IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE
("THE MOTOR VEHICLE ACCIDENT CLAIMS FUND")

Applicant

and

AXA INSURANCE(CANADA)
ELITE INSURANCE COMPANY AND
INTACT INSURANCE COMPANY

Respondents

AWARD

Counsel:

Marie Sydney for the Applicant, Her Majesty the Queen in Right of Ontario

ModupeEgunjobi for the Respondent, Elite Insurance Company

Mark S. Wilson for the Respondent, AXA Insurance (Canada)

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This arbitration arises out of a motor vehicle accident occurring December 29, 2011. Arpad Vadasz ("the claimant") was a passenger in an automobile owned by his friend, Lucia Martins. He had exited the automobile and was attempting to reserve a parking space for Ms. Martins when he was struck by an unidentified vehicle.

The claimant applied to the Applicant ("HMQ") for Statutory Accident Benefits ("SABS"). HMQ handled the claimant SABS claim, and issued a Notice of Dispute between Insurers ("NDBI") to the Respondents, AXA Insurance (Canada) ("AXA"), and Elite Insurance Company ("Elite") asserting that one or the other of the Respondents is higher in priority to HMQ with respect to the obligation to pay SABS.

There are no issues with respect to the timeliness of the NDBIs served, or with respect to the timing of the commencement of the arbitration.

This award deals with the preliminary issue of whether Elite's policy was in effect at the time of the accident. If Elite had a valid policy of motor vehicle liability insurance in force at the time of the accident then the parties agree that Elite is the priority insurer pursuant to section 268 of the *Insurance Act*.[2] If Elite did not have a valid policy of motor vehicle liability insurance in force at the time of the accident then further arbitration proceedings will be required to determine whether AXA must respond to the claimant's SABS claim pursuant to a motor vehicle liability insurance policy it had issued to the claimant's friend, Lucia Martins.

[1] This Introduction is based on facts specifically agreed to by the parties for the purposes of deciding the preliminary issue, or which are not in dispute.
[2] R.S.O. 1990, c. I.8, as amended.

If AXA has to respond to the claimant's claim pursuant to its aforesaid policy it has priority for the claimant's SABS claim over HMQ. If AXA does not have to respond pursuant to its aforesaid policy then HMQ, as the payor of last resort, will maintain responsibility for payment of the claimant's SABS claim.

The Issues

The arbitration issues are stated in the parties' Arbitration Agreement[3] executed in counterpart, April 17, 2015 (AXA), April 20, 2015 (Elite), and April 23, 2015 (HMQ). In summary form they are as follows:

1) Is Elite the priority insurer required to respond to the claimant's SABS claim in respect of an accident which occurred December 29, 2011?

2) Is AXA the priority insurer required to respond to the claimant's SABS claim in respect of the December 29, 2011 accident pursuant to a motor vehicle liability insurance policy issued to Lucia Martins?

3) If applicable, in what amount is HMQ entitled to reimbursement from Elite or AXA for SABS and adjusting fees/costs paid to or on behalf of the claimant?

4) Which party or parties must pay the costs of the arbitration and in what amount?

The Evidence

The preliminary issue proceeded on the basis of an Agreed Statement of Facts, several documents entered into evidence as part of a Joint Document Brief, and written submissions from the parties. The following documents were made exhibits:

[3]Exhibit 1.

1) Arbitration Agreement (as described above).

2) Joint Brief of Documents (Tabs A, 1 – 15).

Analysis

The first question to be resolved in determining whether Elite had a valid policy in place at the time of the accident is whether Elite complied with the requirements of sections 236, 237, and 238 of the *Insurance Act* in notifying the claimant that it did not intend to renew the policy it had issued to the claimant.

The second question is: if Elite did not comply with the aforementioned sections of the *Insurance Act* with its notice of intention not to renew, was the policy still valid on the accident date – December 29, 2011?

I will now outline the facts I find relevant to the issues as derived from the evidence contained in the Joint Brief of Documents.[4]

On September 10, 2009, the claimant applied to Elite to obtain a policy of motor vehicle liability insurance on a 2001 Chevrolet Venture automobile owned by him. The claimant made application for this policy through Elite's broker, KTX Insurance Solutions ("KTX").

On September 11, 2009, Elite issued a policy of motor vehicle liability insurance to the claimant for a 6 month term from September 20, 2009 to March 20, 2010.

[4] Unless otherwise noted, the facts set out in the following paragraphs are taken from the parties' Agreed Statement of Fact, Exhibit 2, tab A. As previously noted, this Agreed Statement of Fact is for the purposes of deciding the preliminary issue, which is the subject of this Award.

The policy issued to the claimant was an “Autograph” policy issued pursuant to a pilot program used by Elite until 2011.In summary, the Autograph policy required the insured to agree to install in his vehicle a device which recorded information regarding the insured’s driving behaviour (“the Autograph device”). Just by installing the Autograph device the insured received a discount on his policy premium. Depending on the information generated concerning the insured’s driving behaviour, he could be eligible for further discounts.

Upon issuance of the Elite policy, the claimant was provided with a document entitled “New Policy Notice” explaining the terms of the policy, how the policy worked, and the benefits of the policy. The insured – the claimant in this case, was required to complete an online registration process. Upon completion of this process theAutograph device would be sent to the insured. The claimant testified on his Examination under Oath (“EUO”) that he knew at the time he received the New Policy Notice, that he was required to register online in order to receive the Autograph device.

On February 10, 2010, Elite renewed the policy for a second 6 month term – March 20, 2010 to September 20, 2010.

On March 10, 2010, the claimant telephoned Elite about not having received the Autograph device. He was advised that he had not registered for the Autograph device. The claimant was also told that he was required to register before March 20, 2010 to receive the Autograph device in order to participate in the program, otherwise Elite would cancel his policy in September, 2010.

On March 19, 2010, Elite telephoned the claimant. The claimant again inquired about not having received the Autograph device. The Elite representative offered to transfer the claimant to technical support but the claimant declined. The Elite representative also provided the telephone number of KTX, and offered to connect the claimant with KTX so that he could seek an alternative policy.

Elite sent a registered letter dated August 12, 2010 to the claimant reading in part as follows:

> …effective September 20, 2010, 12:01 A.M., we are unable to provide automobile insurance on the above vehicle(s) for the following reason(s):
>
> Reason: Rule #56
>
> The named insured/applicant has not registered, via the Internet, to receive the Autograph data-transmitting device, within 2 previous terms (12 months).

The letter advised the claimant that if he required any further information, or wished to obtain a quote for an alternative market he should call KTX. KTX's telephone number was provided in the letter.

The registered letter was delivered to the claimant on August 18, 2010. The claimant acknowledged during his EUO that the signature on the post office receipt for the registered letter was his. Other evidence given by the claimant on his EUO confirmed that he received a letter.[5] It is not disputed in this case that this notice letter was received by the claimant.

