IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8, as amended

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

STATE FARM INSURANCE COMPANY

Applicant

- and -

MANITOBA PUBLIC INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Stanley Tessis/Amanda Lennox – Laxton Glass LLP
Lawyer for the Applicant, State Farm Insurance Company
(hereinafter referred to as "State Farm")

B. Robin Moodie – Moodie, Mair, Walker LLP
Lawyer for the Respondent, Manitoba Public Insurance Company
(hereinafter referred to as "MPI")

ISSUE

This matter comes before me as a motion on a preliminary issue regarding a loss transfer dispute arising from Requests for Indemnification made by the State Farm to MPI with respect to accident benefits paid to the State Farm's insured, John Lancaster ("Mr. Lancaster"), following a multi-vehicle accident on November 21, 2001 ("the accident").

At dispute is whether the State Farm is entitled to be reimbursed under section 275.(1) of the *Insurance Act* for accident benefits paid to Mr. Lancaster, and claimed from the Respondent in a Request for Indemnification dated November 12, 2009, totalling $1,305,020.71.

MPI takes the position that because the State Farm failed to initiate an arbitration to recover this amount within two years following November 13, 2009, therefore the State Farm's loss transfer claim in relation to this amount is statute-barred under the *Limitations Act, 2002.*

An arbitration for loss transfer indemnity was earlier commenced by State Farm on Oct 24, 2008. No separate arbitration was commenced for loss transfer indemnity following service by State Farm of it's Request for Indemnification dated November 12, 2009 in the amount of $1,305,020.71.

LOSS TRANSFER

Section 275 of the *Insurance Act*, R.S.O. 1990 Chap I-8 creates a scheme for loss transfer indemnity where any insurer who paid statutory accident benefits may be repaid by another insurer in certain circumstances.

Section 9(2) of Ontario Regulation 664 under the *Insurance Act* provides a first party insurer who insures an automobile with the right, in certain circumstances, to claim indemnification from a second party insurer who insures a heavy commercial vehicle.

The subject collision involved an automobile and a heavy commercial vehicle.

If the insurers are unable to agree with respect to indemnification under s.275 of the *Insurance Act* the dispute shall be resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, Chap 17.

Indemnification under subsection 275(1) of the *Insurance Act* shall be made according to the respective degree of fault of each insurer's insured as determined under the Fault Determination Rules as set out in Ontario Regulation 668/90 under the *Insurance Act*

FACTS

Mr. Lancaster's automobile was insured by State Farm.

On November 21, 2001, Mr. Lancaster was involved in an accident in which he sustained serious injuries when his automobile was struck by a heavy commercial vehicle (tractor trailer) insured with MPI.

As a result of the accident, Mr. Lancaster applied to State Farm for statutory accident benefits ("accident benefits") under his auto policy.

Pursuant to section 275.(1) of the *Insurance Act*, State Farm became entitled to claim loss transfer indemnification from MPI for accident benefits State Farm paid to Mr. Lancaster to the extent that the operator of the heavy commercial vehicle was responsible for the collision.

Between March 22, 2002 and September 26, 2005, State Farm made Requests for Indemnification totalling approximately $375,000.00, of which MPI reimbursed State Farm approximately $371,408.00. These amounts are not in dispute as between the parties. MPI has made no further payments.

On January 16, 2006, State Farm served on MPI a Request for Indemnification totalling $68,203.98.

On October 21, 2008, State Farm served on MPI a Request for Indemnification totalling $478,485.06.

On October 24, 2008, State Farm served on MPI a Notice to Participate and Demand for Arbitration. At that time there were 2 outstanding Requests for Indemnity.

On May 5, 2009, State Farm served an additional Request for Indemnification of $73,628.66.

On August 20, 2009, State Farm settled Mr. Lancaster's accident benefits claims for $1,215,250.00.

On November 12, 2009, State Farm served on MPI a final Request for Indemnification for $1,305,020.71.

On May 10, 2010 counsel for State Farm advised counsel for MPI that the amount being claimed was $1,925,338.41 being the total of the following Requests for Indemnity:

January 2006	$68,203.98
October 2008	$478,485.06
May 2009	$73,628.66
November 2009	$1,305,020.70

On June 1, 2010, counsel for MPI wrote to counsel for State Farm and again requested information on the total amount of indemnity being sought.

On June 3, 2010, counsel for State Farm wrote to counsel for MPI and advised that this information could be found in the correspondence dated May 10, 2010.

On March 7, 2011, counsel for State Farm wrote to counsel for MPI and again confirmed the outstanding quantum being sought, along with the interest and cost calculations.

