IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and –

MARKEL INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing

Joseph Lin and Alex Dirlis for the Applicant

Kevin Adams for the Respondent

Introduction

This matter comes before me as a loss transfer arbitration dispute between two Ontario automobile insurers.

Pursuant to section 275 of the *Insurance Act*, automobile insurers who are required to pay statutory accident benefits may have a right of indemnity from other automobile insurers in the circumstances described in regulations under the *Insurance Act*. Section 275 of the *Insurance Act* requires the parties to submit any dispute to private arbitration. This is what has occurred in this case.

The parties have submitted a preliminary issue to me for determination with respect the application of any limitation period to the claims for loss transfer indemnity being advanced by the Applicant.

Background

Loss transfer is an indemnity regime created by statute that allows one insurer to recover indemnification from another insurer with respect to payment of statutory accident benefits to an injured individual. In this case, the Applicant has been paying substantial amounts with respect to statutory accident benefits with respect to Kenneth L.[1] as a result of an accident which occurred on October 10, 2005.

At that time Kenneth L. was involved in a collision. The other vehicle was a tractor-trailer insured by Markel. The circumstances of the loss are such that ING has asserted against Markel a claim for indemnity in accordance with section 275 of the *Insurance Act* and the regulations that apply to those disputes.

Exhibit 1 to this proceeding is an Agreed Statement of Fact executed by parties' counsel on March 1, 2011. An Arbitration Agreement executed in July of 2009 is also part of Exhibit 1. The other documents in the record indicate that an Application for Accident Benefits was made to the Applicant by Kenneth L. in about November of 2005.

On April 27, 2006, a letter was sent by the Applicant to Markel enclosing a Notification of Loss Transfer. That letter and subsequent correspondence germane to these issues is also part of Exhibit 1.

There is correspondence going back and forth between the two insurers about the loss transfer issues. On June 24, 2008, Markel wrote to ING indicating that they had now completed their investigation. In that letter, Market indicated that Markel "will not be reimbursing ING for loss transfer purposes". On September 19, 2008, the Applicant commenced arbitration by giving notice of a submission to arbitration.

The Limitation Issue

The issue now brought before me for determination is the effect, if any, of limitation laws on the ING claim for indemnity.

Markel argues that ING should not be permitted to advance claims with respect to payments made more than two years prior to the commencement of the arbitration. ING submits that the applicable limitation commences with denial of indemnification by Markel and argues that the letter found at Exhibit 1, Tab J, commences the limitation period as of June 24, 2008.

The practical difference between the positions is significant. If the ING position prevails then none of the indemnification requests are precluded as a result of a limitation period. However, if the Markel position is correct then benefits paid prior to September 19, 2006, will not be subject to indemnification from Markel.

The Legislative Background

This issue arises as a result of the implementation of the *Limitations Act,* 2002. Prior to the application of that statute, case law had established the position with respect to loss transfer as being subject to a limitation of six years, and that the trigger of the limitation was a rolling one

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[1] In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

triggered by each payment of a benefit. This is the effect of case law of high authority in Ontario.

The *Limitations Act*, 2002, enacts a new limitation scheme and concurrently negates all other limitations to which the Act applies except those that are listed in a schedule to the Act. There is no other limitation which applies to loss transfer claims therefore it is my conclusion that the *Limitations Act* of Ontario has now negated any other limitation which might apply to loss transfer.

The question before me is how the *Limitations Act* applies to a loss transfer proceeding, if at all.

The starting point for this analysis is section 275 of the *Insurance Act* which requires this dispute to be determined in accordance with the *Arbitration Act*, 1991.

Section 52 of the *Arbitration Act*, 1991, provides as follows:

> **Limitation periods**
>
> **52. (1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action.**
>
> **Preservation of rights**
>
> **(2) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order shall be excluded from the computation of the time within which an action may be brought on a cause of action that was a claim in the arbitration.**
>
> **Enforcement of award**
>
> **(3) An application for enforcement of an award may not be made more than two years after the day on which the applicant receives the award.**

In my view this provision requires me to apply the limitation which would apply to this matter if it were an action conducted as a court proceeding.