[5] See Exhibit 2, tab 14, page 83, page 91-92

The second 6 month term of the claimant's policy with Elite expired on September 20, 2010. As of that date the claimant had not completed the registration process required to receive the Autograph device. In fact, the claimant never completed the registration process.

The claimant contacted Elite on September 21, 2010. He stated that he had not received the Autograph device. The Elite representative advised the claimant that he had not registered online to receive the Autograph device and that his policy was canceled effective September 20, 2010. The claimant was transferred to KTX to obtain alternative insurance.

The claimant did not pursue further automobile insurance coverage with Elite. Around September 23, 2010, the claimant obtained an automobile policy for his 2001 Chevrolet Venture with AXA. This policy was canceled by him shortly thereafter.

The accident giving rise to the claimant's SABS claim occurred on December 29, 2011, approximately 15 months after the claimant's last dealings with Elite and/or KTX. Elite did not send any other written notice to the claimant advising that his policy would not be renewed after September 20, 2010, other than the August 12, 2010 letter sent by registered mail.

HMQ's position is that Elite's August 12, 2010 notice letter did not constitute valid non-renewal notice because it did not satisfy the requirements of section 236 and 238 of the *Insurance Act*.Specifically, HMQ submits that Elite's notice was invalid because it did not comply with subsection 236 (3), and section 238 in that the reason given in the

notice did not constitute a valid ground for non-renewal filed with the Superintendent at the time the notice was given.

The relevant parts of section 236 read as follows:

> **236. (1)Notice of expiry or variation** – If an insurer does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms, the insurershall,
>
> (a) give the named insured not less than thirty days notice in writing of the insurer's intention or proposal; or
>
> (b) give the broker, if any, through whom the contract was placed forty-five days notice in writing of the insurer's intention or proposal.
>
> (2) **Idem –** Subject to subsection (4), a broker to whom an insurer has given notice under clause (1) (b) shall give the named insured under the contract not less than thirty days notice in writing of the insurer's intention or proposal.
>
> (3) **Reasons** – Notices given under subsections (1) and (2) shall set of the reasons for the insurer's intention or proposal.
>
> (4) **Exception –** Where, before a broker is required to have given notice to a named insured under subsection (2), the broker places with another insurer a replacement contract containing substantially similar terms as the expiring contract, the broker is exempted from giving notice under subsection (2).
>
> (5) **Effect of failure to comply** – A contract of insurance is in force until there is compliance with subsections (1), (2) and (3).

The relevant part of section 238 reads as follows:

> **238. (1)Prohibition, grounds to terminate** – An insurer shall not decline to issue, terminate or refuse to renew a contract or refuse to provide or

> continue acoverage or endorsement, except on a ground filed with the Superintendentunder this section.

Elite's parent company, Aviva Insurance Company of Canada, filed Declination Rules with the Superintendent.[6] I will reproduce here the relevant portions of these Declination Rules:

> **REASONS FOR DECLINATION**
>
> …**Note:**
>
> If a client does not qualify for the Autograph program, for a reason described below, insurance coverage will be offered through another member of the Aviva group of companies, subject to that member's eligibility requirements, and also provided that the requesting broker carries a valid contract with another member of the Aviva group of companies.
>
> The insurer will decline to issue, terminate, or refuse to renew a contract where:…
>
> 54. The insurer, for any reason, suspends the Autograph program, following approval from the Financial Services Commission of Ontario.
>
> 55. A policy term is other than six months in duration.
>
> 56. The named insured/applicant has not registered, via the Internet, to receive the Autograph data-transmitting device, within 2 previous terms (12 months).

The basis for HMQ's argument is **not** that the ground specified in the Declination Rule was invalid because Elite had not filed the ground with the Superintendent, or that the Superintendent had notified Elite that it was prohibited from using the

[6] Exhibit 2, tab 7.

ground.[7]HMQ's position is based on the argument that the facts required to validate the ground were not yet in existence at the time the August 12, 2010 notice was given.

HMQ submits that Declination Rule 56 relied upon by Elite in its non-renewal notice required that at least 2 terms of the claimant's policy had to elapse without the claimant having registered via the Internet to obtain the Autograph device before this ground of non-renewal could be valid. HMQ argues that the August 12, 2010 notice based on Declination Rule 56 was premature because the full 2 terms of the claimant's policy had not yet elapsed. The claimant could have registered to receive the Autograph device before the end of the second term on September 20, 2010, and therefore there would have been no valid ground for Elite not to renew his policy.

HMQ's position is that the consequence of Elite's August 12, 2010 notice of non-renewal being invalid is set out in subsection 236 (5). The claimant's policy automatically renewed on September 20, 2010 and the coverage under the policy remains in full force and effect until a valid notice of non-renewal is sent by Elite to the claimant. Since Elite did not send any such notice before the December 29, 2011 accident, or at all, the policy was still in full force and effect on December 29, 2011, making Elite the priority insurer.

AXA supports the argument advanced by HMQ. AXA further submits that Elite ought not to be permitted to rely upon Declination Rule 56 as a valid ground of non-renewal because it does not comply with the Technical Notes for Underwriting Rules

[7] See Subsections 238 (4) through 238 (13) dealing with how the Superintendent may prohibit an insurer from using a certain ground, and the process to be followed in the event that the insurer disputes the Superintendent's prohibition. For the reasons outlined in the body of this Award, these subsections are not relevant to the issues in the arbitration.

("the Technical Notes") issued by FSCO outlining matters insurers must take into consideration in developing underwriting rules. Specifically, AXA argues that Declination Rule 56 violates Technical Note #3 which stipulates that Declination Rules must not be written in vague or complicated terms that can be open to various interpretations. I will not go through the details of AXA's argument as to why Declination Rule 56 does not comply with the FSCO Technical Notes for Declination Rules because, based on the parties Agreed Statement of Fact, I think the argument is moot.

Paragraph 10 of the Agreed Statement of Fact states as follows:

> 10. Rule 56 was a valid declination rule filed with the Financial Services Commission of Ontario (FSCO) at the time the registered letter was sent. If the rule applied, Elite was entitled to decline to issue, terminate, or refuse to renew a policy.

In my opinion, this agreed fact confirms the parties have agreed that Declination Rule 56 was a valid ground filed with the Superintendent which satisfied section 238.Subsection 238 (4.1) permits an insurer to use a ground filed with the Superintendent within 30 days of its filing unless the Superintendent notifies the insurer that it is prohibited from using the ground. There is no evidence before me of any notification by the Superintendent to Elite prohibiting Elite from relying on Declination Rule 56 because it did not comply with the Technical Notes, or for any other reason.

Therefore, I see no merit in the argument that Declination Rule 56 cannot be used as a valid ground to refuse to renew the policy because it did not comply with the Technical Notes.

Elite's position is that the August 12, 2010 notice was valid because it served the purpose for which section 236 and section 238 are intended. Relying upon principles of statutory interpretation, Elite submits that sections 236 and 238 must be interpreted by considering their purpose, and the intention of the legislature in inserting those sections in the *Insurance Act*.

