IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.18, and Regulation 664 283/95 as amended;

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

AND IN THE MATTER of an Arbitration

B E T W E E N :

PRIMMUM INSURANCE COMPANY

Applicant

- and –

ALLSTATE INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Pamela Blaikie

Counsel for the Applicant, Primmum Insurance Company of Canada ("Primmum")

Ryan Naimark

Counsel for the Respondent, Allstate Insurance Company of Canada ("Allstate")

ISSUES:

This Arbitration involves a loss transfer dispute between insurers. It is agreed that Primmum is in a position to assert a claim for indemnification by reason of its insured being the owner and operator of a motorcycle. It is also agreed between the parties that by reason of the circumstances of the accident, the application of the *Fault Determination Rules* is not in dispute and, subject to what follows, Allstate must indemnify Primmum to the extent of 100%.

The issues for determination by me, as set out in the Arbitration Agreement (Exhibit "1") and as enunciated by counsel for Allstate are as follow:

(a) Are some or all of the claims for loss transfer indemnification barred by the expiry of a limitation period? Specifically, are any or all claims barred under Section 4 of the *Limitations Act*, 2002?

(b) If the answer to (a) is no, are some or all of the claims for loss transfer indemnification barred under the doctrine of laches?

(c) If the answer to (b) is no, what portion, if any, of the loss transfer claim is interest? Is interest properly the subject of loss transfer indemnification?

EVIDENCE:

The following documents were marked as Exhibits at the hearing which proceeded on a written record only:

Exhibit 1 – Long Form Arbitration Agreement

Exhibit 2 – Short Form Arbitration Agreement

Exhibit 3 – Written Submissions of the Respondent

Exhibit 4 – Book of Authorities of the Respondent

Exhibit 5 – Applicant's Record

Exhibit 6 – Book of Authorities of the Applicant

Exhibit 7 - *The Personal Insurance Company v. Intact Insurance Company of Canada* [Arbitral Award of William J. McCorriston, October 1, 2010]

It should be noted that by reason of the issues, described above, Allstate, while the Respondent to the Arbitration, took the role of Applicant at the hearing before me and has the onus or burden in relation to these issues.

This loss transfer dispute arises from a motor vehicle accident which occurred on April 24, 2003. The Primmum motorcycle was rear-ended by the Allstate vehicle. Allstate concedes that its insured is 100% responsible and that loss transfer indemnification was appropriate (subject to the position it takes in relation to the issues to be determined by me).

Primmum's insured applied to the *Workplace Safety and Insurance Board* (WSIB) to receive Workers' Compensation benefits. Primmum's insured subsequently retained counsel and elected or re-elected to pursue a tort claim. The WSIB consented to allow Primmum's insured to withdraw the WSIB claim (as did the insured's employer which had paid loss of earning benefits) on the understanding that these amounts were to be reimbursed upon settlement of the tort claim. This is confirmed in a letter from the WSIB to the insured's counsel dated July 11, 2005. The parties advise me that they do not take issue with the process undertaken by Primmum's insured in relation to re-acquiring his rights to pursue tort and accident benefit claims from the WSIB.

Counsel for Primmum's insured sought to recover these amounts from Primmum as an incident of an accident benefits claim and sent correspondence to Primmum in that regard on August 31, 2005.

Counsel for Allstate points out that by this point in time, Primmum's claim had crystalized as its insured had returned to work in May 2005. This analysis may be applicable to a tort/bodily injury claim but, for reasons set out below, has no application to a claim for loss transfer indemnification.

Primmum's insured applied for mediation to FSCO on April 10, 2006.

On October 12, 2006, FSCO found that it did not have jurisdiction to conduct the mediation as Primmum's insured had not submitted an application for accident benefits (OPCF-1).

On February 19, 2008, Primmum submitted a loss transfer request for indemnification in the amount of $3,132.52 (net of the $2,000.00 deductible). This request was not paid and is not being pursued in the within Arbitration. Allstate did not respond to this request in any fashion.

On December 29, 2008, Primmum submitted a notification of loss transfer to Allstate. This did not claim any amounts, by way of indemnification, but indicated the applicable Fault Determination Rule. Allstate did not respond to this document and does not take issue in this hearing with the application of Rule 7.3 such that it is liable to indemnify Primmum to the extent of 100%.

On January 17, 2011, Primmum entered a log note to the effect that the underlying accident benefits claim had settled in the amount of $70,000.00 all inclusive ($40,000.00 for income replacement benefits and $30,000.00 for medical and rehabilitation benefits).