On April 20, 2011, counsel for MPI wrote to counsel for State Farm and advised that the file had been reviewed at that time. Counsel for MPI noted the following issues: 1) quantum of the statutory accident benefits paid to the claimant; 2) withdrawal of acceptance of liability for the motor vehicle accident; and 3) limitation period issue with respect to the Request for Indemnification.

On April 20, 2011, counsel for State Farm wrote to counsel for MPI and noted that "I think you and I see the case the same way. There might be a limitation issue for a very small amount, if any. It might turn on the start of the limitation." The writer went on to propose two options for Arbitrators.

On March 13, 2012, both counsel discussed the appointment of a private Arbitrator.

Again on April 10, 2012 counsel discussed the appointment of a private Arbitrator.

On April 24, 2012, counsel for State Farm wrote to counsel for MPI and advised that, as per an earlier discussion, the parties had agreed to use Kenneth J. Bialkowski as private Arbitrator. The writer suggested that the parties get in contact and schedule the initial teleconference.

On June 18, 2012, counsel for State Farm wrote to counsel for MPI and confirmed a conversation between the parties earlier that day in which they agreed to use Kenneth J. Bialkowski as private Arbitrator. The writer advised that he would be scheduling the initial teleconference.

On July 19, 2012, the initial pre-arbitration teleconference was scheduled with Kenneth J. Bialkowski.

On December 21, 2012, MPI's current counsel wrote to counsel for State Farm and advised of the limitation period issue currently in dispute (i.e., MPI alleged that State Farm is precluded from proceeding with the claims for indemnification of May 5 and November 12, 2009 as arbitration was not initiated within two years of the date the Requests for Indemnification were made).

ANALYSIS AND FINDINGS

The preliminary issue before me is whether State Farm's claims for indemnity, as set out in a Request for Indemnification dated November 12, 2009, are time barred as no separate arbitration was commenced within two years as required by the Limitations Act, 2002.

MPI takes the position that no Demand for Arbitration was ever served with respect to the November 12, 2009 Request for Indemnification and as a result the claim is time barred.

State Farm takes the position that an arbitration had already been commenced in October 2008 and that any subsequent Requests for Indemnification ought be dealt with in the already commenced loss transfer arbitration. In the alternative, State Farm took the position that the agreement of the parties to appoint a third party to assist in resolving the dispute suspends the running of the limitation period by reason of s. 11 of the Limitations Act.

Both parties agree that the Limitations Act applies to loss transfer claims. MPI submits that The Limitations Act, 2002 has fundamentally changed the operation of limitation periods. Section 1 of the Limitations Act defines "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or an omission". Section 4 of the Limitations Act prescribes a basic limitation period of two years from the date a claim is discovered:

> 4. 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.

Discoverability in loss transfer claims is governed by section 5.(1)(a) of the *Limitations Act.* The concept of discoverability outlined in section 4 and defined by section 5(1)(a) of the *Limitations Act, 2002* is significantly different from the wording in section 45.(1)(g) of the former *Limitations Act, 1991*, which barred the commencement of claims more than six years after the "cause of action arose". Unlike the *Limitations Act, 1991*, Section 5(1)(a) of the *Limitations Act* provides specific criteria for determining when a claim is discovered. Under the *Limitations Act*, 2002 a claim is "discovered" when the party asserting the claim knows:

> (i) that the injury, loss or damage has 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.

According to MPI, for there to be a "claim" and for the claim to be discovered, there must, by definition and by the words of section 5.(1), be an injury, loss or damage.

In *Federation Insurance v. Markel Insurance Co. of Canada*, (2012) ONCA 218 Justice Sharpe of the Ontario Court of Appeal held that in the context of loss transfer claims, the failure by the second party insurer to pay the first party insurer's Request for Indemnification constitutes an omission which causes a loss that satisfies subparagraphs 5.(1)(a)(i) to (iii) of the *Limitations Act*, and "crystallizes" the first party insurer's claim into a complete and valid legal claim that is legally enforceable the day after the Request for Indemnification is made. Only when the claim becomes legally enforceable, does a proceeding become an "appropriate" means to remedy the loss, thus satisfying subparagraph (iv) of section 5.(1)(a). Accordingly, MPI submits that Section 5.(1)(a) of the *Limitations Act* establishes specific pre-requisites that must be met in order for a claim to be discovered, and to which, once met, a two-year limitation period applies. As a result, MPI submitted that under the new *Limitations Act, 2002* a separate cause of action arises with each successive Request for Indemnity with separate limitation periods applying to each. As a result MPI submits that since no separate arbitration was commenced with respect to the November 12, 2009 Request for Indemnification it is now time barred from pursuing the claims set out in that Notice.

