Case Name:

Zurich Insurance Co. v. TD General Insurance Co.

Between
Zurich Insurance Company, Appellant, and
TD General Insurance Company, Respondent

[2014] O.J. No. 2550

2014 ONSC 3191

Court File No. CV-14-497028

Ontario Superior Court of Justice

S.N. Lederman J.

Heard: April 16, 2014.
Judgment: May 27, 2014.

(51 paras.)

Alternative dispute resolution -- Binding arbitration -- Appeals and judicial review -- Appeal by Zurich Insurance from an Arbitrator's decision dismissing its motion to dismiss TD's application for loss transfer allowed -- Approximately 11 years after a multi-vehicle collision, TD sought indemnification from Zurich -- It was reasonable for the Arbitrator to conclude that TD's claim was not barred by the Limitations Act and that Zurich was not prejudiced by TD's delay -- However, acquiescence was a stand-alone branch of laches that did not require a finding of prejudice -- The Arbitrator erred in not considering or finding that there was acquiescence in TD's delay in serving its first request for indemnification.

Civil litigation -- Limitation of actions -- Non-statutory limitation periods -- Laches and acquiescence -- Appeal by Zurich Insurance from an Arbitrator's decision dismissing its motion to dismiss TD's application for loss transfer allowed -- Approximately 11 years after a multi-vehicle collision, TD sought indemnification from Zurich -- It was reasonable for the Arbitrator to conclude that TD's claim was not barred by the Limitations Act and that Zurich was not prejudiced by TD's delay -- However, acquiescence was a stand-alone branch of laches that did not require a finding of prejudice -- The Arbitrator erred in not considering or finding that there was acquiescence in TD's delay in serving its first request for indemnification.

Insurance law -- Insurers -- Appeal by Zurich Insurance from an Arbitrator's decision dismissing its motion to dismiss TD's application for loss transfer allowed -- Approximately 11 years after a multi-vehicle collision, TD sought indemnification from Zurich -- It was reasonable for the Arbitrator to conclude that TD's claim was not barred by the Limitations Act and that Zurich was not prejudiced by TD's delay -- However, acquiescence was a stand-alone branch of laches that did not require a finding of prejudice -- The Arbitrator erred in not considering or finding that there was acquiescence in TD's delay in serving its first request for indemnification.

Statutes, Regulations and Rules Cited:

Arbitration Act, 1991, S.O. 1991, c. 17,

Fault Determination Rules, O.Reg 668/90,

Insurance Act, R.S.O. 1990, c. I.8, s. 275, s. 275(4)

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 5(1)(b)

Counsel:

Eric K. Grossman and Dilraj Sandhu, for the Appellant.

I. Caley Ross, for the Respondent.

THE APPEAL

1 S.N. LEDERMAN J.:-- Zurich appeals a decision of Arbitrator Kenneth Bialkowski (the "Arbitrator") in a loss transfer proceeding arising from a multi-vehicle collision that occurred on July 14, 1999. The accident involved an automobile insured with the Respondent, TD General Insurance Company ("TD"), and a heavy commercial vehicle insured with the Appellant, Zurich Insurance Company ("Zurich"). The driver of the automobile applied for accident benefits in August 1999. Over the next decade, TD paid benefits to its insured. The automobile driver's tort action settled in July 2009 for $600,000, with Zurich contributing $550,000. Moreover, the driver's accident benefits claim was settled with TD in September 2009.

2 Section 275 of the *Insurance Act*, R.S.O. 1990, c. I.8 creates an indemnity scheme, commonly referred to as a "loss transfer", whereby first party insurers are entitled to recover accident benefits they paid to their insured individuals from second party insurers. Indemnification is determined according to the respective degree of fault of each insurer's insured under the Fault Determination Rules in O.Reg 668/90 under the *Insurance Act.* Pursuant to s. 275(4) of the *Insurance Act*, any

dispute arising from a loss transfer claim is resolved through arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17.

3 In February 2010, approximately 11 years after the accident, TD sent Zurich a Notice of Loss Transfer alleging that Zurich's insured was 100 per cent at fault. Shortly thereafter, TD made the following two loss transfer requests for indemnification from Zurich: (1) $16,529.54 in medical benefits paid by TD between February 4, 2004 and July 22, 2009; and (2) $150,195.92 for medical benefits and settlement sums paid by TD between July 23, 2009 and February 5, 2010.

