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:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

and

ZÜRICH INSURANCE COMPANY LIMITED

Respondent

AWARD

Heard: October 3, 2012 & October 19, 2012

Counsel:

D'Arcy McGoey for the applicant, State Farm Mutual Automobile Insurance Company

Marie Hynes for the respondent, Zürich Insurance Company Limited

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This priority dispute arbitration arises out of an accident occurring October 13, 2008. The accident occurred near the intersection of Eglinton Avenue East and Midland Avenue in Toronto. The accident involved a TTC streetcar and a Toyota vehicle operated by David Campbell.

The Toyota was insured by the respondent ("Zürich"). It had been rented by the spouse (or former spouse) of David Campbell, Eugenie Campbell from Routes Car & Truck Rentals ("Routes").

At the time of the accident, Eugenie Campbell was the principal of E.N. Transportation Inc. The applicant ("State Farm") insured a vehicle or vehicles owned by E.N. Transportation Inc.

David Campbell submitted an application for Statutory Accident Benefits ("SABS") to State Farm. State Farm began adjusting Mr. Campbell's claim for SABS, and subsequently sought to transfer priority for the payment of SABS to Zürich.

The matter proceeded before me on the preliminary issue of whether State Farm complied with the requirements of section 3 of Regulation 283/95 of the *Insurance Act*, in respect of its efforts to transfer priority for the SABS claim to Zürich. Depending on the outcome of the arbitration of this issue, other issues between the parties may have to be resolved.

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[1] The facts set out here are part of the Agreed Statement of Facts for Preliminary Issue Arbitration Hearing, Exhibit 3.

The Issues[2]

1. Did State Farm provide Zürich with their Notice of Intention to Dispute ("NDBI") within 90 days of receiving a completed application for accident benefits from the claimant?

2. If not, is State Farm entitled to an extension of the notice period, pursuant to section 3 (2) of Regulation 283/95?

As will be seen from the analysis of the evidence which follows, the resolution of the issues involves first deciding whether a NDBI served by State Farm January 26, 2009 was effective pursuant to Regulation 283/95 to put Zürich on notice of State Farm's priority claim.

If this NDBI was not effective, it must be determined whether 90 days was not a sufficient period of time for State Farm to determine that another insurer may have higher priority under section 268 of the *Insurance Act*, and whether State Farm made the reasonable investigations necessary to determine if another insurer may have higher priority within 90 days from the time it received the SABS application.

The Evidence

The following documents and *viva voce* evidence were introduced at the arbitration hearing.

Exhibit 1: Arbitration Agreement, executed October 3, 2012.

Exhibit 2: Joint Document Brief (90 Day Issue), Tabs 1 – 37.

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[2] The issues are as stated in paragraph 3 of the Agreed Statement of Facts for Preliminary Issue Arbitration Hearing.

Exhibit 3: Agreed Statement of Facts for Preliminary Issue Arbitration Hearing, executed October 3, 2012.

Exhibit 4: Intact Financial Corporation: Our Company Today[3]

Witness: Sheena Vermeersch.

Witness: Anne Lennox.

Witness: Phyllis Braden-Huck.

Witness: John Philp.

Analysis

State Farm submits that it has complied with the requirements of Regulation 283/95, section 3 (1) by serving a NDBI on Intact Insurance Company of Canada, care of a private adjusting company, McLarens Canada, within 90 days of State Farm receiving David Campbell's SABS application.

The premise for this argument is that at all material times Intact Insurance Company of Canada ("Intact"), and Zürich, were one and the same insurer, and McLarens Canada was the agent of Intact for the purposes of adjusting SABS claims.[4]

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[3] This document was marked as an exhibit for the purposes of identification, and not for the truth of its contents.

[4] ING Canada changed its name to Intact Financial Corporation after the accident giving rise to this arbitration. There is no dispute that the names refer to one and the same company. The parties at the arbitration hearing tended to use ING and Intact interchangeably, and I have done so as well in this Award, referring to ING when a document or portion of the evidence specifically mentioned ING, and referring to Intact for general purposes. It is important to note however, that the parties disagree in their positions as to whether Intact and Zürich are one and the same company.

The agreed evidence is that State Farm received Mr. Campbell's SABS application at the earliest, on November 26, 2008, and at the latest, on December 2, 2008.[5] State Farm subsequently served a NDBI January 26, 2009 on "*ING c/o McLarins Canada*".[6]

If State Farm's position is correct regarding the status of Intact, Zürich, and McLarens Canada, then the NDBI served on January 26, 2009 would satisfy the requirements of Regulation 283/95, Section 3 (1).

If State Farm's position on the "status" argument is not correct, then it becomes important to consider when State Farm served a NDBI on Zürich. The agreed evidence is that State Farm ultimately served a NDBI on Zürich on January 26, 2010.[7] This would not satisfy the 90 day time requirement. The NDBI would be out of time unless section 3 (2) is found to operate in State Farm's favour in the circumstances.

State Farm argues in the alternative that 90 days was not a sufficient time for it to identify another possibly liable insurer (in this case Zürich), and that it made reasonable investigations to determine the identity of another possibly liable insurer within the 90 days.

The foundation for this argument is that State Farm submits it was advised by Routes, the owner of the rental vehicle being operated by David Campbell at the time of the accident, that Routes was insured by Intact at the time of the accident. State Farm argues that it reasonably relied upon this information provided by Routes, and that it did

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[5] Exhibit 3, paragraph 8.
[6] Exhibit 3, paragraph 9, Exhibit 2, tab 10. In my view nothing turns on the typographical error in the name of "McLarens Canada".
[7] Exhibit 3, paragraph 12.

not discover Zürich was actually the insurer of Routes until it indicated its intention to commence arbitration against Intact.. State Farm submits that there was nothing it reasonably could or should have done within the 90 day period other than conducting the inquiries it did, considering the information it received from Routes.

Zürich submits that State Farm's service of a NDBI on Intact c/o McLarens does not constitute service on Zürich. Zürich's position is that it was at all material times a corporation separate and distinct from Intact. Zürich acknowledges that the information contained in Exhibit 4 concerning Intact's 2001 acquisition of some of Zürich's business is correct. Zürich emphasizes that this was not; however, a merger of the companies. Zürich has always remained an independent corporate entity. Since the sale of what was primarily its personal lines business to Intact, Zürich has maintained a commercially focused insurance operation. Its transportation insurance operations include underwriting and servicing commercial accounts such as Routes.

Zürich points to the fact that its admission that it insured Routes under commercial automobile policy number 5RQ00210 at the time of the accident is evidence in itself of Zürich's independent status, unconnected to Intact.

With respect to State Farm's alternative argument, Zürich submits that State Farm has not satisfied the requirements of Regulation 283/95, section 3 (2) to validate the January 26, 2010 NDBI served outside of the 90 day time limit set out in section 3 (1).

Zürich argues that in January 2010, when State Farm finally provided to Intact crucial policy information it had in its possession since January 2009, it took

approximately one business day for Intact to determine that Zürich insured Routes. Zürich submits that this proves both that 90 days was a sufficient time for State Farm to have discovered the existence of Zürich as a potentially prior insurer, and that State Farm did not conduct reasonable investigations within 90 days from receiving the SABS application to determine if another insurer was liable.

A decision on the first part of the issue does not, in my view, require an exhaustive review of the documentary or *viva voce* evidence. The first question to be asked is: did State Farm serve a valid NDBI within 90 days of its receipt of the SABS application? The only way that this question can be answered affirmatively is to conclude that Zürich is bound by the NDBI served on "*ING c/o McLarins*" on January 26, 2009. If Zürich is bound by this NDBI, that is the end of the matter and there is no need to consider whether section 3 (2) applies. If Zürich is not bound by this NDBI, then section 3 (2) must be considered in determining whether the NDBI served on Zürich January 26, 2010 is valid.

Zürich can only be bound by the January 26, 2009 NDBI if it could be legally considered to be the same insurer as Intact. The status of Intact and Zürich is an objective legal question. The answer to this question is not dependent on the subjective belief of Routes as to the identity of its insurer, and any information it may have communicated to State Farm respecting that belief. Neither is it dependent on the reasonableness of any subjective belief on the part of State Farm as to the identity of Routes' insurer. Such inquiries are only relevant if Zürich is not bound by the NDBI served on ING c/o McLarins, and whether section 3 (2) requirements are met to validate the January 26, 2010 NDBI.