If this matter were a court proceeding, the next line of inquiry would be to determine whether or not this matter represents a "claim" within the meaning of the *Limitations Act*. Section 1 of the *Limitations Act* defines claim as follows:

> **"Claim means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".**

The next issue is to determine the starting point of the limitation. Section 4 of the act provides as follows:

> **"Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."**

The *Limitations Act* addresses the concept of discovery in section 5 and provides as follows:

> **5. (1) A claim is discovered on the earlier of,**

> **(a) the day on which the person with the claim first knew,**
>
> > **(i) that the injury, loss or damage had occurred,**
> >
> > **(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,**
> >
> > **(iii) that the act or omission was that of the person against whom the claim is made, and**
> >
> > **(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and**
>
> **(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).**

I note that section 14 of the *Limitations Act* contemplates a situation where a potential defendant can facilitate commencement of a limitation period by giving notice. Section 14 provides as follows:

> **Notice of possible claim**
>
> **14. (1) A person against whom another person may have a claim may serve a notice of possible claim on the other person.**
>
> **Contents**
>
> **(2) A notice of possible claim shall be in writing and signed by the person issuing it or that person's lawyer, and shall,**
>
> > **(a) describe the injury, loss or damage that the issuing person suspects may have occurred;**
> >
> > **(b) identify the act or omission giving rise to the injury, loss or damage;**
> >
> > **(c) indicate the extent to which the issuing person suspects that the injury, loss or damage may have been caused by the issuing person;**
> >
> > **(d) state that any claim that the other person has could be extinguished because of the expiry of a limitation period; and**
> >
> > **(e) state the issuing person's name and address for service.**
>
> **Effect**
>
> **(3) The fact that a notice of possible claim has been served on a person may be considered by a court in determining when the limitation period in respect of the person's claim began to run.**
>
> **Exception**
>
> **(4) Subsection (3) does not apply to a person who is not represented by a litigation guardian in relation to the claim and who, when served with the notice,**
>
> > **(a) is a minor; or**
> >
> > **(b) is incapable of commencing a proceeding because of his or her physical, mental or psychological condition.**

Acknowledgment

(5) A notice of possible claim is not an acknowledgment for the purpose of section 13.

Admission

(6) A notice of possible claim is not an admission of the validity of the claim.

Discussion

A review of the correspondence in Exhibit 1 indicates that ING gave notice to Markel of a potential loss transfer claim in late April 2006. Correspondence followed back and forth between the two insurers more or less regularly for about six months. During that interval, there was a debate between the parties on the question of liability. The communications from Markel to ING had a negative tone to them but were never unequivocally negative until the letter of June 24, 2008.

The letter of July 19, 2006, indicated that Markel would not consider issuing loss transfer indemnification "unless charges to my insured are upheld" making this denial a temporary status pending further developments with respect to *Highway Traffic Act* charges. Further communications in September of 2006 evoked a further response from Markel. This was somewhat more negative. The author of that letter, Tanya Schreck, indicated "my investigations continue". But otherwise was negative towards ING's claim for indemnification. There seems to have been some kind of gap in communications until February 25, 2008 at which point ING again wrote to Markel requesting indemnification for benefits paid. On June 24, 2008, Markel wrote the previously referenced letter to ING unequivocally denying reimbursement to ING.

It is clear from the loss transfer documentation that a significant amount of money has been paid by ING with respect to this loss. No doubt some of this money was paid more than two years prior to the commencement of the arbitration and hence there is a live dispute about the application of the limitation period contemplated by the *Limitations Act*.

I consider it beyond doubt that section 275 of the *Insurance Act* requires this dispute to be decided as an arbitration before an arbitrator in accordance with the *Arbitration Act*, 1991. Not surprisingly that is recited in the Arbitration Agreement found at Tab A of Exhibit 1.

Section 52 of the *Arbitration Act* requires me to look at limitation issues as if the claim before me were an action. If this claim were an "action" it is my view that it would proceed by court proceeding. Accordingly, the *Limitations Act*, 2002, would apply if the matter is a "claim" as contemplated by the *Limitations Act*.

