



## ONCA Sets Limitation Period for Loss Transfer Claims

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The Court of Appeal for Ontario has clarified the limitation period law for loss transfer arbitrations. The issue before the Court was whether the limitation period to initiate arbitration starts the day after the first party insurer sends a loss transfer request for indemnification (as per *Federation v. Kingsway*), or whether it starts the day the first party insurer receives a response from the second party insurer denying reimbursement (as per *ING v. Markel*).

In *State Farm v. Dominion* (2005), the Court of Appeal held that loss transfer claims were subject to a six-year, rolling limitation period, starting with each accident benefit payment. The court's finding was based on the wording under the old Limitations Act, which was repealed and replaced with the new Limitations Act, 2002 for claims arising on or after January 1, 2004. Under the new Act, the default limitation period is two-years from the date the claim is discovered. Section 5 of the Act prescribes when a claim is discovered:

### Discovery

**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).**

For several years, the insurance industry handled loss transfer claims under the new Act by assuming that the rolling limitation start date prescribed by the Court of Appeal was still good law under the new Act. In other words, the industry treated each accident benefit payment made after January 1, 2004 as the start date for a new limitation period. Of course, the six-year clock had to be reduced to two years to stay inline with the default limitation period under the new Act.

In both *Federation v. Kingsway* and *ING v. Markel*, two different arbitrators held that the limitation period under the new Act cannot start with each accident benefit payment because of the wording in section 5 (1)(a)(iii), which requires that the "act or omission" was of the target defendant (the person against whom the claim is made). The arbitrators held that the person against whom the claim is made must be the second party insurer. Therefore, as the second party insurer has nothing to do with the payment of accident benefits, the date of payment of benefits was somewhat irrelevant.

The arbitrators differed with respect to the actual start date: In *Federation*, the arbitrator decided that all of the criteria under section 5 (1)(a) were satisfied the day after the second party insurer receives a loss transfer request for indemnification. He also noted some good policy reasons for choosing that date, such as allowing the parties to know right away when the clock would start.

In *ING v. Markel*, the arbitrator agreed that the *Federation* start date was attractive (for certainty), but did not

believe that all of the criteria under section 5(1)(a) was satisfied on the day after the second party insurer received a loss transfer request for indemnification. More specifically, he had trouble finding that the criteria under 5(1)(a)(iv) was satisfied until the first party insurer knew (by receiving a response) that the second party insurer wasn't going to satisfy a loss transfer request.

On appeal to the Superior Court, the judge "marginally" preferred the Federation approach, as it provided some certainty as to when the clock would start. Of note, the judge agreed with both arbitrators that the payment of benefits does not start any limitation clock.

The Court of Appeal agreed with the arbitrator in Federation, finding that all four criteria under section 5 (1) of the Limitations Act, 2002 are satisfied when the first party insurer sends a Loss Transfer Request for Indemnification to the second party insurer.

So for any loss transfer claims arising after January 1, 2004, the first party insurer has two years -- from the date it sends a Loss Transfer Request for Indemnification -- to initiate arbitration against the second party insurer.

Clear?

See [ING v. Markel and Federation v. Kingsway](#).

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