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:

FEDERATION INSURANCE COMPANY OF CANADA

Applicant

- and –

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: May 11, 2010

Counsel:

Daniel Strigberger for the Applicant

Michael T. Duda for the Respondent

Introduction

The parties appointed me pursuant to the *Arbitration Act, 1991*, and section 275 of the *Insurance Act*, to arbitrate a dispute concerning Federation's entitlement to

indemnification from Jevco[1] for the payment of Statutory Accident Benefits ("SABS") to Pierrette Veillette.

The Arbitration was conducted pursuant to the terms of a written Arbitration Agreement signed and dated August 26, 2010, and a March 25, 2009 letter from Densem ADR Solutions Inc. to counsel.

Factual Background to the Issues[2]

Pierrette Veillette applied to Federation Insurance for the payment of SABS following a motor vehicle accident occurring January 24, 2002. Federation paid SABS to Ms. Viellette and began submitting Loss Transfer Requests to Jevco seeking reimbursement for the amounts paid.

Fault for the accident was not disputed. Jevco has made some payments to Federation in response to the Loss Transfer Requests. The appropriate quantum of reimbursement to Federation is disputed by Jevco, as is Federation's entitlement to reimbursement with respect to certain Loss Transfer Requests, based on Jevco's argument that some of Federation's reimbursement requests were made outside the applicable limitation period.

[1] After the commencement of proceedings in connection with this matter Kingsway became Jevco Insurance Company. Therefore, in this Award I will refer to the Respondent as "Jevco".

[2] These facts are either agreed or non-contentious. The particulars set out here are found in the parties' *facta*

The Issues

1) Does the *Limitations Act, 2002*, apply to Federation's loss transfer claims against Jevco, in respect of SABS payments made by Federation between January 1, 2004, and November 5, 2006?

2) If the *Limitations Act, 2002*, applies to the loss transfer claims described in issue 1, what effect, if any, does it have on those claims?

3) What amount, if any, is due from Jevco to Federation in respect of all loss transfer claims that have been submitted by Federation to Jevco?

We conducted an arbitration hearing on May 11, 2010, restricted to issues 1 and 2. Documentary evidence was tendered by the parties and counsel made submissions on issues 1 and 2.

Counsel agree, and I concur, that my decision on arbitration issues 1 and 2 will impact arbitration issue 3 and that a determination of issue 3 will likely require further documentary and/or *viva voce* evidence relevant to both the legal and factual aspects of issue 3.

Therefore, this decision will, subject to the appeal rights of the parties, determine arbitration issues 1 and 2, with the parties reserving the right to tender further evidence and make further submissions before issue 3 is determined.

The Evidence and Factual Findings

One exhibit was entered into evidence at the May 11, 2010 Hearing:

Exhibit 1: Federation's Arbitration Brief (11 Tabs)

The determination of the issues set out above is really a matter of deciding questions of law. There is little or no dispute on the facts relevant to the legal issues.

Paragraphs 1 through 7 of Federation's Factum outline the Loss Transfer Requests submitted by Federation to Jevco, Jevco's response to those requests, and the indemnity amounts outstanding, the entitlement to recover which will be resolved by a determination of the issues set out above. There appears to be a total of $74,590.35 outstanding from 5 (#3 - #7) indemnity requests submitted by Federation to Jevco.

For clarity, I will set out some of the important dates that will be relevant to the determination of the issues:

- January 24, 2002 – the accident
- **January 1, 2004 – commencement date for the application of the *Limitations Act, 2002*.**
- April 6, 2004 – Loss Transfer Request No. 3 submitted by Federation.
- May 20, 2004 – Jevco's response to Loss Transfer Request No. 3.
- August 4, 2004 – Loss Transfer Request No. 4 submitted by Federation.
- September 1, 2004 – Jevco's response to Loss Transfer Request No. 4.
- November 1, 2004 – Loss Transfer Request No. 5 submitted by Federation.
- January 21, 2005 – Loss Transfer Request No. 6 submitted by Federation.

