COURT OF APPEAL FOR ONTARIO

CITATION: Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada, 2015 ONCA 764
DATE: 20151112
DOCKET: C58290 and C59127

Hoy A.C.J.O., van Rensburg and Benotto JJ.A.

BETWEEN

Intact Insurance Company of Canada

Applicant (Respondent)

and

Lombard General Insurance Company of Canada

Respondent (Appellant)

AND BETWEEN

Zurich Insurance Company

Respondent (Respondent)

and

TD General Insurance Company

Applicant (Appellant)

Greg Bailey, for the appellant, Lombard General Insurance Company of Canada

Joseph Lin and Matthew Stepura, for the respondent, Intact Insurance Company of Canada

William G. Woodward and I. Caley Ross, for the appellant, TD General Insurance Company

Eric K. Grossman, for the respondent, Zurich Insurance Company

Heard: June 22, 2015

On appeal from the order of Justice Victoria R. Chiappetta of the Superior Court of Justice dated September 30, 2013, with reasons reported at 2013 ONSC 5878, and on appeal from the order of Justice Sidney N. Lederman of the Superior Court of Justice dated May 27, 2014, with reasons reported at 2014 ONSC 3191.

Hoy A.C.J.O.:

I OVERVIEW

[1] On these appeals, we are asked to determine whether the equitable doctrine of laches can defeat "loss-transfer claims" made under s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8 ("the Act"), and, if so, whether that doctrine should defeat the loss-transfer claims in the two instances before us.

[2] Under s. 268 of the Act, an insurer – a "first party insurer" – must pay statutory accident benefits to its insured when the insured is injured in a motor vehicle accident, regardless of fault. The legislature recognized that this scheme would result in first party insurers of lighter vehicles bearing a high share of the cost of statutory accident benefits, as their drivers are more likely to suffer

serious personal injuries than the drivers of heavier vehicles.[1] Section 275 provides a means to shift those costs from the first party insurer to another insurer. It permits a first party insurer of a vehicle other than a heavy commercial vehicle to claim indemnification for statutory accident benefits from the insurer of a heavy commercial vehicle involved in the accident – the "second party insurer".[2] Indemnification or "loss-transfer" with respect to this limited class of accidents is to be made based on the respective degree of fault of each insurer's insured as determined under the *Fault Determination Rules*, R.R.O. 1990, Reg. 668. If the insurers are unable to agree with respect to indemnification, the dispute is to be resolved by arbitration.

[3] This court determined that a first party insurer discovers its claim under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B the day after the first party insurer makes a request to the second party insurer for indemnification under s. 275: *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, at paras. 26-27. Thus, the first party insurer must initiate arbitration within two years and a day of requesting indemnification.[3]

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[1] *Jevco Insurance Co. v. Wawanesa Insurance Co.* (1998), 42 O.R. (3d) 276 (Gen. Div.), at p. 286. See also *Royal Insurance Co. v. Wawanesa Mutual Insurance Co.*, [2004] O.J. No. 2924 (S.C.), at para. 3, aff'd, (2005), 25 C.C.L.I. (4th) 120 (Ont. C.A.).

[2] Loss transfer also benefits insurers of motorcycles and motorized snow vehicles. An insurer of a motorcycle or motorized snow vehicle may claim indemnification for statutory accident benefits from the insurer of another vehicle involved in the accident, as long as that other vehicle is not a motorcycle, motorized snow vehicle or off-road vehicle.

[3] The provisions of the *Limitations Act, 2002* apply to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action: *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 52(1).

[4] The Act imposes strict deadlines on insurers, including a 90-day notice period for disputes between insurers as to which insurer is required to respond to an accident benefits claim: *Disputes Between Insurers*, O. Reg. 283/95, s. 3. However, s. 275 does not specify when a first party insurer must make its indemnification request. It provides that the first party insurer's entitlement to indemnification is "subject to such terms, conditions, provisions, exclusions and limits as may be prescribed", but as of yet no condition as to when the first party insurer must make an indemnification request has been prescribed. And while the Financial Services Commission of Ontario, the licensing and regulating body for insurers in Ontario, issued F.S.C.O. Bulletin No. A-11/94, which sets out that the first party insurer should notify the second insurer "promptly", its bulletin does not create a condition of indemnification.