Section 236 is intended to provide the insured with an opportunity to seek replacement coverage when his insurer advises that it will not renew his policy upon the expiry of the current policy period, or that it intends to renew his coverage but on different terms. By providing the insured with 30 days notice (if the insurer gives the notice directly to the insured), or by giving 45 days notice to the insurance broker, who must then notify the insured – unless the broker places alternate coverage, sufficient time is afforded the insured to make alternative arrangements to maintain insurance coverage.

Section 238 is intended to protect the insured from an insurer refusing to renew his policy for reasons that have not been approved by the Superintendent of Insurance to ensure that such reasons are meritorious, and not inappropriate or arbitrary.

Elite argues that on the facts of this case, both legislative objectives were satisfied. It is clear from the Agreed Statement of Fact, and the evidence given by the claimant on his EUO that he was well aware Elite had either canceled or did not renew his policy after September 20, 2010, and he took steps to replace his coverage by obtaining a policy with AXA. The ground relied upon by Elite for declining to renew the claimant's policy is agreed by the parties to have been a valid ground to the extent that

it had been filed with the Superintendent, and not prohibited. The claimant was aware of the reason that his policy was not going to be renewed. He was offered the opportunity to place alternate coverage with an Aviva affiliated company, but he chose to seek insurance coverage elsewhere, and not continue his contractual relationship with Elite.

In the alternative, Elite submits that even if it is August 12, 2010 notice did not technically comply with the requirements of Declination Rule 56 because two terms of the claimant's policy had not yet expired when it sent its notice, the contractual relationship between Elite and the claimant ended long before the accident of December 29, 2011.

Elite argues that at most, if its August 12, 2010 notice of non-renewal was invalid, the claimant's policy would have renewed automatically for one further six-month term, or arguably until the claimant made it clear that he, like Elite, intended to end the contractual relationship by placing insurance coverage on his same vehicle with another insurer – AXA.

In its Written Submissions, Elite argues further that any contractual relationship between it and the claimant in respect of the Autograph policy it had originally issued to the claimant would have ended no later than July, 2011 because Elite received approval from FSCO in February, 2011 to discontinue the Autograph automobile insurance program, and all such policies ceased to exist by July, 2011.

The specific details concerning the dates as to when approval was received by Elite from FSCO to discontinue the Autograph insurance program, and when all Autograph policies ceased to exist are not contained in the Agreed Statement of Fact,

or in other Exhibits.Clearly however, the parties agree that the Autograph insurance program ended in 2011. Paragraph 4 of the Agreed Statement of Fact states that the Autograph insurance program was a pilot program "*…used by Elite until 2011 at which time it was discontinued.*"Of significance, I note that no issue was taken by either HMQ or AXA with the specific 2011 dates indicated by Elite in its Written Submissions.

For all of these reasons, Elite submits that the contractual relationship it had with the claimant through the Autograph policy had come to an end well before the December 29, 2011 accident.

I will deal first with the question of whether Elite's August 12, 2010 registered letter to the claimant constituted a valid non-renewal notice pursuant to the relevant sections of the *Insurance Act*.

As previously discussed, in my opinion, and as agreed by the parties, there is no doubt that Declination Rule 56 is a valid ground for non-renewal of the claimant's policy. There is also nothing wrong with the form of Elite's non-renewal notice to the claimant. As submitted by Elite, other than the requirement for the non-renewal notice to be in writing, there is nothing in the *Insurance Act* mandating a specific form of notice or how it is to be transmitted to the insured. In this case it was sent by registered mail and its receipt is admitted by the claimant.

The subtle question on this issue is whether the facts supporting Declination Rule 56 need to be in existence at the time the non-renewal notice is delivered to validate the ground or the reason for non-renewal.

To resolve this question I must interpret the wording of Declination Rule 56 in accordance with the rules of statutory interpretation, and the relevant case law with respect to the interpretation of insurance policies.

The correct statutory interpretation approach is summarized in Elmer Driedger's work entitled, *Construction of Statutes* (2nd ed. 1983). This approach has been adopted by the Supreme Court of Canada.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[8]

It is also necessary however, to interpret the words of Declination Rule 56 in accordance with the principles of law applicable to interpreting insurance policies. In *Schneider v. Maahs Estate*[9]the Ontario Court of Appeal had to interpret the meaning of "insured person" for the purposes of determining whether a plaintiff was covered under an OPCF 44 endorsement in an automobile insurance policy. It is important to note that the resolution of the issue determined which of two insurers had to respond first to the plaintiff's claims. In other words, this was not a case where the court's interpretation of "insured person" could have been influenced because the plaintiff's recovery hinged on how the issue was decided; it did not. The case involved an issue between two insurers as to which of them would be responsible to pay the plaintiff who would recover from one of them in any event.

[8]*Rizzo & Rizzo Shoes Ltd. (Re)*, CanLII 837 (SCC), per Iacobucci J. at paragraph 21.
[9]2001 CanLII 3018 (ONCA).

It was in this context that Laskin J.A. made the following comments with respect to interpreting Ontario automobile insurance contracts:

> An insurance policy is a contract and the ordinary rules of contract interpretation apply to determine the meaning of an insured person. The court must give effect to the intention of the parties by looking at the words they used (citations omitted). Admittedly, searching for the intention of the parties to an Ontario car insurance policy is somewhat fictional. The mandatory provisions of the policy and the optional endorsements incorporate standard terms and forms. These terms and forms are written by the insurance industry. The driving public can either accept or reject the coverage that is available but they cannot modify the words of the policy. Still, the court should interpret the policy, including optional endorsements, like the OPCF 44, by first looking at the words actually used…
>
> …At best…the definition…is ambiguous…any ambiguity must be resolved against the insurer…Although the OPCF 44 endorsement was approved by the Commissioner of Insurance, its terms, as I have said, were drafted by the insurance industry. Any ambiguity in the terms of a contract must be interpreted against the drafter of those terms on the principle that the drafter could have avoided the ambiguous language.
>
> …As a general rule, clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured; conversely, clauses excluding coverage are interpreted strictly against the insurer.[10]

Reading the operative words in Declination Rule 56 in their grammatical and ordinary sense leads me to agree with HMQ's interpretation of when the Rule can validly apply. The relevant wording states, "…*The…insured has not registered…within 2 previous terms (12 months).*" At the time Elite sent its August 12, 2010 non-renewal notice letter, 2 terms, or 12 months of the claimant's policy had not been completed.

[10]*Schneider v. Maahs Estate*, per Laskin J.A. at paragraphs 13, 15, and 22.

The second term, or 12 months of the policy were not complete until September 20, 2010. Therefore, on a plain reading of Declination Rule 56, the notice was premature. The facts validating the reason or ground for non-renewal did not exist at the time the notice was sent.