On January 28, 2011, a full and final release and settlement disclosure notice was completed. It is acknowledged by Primmum that the settlement disclosure notice was prepared in error as this document indicates the full $70,000.00 was allocated to medical benefits. The appropriate allocation is reflected in the log notes and the parties herein agree in this regard.

On March 30, 2011, Primmum submitted a loss transfer request for indemnification in the amount of $70,697.44. This is broken down correctly to reflect $40,000.00 for income

replacement benefits, $30,000.00 for medical and rehabilitation benefits and an additional $697.44 for what appear to be medical claims or cost of examinations.

Allstate wrote to Primmum in a letter undated but apparently sent on June 1, 2011 to the effect that the claim for loss transfer indemnification made in January 2011 was barred.

The Arbitration was commenced on April 5, 2012 and ultimately gives rise to the hearing held on Thursday, August 13, 2015.

LAW AND ANALYSIS:

The first issue to be determined by me can be dealt with summarily (despite the able and earnest arguments advanced by counsel for Allstate). The Court of Appeal for Ontario determined, in *Markel Insurance Company of Canada v ING Insurance Company of Canada* (109 O.R.(3d) 652; 2012 On. C.A. 218) that an insurer in the position of Primmum cannot assert a claim for loss transfer indemnification until such time as it has paid benefits to its insured. Once the insurer does so and once the insurer makes a request for loss transfer indemnification, then and only then does time start to run in relation to the applicable limitation period.

In the instant case, benefits were paid by Primmum to its insured in January 2011. A request for loss transfer indemnification was made by Primmum to Allstate on March 30, 2011. This Arbitration was commenced on April 5, 2012 and was well within 2 years of the day following the date loss transfer indemnification was requested.

As a result, Primmum's claim for loss transfer indemnification is not barred by reason of the *Limitations Act*, 2002.

Allstate asserts that the equitable doctrine of laches applies to Primmum's request for loss transfer indemnification in the amount of $70,697.44.

There are two decisions of judges of the Ontario Superior Court of Justice which appear to be in direct conflict. In *Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada*, Chiappetta, J. determined that the equitable doctrine of laches does not apply to a loss transfer claim as the right to loss transfer indemnity is purely statutory.

As in the case before me, Chiappetta, J. had to consider the time period between the accident date and the date of the first indemnification request. She found that present case law dictates that the first loss insurer (Primmum in the case before me) retains full control and can unilaterally determine when to trigger the limitation period. While it is generally expected that insurers will proceed in a prompt, expedient and summary fashion and pursue claims for loss transfer indemnification with reasonable diligence, the "check and balance" is that to the extent that the first loss insurer delays in paying benefits to its insured, it may face claims of interest from its insured but face challenges recovering such interest from the other insurer (Allstate in the case before me). Moreover, if the first loss insurer has paid benefits but delayed in advancing a request for loss transfer indemnity, it will face a delayed recovery and challenges to the extent that it seeks to recover interest from the responding insurer.

I prefer the reasoning of Chiappetta, J. in *Intact*, above, to that of Lederer, J. in *TD General Insurance Co. and. Zurich Insurance Co.*, RE (120 O.R. (3d) 278; 2014 On S.C. 319). Lederer, J. found there to be unique circumstances in the case before him. At minimum, the facts in *TD* are distinguishable from the facts before me. In *TD*, the accident occurred on July 14, 1999. TD's insured applied for accident benefits in August 1999 and, for the next 10 years or so, TD paid benefits to its insured. In February 2010,

almost 11 years after the accident, TD first asserted a claim for loss transfer indemnification (alleging that Zurich's insured was 100% at fault) and, shortly thereafter, made two requests for indemnification. This is distinguishable from the facts before me as Primmum made its payment in January 2011, requested indemnification on March 30, 2011 and commenced the within Arbitration on April 5, 2012.

In the event that I am in error, I consider the arguments made on behalf of Allstate that the doctrine of laches can apply to the facts of the matter before me.

Allstate does not seriously advance an argument of prejudice. It does not contest the application of the Fault Determination Rules such that it is 100% responsible for the accident. It is not in a position to contest the quantum of benefits paid by Primmum to its insured (subject to my comments below in relation to interest) as there is no suggestion of a bad faith settlement between Primmum and its insured at the expense of or detriment to Allstate.

Allstate acknowledges that mere delay is insufficient to trigger laches. Rather, it must be determined whether delay on the part of Primmum constitutes acquiescence or results in circumstances that make the prosecution of the claim unreasonable. (See *M.(K) v M.(H)*, [1992] 3 SCR 6.

