within the application of insurance agency law set out in *Stone*, the reasoning of which has been approved of by the majority of the Supreme Court of Canada in *Blanchette*. The Brokers Agreement between Kurt Insurance brokers and Echelon Insurance imposed a duty on Mr. Lee as agent for Echelon to reasonably ensure that Mr. Hassan's application for insurance contained accurate information with respect to his address. He erred in failing to perform "a routine job" clarifying the conflicting address information before submitting the application to Echelon. His error was compounded by Echelon, the party who seeks to terminate the policy, who also failed to follow the terms of the Brokers Agreement by not contacting Mr. Hassan, an applicant for insurance with the company, to verify his personal information.

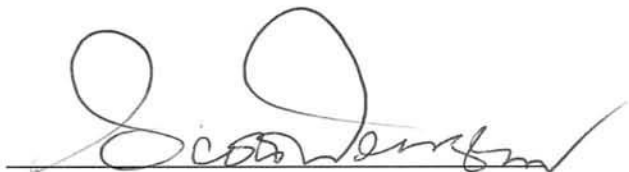
Therefore, I find that Echelon Insurance must bear the responsibility for the error by its agent, Kurt Insurance Brokers, in failing to properly verify and record Mr. Hassan's address, and for the consequences that its policy termination letter was invalid. As a result the purported cancellation by Echelon of Mr. Hassan's policy was a nullity because the registered letter of cancellation was incorrectly addressed. It follows that at the time of the accident giving rise to Mr. Hassan's SABS claim, his automobile policy with Echelon was in full force and effect.

## Conclusion

Since I have found that Echelon's policy number A20210872 in favour of Mr. Hassan was in force at the time of the January 2, 2009 accident, Echelon remains responsible for the payment of SABS to Mr. Hassan.

The successful respondents, Coachman and Economical, are entitled to their costs of the arbitration payable by Echelon, including the fees and disbursements of the arbitrator. If the parties are unable to resolve the costs issue I invite them to contact my Coordinator to arrange a post-arbitration conference to discuss the issue, and if necessary, arrange a time to have the costs issue determined.

February 1, 2013

A handwritten signature in black ink, appearing to read "Scott W. Densem", written over a horizontal line.

Arbitrator Scott W. Densem