I am of the view that this approach to the interpretation of Declination Rule 56 is supported by judicial and arbitral opinions. In *Ip v. Scottish & York Insurance Co.*[11], Justice Price held that the insurer did not have a valid defense on the merits to a claim brought by its insured for wrongful non-renewal of his policy. The insurer had refused to renew the insurance policy for the reason that, according to the insurer, the insured had been involved in two at fault accidents in the preceding five years. The court found on the facts that the insured had not been involved in two at fault accidents as determined by the insurer, and therefore the ground for refusing to renew the insured's policy was invalid at the time the notice was given.

A similar result was reached by Arbitrator Bruce Robinson in *HMQ v. Kingsway.*[12] Arbitrator Robinson determined that Kingsway's termination for nonpayment of premium was invalid because Kingsway had created the non-payment situation by withdrawing more than the proper amount from the insured's bank account by way of automatic premium withdrawal. Therefore, the termination ground was found to be invalid at the time Kingsway sent its registered letter of termination to the insured.

HMQ submitted that the effect of Elite's premature non-renewal notice could have misled the claimant into thinking that even if he had registered to receive the

[11][2008] O.J. No. 4533 (ONSC).
[12] August 5, 2005.

Autograph device before the end of two policy terms, his policy would nevertheless not be renewed. Although HMQ does not concede it would have validated Elite's premature non-renewal notice, HMQ points out that Elite did not explicitly state in its non-renewal notice that the claimant could "save" his policy if he registered to receive the Autograph device by September 20, 2010.

With respect to these arguments, there is no direct evidence before me to support the suggestion that Elite's premature non-renewal notice caused the claimant to be misled as to what would have happened with his policy even if he had registered to receive the Autograph device. Whether an inference to that effect could be drawn from the claimant's EUO testimony is a question that I do not believe I have to answer. In my view, this argument is only relevant if there is a requirement to show that the claimant was prejudiced by Elite's premature non-renewal notice. There is no mention of any such requirement in sections 236 or 238. Either the non-renewal notice is valid because it is given in compliance with the time and reason requirements of sections 236 and 238, or it is not. There is no need to demonstrate prejudice to the insured in the event of noncompliance.

My opinion is the same with respect to the suggestion that Elite's non-renewal notice may also have been defective because it failed to indicate to the claimant that he could save his policy by registering to receive the Autograph device by September 20, 2010. I agree with Elite's submission on this point. Provided notice was given after two policy terms had elapsed, Declination Rule 56 permitted an insurer to decline to renew an insurance policy on the basis that the insured had failed to register to receive the Autograph device before the end of two policy terms. The insurer was not required to

allow the insured to “save” his policy if he registered to receive the Autograph device after he had received proper notice as indicated. From a business standpoint, I expect that the insurer probably would maintain the policy, and refrain from exercising its right not to renew the policy. From a legal standpoint however, there is nothing in the legislation or the Rule requiring the insurer to renew the policy. Therefore, there is no requirement for the insurer to have any type of “saving” language in a non-renewal notice based on Declination Rule 56 to make the notice valid.

Elite argues that the purpose of the non-renewal notice provision in section 236 of the *Insurance Act* was satisfied in this case because the claimant’s actions subsequent to receiving the non-renewal notice indicated that he was well aware he was no longer insured with Elite, and he took steps to replace his insurance coverage by getting the policy with AXA.

Although this may be true, for the reasons just discussed I am of the view that lack of prejudice does not validate the premature non-renewal notice. As will be seen however, in my view this argument has more merit with respect to the issue of whether Elite’s policy was still valid on the December 29, 2011 accident date.

Elite also argued that of necessity, to provide the insured with adequate notice so that he may replace his insurance coverage, it is necessary to give him notice in advance of the expiry of the insurance coverage so that he may take steps to replace the coverage. In principle, I think this argument is correct, but the question is: at what point is it appropriate to give notice if Declination Rule 56 is the basis for non-renewal? Given the wording of Declination Rule 56, in my view the wording requires specific

timing of such notice, which cannot be validly given before the expiry of two, six month terms of the insurance policy.

HMQ submitted that what Elite could have done in the circumstances would have been to wait until two, six month policy terms had expired, and then given the claimant notice that it intended to cancel his policy. This, HMQ submits, would have enabled Elite to get off risk more quickly than simply giving a non-renewal notice after the expiry of two, six month terms, and having to wait until the conclusion of a third term before its coverage would expire.

I am of the opinion that HMQ is incorrect in this submission. Elite could not have canceled the claimant's policy in this manner. The reason for this is found in the opening wording of Statutory Condition 11 dealing with the termination of policies.[13] To properly terminate a policy the insurer must comply with this Statutory Condition. Theopening wording of Statutory Condition 11 makes all terminations subject to, *inter alia*, the *Compulsory Automobile Insurance Act.* Subsection 12 (1) of the *Compulsory Automobile Insurance Act* states that where an automobile insurance contract has been in effect for more than 60 days, the only permitted grounds for termination are nonpayment of premium, giving false particulars of the described automobile to the prejudice of the insurer, the insured knowingly misrepresenting or failing to disclose in his application required facts, or a material change in risk within the meaning of the *Insurance Act*.

[13] The automobile statutory conditions are found in Ontario Regulation 777/93 of the *Insurance Act.*

None of these grounds would have applied on the facts this case (assuming the claimant continued to pay his premium), and the claimant's policy had been in effect well beyond the 60 day minimum set out in Statutory Condition 11. Therefore, even if Elite had waited until the completion of 12 months, its only option to end coverage would have been to give the claimant a Declination Rule 56 non-renewal notice, in which case the policy would have been valid for a third, six month term, until March 20, 2011.

With respect to interpreting Declination Rule 56 in accordance with the principles of interpretation applicable to insurance contracts,in my opinion, Justice Laskin's analysis applies exactly to the interpretation of Declination Rule 56. This rule is part of the automobile insurance system in Ontario, as governed by section 238 of the *Insurance Act*. It is a rule drafted by an insurer, and approved by the Superintendent of Insurance, detailing a reason why the insurer will not issue, will not renew, or will cancel insurance coverage in a policy issued to its insured. Any ambiguity in the wording must be interpreted against the insurer and in favour of the insured – or in favour of expanding coverage versus restricting coverage.

If the wording of Declination Rule 56 in respect of when non-renewal notice can be given is open to competing interpretations, then the law regarding the interpretation of coverage clauses in insurance policies holds that any such ambiguity must be resolved in favour of expanding coverage, as opposed to restricting coverage. In these circumstances, this means the non-renewal notice cannot be validly given until at least two, six month policy terms (12 months) have been completed.

Having found that Elite's August 12, 2010 non-renewal notice was not valid at the time it was given to the claimant, the consequences of this in respect of whether Elite's policy was still in effect at the time of the December 29, 2011 accident must now be considered.