- August 9 & August 10, 2005, Jevco's response to Loss Transfer Requests Nos. 5 and 6.
- May 31, 2006, Loss Transfer Request No. 7 submitted by Federation.
- August 8, 2006, Jevco's response to Loss Transfer Request No. 7.
- October 2, 2006, Federation's response to Jevco's August 8, 2006 letter regarding Loss Transfer Request No. 7.
- November 6, 2006, Jevco's response to Federation's October 2, 2006 letter regarding Loss Transfer Request No. 7.
- November 8, 2006, Federation's response to Jevco's November 6, 2006 letter regarding Loss Transfer Request No. 7.
- **November 5, 2008, Federation commences arbitration.**

Analysis

The first question to be answered is whether the *Limitations Act, 2002,* applies to the Loss Transfer claims as outlined under the previous heading.

Federation's first position is that the *Limitations Act, 2002*, does not apply to the Loss Transfer scheme set out in section 275 of the *Insurance Act*. Federation argues that the *Limitations Act, 2002*, does not apply because a request for indemnity made pursuant to section 275 of the *Insurance Act* does not come within the definition of "claim" as defined in the *Limitations Act, 2002*.

"Claim" is defined in the *Limitations Act*, *2002*, as, "…*a claim to remedy an injury, loss, or damage that occurred as a result of an act or omission;"*. In support of its

position, Federation relies upon the authority of *Lloyd's Underwriters v. Dominion of Canada General Insurance Co.*[3] for the proposition that a claim for indemnity is not a claim for damages.

Alternatively, Federation argues that it is at best ambiguous whether a loss transfer request for indemnity comes within the *Limitations Act, 2002*, definition of "claim". It argues that the well established principle that legislation limiting rights must be strictly construed is applicable in this case and should result in the conclusion that the *Limitations Act, 2002*, provisions do not apply to limit Federation's entitlement to indemnity.

Jevco's responding submissions do not directly address the definition of "claim" issue. Jevco argues however, that legal precedent, both in Ontario and in other provinces clearly supports the application of limitation period legislation to matters dealt with under the *Arbitration Act, 1991*, which includes loss transfer indemnity claims.[4]

I find that the *Limitations Act, 2002*, does apply to loss transfer indemnity claims under section 275 of the *Insurance Act*, and hence applies to the loss transfer claims at issue in this arbitration.

Firstly, I believe this conclusion is consistent with the legislative purpose for which the *Limitations Act, 2002*, was enacted. According to Feldman J.A., in *Joseph v. Paramount Canada's Wonderland*[5], the *Limitations Act, 2002,* "…*represents a revised and comprehensive approach to the limitation of actions (that is designed) to balance*

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[3] (2008) 89 O.R. (3d) 509, Ont. Sup. Ct.
[4] See the discussion and cases cited in paragraphs 22 – 26 of Jevco's factum.
[5] (2008) 90 O.R. (3d) 401 (Ont. C.A.), at p. 8

the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs." Justice Feldman's comments were cited with approval by her brother judges in *Placzek v. Green*[6].

I do not see that that the Court's reasoning should be any less applicable to loss transfer disputes between insurers. The *Limitations Act, 2002,* has rendered uniform many heretofore different limitation periods to create greater consistency of process in all types of litigation. Only in exceptional cases, for example sexual assault by a person in authority or undiscovered environmental claims, are there no time limits to make a claim.[7]

I find further support for my conclusion in the fact that arbitrators, the Ontario Superior Court, and the Ontario Court of Appeal have all held that the statutory limitation period scheme under the preceding legislation replaced by the *Limitations Act, 2002*, applied to section 275 loss transfer indemnity claims.[8]

The same legal and policy reasons for applying the provisions of the previous limitations legislation to *Insurance Act* section 275 loss transfer claims would seem to me equally appropriate to apply the provisions of the successor legislation, the *Limitations Act, 2002.* I did not hear any convincing argument that the legislature intended to exempt loss transfer claims under section 275 of the *Insurance Act* from the sweeping scope of the *Limitations Act, 2002* when it replaced the *Limitations Act,*

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[6] 307 D.L.R. 4th 441 (Ont. C.A.).
[7] Cf. sections 16 and 17, *Limitations Act, 2002.*

[8] The provisions of the *Limitations Act, R.S.O. 1990, c. L15, s.45 (g)* were held to apply to *Insurance Act,* section 275 loss transfer claims in *State Farm Mutual Automobile Insurance Company* v. *Dominion of Canada General Insurance Company* [2006] I.L.R. I-4468 (Ont. C.A.), (affirming Arbitrator R.E. Holland), in *Lloyd's Underwriters v. Dominion of Canada General Insurance Co.*(*supra,* note 3) and in *York Fire & Casualty* v. *Cooperators*, (1999) 17 C.C.L.I. (3d) 16 (Ont. Sup. Ct.).

