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LIMITATIONS ACT

Standardizing Limitation Periods for Actions on Insurance Contracts

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ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGMENTS

The genesis of this Final Report was a relatively narrow issue arising under the *Limitations Act*. However it soon became apparent that some broader issues arose concerning insurance limitation periods and the interplay between the *Insurance Act* and the *Limitations Act*.

Cynthia Martens is the counsel who has had carriage of this project and we acknowledge the detailed and assiduous research which has gone into the preparation of this Final Report. Board members have also provided helpful comments and guidance.

Table of Contents

PART I — EXECUTIVE SUMMARY

Presently limitation periods for bringing actions against insurers for failing to honour insurance policies depends on the type of insurance. The *Insurance Act* contains statutory provisions which specifically set out limitation periods for certain types of insurance. The *Insurance Act* also requires other specific types of insurance policies to contain "Statutory Conditions" which prescribe their own limitation periods. Any other type of insurance would *prima facie* be subject to the default provisions in the *Limitations Act.*

In two recent decisions, *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada* [1] and *Churchland v. Gore Mutual Insurance Co.*,[2] the Supreme Court of Canada addressed the issue of disparate limitation periods for different types of insurance policies and the problems created thereby, particularly in the modern era of comprehensive or multi-peril policies. The Supreme Court has called upon all provinces to amend their Insurance Acts to rectify the confusion caused by disparate limitation periods in different types of insurance contracts.

Inconsistent limitation periods have caused confusion for both insured and for lawyers, and have resulted in a considerable amount of litigation over missed limitation periods.[3] In light of the multitude of actions arising from the present state of the law, it would be desirable to standardize and rationalize all limitation periods for actions against insurers on policies.

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[1] 2003 SCC 25, 225 D.L.R. (4th) 193.

[2] 2003 SCC 26, 225 D.L.R. (4th) 202.

[3] Examples of reported cases include those below, notes 23-25; see also *Matwychuk v. Western Union Insurance Co.* (1992), 134 A.R. 230 (Q.B.), rev'd [1994] A.J. No. 1084 (C.A.); *D'Andrea v. Wawanesa Mutual Insurance Co.* (1995), 164 A.R. 31 (Q.B.); *Montgomery v. Canada West Insurance Co.* (1996), 191 A.R. 1 (Q.B.); *Yara Entertainment Inc. v. Royal Insurance Co. of Canada*, [1998] A.J. No. 1583 (Q.B.).

Recommendation No. 1
Limitation periods for actions on all types of insurance contracts be standardized.

There is no principled reason for having a one year limitation period for actions on insurance contracts, rather than the two year (or ultimate 10 year period) provided for in the *Limitations Act*. Nothing in the case law indicates why the one year limitation period for actions against insurers was adopted originally. Another reason for changing the limitation period for actions against insurers to those in the *Limitations Act* is that to do so would be consistent with the consumer protection aspect of the *Insurance Act.*

The Institute proposes to retain the provisions currently in the *Insurance Act* that require an insured to give timely notice of proof of loss. So long as these notice provisions are retained, the potential lack of notice of a claim is not a convincing argument in favour of shorter limitation periods for commencing actions against insurers.

Recommendation No. 2
Insurance contracts should be subject to the limitation periods in the *Limitations Act*.

As our recommendation is that there should not be different limitation periods for actions on insurance contracts, all limitation periods currently in the *Insurance Act* should be removed. By default, then, actions on insurance contracts would be governed by the *Limitations Act*.

Recommendation No. 3
The limitation periods for all insurance contracts should be centralized in the *Limitations Act.*

During our consultations some questioned when the limitation period for an action on an insurance contract would commence under the *Limitations Act.* Ultimately the Institute feels that there was no need to create a special commencement date for actions on insurance contracts – the limitation period

should commence in accordance with the relevant provisions in the *Limitations Act*. The notice provisions that require an insured to give timely notice of the loss should be retained.

The present provisions in the *Limitations Act* are suitable and appropriate for actions on insurance contracts. Under s. 3(1), the time for an action commences when a claimant ought to have known:[4]

> (i) that the injury *for which the claimant seeks an order* occurred; **and**
> (ii) *that the injury was attributable to the conduct of the defendant.*
> (emphasis added)

In most cases involving actions on insurance contracts, this would likely occur when the insurer denies the claim. When bringing an action against the insurer, the injury for which the claimant seeks an order is not the actual loss occasioned by the peril (i.e. the damage caused by a fire).The actual loss results from the insurer breaching the insurance contract by failing to pay out the claim.

Recommendation No. 4
Limitation periods for actions against insurers should commence in accordance with s. 3 of the *Limitations Act.*

The issue of whether insurers should be permitted to contractually shorten limitation periods under the *Limitations Act* may now be moot in light of an impending amendment to s. 7 of the *Limitations Act*:[5]

> (2) An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid.

The *Justice Statutes Amendment Act, 2002* was given Royal Assent on May 14, 2002, but some issues have arisen relating to the proclamation of this section. This amendment was proclaimed to be effective on June 1, 2003. It was then "unproclaimed" on May 28, 2003. Whether the *Limitations Act* should

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[4] *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1).

[5] *Justice Statutes Amendment Act, 2002*, S.A. 2002, c. 17, s. 4(4).

preclude any party from contractually abridging a limitation period is an issue that is outside of the scope of this project, and the Institute does not make any comment nor recommendation about this principle generally. We will only address the issue as it relates to the question of limitation periods for actions on insurance contracts.

The insurance contract is a classic example of the party who is in the better bargaining position imposing a detrimental limitation period on the more vulnerable party. A contractual limitation period which is shorter than that to which the insured would otherwise be entitled under the *Limitations Act* is detrimental to the insured, as it could have the effect of preventing an insured from pursuing what may otherwise be a *bona fide* claim. Precluding insurers from inserting contractual provisions which limit insureds' rights to bring legitimate actions would be consistent with the consumer protection aspect of the *Insurance Act*.

Recommendation No. 5
Insurance companies should not be able to contractually impose shorter limitation periods in insurance contracts.

PART II — LIST OF RECOMMENDATIONS

PART III — REPORT

CHAPTER 1. INTRODUCTION

[1] In Alberta, as well as other Canadian jurisdictions, the area of limitation periods for actions on insurance contracts is in a state of confusion. There is no rational basis underlying the limitation periods for bringing actions against insurers – different limitation periods apply to different types of insurance policies. These disparate limitation periods have resulted in considerable litigation. Several of the limitation periods that the *Insurance Act* prescribes are also inconsistent with the general limitation periods in the *Limitations Act*. This is contrary to one of the primary purposes of the *Limitations Act* which is to provide uniform limitation periods for all causes of action unless there are principled reasons to justify a departure from that Act.

[2] In light of the problems identified above, this project addresses the following issues concerning the rationalization of limitation periods for actions against insurers:

(1) Should the limitation periods for actions on all types of insurance contracts be standardized?