HMQ's position is straightforward. HMQ relies upon a literal interpretation of subsection 236 (5) of the *Insurance Act*. HMQ argues that Elite's policy remains in force until Elite has complied with subsections 236 (1), and (3). It is agreed that Elite has not, to date, sent any non-renewal notice to the claimant apart from the invalid August 12, 2010 letter, nor has it taken any steps to terminate the policy. Therefore, HMQ submits, Elite'spolicy remained in force at least as of the December 29, 2011 accident date. Although its Written Submissions do not specifically put it this way, the logical extension of HMQ's argument is that Elite's policy could remain in force forever, unless Elite sends the claimant a valid non-renewal notice, or terminates the policy (perhaps for nonpayment of premium).

In support of its position HMQ relies upon arbitral and court decisions. *HMQ v. Cooperators*[14] is on its facts the most similar case to the facts of the case before me, at least in terms of the amount of time which elapsed between the non-renewal notice sent by the insurer, and the occurrence of the accident which gave rise to the dispute.

In June, 1998, a vehicle was leased for a 24 month term by an individual from a dealer. The lease was assigned to Ford Credit Canada Leasing Company ("FCC"). FCC had a contractual arrangement with Cooperators whereby Cooperators was a

[14]November 22, 2004, Private Arbitrator Bruce Robinson.

“continuous carrier” with respect to FCC vehicles. Essentially this meant that Cooperators would maintain insurance on FCC vehicles until FCC was notified otherwise by Cooperators. Cooperators was aware of the 24 month term of the lease for this vehicle. In June, 1998 Cooperators issued a policy covering the vehicle initially for a term of six months naming both the individual and FCC as named insureds.

An accident occurred on April 6, 2000 giving rise to a SABS claim which formed the basis for the dispute. The accident occurred outside of the initial six-month policy term, but within the 24 month vehicle lease term.

Arbitrator Robinson found that the individual who leased the vehicle canceled the Cooperators coverage on September 8, 1998. He further found that no notice of this cancellation was given to FCC even though such notice was required under the terms of the contract between FCC and Cooperators, and the *Insurance Act*.

Arbitrator Robinson could have ended his analysis there since he found that the Cooperators policy had not been properly canceled because Cooperators failed to properly notify one of its named insureds of the cancellation.

Cooperators advanced an argument that since its policy was originally issued for only six months, andit had notified FCC of the cancellation before the end of that six-month term there was no coverage beyond six months. As indicated, Arbitrator Robinson found against Cooperators on the facts, and held that Cooperators did not give notice of any kind to FCC.

In what in my opinion is technically *obiter dicta*, Arbitrator Robinson went on to state that the Cooperators policy had automatically renewed at the end of the six-month

term in any event because Cooperators had not given FCC proper notice under section 236 of the *Insurance Act* of its intention not to renew.

HMQ submits that this decision stands for the proposition that if an insurer who intends not to renew a policy does not give proper section 236 notice of non-renewal, the policy remains in effect indefinitely until such notice is given, or the policy is otherwise properly canceled.

I do not accept that this case stands for the broad proposition HMQ asserts. The *ratio* of Arbitrator Robinson's decision was that Cooperators failed to properly cancel its policy because it did not notify FCC, one of its named insureds. Arbitrator Robinson's comments on the section 236 issue were *obiter dicta*. Additionally, in my view the fact Cooperators had a "continuous carrier" contract with FCC was significant to the Arbitrator's analysis. FCC had a contractual right to expect that Cooperators would have maintained coverage on the vehicle in question at least until the expiry of the 24 month lease term. As indicated, the accident giving rise to the dispute occurred within the 24 month lease term.

Having said this, I agree with Arbitrator Robinson's conclusion that if an insurer fails to give proper non-renewal notice pursuant to section 236 of the *Insurance Act*, its policy will automatically renew. I do not accept however, that this renewal occurs indefinitely thereafter on each anniversary date of the policy term no matter what occurs after the initial automatic renewal, unless a proper section 236 non-renewal notice is given.

The decision of Arbitrator Jones in *Primmum (Pembridge) v. HMQ*[15] involved a situation where an accident occurred within approximately 6 hours after the end of the one year term of an insurance policy. Primmum took the position that it had canceled the policy for nonpayment, a position which Arbitrator Jones rejected because one of the named insureds – the lessor, was not provided with a registered letter of cancellation.Like *HMQ v. Cooperators*, this case was decided on the basis of improper cancellation. So once again, the comments of the Arbitrator on the section 236 issue raised in the alternative by Primmum were *obiter dicta*.

Primmum argued in the alternative that its policy lapsed six hours before the accident. Arbitrator Jones adopted some of the language of Arbitrator Robinson in *HMQ v. Cooperators*, and held that the insurer had not provided any notice pursuant to section 236 of its intention not to renew, therefore the policy automatically renewed on its anniversary date and was in effect six hours later when the accident occurred.

Once again, I do not disagree with the general approach of Arbitrator Jones with respect to the application of section 236. I do not accept however, that on its facts the case is authority for the proposition that in a situation where the insurer has sent an invalid section 236 notice of non-renewal, the insurer's policy will renew itself indefinitely, no matter what events occur thereafter, unless a valid notice of non-renewal is subsequently sent.

[15]August 18, 2005, Private Arbitrator Guy Jones.

I would make the same comments with respect to two other cases referred to by HMQ, *Economical Mutual Insurance Co. v. Pafco Insurance Co*.[16], and *Chenier v. Stephens.*[17]These cases are distinguishable on their facts alone.

In *Economical v. Pafco* the accident occurred one day after the expiry of a 30 day binder issued by the insurer. In *Chenier v. Stephens* the accident occurred three days after the expiry of the policy term. In *Economical v. Pafco* the court held that the insurer did not send a non-renewal notice. In *Chenier v. Stephens* the court held that the non-renewal notice was not received by the insured.

In neither of these cases was it necessary for the court to consider the effect of an invalid non-renewal notice which had been received by the insured. In any event it was not necessary to consider whether there was coverage beyond the policy term immediately following the deemed renewal. I have already noted the special circumstances of the "continuous carrier" contract in *HMQ v. Cooperators* and the fact that the *ratio* of the case was founded on improper cancellation.

The facts of the case before me are distinguishable from the cases mentioned. The accident in this case did not occur within the policy term immediately following the disputed renewal on September 20, 2010. In fact, the accident did not occur for more than 15 months after the disputed renewal.

In my opinion, events which occurred after the September 20, 2010 disputed renewal date are relevant to the issue of whether Elite policy was still in force as of the December 29, 2011 accident date.

[16][2001] O.J. No. 3419 (ONSC) ("*Economical v. Pafco*").
[17][2000] O.J. No. 2721 (ONSC), affd.[2001] O.J. No. 674 (ONCA) ("*Chenier v. Stephens*").

I think it is helpful to consider the events subsequent to September 20, 2010 in the context of how Elite could have properly used Declination Rule 56 to validly refuse to renew (lapse) the claimant's policy.

The evidence in this case makes it clear that one of the terms of maintaining the insurance coverage under the contract issued by Elite to the claimant was that he register online to receive the Autograph device. The policy was issued to the claimant before the online registration process was to be undertaken,it was not a condition precedent to the issuance of the policy. Therefore, there is no doubt that there was a contract of automobile insurance in force between Elite and the claimant for a six month term commencing September 20, 2009, even though the claimant had not yet registered to receive the Autograph device.

