IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8,
AND REGULATION 283/95 MADE THEREUNDER

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

THE COMMONWELL MUTUAL INSURANCE GROUP

Applicant

\- and -

CERTAS HOME AND AUTO INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Eric Grossman and Patrick Baker – Zarek, Taylor, Grossman, Hanrahan LLP
Counsel for the Applicant, The Commonwell Mutual Insurance Group
(hereinafter referred to as “Commonwell”)

Rose Bilash – Desjardins General Insurance Group Inc.
Counsel for the Respondent, Certas Home and Auto Insurance Company
(hereinafter referred to as “Certas”)

ISSUE – 90 DAY NOTICE

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and *Ontario Regulation* 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant John Sparks, with respect to personal injuries sustained in a motor vehicle accident which occurred on February 11, 2015. A preliminary issue has been raised as to whether Commonwell, who did not put Certas on notice of this priority dispute within 90 days of having received a completed OCF-1 as required by section 3(1) of O. Reg. 283/95 – *Disputes Between Insurers*, is entitled to an extension of time in accordance with section 3(2) of the Regulation.

PROCEEDINGS

[2] The matter proceeded on the basis of a motion brought by Certas to dismiss Commonwell's priority claim on the basis of a breach of the notice provisions aforesaid. The matter proceeded on the basis of written submissions, document briefs, Examination Under Oath transcripts and Books of Authority.

FACTS

[3] The claimant, John Sparks, was involved in a dirt bike accident in Florida on February 23, 2015. The claimant was the owner of the dirt bike and had taken it to Florida for his son to participate in a race. While there Mr. Sparks decided to take the dirt bike for a run. The accident left Mr. Sparks with catastrophic injuries, including a serious brain injury. Mr. Sparks was hospitalized for approximately six months in Florida, before returning to Canada.

[4] At the time of the accident and as it is now known, Mr. Sparks had a standard auto policy with The Commonwell Mutual Insurance Group ("Commonwell") with respect to two pickup trucks that he owned, but had also purchased (unbeknownst to him as of the date of his Examination Under Oath) a separate policy of insurance for his dirt bike on February 11, 2015, through Certas Home and Auto Insurance Company ("Certas"). The Certas policy was therefore in effect at the time of the accident.

[5] On January 19, 2018, almost three years post-accident, Commonwell received an OCF-1 Application for Accident Benefits. The available evidence provides an explanation as to why the claim for accident benefits took so long. Mr. Sparks made several attempts to consult with a lawyer following this accident. He estimated that he contacted 10-15 lawyers without any response. Ultimately, Mr. Sparks contacted Thomson Rogers almost three years after the accident, in January 2018 and retained Ian Furlong to represent him with respect to an accident benefits claim.

[6] Because of Mr. Sparks' memory issues, Mr. Furlong claims to have started making contact with insurance brokers in Peterborough, Ontario, where the claimant resided, in order to determine whether there was a valid automobile insurance policy in place at the time of the accident against which an accident benefits claim could be made. Mr. Furlong ultimately identified that Mr. Sparks was covered under an automobile policy with The Commonwell and submitted an OCF-1 to The Commonwell on January 19, 2018. Mr. Furlong did not make a more detailed investigation at that time, having identified an insurer that he believed would respond to the accident benefits claim.

[7] Commonwell retained counsel to conduct an Examination Under Oath of Mr. Sparks on March 2, 2018. Mr. Sparks gave evidence that he suffered from memory issues. He testified that he was not sure whether he had insurance with Commonwell as his wife took care of insurance matters and would have all the paperwork. However, Mr. Sparks and his wife separated after the accident. In addition, his home was also destroyed by a fire prior to the accident. Consequently, there were no paper copies of Mr. Sparks' auto policies.

[8] Mr. Sparks was not aware of the Certas policy on his dirt bike when the OCF-1 was submitted to Commonwell. He testified that he did not believe the dirt bike was insured and that he did not believe it was a requirement to insure a dirt bike in Ontario. Commonwell, relying on the Examination Under Oath testimony of Mr. Sparks, took no further steps to confirm the existence of any other policies within the 90-day period required under s.3(1) of O. Reg. 283/95.