(2) Assuming that the limitation periods should be standardized, should insurance contracts be subject to the limitation periods in the *Limitations Act*, or should they be subject to different limitation periods?

(3) When should the limitation period for actions against insurers commence?

(4) Should insurers be able to contract out of the *Limitations Act*?

CHAPTER 2. PRESENT LIMITATION PERIODS FOR ACTIONS ON INSURANCE CONTRACTS

[3] Presently limitation periods for bringing actions against insurers for failing to honour insurance policies depend on the type of insurance. The *Insurance Act* contains statutory provisions which specifically set out limitation periods for certain types of insurance.[6] The Act also requires other specific types of insurance policies to contain "Statutory Conditions" which prescribe their own limitation periods. Any other type of insurance would *prima facie* be subject to the default provisions in the *Limitations Act*. As mentioned above, it has become a common practice for insurers to insert contractual limitation provisions in insurance contracts for types of insurance which do not have statutorily mandated limitation periods.

A. The *Limitations Act* Generally

[4] One of the primary purposes of the *Limitations Act* is to provide a comprehensive scheme of uniform limitation periods (insofar as possible) for all causes of action in Alberta.[7] It is designed to balance the interests of defendants as well as claimants, in that uniform limitation periods serve to minimize situations where an unsuspecting party is denied the ability to bring a legitimate action as a result of missing an unusually short limitation period.[8]

[5] Under s. 3(1) of the new *Limitations Act*, the default limitation period for most actions is either:[9]

> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

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[6] *Insurance Act*, R.S.A. 2000, c. I-3. (Hereinafter the *Insurance Act.*)

[7] Alberta Law Reform Institute, *Limitations* (Report No. 55) (Edmonton: Alberta Law Reform Institute, December 1989) at 30. (Hereinafter the *Limitations* Report.)

[8] *Limitations* Report at 16.

[9] *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(a)(b). (Hereinafter the *Limitations Act.*)

> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose, whichever is shorter.

[6] The Act applies to all proceedings which are commenced after the Act came into force, being March 1, 1999,[10] subject to the following exceptions:

(i) if the claim involves adverse possession of real property owned by the Crown;[11]

(ii) if the remedial order sought by the claimant is subject to a limitation provision in any other enactment of the Province;[12] or

(iii) if the parties have expressly agreed in writing to extend a limitation period.[13]

Exceptions (ii) and (iii) are relevant to the issue of limitation periods in insurance contracts.

1. Limitation provisions in other enactments

[7] For a statutory provision to constitute a "limitation provision", reference must be had to s. 1 of the *Limitations Act*. Section 1(g) states that a "limitation provision" includes a limitation period or notice provision that has the **effect** of a limitation period. Section 3(1) states that the effect of a limitation provision is to grant a defendant immunity from liability for a claim if that claim is not brought within the prescribed period of time. Thus, if another statute contains limitation periods or notice provisions which have the effect of granting a defendant

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[10] *Limitations Act*, s. 2(1).

[11] *Limitations Act*, s. (4)(a).

[12] *Limitations Act*, s. 4(b).

[13] *Limitations Act*, ss 7 and 9.

immunity from a claim, those provisions will be valid and do not offend the *Limitations Act*.

2. Express agreements to extend limitation periods

[8] The exception regarding agreements to extend limitation periods arises from the following provisions of the *Limitations Act*:

> 7 Subject to section 9, if an agreement expressly provides for the extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.
>
> 9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

These provisions will be discussed in detail below.

B. Statutory Limitation Provisions in the *Insurance Act*

[9] The *Limitations Act*, s. 2(4)(b) provides that limitation periods in other enactments will be given effect. No general limitation provision in the *Insurance Act* applies to all actions against insurers pursuant to insurance contracts. Instead, there are various limitation provisions for different types of insurance which set limitation periods that differ from those in the *Limitations Act*.[14]

[10] Section 590 of the *Insurance Act* imposes the following limitation periods for commencing actions on life insurance policies:

> ***Life Insurance***
>
> 590 (1) Subject to subsection (2), an action or proceeding against an insurer for the recovery of insurance money must not be commenced *after one year from the furnishing of the evidence required by section 587, or after 6 years from the happening of the event on which the insurance money becomes payable, whichever period first expires*. (emphasis added)
>
> (2) If a declaration has been made under section 593, an action or proceeding referred to in subsection (1) must not be commenced after one year from the date of the declaration.

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[14] Although the equivalent sections in the *Insurance Act*, S.A. 1999, c. I-5.1 are identical to those in the former *Insurance Act*, R.S.A. 1980, c. I-5, there may be future changes which affect limitation periods; see below note 18. The new *Insurance Act*, R.S.A. 2000, c. I-3, came into force September 1, 2001, except s. 414.

[11] The limitation period for limited accident insurance blends statutory and contractual limitation periods. While the *Insurance Act* permits contractual agreements as to limitation periods, these agreements are subject to minimum limitation periods:

> ***Limited Accident Insurances***
>
> 647 An action or proceeding against an insurer under a contract in respect of insurance provided under section 640, 641 or 642 *must be commenced within the limitation period specified in the contract, but in no event may the limitation period be less than one year after the happening of the accident*. (emphasis added)

[12] These provisions fall squarely within the exclusion in s. 2(4)(b) of the *Limitations Act*. They are limitation provisions in an enactment which have the effect of entitling the insurer to immunity from the insured's claim if the insured fails to bring the claim within the prescribed time periods.[15]

C. Statutory Conditions

[13] Other limitation periods in the *Insurance Act* are found in "Statutory Conditions", and apply only to certain types of insurance. The *Insurance Act* requires that these Statutory Conditions be included in specific contracts of insurance. The limitation periods in the various Statutory Conditions generally require an insured to commence an action against the insurer within a prescribed time, usually one year from the date of loss.

[14] The specific Statutory Conditions are as follows:

> ***Fire Insurance***
>
> 549 Statutory Conditions
>
> ACTION 14 Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred *unless commenced within one year next after the loss or damage occurs*. (emphasis added)
>
> ***Automobile Insurance***
>
> 614 Statutory Conditions
>
> LIMITATION OF ACTIONS 6(3) Every action or proceeding against the insurer under this contract in respect of loss or damage to the

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[15] *Limitations Act*, ss 1(g) and 2(4)(b).

> automobile *shall be commenced within one year next after the happening of the loss* and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose and not afterwards. (emphasis added)

Accident and Sickness Insurance

671 Statutory Conditions

> LIMITATION OF ACTIONS 12 An action or proceeding against the insurer for the recovery of a claim under this contract *shall not be commenced more than one year after the date the insurance money became payable* or would have become payable if it had been a valid claim. (emphasis added)

358(6) ...Statutory Condition 12 may be varied by lengthening the time period in that Statutory Condition.