[5] In the two instances before us, the first party insurers requested indemnification – and thereby triggered the running of the two-year limitation period – a number of years after the underlying accident occurred. Arbitration ensued. As a preliminary issue, each arbitrator determined whether the first party insurer's delay in making its loss-transfer claim precluded recovery. Each losing insurer appealed, and the Superior Court judges hearing the appeals arrived at conflicting results. One held that the doctrine of laches can have no application to a loss-transfer claim under s. 275 of the *Insurance Act: Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada*, 2013 ONSC 5878, 26

C.C.L.I. (5th) 158. The other held both that it could, and that it defeated the first party insurer's claim for loss-transfer: *Zurich Insurance Co. v. TD General Insurance Co.*, 2014 ONSC 3191, 120 O.R. (3d) 278.

[6] I conclude that the doctrine of laches is not available to a second party insurer in defence of a claim under s. 275 of the Act and that, even if it were, it would not have defeated the first party insurers' claims for indemnification in the instances before the court.

[7] Below, I outline the doctrine of laches, the reasons below and the first and second party insurers' arguments as to the availability of the doctrine of laches as a defence to a loss-transfer claim. I then provide my analysis of that question and explain why, even if the doctrine were available, the second party insurers could not have successfully relied on it in the two instances before the court.

II THE EQUITABLE DEFENCE OF LACHES

[8] Historically, statutes of limitations did not apply to equitable claims: *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at p. 76. As a result, the courts of equity developed their own limitation defences to delayed equitable claims, the most important of which was the defence of laches.

[9] In *M.(K.)*, the Supreme Court discussed the equitable doctrine of laches in defence to a claim in equity. At pp. 77-78, the court stated that mere delay is insufficient to trigger laches. To trigger a laches defence, the defendant must

establish one of two things. The delay of the plaintiff must "[constitute] acquiescence or [result] in circumstances that make the prosecution of the action unreasonable."

[10] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 145-46, McLachlin C.J.C. and Karakatsanis J., writing for the majority, citing *M.(K.)*, summarized the doctrine as follows:

> The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*.
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> As La Forest J. put it in *M.(K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:
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> > Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[11] This court in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.) – a decision central to the second party insurers'

arguments on this appeal – described, at para. 36, the second branch of *M.(K.)*: "A party relying on the defence must show a combination of delay and prejudice."

[12] In *Perry*, the limitations act, to the extent it applied at all, did not bar the creditor's claim under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. The court agreed with the motions judge that the doctrine of laches could apply to an action brought by a creditor pursuant to the *Fraudulent Conveyances Act* to attack the conveyance of assets as void. The doctrine was not unavailable merely because the claim arose under a statute. Sharpe J.A., writing for the court, explained at para. 35:

> The elements of a claim to set aside a fraudulent conveyance have a distinctively equitable flavour and the argument is inconsistent with the modern approach to the significance of the intersection between law and equity.

III THE DECISIONS BELOW

The Lombard Appeal

[13] In the first matter under appeal, Intact Insurance Company of Canada sought indemnity from Lombard General Insurance Company of Canada approximately four years and seven months after a multi-vehicle accident involving a pickup truck insured by Intact and a tractor trailer insured by Lombard.

[14] When the matter proceeded to arbitration, Lombard raised the defence of laches as a preliminary matter. The arbitrator, Bruce R. Robinson, concluded, based on *Perry,* that the doctrine of laches could be applied to loss-transfer claims under s. 275. He then determined that Intact's failure to make a request for indemnification for four years and three months after it was aware of its ability to seek loss-transfer from Lombard amounted to acquiescence. Further, he concluded that Intact's unexplained delay gave rise to a presumption of prejudice; the onus was on Intact to explain that prejudice and it had not done so. Therefore, Intact was precluded from proceeding with its loss-transfer claim.

[15] On Intact's appeal of Arbitrator Robinson's award to the Superior Court of Justice, Chiappetta J. concluded that the laches doctrine does not apply to loss-transfer claims under s. 275. She reasoned, at para. 7, that the right to loss-transfer indemnity is purely statutory and that, unlike the statutory provision considered in *Perry*, it does not have a "distinctively equitable flavour". She wrote, at para. 10, that "[i]t is … not appropriate to purposely re-characterize the equitable doctrine of laches in an effort to fill a perceived legislative omission, or to augment a statutory limitation period."