R.S.O. 1990, c.L15. As I have indicated, I do not think it would be reasonable to draw such a conclusion in light of the significant legal precedent to the contrary developed under the preceding legislation.

It is the second issue in this arbitration that, in my view, raises the most interesting questions. The issue as stated by the parties of necessity focuses on how the loss transfer requests in this case are affected by the application of the *Limitations Act, 2002.* Breaking this down into the components that must be considered, the question to be answered is, when does the limitation period set out in section 4 of the *Limitations Act, 2002*, commence for loss transfer indemnity rights in section 275 of the *Insurance Act?*

It is in answering this question that I will also address in more detail Federation's argument that a loss transfer indemnity request is not a "claim" within the meaning of the definition set out in the *Limitations Act, 2002*. I am of the opinion that to properly interpret the provisions of the *Limitations Act, 2002*, and apply them to the loss transfer indemnity claims in this case it is necessary to read section 1 of the *Act,* the "*Definitions*" section, section 4 of the *Act*, the "*Basic limitation period section*", and section 5 of the Act, the "*Discovery*" section, as operating together as a whole. This approach is not only consistent with principles of statutory interpretation, but I believe that it yields a result consistent with the purpose of the *Act*.

I will begin my analysis of this second arbitration issue with a consideration of the statutory rights given under section 275 of the *Insurance Act* to an insurer paying SABS. That insurer is, provided the other terms of the section are satisfied, entitled to

"…*indemnification in relation to such benefits paid by it from the insurers…of automobiles…named in the regulations involved in the incident…*". The insurer with indemnity rights is entitled to pursue them *via* arbitration if the insurers are unable to agree with respect to indemnification.

An analysis of the *Limitations Act, 2002*, leads me to conclude that the concept of "claim", which is defined in section 1, is intended to replace the concept of "cause of action" under the previous *Limitations Act, R.S.O. 1990.* In effect however, this seems to be a change in form, but not in substance. Like a claim, a cause of action *"…is a …factual situation the existence of which entitles one person to obtain from the court a remedy against another person."*[9]

I would observe here that the language of section 52 (1) of the *Arbitrations Act, 1991,* is supportive of this interpretation. It states, "*…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*."

Federation argues that the *Limitations Act, 2002*, cannot apply to *Insurance Act* section 275 claims for indemnity because they do not come within the definition of "*claim*" in the *Limitations Act, 2002*. Federation asserts that a claim for indemnity is not a claim for damages.

While there is authority for the latter proposition, in my view that argument would apply at best to the word the word "*damage"* in the section. It does not give effect to other words in the *Limitations Act, 2002,* section 1 defining "*claim*". Another principle of

[9] *July v. Neal* (1986) 57 O.R. (2d) 129 (Ont. C.A.).

statutory interpretation is that it should not be assumed that the drafters of legislation intended redundancy with their choice of words. Therefore, the words "*injury",* and "*loss*" in the definition of "*claim"* in the "*Limitations Act, 2002* must be given their own meaning apart from "*damage*".

I suppose it is conceivable that the payment of SABS for which an insurer is entitled to indemnity under section 275 of the *Insurance Act* could be considered an "injury" giving rise to a claim for indemnity but that might be placing a strain on the customary way in which that word is used.

I do not find it necessary to analyze that issue further since I am of the view, and I so find, that a section 275 *Insurance Act* claim for indemnity is a "*claim to remedy…loss…"* within the definition of "*claim*" in the *Limitations Act, 2002*.

In my opinion, for the purposes of section 1 and subsection 5 (a) (i) of the *Limitations Act, 2002,* Federation sustained a "loss" each time it submitted a Request for Indemnity to Jevco, and it was not fully reimbursed by Jevco. The failure to reimburse is brought about by "act" or "omission", thus satisfying subsection 5 (a) (ii) of the *Limitations Act, 2002.*

To properly apply the new *Limitation Act,* 2002, however, the critical part of the analysis becomes determining when the "loss" occurs as this impacts when the time limit to commence a proceeding to remedy the loss begins.

