ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

STANDARDIZING LIMITATION PERIODS FOR ACTIONS ON INSURANCE CONTRACTS

Consultation Memorandum No. 10

December 2001

ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGMENTS

The genesis of this Consultation Memorandum 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 *Limitation 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 Consultation Memorandum. Board members have also provided helpful comments and guidance.

We look forward to response to these issues so that we can prepare a final recommendation.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute on or before June 30, 2002.

Comments should be addressed to:

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I. Introduction

History and scope of project

[1] When the new *Limitations Act*[1] came into force on March 1, 1999, a number of changes were made to the limitations law in Alberta. One change relates to the ability to amend limitation periods by contract. While the old law allowed contractual change up or down, the new law provides only for "extension" by express contract. The intended policy is clear from the comments of the Bill sponsor in Hansard. Whether the policy is effective is a matter of debate.

[2] Assume for the moment that a limitation period cannot be reduced by contract. What is the effect on provisions in insurance contracts? Some limitation periods are in the *Insurance Act*[2] and are therefore valid; some are in statutory condition and are therefore valid; but some are merely in the insurance contract. The validity of these conditions is in question.

[3] While considering this narrow issue and the potential responses, it quickly became apparent that the entire 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 caused a considerable amount of litigation. Further, several of the limitation periods that the *Insurance Act* prescribes are 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 the Act.

[4] In light of the problems identified above, the scope of this project has been expanded to address the following issues which relate to rationalizing limitation periods for actions against insurers:

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[1] S.A. 1996, c. L-15.1

[2] S.A. 1999, c. I-5.1.

(1) Should the limitation periods for all insurance contracts be centralized in either the *Limitations Act* or the *Insurance Act*?

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

(3) 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?

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

(5) If the limitation periods for actions on insurance contracts should not be standardized, should either the *Insurance Act* or the *Limitations Act* be amended to enable insurance companies to contractually impose shorter limitation periods in insurance contracts?

II. Present Limitation Periods for Actions on Insurance Contracts

[5] Presently the limitation period for bringing an action against an insurer for failing to honour an insurance policy depends on the type of insurance. The *Insurance Act* contains statutory provisions which specifically set out limitation periods for certain types of insurance. 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

[6] 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.[3] 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.[4]

[7] Under the new *Limitations Act*, the default limitation period is either

> (a) 2 years after 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,

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[3] Alberta Law Reform Institute, *Limitations* (Report No. 55) (Edmonton: Alberta Law Reform Institute, December 1999) at 30.

[4] *Ibid*. at 16.

or

(b) 10 years after the claim arose, whichever is shorter.[5]

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

i) if the claim involves adverse possession of real property owned by the Crown[7];

ii) if the remedial order sought by the claimant is subject to a limitation provision in any other enactment of the Province[8]; or

iii) if the parties have expressly agreed in writing to extend a limitation period.[9]

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

a. Limitation provisions in other enactments

[9] For a statutory provision referred to in (ii) above to constitute a "limitation provision", reference must be had to s. 1 of the *Limitations Act*. Section 1 states that a "limitation provision" includes a limitation period or notice provision that has the effect of a limitation period. Section 2(1.2) 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 immunity from a claim, those provisions will be valid and do not offend the *Limitations Act*.

b. Express agreements to extend limitation periods

[10] The exception in (iii) above regarding agreements to extend limitation periods arises from the following provisions of the Act:

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[5] *Limitations Act*, *supra* note 1, s. 2(1.1).

[6] *Limitations Act*, *supra* note 1, s. 2(1).

[7] *Limitations Act*, *supra,* note 1, s. 2(a).

[8] *Limitations Act, supra* note 1, s. 2(b).

[9] *Limitations Act*, *supra* note 1, ss. 7 ad 9.

> 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*

[11] The *Limitations Act* 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*.[10]

[12] 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*.
>
> (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.

[13] 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*

---

[10] 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 *infra* note 14. The new *Insurance Act* came into force September 1, 2001, except s. 414.

> *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*.