On this issue I find that Zürich is not bound by the NDBI served on "*ING c/o McLarins*". The evidence before me is insufficient to establish that Intact and Zürich are one and the same insurer. Indeed, I do not think that such evidence could be led because the fact is Intact and Zürich are distinct corporate entities.The only evidence introduced on the issue is in the form of an excerpt from the Intact Financial Corporation website.[8] Technically speaking, it was not introduced for the truth of its contents, but even accepting the accuracy of the information contained in the exhibit, the document refers to Intact acquiring Zürich's home, auto and small and medium business insurance portfolio in 2001. It does not confirm a merger of the companies, or a takeover of Zürich's entire operation by Intact, since that did not happen.

On the contrary, and I feel entitled to take judicial notice of this fact, Zürich has always maintained a corporate status unconnected with Intact, apart from the sale of certain parts of its portfolio to Intact in 2001. Zürich's website indicates that it is an insurance-based financial services provider. Its focus is on, *inter alia*, Canadian businesses in manufacturing, transportation, and construction.[9] A review of both Zürich's website and the website of Intact Financial Corporation, does not indicate any connection between the companies apart from the previously mentioned partial portfolio acquisition by Intact from Zürich in 2001.

Therefore, I conclude that Zürich is not bound by the NDBI served January 26, 2009 by State Farm on "*ING c/o McLarins*". It is now necessary consider whether the

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[8] Exhibit 4.
[9] See www.zurichcanada.com.

service of the NDBI by State Farm on Zürich on January 26, 2010 can be validated by operation of section 3 (2) of Regulation 283/95.

To deal with this issue, I will review and comment on the documentary and *viva voce* evidence. Before beginning my analysis I will say that I found all the witnesses who testified at the arbitration hearing to be credible. I thought they were doing their best to provide an accurate recollection of events, or an accurate interpretation of notations made in documentary records entered into evidence. There were some unexplained discrepancies in the evidence that I will refer to. I do not attribute these discrepancies to a lack of truthfulness on the part of any witness. To the extent there are gaps or unexplained matters, I attribute these to the pressures that especially the file handling adjusters were under to manage a very busy SABS file load, while trying to keep up with the other administrative and record keeping aspects of their jobs.

Sheena Vermeersch:

At the time of the October 13, 2008 accident giving rise to this arbitration, Ms.Vermeersch was a claims representative in State Farm's accident benefits department. She is currently a Team Manager in the accident benefits department overseeing other claims representatives and processors. In October 2008 Brian Donaher was her Team Manager, and Randall Brown was the Team Manager of the Catastrophic Task Unit.

Much of Ms. Vermeersch's testimony was based on entries made by her in State Farm's Auto Claim Service Record ("ACSR") approximately contemporaneous to events

relating to this claim.[10] Her first involvement with this matter took place on December 9, 2008. This is approximately 8 days after State Farm received Mr. Campbell's SABS application. On that date she performed an "ISB" search to try to determine a license and insurance history for Mr. Campbell. Ms. Vermeersch was aware that Mr. Campbell was not a listed driver on any policy issued by State Farm, nor was he an occupant of any vehicle insured by State Farm at the time of the accident, so she was *"looking to see if there was priority elsewhere".*

Ms. Vermeersch was looking to see if Mr. Campbell was named on an automobile insurance policy either with State Farm or another insurer. She commented that she could run an Auto Plus search to determine if Mr. Campbell was insured on another policy.

From Mr. Campbell's SABS application Ms. Vermeersch knew that Mr. Campbell was driving a rental vehicle when the accident occurred. I note that on December 9, 2008 Ms. Vermeersch's entry in the ACSR indicates that she had spoken to Mr. Campbell's representative who advised that Mr. Campbell was driving a rental vehicle.

On December 16, 2008 Ms. Vermeersch entered a note in the ACSR indicating that her ISB search for insurance history determined that no other insurance company was found. She testified that she was, *"... now satisfied David Campbell did not have his own policy of insurance."*

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[10] Exhibit 2, tab 1.

Also on December 16, 2008, Brian Donaher entered a note in the ACSR stating, "*... Reviewed and discussed claim with Sheena. Will contact insured Eugenie for details regarding relationship with injured party...*"

Ms. Vermeersch testified that on December 17, 2008 she entered an ACSR note indicating that she had spoken to Mr. Campbell's representative and explained that it appeared State Farm may not be in priority for Mr. Campbell's SABS claim. The representative said that she would fax over a copy of the police report and rental agreement.[11]

Ms. Vermeersch testified that on January 6, 2009 she reviewed the Routes rental agreement. She noted that David Campbell was not listed on the agreement as a driver. She concluded that it appeared State Farm would not be priority for Mr. Campbell's SABS claim and that the insurer of Routes would have priority. She left a telephone message for Routes to obtain insurance information. These details are confirmed in her ACSR note.

It was clear by January 6, 2009 that State Farm was targeting the insurer of Routes as the insurer likely to have priority for Mr. Campbell's SABS claim. This is reinforced by a note albeit over a week later made by Randall Brown on January 15, 2009 in the ACSR stating, "*Lets get the insurer of the vehicle on notice immediately, it would not appear we are priority here.*"

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[11] Exhibit 2, tab 7, is a December 18, 2008 letter from David Campbell's representatives to State Farm, enclosing the police report. The letter indicates that it was sent via facsimile. Exhibit 2, tab 6, is a December 17, 2008 letter from David Campbell's representatives to State Farm enclosing the Routes rental agreement. The letter indicates that it was sent via regular mail. There is no date stamp on the exhibit indicating a date of receipt by State Farm.

Just over 2 weeks elapsed however, before any further efforts were made to determine insurance information for Routes. The ACSR indicates that at 11:08 a.m. on January 23, 2009, Anne Lennox of State Farm telephoned Routes' corporate office and left a message for "Vicki".

Ms. Vermeersch was also involved on January 23, 2009. She testified that she spoke with Vicki of Routes. Her ACSR note of this conversation is entered at 4:06 p.m. Her arbitration evidence was that Vicki told her that Routes was insured by ING, and that he provided a policy number. She then updated the Parties to Loss[12] information in the computer database to indicate that the insurance company for Routes was ING, pursuant to policy number 5RP00210. This evidence is confirmed by her ACSR note for January 23, 2009.

I note here that the policy number entered by Ms. Vermeersch for the insurer in the Parties to Loss information screen was incorrect. The correct policy number for what turns out to be Zürich's policy in favour of Routes, as opposed to an Intact policy, is actually 5R**Q**00210.[13] Ms. Vermeersch recorded a "P" in the policy number, instead of "Q". It is not clear on the evidence whether this was an error on the part of Ms. Vermeersch in recording the policy number, or whether the number provided to her by Vicki at Routes was incorrect.

Ms. Vermeersch testified that her active involvement in the Campbell claim had actually ended January 6, 2009. State Farm's Catastrophic Task Unit had assumed responsibility for the matter. She said that she spoke with Anne Lennox of the

[12] See p. 8, Exhibit 2, tab 1.
[13] Arbitrator's emphasis.

Catastrophic Task Unit to update her, and to advise her to notify ING that it had priority, by serving a NDBI.

On cross-examination Ms. Vermeersch conceded that although she probably would have known at the time she was dealing with the claim when the 90 day limitation for serving a NDBI expired, there was no formal system to record the 90 day expiry date.

She acknowledged that State Farm was aware as early as December 9, 2008 that priority for the SABS claim was an issue, and in this case David Campbell's coverage under the policy issued to Eugenie Campbell's company depended on their being spouses of each other. Although this is noted in Ms. Vermeersch's ACSR note of December 17, 2008, there is no record of this inquiry being made of Mr. Campbell's representative during a telephone conversation of the same date. Ms. Vermeersch's arbitration evidence was that she believed that she had made inquiry but she could not recall.

Despite the December 16, 2008 ACSR note indicating that Ms. Vermeersch will contact Eugenie, there is no evidence that she ever contacted her, nor could she recall why she did not contact Eugenie.

Ms. Vermeersch stated in cross-examination that by January 6, 2008, Anne Lennox of the Catastrophic Task Unit had taken over handling of the file. Ms. Vermeersch's last involvement with the file occurred January 23, 2009. She had done no investigation of the priority issue between January 6, and January 23, 2009, and she did no further investigation of the priority issue after January 23, 2009. She did not

attempt to verify any information given to her by Vicki of Routes. She based her conclusion that Intact was Routes' insurer solely on the information given to her over the telephone by Vicki of Routes on January 23, 2009.

Anne Lennox:

Ms. Lennox has been employed with State Farm for 26 years. She was a claims representative at the time relevant to this matter. She too testified with the aid of the ACSR.