This determination requires an application of both the "*Basic limitation period*" under Section 4, and the "*Discovery"* Section 5, of the *Limitations Act, 2002*. It is now important to contrast the wording of the predecessor legislation, the *Limitations Act,*

R.S.O. 1990 c.L-15, with the *Limitations Act, 2002*. The effect of the old legislation was to preclude legal steps being taken to pursue rights more than six years after the "…*cause of action arose*". The *Limitations Act, 2002*, precludes legal steps being taken to pursue rights more than two years after the "…*claim was discovered*."

At this point there is, in my view, a significant change from the predecessor legislation, the *Limitations Act, R.S.O. 1990*, to the *Limitations Act, 2002.* The previous legislation did not contain any statutory direction as to how it was determined when the cause of action arose, and hence when the limitation period began to run on a proceeding to enforce that cause of action. Under the previous legislation, the determination of when the limitation period commenced in loss transfer cases was made by arbitrators and courts in the jurisprudence that developed relating to section 45 (1) (g) of the *Limitations Act, R.S.O. 1990.*[10]

The new legislation however, sets out in Section 5 specific criteria for determining when a "claim" is discovered and hence when the limitation period on a proceeding to enforce that claim begins to run. Paraphrasing Section 5, subsections (i) and (ii), the 2 year limitation period begins to run when a person knew or ought to have known he or she had sustained a loss that was caused by an act or omission.

It is subsections (iii) and (iv) of section 5 that, in the circumstances of a case like the one before me, create a critical change in the timing of when the "loss" occurs, and when the limitation period begins to run.

[10] See the cases in note 8.

Dealing first with subsection (iii) of section 5, it requires that the person know or ought to know that the act or omission which caused the loss, "***was that of the person against whom the claim is made***" (author's emphasis).

The case law that developed under the *Limitations Act, R.S.O. 1990, c. L-15* determined that the cause of action for loss transfer claims arose upon payment of SABS to a claimant by the insurer entitled to indemnity for that payment from the second insurer. The limitation period was held to be six years from the date of each SABS payment by the first insurer. To properly give effect to the wording of the *Limitations Act, 2002*, I do not believe it is possible to take the same approach.

Effect must be given to subsection (iii) of Section 5 of the *Limitations Act,* 2002. In the case before me, the result is as follows: By operation of Section 275 of the *Insurance* Act, Federation had a claim or claims for indemnity against Jevco arising out of the payment(s) by it of SABS to Ms. Veillette. Although Federation's right to be indemnified by Jevco arose upon payment by it to Ms. Veillette, the time limit to pursue a proceeding to enforce that right of indemnity could not start until Federation knew or ought to have known it had suffered a "loss" caused by an "act" or "omission" by Jevco (the person "*against whom the claim is made")*.

Jevco argued before me that the time for the commencement of the limitation period in loss transfer indemnity claims has been determined by the Ontario Court of Appeal to be the when the first insurer (Federation, in this case) makes a payment of SABS for which it is entitled to indemnity from the second insurer (Jevco, in this case).[11]

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[11] State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co., 79 O.R. (3d) 78, (Ont. C.A.).

Federation stressed that The Court of Appeal also held a new cause of action arose, or put another way, a new limitation period commenced, with each payment of SABS by the first insurer. In essence, this created a "rolling" limitation period that renewed itself with each payment of SABS by the first insurer.

I agree with Jevco's characterization of the Court of Appeal's statement of the law as it applied when the *State Farm v. Dominion of Canada* case was decided. I would undoubtedly be bound by that statement of the law were it not for the fact that the decision was founded upon the application of the old limitation legislation, section 45 (1) (g) of the *Limitations Act, 1990, R.S.O. c. L 15*. As I have indicated, that legislation has subsequently been repealed and replaced by *The Limitations Act, 2002*, which applies to this case, and is fundamentally different in its wording and operation. Therefore, I do not regard myself as bound by the decision in *State Farm v. Dominion of Canada* to decide that the limitation period for loss transfer indemnity claims runs from the date of each SABS payment by Federation.

I would, however, adopt the reasoning and approach taken by the Court of Appeal in *State Farm v. Dominion of Canada* with respect to the limitation period renewing itself with each "loss" created by an "act" or "omission" by Jevco.

I conclude that the effect of Section 5 (a) (iii) of the *Limitations Act, 2002,* is that the limitation period for Federation's loss transfer indemnity claims commences each time there was an "act" or "omission" by Jevco resulting in a "loss" to Federation because it was not indemnified in respect of a Request for Indemnity it had submitted to Jevco.