[14] These provisions fall squarely within the exclusion in s. 2(1.2) 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.[11]

C. Statutory Conditions

[15] 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.

[16] 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*.
>
> 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 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.
>
> 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*

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[11] *Limitations Act*, *supra* note 1, ss. 1 and 2(1.2).

> *more than one year after the date the insurance money became payable* or would have become payable if it had been a valid claim.
>
> 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*.

[17] The Statutory Conditions which apply to fire insurance also apply, insofar as they are applicable, to weather insurance and livestock insurance.[12]

D. Statutory character of limitations in statutory conditions

[18] As noted above, the *Insurance Act* requires certain types of insurance contracts to contain Statutory Conditions, one of which sets out a limitation period for bringing an action on the insurance contract. The question which 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.*

[19] In *Triple Five Corp.* v. *Simcoe & Erie Group*[13] 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.

[20] As the limitation periods in the Statutory Conditions are "statutory rules", they likely fall within the exception in s. 2(1.2) of the *Limitations Act* relating to limitation

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[12] *Insurance Act*, *supra* note 2, s. 704(b) (livestock); s. 731(b) (weather).

[13] (1990), 72 Alta. L.R. (2d) 254 (C.A.).

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.*

[21] 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.

[22] 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*

[23] 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*:

(i) theft insurance;[14]
(ii) general and commercial liability insurance;
(iii) guarantee and surety insurance;
(iv) bonds used in the construction industry.

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[14] The Deputy Superintendent of Insurance, Arthur Hagen, advises 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)

F. Notice provisions

[24] 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.[15] 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.[16] 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

[25] 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
>
> (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.

[26] 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

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[15] *Supra* note 2, 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.

[16] *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.).

is not an actual limitation provision as the court may grant relief from forfeiture from the failure to comply with this section.[17]

H. Contractual limitation periods in insurance contracts

[27] 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. Abridged limitation periods are also commonly found in other forms of insurance contracts specific to the construction industry, such as performance bonds, bid bonds, and labour and materials bonds. These types of insurance contracts are neither subject to 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.

[28] 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 year period under the former *Limitation of Actions Act.*[18] 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.[19] The only caveat was that the insurance policy must clearly indicate that the Statutory Conditions applied to

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

[18] See cases listed *infra* notes 19-21 and 36; 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.).

[19] *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.

the entire policy. The Court's view of this practice was summarized in *Edmonton (City)* v. *Protection Mutual Insurance Co.*:[20]

> 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.

[29] 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*:[21]

> 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.
>
> 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.

[30] 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, supra*. 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:

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[20] (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.

[21] (1997), 145 D.L.R. (4th) 236 (Alta. C.A.); leave to appeal ref'd [1997] S.C.C.A. No. 263.

> 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 contract itself so as to require the categorization of a multi-peril contract as being a one peril or primarily one peril contract.[22]

[31] 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*:[23]

> 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

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[22] *Supra* note 19 at 168-169.

[23] *Supra* note 19 at 269-270.

> 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.

[32] The distinction between statutory conditions and contractual conditions is important, as only statutory limitation periods fall within the exception in s. 2(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.

III. Legislation and Common Law in Other Provinces

[33] 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

[34] 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. 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.

[35] 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*.[24]

B. Ontario

[36] 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.*[25] However, Ontario is considering enacting new limitations legislation (Bill 10: *An Act to Revise the Limitations Act*)[26] which would significantly change the limitation periods in the *Insurance Act.* These

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[24] [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.

[25] (1977), 18 O.R. (2d) 10 (Ont. C.A.).

[26] Formerly the *Limitations Act, 2000* (Bill 163) (37th Parliament, Session 1). Bill 163 was given First Reading on December 12, 2000 shortly before the legislative session ended.

amendments provide that no statutory limitation periods other than those in the *Limitations Act* are valid unless they are specifically preserved in the Schedule to the *Limitations Act* (s. 19). Only the one year limitation for fire insurance contracts is preserved in the Schedule. Thus, all other limitations in the Ontario *Insurance Act* would fall under the default limitation periods in the revised *Limitations Act.* Section 22 of Bill 10 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 (s. 22(2)). Bill 10 was given First Reading on April 23, 2001.