[16] She further concluded that, even if the doctrine of laches could apply, Arbitrator Robinson had erred in concluding that it was made out in this case. At para. 18, she held that "acquiescence" requires a plaintiff to fail to react to the defendant's conduct. Here, there was no evidence that Lombard attempted to

deny Intact any of its rights: "Intact cannot acquiesce to conduct that never occurred". And, she wrote at para. 24, a presumption of prejudice arising out of delay has no place in the context of a positive laches defence. Lombard was required to demonstrate actual prejudice and did not.

[17] Lombard appeals the order of Chiappetta J. setting aside the decision of Arbitrator Robinson.

The TD Appeal

[18] In the second matter under appeal, TD General Insurance Company sought indemnity from Zurich Insurance Company approximately 11 years after an accident involving a heavy commercial vehicle insured by Zurich and an automobile insured by TD. Over the decade that followed, TD paid statutory accident benefits to its insured. Ten years after the accident, a global mediation was held to settle TD's insured's tort claim. TD's insured's accident benefits claim settled approximately one week later. TD requested indemnification seven months later. TD paid the majority of the amounts for which it sought indemnification following the settlement.

[19] Zurich moved before Arbitrator Kenneth J. Bialkowski to have TD's claim dismissed on the basis of laches.

[20] Arbitrator Bialkowski declared himself bound by the decision of Chiappetta J. in *Intact*, and dismissed Zurich's motion. However, he expressed his disagreement with her conclusion that laches should never apply:

> I am of the view that there may well be circumstances where laches ought [to] apply. If crucial documentation, information or witnesses are no longer available by reason of the passage of an inordinate amount of time to the prejudice of the second party insurer then laches should be available to preclude a loss transfer claim.

[21] He concluded that, even if the doctrine of laches could apply in certain cases, it would not apply in this instance. Zurich was required to prove presumed prejudice or actual prejudice and it had failed to do so. He wrote that Zurich had knowledge of the accident and the personal injury claims resulting from the accident. It had defended the tort claim brought by TD's insured and would have completed a thorough liability investigation to defend that claim. There was no indication that their liability investigation documents were no longer in existence or that a crucial witness was no longer available.

[22] Lederman J. allowed Zurich's appeal to the Superior Court. He considered *Perry* and found, at para. 22:

> [T]hat 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.

[23] He also reasoned that, as the doctrine of laches developed because limitation periods did not apply to equitable claims and, as post-*Markel*, there is no limitation period governing when a first party insurer must request indemnification, applying the doctrine of laches in this situation is consistent with the purpose of the doctrine.

[24] Lederman J. held, at para. 28, that Arbitrator Bialkowski had not erred in finding that Zurich did not suffer prejudice:

> 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.

[25] However, the Arbitrator failed to consider whether there was acquiescence in this case. Lederman J. reasoned, at para. 45, that *Manitoba Metis* "at least implied that in some cases, delay might be interpreted as a clear act by the plaintiff amounting to acquiescence." At para. 47, he concluded that, in the unique circumstances of this case, "TD's delay in requesting loss transfer gave rise to an inference that it had abandoned or waived its rights to the claim."

[26] TD appeals Lederman J.'s order setting aside Arbitrator Bialkowski's award.

IV THE POSITIONS OF THE PARTIES: CAN LACHES DEFEAT A CLAIM OF A FIRST PARTY INSURER UNDER S. 275?

[27] The second party insurers argue that Ontario's loss-transfer regime has an equitable flavour and that, in any event, the fusion of law and equity should permit the application of laches to prevent injustice.

[28] They submit that *Perry* and Lederman J.'s conclusion find further support in *N.A.P.E. v. Memorial University of Newfoundland* (1998), 167 Nfld. & P.E.I.R. 72 (N.L.C.A.) and *ING Halifax v. Royal & SunAlliance Insurance Co. of Canada* (2004), 12 C.C.L.I. (4th) 272 (Ont. S.C.).

[29] Between 1986 and 1995, no legislative provision in Newfoundland and Labrador stipulated the time within which an application to set aside an arbitration award had to be brought. At paras. 84 and 85, the court in *N.A.P.E.*, relying on *Lindsay Petroleum*, concluded that laches could be used to fill the limitation gap: "*Lindsay Petroleum* speaks generally of utilizing 'principles substantially equitable' to fill a limitation gap."