Her first involvement with the claim was January 20, 2009 when she was assigned to handle the claim. At the time she was handling Catastrophic claims and as a result she would sometimes take over file assignments from other adjusters.

Having reviewed the file she was aware that no policies of insurance had been found for David Campbell. He was not a listed driver on any State Farm policy, and the car that he was driving at the time of the accident was not insured with State Farm.

Ms. Lennox had reviewed the January 15, 2009 ACSR note made by Randall Brown confirming the importance of immediately putting on notice the insurer of the vehicle Mr. Campbell was driving at the time of the accident.

Ms. Lennox sent a NDBI to the Motor Vehicle Accident Claims Fund on January 21, 2009, in case there was no other insurance available to David Campbell.

She confirmed that in the morning of January 23, 2009 she had telephoned Routes corporate office and left a message asking for a return call. She wanted to obtain Routes' insurance information for priority purposes.

The ACSR contains a note entered by Ms. Lennox at 2:24 p.m. on January 23, 2009. It deals with her priority investigation. The last part of the note indicates that State Farm required the "*policy number for ING*." She explained this by saying that she had spoken with Sheena Vermeersch who advised her that this information came from the State Farm agent who had written the policy for Eugenie Campbell's company, EN Transportation. The agent had reported to Ms. Vermeersch that Routes had called the agent seeking to have State Farm pay for the damage to its rental vehicle, and that Routes had indicated it was insured by Intact.

I have previously indicated that the ACSR note entered by Ms. Vermeersch on January 23, 2009 was not entered until 4:06 p.m. This is the only note entered that day by Ms. Vermeersch. It indicates that Routes identified ING as its insurer. In the same note Ms. Vermeersch records the policy number provided by Routes. This note does contain a reference to a conversation with the State Farm agent who recounted discussions with Routes wherein Routes was seeking recovery from State Farm for damage to its rental vehicle.

It was not explained in the evidence how, approximately 90 minutes earlier in the afternoon on January 23, 2009, Ms. Lennox knew about ING purportedly being the insurer of Routes, but not having information about the policy number. It would not make sense to conclude that Ms. Vermeersch told Ms. Lennox in their conversation at 2:24 p.m. that she had learned Routes was insured with ING, but that she did not tell Ms. Lennox that she had been given the policy number and recorded it in the Parties to Loss screen. The only sensible explanation is that at the time of Ms. Vermeersch's conversation with Ms. Lennox, Ms. Vermeersch had information from State Farm's

agent that Routes believed it was insured with ING, but she did not obtain the policy number until later in the day, after her conversation with Ms. Lennox.

Perhaps Ms. Vermeersch had an earlier conversation with the State Farm agent that she did not record in the ACSR at the time, in which she was told by the agent that Routes thought it was insured with ING, but no policy number was given. This would have been before Ms. Vermeersch's conversation with Ms. Lennox, documented in Ms. Lennox's 2:24 p.m. ACSR note, in which Ms. Vermeersch passed along the agent's information that Routes thought ING was its insurer, but without providing a policy number. After her discussion with Ms. Lennox, perhaps Ms. Vermeersch had her conversation with Vicki at Routes wherein Vicki confirmed his belief that Routes was insured with ING, and at that time he provided the policy number. Ms. Vermeersch may have recorded her earlier conversation with the agent, and her later conversation with Routes (the conversation with Ms. Lennox occurring in between) all as one entry, in her 4:06 p.m. ACSR entry.

In any event this discrepancy is not explained in the evidence. It could be significant however, because it does create some uncertainty about exactly how and when State Farm received a crucial piece of information – the Routes insurance policy number, either incorrectly given or incorrectly recorded, and attributed by State Farm to Intact based on the information received from Routes. It also causes me to wonder whether Ms. Lennox carefully referred to the Parties to Loss computer screen, or Ms. Vermeersch's 4:06 p.m., January 23, 2009 note in the ACSR when she later prepared the January 26, 2009 and February 6, 2009 NDBIs that she sent to McLarens and Intact. If she did not, and relied only on the information she received from Ms.

Vermeersch in their 2:24 p.m. conversation on January 23, 2009 that Routes had informed Ms. Vermeersch ING was its insurer, but that a policy number was still required, this could explain why this information was omitted from the NDBIs.

Ms. Lennox's next involvement in priority investigation occurred on January 26, 2009. The ACSR contains a note made by Ms. Lennox at 10:27 a.m. on that date confirming that she sent an NDBI "*to ING via McLarins Canada*". The ACSR does not explain how State Farm obtained information indicating that McLarens was acting on behalf of ING in handling this or other SABS claims.

Ms. Lennox testified at the arbitration hearing that before sending the NDBI on January 26, 2009 she had telephoned ING to obtain an address for service of the NDBI. She acknowledged however, that she did not specifically mention that the address was required for the purpose of an NDBI. She told ING that her inquiry was regarding a claim in connection with Routes. Ms. Lennox testified that in response to this inquiry she was given the McLarens name. She did not get an address for McLarens from ING. She obtained the 600 Alden Road, Markham, address that appears in the NDBI from the Internet. In response to a question by counsel for State Farm, Ms. Lennox said that the ING representative did not say that ING did not insure Routes during this discussion. It is also clear however, that Ms. Lennox did not ask for confirmation from ING that ING insured Routes, nor did she make any mention of David Campbell, the date of loss, or the fact that he was advancing a SABS claim arising out of his operation of a Routes vehicle.

Ms. Lennox testified that through oversight she did not make an ACSR note recording this conversation she had with ING wherein she obtained the name of McLarens Canada. She was testifying completely from memory about this telephone call.

After this telephone conversation on January 26, 2009, Ms. Lennox testified that she did two things. She updated the ACSR Parties to Loss computer information screen to add the information that David Campbell's SABS claim was being handled on behalf of ING "... *by McLarins Canada.*" It will be recalled that Ms. Vermeersch had on January 23, 2009 updated this part of the ACSR to indicate that ING was the insurer pursuant to policy number 5RP00210.

On January 26, 2009, Ms. Lennox also sent by facsimile a NDBI to the address she obtained from the Internet for McLarens Canada.[14] It is significant to me that the NDBI sent to McLarens makes no mention of two essential pieces of information. State Farm had been well aware since January 6, 2009 that it was targeting the insurer of Routes as the priority insurer for David Campbell's SABS claim, and it had in its possession a copy of the Routes rental agreement. On January 23, 2009 Sheena Vermeersch had updated State Farm's ACSR to include an insurance policy number attributed to ING, as provided by Routes.

Yet the NDBI makes absolutely no mention of these facts. Instead, in Part 3 of the NDBI, the section for the reasons why notice is being given to ING, it states, "*Mr. Campbell is not a listed driver on our policy. He was not an occupant in the vehicle*

[14] Exhibit 2, tab 10.

insured under this policy." Even the NDBI that Ms. Lennox had previously sent to the Motor Vehicle Accident Claims Fund included the information that Mr. Campbell had been driving a car rented through Routes, and that he was not listed on the rental contract.

State Farm had known since December 16, 2008 when it had completed searches on Mr. Campbell that he did not turn up as having his own policy of insurance with any insurer. In my view it ought to have been obvious to State Farm that failing to provide to ING and/or McLarens the name of the party thought to be ING's insured - Routes, and the policy number thought to be an ING policy insuring Routes, made it highly unlikely that confirmation of insurance coverage would be forthcoming.

Ms. Lennox testified, and the documents indicate that McLarens Canada promptly responded to the January 26, 2009 NDBI.[15] On January 29, 2009 McLaren's Canada wrote (sent by facsimile) to State Farm indicating that it was unable to respond to the NDBI. McLarens did not have Mr. Campbell in its database. McLarens made what seems to me to be an obviously relevant request by asking for a claim or policy number, or some other evidence that McLarens was acting on behalf of ING with respect to the claim.

Ms. Lennox did not deal with the McLarens response until some eight days later, on February 6, 2009. She testified that upon reviewing the McLarens response she thought that no claim had been reported to McLarens so it was her judgment to try to notify ING directly. On February 6, 2009 she sent a NDBI to ING at its 700 University

[15] See Exhibit 2, tab 11.

Avenue address that Ms. Lennox obtained from the Internet. Once again however, in my opinion, the NDBI was deficient. It contained the identical, inadequate information that was in the January 26, 2009 NDBI sent to McLarens. Despite the fact that State Farm had information from Routes that Routes believed its insurer to be ING pursuant to policy number 5RP00210, neither the name of ING's purported insured – Routes, nor the purported policy number were included in this NDBI.