On the other hand, State Farm takes the position that the Notice to Participate, served on MPI on October 24, 2008, commenced arbitration with respect to all Requests for Indemnification, including those served within two years prior to the delivery of the Notice to Participate and all subsequent Requests for Indemnification. As a result, it is State Farm's position that it complied with the limitation period to commence arbitration, and it is not precluded from proceeding with the loss transfer claim against MPI with respect to the Requests for Indemnification dated May 5 and November 12, 2009. (only the latter being the subject matter of this preliminary issue).

In the alternative, it is the position of State Farm that the agreement of the parties to appoint a third party to assist in resolving the loss transfer dispute suspended the running of the limitation period pursuant to section 11 of the *Limitations Act*. It is the State Farm's position that the Notice to Participate served on MPI on October 24, 2008 constituted the agreement and that the limitation period was suspended as of that date. As a result, it is State farm's position that it is not precluded from proceeding with the loss transfer claim against the MPI with respect to the Requests for Indemnification dated May 5 and November 12, 2009. (only the latter being the subject matter of this preliminary issue).

On the basis of the arguments presented to me as well as the documentation and jurisprudence reviewed I accept the arguments advanced by State Farm.

Although the *Arbitration Act 2002* dictates when an arbitration is to be commenced it is the *Insurance Act* and *Arbitration Act* which govern the implications of having commenced an arbitration. In Cahoon v. Franks (1967) S.C.R. 455, the Supreme Court of Canada determined that seeking to add additional claims arising from a single tort did not establish a new cause of action which is subject to a limitation period. The Supreme Court of Canada quoted from Johnson, J.A. of the Court of Appeal and stated "'The factual situation'" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action". State Farm submitted that the service of additional Requests for Indemnification following the commencement of arbitration is akin to adding additional claims to the initial cause of action and does not result in new and separate causes of action subject to a limitation period as alleged by MPI. I accept the legal principles outlined in Cahoon (supra). The situation is similar to a personal injury claim where additional claims for losses can be added where the action was originally commenced in a timely fashion. By way of simple example, it is akin to an injured bodily injury claimant requiring home modifications long after his or her lawsuit had been commenced. It would not be necessary for the claimant to start a separate lawsuit for the expenses incurred in the home modifications but the claim would simply be dealt with in the context of the existing lawsuit provided the pleadings were broad enough to incorporate such claims and, if not, a motion could simply be brought to expand the already existing claim for damages.

In my view to require a separate arbitration for each unsatisfied Request for Indemnification makes no sense. It would result in an unnecessary multiplicity of legal proceedings with potential conflicting legal findings. There is no guarantee that the same arbitrator would be chosen for each of the arbitrations. As a result there could be conflicting production orders and conflicting liability findings. In many loss transfer disputes liability for a collision must be determined by the arbitrator either by application of the Fault Determination Rules or in some cases by application of the ordinary rules of negligence. I find that once a loss transfer arbitration is commenced it governs the claims outlined in Requests of Indemnification served within two years of the commencement of the arbitration and any Requests made subsequent to the commencement of arbitration so long as the arbitration is still active and has not been finalized. I have reviewed the decisions of State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co. 2005 CarswellOnt 7427 and Markel Insurance Company of Canada v. ING Insurance Company of Canada 2012 ONCA 218. I do not believe either case supports the proposition that each Request gives rise to a separate limitation period and requires the commencement of a separate arbitration. They simply do not deal with a situation whereby an arbitration has been commenced in a loss transfer dispute with subsequent service of further Requests for Indemnification.

I accept that once a Notice to Participate has been served pursuant to the *Arbitration Act*, a retrospective limitation is placed on those Requests for Indemnification which will be governed by the Notice to Participate (i.e., the Requests for Indemnification must have been delivered within two years of the date that the Notice to Participate was delivered). I accept that once a Notice to Participate has been delivered pursuant to the *Arbitration Act*, the limitation period for which to commence arbitration has been satisfied. State Farm submitted that once the *Limitations Act* has been satisfied, the *Arbitration Act* governs what issues may be disputed at arbitration. I am satisfied that such interpretation is consistent with the general objectives of a limitation period (as set out in Mazzuca v. Silvercreek Pharmacy Limited, 2001 CarswellOnt 4133 SCC) which is to ensure that litigation is commenced in a timely manner and to protect defendants from being blindsided by a claim that arose from events that took place many years previously. This not a case where MPI has been

blindsided or prejudiced in any way. The exchange of correspondence between counsel after arbitration was commenced clearly identified the ongoing payments to State Farm's insured and the ultimate settlement of the accident benefits claim giving rise to the final Request for Indemnification dated November 12, 2009 in the amount of $1,305,020.70.

