

IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 as amended, Section 275 and Regulation  
s64 as amended

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

AND IN THE MATTER of an Arbitration

**BETWEEN**

**ROYAL & SUN ALLIANCE/WESTERN ASSURANCE COMPANY**

Applicant

and

**THE CO-OPERATORS GENERAL INSURANCE COMPANY**

Respondent

**AWARD**

**COUNSEL**

Lora Castellucci, counsel for the Applicant, Royal Sun Alliance/Western Assurance Company (hereinafter referred to as "Western").

Mai T. Nguyen, counsel for the Respondent, The Co-operators General Insurance Company (hereinafter referred to as "Co-operators").

**INTRODUCTION**

This matter comes before me pursuant to s. 275 of the *Insurance Act* and Regulation 664 as amended. This is a dispute between two automobile insurers with respect to a claim for loss transfer arising out of an accident that occurred on July 16, 2018.

Counsel on consent have appointed me as their arbitrator pursuant to s. 275(4) of the *Insurance Act*, Regulation 664 and the *Arbitration Act*. Counsel signed an Arbitration Agreement dated January 29, 2026. By way of background, on July 16, 2018 a vehicle being operated by the two claimants was involved in a three-car rear-end collision. While the facts of how this collision occurred and what contact was between the vehicles remains in dispute, essentially the vehicle containing the two claimants was the first vehicle in line. This was a 2010 Nissan insured by Western.

Also involved in the accident was a 2011 Peterbilt dump truck which was insured by Co-operators. There is no issue that this was a heavy commercial vehicle. It is alleged that a 2003 Pontiac cut in front of the dump truck. The dump truck then rear-ended the Pontiac and the Pontiac then rear-ended the Nissan. Whether or not there was contact between the Peterbilt dump truck and the Nissan remains an issue in dispute between the parties. However, this arbitration is not for the

purpose of determining fault. Rather, the parties have raised a preliminary issue.

Western argues that Co-operators accepted loss transfer for both claimants by letter dated July 7, 2021. Co-operators acknowledges that it initially accepted loss transfer but under the mistaken belief that loss transfer applied even if there was no contact between the heavy commercial vehicle and the vehicle claiming loss transfer. Accordingly, Co-operators retracted their acceptance by letter dated July 13, 2021. Western disputes that Co-operators has the right to retract its acceptance and that question is the matter before me to be resolved in this preliminary issue proceeding.

## **PROCEEDINGS**

The hearing was conducted in writing but the parties did have an opportunity to make oral submissions. Counsel also submitted Factums, various documents, case law, as well as an Arbitration Agreement.

The documents before me included:

1. The relevant log notes from Co-operators;
2. Letter dated May 28, 2021 from Western to Co-operators with respect to notice of loss transfer;
3. The Notification of Loss Transfer dated May 28, 2021;
4. A copy of the Police Report;
5. A copy of notes from the police officer;
6. Letter dated June 3, 2021 from Co-operators to Western;
7. Letter dated July 7, 2021 from Co-operators to Western;
8. Letter dated July 13, 2021 from Co-operators to Western;
9. Letter from Western to Co-operators with request for indemnification with respect to Claimant 1 dated July 13, 2021 with attached invoices;
10. Letter from Western to Co-operators dated July 16, 2021; and
11. Letter from Co-operators to Western dated July 20, 2021.

There was no oral evidence nor were there any transcripts of any examinations under oath of any of the representatives of the parties or the claimants themselves.

## ISSUE FOR DETERMINATION

The Arbitration Agreement identifies the preliminary issue as follows:

"By way of preliminary issue hearing in writing and oral hearing, the arbitrator shall determine whether or not the Respondent waived its right to deny and dispute loss transfer of the two claimants' claims based on its loss transfer acceptance, and if so, whether the Respondent is permitted to retract the waiver."

## FACTS

On July 16, 2018 a 2010 Nissan insured by Western with two claimants as occupants was involved in a three-vehicle collision which resulted in injuries to the two occupants.