It is important to recognize that the *Limitations Act* puts several qualifications on whether or not a matter is a "claim". It is only a claim within the meaning of the *Limitations Act* if it is a claim:

> **"to remedy an injury, loss or damage, and the injury loss or damage occurred as a result of an act or omission"**

If our examination of the *Limitations Act* stops at this point there is not much difficulty in determining that this matter represents a claim. ING has "injury, loss or damage" as a result of the fact that it has paid substantial benefits for which it asserts it is entitled to indemnification. The more difficult issue is finding the "act or omission" which results in that injury, loss or damage. One could look at the circumstances of the underlying accident and suggest that that

event includes acts or omissions by various motorists giving rise to the injury thereby giving rise to the benefit claims that ING has faced.

However, this issue is further informed by section 5 of the *Limitations Act* which provides, in part, as follows:

> **"5. (1) A claim is discovered on the earlier of,**
>
> **(a) the day on which the person with the claim first knew,**
>
> …
>
> **(iii) that the act or omission was that of the person against whom the claim is made,"**

In my view, the concept of "claim" as used in the *Limitations Act* must be read in conjunction with section 5 of the Act. Accordingly, it is my conclusion that the "act or omission" must be the act or omission of the person against whom the claim is made. Without this nexus to the target of a claim, the fundamental premise of the limitation law is lost. The purpose of the limitation law is to protect defendants against stale claims.

Accordingly, it makes sense to regard such claims in the context of their connection with the defendant.

Markel suggest that I should read these provisions as being inclusive of acts or omissions of the insureds of the insurer. Accordingly it is suggested that discoverability takes place when the Applicant knows that the act or omission of Markel's insured may have caused the loss. In my view this gives a meaning to section 5(1)(a)(iii) that it does not reasonably bear.

In my view a "claim" for the purposes of the *Limitations Act*, is an assertion of a set of circumstances that gives rise to a legal consequence. The additional requirement of there being "injury, loss or damage" is met by the circumstance of ING having paid out substantial sums for which it claims a right of indemnification. With respect to the issue of there being an act or omission, in some cases it would not matter too much whether we look at the act or omission as being referable to the circumstances giving rise to the underlying accident and personal injury, or whether we look at the failure of Markel to effect indemnity as being the act or omission. However, in my view Markel's failure to affirmatively respond to the request for indemnification does amount to an act or omission and that act or omission has resulted in the subsisting injury, loss or damage sustained by ING.

Accordingly, it is my conclusion that this proceeding is a "claim" within the meaning of the *Limitations Act*, 2002.

I therefore turn to the question of the commencement of the limitation. The *Limitations Act*, 2002, codifies discoverability as a precondition to the running of a limitation period. Accordingly, the start of a limitation period is not necessarily demarcated by an easily fixed point in time. Section 5 of the Act describes the criteria that go into the analysis of discovery. But these criteria necessarily refer to a person's knowledge of events and circumstances. Definitively establishing the date of such knowledge, or the character of the knowledge, gives rise to uncertainty. In particular, section 5(1)(a)(iv) introduces a value judgment as to whether or not "a proceeding would be an appropriate means to seek to remedy it" before there can be discovery.

For better or worse, the *Limitations Act*, 2002, has adopted concepts which make limitation issues "fuzzy", subject to contentious fact assertions, and difficult legal interpretations.

Markel suggests that we should not look at the principles enunciated in section 5 at all since these are codifications of the common law. Counsel argues that common law principles have been held inapplicable to adjudication of limitation issues associated with this statutory cause of action. While I find that to be historically correct, the enactment of the *Limitations Act*, 2002, changes the landscape. I am now required to look at discoverability issues and this is no longer a matter of a common law proposition being applied to a statutory cause of action. In my view, I am required to look at the discoverability issues as guided by section 5 of the *Limitations Act*, 2002.