[30] In *ING*, a first party insurer paid statutory accident benefits to its insured then sought and obtained indemnification from the second party insurer under s. 275. The insurers subsequently learned that the accident occurred while the insured was in the course of employment and therefore was not entitled to statutory accident benefits. The second party insurer sought reimbursement from

the first party insurer, asserting that the first party insurer was similarly entitled to reimbursement. E. MacDonald J. held that the second party insurer was entitled to rely on the equitable principle of restitution to seek repayment of amounts paid to the first party insurer under s. 275. This was a claim in equity as opposed to a claim under s. 275. Nevertheless, the second party insurers rely on this case as authority for the proposition that equity is not foreign to loss-transfer disputes.

[31] The first party insurers, on the other hand, say laches cannot apply to a claim under s. 275 of the Act.

[32] They say a loss-transfer claim is a purely statutory claim and does not have the "distinctively equitable flavour" of the action under the *Fraudulent Conveyances Act* considered in *Perry*. Moreover, they argue, laches does not apply when – as in these cases – a claim is subject to and made within a statutory limitation period: *Paul v. 1433295 Ontario Ltd.*, 2013 ONSC 7002, 120 O.R. (3d) 339, at para. 43; G. Mew, *The Law of Limitations*, 2nd ed. (Markham: LexisNexis, 2004), at p. 38.

V ANALYSIS: CAN LACHES DEFEAT A CLAIM OF A FIRST PARTY INSURER UNDER S. 275?

[33] I agree with Chiappetta J. that the defence of laches cannot be invoked in response to a loss-transfer claim under s. 275. Such a claim is a claim for legal relief. In my view, given the historic restriction of laches to claims for equitable

relief, the removal of the provision preserving the use of equitable defences from the *Limitations Act, 2002* and the comprehensive nature of the new Ontario limitations scheme, the defence of laches cannot be raised to defeat claims for legal relief that are subject to the unexpired basic limitation period under the *Limitations Act, 2002*, even those with an "equitable flavour". Accordingly, even if a second party insurer's right to indemnity under s. 275 might be argued to have an "equitable flavour" because its objective is to re-allocate the cost of statutory accident benefits in a more equitable fashion, a second party insurer cannot invoke the doctrine of laches as a defence.

Loss Transfer is Not an Equitable Claim or a Claim for Equitable Relief

[34] The remedy of indemnification is a "direct right to reimbursement": *Addison & Leyen Ltd. v. Fraser Milner Casgrain LLP*, 2014 ABCA 230, 577 A.R. 99, at para. 22. A party may have a legal claim for indemnity that arises as a result of a contract or statute. In the absence of a legal right to indemnity, a party may, in a narrow set of circumstances, be able to seek equitable indemnification (also referred to as implied indemnity). In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 147, the Supreme Court of Canada recently explained:

> Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*,

> [1945] S.C.R. 635, "claims of equitable indemnity 'proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so'". [Citations omitted.]

[35] A loss-transfer claim is clearly a statutorily-provided legal right to indemnity and not an equitable claim or a claim for equitable relief: see *Markel*, at paras. 20 and 26.

Historic Restriction of Laches to Claims for Equitable Relief where Limitations Statute Did not Apply

[36] Historically, the doctrine of laches was restricted to claims for equitable relief that were not subject to a statutory limitation period. Several of the authorities relied on by the second party insurers in this case were decided when the Ontario limitations statute did not apply to the equitable claims at issue. Accordingly, these cases do not assist in determining whether laches can defeat a legal claim for indemnity that is subject to the basic limitation period prescribed under the *Limitations Act, 2002*.

[37] As the Supreme Court explained in *M.(K.)*, the courts of equity developed their own limitation defences to delayed equitable claims because historically statutes of limitations did not apply to equitable claims. In that case, the court concluded that the defendant could raise the defence of laches to defeat the

plaintiff's claim for breach of fiduciary duty.[4] At the time, the old *Limitations Act*, R.S.O. 1990, c. L.15 was in effect. This act applied only to specified causes of action and not to civil actions in general. No relevant limitation period under that Act would have applied to the fiduciary duty claim. The limitation periods prescribed under the *Limitations Act, 2002*, however, apply to all claims – whether legal or equitable, arising under statute or common law – unless they are specifically exempted from its application. It is undisputed that the *Limitations Act, 2002* and the basic limitation period prescribed thereunder apply to a claim for indemnification under s. 275 of the Act.