C. Manitoba, NWT, Yukon, Nunavut

[37] 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".

[38] 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 interpretation of s. 14(3) set out above): *Royal Bank* v. *Red River Valley Mutual Insurance Co.*[27] 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.[28]

[39] 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

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[27] (1986), 18 C.C.L.I. 75 (Man. C.A.).

[28] *Insurance Act*, R.S.M. 1987, c. 140, s. 142 (S.C. 14) (fire), s. 237 (S.C. 6(3)) (auto).

Manitoba, the insurance acts of each Territory provides a two year limitation period in the Statutory Conditions for actions on fire and automobile insurance.[29]

D. Nova Scotia

[40] Nova Scotia's *Limitations of Actions Act*[30] expressly allows contracting out of statutory limitation periods:

> 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.

[41] 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.

E. British Columbia

[42] The British Columbia *Limitations Act* does not address the issue of contracting out of statutory limitation periods. The B.C. *Insurance Act*[31] takes a different approach to limitation periods than that found in the other jurisdictions. 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.

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[29] *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 64 (S.C. 14), s. 129 (S.C. 6(2)); *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 64 (S.C. 14), s. 129 (S.C. 6(2)); R.S.Y. 1986, c. 91, s. 68 (S.C. 14), s. 165.

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

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

[43] The question of whether this precludes an insurer from incorporating the limitation provisions from Statutory Conditions into multi-peril policies was discussed recently in *Dhillon* v. *Liberty Insurance Co. of Canada*.[32] The Court held:

> 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.[33]

[44] This decision is questionable as the Court based its decision on *Dressew Supply Ltd.* v. *Laurentian Pacific Insurance Co.*[34] 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*[35] 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.

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[32] [2001] I.L.R. 1-3881 (B.C.S.C.).

[33] 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*.

[34] (1991), 57 B.C.L.R. (2d) 198 (C.A.).

[35] R.S.B.C. 1979, c. 220.

IV. Rationalizing Limitation Periods for Actions Against Insurers

[45] 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 for lawyers, and have resulted in a considerable amount of litigation over missed limitation periods.[36] 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.

A. Centralizing limitation periods in the *Limitations Act*

[46] A partial solution would be to centralize the limitation periods for actions on all insurance policies. Whether this is done in the *Limitations Act* or in the *Insurance Act* depends on the resolution of the other issues raised herein, specifically, whether actions on insurance contracts should be subject to either special limitation periods or the limitation periods in the *Limitations Act*.

[47] If it is decided that there should not be different limitation periods for actions on insurance contracts, all limitation periods currently in the *Insurance Act* could be removed and replaced with the default limitation provisions in the *Limitations Act*. No new limitation provisions would then be necessary, apart from provisions clarifying the date upon which the limitation period commences (discussed below).

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[36] Examples of reported cases include those *supra*, notes 19-21; 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.).

B. Centralizing limitation periods in the *Insurance Act*

[48] If there continues to be different limitations for the insurance industry, it is most sensible to centralize the limitation periods in the *Insurance Act*. The *Insurance Act* regulates the insurance industry and it applies to all insurers and insurance contracts in Alberta. As such, the number of situations which fall outside of its coverage are minimal, subject to those exceptions discussed below. The *Insurance Act* is also a logical place for these types of provisions as it already deals with limitation periods applicable only to the insurance industry. It is likely that practitioners would expect to find all limitation provisions relating to insurance contracts in the *Insurance Act*. It is also consistent with the practice in most of the other provinces in Canada, which deal with limitation periods specific to insurance contracts in their respective insurance acts. There is no conflict with the *Limitations Act* in doing so, as it preserves the validity of limitation provisions in other statutes.

