

Limitation Period Issues

The Ontario Court of Appeal recently considered limitation period issues relevant to motor vehicle cases and in particular, with respect to the inadequately insured motorist endorsement of the automobile insurance policy and loss transfer claims.

When does the limitation period begin to run for claims made pursuant to the inadequately insured motorist endorsement of an automobile insurance policy?

In [*Roque v. Pilot Insurance Company*](#)^[1], the Court was asked to determine when the limitation period begins to run for commencing an action against an insured's own insurer under the inadequately insured motorist endorsement of an automobile insurance policy.

Fernando Roque was injured in an accident on December 5, 1996. He commenced an action against the driver of the vehicle, claiming \$1,000,000.00 in general damages and \$750,000.00 in special damages. He was insured by Pilot Insurance, and his policy included the Family Protection Endorsement OPCF 44. The OPCF 44 included coverage for inadequately insured motorists. The policy required that every action or proceeding against the insurer be commenced within 12 months of the date that the claimant knew or ought to have known that the quantum of claims exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred. The policy further provided that this requirement is not a bar to an action commenced within 2 years of the date of the accident.

The Plaintiff submitted that the OPCF "should be interpreted to mean that the limitation period begins to run when the Plaintiff's damages have been quantified by settlement or judgment. Only then can it be said that the Plaintiff "knows" for certain that the available insurance under the Defendant's policy is less than that available under his own coverage". In the alternative, the Plaintiff submitted that "the limitation period does not begin to run until the Plaintiff knows that the quantum of the claim is greater than the tortfeasor's insurance coverage."

The Court of Appeal rejected both submissions and determined that the limitation period begins to run when the Plaintiff has a body of evidence accumulated that would afford a "reasonable chance" of persuading a Judge that the quantum of the Plaintiff's claims will exceed the sum of \$200,000.00. The Court agreed that the interpretations suggested by the Plaintiff had advantages, but felt that such interpretations were inconsistent with the wording of the OPCF 44, and therefore should fail.

The Court of Appeal notes that accepting this interpretation should not be dangerous if insurers abide their obligations under the *Insurance Act*, while also acknowledging that the outcome will likely cause Plaintiffs to commence actions against their own insurers only to discontinue them later:

In my view, the appellant overstates the concern that applying the limitation period in s. 17 of OPCF 44 according to its ordinary grammatical meaning will lead to a multiplicity of proceedings. Section 258.4 of the *Insurance Act*, R.S.O. 1990, c. I.8 obligates an insurer who receives a notice under s. 258.3(1)(b) to promptly inform the plaintiff whether there is a motor vehicle liability policy issued by the insurer to the defendant and, if so, the liability limits under the policy, as well as whether the insurer will respond under the policy to the claim. Section 258.4 is intended to avoid the situation that arose in this case, where the defendant's insurer did not comply with s. 258.4. Where a defendant's insurer fails to comply with its obligations under s. 258.4, it would be prudent for plaintiffs' counsel to commence an action against their own insurer and discontinue it later if necessary.^[2]

It is possible that this decision will result in the Plaintiff's insurer being named as a Defendant in any action commenced against a tortfeasor, out of an abundance of caution, in order to avoid the expiry of the limitation period.

When does the limitation period begin to run for loss transfer claims?

In [*Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*](#)^[3], the Court of Appeal was asked to determine when the limitation period begins to run in a loss transfer case.

The case arose out of two Arbitration decisions. In *Federation v. Kingsway*, the Arbitrator held that the limitation period begins to run the day after the insurer seeking indemnification makes a demand for loss transfer. In *ING v. Markel*, the Arbitrator found that the limitation period runs only from the date the second insurer definitively refuses to indemnify. Both arbitration decisions were appealed. The Superior Court Judge upheld the approach in *Federation v. Kingsway* and rejected the approach of the arbitrator in *ING v. Markel*. This decision was appealed in both actions to the Court of Appeal.

The Court of Appeal concluded that the first party insurer "discovers" a claim for loss transfer against the second party insurer within section 5 of the *Limitations Act, 2002* as follows:

Once a legally valid (*i.e.*, apart from any issue as to limitations) claim is asserted by the first party insurer's request for indemnification, the second party insurer is under a legal obligation to satisfy it. All the facts are present to trigger the legal obligation of the part of the second party insurer to indemnify the first party insurer for the loss. The situation has crystallized into complete and valid legal claim that is immediately enforceable

against the second party insurer. There is noting more that must happen to create the legal obligation of the second party insurer to pay the claim.

In my view, it must follow that the first party insurer suffers a loss from the moment the second party insurer can be said to have failed to satisfy its legal obligation to satisfy the loss transfer claim. I agree with the arbitrator in *Federation v. Kingsway* that the first party insurer suffers a loss caused by the second party insurer's omission in failing to satisfy the claim the day after the request for indemnification is made.^[4]

The Court rejected the argument that a failure of the insurers to agree with respect to the request to indemnify is a condition precedent to the commencement of arbitration proceedings. The request for indemnification triggers the commencement of the running of the limitation period.

[1] 2012 ONCA 311, (2012) 110 O.R. (3d) 21 (C.A.)

[2] *ibid.*, paragraph 11.

[3] 2012 ONCA 218, (2012) 109 O.R. (3d) 652 (C.A.)

[4] *ibid.*, paragraphs 25-26.