Declination Rule 56 provided Elite with the means to end its contractual relationship with the claimant in the event of the claimant's failure to register to receive the Autograph Device (and assuming there were no other *Insurance Act* grounds to terminate or refuse to renew the policy). In my view however, a proper reading of this Rule obligated Elite to maintain coverage under the policy for a minimum of two, six month terms before it could refuse to renew the policy on the basis that the claimant had failed to register to receive the Autograph Device.

Elite could not send a valid notice of non-renewal based on Declination Rule 56 however, until two, six month terms had been completed. This means that the policy would have renewed for a third, six month term. If a Declination Rule 56 notice of non-renewal was delivered after the commencement of the third, six month term, the policy

could have been validly “non-renewed” (lapsed) at the end of the third six-month term. In effect then, Elite would have been obligated to insure the claimant under the policy for three, six month terms before it could validly lapse the policy using Declination Rule 56 (again, assuming there were no other grounds to otherwise terminate the policy).

On the facts of this case, the earliest that Elite could have lapsed the claimant’s policy pursuant to Declination Rule 56 would have been at the expiry of the third, six month term – March 20, 2011. I will pause to note here that this date is still well before the December 29, 2011 accident giving rise to the claimant’s SABS claim.

As discussed, although Elite could have validly lapsed the claimant’s policy using Declination Rule 56 well before the accident date, it did not do so. Does this mean that Elite’s policy is in effect in perpetuity, or at least until Elite takes active steps to properly lapse or terminate the policy? I am of the opinion that this is not the case, and that Elite’s policy does not remain in effect in perpetuity unless it takes steps to lapse or terminate the policy.

Although a contract of automobile insurance in Ontario is governed by special, statutory rules and regulations, nevertheless it is still a contract to which common law principles of contract law apply unless specifically excluded by legislation.

A contract of automobile insurance in Ontario is a “continuous contract” in the sense that once established, the legislation provides that the relationship will continue unless the parties mutually do not intend to maintain the relationship, or one of the parties unilaterally exercises their rights of termination or non-renewal pursuant to the legislation.

Upon renewal of the contract however, the parties must come to an agreement on the terms for what in effect is a new contract. Neither party is bound to maintain the status quo regarding the terms of the contract. Subject to the legislated standard terms, they are free to agree to vary the terms. One side can propose to the other a change of terms. The other side is not bound to accept the proposed change. If there is no agreement then the contract will not be renewed and neither side is bound to continue the relationship. For example, at the end of a six month or one year term, the insurer may propose to continue the insured's coverage, but only at an increased premium. The insured is not bound to accept the premium increase, but if the proposed increase is not accepted the insurer is not bound to continue the coverage and the relationship can be ended.

In other words, upon renewal, an automobile insurance contract is like any other contract in that each renewal represents a new contract and requires its own "offer and acceptance".

The Supreme Court of Canadain *Patterson v Gallant*[18]confirms what I have described in the preceding paragraphs as the nature of automobile insurance contracts.

Patterson v. Gallant dealt with an issue of whether an automobile insurance policy in Prince Edward Island had been automatically renewed by the insurer which sent the insured a new insurance "pink card" together with a premium notice/offer to renew. The court found that the insurer, Cooperators, had simply made an offer to renew to the insured which required that the insured pay the proposed premium in order

[18][1994] 3 S.C.R. 1080.

to accept the offer. The insured did not do so. Consequently, the court held that the policy lapsed, and that it was not necessary for Cooperators to take any further steps under Prince Edward Island's automobile legislation to either terminate or refuse to renew a policy which had lapsed.

In speaking for a unanimous court, Major SCJ stated as follows:[19]

> Two separate meanings can be ascribed to a "renewal" of an insurance policy. The first meaning results from a continuous policy. Such policies provide for further extensions to the term of an existing contract, subject to the rights of either of the parties to terminate the contract. In a single continuous policy, questions of formation are answered by reference to the original offer and acceptance that initiated the coverage. By contrast, the other meaning of a "renewal" of an insurance policy involves the situation where a separate and distinct contract comes into existence at each renewal. Automobile insurance renewals fall into the latter category, in that each renewal represents a new contract with its own offer and acceptance.

The case of *Masters v. Mohammed*[20] further illustrates the point that other principles of ordinary contract law – repudiation, apply to automobile insurance contracts. The insured sought a declaration of coverage against his insurer, Cooperators, for an accident occurring October 28, 2000. Cooperators had renewed the insureds policy for a six month term commencing on March 11, 2000. Cooperators took the position that it had validly canceled the insureds policy prior to the accident. Cooperators asserted that it had sent a registered letter dated July 19, 2000 to the insured and followed up with a telephone voice message to the insured. It could not produce a copy of the letter, only an electronic note that the letter had been sent. Echlin

[19]At paragraph 10.
[20][2007] O.J. No. 5554 (ONSC).

J. accepted this evidence and found that the insured's policy had been properly canceled prior to the accident. He rejected the insured's evidence that he had not received any registered letter nor a telephone voice message advising of the cancellation.

The background facts are relevant to consider in respect of the judge's rejection of the insured's evidence. Echlin J. found that the insured was in financial difficulty, and was well aware that there were insufficient funds in his bank account after May, 2000 to accommodate monthly, automatic premium withdrawals he knew would be made by Cooperators. Echlin J. found that the insured knew or was willfully blind to the fact that he paid no premiums for the months of June, July, August, September, and October, 2000. The insured testified that he knew to expect a letter and a "pink slip" every six months at the time his policy was to be renewed and he knew that he needed it to legally drive. He did not receive a pink slip to cover the post-September 11, 2000 time. He did not contact his insurer or make any inquiries as to why he had not received it. He simply chose to operate his vehicle without insurance.

Although the *ratio* of the case is that Cooperators properly canceled the insured's policy before the accident, Echlin J. made the following comments as an alternative basis for dismissing the insureds coverage application:[21]

> In the alternative, I find that the Cooperators policy lapsed prior to the accident in question. I say this because Mohamed, by his actions in failing or refusing to pay the premiums has repudiated his contract with Cooperators. his absolute disinterest in the policy, the obligation to pay premiums, his continuing to drive without a valid pink slip and his failure to even inquire as to

[21]At paragraph 27.

> its whereabouts are sufficient to bring the coverage to an end as of September 11, 2000, well before the date of the accident on October 28, 2000.

I want to make reference to one further case, the decision of private Arbitrator Samis in *The Economical Insurance Group v. Wawanesa Insurance*.[22] The issue in what was a priority dispute involved whether Economical (Perth) had properly canceled its policy in favour of a SABS claimant.