Hail Insurance

728 Statutory Conditions

> 16 ACTION BROUGHT WITHIN ONE YEAR Every action or proceeding against the insurer in respect of loss or damage to the crops insured under the policy *shall be commenced within one year next after the occurrence of the loss or damage and not afterwards*. (emphasis added)

[15] The Statutory Conditions which apply to fire insurance also apply, insofar as they are applicable, to weather insurance and livestock insurance.[16]

D. Statutory Character of Limitations in Statutory Conditions

[16] As noted above, the *Insurance Act* requires certain types of insurance contracts to contain Statutory Conditions that set out, *inter alia*, limitation periods for bringing actions on the insurance contract. The question that initiated this project was whether the limitations periods in the Statutory Conditions are truly statutory in nature such that they fall within the exemption provisions of the *Limitations Act*, or whether they are contractual terms, thus conflicting with the *Limitations Act*. The Alberta Court of Appeal has provided guidance on this issue, although the relevant decision was rendered prior to the enactment of the *Limitations Act*.

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[16] *Insurance Act*, s. 704(b) (livestock); s. 731(b) (weather).

[17] In *Triple Five Corp. v. Simcoe & Erie Group*,[17] the Court of Appeal held that the Statutory Conditions are statutory provisions rather than merely contractual conditions because they are prescribed by statute:

> In my view, concurred in by Mr. Justice Lieberman, the statutory conditions imposed on contracts of insurance in Alberta by the Alberta *Insurance Act* are statutory rules governed by the *Interpretation Act*.

[18] As the limitation periods in the Statutory Conditions are "statutory rules", they likely fall within the exception in s. 2(4)(b) of the *Limitations Act* relating to limitation provisions contained in other enactments. The limitation periods in the Statutory Conditions meet the definition of "limitation provisions" in the *Limitations Act*, as they grant an insurer immunity from a claim after the expiration of the prescribed period of time. As such, these limitation periods are valid and do not run afoul of the *Limitations Act.*

[19] In summary, the following types of insurance contracts would be subject to one year limitation periods prescribed by the *Insurance Act*:

(i) fire insurance and extended perils;
(ii) automobile insurance;
(iii) life insurance;
(iv) hail insurance;
(v) livestock and weather insurance;
(vi) limited accident insurance;
(vii) sickness and accident insurance.

[20] The one year limitation periods in insurance policies governing these perils would not be rendered invalid by the *Limitations Act.*

E. Insurance Contracts Subject to Limitations in the *Limitations Act*

[21] All other types of insurance would be subject to the default limitation provisions in the *Limitations Act* as they are not governed by specific statutory limitation provisions in the *Insurance Act.* Examples of these include, *inter alia*:

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[17] (1990), 72 Alta. L.R. (2d) 254 (C.A.).

(i) theft insurance;[18]

(ii) general and commercial liability insurance;

(iii) guarantee and surety insurance;

(iv) professional liability insurance;

(v) economic loss insurance.

F. Notice Provisions

[22] The Statutory Conditions in the *Insurance Act* require an insured to give notice of the loss to the insurer in a timely manner, and provide that the insurer may deny the claim if the insured fails to do so.[19] However, the courts have held that these notice provisions do not constitute limitation periods. Sections 515 and 521 permit the court to relieve an insured from the effect of imperfect compliance with the notice of loss provisions contained in either the Statutory Conditions or in the contract.[20] Thus, these notice provisions do not necessarily provide a defendant insurer with immunity from liability for a claim. As these notice provisions are not "limitation provisions" for the purposes of the *Limitations Act*, they do not run afoul of the *Act*.

G. Notice of Claim Prior to Commencing Action

[23] Section 520 of the *Insurance Act* is another form of notice provision. It constitutes a time limitation which must expire before an insured can commence an action:

> 520 No action lies for the recovery of money payable under a contract of insurance until the expiration of 60 days after proof, in accordance with the provisions of the contract,
>
> (a) of the loss, or

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[18] The Deputy Superintendent of Insurance advised that the Department of Insurance Regulation is considering amending the new *Insurance Act* to do away with the distinction between fire insurance and other types of property insurance and create a Part dealing instead with all property insurance. Likely the Statutory Conditions would remain in their present form and would apply to the new category of property insurance. What precisely would be covered by "property insurance" is not presently known. (Telephone conversation, March 6, 2001)

[19] *Insurance Act*, s. 549 (fire), S.C. 6; s. 614 (automobile), S.C. 4; s. 671 (accident and sickness), S.C. 7; s. 728 (hail), S.C. 6.

[20] *National Juice Co. v. Dominion Insurance Co.* (1977), 18 O.R. (2d) 10 (Ont. C.A.); *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.* (1989), 62 D.L.R. (4th) 236 (S.C.C.).

> (b) of the happening of the event on which the insurance money is to become payable,
>
> or of any shorter period fixed by the contract of insurance.

[24] While this is not a limitation period for the purpose of the *Limitations Act*, it is relevant to the issue of limitation periods for insurance contracts. As no action may be brought until the insured has given notice to the insurer of the loss, an insurer is guaranteed to receive notice of the loss prior to an action being commenced against it. Since the actual limitation period runs before notice of loss is given to the insurer, an insured could lose its right to bring an action as a result of this section if notice is not given more than 60 days before the limitation period ends. In accordance with the other notice provisions discussed above, the courts have held that this notice provision is not an actual limitation provision as the court may grant relief from forfeiture from the failure to comply with this section.[21]

H. Contractual Limitation Periods in Insurance Contracts

[25] The insurance contracts which are subject to statutorily prescribed one year limitation periods have already been identified. However, prior to the enactment of the *Limitations Act*, it was a common practice for insurers to impose the statutory one year limitation period on actions relating to other perils insured under the policy. This was done by way of contractual provisions indicating that the Statutory Conditions would apply to every peril insured under the policy. This practice is particularly common in multi-peril insurance contracts which provide coverage for a number of different losses, such as fire insurance, theft insurance and liability insurance policies. These types of insurance contracts are subject to neither the Statutory Conditions nor to specific limitation periods in the *Insurance Act*. Therefore, many existing insurance contracts contain a one year limitation period for bringing an action against the insurer for failing to pay out other perils covered by the policy.

[26] There has been a significant amount of litigation as to whether the applicable limitation period in a particular policy was the contractually incorporated one year limitation period from the Statutory Conditions or the six

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[21] *Foley v. Wawanesa Mutual Insurance Co.* (1986), 55 Sask. R. 62 (Q.B.).

year period under the former *Limitation of Actions Act*.[22] The courts accepted that an insurer could contractually incorporate a one year limitation period into a policy as there was nothing in the Act precluding parties from agreeing to a specific limitation period.[23] The only caveat was that the insurance policy must clearly indicate that the Statutory Conditions applied to the entire policy. The Court's view of this practice was summarized in *Edmonton (City) v. Protection Mutual Insurance Co.*:[24]

> The *Insurance Act* clearly binds the parties to an insurance contract to the statutory conditions in the case of insurance for fire and extended perils. It does not require them to be so bound in respect of other perils in a multi-peril policy....[references omitted]
>
> However, the Court of Appeal of Alberta has indicated that it is open to the parties to incorporate the Statutory Conditions into other parts of a multi-peril policy of insurance if it is done by express agreement in clear and unequivocal language.