[49] The main problem with amending the *Insurance Act* is that it would not necessarily cover certain types of construction bonds issued by bodies other than licensed insurers.[37] Presently construction bonds are regulated by the *Insurance Act* if they are issued by a licensed insurance company. However, other institutions, such as banks, may issue guarantees and sureties in the construction industry. These entities do not fall under the *Insurance Act* regulatory regime. Any amendments made to the *Insurance Act* permitting insurers to incorporate limitation provisions from the Statutory Conditions would not extend to the limitation provisions in these other types of policies. This may not be a concern if the view is that shorter limitation periods that apply to insurers are exceptional. It may be that it is not desirable to extend this exception to parties who do not fall under the *Insurance Act* regime and instead have these other parties abide by the limitations in the *Limitations Act*.

ISSUE No. 1
Should the limitation periods for all insurance contracts be centralized in either the *Insurance Act* or the *Limitations Act*?

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[37] Although most types of construction bonds and sureties would fall under the definition of either "guarantee insurance" or "surety insurance" in the Act, whether a specific construction surety is in fact a contract of insurance has been the subject of much litigation in the past. In any given situation the precise terms of the contract must be examined. (Conversation with James Rendall, March 13, 2001).

C. Standardized limitation periods

[50] As discussed above, the limitation periods for actions against insurers are not consistent. Some types of insurance are subject to one year limitation periods while others are subject to the default limitation periods in the *Limitations Act*. The date on which the limitation period commences also varies. Again, this causes confusion for both insureds and lawyers, resulting in litigation when a disparate limitation period is missed. This confusion would be minimized if the limitation periods for actions on all types of insurance policies were standardized. Standardizing the limitation periods is a rational reform, as there are no principled reasons for having different limitation periods for different types of insurance.

ISSUE No. 2
Should the limitation periods for actions on all types of insurance contracts be standardized?

D. Length of limitation period for actions against insurers

a. Historical development of limitation periods

[51] 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* which 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*.

[52] 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.

b. Arguments against special limitation periods in insurance contracts

i. Historical justifications

[53] Nothing in the case law indicates why the one year limitation period for actions against insurers was adopted in the first instance. 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*[38] in 1915. It appears to have simply been carried through the progressive versions of the *Insurance Act* without examining the rationale for its inclusion.

[54] 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)*:

> 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 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

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

> by the insurer, one that the insured does not want to be protected by.[39]
> (emphasis added)

[55] 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*.

ii. Consumer protection legislation

[56] 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

> 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.[40]

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

iii. Notice of claim

[58] 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,[41] 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

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[39] *Supra* note 20 at 306-307. The Court did not provide a cite for the "academic commentary" referred to in this passage.

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

[41] *Insurance Act*, *supra* note 15.

days after notice of proof of loss has been given,[42] 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,[43] 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.

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

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

[60] The existing legislation in Alberta suggests that there is no principled reason for having certain types of insurance policies subject to one year limitation periods but not others. 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.

[61] 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

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[42] *Supra* note 2, s. 520.

[43] See discussion above.

currently subject to the one year limitation in Alberta. The proposed *Limitations Act* in Ontario 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.

v. Opportunity to negotiate

[62] 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.

E. Conclusion

[63] 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.

ISSUE No. 3
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?

F. Commencement of limitation periods

[64] If it is appropriate to amend the one year limitation periods which presently apply to actions on certain types of insurance policies, the date upon which the limitation period commences should also be clarified.

[65] There are several options for the commencement date:

(a) the date of proof of loss;

(b) the date of the loss; or

(c) when the insurer denies the claim.

a. Date of proof of loss

[66] One alternative is to adopt the commencement date used in British Columbia, being that the limitation runs from the date on which proof of loss is provided to the insurer. This is also the commencement date which is used for claims against life insurance policies in the Alberta *Insurance Act.* The insurer will not be prejudiced for the same reasons as those set out below in the discussion regarding commencement on the date of denial. From a principled viewpoint, providing proof of loss is, in essence, a condition precedent mandated by statute which must be fulfilled prior insurer having any liability under the policy. It is also a date of which both the insured and the insurer are aware, which should minimize issues relating to the actual date on which the limitation period commences. As such, it would be reasonable to commence limitation period on the date of proof of loss.

b. Date of loss/Discoverability of loss

[67] Commencing the limitation period as of the date of loss is also reasonable. It is the commencement date used in the limitation provisions in all of the Statutory Conditions in the Alberta *Insurance Act*, thus it is the least radical alternative. The insured's rights to be paid under the policy may be seen as arising on the date the loss occurred. The insured would likely be aware of the date upon which the loss occurred and presumably would be aware that a claim could be made on the insurance policy as a result of the loss.