The three vehicles involved in the collision included the 2010 Nissan insured by Western, a 2003 Pontiac and a 2011 Peterbilt dump truck insured by Co-operators. It is acknowledged that the latter is a heavy commercial vehicle.

The two claimants submitted an Application for Accident Benefits to Western. One of the claimant's accident benefit files settled prior to the commencement of the claim for loss transfer. The second claimant's file settled sometime thereafter.

By letter dated May 28, 2021, Western placed Co-operators on notice of loss transfer for the two claims. A Notification of Loss Transfer was included with the letter for both claimants. In addition, a copy of the Police Report, police notes, and an Autoplus report were included.

The letter of May 28 advised that Western did not insure any commercial vehicles under their policy and took the position that the Co-operator's vehicle was a heavy commercial vehicle (dump truck) and that the auto policy confirmed a valid policy with Co-operators on the dump truck on the date of loss.

The letter from Western also states:

"Attached is the police report and police officer's notes. According to the police officer's notes, our insured and a witness confirmed that the dump truck also hit our insured (despite what the police report shows)."

In the police officer's notes attached to the letter from the police office, there is an entry indicating that the claimants' vehicle had been in stop-and-go traffic when a second vehicle was rear-ended which caused that vehicle to make contact with her car and then for the third vehicle (the dump truck) to "lightly rear-end her".

The Notification of Loss Transfer suggested the applicability of Rule 6(2).

Co-operators' log notes show an entry on May 28, 2021 confirming that they had been put on notice of loss transfer.

A log note dated June 3, 2021 at 9:54 a.m. notes, "Details of loss: Our insured rear-ended TP1, then TP1 ended up rear-ending TP2 (three vehicles involved). Our insured driving HCV and both TPs were driving PPVs verified on police report. We accepted 100% loss transfer as our insured was 100% at fault for the loss."

An entry June 3, 2021 at 10:18 notes, "We have received a Notice of Loss Transfer and completing our investigation for same ... Ask the TPA to send the OCF-1, a copy of their response and any other information to assist in the investigation."

In a letter dated June 3, 2021 the Co-operators adjuster wrote to Western and advised that they had received the Notice of Loss Transfer but they were not prepared to accept loss transfer at that time until "we complete our investigation". A request was made for the claimants' OCF-1 and also proof that the claimant was not in the course of her employment such that a worker's compensation benefit would be applicable. There was no request for any other additional information.

On July 7, 2021 at 21:09 the log note from the Co-operators adjuster indicates the following: "Received email from TPA requesting status of loss transfer decision for claimants. Our insured was 100% at fault for the loss - PR on file confirming same and charged with HTA. He rear-ended third party vehicle causing rear-end chain reaction. Claimant is insured with RSA and she is named insured on RSA policy. A copy of RSA policy was sent to us confirming same. 100% loss transfer applies and we will need to reimburse RSA for same less \$2,000 deductible." This particular email dealt with the first claimant (the mother) and goes on to indicate that the adjuster emailed Western back with their decision to "accept 100% loss transfer for this claimant". A letter was also emailed of the same date confirming that.

The letter of July 7, 2021 from Co-operator's to RSA for the mother claimant indicates the following:

"We have completed our investigation surrounding your Notice of Loss Transfer dated May 28, 2021 and agree to reimburse for reasonable medical and disability benefit expenses arising out of this claim less the initial \$2,000 deductible. Please forward your indemnity request to the writer below email."

A subsequent log note indicates that the same adjuster was accepting loss transfer for the younger claimant and that a similar letter was sent confirming acceptance of loss transfer. That letter of July 12 was not produced at the hearing and counsel advised they had been unable to locate it but submitted the letter would have been in the same wording as the July 7 letter sent with respect to the mother claimant.