[27] Even though the courts accepted that Statutory Conditions could be incorporated into other types of insurance contracts, they recognized that there was a distinction between policies subject to actual Statutory Conditions and policies which merely had those conditions imposed by contract. As stated in *Triple Five Corp. v. Simcoe & Erie Group*:[25]

> It is correct that the *Insurance Act* does not require those [statutory] conditions on the insurance contract in this case and they are there by agreement only. Nevertheless, we infer from the inclusion in the agreement of what are there described as "statutory conditions" an agreement to incorporate into this contract the regime established by the *Insurance Act*, which includes the rule I have just stated.

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[22] See notes 3 and 23-25; see also *Genuine Auto Services Ltd. v. Canadian Home Assurance Co.*, [1990] A.J. No. 174 (C.A.); *Deveau Estate v. Blue Cross Life Insurance Co. of Canada* (1996), 141 Nfld. & P.E.I.R. 286 (P.E.I. S.C. (T.D.)); *London and Midland General Insurance Co. v. Kansa General Insurance Co.*, [1994] I.L.R. 1-3112 (Ont. Gen. Div.).

[23] *Tri-Service Machine Ltd. v. United States Fire Insurance Co.* (1994), 19 Alta. L.R. (3d) 163 (C.A.); leave to appeal to S.C.C. dismissed [1994] S.C.C.A. No. 364; see also *Andrews v. General Accident Assurance Co. of Canada* (1995), 27 Alta. L. R. (3d) 267 (C.A.). Both of these cases specifically dealt with the applicability of the limitation periods in the Statutory Conditions.

[24] (1997), 49 Alta. L.R. (3d) 233 at 297 (Q.B.), aff'd (1999), 69 Alta. L.R. (3d) 211 (C.A.); leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 126.

[25] (1997), 145 D.L.R. (4th) 236 (Alta. C.A.); leave to appeal ref'd [1997] S.C.C.A. No. 263.

> Mr. Justice Belzil wishes me to say that he hesitates to accept that view. He does, however, accept that, purely as a matter of interpretation of contract, the same result is achieved. Neither myself or Mr. Justice Lieberman dissent from his view, although we prefer the analysis just made.

[28] Until the early 1990s the courts in Alberta took the view that Statutory Conditions may apply to other insured perils if the primary purpose of the policy was one to which Statutory Conditions applied. However, the Courts adopted a different approach in *Tri-Service Machine Ltd. v. United States Fire Insurance.* The Court held that to determine whether the one year limitation applied, the nature of the particular peril must first be characterized and it then must be determined whether the insurer clearly intended that the Statutory Conditions apply to that peril:[26]

> In *Canadian Home* (*supra*) the Court considered the same issue, namely the application of the one year limitation period under a multi-peril comprehensive policy of insurance. In that case, as in the present one the insurance covered more than fire loss and in both cases the loss in question arose from burglaries. In *Canadian Home* this Court said (p. 105):
>
> > We start by noting that the policy here is a multi-peril comprehensive policy of insurance. It appears to be subject to three sets of conditions which are engaged by the nature of the perils insured against.
>
> The learned chambers judge distinguished the *Canadian Home* case from the present one on the grounds that the policy in *Canadian Home*:
>
> > ...set forth expressly several different forms of coverage in detail; and in the case of all of them, except one, set forth the statutory conditions that are applicable under the Insurance Act pursuant in regard to the particular peril concerned.
>
> That distinction, although valid, in our view does not negate the application of the rationale of *Canadian Home* to the present situation. The chambers judge's statement that "one begins by characterizing the nature of the peril insured against" is consistent with the *Canadian Home* decision. However we find, with the greatest respect, that he erred in not following *Canadian Home* by recognizing that in a multi-peril insurance policy, the nature of the various perils insured against may be looked at separately, for the purposes of determining the applicability of Statutory Conditions under the Act. The interpretation arrived at in *Canadian Home* is consistent with the opening words of section 229(1) which expressly focuses on "loss...arising from the peril of fire in any contract'". Thus the focus should not be directly on the

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[26] See above note 23 at 168-169.

> contract itself so as to require the categorization of a multi-peril contract as being a one peril or primarily one peril contract.

[29] That each peril insured under the contract should be considered separately when determining whether the limitation period in the Statutory Conditions applies was confirmed in *Andrews*:[27]

> As to the argument for statutory obligation, the *Insurance Act* binds the parties to the statutory conditions in the case of insurance for fire and extended perils. It does not require them to be so bound in respect of other insurance. It is common ground that the hail insurance built into this all-risk policy did not fall within the definition of fire and extended coverage in s. 229 of the Act. In the result, the Act does not bind the parties to the statutory conditions except for the insurance against the peril of fire and the extended matters. This was the decision of this Court in *Canadian Home Assurance Co. v. Genuine Auto Services Ltd.* (1990), 2 C.C.L.I. (2d) 103. We affirmed that view earlier this year in *Tri-Service Machine Ltd. v. United States Fire Insurance Co.* (1994), 19 Alta. L.R. (3d) 163.
>
> We agree with the learned chambers judge that the parties are free, by express agreement, to incorporate the statutory conditions into any policy of insurance.
>
> ...
>
> Counsel for the insurer added that the interpretation offered by the insured would undermine the statutory obligation to apply the condition to some property rights, like fire. It would not, however, precisely because it is a statutory obligation and does not depend on the contract.

[30] The distinction between statutory conditions and contractual conditions is important, as only **statutory** limitation periods fall within the exception in s. 2(4)(b) of the *Limitations Act*. As contractual limitation periods in multi-peril policies and other types of policies mentioned above do not fall under this exception, such limitation provisions would likely be void at least based on our initial assumption in paragraphs 1 and 2.

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[27] See above note 23 at 269-270.

I. Recent Supreme Court of Canada Decisions

[31] In two recent decisions, *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada* [28] and *Churchland v. Gore Mutual Insurance Co.*,[29] the Supreme Court of Canada addressed the issue of disparate limitation periods for different types of insurance policies and the problems created thereby, particularly in the modern era of comprehensive or multi-peril policies. The Supreme Court has called upon all provinces to amend their Insurance Acts to rectify the confusion caused by disparate limitation periods in different types of insurance contracts.

[32] Both *KP Pacific Holdings* and *Churchland* concerned multi-peril policies. The issue in each was whether the applicable limitation period was that which applied to the specific peril in issue (in *KP Pacific* the loss was caused by fire; in *Churchland* the loss was caused by theft), or whether the applicable provision was the general limitation period which applies to other types of policies found in Part 2 of the British Columbia *Insurance Act*.[30] The limitation periods for the specific perils began running on the date of loss, while the general provisions provided that the limitation period commenced on the date of filing of proof of loss.