[9] The expiry of the 90 day period was April 19, 2018.

[10] Aside from the Examination Under Oath, there is no evidence that Commonwell conducted an AutoPlus search or any other investigation within the 90-day timeframe to determine if there was a separate policy on the dirt bike. Autoplus is a database that all insurance companies in Ontario subscribe to. With simply providing a driver's licence number, it will list all insurance companies that individual was insured with going back decades, at a relatively small cost. The report provides a list of all vehicles the individual has insured, any accidents or claims ever made, details of claims made against the individual and details of any insurance cancellations. It is well known that it is used regularly by insurers to determine insurance in place on any particular date with respect to any vehicles owned by the individual.

[11] Commonwell did not order a transcript of the Examination Under Oath (EUO) until February 13, 2019. The log notes following the completion of the EUO on March 2, 2018 to the 90-day point, contain no reference whatsoever to the EUO. The notes for this period of time were comprised largely of medical documentation and the outcome of an appeal decision that would permit Commonwell to deny coverage on the basis that the injuries did not arise from an "accident", as the dirt bike might not be considered an "automobile".

[12] In or around September 2018, Commonwell retained counsel to deal with the issue as to whether Commonwell was obligated to pay accident benefits. An argument was available that the claim did not arise from an "accident", as the dirt bike was not an "automobile" based on the state of the jurisprudence at that time, which has since been clarified. Thereafter, counsel for Mr. Sparks made further efforts to determine whether any other insurer might respond to an accident benefits claim.

[13] On January 3, 2019, almost a year after submitting his OCF-1 to Commonwell, Mr. Sparks' counsel sent a letter to counsel for Commonwell confirming that he had now canvassed all the brokers in the Peterborough area where the claimant had resided and was now able to confirm that Mr. Sparks had a separate policy on the dirt bike with Certas. A copy of the Certificate of Automobile Insurance was enclosed. As indicated above, Commonwell initially denied the accident benefits claim on the basis that the claim did not arise out of an "accident", given the state of jurisprudence at that time as to whether a dirt bike met the definition of "automobile". This prompted claimant's counsel to complete the further investigation which identified Certas as to the insurer of the dirt bike.

[14] Commonwell conducted an AutoPlus search on January 4, 2019. The AutoPlus search confirmed that Certas indeed insured the dirt bike at the time of the accident.

[15] A Notice of Dispute was later forwarded to Certas and the present priority dispute commenced.

ANALYSIS AND FINDINGS

[16] An individual involved in a motor vehicle accident may have accident benefits coverage available to him or her from more than one policy of motor vehicle insurance. The rules for determining which of those insurers stands in priority to pay the individual is set out in Section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8. If a dispute arises as to which of two or more insurers ought to be responsible for payment of accident benefits to the individual, then the insurers look to the dispute resolution scheme as set out in *Ontario Regulation* 283/95 – *Disputes Between Insurers* to resolve that issue.

[17] Section 1 of *Ontario Regulation* 283/95 – *Disputes Between Insurers*, requires all disputes as to who should pay an injured party's benefits under Section 268 of the *Insurance Act* to be settled in accordance with the Regulation.

[18] Section 2 sets out who should pay pending the resolution:

> *"The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the Act."*

[19] Section 3 sets out the notice requirements of an insurer seeking to pass priority for payment to another insurer. It reads as follows:

> *"3(1) No insurer may dispute its obligation to pay benefits under Section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that Section.*
>
> *(2) An insurer may give notice after the 90 day period if,*
>
>> *(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under Section 268 of the Act; and*
>>
>> *(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90 day period."*

[20] If the insurers cannot agree as to who is required to pay benefits, Section 7 of Ontario Regulation 283/95 requires the dispute to be resolved through an arbitration under the *Arbitration Act*, 1991, S.O. 1991 c.17. This is exactly what has occurred here.

[21] The very issue before me is whether Commonwell can satisfy the relief provision set out in section 3(2) as set out above.