[68] The loss may not always be discovered on the day the peril occurred. As such, an element of discoverability will be present and the date may be subject to some uncertainty. Discoverability is one of the commencement dates for limitation periods in the *Limitations Act.* The date upon which the loss is discovered, therefore, may also be a reasonable date upon which to commence the limitation period for bringing an action against an insurer.

c. Date of denial of claim

[69] A final possibility is to commence the limitation period on the date on which the insurer denies the claim. The actual cause of action against the insurer is breach of contract for failing to honour the policy. It is reasonable that, as with any breach of contract claim, the limitation period commences when the cause of action arises. This would not actually occur until the insurer denies the claim. It may be argued that this 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 of furnishing proof of loss within a reasonable time. An insured's claim may still be barred if there is an unreasonable delay in providing proof of loss to the insurer.

[70] This approach is consistent with the principles in the *Limitations Act* which govern the commencement of limitation periods. 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*.

[71] 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. Further, as the defendant 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. The insurer (presumably) had nothing to do with the peril itself. The only conduct of the insurer which causes injury is the failure to honour the terms of the policy. Therefore, the real cause of action which a claimant has against the insurer reasonably arises on the date upon which the insurer denies the claim.

[72] This approach also lends itself to a date certain for the commencement of the limitation period, being the date upon which the insurer communicates the denial to the insured.

ISSUE No. 4
When should the limitation period for actions against insurers commence?

V. Allowing Insurers to Shorten Limitation Periods Through Contract

A. Contracting out of the *Limitations Act*

a. Interpreting the *Limitations Act* as precluding contractual abridgment of limitation periods

[73] It was accepted that under the former *Limitations of Actions Act* parties could shorten limitation periods through express agreement as there was nothing in that Act to the contrary. It appears that the Legislature intended to do away with this practice under the *Limitations Act*. Although not expressly stated in the new *Limitations Act*, the most logical interpretation of the Act is that the Legislature must have intended to exclude contractual agreements that purport to shorten the statutorily prescribed limitation periods.

i. Rules of statutory interpretation

[74] The statutory interpretation rule of *expressio unius est exclusio* supports the proposition that the *Limitations Act* precludes contractual agreements to shorten limitation periods. This principle is that:

> ...'to express one thing is to exclude another', or 'implied exclusion'.
>
> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is not express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.
>
> An expectation of express reference can arise in a number of ways. Most often it is grounded in presumptions relating to the way legislation is drafted or to the policies it is likely to express.[44]

[75] Although the *Limitations Act* contains an express list of exceptions to the default limitation periods, contractual agreements to shorten limitation periods are not included in those exceptions. Had the Legislature intended to include

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[44] R. Sullivan, *Driedger on The Construction of Statutes* (3d) (Toronto: Butterworths, 1994) at 168.

this exception to the general rule, one expects that it would have done so expressly when it addressed other exceptions to the Act.

[76] The *Limitations Act* also specifically addresses parties' rights to contract out of the general limitation periods in that they may agree to lengthen limitation periods. The Act is noticeably silent as to whether parties may agree to abridge limitation periods. Thus, although the Legislature put its mind to the issue of contracting out of the limitation periods in the Act, it did not do so in a general manner. Had it intended to continue to allow parties to contractually vary limitation periods at will (as was the practice under the former *Limitations of Actions Act*), it would have used wording to that effect. However, the new Act specifically preserves only the right to contractually extend limitation periods. Correspondingly, it is implied that the Act does not preserve the right to contractually shorten limitation periods.

ii. Evidence of legislative intent

[77] The Hansard debates concerning the enactment of the Act provide further evidence that the Legislature intended to preclude parties from agreeing to shorten limitation periods:

> Two areas in section 8 are amended. The first amendment is the addition of the word "expressly" before "provides". This will ensure that the agreements to increase limitation periods are expressed and not implied and therefore clear to both parties. The next amendment to section 8 is to remove the possibility of agreements reducing a limitation period. Concerns have been raised regarding situations where there is an imbalance of power between two parties and one party may be in a stronger bargaining position to reduce the limitation period. So agreements, now, Mr. Chairman, could only increase and not decrease the limitation period.[45]

[78] This is another indication that the Legislature intended to preclude parties from entering into agreements to shorten the statutory limitation periods in the *Limitations Act.* The reference in this passage was to the *Limitations Act* when it was Bill 205 in First Reading, wherein the wording of s. 8 (now s. 7) was:

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[45] Alberta Hansard, March 20, 1996.

> 8 Subject to section 10 [now s. 9] if an agreement provides for the reduction or extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.
>
> 10(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

[79] The only points of departure between the former s. 8 and the present s. 7 are the removal of the word "reduction" of a limitation period, and the addition of "expressly" after "agreement". The fact that the Legislature deliberately removed the right to contractually shorten limitation periods is a strong indication that it did not intend to retain this practice.

b. Can the Act be interpreted as allowing contractual abridgment of limitation periods?

i. Argument in favour of this interpretation

[80] There is a contrary argument that the *expressio unius* principle does not apply, thus the *Limitations Act* does not preclude agreements to shorten limitation periods. This contrary position is based on a more theoretical view of the *Limitations Act* rather than focussing on specific statutory sections.

[81] It may be argued that the primary purpose of *Limitations Act* is to protect defendants by providing maximum periods during which actions must be brought. This serves to prevent the evils associated with delay in bringing actions, and protects the right of a defendant not be sued after an unreasonable period of time. The Act is not intended to protect claimants' rights to bring actions, which is why there are no statutorily guaranteed minimum limitation periods in the *Limitations Act*. As such, the *expressio unius* principle does not apply as the Legislature did not intend for the Act to address minimum limitation periods at all. As such, the common law would apply, and at common law parties may contractually agree to any limitation period they wish.

ii. Arguments against this interpretation

[82] Although it may be arguable that the Act is not intended to prohibit contractual shortening of limitation periods, this interpretation has several flaws:

i) it does not sufficiently recognize that the Act is also intended to protect a claimant's ability to bring an action;
ii) it leads to inconsistencies in interpreting the Act; and
iii) it ignores the evidence of the Legislature's intent.

[83] While it is true that the Act protects a defendant from stale claims, it can also be seen as protecting a claimant. It gives a claimant a defined limitation period, the full extent of which is (relatively) certain. This is demonstrated by looking at the plain and ordinary meaning of the actual limitation period provisions of the Act. For instance, section 3 provides:

> if a claimant does not seek a remedial order within
> (a) two years after the claimant first knew...or
> (b) 10 years after the claim arose
> whichever period expires first...

[84] The plain and ordinary meaning of these sections is that a claimant has a statutory right to bring an action at any time within either two years from the date of discovery, or 10 years from the date the claim arose (unless the situation falls into one of the listed exceptions). Nothing in the Act suggests that this right may be limited by shortening the limitation period. This leads to the next problem with interpreting the Act as allowing parties to contractually shorten limitation periods.

[85] The argument that the *expressio unius* principle does not apply requires one to ignore sections 7 and 9, which specifically address the right to contract out of the Act for the purpose of extending the limitation period. This interpretation also does not explain why s. 7 was specifically amended to remove the very proposition that a party may contractually reduce a limitation period.

[86] A further problem with this interpretation is that it creates an inconsistency in interpretation. Section 7 provides that a party can only agree to extend a limitation period in accordance with s. 9. Section 9 requires that the agreement be in writing and be signed by the party who is adversely affected. There is no mention anywhere in the Act of any other agreement other than

those mentioned in section 7, thus the agreements to which s. 9 refers must be limited to agreements to extend limitation periods, as these are the only agreements referred to in s. 7.