[38] In *N.A.P.E.*, there was similarly no applicable statutory limitation period. The Newfoundland Court of Appeal held that laches could fill a legislative gap. *ING*, the other case relied on by the second party insurers, involved a claim for restitution – an equitable remedy – and simply recognized that such a claim could be advanced. There was no question of delay or the application of the equitable defence of laches.

Absence of a Laches-Saving Provision in the Limitations Act, 2002

[39] Unlike the *Limitations Act, 2002*, s. 2 of the old *Limitations Act* specifically preserved entitlement to equitable relief. It provided that nothing in that act interfered "with any rule of equity in refusing relief on the ground of

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[4] It concluded, however, that the defence was not made out in the circumstances.

acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." (For convenience only, I refer in the following paragraphs to this section as the "laches-saving provision".) The court in *M.(K.)*, at p. 70, commented with respect to that section:

> This section makes clear that the Act does not exhaust the defences available to a defendant because of the passage of time. Thus, certain actions expressly made subject to the *Limitations Act* may not yet be out of time under the terms of that statute, but may be precluded by equitable defences that apply notwithstanding the terms of the Act. The section also gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases.

[40] While s. 2 was contained in Part I of the old *Limitations Act*, which dealt with limitation periods in respect of real property claims, the Supreme Court interpreted it as applying generally to all claims under that act. See also: *Susin v. Genstar Development Co.* (2001), 14 C.L.R. (3d) 292 (Ont. S.C.), aff'd (2003), 27 C.L.R. (3d) 161 (Ont. C.A.), at paras. 21-23.

[41] In *Perry*, which is the cornerstone of the second party insurers' arguments, the old *Limitations Act* – with its broad laches-saving provision in s. 2 – was applicable. Nolan J. noted in *Paul*, at para. 44, that the decision not to include the saving provision from the old *Limitations Act* in the *Limitations Act, 2002* "could be interpreted as an implication by the legislature that, where limitations

legislation is applicable to claims in equity, equitable remedies are not to be used."

[42] While I refrain from commenting on the availability of equitable remedies generally, I agree with the view that the absence of a laches-saving provision from the *Limitations Act, 2002* suggests that the equitable defence of laches is not available to bar a claim that is brought within the basic limitation period prescribed under the *Limitations Act, 2002*. While the mere fact that the laches-saving provision was left out of the new Act may not necessarily give rise to a presumption that the legislature intended to change the law, the removal takes on additional significance when viewed in context. A number of factors support the conclusion that the removal of the laches-saving provision in this case was intentional.

(a) Consideration of the Impact of a New Limitations Scheme on Laches

[43] The need to consider the impact of any legislative changes on the doctrine of laches was highlighted in the review of limitations law that preceded the enactment of the *Limitations Act, 2002*. However, the laches-saving provision from the 1990 *Limitations Act* was not included in the *Limitations Act, 2002* in the face of decades of consideration.

[44] In its seminal 1969 report entitled "Report on Limitation of Actions" (the "1969 Report"), the Ontario Law Reform Commission recommended the adoption of a "catch-all" provision that would make all claims subject to the new Ontario limitations scheme. The Commission cautioned, at p. 22, that "when reform of limitation laws is being undertaken, careful consideration should be given to the role that ... laches should play and the consequences that changes would have on [this] equitable [defence]."

[45] The Commission distinguished between the defence of acquiescence (which it described as conduct by which a person has shown himself indifferent to the violation of his rights and as something which may arise without delay) and laches, which may exist even without any element of acquiescence being present. The Commission noted that "it seems that acquiescence will always be a defence" and "it makes no difference whether the Act expressly governs the matter or not". Laches, on the other hand, could operate as a limitation period by analogy, when no statutory limitation period applies. The Commission contemplated that the scope of laches would be narrowed once the new act governed all claims and would not be applicable to equitable claims generally. It wrote, at pp. 22-23:

> Where the Act expressly applies to an equitable claim, delay short of the full period is clearly irrelevant.
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> ...

> Once all actions are expressly governed, there will be no need for the operation of the doctrine of laches except insofar as the granting of certain equitable remedies in aid of legal rights is concerned. Claims for specific performance or rescission of a contract, for example, should remain subject to the defence of laches. Acquiescence, on the other hand, should continue to be a valid defence to the full extent that it now is.

[46] In a 1977 discussion paper, the Ministry of the Attorney General proposed draft legislation reflecting this recommendation: it contained a catch-all provision, capturing any residual claims not covered by a specified limitation period, and preserved the doctrine of laches only in the case of equitable relief claimed in aid of a legal right: Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (Toronto: Ministry of the Attorney General, 1977), at pp. 6 and 8.