Markel strenuously argues that we should be looking at the date of each individual payment as the date of commencement of the limitation. However, I see no justification for this at all in the *Limitations Act*. The *Limitations Act* has specifically directed us to look at discoverability of a claim in accordance with the language of the act. The fact that there is a payment would be highly material to one of the four discovery touch points, that there must be injury, loss or damage that has occurred. However, section 5 introduces three other concepts. Firstly, the injury must be caused or contributed to by an act or omission. Secondly, the act or omission must the act or omission of the Respondent. Finally the proceeding must be appropriate.

As to whether there has been an act or omission, this is repetitive of the requirement that is already embedded in the concept of "claim". As indicated, I am satisfied that ING, upon having made a payment, has sustained an injury, loss or damage, but I am not convinced that the mere payment is as a result of "an act or omission".

Additionally the loss must be the result of the Respondent's act or omission. Having regard to section 5(1)(a)(iii), I conclude that the act or omission in question is the act or omission of Markel in these circumstances. Therefore the limitation period commences if and only if it can be shown that Markel's act or omission has resulted in ING's injury, loss or damage.

This is a complete answer to Markel's argument that the limitation should start to run with each individual payment. Those payments, made by ING, are necessary, but insufficient, circumstances to commence the running of the limitation period. The statute imposes the additional obligation that the injury, loss or damage result from the Respondent's act or omission and that aspect is lacking on Markel's theory of payment trigger.

Markel makes a compelling argument for a trigger which is independent of the claimant's actions. Markel argues that requiring an omission to start the running of the limitation period amounts to giving the claimant control over when or if the limitation period will be begin to run. ING could, theoretically, not give any notification to Markel about a loss transfer claim pending. Without such knowledge Markel might not have any information about the claim and almost certainly would not be characterized as being guilty of any "act or omission" resulting in ING's loss. On this scenario, Markel points out that it is quite offensive that the person asserting a claim, ING, could be in the position of extending the limitation period indefinitely by its own failure to give notice to the target insurer. There is comfort for Markel in some of the case law and in particularly in the decision of Mr. Justice Somers in the case of *York Fire* v. *Co-operators*[2]. He made the following comments:

[2] 17 C.C.L.I. (3d) 16

> **"From a practical point of view there is a real danger that an insurer could be paying its insured over a protracted period of time without notifying the third party insurers that in due course it wished to be reimbursed. Long range disability payments often stretch out or are intended to stretch out over many years"…**
>
> **"I agree with the reasoning of Mr. Holland that because the right to indemnification arises when the benefits are paid that starts the operation of the limitation period for a claim for reimbursement of any such payment. There is nothing to prevent a no-fault insurer from immediately asking for indemnification in connection with such payments."**

I agree with Markel that it is a concern that the limitation law might be interpreted in a way which gives the plaintiff control over the underlying circumstances that cause the limitation period to commence running. This seems to be contrary to the fundamental premise of a limitation law, that defendants should be protected from stale claims.

However, I cannot ignore the plain words of section 5 of the *Limitations Act*, 2002. That section requires there to be an act or omission on the part of the person claimed against in order for the limitation to commence to run. For better or worse, in transactions such as this, this must mean that the Respondent be well aware of a possible cause of action before there is any limitation commencing to run that might protect the targeted defendant. This, of course, is only relevant in this particular case because the targeted defendant is not involved in the underlying transaction giving rise to the injuries sustained by the ING policy holder. Markel's involvement comes as a result of a statutory scheme of indemnity which causes it to have an obligation as a result of being the insurer of a heavy commercial vehicle involved in the accident.

Markel makes a further argument that I should construe Markel's issuance of a policy in these circumstances as the act or omission giving rise to ING's loss, injury or damage. There is some analogy for this with respect to demand obligations and I am mindful of the language found in section 5 of the *Limitations Act* in that regard. Counsel also referenced the various decisions in the case of *Hare* v. *Hare*[3]. Some of the discussions in that case contemplate that the "act or omission" might be the mere existence of a demand obligation arrangement. But that is significantly different than a loss transfer obligation associated with a car accident. Somebody who has negotiated a demand obligation has knowledge of the obligation created and doesn't need any notification of the existence of that debt. This is quite different than Markel's situation in the loss transfer. Markel doesn't have any knowledge of a loss transfer obligation until it is given notice by some external source. The mere fact that another insurer is paying benefits which might ultimately be presented for reimbursement is no notification at all to Markel. Hence, I do not think it is realistic that Markel's failure to accept the claim or denial of a claim can be construed as an act or omission which causes ING's losses at the time of payments.