The log notes of Co-operators between May 28, 2021 when the Notice of Loss Transfer was received and July 7 when the first letter accepting the loss transfer was sent, show the following activities:

1. A review of the file with respect to the nature of the accident benefit claim and

confirmation that the daughter's claim had been settled prior to Notice of Loss Transfer being submitted and that had been settled for outside of the MIG limits;

2. Copies of the OCF-1 and OCF-3 were received on June 22;
3. On June 24 there is a "detailed loss review" in which the loss transfer claim is summarized. The note indicates, "Awaiting loss transfer indemnity requests from Western." Finally, the note indicates that the Police Report on file confirms that the Co-operator's policyholder was 100% at fault for the motor vehicle accident and that he was operating a heavy commercial vehicle;
4. On July 7 at 21:01 (prior to the email accepting loss transfer) the adjuster notes that she had requested with respect to the younger claimant a copy of the Autoplus to confirm that the daughter was also insured under the Western policy. This was later confirmed on July 12 before the letter of acceptance was sent out for the younger claimant as coverage under the Western policy was based on dependency on her mother as she was 16 at the time of the accident.

In response to Co-operators' acceptance of loss transfer with respect to the daughter, Western provided Co-operators with a request for indemnification by letter dated July 13, 2021 in the amount of \$16,366.59.

No payment was made by Co-operators with respect to either claimant in terms of loss transfer indemnification.

Turning back to the log notes of Co-operators, on July 13, 2021 at 13:09 there is a note from another individual, not the adjuster handling the claim (possibly a supervisor). Her first note indicates, "Claim originally open due to possible LT exposure, we were not notified until May 21. LT has been accepted and we await indemnification request."

A subsequent note by the same individual at 13:49 indicates, "Is there a possibility that loss transfer does not apply as our insured did not strike their vehicle, rather only struck/rear-ended the middle vehicle of three, middle vehicle was pushed into the first vehicle (claimant). Case law should be reviewed to confirm LT is applicable."

The adjuster at 14:17 on July 13 notes, "Case law reviewed for fault and LT." She references an article she found from Rogers & Partners and provides a summary of that article. She concludes, "Case law confirms that the vehicle at the front of the rear-end collision has no recourse for loss transfer against the heavy commercial vehicle if no contact physical contact was made between the two."

The log note goes on to say that the adjuster then emails the third party adjuster with a denial letter and cited case law.

By letter dated July 13, 2021 Co-operators wrote to Western advising that they had accepted loss

transfer prematurely. The letter notes:

"Upon review of case law, it is determined that Western assurance has no recourse for loss transfer against The Co-operators as there was no physical contact between the vehicles."

The letter goes on to provide a summary of the case law and the conclusion that the Co-operators vehicle is not responsible for paying loss transfer indemnity in the circumstances. The letter concludes, "We will not be accepting loss transfer this claim."

By letter dated July 16, 2021 Western wrote to Co-operators advising that Co-operators had waived its right to dispute loss transfer. Western states:

"Your correspondence of July 7, 2021 clearly confirms that The Co-operators had completed its investigation and as a result accepted loss transfer of this claim. Western Assurance will rely on this letter as proof that The Co-operators had made an unequivocal and conscious decision to abandon its right to dispute loss transfer. The case law is clear that where an insurer demonstrates a full intention to abandon its rights, waiver will be found. As such, The Co-operators has no basis for retracting acceptance of loss transfer."

According to the log notes, on July 19, 2021 Co-operators contacted legal counsel to discuss the claim and on July 20, 2021 another letter was sent from Co-operators to Western confirming their position that they would not accept loss transfer and disagreeing with Western's position that Co-operators had waived their rights to dispute loss transfer. In any event, Co-operators took the position that they were now retracting that waiver and that reasonable notice had been given of the retraction.

#### **POSITION OF THE PARTIES**

Both parties agree that the four criteria that are to be applied to the question as to whether Co-operators can retract from their acceptance of loss transfer are those set down by Arbitrator Samis in *Waterloo Insurance Company v. ACE INA Insurance Company*, Arbitrator Samis, April 19, 2018. Those four criteria are:

1. Did the person have full knowledge of their rights?
2. Does the evidence demonstrate an unequivocal and conscious intent to abandon the rights?
3. Has the waiver been retracted on reasonable notice:
4. Would it be unfair to allow the retraction of the waiver?