The Supreme Court of Canada decision, cited immediately above, provides to the following effect: "it is a defence which requires that a defendant [Allstate in the matter before me] can successfully resist an equitable (although not a legal) claim made against him [Allstate] if he [Allstate] can demonstrate that the plaintiff [Primmum], by delaying the institution or prosecution of his [Primmum's] case has (a) acquiesced in the defendant's conduct or (b) caused the defendant [Allstate] to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise

permitted a situation to arise which it would be unjust to disturb….The doctrine considers whether the delay of the plaintiff [Primmum] constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable".

As there is no prejudice suffered by Allstate, I find that Allstate must demonstrate some conduct, by way of words or deeds, against which Primmum acquiesces. The evidence falls short in this regard. Primmum initially gave notice of its intention to assert a loss transfer claim (relying on Rule 7.3 of the *Fault Determination Rules*). Allstate did nothing; moreover, Allstate accepts that this Rule applies to this claim.

Primmum asserted a request for indemnification in the amount of $3132.50 on February 19, 2008. Allstate did nothing and, by reason of the Court of Appeal for Ontario's decision in *Markel v ING*, above, this claim is out of time (deemed denial on February 20, 2008; arbitration not commenced until April 5, 2012).

Ultimately, Primmum was in a position to make a request for indemnification in the amount of $70,697.44, which claim was made in a timely fashion, and Allstate seeks to resist this claim. As I have found, above, the claim was made within time. Once Allstate expressed its position, arbitration was commenced in a timely fashion. As Chiappetta, J. observed in *Intact*, one cannot acquiesce to conduct that never occurred.

There is one further observation that should be made or reinforced. Claims for loss transfer indemnification as between insurers are a creature of statute. Section 275(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 provides as follows:

275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be

prescribed, to indemnification **in relation to such benefits paid by it** from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1 (emphasis added).

There can be no claim for loss transfer indemnification until such time as the first party insurer pays benefits to its insured. Until there is a claim to be made from the first party insurer to the second party insurer, the doctrine of laches, if applicable to such claims, can have no application to the facts of this matter. I suppose that if one strained to try to apply this doctrine to the facts of this case, one could look at the first loss transfer request for indemnification submitted on February 19, 2008. This arbitration was commenced in April, 2012. This passage of time, having regard for all other facts of the matter, would not lead to an application of the doctrine of laches in favour of Allstate.

In summary, I find that the laches doctrine does not properly apply to claims for loss transfer indemnification under Section 275 of the *Insurance Act*. If I am in error, the necessary elements of this defence have not been established by Allstate.

The final issue to be determined by me is what amount, if any, was payable by Primmum to its insured for interest and is interest properly the subject of a claim for loss transfer indemnification.

There is no evidence to suggest that any portion of the $30,000.00 paid on account of medical and rehabilitation benefits is interest. This amount is properly the subject of loss transfer indemnification.

Conversely, the only evidence regarding income replacement benefits lead inexorably to the conclusion that Primmum paid interest to its insured when it resolved the claim for

income replacement benefits. Income replacement benefits were properly payable commencing May 2, 2003 to and including May 2, 2004. This is a period of 367 days or 52 weeks, 3 days. Income replacement benefits were properly paid at the maximum rate of $400.00 per week over a period of 52.43 weeks. This substantiates a claim for loss transfer indemnification in the amount of $20,971.43. There is no evidence of any subsequent period of disability giving rise to a payment of income replacement benefits after Primmum's insured returned to work on May 3, 2004. The conclusion to which I am drawn is that the balance of the payment in the amount of $19,028.57 was made on account of interest.

Allstate relies on *The Personal Insurance Company v. Intact Insurance Company of Canada* [Arbitral Award of William J. McCorriston, October 1, 2010] which held, inter alia, that interest on overdue payments of statutory accident benefits are not subject to loss transfer. I adopt the reasons expressed by Arbitrator McCorriston and have nothing to add in this regard.

CONCLUSION:

Allstate has not discharged the onus or burden in relation to the first two issues to be determined by me. However, Allstate has discharged its onus in relation to the third issue. As a result, Primmum is entitled to recover $70,697.44, reduced by what I have found to be a payment of interest between Primmum and its insured in the amount of $19,028.57, such that the net amount payable by Allstate to Primmum is $51,668.87.

I remain seized of this matter to address claims for interest on the amount payable and to determine all issues in relation to costs between the parties. In accordance with the terms of the long form arbitration agreement, my account as arbitrator will be directed to Allstate. However, if there are submissions to be made in relation to the "success" of one

party or the other, having regard for offers to settle or otherwise, then I will hold my account in abeyance while we arrange for a mutually convenient date to convene a teleconference with a view toward establishing a process for me to hear submissions in this regard or otherwise.

DATE: August 26, 2015 _____

Vance H. Cooper, Arbitrator