4 In August 2011, TD brought an application for an order requiring Zurich to participate in a loss transfer arbitration. TD and Zurich agreed to proceed with the preliminary issue of a motion brought by Zurich to dismiss TD's application for loss transfer. Zurich argued that TD's loss transfer was barred by the equitable doctrine of laches and by operation of the *Limitations Act, 2002*, S.O. 2002, c. 24.

5 The motion was heard on or about October 7, 2013, and the Arbitrator dismissed it on December 24, 2013.

The Arbitrator's Decision

6 On the issue of laches, the Arbitrator acknowledged that he was bound by Chiappetta J.'s decision in *Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada*, 2013 ONSC 5878 [*Intact*], but stated that he disagreed with her finding that laches cannot be applied to a statutory claim for loss transfer. The Arbitrator held that in any event, Zurich had failed to establish "the necessary components of laches...one of them being presumed prejudice or actual prejudice."

7 With respect to the *Limitations Act*, the Arbitrator agreed with the analysis and finding of the Ontario Court of Appeal in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652 [*Markel*]. In that case, the Court held that the limitation period runs from the day after the first party insurer requests loss transfer from the second party insurer. Noting that TD's application for an order requiring Zurich to participate in the arbitration was brought within two years of requesting indemnity, the Arbitrator concluded that TD had satisfied its requirements under the *Limitations Act*.

GROUNDS OF APPEAL

8 Zurich appeals the Arbitrator's decision, raising the following issues:

(i) Did the Arbitrator err in finding that TD was not time-barred by s. 5(1)(b) of the *Limitations Act* in bringing its loss transfer notice over 10 years after the accident?;

(ii) Did the Arbitrator err in law in finding that the equitable doctrine of laches did not apply to TD's loss transfer applications?; and

(iii) Did the Arbitrator err in finding that Zurich did not meet the necessary components of the doctrine of laches by failing to show that it was prejudiced by TD's late notice of loss transfer?

STANDARD OF REVIEW

9 Both parties agree that the standard of review from a private arbitrator on a question of law is correctness; the standard of review on a question of mixed fact and law is reasonableness and the reviewing court is to give deference to the arbitrator.

ANALYSIS

1.

Did the Arbitrator err in finding that TD was not time-barred by s. 5(1)(b) of the *Limitations Act* in bringing its loss transfer notice over 10 years after the accident?

10 Zurich argues that that the Ontario Court of Appeal's decision in *Markel* unwittingly allows a first party insurer to indefinitely postpone the running of the limitation period. It submits that this is contrary to the purpose and intent of the *Limitations Act* and its fairness-based discoverability rule. Zurich submits that as a sophisticated party, TD knew or reasonably ought to have known of its right to loss transfer by July 1999 or alternatively, by September 2001.

11 TD submits that loss transfer legislation does not indicate any time limit for making a request for indemnification. Moreover, the Court of Appeal in *Markel* confirmed that the two-year limitation period for initiating a loss transfer runs from the day after a first party insurer sends a Loss Transfer Request for Indemnification to a second party insurer. Accordingly, TD's claim for indemnity is not time-barred.

12 I agree with the Arbitrator and TD that TD's loss transfer claim is not barred by the *Limitations Act.* With respect to Zurich's argument that TD ought to have known it had a loss transfer claim in 1999, the Court in *Markel* was aware that a first party insurer will often have "discovered" a claim in practice, but not within the meaning of the *Limitations Act*. The Court stated the following, at para. 22:

> I would observe at the outset that there is a certain element of artificiality in the use of the word "discovered" in the context of these cases. A first party insurer will be fully aware of the claim for loss transfer well before it can be said that he or she has "discovered" the claim within the meaning of s. 5(1). That said, it is clear that the limitation period must be determined by interpreting "discovered" as defined by the Act

13 *Markel* is still binding law in Ontario. In that case, the Court could have held that the limitation period runs when a party reasonably discovers that it has a loss transfer claim. It

specifically rejected such an approach, and instead held that it runs from the day after the request is made. Zurich did not cite any authority supporting its argument that the limitation period began to run prior to TD's request for indemnity from Zurich. While I acknowledge that the delay is more egregious in this case than in *Markel*, the *Markel* decision applies to the facts of this case, and Zurich's argument in this regard must be rejected.

2.

Did the Arbitrator err in law in finding that the equitable doctrine of laches did not apply to TD's loss transfer applications?

14 Zurich argues that laches can be applied to legal claims where a legislative gap exists. It says that such a gap was created by the Court of Appeal's decision in *Markel.* It says that *Markel* has the effect of permitting first party insurers to indefinitely delay the limitation period in respect of loss transfer claims because the clock does not start running until the day after the loss transfer claim is made. Zurich submits that *Markel* did not address when the loss transfer claim should be made.