The evidence indicates that Intact later advised State Farm that it never received the February 6, 2009 NDBI. Even if it had, the information the NDBI contained would not have enabled Intact to locate an insured it did not have. At best, it would have resulted in the same type of response that State Farm received from McLarens, a response that State Farm made no attempt to follow up on or discuss with McLarens.

At some point in the first half of February, 2009 State Farm referred the matter to counsel. State Farm did do some additional work after this that was related at least in part to investigating priority. State Farm solicited the cooperation of David Campbell's representatives to obtain recorded statements that dealt in part with the priority issue. The ACSR records indicate that this occurred around March 20, 2009. This was well after the expiry of the 90 day section 3 (1) limitation date of March 2, 2009.[16] The delay in taking statements is explained by the fact that the SABS claimant David Campbell was out of the country for an extended period of time after his accident. In any event, the statements did not advance the priority investigation. It was conceded by Ms. Lennox at the arbitration hearing that State Farm was aware that obtaining statements

[16] On the assumption that State Farm received David Campbell's SABS application on December 1, 2008, with March 2, 2009 being the first business day after the 90 day time limit expiry.

from David and Eugenie Campbell would not be of any assistance in determining the identity of Routes insurer, so they were not even asked questions on that topic. In my opinion, obtaining the statements would in no way advance an investigation that State Farm had long ago concluded (correctly) should be focused on confirming the identity of Routes' insurer.

On cross-examination Ms. Lennox stated that State Farm received David Campbell SABS application on December 1, 2008. She was aware that the 90 day time limit for putting another priority insurer on notice would expire 90 days from that date (March 2, 2009). She agreed however, that the 90 day limitation date is not specifically documented in the ACSR, or in other relevant productions.

With respect to her undocumented telephone conversation with Intact on January 26, 2009, she testified that she just spoke to "*the person answering the phone*" when she telephoned Intact that day. She acknowledged that she did not ask if Intact insured Routes during this conversation, and she did not give David Campbell's name or the date of loss. She simply got a referral to McLarens from the person at Intact who answered the phone.

She agreed that it "*possibly would have been helpful*" to indicate in the NDBI sent to McLarens that the claim involved a Routes vehicle.

Ms. Lennox explained that she likely did not deal with McLarens' January 29, 2009 response to the NDBI until February 6, 2009 because of "workload". She did not know why she did not call McLarens to discuss McLarens' January 29, 2009 response to the NDBI. She also did not call Intact again to make further inquiries about the issue.

With respect to the February 6, 2009 NDBI sent to Intact, she said that there was no covering letter accompanying it, there was no way to track how it was sent, and that she likely sent it regular mail. She was not aware that Intact later advised that it did not receive the February 6, 2009 NDBI from State Farm. She admitted that she never received a response to the February 6, 2009 NDBI from Intact, and she did not follow up with Intact about it. She admitted the obvious that the February 6, 2009 NDBI did not contain any reference to Routes or the purported ING policy number that State Farm had been given by Routes.

She did not know exactly when in February, 2009 she referred the matter to counsel.

Phyllis Braden-Huck:

Ms. Braden-Huck is a law clerk of some 15 years experience with Thomas Gold Pettingill LLP, State Farm's counsel in this matter. She was not exactly certain when she first was instructed to work on the file by her principal at the firm. Both her testimony, and the contemporaneous documents indicate however, that Ms. Braden-Huck made several efforts to investigate the insurance issue commencing approximately February 17, 2009. This would have been less than 10 business days before the expiry of the 90 day section 3 (1) time limit.

There is no evidence as to what information was initially provided by State Farm to its counsel with respect to State Farm's own priority investigations up to that point. I do note that efforts were made by State Farm's law firm and Ms. Braden-Huck to confirm the insurer of Routes. This included a telephone/e-mail contact by Ms. Braden-

Huck with Routes that was not responded to, and February 17, 2009 correspondence from Thomas Gold Pettingill LLP to Intact's accident benefits claims department identifying Routes, the vehicle owned by Routes, the SABS claimant David Campbell, and the date of loss.[17]

John Philp:

Mr. Philp is a barrister and solicitor who at the relevant time was employed by Thomas Gold Pettingill LLP, having been recently admitted to the bar in 2008.

Mr. Philp became involved in this matter after his firm had, on the instructions of State Farm, commenced priority dispute arbitration against Intact. On October 27, 2009 a Notice of Initiation and Commencement of Arbitration was sent by facsimile and overnight courier to Punita Kaur in Intact's accident benefits claims department.[18]

On November 11, 2009, Intact responded by email to the October 27, 2009 correspondence and initiation of arbitration. Intact was requesting a copy of the Routes rental agreement. Intact indicated that is extremely difficult to locate a policy with only a plate number for the vehicle.[19]

Mr. Philp testified that on November 26, 2009 he received a telephone call from Punita Kaur at Intact. Ms. Kaur was following up on the October 27, 2009 Thomas Gold Pettingill LLP letter, and her November 11, 2009 response. Ms. Kaur advised that she

[17] Exhibit 2, tabs 13 and 18.
[18] Exhibit 2, tab 24.
[19] Exhibit 2, tab 25.

could not find an open claim at Intact, and was still looking for a copy of the Routes rental agreement. Mr. Philp made a memorandum of this telephone call.[20]

On December 2, 2009, Mr. Philp wrote (sent by facsimile) to Ms. Kaur at Intact enclosing a copy of the Routes rental agreement.[21]

On December 16, 2009, Mr. Philp wrote (sent by facsimile) to Ms. Kaur at Intact stating in part as follows: "*Our client has advised us that the Intact policy number at issue is 5RP00210*". Mr. Philp testified on direct examination that he could not recall how he obtained the policy number specified in this letter. It is noteworthy that this is the first time that either State Farm or its counsel had provided the purported Intact policy number to Intact, despite the fact that State Farm had this information in its possession for almost a year, since January 23, 2009.

The wording of Mr. Philp's letter suggests to me that State Farm did not provide the policy number information to its counsel until sometime between December 2, 2009, and December 16, 2009. This conclusion is supported by the fact that the correspondence and other documents prepared by Thomas Gold Pettingill LLP respecting their efforts to confirm the identity of Routes' insurer starting in February, 2009, until December 16, 2009, contained detailed information identifying Routes, the make, model, and license plate number of the Routes vehicle, the SABS claimant David Campbell, and the date of loss of October 13, 2008. None of these documents however, reference the purported Intact policy number.

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[20] Exhibit 2, tab 26.
[21] Exhibit 2, tab 27.

I find it extremely unlikely that Thomas Gold Pettingill LLP would have included all of this other detail, but omitted the purported policy number, particularly in their correspondence with Intact, if they had had this information readily available.

Mr. Philp testified that on January 4, 2010 he received a telephone call from Julie Turrin, a Claims Representative III at Intact. Ms. Turrin was responding to Mr. Philp's December 16, 2009 correspondence. His testimony, as confirmed by his memorandum of the conversation[22], confirms that Ms. Turrin advised him that the policy number provided in the December 16, 2009 letter did not exist as an Intact policy. Ms. Turrin also requested a copy of the NDBI that Ms. Lennox had issued against Intact, because Intact did not have it.

Later in the day on January 4, 2010 Ms. Turrin sent a letter (by facsimile) to Mr. Philp confirming their conversation in the morning. She confirmed that Intact had no record of the NDBI that State Farm had issued against Intact, and that she had been unable to locate a policy of insurance with Intact for either Routes or David Campbell.[23]

On Friday, January 22, 2010 Mr. Philp wrote (sent by facsimile) to Ms. Turrin at Intact.[24] In this letter Mr. Philp indicated that the policy number referenced in his December 16, 2009 letter was actually a McLarens policy number as opposed to an Intact policy number. He enclosed the January 26, 2009 NDBI that had been sent to McLarens. Mr. Philp suggested that Intact follow up with McLarens as to the details of the claim. In his arbitration evidence Mr. Philp indicated that he could not recall where he obtained the information that the policy number was a McLarens policy number and

[22] Exhibit 2, tab 30.
[23] Exhibit 2, tab 29.
[24] Exhibit 2, tab 31.

not an Intact policy number. In any case, Mr. Philp's January 22, 2010 letter is the first time Intact received any information that the policy number first provided to it on December 16, 2009 might have some connection with McLarens.