[47] In 1983, the Ontario legislature introduced Bill 160, *An Act to revise the Limitations Act*, 3rd Sess, 32nd Leg, Ontario, which would apply generally to all claims. Subsection 2(1) of the Bill contained a broader laches-saving provision than that recommended by the 1969 Report and 1977 discussion paper, explicitly preserving the use of equitable defences to defeat a claim on the grounds of "acquiescence or undue delay."

[48] In December 1989, the Ministry of the Attorney General established a Limitations Act Consultation Group to conduct a comprehensive review of the Ontario limitations regime and make recommendations for reform. While it did not specifically mention equitable doctrines or the role they should play in the new

limitations scheme in its subsequent report (the "March 1991 Report"), the Consultation Group referred to the 1969 Report, the 1977 draft legislation and Bill 160 in discussing the ongoing attempts to modernize Ontario's limitations scheme and endorsed many of the recommendations contained therein: Limitations Act Consultation Group, *Recommendations for a New Limitations Act* (Toronto: Ministry of the Attorney General, 1991), at p. 1. The 1969 Report, the 1977 draft legislation and Bill 160 continued to remain at the forefront as new legislation was considered. Despite over three decades of considering the role of laches in Ontario's limitations regime, the legislature ultimately did not include a laches-saving provision in the *Limitations Act, 2002*.

(b) Laches-Saving Provision in the Real Property Limitations Act

[49] While the legislature did not include a laches-saving provision in the *Limitations Act, 2002*, it preserved s. 2 of the old *Limitations Act* in the *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

[50] In its March 1991 Report, the Consultation Group had recommended further review of Part I of the old *Limitations Act* – the provisions in respect of actions affecting real property (primarily to recover land or rent or relating to charges on land). It also expressed concern that such further review not delay the implementation of the balance of the proposed reforms. The legislature acted on that recommendation. In 2002, it repealed Parts II and III of the old *Limitations*

Act, leaving only the definitions and Part I. To reflect this narrowed scope, the old *Limitations Act* was renamed the *Real Property Limitations Act* and the *Limitations Act, 2002,* which came into effect on January 1, 2004, was enacted to deal with limitation periods other than those affecting real property. The fact that the legislature extricated Part I of the old *Limitations Act* – including the laches-saving provision in s. 2 – and enacted it as the *Real Property Limitations Act* without adding a general laches-saving provision to the *Limitations Act, 2002* might suggest that it had always intended that the laches-saving provision apply only to real property claims.

(c) Other Common Law Provinces Retained a Laches-Saving Provision

[51] Ontario was one of the last provinces to adopt a limitations statute that applies to civil actions generally. At the time the *Limitations Act, 2002* was enacted, every other common law province where the limitations legislation governed all civil actions contained a laches-saving provision, expressly preserving the application of equitable doctrines, notwithstanding that the applicable limitation period had not expired.[5] The drafters of the *Limitations Act, 2002* would have been familiar with this legislation and the widespread retention

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[5] *Limitations Act*, R.S.A. 2000, c. L-12, ss. 3 and 10; *Limitation Act*, R.S.B.C. 1996, c. 266, ss. 3(5) and 2, as repealed by S.B.C. 2012, c. 13, s. 31; *The Limitation of Actions Act*, C.C.S.M. c. L150, ss. 2(1)(n) and 59; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 9 and 65, as repealed by 2009, c. L-8.5, ss. 34(3) and 34(17); *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 9 and 3; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(j) and 49; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(j) and 49, as amended by S.Nu. 2013, c.20, s. 23; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, ss. 2(1)(g) and 51; *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, ss. 3(1)(j) and 51, as repealed by *The Limitations Act*, S.S. 2004, c. L-16.1, s. 28; *Limitation of Actions Act*, R.S.Y. 2002, c. 139, ss. 2(1)(j) and 50.

of a laches-saving provision in the context of generally applicable limitations statutes. A number of these provinces have recently amended their limitations legislation to adopt a uniform limitation period applying to all claims, similar to the *Limitations Act, 2002*. With the exception of Nova Scotia, these amended acts continue to retain a laches-saving provision.[6] The absence of such a provision in Ontario is therefore noteworthy.