Markel argues that complete control is given over to the Applicant, ING, about when the limitation period will start and that this gives rise to some potential abuse. I am concerned about this issue. I do think that a statute designed to protect defendants from stale claims should be interpreted in a way that gives effect to this purpose, if at all possible. However, I do not see such leeway in the language of section 5 of the *Limitations Act*, 2002. Simply put, a claim cannot be discovered until there has been an act or omission on the part of the targeted defendant which results in the injury, loss or damage of the person making the claim.

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[3] 2006 CanLII 63693 (ON S.C.) and 2006 CanLII 41650 (ON C.A.)

I am very mindful of the concern of the Court of Appeal in *Hare v. Hare*, and the focus on bringing closure to potential litigation. But the *Limitations Act*, 2002, changes the law. The legislature has chosen to inject new concepts - "claim" - "discovery" - "appropriate". These are concepts likely to be fact sensitive, and somewhat subjective. The legislature has made the decision that other policy considerations overshadow the administrative attraction of a bright line demarcation.

The new law speaks to the commencement of the limitation being after the causal act or omission of the defendant. In the particular circumstances of inter insurer loss transfer the requirement to find some act or omission of the Respondent requires me to find some knowledge of the claim. Without such knowledge I cannot characterize the Applicant's loss as flowing from the Respondent's act or omission.

Having regard to the provisions of section 5 of the *Limitations Act*, 2002, I conclude that the limitation period that operates with respect to a loss transfer claim does not commence to run unless there has been an act or omission by the target insurer that results in the Applicant sustaining injury, loss or damage. Ordinarily I would expect this to be an "omission" of reimbursement. Necessarily that omission is likely to take place in the context of action or inaction subsequent to a communication of a reimbursement claim. I do not accept the argument that the limitation period should be read as commencing with each individual payment. However appropriate that theory might have been in another era, with the advent of the *Limitations Act*, 2002, and its specific requirements about the loss, injury or damage being the result of the act or omission of the litigation target, that law can no longer be considered applicable.

Furthermore, such act or omission is not, in and of itself, sufficient to start the commencement of a limitation. Section 5(1)(a)(iv) injects the additional requirement that a proceeding must be appropriate. In the context of loss transfer, it seems to me that this requires at least an inquiry into the nature of the outstanding claim, and the tenor and status of the communications, if any, between the insurers.

In this case, I have carefully reviewed the communications as evidenced by the documents in Exhibit 1. This record clearly indicates an initial notice of a loss transfer claim being brought to the attention of Markel at the end of April 2006, about five months following ING's receipt of an application. Understanding that the receipt of the application is at an early stage of the processing of a SABS claim, it seems to me that notification to Markel in April is reasonably timely. It appears that there was a further communication in June of 2006 at which time a request for indemnification form was presented with particulars of individual payments for which reimbursement was claimed. About three weeks later, Markel responded as follows:

> **"Based on investigations to date, I am holding my insured not at fault for the loss. Originally, your insured was charged for running a red light. Witnesses confirmed my insured's version of the story. Recently, the police report has been revised. My insured was subsequently charged. The matter is being heard in court in September of this year.**
>
> **Until the matter is settled in court, I will not consider issuing loss transfer indemnification unless charges to my insured are upheld."**

I view this as something less than an unequivocal denial of the claim. The author of this letter has injected the contingency of the future court proceeding. Markel has suggested that the disposition of the loss transfer claim might be influenced by, or determined by, the outcome.