15 In oral submission, counsel for Zurich further argued that the loss transfer scheme under the *Insurance Act* is intended to address the fact that certain classes of vehicles were bearing a disproportionate burden of Ontario's insurance costs. Zurich submits that a loss transfer claim possesses an equitable flavour because it is intended to address unfairness between the various participants in the province's insurance industry.

16 TD argues that as a purely statutory claim that is devoid of equitable relief, a loss transfer claim is not subject to laches. It points to *Intact*, in which Chiappetta J. held that laches did not apply to a loss transfer claim because it did not have a "distinctively equitable flavour": see para. 7.

17 For the reasons that follow, in the unique circumstances of this case, I find that the doctrine of laches applies to a situation where a first party insurer delays for approximately 11 years in requesting loss transfer from a second party insurer.

18 Traditionally, the doctrine of laches has only been applied to equitable, and not legal, claims. Following the fusion of law and equity, however, courts have been more flexible in applying the doctrine to legal claims under certain circumstances.

19 In *Chippewas of Sarnia Band v. Canada (Attorney General*) (2000), 51 O.R. (3d) 641 (C.A.) [*Sarnia Band*], the Ontario Court of Appeal stated that the traditional rigid line drawn between law and equity has broken down, but "historical factors continue to influence the applicability of equitable principles to claims traditionally associated with the common law": see para. 276.

20 Building on this principle from *Sarnia Band*, the Court of Appeal in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.) [*Perry*] held that a court will not be precluded from applying equitable defences to a claim merely because the claim arises under a statute. The court suggested that legal claims with a "distinctly equitable flavour" can

be subject to equitable principles: see para. 35.

21 In Bulletin A-11/94, the former Ontario Insurance Commission (now the Financial Services Commission of Ontario ("FSCO")) states that "loss transfer was introduced in order to balance the cost of providing accident benefits between specified classes of vehicles." The Bulletin states that in some circumstances, loss transfer shifts the costs from motorcycle insurers to insurers of other classes of automobiles, and in other cases, shifts the costs from insurers of other classes of automobiles to insurers of heavy commercial vehicles: see D. Blair Tully, Commissioner, Bulletin No. A-11/94, Property & Casualty -- Auto Loss Transfer: Standardized Forms and Procedures (Toronto: Ontario Insurance Commission, June 6, 1994).

22 It therefore appears that Ontario's loss transfer regime possesses an equitable flavour because it is designed to address unfairness between participants in the province's insurance industry, and that is a sufficient basis to permit the application of the doctrine of laches. Alternatively, I find that the fusion of law and equity, which has evolved in order to achieve fairness and justice, requires a finding that laches can apply in this case. Accordingly, I find that the doctrine of laches applies, under certain circumstances, to delayed loss transfer claims made by first party insurers.

23 My decision in this regard is guided by the principle that the fusion of law and equity has developed in order to achieve just results. In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, La Forest J. stated the following, at pp. 585-586:

> [T]he maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice. Viscount Haldane reminded us in *Nocton v. Lord Ashburton*, [1914] A.C. 932, of the elasticity of equitable remedies. But in this area, it seems to me, even the path of equity leads to law. The maxim that "equity follows the law" (though I realize that it has traditionally been used only where the Courts of Chancery were called in the course of their work to apply common law concepts) is not out of place in this area where law and equity have long overlapped in pursuit of their common goal of affording adequate remedies against those placed in a position of trust or confidence when they breach a duty that reasonably flows from that position. And, as I have indicated, willy-nilly the courts have tended to merge the principles of law and equity to meet the ends of justice as it is perceived in our time. That, in effect, is what was done in *Jacks v. Davis, [1980] B.C.J. No. 1538, supra*, and by the courts below in the instant case. As I see it, this is both reasonable and proper.

24 The evolution of fusion is discussed in Jill E. Martin, *Modern Equity*, 16th ed. (London: Sweet & Maxwell, 2012) at p. 29:

> Sufficient examples have been given to show that law and equity are not fused.

> What can be said is that more than a century of fused jurisdiction has seen the two systems, whose relationship is "still-evolving", working more closely together; each changing and developing and improving from contact with the other; and each willing to accept new ideas and developments, regardless of their origin. They are coming closer together. But they are not yet fused.