[52] The legislature's removal of the laches-saving provision overrules any suggestion in *Perry* that laches might bar the commencement of a proceeding to pursue an unexpired legal claim to which the basic limitation period prescribed by the *Limitations Act, 2002* applies. Indeed, even in the presence of such a provision, this court has held that "[s]o long as the action was instituted within the limitation period, the question of laches does not arise": *F.(L.) v. F.(J.R.)* (2001), 144 O.A.C. 372 (C.A.), at para. 6.

Comprehensive Nature of the Limitations Act, 2002

[53] The deletion of the laches-saving provision from the *Limitations Act, 2002* coincided with a major reform of the existing limitations law in Ontario and a shift toward a more comprehensive scheme that aims to provide certainty and clarity to litigants.

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[6] *Limitation Act*, S.B.C. 2012, c. 13, s. 5; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; *The Limitations Act*, S.S. 2004, c. L-16.1.

[54] As I note above, the old *Limitations Act* applied only to a closed list of enumerated causes of action and not to civil actions in general. Equitable causes of action, with few exceptions, were outside of its scope. The *Limitations Act, 2002* "represents a revised, comprehensive approach to the limitation of actions": *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401, at para. 8. In *Joseph*, this court concluded that the common law doctrine of special circumstances had no application under the new, comprehensive *Limitations Act, 2002*. That doctrine had allowed a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where special circumstances existed, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment. Permitting a defendant to invoke the equitable doctrine of laches because a legal claim has an "equitable flavour" would be inconsistent with the comprehensive approach to the limitation of actions represented by the *Limitations Act, 2002*.

[55] Permitting a defendant to rely on the defence of laches where the claim is a legal claim and subject to and within the basic limitation period prescribed under the *Limitations Act, 2002* would also be counter to the purpose of that Act of promoting certainty and clarity in the law of limitation periods: *msi Spergel Inc. v. I.F. Propco Holdings (Ontario) 36 Ltd.*, 2013 ONCA 550, 117 O.R. (3d) 81, at para. 61.

[56] Given the comprehensive approach of, and absence of a laches-saving provision in, the *Limitations Act, 2002*, together with the historic restriction of laches to claims for equitable relief, I am satisfied that a second party insurer cannot invoke the doctrine of laches as a defence to a first party insurer's legal claim for indemnity.

Scope of Decision and Impact on Equitable Defences Generally

[57] I wish to make clear that this decision does not address the availability of equitable defences (such as waiver, estoppel and acquiescence) to the extent not founded solely on a plaintiff's delay in initiating its claim. Nor do I suggest that delay in seeking equitable relief such as an injunction could not be a relevant factor in deciding whether such equitable relief should be granted. This decision considers whether a defendant seeking legal relief within the basic limitation period prescribed under the *Limitations Act, 2002* can rely on the delay-based defence of laches.

[58] In coming to my conclusion, I am mindful of the fact that the arbitrators in the loss-transfer disputes (*Federation Insurance Co. of Canada v. Kingsway General Insurance Co.*, 2010 CarswellOnt 17903 (Ins. Arb.) (S. Densem), at p. 16, and *ING Insurance Co. of Canada v. Markel Insurance Co. of Canada* (4 April 2011), Toronto (Ins. Arb.) (L. Samis), at p. 10) that led to this court's decision in *Markel*, either assumed or contemplated that the doctrine of laches could be

available to a second party insurer where the first party insurer had been exceptionally dilatory in seeking indemnification.

[59] However, I am not persuaded that the inability to invoke the doctrine of laches is as significant an issue for second party insurers as they argue. First, it is in a first party insurer's best interests to request indemnification under s. 275 promptly. It will only obtain payment from the second party insurer if it requests payment. Presumably, therefore, any instances of exceptional delay would be the result of inadvertence and would not be commonplace. Second, the Act and the regulations under the Act are the subject of frequent amendment. What the second party insurers characterize as a "legislative gap" could seemingly be filled by the enactment of regulations. Finally, given the requirements of the doctrine of laches, the situations in which a second party insurer could have successfully invoked the doctrine would have been very limited. As I discuss below, neither Lombard nor Zurich would have been able to rely on laches in the cases under consideration.

VI COULD THE SECOND PARTY INSURERS HAVE RELIED ON LACHES IN THESE CASES?