[33] The Court concluded that multi-peril policies cannot be governed by the legislative provisions that apply to specific perils. Rather, they fall under the "general" provisions of Insurance Acts, regardless of whether the actual peril for which the claim is made is one to which specific statutory provisions (such as limitation periods) apply. Finally, the Court opined that the preferable solution would be for all provincial legislatures to amend their Insurance Acts to address the rules by which comprehensive policies are to be governed.[31]

[34] While the Supreme Court did not provide specific guidelines as to what limitation provisions should apply to multi-peril policies, it noted that some losses

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[28] See note 1 above.

[29] See note 2 above.

[30] R.S.B.C. 1996, c. 226.

[31] See note 1 above, at para. 20.

covered by comprehensive policies, such as business losses, may be difficult to assess within the limitation period of one year from the date of the precipitating event.[32]

[35] The likely effect of these Supreme Court of Canada decisions in Alberta is that the limitation periods in the *Insurance Act* would apply to multi-peril policies. The Alberta *Insurance Act* does not contain a provision similar to the section in the British Columbia *Insurance Act* that provides a default limitation period for actions on types of insurance for which there is no specific statutory limitation.

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[32] See note 1 above, at para. 15.

CHAPTER 3. LEGISLATION AND COMMON LAW IN OTHER PROVINCES

[36] Other provinces have adopted different approaches to limitation periods in insurance contracts through their limitations statutes or their insurance acts. There are differences in the length of the limitation periods and the times at which the limitation periods commence.

A. Saskatchewan, New Brunswick, Prince Edward Island

[37] The various limitation acts in Saskatchewan, New Brunswick and Prince Edward Island are virtually identical to Alberta's former *Limitations of Actions Act* in that nothing in these acts precludes parties from contracting out of the statutory limitation periods.[33] All of the insurance acts in these provinces are virtually identical to Alberta's with respect to limitation periods in the insurance statutes and the Statutory Conditions.

[38] The issue of contractually incorporating the limitation periods from the Statutory Conditions not been addressed in Saskatchewan or Prince Edward Island. Recently the New Brunswick Court of Appeal expressly declined to decide whether parties to an insurance contract can contract out of the statutory limitation period: *Lloyd's of London v. Norris*.[34]

B. Ontario

[39] Presently the *Limitations of Actions Act* in Ontario is virtually identical to that which formerly existed in Alberta, and its *Insurance Act* is also identical with respect to its limitation periods. Under the provisions in these Acts, the courts in Ontario accepted that parties to insurance contracts can agree to shorten limitation periods: *National Juice Co. Ltd. v. Dominion Insurance Co.*[35] However, Ontario

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[33] *Limitation of Actions Act*, R.S.A. 1980, c. L-15.

[34] [1998] N.B.J. no. 351 (N.B. C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 559.

[35] See note 20 above.

has passed a new *Limitations Act*[36] that amends most of the limitation periods in the *Insurance Act*. The new Ontario *Limitations Act* is very similar to that in Alberta. It provides that no statutory limitation periods, other than those in the Act, are valid unless they are preserved specifically in a Schedule that accompanies the Act.[37] Only three limitation periods from the *Insurance Act* are retained under the new Ontario *Limitations Act*: one year after the date of loss for fire insurance; one year after the date of loss for motor vehicle insurance; and two years after the date of denial for statutory accident insurance benefits.[38] All other limitations currently in the Ontario *Insurance Act* will fall under the default limitation periods in the revised *Limitations Act*. Section 22 of the new *Act* expressly prohibits any contractual variation of the statutory limitation periods, although it does not affect any agreement made prior to the Act coming into force.

C. Manitoba, Northwest Territories, Yukon, Nunavut

[40] Manitoba's *Limitations of Actions Act* does not expressly address whether parties may agree to limitation periods which differ from those in the Act, although it is arguable that it may permit contracting out for the purpose of extending a limitation period:

> 14(3)(b) Nothing in this section excludes or otherwise affects the operation of any Act of the legislature or rule of law or equity that, apart from this section, would enable such an action to be brought after the end of a limitation period fixed in this Act or any other Act of the legislature in respect of cause of action on which that action is founded.

Under this section, parties may agree to extend a limitation period if freedom of contract is considered to be a "rule of law".

[41] The Manitoba *Insurance Act* is similar to Alberta's in that its Statutory Conditions impose limitation periods for specific types of insurance. Manitoba's Court of Appeal has held that the limitation periods from the Statutory Conditions can be applied to other parts of a policy (without reference to the proposed

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[36] S.O. 2002, c. 24, Schedule B; proclaimed into force January 1, 2004.

[37] S.O. 2002, c. 24, s. 19.

[38] Ontario *Insurance Act*, R.S.O. 1990, c. I-8, s. 148, Statutory Condition 14; s. 259.1; s. 281.1 respectively.

interpretation of s. 14(3) set out above): *Royal Bank v. Red River Valley Mutual Insurance Co.*[39] A notable difference between the Alberta and Manitoba legislation is that the limitation period in Manitoba's Statutory Conditions for both fire and automobile insurance is **two years** as opposed to one.[40]

[42] The *Limitations of Actions Acts* of the Northwest Territories, Nunavut and the Yukon are virtually identical to the former *Limitations of Actions Act* of Alberta. As in Manitoba, the insurance acts of each Territory provides a two year limitation period in the Statutory Conditions for actions on fire and automobile insurance.[41]

D. Nova Scotia

[43] Nova Scotia's *Limitations of Actions Act* expressly allows contracting out of statutory limitation periods:[42]

> 3(1) "time limitation" means a limitation for either commencing an action or giving notice pursuant to
>
> (ii) the provisions of any other enactment or
>
> (iii) the provisions of an agreement or contract.

[44] The Act provides that a court can permit an action which has been filed outside of a limitation period to proceed if it is equitable to do so in the circumstances. Therefore, insurers may impose contractual limitation periods in insurance policies for which there are no statutory limitation provisions. The limitation periods in the Nova Scotia *Insurance Act* are the same as those in Alberta.

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[39] (1986), 18 C.C.L.I. 75 (Man. C.A.).

[40] *Insurance Act*, R.S.M. 1987, c. I-40, s. 142 (S.C. 14) (fire), s. 237 (S.C. 6(3)) (auto).

[41] *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 64 (S.C. 14), s. 129 (S.C. 6(3)); *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 64 (S.C. 14), s. 129 (S.C. 6(3)); R.S.Y. 1986, c. 91, s. 68 (S.C. 14), s. 165.

[42] R.S.N.S. 1989, c. 258.