Jevco argued that to interpret the *Limitations Act, 2002,* consistently with the approach taken in the prior jurisprudence, I should focus on the “act” or “omission” of Jevco’s insured that gave rise to Ms. Veillette’s entitlement to SABS, as the one relevant to subsection (iii) of Section 5 in determining “*the person against whom the claim is made*”. It was argued that the interpretation of section 275 of the *Insurance Act* when subject to the *Limitations Act, 2002,* should be analogized to the principle of vicarious liability. This theory holds that for the purpose of section 275, Jevco, the insurer, is responsible for the acts or omissions of its insured, giving rise to Federation’s loss in having to pay SABS to Ms. Veillette.

I think such an interpretation unduly strains the language of subsection (iii) of Section 5. It would involve reading into the section language which clearly is not there, without any compelling reason or justification for doing so. The right to claim loss transfer indemnity is a statutory right given by section 275 of the *Insurance Act* to one insurer against another **insurer** (author’s emphasis). It is not based on any common law principles such as subrogation or vicarious liability. Section 275 does not give the first insurer any rights to pursue an indemnity claim against another insurer’s insured. If the legislature had intended this it could have very easily said so.

The interpretation that it must be Jevco’s act or omission which triggers the limitation period for Federation to commence a proceeding to enforce its indemnity rights is, in my opinion, much more in keeping with the plain and ordinary interpretation of the words in the statute.

I recognize that this may represent a departure from the state of loss transfer indemnity law as it developed under the *Limitations Act, R.S.O. 1990, c. L-15.* I also realize that this interpretation of the application of the *Limitations Act, 2002*, to loss transfer indemnity claims could result in a situation where the limitation period would be indefinitely postponed by a failure by a first party insurer to submit a loss transfer indemnity claim to a second party insurer in timely fashion.

I would address these arguments as follows: First, I am strengthened in my conclusion regarding the proper application of the *Limitations Act, 2002*, to loss transfer indemnity claims by developments concerning the law of debtor/creditor rights and obligations, and amendments to the *Limitations Act, 2002*.

I was referred to the decision of the Ontario Court of Appeal in *Hare v. Hare*.[12] This was a split (2-1) decision of the Court dealing with the issue of how the *Limitations Act, 2002*, applied to the commencement of the limitation period for a creditor's right to repayment of a loan secured by a promissory note.

Two judges concurred that the limitation period began to run against the creditor upon receipt by the creditor of the promissory note. Juriansz J., in dissent, concluded that the *Limitations Act, 2002*, had changed the law and that the limitation period did not run until there had been default on a demand for repayment of the loan.

The first reason given by the majority for declining to accept, as Juriansz J. did, what was admitted to be a position that had, "*a great deal of strength…*"[13] was that this, "…*would overturn centuries' old jurisprudence…*". The second reason given for not

[12] 277 D.L.R. (4th) 236, (Ont. C.A.)
[13] *Ibid.*

accepting the argument that the limitation period began to run upon default on a demand was that this could give rise to a situation where the limitation period never began to run. The claim could exist in perpetuity if the creditor made no demand and thus there was no default by the debtor.

In his dissenting opinion, Justice Juriansz rejected these arguments as applying an "interpretive approach" that was not called for in the circumstances, since the usual principles of statutory interpretation yielded a result in keeping with the plain meaning of the provisions of the *Limitations Act, 2002*, that did not interfere with commercial practice or common law rights. He also noted that limitation periods were not the only means available to prevent parties from "sitting" on their rights indefinitely. "*At the outset, it is important to note that '[t]he law of limitations is wholly a creature of statute. Limitation periods were unknown to the common law, although equity developed the doctrine of laches': Grame Mew, The Law of Limitations, 2nd ed. (Markham: LexisNexis Butterworths, 2004,) at 29."*[14]

The common law doctrine of *laches* is available to the second insurer where the evidence supports a finding that first insurer has been exceptionally dilatory in seeking indemnity for SABS payments and has prejudiced the second insurer.

The significant point to make about *Hare v. Hare* is that the *Limitations Act, 2002*, was amended following this decision. Section 5 (3) was added in 2008. That section makes it clear that the limitation period to commence a proceeding in relation to a demand obligation commences after there has been a demand for performance and a

[14] *Ibid.*

failure to perform. In effect, the legislature reversed the majority result in *Hare*, and gave effect to the dissenting opinion of Justice Juriansz.