The policy had been renewed on previous occasions for six month terms. The last, six month term prior to cancellation commenced August 3, 2008. Economical's cancellation by registered letter was to be effective January 22, 2009. Arbitrator Samis found that based on the history between the parties, if it had not canceled the policy, Economical would have offered to renew it for a further six months which would have covered February 3, 2009 to August 3, 2009. It would have been necessary for there to have been a further renewal to extend coverage as far as the accident date – August 12, 2009.

Most of the decision concerned the evidence bearing on the issue of cancellation. Ultimately, Arbitrator Samis concluded that Economical had established that it had properly canceled the SABS claimant's policy.

On the issue of what the consequences would have been had Economical's termination been invalid however, Arbitrator Samisconcluded as follows:[23]

> …the policy would have been at the end of its second term on February 3, 2009. If renewed for a third term, that third term would have expired August

[22] May 7, 2014 ("*Economical v. Wawanesa")*.
[23]At pages 6 and 7.

> 3, 2009. The accident giving rise to this loss occurred after that date, on August 12, 2009.
>
> A finding that Economical's policy was in force and effect on August 12, 2009 would necessitate finding that the termination was ineffective, and that somehow the policy continued in force for two subsequent renewals, by authorization of law…
>
> The Supreme Court of Canada, in *Patterson v. Gallant* [1994] 3 S.C.R. 1080 is germane. In that case the Supreme Court of Canada dealt with what it considered to be the important issue of the meaning of "renewal" of an automobile policy…the Supreme Court of Canada held that (in respect of) automobile insurance…'each renewal represents a new contract with its own offer and acceptance'.
>
> Following in this analysis, there could not have been a policy in force with Economical at the time of this accident unless there had been two further cycles of offer and acceptance. This, of course, did not happen. In fact the communications between the parties are of the opposite effect. The December 23, 2008 letter from Economical to the customer made it very clear that Economical was not interested in a continuation of the insurance arrangement.
>
> For this additional reason, I conclude that the Economical policy was not in force on the date of the accident.

I will concede that technically speaking, the comments by Justice Echlin in *Masters v. Mohamed*, and by Arbitrator in Samisin *Economical v. Wawanesa*on the issue of the lapse or non-renewal of the policies in those cases could be construed as *obiter dicta*, since in both decisions the adjudicators determined that the policies had been properly canceled.

In my view however, the analysis employed by Echlin J. and Arbitrator Samis is persuasive, and is in accordance with the Supreme Court of Canada's statement of the law concerning automobile insurance contract renewals in *Patterson v. Gallant*.

Applying the law as stated in *Patterson v. Gallant*, and the analysis of the *Masters v. Mohamed* and *Economical v. Wawanesa* to the facts of the case before me supports, in my opinion, the conclusion that Elite's policy was not in force at the time of the December 29, 2011 accident.

The evidence from the Agreed Statement of Fact, and the claimant's EUO supports the following findings of fact:

1. The claimant received the New Policy Notice when the Elite policy was issued to him in September, 2009. He understood that he was required to register online to receive the Autograph device.[24]

2. The claimant understood that the Autograph Policy which had been issued to him by Elite required him to obtain and connect the Autograph device in his vehicle. He understood that the Autograph device would provide information to Elite about his driving. The claimant understood that the Autograph Policy which he had applied for required him to use the Autograph device.[25]

3. Despite some testimony from the claimant suggesting that he was uncertain how he was to obtain the Autograph device, the totality of his evidence indicates that he understood that he needed to take active steps to obtain the Autograph device to maintain coverage under the Autograph Policy. The claimant acknowledged at least two telephone conversations with Elite during the first and second six month terms of his policy in which he was told that he was required to register and obtain the Autograph device to maintain coverage under the Autograph Policy program. I find that the reason

[24]Agreed Statement of Fact, paragraph 5.
[25] EUO, Q. 314 – 318.

he did not do so is that sometime after having been issued the policy he formed the opinion that using the Autograph device would invade his privacy, and permit Elite to "spy" on him. Therefore, he simply made no effort to obtain the Autograph device because he had no intention of using it in his vehicle. He did not communicate this to Elite. I find that he did not communicate to Elite the fact that he had no intention of using the Autograph device because he was aware that if the changed his policy from the Autograph Policy to a different insurance product he would have to pay a higher premium. I find it a reasonable inference to draw that the claimant was content to remain insured under the Autograph Policyobtaining the benefit of a lower insurance premium without making any effort to employ the Autograph device until Elite finally canceled or refused to renew his policy.[26]

4. Elite sent its August 12, 2010 registered letter to the claimant advising that effective September 20, 2010 it would not renew the claimant's policy because the claimant had not registered via the Internet to obtain the Autograph device. Although I have found this notice to be invalid for s. 236 purposes for the reasons discussed, there is no doubt that the claimant received the notice, and understood that Elite did not intend to insure him under the Autograph Policy beyond September 20, 2010.[27]

5. After receiving Elite's notice that it did not intend to insure him after September 20, 2010, and although he received some quotes for alternative automobile insurance coverage from KTX, the claimant decided to end his insurance relationship with Elite and pursue insurance coverage with a different insurer. Within a few days of September

[26]Agreed Statement of Fact, paragraphs 7, and 8. EUO, Q. 299 – 319, 359, 360.
[27] EUO, Q. 327 – 330, 334, 363 – 368.

20, 2010, the claimant had replaced his automobile insurance coverage with Elite by obtaining a policy of automobile insurance with AXA. The AXA policy was issued September 23, 2010. The claimant canceled his policy with AXA shortly thereafter.[28]

The significance of these facts is that they demonstrateboth Elite and the claimant intended to end their contractual relationship. Although Elite evinced this intention before the claimant, in my opinion the evidence clearly indicates that the intention was mutual within a few days after September 20, 2010.

These facts also could be interpreted to indicate that the claimant effectively repudiated his contract with Elite by willfully, or with knowing indifference failed to make any effort to comply with the essential conditions of the contract. With respect to this latter point, once Elite indicated its intention not to renew the contract, the claimant's actions, or more accurately – inaction, in failing to comply with the conditions of the Elite contract, combined with his securing replacement coverage, could amount to a repudiation of the Elite contract thereby ending it no later than March 20, 2011.

In any event, in my opinion, putting the automatic renewal argument at its strongest, the s. 236 (5) consequence of Elite's invalid non-renewal notice is that the claimant's policy automatically renewed on September 20, 2010 because at that point it was only the insurer Elite who had expressed the intention to end the contractual relationship. It was not until a few days after September 20, 2010 that there was a mutual intention to end the contractual relationship.

[28]Agreed Statement of Fact, paragraph 14, and 15, EUO, Q. 332, 344 – 358.

Subsection 236 (5) details the requirements to be met where the insurer unilaterally intends not to renew the contract. It stipulates that a contract of insurance remains in force until the insurer complies with those requirements. It does not however, override the principle of contract law which, to have a valid contract, requires that both parties intend to enter into, or to maintain contractual relations. Subsection 236 (5) does not have the effect of making the automobile insurance contract continue indefinitely where the parties are not *ad idem,* or where they have mutually indicated an intention to end any contractual relationship which existed.