[60] To rely on the doctrine of laches a defendant must establish that in all the circumstances the delay was unreasonable and either that:

> (1) the delay by the claimant constituted acquiescence of the defendant's conduct; or

> (2) the claimant's delay resulted in *actual* prejudice to the defendant that would make the action unreasonable or unjust.
>
> *Manitoba Metis*, at paras. 145-46; *M.(K.)*, at pp. 76-78; *Perry*, at para. 36; *Lindsay Petroleum*, at pp. 239-240, *N.A.P.E. v. Memorial University of Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (N.L. T.D.), aff'd (1998), 167 Nfld. & P.E.I.R. 72 (N.L. C.A.), at paras. 42, 44, 49-50, 52-55.

[61] At p. 78 of *M.(K.)*, the Supreme Court explained what acquiescence means in the context 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."

[62] Contrary to the second party insurers' submissions, the notion of a "presumption of prejudice" arising from the passage of time which surfaces in other contexts has no place in this equitable doctrine. This is clear from *Perry* and *Manitoba Metis*. In *Perry*, the court indicated that the defendant "must show ... prejudice" and set aside the summary judgment below because the motion judge had not specified the nature of the prejudice suffered by the defendants that would justify barring the claim. *Manitoba Metis* directed, at para. 145, that under the second branch of the test in *M.(K.)* the court must consider whether there was "any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*."

[63] The party seeking to rely on the defence of laches must show actual prejudice.

[64] Accordingly, in the context of a claim under s. 275 of the Act, a second party insurer seeking to rely on the second branch of the test would have to establish that the first party insurer's delay resulted in *actual* prejudice to the second party insurer that would make a determination of the loss-transfer, based on the Fault Determination Rules, unreasonable or unjust.

[65] Neither Lombard nor Zurich could have successfully invoked the doctrine of laches in these cases.

The Lombard Appeal

[66] I agree with Chiappetta J. that the defence of laches, if applicable, was not made out.

[67] Lombard did not establish acquiescence. As Chiappetta J. wrote, at para. 18, there was no evidence that Lombard attempted to deprive Intact of any of its rights. Indeed, it is difficult to envisage a situation where a second party insurer could successfully invoke laches in response to a first party insurer's claim for indemnification under s. 275 based on "acquiescence".

[68] And, as Chiappetta J. wrote, at para. 25, Lombard was required to demonstrate actual prejudice and did not.

The TD Appeal

[69] I disagree with Lederman J. that acquiescence was made out simply because of TD's delay. While delay *after a plaintiff has been deprived of her rights* can give rise to an inference that her rights have been waived, Zurich had not deprived TD of any rights. TD's delay in making a loss-transfer claim therefore could not constitute acquiescence in the context of laches.

[70] *Manitoba Metis* was central to Lederman J.'s reasoning. With respect, *Manitoba Metis* does not permit a finding of acquiescence where – as here – the claimant has not been denied any rights.

[71] In *Manitoba Metis*, the majority concluded that the doctrine of laches did not bar a claim by Métis claimants that the Crown failed to implement its land-grant obligations to the Métis people enshrined in the *Manitoba Act, 1870,* S.C. 1870, c. 3, in a manner consistent with the honour of the Crown.

[72] In addressing the issue of acquiescence, the majority focussed on, among other things, the imbalance in power between the Métis people and Crown. At para. 147, the majority concluded that, in the context of that case, the delay of more than 100 years could not by itself "be interpreted as some clear act by the claimants which amounts to acquiescence or waiver."

[73] Lederman J. interpreted this passage as implying that, in some cases, delay alone might be interpreted as giving rise to an inference that a claimant had abandoned its rights and that the claimant need not have been deprived of any rights. However, the majority found that the Métis people had been deprived of rights: the federal Crown had failed to implement the land grant provisions set out in the *Manitoba Act* in accordance with the honour of the Crown. The statement on which Lederman J. relied was made in that context and must in my view be interpreted in that light.

[74] As to prejudice, Arbitrator Bialkowski determined that Zurich had failed to prove prejudice, and Lederman J. held that the Arbitrator's conclusion was reasonable. I agree with Lederman J.'s analysis and conclusion on this issue.

VII DISPOSITION

[75] I would dismiss the Lombard appeal and allow the TD appeal. In accordance with the agreement of the parties, I make no order as to costs of these appeals.

NOV 12 2015

Released: dlw

Alexandra Ng, ACSD

I agree. K. van Rensburg JA

I agree M.L. Benotto J.A.