[87] However, if the Act permits agreements to shorten limitation periods, s. 9 would not apply to such agreements. It follows that an agreement which deprives a claimant of the right to bring an action within the full limitation period would not have to be in writing and would not have to be signed by the claimant, who would be the party "adversely affected". This is not consistent with the rest of the Act which requires that variations to the standard limitation periods must be in writing, and must signed by the party who is adversely affected by the agreement. These obviously are intended to ensure that a defendant who relinquishes the right to rely on the standard limitation period does so in an informed manner. These same protections should also be afforded to a claimant who agrees to limit itself to a limitation period shorter than that which the Act provides. Had the Legislature intended to allow contractual agreements to vary a limitation party, one expects the s. 9 of the Act would provide that "any agreement affecting a limitation period must be in writing and signed by the party adversely affected", or other words to that effect.

c. Conclusions on interpretation of the Act

[88] All of the above supports the conclusion that contractual provisions in an agreement which purport to shorten a limitation period contravene the *Limitations Act* and would be void. On this view, the default limitation provisions of the *Limitations Act* would apply to any contract which contractually imposes limitation periods which are shorter than those in the *Limitations Act*.

B. Arguments against allowing insurers to contractually shorten limitation periods

[89] If it is found that limitation periods for actions against insurers should be exempt from the *Limitations Act* and that they should not be standardized, it must then be determined whether the practice of contractually incorporating the one year limitation periods into multi-peril insurance policies should be maintained through legislation.

[90] The practice of allowing insurers to impose contractual limitation periods in insurance policies increases the number of different limitation periods for insurance contracts and adds to the 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.

[91] 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. It appears the Legislature specifically intended to abolish this type of situation with the enactment of the *Limitations Act.*

[92] 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.*

[93] 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.*

C. Arguments in favour of allowing insurers to contractually incorporate limitation periods

[94] Until the new *Limitations Act* came into force there were no restrictions on insurers contractually imposing limitation periods in insurance contracts shorter than those in the *Limitations of Actions Act.* It may be argued that no mischief occurred during that time and insurers did not abuse this situation by imposing unfair or unconscionable limitation periods. Further, the court may strike down contractual limitation provisions in the event that they are unconscionably short.[46] However, this solution requires the matter to be settled through litigation, which is costly, time consuming and uncertain for both the insured and the insurer.

[95] The status quo which existed prior to the enactment of the *Limitations Act* will be altered if insurers are precluded from contractually incorporating limitation periods into policies. This could result in a considerable amount of litigation, as any existing policies that contain contractual provisions which incorporate the one year limitation period arguably are void under the new *Limitations Act*. The likelihood of litigation is also heightened as the applicable limitation period in contracts of insurance has been the subject of much litigation, as indicated in the cases discussed above. Allowing insurers to

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[46] *Anglo-American Fire Insurance Co.* v. *Hendry* (1913), 48 S.C.R. 577.

contractually set limitation periods would maintain the status quo. This would reduce the possibility of litigation on the validity of the contractual limitation periods in existing policies, although the issues regarding the applicability of these provisions would remain.

[96] One final option which would permit insurers to continue to contractually impose limitation periods would be to limit, but not prohibit, an insurer's ability to impose contractual limitation periods by imposing a minimum limitation period. This approach already exists in the sections governing limited accident insurance in the *Insurance Act*.[47]

[97] If no legislative amendments are made, it is foreseeable that at some point the question of whether the *Limitations Act* precludes parties from contracting out will have to be litigated, particularly if the insurance policy in question was executed prior to enactment of the *Limitations Act*. As such, even if this practice is continued, it should still be addressed expressly in either the *Insurance Act* or the *Limitations Act* to minimize the potential for litigation.

ISSUE No. 5
If the limitation periods for actions on insurance contracts should not be standardized, should either the *Insurance Act* or the *Limitations Act* be amended to enable insurance companies to contractually impose shorter limitation periods in insurance contracts?

[47] *Supra* note 2, s. 647.