Co-operators accepts that it is a sophisticated insurer that deals frequently with loss transfer matters and that therefore the first criterion has been met. In other words, Co-operators acknowledges that it has full knowledge of their rights.

Co-operators also acknowledges that the letter accepting loss transfer for these two claimants did "demonstrate an unequivocal and conscious intent to abandon their rights". It is with respect to the latter two criteria where Co-operators and Western disagree.

### **Co-operators' Position**

With respect to the third criterion, Co-operators submits that it provided prompt and reasonable notice of its retraction and that the reasonable notice had the effect of protecting reliance by the party in whose favour the waiver operates.

Co-operators notes that the letter seeking to retract the acceptance of loss transfer dated July 13, 2021 was sent merely six days after the initial acceptance letter. Co-operators submits that that letter clearly set out the basis that the retraction was sought: the fact that loss transfer did not apply if there was no contact between the two vehicles as there was no allocation of fault in those circumstances.

Co-operators submits that as soon as the initial mistake was identified, that immediate notice was given and Co-operators did not sit on the information obtained.

Co-operators notes that it did not pay any amounts towards indemnification to Western and in fact it did not even receive a request for indemnification for the older claimant, only for the younger one. No payments were made that Western could rely upon to its detriment.

With respect to the second point, Co-operators submits that considering it was only six days between acceptance and retraction, that there could be no prejudice caused to Western and therefore it should be permitted to withdraw its initial agreement.

Co-operators submits that the circumstances of this case are sufficiently different from the case of *Intact Insurance Company v. Co-Operators General Insurance Company* (decision Arbitrator Samworth, April 14, 2025) that it should not be followed but distinguished. Co-operators submits that the nature of the mistake made in this case is more nuanced and different in nature than the mistake made in *Intact v. Co-operators (supra)*. In that case the mistake was, the Co-operators accepting loss transfer on the basis that the vehicle was a heavy commercial vehicle without having made investigations to determine whether it met the definition of a heavy commercial vehicle.

Co-operators submits that in this case it is a legal mistake as opposed to a factual mistake. It was not until there was clarification of the legal principles that would be applicable to the nature of loss transfer being claimed that Co-operators became aware that loss transfer may not be applicable.

In addition, Co-operators distinguishes the *Intact v. Co-operators* case from the amount of time that took place between acceptance and retraction. In this case it was six days and in the *Co-*

*operators v. Intact* case the time period was from January 12, 2021 to April 27, 2021, a significantly longer time.

Co-operators submits that to find that they are not permitted to withdraw from their loss transfer acceptance in the circumstances of this case would result in there being a standard of perfection for adjusters for there ever to be circumstances when a retraction of an acceptance would be permitted.

### **Submissions of Western**

In neither their written nor oral submissions did Western take serious issue with the fact that six days constituted reasonable notice of the parties' request to withdraw their acceptance of loss transfer.

Western focused on the issue of prejudice and whether Co-operators had established that a reasonable investigation had been conducted prior to accepting loss transfer.

Western relied almost exclusively on the decision in *Intact v. Co-operators (supra)*.

Western argues that when considering if an insurer should be entitled to retract from a clear and unequivocal acceptance of loss transfer, that one that must make enquiries into whether that insurer made a reasonable investigation into the circumstances of the loss and the basis for the acceptance of loss transfer before accepting loss transfer.

Western submits that a party seeking to retract a waiver must do more than just communicate a prompt retraction. There must be evidence of reasonable investigation and diligent efforts to obtain relevant information at an early stage both before and after accepting loss transfer. Where the basis for denying loss transfer could have been identified earlier through reasonable investigation prior to the acceptance of the loss transfer, then reasonable notice will not be established.