[22] Some of the general legal principles applicable to the issue before me are:

> The purpose of the 90 day period is to permit the insurer who first receives a completed Application for Benefits to gather factual information which will allow it to determine whether another insurer is responsible to pay the benefits.
>
> > *State Farm Mutual Automobile Insurance Company of Canada v. Ontario* (*Minister of Finance)* [2001] O.J. No. 1115
>
> Whether or not 90 days is a sufficient time to make a determination that another insurer may be responsible to pay the accident benefits is a question to be decided based on the facts of each case. The arbitrator must decide whether the insurer had enough facts to make a determination within 90 days. If not, the arbitrator must then consider whether the insurer made reasonable investigations within the 90 day period.
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> > *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co.* [2009] O.J. No. 2971
> >
> > *Primmum Insurance Co. v. Aviva Insurance Co. of Canada* [2005] O.J. No. 1477
> >
> > *Coseco Insurance Company v. Allstate Insurance Company* (Arbitrator Stephen Malach, November 15, 2001)
> >
> > *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* (2007) 88 O.R. (3d) 629
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> Whether or not the insurer has been provided with accurate information by the insured is a factor in determining whether the 90 day period was sufficient.
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> > *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, supra
> >
> > *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Co.*, supra
>
> Deciding whether or not reasonable investigations were made during the 90 day period is also dependant on the facts of each case. However, investigations must be "reasonable", which is not the same as perfect. The fact that, in retrospect, other investigations might have been seen to be helpful, does not mean the investigations which were undertaken do not meet the test of reasonableness.
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> > *Primmum Insurance Co. v. Aviva*, supra

> *Federated Insurance Company of Canada v. CGU Insurance Company of Canada* (Arbitrator Stephen Malach, September 2, 2003)

In determining the reasonableness and the timeliness of investigations, it must be remembered that insurance adjusters are extremely busy individuals working on many complex matters at the same time. They should not be held to a standard of perfection.

> *Coseco Insurance Company v. Lombard Insurance Co.* (Arbitrator Guy Jones, June 3, 2004)

Where little or no reliable information is available upon which to conduct follow-up investigations, minimal investigations may be found to be reasonable.

> *Ontario (Minister of Finance) v. Co-Operators General Insurance Company* (Arbitrator B. Robinson, February 22, 2002)

Where the Applicant or the representative indicates on the Application for Accident Benefits that no other insurance is available when in fact such coverage is available, then such misinformation serves to mislead the insurer.

> *Coachman Insurance Company v. ING Insurance Company of Canada* (Arbitrator Stephen Malach, March 1, 2007)

[23] The Respondent Certas claims that Commonwell could have easily completed the AutoPlus search immediately after the Examination Under Oath to determine the existence of another policy on the dirt bike. This was not an onerous or costly task and could have been completed well within the 90 day period required under section 3 (1) by doing its own Autoplus search or, as Plaintiff's counsel did, canvass the brokers in the Peterborough area.

[24] In response, Commonwell claims that there were extenuating circumstances warranting an extension of the 90 day notice requirement, in that the claimant had provided what turned out to be inaccurate information on his Examination Under Oath, wherein he testified that he did not believe the dirt bike was insured. Commonwell maintained that it was entitled to rely on the evidence of their own insured and hence their investigation within 90 days was reasonable and therefore an extension of time to provide a notice of dispute warranted.

[25] According to Commonwell, there was no reason to doubt Mr. Sparks' sincerity, honesty, and forthrightness in stating his belief that he did not believe the dirt bike to be insured and there is no question that Mr. Sparks was the named insured under the applicable policy issued by Commonwell. In other words, Mr. Sparks was not a stranger to the policy, such that obtaining an Autoplus would be considered a requirement of a reasonable investigation where no other suspicious circumstances exist. There was no reason to distrust Mr. Sparks' word and Commonwell was entitled to take him at his word in this particular

case. Commonwell suggests that dirt bikes - and particularly track dirt bikes – are not commonly covered by their own insurance policies, so it would stand to reason that the dirt bike may well not have been insured.

[26] While Commonwell acknowledges that Mr. Sparks testified to memory issues and certainly sustained a traumatic brain injury as a result of this accident, Commonwell claimed that his evidence during the EUO was not as unreliable as Certas suggests. The transcript reveals that Mr. Sparks recalled various details and facts, such as the registration of his dirt bike for his trip to Florida and certain details of his trip to Florida leading up to the accident. In short, Commonwell maintains that Mr. Sparks' brain injury did not have the effect of immediately rendering his answers during the EUO to be so suspicious that additional investigations were required.