Effect must also be given to subsection 5 (a) (iv) of the *Limitations Act, 2002.* Here I derive further support for my conclusion in this case, from the reasoning of Justice Juriansz in *Hare.* Justice Juriansz analyzes how the *Limitations Act, 2002*, reflects the legislative intent, and social interest, in undertaking litigation only when necessary. He cites, with approval, a passage from a 1991 report prepared by a Consultation Group engaged to provide advice on the drafting of the new *Limitations Act, 2002*. The report said, "*It would not be in the public interest if the limitations policy inadvertently promoted unnecessary litigation. Accordingly, some account should be taken of the significance of the harm, so the plaintiff is not necessarily required to commence proceedings at the first sign of damage."* Justice Juriansz applied this approach in *Hare*, and stated, "*Thus, it would seem to me that a reasonable person would not know that it was appropriate to commence a legal proceeding to recover a demand loan without first making a demand for repayment".*[15]

Justice Juriansz was discussing this legislative intent in the context of giving effect to Section 5 (a) (iv) of the *Limitations Act, 2002*. He noted that although the requirements of Section 5 (a) (i), (ii), and (iii), may be satisfied on the date that a loan is made by a creditor to a debtor, Section 5 (a), (iv) imposes a further requirement. He points out that there is nothing analogous to this section in either the former limitations legislation, or the common law. By operation of Section 5 (a) (iv), a party does not

[15] *Ibid.*

"discover" a claim until, "*…having regard to the nature of the…loss…, a proceeding would be an appropriate means to seek to remedy it.*"

In applying this section in *Hare,* Justice Juriansz goes on to conclude that although a creditor may know (or ought to know) that a cause of action has accrued at the point he has loaned money to the debtor, it would not be "appropriate" to commence a proceeding against the debtor until the creditor asks the debtor repay the money loaned, and the debtor does not do so.

Applying this approach to the case before me, to give effect to subsection 5 (a) (iv) of the *Limitations Act, 2002,* I conclude that commencing a proceeding (*i.e.* arbitration) would not be an "appropriate means" for Federation to enforce its Section 275 indemnity rights until Jevco had received Federation's Loss Transfer Requests for Indemnity, and those Requests were not fully satisfied.

Having determined how, in my view, the various subsections of Section 5 of the *Limitations Act, 2002,* apply to this case, I will now address in more detail the reasons for my conclusion on the issue of when the limitation period commenced in respect of Federation's entitlement to enforce its loss transfer indemnity rights *via* arbitration, and the exact point at which it commenced.

The starting point for this analysis is a consideration of how the loss transfer indemnity scheme as set out in Section 275 of the *Insurance Act* was designed to operate. In my view, it was created to establish a streamlined mechanism to readjust responsibility for the payment of SABS between commercially sophisticated parties – insurance companies. The structure of the scheme throughout is, it seems to me,

directed towards reducing the incidence of costly litigation in effecting loss transfer. For example, Section 275 (2) stipulates that the Fault Determination Rules in Regulation 668 will be used to determine issues of fault, thus reducing the number of, and the cost of litigating, arguments over liability for reimbursement of SABS payments.

Section 275 (4) reinforces this point. It mandates that arbitration be the means by which any irresolvable disputes between the insurers are decided, rather than longer, and often more costly court proceedings. Most significantly however, this section begins with the words, "*if the insurers are unable to agree with respect to indemnification under this section…".* This wording clearly contemplates that there should be an effort made by the insurers to resolve the loss transfer indemnity claim through discussion and negotiation, before resort is had to arbitration.

To paraphrase Justice Feldman's comments, in *Joseph v. Paramount Canada's Wonderland* [16] regarding the legislative intention behind the *Limitations Act, 2002,* I believe that the application of the *Limitations Act, 2002,* to loss transfer indemnity claims must strike a balance between the rights of the first insurer to have a reasonable opportunity to seek indemnity from the second insurer for SABS payments made, and the rights of the second insurer to have some certainty with respect to its obligation to indemnify the first insurer.

In my opinion the commencement date that best strikes this balance, and is in keeping with principles of statutory interpretation in applying the *Limitations Act, 2002*, is the first day following the receipt by Jevco of Federation's Loss Transfer Indemnity

[16] *Supra,* note 5.