Western also submits that the case law in this area requires that in addition to reasonable notice, that the retraction of a waiver is only available in extreme circumstances. In addition to the decision in *Intact v. Co-operators (supra)* Western relies on the decisions of Arbitrator Jones in *Motors Insurance Company v. The Co-Operators General Insurance Company*, August 24, 2024 and *Enterprise Rent A Car v. ING Insurance Company of Canada*: Arbitrator Jones, November 1, 2006.

Western submits that there is no evidence in this case of extreme circumstances that would justify permitting Co-operators to withdraw their acceptance.

In terms of the investigation of Co-operators, Western submits there really was none. Co-operators was provided with a copy of the Police Report, the notes of the investigating officer and as well the covering letter sent by Western to Co-operators putting them on notice of loss transfer and identified that they were taking the position that there was contact between the heavy commercial vehicle and their Nissan despite what the Police Report said. Therefore, Western submits Co-operators should have been aware on receipt of that letter that there was a live issue with respect to vehicle contact in the context of the loss transfer matter.

Western reviewed the log notes of Co-operators between May 28, 2021 when Notice of Loss Transfer was sent to Co-operators and July 7, 2021 when Co-operators accepted loss transfer and other than reviewing the Police Report and noting that their insured was 100% at fault and that loss transfer should be accepted, Co-operators made no other efforts to investigate. Specifically, Co-operators did not contact their insured and seek a statement. They did not request an examination under oath. They did not ask for any more documentation relating to potential liability. They did not review any case law. They did not seek an opinion from legal counsel formally or informally.

Western submits that by the time Co-operators sent their letter of July 13 seeking to retract their acceptance of loss transfer, that no new information was provided to Co-operators. Western points out that no investigation was done between July 7 and 13 that would suggest that the facts were any different than Co-operators had been aware of when they accepted loss transfer on July 7. The only difference was that another individual at Co-operators had suggested to the adjuster after accepting loss transfer that they might want to look into the question of case law surrounding applicability of loss transfer when there is no contact between the vehicles. Western submits that that should have been done before loss transfer was accepted.

Western submits that Co-operators did not meet the standard of a reasonable investigation required to establish reasonable notice as a basis for claiming the retraction of their waiver.

On the issue of prejudice, Western submits that this accident occurred in 2018. As the key dispute between the parties in loss transfer is whether there was contact between the vehicles involved, Western submits that that information may not be available. While Western acknowledges that they had copies of the transcripts of the tort discovery of the driver of the heavy commercial vehicle, in the context of this arbitration and relating to the issues in dispute, Western submits that they have not been able to get Mr. Singh to attend an EUO. Western does acknowledge that an EUO has been conducted of the driver of the claimants' vehicle. Therefore, there is no guarantee, Western submits, that they can at this late stage generate evidence to establish the facts of the incident and thus there is significant prejudice to Western moving forward.

## **ANALYSIS AND DECISION**

Loss transfer is a statutory scheme under s. 275 of the *Insurance Act* and Regulation 664 which was created in order to allow for a reasonably quick and efficient transfer of risk between certain insurers where there is a collision between certain types of vehicles.

The loss transfer scheme recognizes that in certain circumstances when vehicles of a certain class come into contact with others, that one vehicle may suffer significantly more damages. This class of vehicle includes motorcycles and heavy commercial vehicles. Section 275(1) is set out below:

"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 insurer 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."

As Arbitrator Jones indicated in his decision *Motors v. Old Republic (supra)* this statutory scheme is designed to allow a quick and efficient transfer of risk between the insurers. It puts a premium on speed and efficient resolution of these claims. It is assumed that the users of the system are sophisticated in their understanding of loss transfer and in the litigation of loss transfer matters.

Arbitrator Jones stated in *Motors v. Old Republic*:

"In such a system it is desirable, once an agreement has been reached, that it be enforced except in the most extreme circumstances."

As I indicated in my decision in *Intact v. Co-operators*, I agree with Arbitrator Jones.

Despite the able submissions of Co-operators in this matter, I find that the facts of this case fall on all fours with those facts and therefore the conclusions that I reached in my decision in *Intact v. Co-operators*.