[27] Certas has referred me to several cases to support its position.

[28] I accept the legal proposition that "depending on the circumstances, it may not be reasonable for the insurer to accept information that the insured provided without further investigation", as found in *Echelon General Insurance Company v. CGU Insurance Company of Canada* 2008 CanLII 27175. In that case, the young claimant was struck while riding a bicycle by a vehicle insured by Echelon. The family would not co-operate in providing insurance information with respect to the claimant's father. Two weeks prior to the expiry of the 90 day period for notice, the claimant's legal representative provided the name of the father's broker and insurance he had with CGU, but advised that the policy had lapsed for non-payment. It was found as a fact that the adjuster never contacted the identified broker. It was later determined that the father had another valid policy with CGU that likely would have been identified if the broker had been contacted. The arbitrator's finding that the requirements of the savings provision had not been met was upheld on appeal.

[29] I further accept the legal proposition that "so long as a reasonable avenue of investigation is open, it must be pursued within 90 days", as found in *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* 2007 CanLII 54080 by Justice Perell. In that case, the claimant was 13 years of age and struck while riding a bicycle by a vehicle insured by Liberty. The information contained in the OCF-1 was somewhat misleading in that it indicated that the claimant was living with his mother who had no insurance. However, Liberty came into possession of the police report within a month of having received the OCF-1 which showed that the claimant was actually residing at an address different than his mother's. Shortly after the expiry of the 90 day notice period, an investigator attended the address shown on the police report and identified a vehicle owned by the claimant's father. It was then determined that the vehicle was insured by Zurich. The Arbitrator's finding that 90 days was not an insufficient time to identify the priority insurer was upheld on appeal.

[30] In *Jevco Insurance Company v. Wawanesa Mutual Insurance Company* (Arbitrator Bialkowski – December 21, 2014), the claimant was a bicyclist struck by a vehicle insured by Jevco. He indicated in his OCF-1 that he was separated at the time of the accident. Shortly thereafter, a statement was taken from the claimant who confirmed that he had been separated for 6-7 years and not divorced. The name of his wife was provided, but he did not

know her whereabouts. The insurer of a spouse would stand in priority to the insurer of the striking vehicle, so attempts were made to locate the spouse but to no avail. Shortly prior of the expiry of the 90 day notice period, a private investigator was retained. He was able to locate the spouse and identify the insurance she had with Wawanesa, but the limitation had expired. The arbitrator held that within six weeks of having received the OCF-1, Jevco had all of the information that the private investigator was provided to identify the insurance available to the spouse and that 90 days was a sufficient period to identify such insurance if Jevco had acted in a more timely fashion.

[31] The jurisprudence advanced by Certas is factually distinguishable from the facts before me. In each of the cases above the accident benefit claim was presented to the insurer of the striking vehicle and not the claimant's own insurer. The claimant was not a named insured under the policy. In the three cases referred to above the insurer had to investigate whether the claimant was dependant on someone who had automobile insurance. An investigation was required to identify the individual and determine whether that individual had automobile insurance. In the case before me the claimant was a "named insured" under the Commonwell policy. The only possible insurer who might stand in priority would be the insurer of the dirt bike itself, if one existed. Steps were taken by way of the completion of an EUO of the claimant and the insurer was satisfied that no other insurance existed by accepting the testimony of the claimant and supported by the fact that his lawyer had not identified other insurance. The case before me involves the issue as to whether there is a requirement to confirm the information provided by their own insured, when provided by oral testimony and an opportunity to assess credibility and reliability, by taking additional steps to identify another insurer standing in priority.