On either Friday, January 22, 2010, or on the following Monday, January 25, 2010, Ms. Turrin contacted McLarens with the policy number information Mr. Philp had provided. She spoke with Elizabeth Davidson of McLarens who was able to determine that the policy of insurance referred to by Mr. Philp was actually underwritten by Zürich, and the correct policy number was 5RQ00210. This evidence did not come from Ms. Turrin or Ms. Davidson directly, but the documentary evidence reliably supports this conclusion as to how Ms. Turrin obtained her information. Mr. Philp's memorandum of his telephone conversation on January 25, 2010 with Ms. Turrin,[25] Ms. Turrin's correspondence to Mr. Philp of January 25, 2010, and Ms. Turrin's January 25, 2010 email to Mr. Philp,[26] are all documents created contemporaneously with the events, and they support this conclusion.

There is no evidence before me as to how Ms. Davidson of McLarens was able to determine that policy number 5RP00210 was actually a Zürich policy in favour of Routes, with the correct number being 5RQ00210. What is clear from the evidence however, is that Ms. Davidson was able to make this determination very quickly and accurately.

Intact received Mr. Philps January 22, 2009 letter at 11:45 a.m. January 22, 2009 was a Friday. By 2:40 p.m. on the following Monday, January 25, 2009, Ms. Turrin of

[25] Exhibit 2, tab 32.
[26] Exhibit 2, tabs 33 and 34.

Intact had obtained the aforementioned information about Zürich's policy in favour of Routes from Ms. Davidson at McLarens, and had communicated that information to Mr. Philp in a telephone conversation, confirmed by letter later that same day.

Mr. Philp testified that at this point his active involvement in the file came to an end. On cross-examination, he acknowledged that at no time did he contact McLarens to follow up on the insurance policy information. He also agreed, quite properly I might add, that Intact (Ms. Turrin), in a phone call or two with McLarens on January 22, 2010, and/or January 25, 2010, had been able to identify Zürich as the Routes insurer by providing McLarens with the policy number information State Farm had in its possession since January 23, 2009.

I will now review the applicable law, in the context of the arguments advanced by the parties in their closing submissions.

The parties agree on the appropriate application of section 3 (2) of Regulation 283/95. Subsection (a) and subsection (b) of section 3 (2) of Regulation 283/95 both must be satisfied for State Farm to succeed in its argument to validate the January 26, 2010 NDBI served on Zürich. In other words, to validate State Farm's January 26, 2010 NDBI, I must be satisfied that not only was 90 days (December 1, 2008 to March 2, 2009) an insufficient time for State Farm to be able to make the determination that another insurer may be liable, but I must also be satisfied that State Farm made the reasonable investigations necessary between December 1, 2008 and March 2, 2009 to determine if another insurer was liable.

State Farm submitted that 90 days (December 1, 2008 to March 2, 2009) was an insufficient time for State Farm to be able to make a determination that another insurer was the priority insurer. In support of its argument State Farm submitted that its ability to make this determination was compromised by incorrect information it was given concerning the Routes insurer and insurance policy number.

The evidence before me indicates that the information about the identity of the insurer and the policy number was provided to Ms. Vermeersch of State Farm by a representative of Routes named Vicki. I am prepared to find that the Routes representative incorrectly advised Ms. Vermeersch that Routes' insurer was ING. Although there is no direct evidence apart from Ms. Vermeersch's testimony on this point, I have previously indicated that I found Ms. Vermeersch to be a credible witness. I have no reason to doubt the accuracy of this evidence. I find it unlikely that the Routes representative would have told Ms. Vermeersch that Routes was insured by Zürich, but somehow Ms. Vermeersch understood the representative to be saying ING, or that she would have recorded ING as the insurer in the ACSR when she meant to record Zürich.

Although in my view it is not relevant to my decision, I will address the issue of whether the Routes representative deliberately or innocently provided incorrect information about the identity of Routes insurer to State Farm. As I have indicated, I am satisfied that the evidence shows the Routes representative did provide incorrect information to State Farm about the identity of its insurer. I am not satisfied however, that there is evidence to prove that the Routes representative deliberately gave misinformation to State Farm on this point. The circumstances of the discussion between the Routes representative and Ms. Vermeersch of State Farm, and between

the Routes representative and the State Farm agent referred to in the ACSR notes, do not suggest to me that there would be anything for Routes to gain by deliberately giving State Farm misinformation as to the identity of its insurer. To the contrary, Routes seems to have been searching around for any way it could get paid for the damage occasioned to its rented vehicle in the accident. I do not think it would make sense on the facts to impute a motive to deceive to Routes in providing information to State Farm. In any case, there is insufficient evidence before me to conclude that any misinformation provided was deliberately given. Therefore, if it is relevant to do so, I conclude that the misinformation provided by Routes to State Farm about the identity of its insurer was innocently done.

The explanation for the error in the policy number is more problematic. It seems to me equally, if not more plausible that Ms. Vermeersch was responsible for the mistake in the policy number as recorded in the ACSR. The Routes representative could have provided the correct Zürich policy number (while identifying it as an ING policy), but in typing the number into the ACSR, Ms. Vermeersch mistakenly pressed the "P" key on her keyboard, instead of the "Q" key. It is also possible that the Routes representative made the mistake and misread "P" instead of "Q" when communicating the policy number to Ms. Vermeersch, but I tend to think a typographical error is a more likely explanation. The evidence is insufficient to draw a conclusion one way or the other.

No matter how the error occurred, in my opinion the evidence indicates that the incorrect policy number presented little if any impediment to determining that Zürich insured Routes, and in deriving the correct policy number.

As will be seen from my analysis of the case law, whether the incorrect information was innocently or deliberately given, and no matter how the mistake in recording the policy number came about, these are simply factors that must be considered together with all of the evidence in determining whether State Farm has satisfied the requirements of section 3 (2) (a) and (b).

The decision of Justice Ducharme in *Primmum Insurance Company v. Aviva Insurance Company of Canada*[27] to which I was referred by counsel for State Farm clearly demonstrates this point.

In that case Primmum was given incorrect information by its insured that significantly impacted Primmum's assessment of whether the SABS claimant was a dependant of its insured.

Relying on this information Primmum concluded the claimant was a dependant of its insured, thus making it the priority insurer, and started to pay SABS. It was only long after the expiry of the 90 day period that Primmum discovered that its insured had failed to disclose certain facts, and misstated others, leading to the conclusion of dependency. The correct facts supported an argument that Aviva was the priority insurer.

Primmum argued that it had been intentionally misled by its insured, but even if it were found that the inaccuracies and non-disclosures were innocent, Primmum submitted that the misinformation rendered the 90 day period insufficient to identify another priority insurer.

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[27] 2005 CanLII 11975 (ONSC)

Justice Ducharme held that because insurance contracts are contracts of utmost good faith between the insurer, and the insured, where an insured misleads the insurer by either deliberately or innocently providing incorrect information to the insurer, the 90 day period to determine whether another insurer may have priority may not be sufficient.

Is important to note here that this case is distinguishable from the one before me on the basis that the incorrect information provided to State Farm in this case was not provided by its insured, so the issue of an insured having the duty of utmost good faith to provide accurate information to the insurer does not factor into the case before me.

Technically speaking, the fact that it was Routes – a Zürich insured, not a State Farm insured, who provided inaccurate information to State Farm, takes this case outside the *ratio* of *Primmum v. Aviva*. The representative of Routes was not bound by the insured's duty of good faith in providing information to State Farm.

Let us assume for the moment; however, that it is not necessary to have the relationship of insured – insurer to advance the argument that 90 days may not be sufficient to identify another priority insurer where the insurer has been provided with inaccurate information in the course of investigating priority. *Primmum v. Aviva* makes it clear that nondisclosures or inaccurate information provided to an insurer will not automatically lead to the conclusion that 90 days is an insufficient time to determine the identity of another priority insurer.

Justice Ducharme speaks to the importance of the insurer conducting a thorough investigation, even in the situation where there is a duty of utmost good faith on the party providing the information to the insurer. He states as follows:[28]

> While the duty of utmost good faith means that the 90-day period in section 3 (2) (a) may not be sufficient for an investigation where an insurer has been misled as to material facts, it does not preclude a searching assessment of the investigation conducted by the insurer. To hold otherwise would render section 3 (2) (b) meaningless. This would substantially reduce incentives for the insured (*sic*)[29] to conduct a thorough investigation and be contrary to the purpose of section 3 of the Regulation, i.e. to place 'the burden on the insurer who intends to dispute its liability to take a more proactive approach to these issues'.[30] A thorough investigation is required precisely to detect a non-disclosure or misrepresentation no matter what its cause. The resulting early detection of inaccuracy will benefit everyone by ensuring that decisions are made on a proper understanding of the facts. This will reduce the number of disputes between insurers and their related costs and increase certainty for all.