A question was raised by in argument as to what the correct duration of the renewal period was assuming that the Elite policy automatically renewed on September 20, 2010 because of the invalid non-renewal notice. As somewhat of an alternative argument to its position that the renewal was indefinite until a proper termination was effected, or a valid non-renewal notice was sent, HMQ argued that it was conceivable that a longer-term renewal may have been entered into, such as a one year term. I think this argument is incorrect for two reasons. First, the history of the parties'dealings was that the insurance contract term was for six months at a time. Second, and this point I think is determinative of the issue, a review of the Declination Rules makes it clear that the policy term for the Autograph form of policy was limited to six months. The insurer could decline to issue, terminate, or refuse to renew a contract where the policy term was other than six months in duration.[29]

In my opinion, the automatic renewal by operation of s. 236 (5) was valid at most for only a further six months, until March 20, 2011. At that point, based on the law, the

[29] See Declination Rule 55.

contract would only have renewed again if the parties had mutually intended to maintain the contractual relationship. The evidence indicates that this would not have been the case. In fact, the evidence makes it clear that within days of the automatic renewal on September 20, 2010 neither party was interested in maintaining the contractual relationship.

In terms of the law of contract, the sending of a premature, and therefore invalid non-renewal notice from Elite could be construed as an anticipatory breach of contract. Theevidence indicates that the claimant elected to accept this anticipatory breach, and treated the contract as at an end. He mitigated his damages by replacing his automobile insurance coverage with another insurer. In contract terms, his remedy would have been to claim as damages from Elite any increased difference in premium cost for his replacement coverage for the six month term for which Elite's policy would have been in force between September 20, 2010 and March 20, 2011. Considered in this way, it could be argued that the automobile insurance contract came to an end within days after the automatic renewal on September 20, 2010, subject to the claimant's right to sue for damages as indicated.

Although this argument may make for an interesting discussion from a contract law point of view, it is not necessary for me to conclude that it applies in this case. Even if by operation of subsection 236 (5) the Elite policy automatically renewed on September 20, 2010 for a further period of six months until March 20, 2011, that renewal ended well before the December 29, 2011 accident date.

If I am found to be incorrect in my conclusion that Elite's policy was only automatically renewed for a further six-month term and no longer as a consequence of its invalid non-renewal notice, there is a further reason I think the insurance contract between Elite and the claimant ended long before the December 29, 2011 accident occurred. The evidence before me is, in my opinion, sufficient to demonstrate that the entire Autograph Policy automobile insurance program underwritten by Elite was terminated by authorization of the Superintendent of Insurance months before the December 29, 2011 accident. I am satisfied that Elite has proven that the claimant's policy, being an Autograph Policy governed by the terms of the Autograph program, would not have been in force at the time of the accident because the program had been terminated.

Had the claimant complied with the conditions of insurance under the Autograph Policy program, and his policy periodically renewedfor six month terms, Elite would not have insured the claimant under the Autograph Policy for any six month period which would have overlapped the December 29, 2011 accident date. Elite had sought permission from the Superintendent of Insurance in February, 2011 to end the pilot insurance program requiring the in-vehicle Autograph Device. Approval to end the program was given, and by July, 2011 the Autograph Policy ceased to exist. Elite had made provision for just such an eventuality by filing with the Superintendent of Insurance Declination Rule 54. That Rule states as follows:

> The insurer will decline to issue, terminate, or refuse to renew a contract where:…

> 54. The insurer, for any reason, suspends the Autograph program, following approval from the Financial Services Commission of Ontario.

It may be that had the claimant complied with the conditions of insurance under the Autograph Policy program within the first two, six month terms Elite would not have communicated an intention not to renew the claimant's insurance coverage, and perhaps the parties may have maintained a contractual relationship. It is a certainty however, that in 2011, well before the December 29, 2011 accident, Elite and the claimant would have had to agree upon a replacement automobile insurance product for the discontinued Autograph Policy if the relationship were to continue. In effect, this would have involved the negotiation of an entirely new contract – a contract neither party would have been obligated to enter into unless there was a meeting of the minds on the terms, and they both intended to do so. All of this would have had to have taken place long before the December 29, 2011 accident.

In light of this, it seems to me that it would stretch the application of subsection 236 (5) beyond the breaking point to accede to HMQ's argument that the claimant's Autograph Policy is in effect indefinitely, until Elite properly terminates it, or delivers a valid notice of non-renewal. This would create the legal fiction of an ongoing Autograph Policy contract in circumstances where, by the middle of 2011 with the approval of the Superintendent of Insurance, the insurer could not offer, and the insured could not obtain, automobile insurance coverage under the Autograph Policy program.

Therefore, for the foregoing reasons I conclude that the effect of Elite delivering an invalid notice of non-renewal was to cause the claimant's Autograph Policy to automatically renew effective September 20, 2010. I believe it could be held that Elite's

contractual arrangements with the claimant ended a few days after September 20, 2010. Even if that is not accepted, applying the law as I have stated it, the automatic renewal on September 20, 2010 extended the term of the policy for a further six months at most, until March 20, 2011.

At this point, no further renewal would have occurred because the evidence indicates both parties intended to end their contractual relations within a few days of the automatic renewal on September 20, 2010, and the Autograph Policy program was terminated with the approval of the Superintendent of Insurance in 2011, well before the accident date.

Conclusion

1. Elite's non-renewal notice in the form of its August 12, 2010 registered letter did not satisfy the requirements of sections 236of the *Insurance Act* because it was given prematurely. Declination Rule 56 was a valid Rule, but it required that two, six month terms of the Autograph Policy be fully completed without the insured having registered via the Internet to receive the Autograph device, before a non-renewal notice relying on Declination Rule 56 could be valid.

2. Notwithstanding the invalidity of Elite's non-renewal notice, Elite's policy was **not** in force at the time of the December 29, 2011 accident. By operation of subsection 236 (5) of the Insurance Act the invalidity of Elite's non-renewal notice caused the policy to automatically renew effective September 20, 2010. This automatic renewal extended the policy at most for only a further six-month term ending March 20, 2011. The policy did not renew beyond March 20, 2011 because Elite and the claimant mutually indicated

their intention to end their contractual relationshipshortly after the automatic renewal effective September 20, 2010.

3. The determination of the preliminary issue in this arbitration is that Elite is **not** the priority insurer responsible for payment of the claimant's SABS claim. Subject to the wishes of the remaining parties, HMQ and AXA, the arbitration will continue to determine the priority issue between HMQ and AXA.

4. Elite is the successful party in this preliminary issue. It is entitled to recover from the other parties its arbitration costs, including its share of the arbitrator's fees and disbursements. Should the parties be unable to agree on the quantum of costs, or if there are other matters in connection with the quantum of costs about which the parties wish to make submissions, I invite them to contact my Coordinator to schedule a telephone conference to discuss arrangements to deal with the costs issue.

Dated at Toronto, May 12, 2016

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Scott W. Densem, Arbitrator