On September 15, 2006, ING again communicated to Markel making the argument that indemnification was to be determined in accordance with the fault chart, in the regulations, regardless of the status of charges. The request for indemnification was reiterated. Markel responded promptly on September 21, 2006. Markel recited further understanding of the facts of the loss and closed their letter with the following comment:

> **"My investigations continue. Because of the above information, I cannot fulfill your claim for loss transfer. If your investigation support information to the contrary please advise me by phone, fax or email."**

Thereafter there was an unexplained hiatus until February of 2008. At that time ING again wrote to Markel and enumerated their pending request for $725,487.05 of indemnification. On June 24, 2008, Markel wrote to ING and said:

> **"We have now completed our investigation and we are of the opinion that Mr. L. is at fault for this accident as he ran the red light. We conducted a collision reconstruction and the engineer confirmed that the light for Mr. L. had been red for approximately three to four seconds when he entered the intersection.**
>
> **Furthermore, Mr. L. was originally charged with running a red light and the charges were then dropped and our insured was then charged. He fought his charges and they were later dropped as well.**
>
> **Based on the above information and FDR 15(2) we feel the (sic) Mr. L. is at fault for the accident and therefore, Markel Insurance Company of Canada will not be reimbursing ING for transfer purposes."**

This letter is the first unequivocal, unconditional, denial of ING's loss transfer claim.

In view of this, I must turn my attention to the question of when the limitation period does in fact commence on the facts of this case.

I have been directed to the decision of Arbitrator Scott Densem in a decision rendered December 16, 2010[4]. I find myself in agreement with many of the comments of Mr. Densem. I agree that the effect of the *Limitations Act*, 2002, is that there is a limitation period for the loss transfer indemnity claim commencing each time there is an act or omission by the Respondent resulting in a loss to the Applicant. As noted above, I agree with his interpretation that the act or omission required by the *Limitations Act*, must be the act or omission of the Respondent insurer, not the act or omission of the policy holder.

Mr. Densem raises the interesting notion of applying the doctrine of laches to a dilatory insurer. In part this is responsive to Markel's concern that the *Limitations Act* might be interpreted to give the Applicant insurer control over the process to the extent that a limitation period could be extended indefinitely. According to Mr. Densem's analysis the doctrine of laches might be applied to remedy that perceived wrong. In this case ING notified Markel of a loss transfer claim about five months after receipt of the application and submitted various claims documentation over the following months. In my view this does not support a conclusion that ING has been dilatory.

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[4] Federation Insurance Company of Canada v. Kingsway General Insurance Company, Arbitrator Scott Densem, December 16, 2010

A troubling aspect of this case is the application of section 5(1)(a)(iv) of the *Limitations Act* to determine the appropriateness of a proceeding to remedy the loss. Until that state of appropriateness is reached, the limitation period does not start to run. Arbitrator Densem in his analysis concluded that it would be appropriate to commence proceedings immediately after the Respondent insurer receives a loss transfer request. I cannot agree with this conclusion on his part. Whether or not a proceeding would be appropriate must be taken in the context of the commercial relationship between the insurers and the communications between them.

The mere fact that ING might have the right to bring an action as of the date of communication to Markel does not satisfy the mandatory requirement that a proceeding be appropriate. As observed by Justice Juriansz in *Hare v. Hare*[5], the legislature has injected an entirely new feature into this analysis:

> **Under the new Act, which governs now, it is only when the creditor knows not only that he or she is *entitled* to bring an action but also that it is *appropriate* to do so that the limitation period begins to run.**

Arbitrator Densem concluded that the limitation should commence to run from the date each loss transfer request is received. I do not agree with that approach in this case. In particular, I note the communications in April, June and July of 2006. These letters, found as part of Exhibit 1, evidence an ongoing discussion between the parties about the merits of the case. Markel did not give an unequivocal denial of the claim at the point. They referred to charges coming up in September and indicated that they would not issue indemnification until the matter was settled in court (unless charges are upheld). I am mindful of Justice Juriansz' observations affirming the judicial policy to discourage unnecessary litigation. These communications are not denials, nor are they non responsive. They are communications which appear intended to have the effect of forestalling proceedings. In particular Markel has, at that point in July 2006, held out hope for a non litigious resolution after the pending charges are heard. Given the context of these communications, I do not think it was "appropriate" for ING to institute a proceeding to recover its loss at this point. In my view, condition (iv) of 5(1)(a) of the *Limitations Act* had not been met at that juncture. Interestingly the effect of the new requirement of appropriateness in this case is to make Markel accountable for their part in the negotiations. If they had chosen to give an unequivocal denial at any point, they would have started the limitation countdown. When they played for time, it had the opposite effect.