Justice Ducharme provides what in my view is a helpful statement of how the analysis of the section 3 (2) (a) and (b) issues should be approached in cases where there has been a nondisclosure of information to the insurer, or where inaccurate information has been provided to the insurer.

With respect to section 3 (2) (a), Justice Ducharme states:[31]

> ...the principal issue is not whether the nondisclosure or misinformation provided (to the insurer) was the result of dishonesty or some other more innocent reason. Rather the only issue under s. 3 (2) (a) is whether the receipt

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[28] At paragraph 33.
[29] I believe this is a typographical error in the judgment and the word should be, "insurer".
[30] *AXA Insurance Company v. Cooperators Insurance Company* (unreported, 3 May 2001, Toronto, 00-CV-191314 (S.C.J.) per Nordheimer J., at p. 7.
[31] At paragraph 27.

> of the inaccurate information renders the 90-day period insufficient for the investigation of the particular case. It is for the insurer who seeks to rely on s. 3 (2) to demonstrate why, in the particular case, the non-disclosure or misrepresentation made the 90-day period inadequate.

In considering whether 90 days is a sufficient time to determine whether another insurer may have priority, Justice Ducharme again refers to a judgment of Justice Nordheimer in *Kingsway General Insurance Company v. West Wawanoosh Insurance Company.*[32]

> The section (3 (2) (a)) is really directed toward the ability of the insurer to gather the necessary factual information to make a determination as to whether its policy or the policy of another insurer should answer for the benefits to be paid.[33]

Later in his judgment in discussing the adequacy of the 90 day period in the context of what investigation was done during that time, Justice Ducharme states:[34]

> The issue under section 3 (2) (a) is not whether the investigation was done properly within the 90 days. The issue is whether the investigation could be done properly within the 90 days.

With respect to section 3 (2) (b), Justice Ducharme comments as follows:[35]

> In considering the adequacy of the investigation it is important to stress that section 3 (2) (b) requires that the investigation be "reasonable," not that it be perfect. This could not be otherwise since, when viewed through the often omniscient lens of hindsight, it would be rare the investigation that could not be improved upon. In making this assessment of reasonableness, it is appropriate

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[32] (2001), 53 O.R. (3d) 436 (S.C.J.), (2002), 58 O.R. (3d) 251 (Ont. C.A.) (*"Kingsway v West Wawanoosh"*).
[33] *Supra,* note 31, at page 445.
[34] At paragraph 27.
[35] At paragraph 31.

to consider both what was done to investigate the claim as well as what was not done.

The trial and appeal judgments in *Kingsway v. West Wawanoosh* were also cited by Justice Ducharme because they outline the purpose of Regulation 283/95.[36]

In the Court of Appeal, Justice Sharpe stated:[37]

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.

Justice Ducharme found in the comments of Justice Nordheimer, the trial judge, "*equally compelling*". He stated:[38]

> I do not see any reason why the parties here should not be held to strict compliance with the requirements of the Regulation. In both of these appeals, we are dealing with three large insurance companies and a branch of the Provincial Government. It goes without saying that these parties are sophisticated and experienced participants in the insurance industry. They have available to them all of the advisors of the highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime. There is, therefore, no unfairness visited upon them by insisting on

[36] *Supra*, note 32.
[37] At page 255.
[38] At page 443.

> strict compliance with the notice requirements... Further, in cases involving disputes between insurers, strict compliance promotes certainty for the parties in terms of their handling of claims. While it might redound to the detriment of State Farm in this case, is just as likely that State Farm will be the beneficiary of the strict compliance in some other case.

It is clear from these judgments that evidence in section 3, Regulation 283/95 cases must be viewed in the context of this purpose as stated by the courts.

Counsel for State Farm referred me to the decision of Justice MacDonnell in the *Dominion of Canada General Insurance Company* v. *Certas Direct Insurance Company*[39]. In that case Dominion had received an application for SABS in which the applicant had indicated her marital status as "single". She also indicated in her application that she was not covered under any other policy of insurance. Dominion commissioned a statement from the applicant in which she again indicated that she was not married. Dominion accepted this evidence that the claimant was not married and began adjusting her claim.

Some 16 months later during the course of an examination for discovery in a tort claim advanced by the same claimant, information surfaced that indicated the claimant may have been married at the time of the accident. Dominion conducted further investigation and did not determine for almost another year that the claimant's alleged spouse was insured by Certas. Dominion served a NDBI on Certas at that point, some two years after the expiry of the 90 day period for disputing priority expired.

The arbitrator held that Dominion had made reasonable investigations within 90 days from receiving the claimant's SABS application to determine whether another

[39] 2009 CanLII 37348 (ONSC).

insurer might be liable. He also found that given the incorrect information the SABS claimant had provided to Dominion in her application and her statement within the 90 day period, 90 days was not a sufficient period of time for Dominion to make a determination that another insurer might be liable.

The arbitrator relieved Dominion of the section 3 (1) obligation to serve its NDBI within 90 days from receiving the SABS application. The arbitrator held however, that Dominion had not pursued its priority investigation diligently enough once it learned from the discovery evidence that the claimant may have been married at the time of the accident. He held that Dominion should have pursued this information more vigorously and served Certas with the NDBI much sooner than it did.

Consequently, although the arbitrator held that the 90 day time limit in section 3 (1) did not apply, Dominion had nevertheless taken too much time to serve its NDBI on Certas once it had different information from the claimant suggesting that she might be married. The arbitrator held that Dominion was not entitled to pursue its priority dispute.

Dominion appealed the decision. Justice MacDonnell reversed the arbitrator. The essence of his decision is contained in the following excerpt from the judgment:[40]

> ...the task of the arbitrator is not to decide whether the 90-day limitation period for disputing priority should be extended but rather whether it applies at all. If the arbitrator decides that ss. 3 (2) has been complied with, an insurer may dispute priority, not because the time for doing so has been extended but because no time limit is applicable... The legislature has decided that an insurer who receives an application for accident benefits may serve a notice disputing priority outside the initial 90-day window if two criteria can be

[40] Paras. 25 and 26.

> established. In essence, the arbitrator amended the scheme by adding a third criterion, namely a requirement that the insurer move with reasonable dispatch after discovering that another insurer may be liable.

Counsel for State Farm properly submitted, on the authority of *Dominion v. Certas*, that if I conclude 90 days was not a sufficient period to make a determination that another insurer was liable, and that State Farm made reasonable investigations within the 90 days to determine whether another insurer was liable, then it is irrelevant how much more time it took State Farm to serve Zürich with its NDBI.

I also agree with State Farm's submission that it is relevant to consider events after the 90 days that relate to the discovery of Zürich as the potential priority insurer only for the purpose of deciding whether State Farm conducted reasonable investigations within 90 days. These events should not be looked at for the purpose of considering imposing any other time limit on State Farm. There is no time limit for the service of the NDBI to be imposed upon an insurer other than the section 3 (1) 90 day time limit.

Mindful of the law as I have summarized it, I will now examine the two, section 3 (2) criteria to determine, on a balance of probabilities, whether State Farm has satisfied their requirements.

In determining whether 90 days was a sufficient period of time for State Farm to make the determination that Zürich may have been the priority insurer in this case, it is necessary to examine whether within 90 days from the receipt of Mr. Campbell's SABS application State Farm had the ability to obtain more information than it did concerning the identity of Zürich as another priority insurer. To phrase the question as Justice

Ducharme did in *Primmum v. Aviva*: could State Farm's investigation have been done properly within the 90 day period to disclose the existence of Zürich as a priority insurer?

The evidence confirms that by January 6, 2009 State Farm had satisfied itself that Mr. Campbell was not a named insured under an automobile policy, and it had concluded that the insurer of the rented vehicle Mr. Campbell was operating at the time of the accident would have priority. Therefore, State Farm knew close to 8 weeks before the expiry of the 90 day period that it needed to identify the insurer of Routes for the purposes of serving an NDBI.

The evidence confirms that by January 23, 2009, a representative of Routes had provided State Farm with ING as the name of its insurer, as well as a policy number for the Routes policy. This is approximately 5 weeks before the expiry of the 90 day period.

On January 26, 2009, the State Farm representative, Ms. Lennox, had a telephone conversation with an Intact representative. Ms. Lennox concluded as a result of information she received in this telephone conversation that McLarens had a connection to Routes, and therefore the insurer of Routes for the purposes of handling SABS claims. She served the January 26, 2009 NDBI on "*ING, c/o McLarins*", on the strength of this information.