E. British Columbia

[45] The British Columbia *Limitations Act* does not address the issue of contracting out of statutory limitation periods. The B.C. *Insurance Act* takes a different approach to limitation periods than that found in the other jurisdictions.[43] It provides a default limitation period for all insurance contracts for which there are no Statutory Conditions:

> ***Part II General Provisions***
>
> 3 This Part has effect despite any law or contract to the contrary except that
>
> (a) if any section or statutory condition contained in Part 3,4,5,6 or 7 is applicable and deals with a subject matter that is the same as or similar to any subject matter dealt with by this Part, this Part does not apply.
>
> 22 (1) Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of loss or claim under the contract and not after.

[46] Prior to the recent Supreme Court of Canada decisions in *KP Pacific* and *Churchland*,[44] the question of whether this precludes an insurer from incorporating the limitation provisions from Statutory Conditions into multi-peril policies was discussed in *Dhillon v. Liberty Insurance Co. of Canada*.[45] The British Columbia Supreme Court held:[46]

> If Statutory Condition 14 becomes applicable as a contractual term, as in the case before me, then it falls within the exception to section 3 of the Insurance Act which states that
>
> ... except that if any...statutory condition contained in Part 5...is applicable...
>
> I find that by reason of the wording of the policy and the rationale of the Court of Appeal in *Dressew*, that the limitation period in Statutory Condition 14 is applicable to the plaintiff's insurance policy in this case by operation of contract and therefore falls outside of the application of section 3, or section 22, of the *Insurance Act*.

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[43] R.S.B.C. 1996, c. 226.

[44] See notes 1 and 2 above.

[45] [2001] I.L.R. 1-3881 (B.C.S.C.).

[46] The issue was whether the one year limitation ran from the date of loss as provided in the Statutory Condition, or from the date of proof of loss as set out in s. 22 of the *Insurance Act*.

[47] The *Dhillon* decision was questionable as the Court based its decision on *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.*[47] In *Dressew*, the Court of Appeal held that insurers could incorporate the limitations provisions into other parts of a policy through contractual agreement. However, *Dressew* was decided under a different *Insurance Act*[48] which had no equivalent provisions to section 3. This is an important distinction, as s. 3 seemingly precludes insurers from inserting contractual limitation periods in policies for which there are no contractual conditions.

[48] Although it is likely that the *Dhillon decision* is no longer applicable in light of the recent decision from the Supreme Court of Canada, it serves to illustrate the fact that disparate limitation periods cause considerable confusion and litigation.

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[47] (1991), 57 B.C.L.R. (2d) 198 (C.A.).

[48] R.S.B.C. 1979, c. 200.

CHAPTER 4. RATIONALIZING LIMITATION PERIODS FOR ACTIONS AGAINST INSURERS

A. Standard Limitation Periods

[49] As previously discussed, no rational basis underlies the existing limitation periods for bringing actions on insurance contracts; the sole determining factor is the type of insurance. The applicable limitation period may be found in the *Insurance Act*, the *Limitations Act*, or in the insurance contract (although, as discussed, these contractual limitation periods are likely invalid). These inconsistent limitation periods have caused confusion for both insured and lawyers, and have resulted in a considerable amount of litigation over missed limitation periods.[49] In light of the multitude of actions arising from the present state of the law, it would be desirable to standardize and rationalize all limitation periods for actions against insurers on policies.

[50] In the *KP Pacific* and *Churchland* decisions,[50] the Supreme Court of Canada expressed a similar sentiment. The Supreme Court noted that the variant limitation periods based on categories of insurance stem back to an era when people purchased specific types of insurance, such as fire insurance, theft insurance, etc. However, the Court recognized that this practice is no longer applicable in modern society:[51]

> Insurance practices, by contrast, have changed. A dominant policy in today's world is the "all-risks" or "multi-peril" policy, which covers a panoply of perils. This is good for consumers. It minimizes the number of policies they need to buy and ensures comprehensive coverage at lower costs, But it is bad when legal issues arise. The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories. The result is continued uncertainty about what rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. ...

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[49] See note 3 above.

[50] See notes 1 and 2 above.

[51] See note 1 above at paras. 4-5.

> It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies. In the meantime, the task of resolving disputes arising from this disjunction between insurance law and practice falls to the courts.

[51] Though the Supreme Court of Canada was focussing on contradictory limitation periods within multi-peril policies, these comments can apply equally to the entire area of limitation periods and insurance contracts.

[52] The significant changes in the insurance industry, to which the Supreme Court of Canada refers, essentially have rendered obsolete the practice of issuing single peril insurance policies. It is far more common today for insurance contracts to cover a number of perils. Having different limitation periods for each type of peril creates confusion and results in litigation when a limitation period is missed. This confusion would be minimized if the limitation periods for actions on all types of insurance policies were standardized.

[53] Standardizing the limitation periods is a rational reform as there are no principled reasons for having different limitation periods for different types of insurance.

RECOMMENDATION No. 1
The limitation periods for actions on all types of insurance contracts should be standardized.

B. Length of Limitation Period for Actions Against Insurers

1. Historical development of limitation periods

[54] The policy underlying the *Limitations Act* is that there should not be different limitation periods for different causes of action or for different groups. It seeks to provide a unified, rational approach to limitation periods. To achieve this, all provisions in the former *Limitations of Actions Act* that provided special limitation periods for certain groups were excluded from the new Act. For example, the one year limitation period for bringing actions against doctors was abolished. Doctors are now subject to the default limitation provisions in the *Limitations Act*.

[55] Although the different limitation periods in the *Limitations of Actions Act* were removed, there was no universal abolishment of all limitation provisions in other statutes. It was recognized that there may be situations in which special limitation periods are justified, and as such it was preferable to have the Legislature review the limitation provisions in the various statutes and determine individually whether to retain the statutory limitation period. Since amendments to the limitation provisions may be necessary in light of the problems with contractual limitation periods, this may be an appropriate opportunity to review all of the limitations provisions which relate to actions against insurers.

2. Arguments against special limitation periods in insurance contracts

a. Historical justifications

[56] Nothing in the case law indicates why the one year limitation period for actions against insurers was adopted originally. In fact, the one year limitation period in the Statutory Conditions for fire insurance policies has remained virtually unchanged since its first enactment in the Alberta *Insurance Act* in 1915.[52] It appears to have simply been carried through the progressive versions of the *Insurance Act* without examining the rationale for its inclusion.

[57] There is little support in either academic writings or the case law for shorter limitation periods for actions against insurers, as discussed in *Edmonton (City) v. Protection Mutual Insurance Co.*:[53]

> The Defendant submits that academic commentary encourages the uniform application of the [statutory] conditions to all perils:
>
> The first approach of treating the composite policy as evidencing several different contracts (or at least a contract with distinct coverages for each peril, each subject to different conditions) presents two kinds of problems. First, it tends to defeat the reasonable expectations of the insuring public [emphasis added] who are not likely to expect different terms (eg. different claims procedures or limitation periods) to apply to each peril. Secondly, it

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[52] S.A. 1915, c. 8, Schedule C, s. 24.