The communications in September of 2006 have a somewhat different tone. The communications do not mention, at that point, the outcome of police charges. By letter September 21, 2006, Markel declines to fulfill the claim for loss transfer but does indicate that their investigations continue. In July, Markel had been referring to upcoming police charges as a reason to delay in making a decision in respective loss transfer. But it was recognized by ING in September of 2006 that, in its view, the status of the charges were irrelevant. On September 21, 2006, ING reiterated its denial. In my view, at this juncture it would have been appropriate for ING to institute legal proceedings. Markel's assertion that its investigations continue lack any specificity. The entire tenor of the communications between the parties indicated a disagreement with respect to the fundamental issue of liability. There is, in the September dialogue, no identified prospect of a development which would alter that position nor any invitation to engage in compromise discussions.

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[5] 2006 CanLII 41650 (ON C.A.)

By September of 2006, the sums at issue were quite substantial, in excess of $150,000.00. The continuing dialogue between ING and Markel did not appear to be leading to any softening of positions. There was little or no prospect for resolution hinted in the communications. Notwithstanding Markel's indication that their investigation continues, it is my view that as of September 21, 2006 that, having regard to the nature of the injury, loss or damage, a proceeding would have been an appropriate means to seek to remedy it. Therefore, in accordance with section 5 of the *Limitations Act*, 2002, the limitation commenced upon receipt of that communication. Therefore, ING had two years from that date in order to commence proceedings with respect to the amounts for which indemnity was claimed up to that point.

Arbitrator Densem's approach, finding the commencement of the limitation to be the date of receipt of each loss transfer request, has the attractiveness of relative certainty. It allows us to easily ascertain a date for calculation of the limitation in respect of each loss transfer indemnity request. However, the *Limitations Act* requires us to consider a more substantial question in the context of this case. We must inquire into the appropriateness of commencing legal proceedings at a particular juncture having regard to the nature of the injury, loss or damage. The lack of an answer on the date of presentation of a claim does not imply that a proceeding is necessarily appropriate at that initial moment. We must look further into the context.

Conclusion

In summary, I have concluded the following:

1. Section 275 of the *Insurance Act* requires this dispute between insurers to be conducted in accordance with the *Arbitration Act*, 1991.

2. Section 52 of the *Arbitration Act*, 1991, requires me to apply the limitation law that would apply to an action.

3. The limitation law which would apply to an action is the *Limitations Act*, 2002, if this matter is a claim as defined in that act.

4. ING's loss results from Markel's omission to make reimbursement as required and therefore this matter is a "claim" as defined in the *Limitations Act*, 2002.

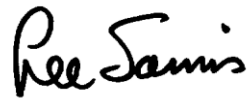
5. The commencement of the limitation is governed by section 5 of the *Limitations Act* and requires that there be an omission by Markel which necessarily means that there must be a communication to Markel. The limitation is not triggered by the mere payment of a benefit by ING.

6. Section 5 of the *Limitations Act* requires that the limitation period commences only after a proceeding would be an appropriate means to seek to remedy injury, loss or damage. I find that date to be when the Markel letter of September 21, 2006 was received by ING.

As it is agreed that a Notice of Submission to Arbitration was served by ING on Markel on September 19, 2008, it is my conclusion that none of the claims advanced by ING in this proceeding are precluded as a result of the operation of the *Limitations Act*, 2002, as that section is required to be applied by section 52 of the *Arbitration Act*, 1991.

Counsel should make any submissions with respect to costs within the next 30 days.

Dated at Toronto this 4th day of April, 2011.



LEE SAMIS
Arbitrator