[32] I am satisfied that the key to my determination herein is whether the evidence of the claimant on his EUO was straightforward enough that it could be relied upon, or whether so suspicious to render additional investigation in the form of a simple Autoplus search, necessary so as to satisfy the requirements of a reasonable investigation within 90 days. The onus of proving that a reasonable investigation was completed within 90 days would rest on Commonwell. This requires a careful examination of the full transcript of the examination of Mr. Sparks. Having completed this examination, it is clear to me that there exists evidence demonstrating general memory difficulties that may have raised some suspicion as to the reliability of his evidence. However, when asked at page 13 as to whether the dirt bike was ever insured, he responded "no, I don't believe so". At page 14, he indicated that he did not believe that it was a requirement in Ontario to insure a dirt bike. At page 17, he similarly indicated that to his knowledge the dirt bike was not insured. On balance, although there appears to be some issue with reliability as to his memory in general, his evidence was quite clear that to his knowledge there was no insurance on the dirt bike and no requirement in Ontario to insure it. The Commonwell adjuster accepted the evidence of its insured in this regard.

[33] The situation must also be considered in the context of claimant's counsel not having identified any insurance on the dirt bike as of the date of the Examination Under Oath and, as I have indicated, the fact that insurance is not required in Ontario on dirt bikes not operated on public roadways.

[34] I accept the legal proposition that the test is not a standard of perfection, but rather one of reasonableness. There are a number of arbitral decisions where additional steps could have been taken within 90 days which would have identified another insurer liable to pay benefits yet the investigations held to be "reasonable".

[35] In *Coseco Ins. Co. v. Allstate Ins. Co. (Arbitrator Malach - November 15, 2001)*, the claimant was a pedestrian stuck by a vehicle insured by Coseco. The completed OCF-1 (Application for Accident Benefits) executed by the claimant indicated that the claimant had no other insurance available to him. Relying on that information, Coseco commenced the payment of accident benefits. Some eight months later, Coseco was provided with information from claimant's counsel that the claimant's late father was insured by Allstate. Allstate was put on notice on suspicion that he may have had regular use of the father's vehicle. As it turned out, the claimant was a listed driver on his late father's policy as of the date of the accident. Allstate's defence was that Coseco had not met the notice requirements of the Regulation. Allstate claimed that Coseco ought to have completed an Autoplus search (just as suggested in the case before me) within 90 days of having received the OCF-1. Arbitrator Malach confirmed that all that was required was a reasonable investigation and not perfection. He concluded that failure to conduct an Autoplus search does not mean that a reasonable investigation had not been conducted. It was held that notice some eight months of having received the OPCF-1 was appropriate in the circumstances.

[36] In *Federated Ins. Co. v. CGU Ins. Co. (Arbitrator Malach - November 2, 2003)*, the claimant was injured while a passenger in a vehicle insured by Federated. There was reference in the OCF-1 that he was separated at the time of the accident and had been for two years. The adjuster attempted to obtain information from claimant's counsel with respect to the spouse. Claimant's counsel advised that she did not own a car during the relationship. Information as to the spouse's address was not provided by claimant's counsel despite requests. At a FSCO mediation just ten days prior to the expiry of the 90 day notice period, details as to the spouse's identity was provided. Federated immediately retained an investigator and about a month later, it was determined that she did own a vehicle which was insured by CGU. Notice was immediately forwarded to CGU which took the position, like the case before me, that Federated ought to have completed an Autoplus search within 90 days and that Federated had not satisfied the notice provisions of the Regulation. Arbitrator Malach nevertheless found that a reasonable investigation had been completed. At page 9 of the decision Arbitrator Malach writes:

> "As noted by Arbitrator Guy Jones in the case of *Ontario Municipal Insurance Exchange* v. *Liberty Mutual Insurance Company* (October 10, 2000), at page 12, "it is important to note that s.3(2) requires reasonable investigation, not perfection". I agree with that interpretation. As to suggest that even more ought to have been with Lenny Young or that an Autoplus Search ought to have been conducted at some point, I conclude that in every case, one can criticize exactly what has been done and suggest what else might have been done. The question for determination in each case is whether the insure made " reasonable" investigations necessary to determine if another insurer was liable within the 90 day time frame. I specifically find as a fact that the investigations made by Federated were reasonable in this case."