As it turns out the name of the insurer and the policy number were incorrect. The question is, did State Farm have the ability to obtain the correct information as to the identity of Routes' insurer and the correct policy number before the 90 day time limit expired?

This is where it becomes relevant to examine events after the 90 day time limit expired in the context of how the correct insurer's identity and policy number were determined.

Ultimately it was Julie Turrin of Intact who was able to determine that Routes' insurer was Zürich, and the correct policy number was 5RQ00210. What information was necessary for Ms. Turrin to make this determination? The evidence indicates that Ms. Turrin was able to determine that Zürich was Routes' insurer, and that the correct policy number was 5RQ00210, once she had the incorrect policy number, 5RP00210, and she was told that this number might be a McLarens policy number.

The evidence confirms that State Farm's counsel provided the incorrect policy number it had received from State Farm to Intact on December 16, 2009. With that information Ms. Turrin was able to verify that Intact did not have a policy with that number. Intact confirmed this to State Farm's counsel on January 4, 2010. On January 22, 2010, State Farm's counsel wrote to Intact suggesting that the policy number previously provided was a McLarens policy number, not an Intact policy number. As I have indicated, January 22, 2010 was a Friday. By the afternoon of Monday, January 25, 2010, Ms. Turrin of Intact had contacted McLarens, she had determined that Zürich insured Routes under policy number was 5RQ00210, and she had advised State Farm's counsel of this information.

Could State Farm have accomplished what Ms. Turrin of Intact accomplished within 90 days of State Farm's receipt of Mr. Campbell's SABS application? Based on

the evidence before me there is no doubt, in my opinion, that State Farm could have identified Zürich as a priority insurer well within the 90 day period.

Approximately 5 weeks before the expiry of the 90 day period, State Farm knew both the incorrect policy number, its potential connection with ING, and its potential connection with McLarens. Given that Ms. Turrin of Intact was able to determine that Zürich insured Routes, and the correct policy number, in one business day or less, using the same information that State Farm had five weeks before the expiry of the 90 day period, I am of the view that State Farm had more than adequate time to make the necessary inquiries to identify Zürich as the priority insurer.

Technically, since I have concluded that State Farm has not satisfied subsection (a) of the test set out in section 3 (2), that ends the matter.

In the event that I am found to be in error with respect to my conclusion on section 3 (2) (a), I will make findings with respect to section 3 (2) (b).

As indicated, the question to be answered here is whether State Farm conducted the reasonable investigations necessary within the 90 day period, to determine if another insurer was liable.

As Justice Ducharme states in *Primmum v. Aviva* in considering whether an insurer has conducted reasonable investigations, it is necessary to look not only at what was done, but what was not done. It was what was not done in this case, that in my opinion renders State Farm's section 3 (2) (b) position untenable.

State Farm's early investigation of the priority issue was focused and productive. Various steps had been taken so that by January 6, 2009, State Farm had concluded that the insurer of Routes would have priority for Mr. Campbell's SABS claim. Ms. Vermeersch of State Farm telephoned Routes that day with the intention of discussing the insurance issue. She was unable to reach anyone so she left a message.

At this point however, I found that the evidence indicated State Farm's investigation of the priority issue became less efficient. Despite a message having been left for Routes on January 6, 2009, for a return contact to discuss the insurance issue, there was no follow-up on this by State Farm until January 23, 2009, over two weeks later. I would point out that by this point State Farm was aware that it was potentially dealing with a catastrophic claim, and that the priority clock was ticking.

Around this time there also appears to have been some confusion about who may have been following up on the insurance priority issue, and what information was known to which State Farm representative.

Ms. Vemeersch's active involvement in the file had ceased, and the matter had been transferred to Ms. Lennox in State Farm's catastrophic unit. Despite the cessation of her active involvement, Ms. Vermeersch became re-involved in the matter on January 23, 2009 when she made contact with the Routes representative. On this date she obtained the information from Routes identifying ING as the Routes insurer, and the policy number. I have already reviewed the fact that she recorded this information in the ACSR on the same date.

Ms. Lennox was also active on January 23, 2009. As I have indicated in my review of the evidence, her entry in the ACSR suggests that she may not have had personal knowledge of the policy number that had been provided for Routes' insurer.

It is at this point where, in my view, State Farm's investigation to confirm the identity of Routes' insurer and the policy number falls below the reasonable standard. As the case law indicates, even where an insurer is provided with information from its own insured who is duty bound to act in good faith in providing information, the insurer is not absolved from being proactive, and thorough in confirming the accuracy of the information. Arguably, the need to verify the information is perhaps greater in the case where, as here, the source providing the information is not bound by any duty of good faith.

This does not mean that State Farm ought to have been suspicious of the information provided by Routes as to its insurer and the policy number, or to have doubted the truthfulness of the Routes representative.

In my opinion however, with priority for a potentially catastrophic claim at stake, a reasonable investigation required more thorough efforts to confirm the accuracy of the information as to the identity of Routes insurer and the policy number, especially when subsequent events raised doubts about whether ING was Routes' insurer.

Ms. Lennox contacted ING based on the information received from Routes that ING was Routes' insurer. It is not clear with whom Ms. Lennox spoke at Intact when she telephoned Intact on January 26, 2009. Based on her evidence that she spoke to "... *the person answering the phone*", I think it a reasonable conclusion that she did not

speak to anyone in Intact's SABS department, or underwriting department. As an experienced insurance adjuster in State Farm's catastrophic SABS unit, Ms. Lennox would know that an inquiry about policy coverage or a SABS claim would be most effectively directed to these departments in an insurance company.

Counsel for State Farm submitted in argument that it would be well beyond the standard of reasonableness for a priority investigation to require a person in Ms. Lennox's position to ask for a specific department at an insurance company when making an inquiry to confirm insurance coverage for a particular SABS claim.

I would agree with that argument if it was proposed that as a general rule an insurance representative making an inquiry about coverage or a SABS claim with another insurer must always speak with the SABS department or the underwriting department of that insurer. That does not mean however, that a reasonable investigation standard could never require the inquiry to be made in that way.

The reasonable investigations test in section 3 (2) (b) does not set out a general rule that can be applied to every case no matter what the facts. The conclusion as to whether an insurer's investigations are reasonable depends entirely upon the facts of the case under consideration. In some cases, depending on the circumstances, the reasonable investigation standard may require the person making the inquiry to speak with a specific department of an insurance company. In other cases, depending on the facts, that may not be necessary.

I am of the opinion, based on the evidence in this case, that a reasonable priority investigation standard required State Farm to do more than was done here in Ms.

Lennox's conversation with the person answering the phone in Intact's office, when the purpose of contacting Intact was to confirm whether Intact insured a specific entity – Routes, with respect to a specific SABS claim.

Even if a reasonable investigation standard did not make it necessary for Ms. Lennox to ask to speak to someone in underwriting or the SABS department of Intact, it would at the very least require her to ask the Intact employee to whom she was speaking to try to confirm whether Intact had an automobile policy in favour of Routes bearing the policy number that the Routes representative had provided to State Farm. It was not reasonable investigation in these circumstances that the policy number was never mentioned. As a result, Ms. Lennox did not receive confirmation one way or the other from the Intact representative as to whether Intact insured Routes, she was simply given the name of McLarens Canada to further pursue her inquiries.

Ms. Lennox stated in a response to a question by State Farm's counsel that the Intact representative did not say that Intact did not insure Routes. This is insufficient in my view to meet the burden of establishing a reasonable investigation to confirm whether Intact, or another insurer, was the insurer of Routes. Not stating a negative, does not prove a positive.

Had Ms. Lennox asked the Intact representative to whom she was speaking for confirmation that policy number 5RP00210 was an Intact automobile policy in favour of Routes, and that it could have relevance to the SABS claim arising out of Mr. Campbell's operation of the Routes vehicle, I think it is likely that the person Ms. Lennox

was speaking to would have transferred her to either Intact's underwriting department or its SABS department so the inquiry could be properly pursued..

Of course had Ms. Lennox requested Intact search for policy number 5RP00210, the result would have been what occurred almost a year later when Mr. Philp provided the same incorrect policy number to Ms. Kaur in Intact's SABS department so that she could investigate the matter. Intact would have reported then to Ms. Lennox, as Ms. Turrin of Intact reported to Mr. Philp about a year later, that Intact had no such policy. This would have certainly alerted Ms. Lennox to a problem with respect to the information provided by the Routes representative, and it would have prompted more probing inquiries to identify the correct insurer and/or policy number. There were still several weeks left in the 90 day period to make such inquiries.