There is no dispute between the parties that Co-operators had full knowledge of their rights when they wrote their acceptance letter on July 7, 2021. Co-operators accepted both in their materials and in oral submissions that letter demonstrated an unequivocal and conscious intent to abandon their rights.

There also does not appear to be any dispute and I agree with Co-operators that with respect to the time between their acceptance of loss transfer and their retraction of that acceptance (July 7 to July 13, 2021), that that is a reasonable time period to give notice. In other words, six days constitutes a reasonable time period. We are not talking about months or years.

However, I find that in the circumstances of this case the evidence does not support those extreme circumstances referred to by both myself and Arbitrator Jones as a basis for granting a retraction of the waiver.

While Co-operators may have retracted the waiver in a reasonable timeframe, I find that Co-operators did not conduct a reasonable investigation prior to their acceptance of loss transfer and then leading up to the retraction.

Between May 28, 2021 when Co-operators received the Notice of Loss Transfer and July 7, 2021 when they accepted the loss transfer for the adult claimant, Co-operators conducted little if any investigation. Co-operators had the letter of May 28 from Western which included the Police Report, the Notice of Loss Transfer, the notes from the investigating officer as well as the Autoplus report. The letter from Western clearly identified that there was some difference between what the Police Report showed and what the police officer's notes showed in terms of contact between the heavy commercial vehicle and the Nissan insured by Western. The letter indicated that their insured and a witness would confirm that the dump truck hit the Nissan despite what the Police Report shows.

Despite that information, Co-operators did not undertake any investigations independently to determine whether their insured supports Western's position that the dump truck hit the Nissan. They did not make an effort to contact the police officer or contact a witness. There was no investigation into whether the factual basis for the claim for loss transfer was accurate or not.

Further, having been made aware that there may be an issue as to whether their dump truck struck the Nissan (a no contact situation), the Co-operators adjuster did not investigate the law. The adjuster may have been under the understanding that loss transfer applied in the circumstances of this case. In any event, the adjuster did not seek advice from a lawyer on a formal or informal basis. The adjuster did not speak to their supervisor. There was no research done into this issue until after loss transfer had been accepted and only after another individual reviewing the file on July 13 suggested that there may be an issue in terms of the liability and applicability of loss transfer.

I also note that Arbitrator Novick in her decision in *Aviva Insurance Company of Canada v. State Farm Insurance Company* (March 2012) reached similar conclusions about the obligation of an adjuster to be diligent prior to accepting responsibility. In the case before Arbitrator Novick, she was dealing with a priority dispute but the issue before her was whether State Farm was permitted to withdraw its acceptance of priority.

Arbitrator Novick pointed out that claims handlers deal with several claims at the same time and have many demands on their time. I agree that this is a relevant consideration. However, Arbitrator Novick noted that in the case before her she was struck by the lack of diligence on the part of the State Farm adjuster in conducting any investigation prior to accepting priority. In that case, the adjuster was examined and he acknowledged that he did not do any investigation. He acknowledged he could have contacted counsel to seek advice but he chose not to do so. He acknowledged he could have consulted a colleague or a supervisor but also chose not to do so.

Arbitrator Novick noted, and I quote:

"Whether this lack of action was due to overwork or was simply an 'honest mistake' as characterized by counsel for State Farm, the system cannot function efficiently if adjusters fail to investigate at the appropriate time, and then, after advising the first insurer they accept priority to take over the claim, ask a colleague and change their mind. ... If this were allowed to happen on a regular basis the system would devolve into chaos."

Arbitrator Novick did not permit State Farm to withdraw its acceptance of priority.

I agree with Arbitrator Novick that to permit an insurer to withdraw their acceptance of loss transfer even if it involves an honest mistake in the absence of appropriate investigation would result in the loss transfer system devolving into chaos.

While I am very sympathetic to the Respondent in this case and what appears to have been a mistake, the circumstances do not meet the test for the retraction of the waiver.

The last area to consider is whether or not there is some prejudice to Western if I allowed the retraction.