[37] In *Coachman Insurance Company v. ING insurance Company of Canada (Arbitrator Malach – March 1, 2007)*, the claimant was a passenger in a taxi insured by Coachman. The OCF-1 was delivered October 15, 2002. The application indicated that there was no other insurance available and in particular, no coverage on any company vehicle on which he was a listed driver. The application did show that he was employed by Solda Pools. Information was later provided to the insurer that the claimant did not have a licence and did not own a vehicle. Like the claimant in the case before me, he had suffered a closed head injury and was still hospitalized at Sunnybrook. On discharge from Sunnybrook, the claimant returned to Newfoundland. It was not until June 24, 2003*,* some eight months after delivering his OCF-1, when a detailed statement was obtained from the claimant contradicting the information earlier provided to the insurer and indicating that he did drive a Solda company vehicle and was insured under their insurance policy. Investigation commenced as to which insurer provided coverage with respect to company vehicles and as soon as it was determined that it was ING, notice was served upon them approximately one year after receiving the OCF-1. One of the questions which arose is whether Coachman ought to have contacted Solda Pools within 90 days, rather than relying on the insurance information contained in the OCF-1. Arbitrator Malach ultimately concluded that the investigation conducted by Coachman within 90 days was reasonable. At page 29 of the decision, Arbitrator Malach states:

> "'… In any case, it is easy to second guess what one insurer has done in respect of investigating whether another insurer may be responsible to pay benefits under the SABS. In the final analysis, an Arbitrator must examine all of the facts and finally determine, as a finding of fact, whether what another insurer did was "reasonable investigations" under s. 3(2)(b) of Regulation 283/95. My finding that what Coachman did was "reasonable" does not mean that Coachman ought not to have done some of the things which counsel for ING pointed out."

[38] In the more recent decision in *Guarantee Co. v. Kingsway Insurance Co. (Arbitrator Novick – December 20, 2013)*, the claimant was a passenger in a vehicle thought to be uninsured. The vehicle had collided with a vehicle insured by Guarantee. The OCF-1 was received on December 18, 2003 and Guarantee commenced the payments of accident benefits. In Guarantee's initial investigation, the investigating police officer had advised them that the insurance on the vehicle in which the claimant was a passenger had been cancelled about three months before the date of the accident. The adjusted even called the broker who confirmed that the policy had been cancelled. It was years later in the claimant's tort action that it was determined that the cancellation letter did not meet the statutory requirements. Arbitrator Novick held that there was no reason not to rely on the information provided by the investigating police office as confirmed by the broker. It was indicated that there was no reason for the adjuster to have been suspicious about the information received and that anything additional would have placed the bar well above the standard of a "reasonable investigation".

[39] It is clear from the arbitral decisions above that perfection in an investigation is not required and that in many cases additional steps may have been taken, including an Autoplus search, yet the investigation found to be "reasonable". In the case before me, there

was no indication in the OCF-1 that there may be insurance available other than with Commonwell. An Examination Under Oath was conducted within 90 days and the information provided by the claimant was that to his knowledge there was no insurance on the dirt bike. It was clear from the transcript that even Claimant's counsel was unaware of any other insurance. Although there may have been some question as to the general reliability of the evidence provided by the insured, it would be difficult to second guess an adjuster's subjective assessment of the reliability of the insured's evidence. On the basis of the evidence overall, I am of the view that the Commonwell adjuster was entitled to rely on the evidence of their insured that to the best of his knowledge the dirt bike was not insured, As the jurisprudence above indicates, just because additional steps could have been taken, does not mean the investigation itself was not reasonable. Perfection is not required.

[40] On the evidence before me, I find that 90 days was not a sufficient period of time to make a determination that another insurer was liable for the payment of benefits and that Commonwell made reasonable investigations within the 90 day period.

ORDER

[41] On the basis of my findings, I hereby order that:

1. Commonwell's notice beyond 90 days was appropriate in the circumstances and that the priority dispute ought proceed on the merits;

2. Certas pay to Commonwell the legal costs with respect to the arbitration of this preliminary issue on a partial indemnity basis;

3. Certas pay the costs of the Arbitrator with respect to the arbitration of the preliminary issue herein.

DATED at TORONTO this 24th)

day of February, 2020.) ______________________________________

KENNETH J. BIALKOWSKI
Arbitrator