25 In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, [*M.(K.)*], La Forest J. stated, at p. 76, that the doctrine of laches developed because limitation statutes did not apply to equitable claims. As noted, following the authority in *Markel*, there is currently no limitation period governing when a first party insurer ought to make a loss transfer claim to a second party insurer. In this case, this has resulted in a loss transfer claim being made almost 11 years after the accident giving rise to the loss. Applying laches in these circumstances is, in my view, consistent with the principle that the fusion of law and equity has evolved in order to achieve just results.

26 I am further guided by the notion that applying laches to loss transfer claims is consistent with the purposes of the *Limitations Act.* As stated by Strathy J.A. in *Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd.*, 2013 ONCA 550, 117 O.R. (3d) 81, its purpose is the promotion of certainty and clarity in the law of limitation periods: see para. 61. Applying laches in circumstances where a first party insurer has waited approximately 11 years to request indemnification meets this objective.

3.

Did the Arbitrator err in finding that Zurich did not meet the necessary components of the doctrine of laches by failing to show that it was prejudiced by TD's late notice of loss transfer?

27 Having concluded that the doctrine of laches applies to loss transfer claims, I must now consider whether the Arbitrator erred in determining that Zurich had not successfully proved the requisite elements of the doctrine. This requires determining the following three issues: (i) Did the Arbitrator err in determining that Zurich did not suffer prejudice?; (ii) Is prejudice a necessary requirement for a finding that laches operate?; and (iii) If not, did TD acquiesce such that laches should preclude its loss transfer request?.

(i) Did the Arbitrator err in determining that Zurich did not suffer prejudice?

28 On the facts before him, the Arbitrator was not satisfied that Zurich was prejudiced by TD's delay in serving its first notice for loss transfer approximately 11 years following the accident. He had a sufficient basis to come to this conclusion. There was evidence that Zurich had knowledge of both the accident and the personal injury claims brought by TD's insured; there was no suggestion that Zurich's liability documentation was no longer available; nor that any crucial witness was no longer available. In the circumstances, his conclusion as to prejudice was reasonable and the Court

should give deference to it.

(ii) Is prejudice a necessary requirement for a finding that laches operate?

29 As noted, the Arbitrator acknowledged that he was bound by Chiappetta J.'s decision in *Intact,* but stated that he disagreed with Justice Chiappetta's finding that laches cannot be applied to a statutory claim for loss transfer. The Arbitrator found that in any event, Zurich had failed to establish "the necessary components of laches...one of them being presumed prejudice or actual prejudice." It appears from this quotation that the Arbitrator was under the impression that prejudice is a necessary element for establishing the defence of laches.

30 Zurich submits that the first branch of laches is acquiescence, and is sufficient on its own to apply the doctrine of laches to preclude TD from pursuing indemnity. It submits that the Arbitrator erred in not considering or not finding acquiescence.

31 TD submits that the jurisprudence is clear that the party relying on the doctrine of laches must demonstrate both delay and prejudice.

32 For the reasons that follow, I find that acquiescence is a stand-alone branch of laches that does not require a finding of prejudice for laches to apply.

33 The Arbitrator relied on *Perry*, in which the Ontario Court of Appeal stated that the motion judge "correctly stated that prejudice must be shown", but held that she erred in finding that prejudice had been demonstrated: see para. 37. In her decision, however, the motion judge had noted, at para. 40, that laches can arise where delay causes prejudice to a party, *or* where the plaintiff refrains from making a claim where he or she knows her rights have been violated:

> In order to invoke this remedy, the defendant seeking to invoke it must establish the plaintiff's delay plus circumstances in which it would be inequitable to enforce the plaintiff's claim...Typically, such circumstances arise either where the plaintiff refrains from seeking redress once she knows her rights have been violated, or where there is reasonable reliance by the defendant on the plaintiff's "acquiescence" or inaction.

34 In my view, it is unclear whether the Court of Appeal in *Perry* was stating that laches will only bar a claim where the defendant can demonstrate prejudice. A review of the authorities suggests that laches has two branches, acquiescence and prejudice, and each can constitute a stand-alone ground for the doctrine's operation.

35 The leading case on laches in Canada is the Supreme Court's decision in *M.(K.),* in which La Forest J. described the doctrine as follows, at pp. 77-78:

> What is immediately obvious from all of the authorities is that mere delay is

> insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence *or* results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine [Italics added].

36 In that case, La Forest J. held that is was obvious that the defendant had not altered his position because of the plaintiff's delay, and therefore if laches were to operate, "it must be because of acquiescence, the first branch of the *Lindsay* rule": see p. 78. The proposition that acquiescence is a stand-alone branch of laches finds support in R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines & Remedies* (Sydney, Butterworths, 2002), at p. 1031:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct; or (b) caused the defendant 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.