Western's position with respect to prejudice is that the accident occurred in 2018 that there is prejudice with respect to Western's ability to now generate the necessary evidence to establish the facts of the incident. Western specifically points to an inability to get the driver of the heavy commercial vehicle to an EUO. As well as the fact that we are now some 7 years post accident and how that would affect the ability to present evidence on the key issue as to whether or not the two vehicles (heavy commercial and personal vehicle) had actual contact.

Co-operators' position is that Western has not presented any evidence of prejudice or detrimental reliance and references Arbitrator Samis' decision in *Waterloo & Ace* (supra).

Certainly one can take notice of the fact that it will be more difficult to prove how this accident occurred and specifically what contact was between the two vehicles with the passage of time and the lack of availability of the key evidence of the driver of the heavy commercial vehicle. However in this case I note that Western did not put Co-operators on notice of loss transfer until May 28, 2021. By this time we were already almost 3 years post accident. While there is no requirement in law as to when an insurer puts another insurer on notice of loss transfer the fact that 3 of the years with respect to the passage of time in terms of the availability of the evidence were as a result of Western's own choice does play a role in looking at the issue of any potential prejudice.

In addition the period between Co-operators advising Western loss transfer had been accepted and the Co-operators' effort to retract that was minimal. It was only 6 days.

Arbitrator Samis when considering the issue of prejudice in the *Waterloo & Ace* decision (supra) matter before him there was no basis to presume that there was prejudice. He looked specifically at what evidence had been presented with respect to prejudice and found there had been none. However he did note that the nature of the evidence in his loss transfer case was not "of a nature that is subject to being lost with the passage of time". Clearly in this case the evidence that is required to advance a loss transfer claim is the type of evidence that can be lost with the passage of time.

Certainly the passage of time in this case could affect the available evidence, the fact that Western did not pursue its loss transfer claim for nearly 3 years and the timing with respect to the Co-operators' retractions satisfies me that there is insufficient evidence as against Western in this case.

However prejudice is only one of a number of items to be considered in determining whether an insurer can retract a waiver. For the reasons I have outlined previously I remain satisfied that as Co-operators did not conduct a reasonable investigation prior to their acceptance of the loss transfer that this case does not support the type of circumstances contemplated by Arbitrator Jones, Arbitrator Samis or myself to justify a retraction of a waiver.

As I said in my decision in *Intact & Co-operators*:

“To read into the legislation, the right of an insurer to retract an acceptance of loss transfer and a waiver of its rights to dispute loss transfer based on errors made by an adjuster will result in some significant uncertainty and potential delay in loss transfer matters. I also stated that in my view would adjusters who are dealing with loss transfer claims to sit comfortably handling the file with the knowledge that need not have all the necessary information available to them and/or thoroughly investigate the matter before they accept loss transfer. If a waiver is simply allowed on the basis of a mistake, then the certainty and efficiency and costliness of the loss transfer system is at risk.”

I therefore conclude that Co-operators cannot retract their waiver in this case.

#### **AWARD**

Co-operators has waived its right to deny and dispute loss transfer based on its letter of July 7, 2021 and is not permitted to retract that waiver. Accordingly, Co-operators is responsible for paying reasonable loss transfer indemnification to Western subject to any arguments with respect to quantum.

#### **COSTS**

According to the Arbitration Agreement, legal costs are to be determined by the arbitrator taking into account the success of the parties, conduct of the proceedings and any offers to settle. The same is true with respect to the expenses of the arbitrator and any expenses relating to the arbitration.

As Western has been entirely successful in this matter, I find that Co-operators is responsible to pay legal fees and any related costs and disbursements to Western. Similarly, Co-operators is responsible for the arbitration fees and any expenses of the hearing.

I am not going to fix costs. If the parties cannot agree on costs, they can contact me and we will schedule a costs hearing. We will also schedule a further pre-hearing subject to any appeal on the issue of the quantum of the indemnification sought by way of loss transfer by Western.

DATED THIS 2<sup>nd</sup> day of February, 2026 at Toronto.



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