Request(s).[17] That day would be the first day when Jevco could have either responded in a way other than paying or agreeing to pay the Loss Transfer Request as submitted (an "act"), or the first day Jevco did not respond to the Loss Transfer Indemnity Request (an "omission"), and thus the first day that Federation could have suffered a "loss". Therefore, the time limit for commencing loss transfer arbitration would expire 2 years from the first day following Jevco's receipt of each of Federation's Loss Transfer Requests.

Federation has argued that the limitation period should not commence until there has been a disagreement with respect to indemnification, which it submits occurs when the second insurer has responded negatively to the first insurer's Loss Transfer Indemnity Request. This approach does not account for the other trigger in section 5 (a) (iii) - the word "omission". I am of the view that responding in a way other than paying or agreeing to pay, without qualification, the first insurer's Loss Transfer Requests, are "acts" by the second insurer which trigger the 2 year limitation period. Not responding for any period of time, or at all, constitute "omissions" by the second insurer that also trigger the limitation period.

As a matter of statutory interpretation, the "clock" must start on the limitation period at the first moment all of the conditions in section 5 of the *Limitations Act, 2002* have been satisfied. Therefore, the proper way to give effect to the statutory wording in a loss transfer indemnity case is to stipulate that the second insurer has either acted or

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[17] Technically, the conditions of section 5 (a) of the *Limitations Act, 2002,* are satisfied the moment the second insurer receives the Loss Transfer Request, and it remains unpaid. It is a long standing principle of law however, that fractions of a day are not counted for the purpose of calculating legal time periods, hence my determination that the 2 year limitation period commences the day following the day the second insurer received the Loss Transfer Request.

omitted to indemnify the first insurer if it has not done so by the first day following receipt of the Loss Transfer Request. This is the first point in time by which all of the conditions in section 5 (a) of the *Limitations Act, 2002,* are satisfied, thus triggering the commencement of the 2 year limitation period.

I am also of the view that for the purpose of determining when the conditions in section 5 of the *Limitations Act, 2002,* are satisfied, there is a "disagreement", between the insurers the moment that the second insurer does, or omits to do, anything other than pay in full the first insurer's Loss Transfer Request, as submitted. It would be "*appropriate"*, using that word in the legal sense intended by subsection 5 (a) (iv), to commence arbitration at that moment.

For practical purposes, this does not mean that the first insurer must immediately commence arbitration as soon as it delivers a Loss Transfer Request. It has a full 2 years to do so, if necessary. The insurers have plenty of time to negotiate the disagreement and settle the matter without arbitration. As I have mentioned, that is what section 275 (4) encourages. In practice, the insurers will discuss the claim and try to resolve it. As far as applying subsection 5 (a) (iv) of the *Limitations Act, 2002,* is concerned however, as soon as there is a "disagreement", arbitration becomes an "appropriate means" for the first insurer to remedy its "loss" and the final condition to start the 2 year limitation period running has been satisfied.

I am supported in my conclusion regarding the commencement date of the limitation period for several reasons. First, this is the approach that Ontario, and other Canadian legislatures have taken with respect to applying new limitations legislation to

demand obligations.[18] In saying this, I should not be taken to suggest that demand obligations are identical in their legal character to Section 275 loss transfer indemnity claims. They are not. I do believe however, that the procedure by which a creditor seeks repayment of a loan to a debtor is analogous to the way a first, loss transfer insurer seeks indemnity from a second insurer. Treating them similarly for the purposes of determining when the limitation period begins to run under the *Limitations Act, 2002*, is the best way to properly give effect to the provisions of the statute and the purpose of the loss transfer scheme in section 275 of the *Insurance Act*.

The second reason that I believe my conclusion regarding the commencement date for the limitation period is justified, is that it best promotes the purpose of the legislature's intention in both the *Limitations Act, 2002,* and the loss transfer indemnity scheme in section 275 of the *Insurance Act.*

The first insurer seeking indemnity is fairly treated. It can first focus on its obligation to pay SABS to the claimant to ensure the claimant is adequately looked after (the paramount objective of the SABS legislation). It also has control over its rights to seek indemnity from the second insurer. The first insurer effectively starts the limitation period by delivering a request for indemnity to the second insurer. The first insurer then has 2 years from day after the second insurer receives its request to explore with the second insurer, as section 275 (4) of the *Insurance Act* contemplates, options to resolve the indemnity claim. It is reasonable to conclude that the first insurer would know, or ought to know, that it would be appropriate to commence arbitration to enforce its loss

[18] In addition to the Ontario *Limitations Act, 2002,* see also the Alberta *Limitations Act R.S.A. 2000, c.L-12*

transfer indemnity rights if it had not received satisfaction within 2 years of the second insurer receiving its Loss Transfer Indemnity Request.