37 In light of these authorities, I conclude that as a separate branch of laches, acquiescence can, in some circumstances, justify the application of laches in the absence of prejudice.

> **(iii) Did TD acquiesce such that laches should preclude its loss transfer request?**

38 Zurich argues that TD was aware of the circumstance of the accident, and has not provided an explanation of its approximate 11-year delay in serving its first Notice of Loss transfer. Zurich argues that TD's failure to request loss transfer in a timely manner, combined with its knowledge of its claim, gives rise to a finding of acquiescence.

39 TD submits that for acquiescence to be found, a plaintiff must have failed to react to the defendant's *conduct,* therefore justifying barring the plaintiffs claim against the defendant. It relies on *Intact*, in which Justice Chiappetta held that not only must the claimant know of facts that give rise to a claim, the defendant must commit some clear act to which the claimant can react. In that case, Chiappetta J. held that the plaintiff had not acquiesced because acquiescence requires the plaintiff to "fail to react to the defendant's conduct": see para. 18. She found that there was no evidence that the defendant attempted to deny the plaintiff's right to a loss transfer, with the plaintiff thereafter delaying its indemnification request. Justice Chiappetta held, at paras. 18-19, that the plaintiff could not acquiesce to conduct that never occurred, and that the plaintiff had reserved its rights, not waived them.

40 For the reasons that follow, I find that in the unique circumstances of this case, TD acquiesced, and therefore its loss transfer claim against Zurich is barred by the doctrine of laches.

41 In *M.(K.),* Justice La Forest described acquiescence in the following terms, at p. 78:

> Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, supra, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence.
>
> Its secondary sense is as an element of laches -- after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

42 Recently, in *Manitoba Métis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14, [2013] 1 S.C.R. 623, the majority of the court stated that "acquiescence depends on knowledge, capacity and freedom": see para. 147.

43 *Snell's Equity* states that for acquiescence to occur, "it is necessary for there to be some clear act of the claimant which amounts to an acquiescence or waiver of his rights": see J. McGhee ed., *Snell's Equity* 32nd ed. (London: Sweet & Maxwell, 2010), at p. 117.

44 I am aware that in these circumstances, Zurich did not "deprive" TD of its rights. I am also aware that mere delay, on its own, will not give rise to a finding of laches. I also agree that to a certain extent, Chiappetta J. was correct in finding that in the context of a delayed loss transfer claim, the defendant will not have committed an act to which the plaintiff fails to react.

45 In *Manitoba Métis Federation, supra,* however, the Supreme Court at least implied that in some cases, delay might be interpreted as a clear act by the plaintiff amounting to acquiescence. The Court stated the following, at para. 147:

> In the context of this case -- including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants -- delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver: see para. 147.

46 Moreover, Bulletin A-11/94 states that a first party insurer should notify a second party insurer of a loss transfer "promptly". The directive to act "promptly" demonstrates the perceived importance of timely claims for the effective operation of the loss transfer claim regime. The Bulletin is not legally binding; however, as sophisticated participants in the insurance industry, I

assume both parties were aware of it. TD, with full knowledge that it is supposed to deliver a Notice of Loss Transfer "promptly", and with full knowledge that it likely had a loss transfer claim against Zurich, failed to make a request for almost 11 years.

47 Given the directive in the Bulletin, the fact that TD is a sophisticated insurer that had knowledge, capacity and freedom with respect to its rights, and perhaps most importantly, the almost 11-year delay, I find that TD's delay in requesting loss transfer gave rise to an inference that it had abandoned or waived its rights to the claim.

48 As a matter of justice between the parties, Zurich should not have to pay the amounts sought in the two Loss Transfer Requests for Indemnity even though they equate to only approximately 50 per cent of the total benefits paid by TD.

CONCLUSION

49 In summary, I conclude that acquiescence alone is enough to apply the doctrine of laches and preclude TD from pursuing indemnity, and that prejudice is not a necessary element to a laches defence. The Arbitrator erred in law in not considering or finding that there was acquiescence in the egregious delay on the part of TD in serving its first request for indemnification.

50 The appeal is therefore allowed. The Arbitrator's decision is set aside and TD's loss transfer application is dismissed.

51 The parties have agreed that the costs of the appeal should be fixed at $7,500 inclusive of disbursements and appropriate taxes. Zurich will have its costs in that amount payable by TD. The costs of the arbitration are to be agreed upon or remitted to the Arbitrator for assessment.

S.N. LEDERMAN J.