[53] See note 24 at 306-307. The Court did not provide a citation for the "academic commentary" referred to in this passage.

> deprives the insuring public of the protection afforded by the Insurance Act's standard conditions for all losses other than fire.
>
> These problems are overcome", according to that author "if insurers, as a matter of contract, adopt the statutory conditions and expressly make them applicable to all the perils covered by the policy. This is often done by the insurance industry".
>
> *With respect, the Defendant's submission of the academic commentary quoted by them presents one significant problem in the context of this case. In my view, generally and certainly in the context of this case, the "expectations of the insuring public" would not readily welcome a significant reduction from the standard six year limitation period for commencing actions with respect to contracts to the one year limitation period provided for by the Statutory Conditions of the Insurance Act.*
>
> *The second point in the academic commentary about "depriving the insuring public of the protection afforded by the Insurance Act's standard conditions for all other losses other than fire" clearly does not apply to the facts of this case where the "protection" being described is in fact a defence being use by the insurer, one that the insured does not want to be protected by.* (emphasis added)

[58] Although this decision was made while the former *Limitations of Actions Act* was in force, the same reasoning applies today as the limitation periods in the Statutory Conditions are shorter than those found in the *Limitations Act*.

b. Consumer protection legislation

[59] As the *Insurance Act* is a form of consumer protection legislation, it should seek to protect the consumer. In this case the consumer is the insured. As the primary object of the Statutory Conditions:[54]

> is to protect the insured from the insurer's use of skilfully worded clauses in the contract that would allow for the prevention of liability in cases where it is just and reasonable that liability be included. They are to be construed broadly rather than limiting the insurer's liability, if there is any doubt about their meaning.

[60] As the Court noted in *Edmonton (City)* above, it is anomalous that the Statutory Conditions contain limitation periods which are actually detrimental to

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[54] CED Western, *Insurance*, para. 357.

the insured. It would be consistent with the consumer protection aspect of the *Insurance Act* to have the same limitation periods for actions against insurers for breach of contract as are standard for other actions on breach of contract in Alberta.

c. Notice of claim

[61] A potential argument in favour of shorter limitation periods for insurers is that a shorter limitation period is necessary to ensure that the insurer has the ability to investigate the situation and provide sufficient reserves. However, this still does not justify an abridged limitation period for **commencing an action** against an insurer. As mentioned above,[55] other provisions in the *Insurance Act* require an insured to give the insurer notice of a claim within a prescribed period of time. Failure to do so may result in the insured losing its right to claim against the insurer. The *Insurance Act* also provides that an insured cannot even commence any action against an insurer until 60 days after notice of proof of loss has been given,[56] and the insured may also lose its right to claim against the insurer. This provides an insurer with sufficient opportunity to investigate the claim regardless of the length of the limitation period. Not only is an insurer in the same position as any other defendant in respect of being able to gather evidence to investigate the claim, it is actually in a better position than most defendants as it has 60 days to investigate the claim before the insured may commence an action against it. Although the court may relieve the insured from forfeiture under this section,[57] it is unlikely to do so if the insurer can demonstrate that it has been prejudiced by the insured's failure to provide notice of the claim at least 60 days prior to commencing the action.

[62] If these types of notice provisions are retained in the *Insurance Act* and are required in all types of insurance contracts, any prejudice which the insured could suffer by reason of lack of notice of a claim would be negated. Under these

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[55] See note 19 above.

[56] *Insurance Act*, s. 520.

[57] See discussion in Chapter 2, para. 22.

circumstances, the lack of notice of a claim is not a convincing argument in favour of shorter limitation periods for commencing actions against insurers.

d. Many types of insurance policies already subject to default limitation periods in the Limitations Act

[63] The existing legislation in Alberta suggests that there is no principled reason for having certain types of insurance policies, but not others, subject to one year limitation periods. As discussed previously, the limitation periods vary depending on the peril which insurance contract insurers against. Many types of insurance are actually subject to the default limitation periods in the *Limitations Act*. If the default limitation periods in the *Limitations Act* are adequate for certain types of insurance, it is not rational to suggest that shorter limitation periods are necessary for other types of insurance.

[64] The limitation periods in other provinces further support the proposition that it is not necessary to protect insurers with a one year limitation period. Manitoba and all three Territories have adopted a two year limitation period in their respective Statutory Conditions for actions against insurers on the same types of policies which are currently subject to the one year limitation in Alberta. The new Ontario *Limitations Act* also provides that all actions on insurance contracts would be subject to the default limitation provisions in the *Limitations Act*, save for actions on fire insurance policies.

e. Opportunity to negotiate

[65] One further reason for removing the one year limitation period is that the default limitation periods under the *Limitations Act* allow more time for negotiation before the matter enters the litigation phase. Realistically, a one year limitation period does not permit much time to resolve a dispute, yet an insured is required to commence litigation at the expiry of one year if the matter is not resolved. Allowing more time to settle the matter prior to commencing litigation would likely be less expensive for both the insured and the insurer, as it would not be necessary to retain legal counsel during the negotiation stage.

[66] It is difficult to identify principled reasons for differentiating actions on insurance contracts from actions on other types of contracts. This difficulty is

enhanced by the fact that actions on some types of insurance contracts are subject to a one year limitation period while others are subject to the standard limitation periods in the *Limitations Act*. As such, there appears to be no principled reason for having a one year limitation period for actions on insurance contracts, nor is there any persuasive reason why actions against insurers should not be subject to the limitation periods in the *Limitations Act*.

RECOMMENDATION No. 2
Insurance contracts should be subject to the limitation periods in the *Limitations Act*.

C. Centralizing Limitation Periods in the *Limitations Act*

[67] As our recommendation is that there should not be different limitation periods for actions on insurance contracts, all limitation periods currently in the *Insurance Act* should be removed. As discussed above, the legislative provisions in the *Insurance Act* that require an insured to give timely notice of claims should be retained in the *Insurance Act*. By default, then, actions on insurance contracts would be governed by the *Limitations Act*.

RECOMMENDATION No. 3
The limitation periods for all insurance contracts should be centralized in the *Limitations Act.*

D. Commencement of Limitation Periods

[68] During our consultations some questioned when the limitation period for an action on an insurance contract would commence under the *Limitations Act*. Currently most limitation periods in the *Insurance Act* commence on the date the loss occurred, although there are some exceptions to this.[58]

[58] See discussion in Chapter 2 above of the different existing limitation provisions in the Alberta *Insurance Act*.

[69] The Institute considered whether it would be appropriate to define an event that would trigger the limitation period for an action on an insurance contract, such as:

(a) the date proof of loss is given;
(b) the date of the loss;
(c) when the insurer denies the claim;
(d) the date of the discoverability of the claim.

[70] Ultimately the Institute feels that there was no need to create a special commencement date for actions on insurance contracts – the limitation period should commence in accordance with the relevant provisions in the *Limitations Act*. However, the notice provisions that require an insured to give timely notice of the loss should be retained.