The second insurer's position is similar to that of a debtor. Its statutory obligation under section 275 of the *Insurance* Act to indemnify the first insurer does not change as a matter of substantive law, but after the provincially enacted limitation period elapses the first insurer is procedurally precluded from commencing arbitration to enforce that statutory obligation.[19] The second insurer is treated fairly in that it knows that once it has received the first insurer's demand for indemnity, the first insurer has only 2 years to commence arbitration to enforce its rights, after which the first insurer cannot pursue the second insurer any further in connection with the claim.

The third, and perhaps most important reason that supports my conclusion is founded on principles of statutory interpretation. As arbitrator, I am bound to interpret the *Limitations Act, 2002,* in its application to loss transfer indemnity claims in a way that best gives effect to the object of the Act, and the intention of the legislature. The following statement of the law of statutory interpretation is found in Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

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

[19] See the analysis of Juriansz J. in *Hare v. Hare.* at para. 102.

In my opinion, my conclusions as to how the *Limitations Act, 2002,* applies to loss transfer claims properly interpret the object of the Act, and the intention of the Legislature.

Subject to my further comments (*infra,* pp. 24, 25), my conclusion with respect to the commencement of the limitation period for Federation's Loss Transfer Requests for Indemnification would result in a finding that the 2 year limitation period had expired on all 5 of the Requests in issue in this arbitration, before Federation commenced arbitration November 5, 2008.

Although I have not received any evidence as to the exact date when each of the 5 Requests was received by Jevco, there is no doubt that Jevco did receive each of the 5 requests because it responded to each of them more than 2 years before Federation commenced arbitration. The latest response received from Jevco was to request # 7. Jevco's first response to Federation in connection with this Request was by letter of August 8, 2006, about 2 years and 3 months before arbitration was commenced.

The evidence is clear that the responses Jevco made to each of Federation's Requests in issue fell short of paying or agreeing to pay, in full, each of those Requests. Since I have concluded that the limitation period begins to run the day following the receipt by Jevco of each Loss Transfer Request for Indemnification, I would find that Federation was out of time to commence arbitration on any of the 5 Requests, using either the date of receipt of those Requests, or even the date of first response by Jevco to those Requests.

As I indicated at the outset of my Award, these reasons address only issues 1 and 2 of my mandate as Arbitrator. It was agreed that counsel would have the opportunity to lead further evidence and make submissions concerning issue 3 – what amount, if any, is due from Jevco to Federation in respect of the loss transfer indemnity claims?

To address issue 3, further evidence and submissions may be required in three areas:

i) When did Jevco receive Federation's Loss Transfer Requests for Indemnity which are the subject of this arbitration?

ii) Should Jevco be estopped from relying upon the effect of the operation of the *Limitations Act, 2002*, as found by the Arbitrator in respect of any of the Loss Transfer Requests for Indemnity?

iii) Apart from entitlement issues as governed by the Arbitrator's findings regarding the operation of the *Limitations Act, 2002*, what is the proper quantum recoverable by Federation in respect of the Loss Transfer Requests for Indemnity which are the subject of this arbitration?

By setting out the areas above, it is not my intention to limit counsel to only these matters in addressing issue # 3. I will hear any relevant evidence and submissions with respect to issue # 3 that counsel wish to advance.

Conclusion

For the forgoing reasons, in answer to issues # 1 and # 2, I rule as follows:

1) The *Limitations Act, 2002,* applies to Federation's loss transfer claims against Jevco, in respect of SABS payments made by Federation between January 1, 2004, and November 5, 2006.

2) A separate, 2 year limitation period for Federation's 5, Loss Transfer Requests for Indemnity commenced for each, separate Request the day following receipt by Jevco of each Request. Subject to further evidence and submissions that would result in a finding that Jevco is estopped from relying upon the limitation defence, by November 5, 2008, Federation was out of time to commence arbitration in respect of all 5 of its Loss Transfer Requests for Indemnity.

3) The parties are at liberty to introduce further evidence and make further submissions in respect of issue # 3 in this arbitration, including, but not limited to, the matters suggested by the Arbitrator.

4) My decision on costs is reserved pending a determination of issue # 3.

Dated at Toronto, December 16, 2010