I also accept that such an interpretation (that once an arbitration is commenced it is the *Arbitration Act* which governs what issues may be disputed) is consistent with the principles of loss transfer. State Farm submitted that the *Insurance Act*, and the loss transfer framework in particular, was designed to create a simple system between sophisticated litigants (i.e., insurers) whereby disputes are governed by a specialized procedure pursuant to the *Arbitration Act*. It is commonly accepted that the loss transfer framework is meant to provide an expedient and summary method of reimbursement between insurers (see: *Jevco Insurance Co. v. York Fire Casualty Co 133 D.L.R. (4th) 592 OCA.*). The implication that an initial Notice to Participate governs all future Requests for Indemnification while the two sophisticated parties are engaged in the dispute resolution process is in keeping with the principle that loss transfer is to be an expedient, summary method of settling disputes. I find that requiring the primary insurer to serve additional Notices to Participate with every subsequent Request for Indemnification served after the delivery of the initial Notice to Participate would add additional, unnecessary steps to a framework designed to be swift and efficient.

Simply stated, I believe that the *Limitations Act* prescribes "when" an arbitration must be commenced and the *Arbitration Act* governs "how" the arbitration is to be commenced and "what" issues may be disputed within the loss transfer arbitration. The Notice to Participate makes the claim for loss transfer indemnity and it is then up to the arbitrator to determine the amount of indemnity. In the case of an open accident benefits claim the amount of indemnity or damages is an increasing one that will be dealt with by the arbitrator.

Pursuant to section 24 of the *Arbitration Act*, "a notice that commences an arbitration without identifying the dispute **shall** be deemed to refer to arbitration **all** disputes that the arbitration agreement entitles the party giving the notice to refer" (i.e., "what" disputes may be referred to arbitration). Subsection 275(1) of the *Insurance Act* states that an insurer is entitled to "indemnification in relation to such benefits paid by it" from an insurer "of such class or classes of automobiles...involved in the incident from which the responsibility to pay the statutory accident benefits arose". I am satisfied that the Notice to Participate served on MPI was broadly worded and did not specifically place any limitations on the amount of indemnification disputed and/or being referred to arbitration. I am satisfied that as the subject Notice to Participate did not identify the specific Requests for Indemnification to be arbitrated between the parties, pursuant to section 24 of the *Arbitration Act*, the Notice to Participate is deemed to refer all disputes to arbitration. I find that "all" includes Requests for Indemnification delivered within two years of the Notice to Participate and all subsequent Requests for Indemnification while the dispute remains in arbitration.

Regardless of my findings aforesaid, I believe that the State Farm's alternative argument involving s. 11 of the *Limitations Act* also has merit. Section 11 of the *Limitations Act* provides that where the parties to a dispute have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation period established by the *Limitations Act* does not run from the date of the agreement until the date the claim is resolved, the date the attempted resolution process is terminated, or the date a party terminates or withdraws from the agreement. I accept that the Notice to Participate in Arbitration on October 24, 2008 intended to arbitrate all issues arising from the loss transfer

claim. The Notice did not restrict the dispute to past Requests for Indemnification. Furthermore, correspondence between the parties made it clear that all claims were to be resolved through the arbitration process. It ought to have been clear to MPI that State Farm was seeking reimbursement for all Requests served upon MPI including those payments made to it's insured after the commencement of arbitration on October 24, 2008. Once served with the Notice to Participate on October 24, 2008 MPI was statutorily obligated by reason of s. 275 of the *Insurance Act* to participate in the arbitration of the loss transfer dispute. This statutorily required involvement of a third party had the effect of suspending any limitation with respect to any subsequent Requests for Indemnification as long as the loss transfer arbitration was still active and yet finalized.

In my view it only makes sense for a loss transfer arbitration, once commenced, to involve Requests for Indemnification made in the two year period predating the commencement of the arbitration and those subsequent Requests for Indemnification made while the arbitration continues. This avoids a multiplicity of proceedings and possible contradictory findings. It is consistent with the commonly accepted principle that the loss transfer legislative framework was meant to provide an expedient and summary of reimbursement between insurers.

I find that State Farm is not time-barred from pursuing its claims outlined in the November 12, 2008 Request for Indemnification served upon MPI.

ORDER

In light of my findings aforesaid, I order that State Farm is not precluded from proceeding with the loss transfer claims with respect to the Request for Indemnification dated November 12, 2009.

I order that MPI pay the costs of State Farm with respect to this preliminary issue on a partial indemnity basis as well as paying the costs of the Arbitrator.

DATED at TORONTO this 4th)

day of February, 2014.)

KENNETH J. BIALKOWSKI
Arbitrator