This is exactly what was done by Mr. Philp when Ms. Turrin reported to him that Intact did not have a policy number 5RP00210. Mr. Philp followed up by providing information concerning a possible connection between the policy number and McLarens. As I have discussed, the combination of these facts enabled Ms. Turrin to identify Zürich as Routes insurer and the correct policy number within a business day.

Even though Ms. Lennox did not, in my opinion, make adequate inquiries of Intact to confirm whether Intact had an automobile policy bearing number 5RP00210, she was nevertheless able to obtain information from the Intact representative suggesting a possible connection between Routes and McLarens. As is evidenced by events occurring approximately a year later, the combination of the policy number, even though it was incorrect, and the McLarens Canada connection, was all the information

that was required to determine that Zürich was Routes' insurer, and that the correct policy number was 5RQ00210.

Despite having the crucial facts necessary to complete the investigation that would have revealed Zürich was the Routes insurer, at this point State Farm effectively ceased any further investigation. No one at State Farm contacted McLarens to follow up on the information received from the Intact representative in Ms. Lennox's telephone conversation of January 26, 2009. Ms. Lennox simply prepared a NDBI and sent it to McLarens at an address for McLarens she found on the Internet. The NDBI purported to notify Intact that State Farm asserted Intact was the priority insurer with respect to Mr. Campbell's SABS claim.

Sending an NDBI is not conducting a priority investigation, it is what an insurer does after completing a priority investigation. At this point State Farm's priority investigation was not complete. It had not confirmed that Intact insured Routes or that McLarens was acting on behalf of Intact in the matter. This was not a situation where State Farm was being pressed by the 90 day limitation period to issue a NDBI. The limitation date was still at least 5 weeks away.

To the extent that sending an NDBI might have some ancillary priority investigation value, there was no chance of that in this case. The January 26, 2009 NDBI contained no relevant information which McLarens could have used to confirm whether it or Intact had some involvement in the matter. State Farm knew that if there was an insurer in priority to it, that it was the insurer of Routes; yet the NDBI was devoid of any mention of Routes whatsoever. It contained no information asserting that Intact

insured Routes. It contained no information about the alleged Intact policy number for a Routes policy. The NDBI did not even mention that Mr. Campbell was operating a Routes vehicle at the time of his accident.

In my opinion, instead of effectively ceasing the priority investigation at this stage, and sending a deficient NDBI, a reasonable investigation standard required State Farm to contact McLarens directly to follow up on the information received from Intact. State Farm should have attempted to confirm with McLarens whether McLarens represented Intact with respect to SABS claims in connection with Routes vehicles, and specifically whether McLarens had any involvement with a claim for Routes under policy number 5RP00210.

In my opinion, the evidence indicates that had these inquiries been made, State Farm would have quickly determined, just as Ms. Turrin of Intact did a year later, that it was Zürich, not Intact which insured Routes, and the correct policy number was 5RQ00210, not 5RP00210.

An opportunity for State Farm to salvage the investigation presented itself when McLarens responded to the January 26, 2009 NDBI. On January 29, 2009 McLarens faxed a response to State Farm's January 26, 2009 NDBI. McLarens' January 29, 2009 letter makes it clear that it had searched for any connection with David Campbell, but found no evidence of Mr. Campbell in its database. This makes sense because the NDBI only referred to David Campbell. There was no mention of Routes or a purported Intact policy number for Routes, so McLarens could hardly have searched for either of them.

McLarens January 29, 2009 letter specifically asks State Farm *"...to provide a claim number, or a policy number or any other supporting documentation that McLarens act on behalf of ING."*[41]

Had State Farm responded to this letter from McLarens and provided McLarens with the policy number it had, as well as the name of Routes as the potential insured, in my view it is very likely that Zürich and the correct policy number would have been identified at that time.

In any case, in my opinion, a reasonable investigation standard required that State Farm at least respond to this letter from McLarens providing the requested information that it had in its ACSR. McLarens' response cast doubt upon the accuracy of the information that State Farm had received from Intact, and therefore on the accuracy of the insurance information State Farm had received from Routes. In my view the reasonable thing to do was to contact McLarens to confirm whether McLarens and/or Intact did have some involvement in the matter, and to try to confirm the accuracy of the insurance priority information it had in its possession.

Once again however, State Farm did not follow through in a thorough manner on this opportunity to rehabilitate its prematurely halted priority investigation. State Farm did not respond to the McLarens letter; instead, State Farm drafted the February 6, 2009 NDBI, and send it to Intact. Any possible ancillary investigation value to this NDBI was negated, because the February 6, 2009 NDBI was similarly deficient to the January 26, 2009 NDBI. It did not contain a reference to Routes, the insurer of whom State Farm

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[41] Arbitrator's emphasis.

knew would be the priority insurer. It did not contain the policy number for what was believed to be Routes' policy with Intact.

Intact did not respond to this NDBI. The documentary evidence indicates that Intact did not receive the February 6, 2009, NDBI. Whether Intact did or did not receive the NDBI is irrelevant, in my opinion, for two reasons. The NDBI had no priority investigation value for the reasons previously described, and in any event State Farm did not follow-up within the 90 day period with respect to this NDBI.

State Farm elected to refer this matter to its counsel in approximately the middle of February 2009. I make no criticism of that step, nor do I criticize any step taken by State Farm's counsel on State Farm's behalf in investigating priority. Once State Farm's counsel had all of the necessary information (i.e. the policy number and the fact that there was a McLarens connection), information they do not appear to have received until long after the 90 day period had expired, they efficiently followed up with Intact and the identity of Zürich as the insurer and the correct policy number were determined.

In summary, in my opinion it is unfortunately State Farm's own failure to do what should have been done in a proactive and thorough priority investigation which leads to the conclusion that its investigation fell below a reasonable standard.

In coming to this conclusion I have tried to be careful not to apply Justice Ducharme's "*omniscient lens of hindsight*" to the evidence. I am cognizant of the pressures that SABS adjusters are under in conducting their daily activities. As Justice Ducharme points out in *Primmum v. Aviva*, it is rare the investigation that could not be improved upon with the benefit of hindsight. This must be balanced however, with the

rigorous approach to the evidence in section 3 (2) cases required by the case law, to comply with the purpose of the Regulation.[42]

On the evidence before me this case, I am compelled to conclude that State Farm's priority investigation fell below a reasonable standard.

Many weeks before the expiry of the 90 day limitation period, State Farm had in its possession information that it knew or ought to have known would be critical to identifying a priority insurer – an insured's name and policy number. For reasons that were not adequately explained, State Farm failed to make proper or any use of this information in its priority investigation efforts, and in sending NDBIs.

When events called into question the validity of the insurance information State Farm had been given, it did not take sufficient steps to try to verify the accuracy of the information. These steps would not have required extraordinary efforts. Subsequent events demonstrated that a letter of inquiry containing the proper information, or a telephone inquiry using the insurance information State Farm already had, would likely have yielded successful results.

Finally, when State Farm was presented with the opportunity to repair its priority investigation, it failed to take the simple step of responding to a letter which asked State Farm for a policy number. State Farm had this information, as well as the name of the insured, but it did not answer the letter.

The evidence of events occurring about a year later confirms that long before the 90 day limitation period expired, had State Farm made proper use of information it had

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[42] See *infra*, pp. 34-35.

in its possession that it should have known could be crucial to the priority investigation, the priority puzzle would have been solved very quickly.

Therefore, with respect to section 3 (2) (b), I find that State Farm has not discharged its onus of proving that it conducted reasonable investigations within 90 days to determine if another insurer was liable.

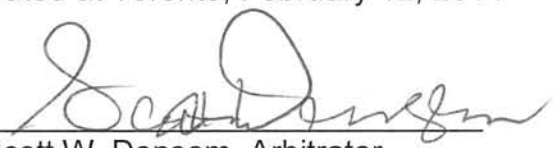
Conclusion

1. State Farm did not serve Zürich with an NDBI within 90 days from its receipt of David Campbell's SABS application, and therefore it has not satisfied the requirements of section 3 (1) of Regulation 283/95.

2. State Farm may not rely on the January 26, 2010 NDBI it served on Zürich to pursue a priority dispute against Zürich pursuant to Regulation 283/95, because it has not satisfied the requirements of either subsection (a) or subsection (b) of section 3 (2) of Regulation 283/95.

3. As the successful party, Zürich is entitled to its costs of the arbitration. Should there be any issues respecting the quantum of costs requiring determination by me, I invite counsel to contact my Coordinator to arrange a post-arbitration conference to discuss arrangements to have the quantum of costs determined.

Dated at Toronto, February 12, 2014



Scott W. Densem, Arbitrator