[71] Presently s. 3(1) of the *Limitations Act* provides that limitation periods commence on the date on which the claimant first knew, or in the circumstances ought to have known,

> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.

The event for determining the commencement of the ultimate 10 year period is the date that the claim arose.[59]

[72] The present provisions in the *Limitations Act* are suitable and appropriate for actions on insurance contracts. Under s. 3(1), the time for an action commences when a claimant ought to have known:

(i) that the injury *for which the claimant seeks an order* occurred; *and*
(ii) *that the injury was attributable to the conduct of the defendant*. (emphasis added)

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[59] *Limitations Act*, s. 3(1)(5).

In most cases involving actions on insurance contracts, this would likely occur when the insurer denies the claim. When bringing an action against the insurer, the injury for which the claimant seeks an order is not the actual loss occasioned by the peril (i.e. the damage caused by a fire).The actual loss results from the insurer breaching the insurance contract by failing to pay out the claim.

[73] Under the present *Limitations Act*, it is inconceivable that the limitation period for an action against an insurer would commence on the date of the loss. As the defendant is the insurer, it cannot be said that the conduct of the insurer caused the injury which the claimant suffered as a result of the peril (pursuant to s. 3(1)(a)(ii) of the *Limitations Act*). The insurer (presumably) had nothing to do with causing the peril itself. The only conduct of the insurer which causes injury that warrants bringing a proceeding is the failure to honour the terms of the policy. Therefore, the cause of action which a claimant has against the insurer arises on the date upon which the insurer denies the claim.

[74] It may be argued that relying upon the codified discoverability principle in the *Limitations Act* could prejudice the insurer's ability to investigate the incident triggering the insurance policy, as an insured may delay reporting the claim if not under the constraint of a limitation period. However, this prejudice is minimized by the statutory requirements in the *Insurance Act* that require an insured to provide proof of loss to the insurer within a reasonable time. Therefore, even under the limitation provisions in the *Limitations Act*, an insured's claim may still be barred if there is an unreasonable delay in providing proof of loss to the insurer.

RECOMMENDATION No. 4
Limitation periods for actions against insurers should commence in accordance with s. 3 of the *Limitations Act.*

CHAPTER 5. ALLOWING INSURERS TO SHORTEN LIMITATION PERIODS THROUGH CONTRACT

A. Contracting out of the *Limitations Act*

[75] In the Consultation Memorandum the issue of whether the *Limitations Act* precludes parties from abridging limitation periods through agreement was discussed, as there was an ambiguity in the *Act* as to whether this practice was permissible.[60] The discussion in the consultation memorandum regarding whether parties are permitted to contractually shorten limitation periods under the *Limitations Act* may now be moot in light of an impending amendment to s. 7 of the *Limitations Act*:[61]

> (2) An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid.

[76] There is no exclusion in this provision for insurance contracts. Presumably then, any contractual provision in an insurance contract that purports to shorten a limitation period that is not sanctioned by statute (such as the Statutory Conditions, discussed above) will not be valid.

[77] The *Justice Statutes Amendment Act, 2002* was given Royal Assent on May 14, 2002, but some issues have arisen relating to the proclamation of this section. This amendment was proclaimed to be effective on June 1, 2003. It was then "unproclaimed" on May 28, 2003. The proclamation was rescinded due to concerns as to how this provision could affect commercial dealings (outside of the insurance area), particularly with respect to common representation and warranty clauses in commercial contracts between sophisticated parties. We understand that further consultation is ensuing as to the general effect of such a provision.

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[60] In the Consultation Memorandum, the Institute concluded that pursuant to the accepted rules of statutory interpretation, the present *Limitations Act* impliedly prohibits parties from contractually abridging limitation periods.

[61] *Justice Statutes Amendment Act, 2002*, S.A. 2002, c. 17, s. 4(4).

[78] Whether the *Limitations Act* should preclude any party from contractually abridging a limitation period is an issue that is outside of the scope of this project, and the Institute does not make any comment nor recommendation about this principle generally. However, if the amendment to the *Justice Statutes Amendment Act, 2002* is repealed or not brought into force, the question still remains as to whether insurers should be permitted to contractually shorten limitation periods for actions on insurance contract.

[79] The practice of allowing insurers to impose contractual limitation periods in insurance policies increases the number of different limitation periods for insurance contracts and will merely continue the general confusion in this area. Although this was the state of affairs prior to the *Limitations Act*, it is not desirable as it defeats one of the primary purpose of the *Limitations Act.* As has been discussed above, there are no principled reasons for protecting insurers with statutory limitation periods which are shorter than the standard limitation periods for most other causes of action. Similar reasoning supports the proposition that insurers should not be able to contractually impose shorter limitation periods in insurance contracts.

[80] The main concern associated with contractual limitation periods shorter than those permitted by statute is that one party may be deprived of the right to bring a legitimate claim due to a very short limitation period. This may be less of a problem in a situation where both parties are of equal bargaining power and are similarly sophisticated. In such a situation it may be said that there is no need to depart from the principles of freedom of contract, and if one party wishes to relinquish its right to bring an action within a longer period the state should not interfere. This position is less tenable where one party has little, if any, opportunity to negotiate the terms of a contract.

[81] The insurance contract is a classic example of the party who is in the better bargaining position imposing a detrimental limitation period on the more vulnerable party. An insured is in no position to negotiate the actual terms of the insurance contract; at best, an insured is limited to negotiating the cost of the policy. It is virtually a universal practice throughout the insurance industry to

contractually incorporate limitation periods for those types of insurance for which there are no limitation periods in the *Insurance Act*. The insured cannot simply look for another insurance company who will provide a policy which does not contain limitation periods shorter than those prescribed by the *Limitations Act*.

[82] As discussed above, the *Insurance Act* may be described as a form of consumer protection legislation, as it sets standards and procedures by which the insurance industry must abide. A contractual limitation period which is shorter than that to which the insured would otherwise be entitled under the *Limitations Act* is detrimental to the insured, as it could have the effect of preventing an insured from pursuing what may otherwise be a *bona fide* claim. As the insured normally will not even receive the actual policy until after entering into an agreement with the insurer, the one year limitation provisions are not brought to the insured's attention when the contract is entered into. Precluding insurers from inserting contractual provisions which limit insureds' rights to bring legitimate actions would be consistent with the consumer protection aspect of the *Insurance Act*.

[83] If the Legislature chooses not to proclaim a general provision in the *Limitations Act* which prohibits any party from contractually shortening a limitation period, insurance companies may still be prevented from contractually abridging limitation periods in an insurance contract by inserting a section to that effect in the *Insurance Act*, similar to s. 3 of the British Columbia *Insurance Act*.[62]

RECOMMENDATION No. 5
Insurance companies should not be able to contractually impose shorter limitation periods in insurance contracts.

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[62] R.S.B.C. 1996, c. 226.

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