

Manitoba Law Reform Commission

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Hon. Andrew Swan
Minister of Justice and Attorney General of Manitoba
104 Legislative Building
Winnipeg, MB R3C 0V8

Dear Minister:

RE: LIMITATIONS OF ACTIONS AGAINST INSURERS

A. INTRODUCTION

In the past, the Commission has found it useful to submit by letter to the Minister of Justice and Attorney General what is referred to as an informal report. The following is such a report and contains our comments regarding limitation periods in Manitoba's *Insurance Act*.

In its October 2010 *Limitations Report*, the Commission commented on the wealth of specialized limitations provisions in *The Insurance Act* and concluded that it would make sense for such provisions to be considered in detail due to the risk that the overall limitations regime may become incoherent or inconsistent. Such a review was beyond the scope of last year's report.

The Commission understands that the Manitoba Superintendent of Insurance has conducted extensive consultations in respect of proposed changes to *The Insurance Act* over the past several years. Indeed, Manitoba has already taken the first steps towards a new *Insurance Act* with the enactment of the *Insurance Amendment Act* in 2007.¹

¹ S. M. 2007, c. C.10.

The Commission expects that the consultation process has included a thorough review of the limitation provisions in *The Insurance Act*. Accordingly, the Commission does not propose to make detailed recommendations for substantive changes to this legislation. Instead, the Commission will offer some general remarks with a view to enhancing consistency, clarity and accessibility within the province's overall limitations regime.

B. THE ISSUES

In Manitoba's current *Insurance Act*, as in most other provincial Insurance Acts, the applicable limitation period for an action against an insurer is based on the category of peril the insurance contract covers. For example, under Manitoba's Act, actions against insurers in respect of a fire insurance policy, livestock insurance policy and weather insurance policy must be commenced no more than two years after the date of loss.² Subject to certain exceptions, no action can be brought in respect of life insurance contracts, which includes many forms of disability coverage, after the earlier of one year after furnishing proof of loss or six years from the date of loss.³ No action can be brought in respect of accident or sickness insurance more than one year after the date the insurance money is payable and, for hail insurance, no action can be brought more than one year from the date of loss.⁴

Part III of *The Insurance Act* applies to all contracts of insurance except those respecting life insurance, accident and sickness insurance, marine insurance and those policies governed by specific Parts of the Act including fire, automobile, livestock, weather and hail policies. Part III does not specify a limitation period for actions against insurers.

Overall, there is a combination of one, two and six-year limitation periods, all triggered by different events, depending on how the peril or perils covered by the insurance contract are categorized.

The varying lengths of limitation periods and the inconsistencies based on the categorization model have caused considerable confusion and resulted in extensive litigation in Manitoba and throughout Canada. This is all the more significant because most modern policies are multi-peril policies which do not fit easily into the existing legislative categories.

If the peril is not specifically identified in *The Insurance Act*, there is some question as to which limitation should apply. Presumably recourse should be had to *The Limitations of Actions Act*⁵ in these cases. In many policies, there are contractual provisions which apply the statutory limitation period found in *The Insurance Act* to perils covered by the contract but for which there is no prescribed limitation period in the legislation. These contractual limitation periods are typically shorter than the otherwise applicable limitation period under *The Limitation of Actions Act*. To that extent, they are inconsistent with the Commission's recommendation in its *Limitations Report* that parties not be permitted to contractually shorten limitation periods.⁶

² *The Insurance Act* C.C.S.M. c. 140, s. 142(1) stat.cond. 14 [fire]; s. 276 [livestock]; s. 280 [weather].

³ *Ibid.*, s. 184(1).

⁴ *Ibid.*, s. 211 stat.cond. 12 [accident and sickness]; s. 299 stat. cond. 16 [hail].

⁵ C.C.S.M. c. L150.

⁶ Manitoba Law Reform Commission, *Limitations* (Report No. 123, 2010) at 51.

C. THE CASE-LAW

In *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada*⁷ and *Churchland v. Gore Mutual Insurance Co.*⁸ the Supreme Court of Canada addressed the problem of multiple limitation periods in the British Columbia *Insurance Act* in the context of multi-peril policies. In *KP*, the insured claimed for loss by fire under a multi-peril policy. The insurer took the position that the claim could not proceed because it was filed more than one year after the date of loss, which was the applicable period under Part V of the B.C. Act – the Fire Insurance Part. The insured argued that the policy fell under the general provisions of Part II of the B.C. Act which provides for a limitation period of one year from filing proof of loss. The Supreme Court agreed with the plaintiff that the policy fell within the general Part II of the Act and that the claim was not statute-barred. The result in *Churchland* was similar.

The Court made the following remarks:

The out-moded 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. The rulings that have emerged have been likened to a “judicial lottery”. 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.⁹

And later:

To repeat, it is our hope that legislators will rectify the situation by amending the Insurance Act to provide specifically for comprehensive policies.¹⁰

The Manitoba Court of Queen’s Bench has also been asked to decipher the various limitation periods applicable under the *Insurance Act* in, among others: *Lehmann et al v. Co-operators*;¹¹ *Audio Works Production Services Ltd. v. Canadian Northern Shield Insurance*;¹² *Casey v. Federated Insurance*;¹³ and *Smith v. Clarica Life Insurance*.¹⁴

The Court has not taken a consistent approach in interpreting the limitations provisions in *The Insurance Act*. In *Lehmann*, Master Cooper reviewed the jurisprudence and determined that the law is not clear in this area.¹⁵

⁷ 2003 SCC25; [2003] 1 S.C.R. 433.

⁸ 2003 SCC 26; [2003] 1 S.C.R. 445.

⁹ *Supra* note 7 at paras. 4-5.

¹⁰ *Supra* note 7 at para. 20.

¹¹ 2009 MBQB 6; [2009] 8 W.W.R. 361.

¹² 2005 MBQB 209; [2006] 8 W.W.R. 643.

¹³ 2004 MBQB 99; 240 D.L.R. (4th) 567.

¹⁴ 2002 MBQB 308; 169 Man. R. (2d) 244.

¹⁵ *Supra* note 11 at para. 47.

D. OTHER LAW REFORM AGENCIES

In 2003, the Alberta Law Reform Institute (“ALRI”) issued the report: *Limitations Act- Standardizing Limitation Periods for Actions on Insurance Contracts*.¹⁶ ALRI recommended that limitation periods for actions on all types of insurance contracts be standardized to two years, insurance contracts be subject to the limitation periods in the *Limitations Act*, limitation periods respecting insurance contracts be centralized in the *Limitations Act* and insurance companies not be permitted to contractually impose shorter limitation periods in insurance contracts.

In 2005, the Uniform Law Conference of Canada Civil Law Section (“ULCC”) issued a report: *Limitation Periods in Insurance Claims*.¹⁷ The ULCC agreed with the ALRI’s proposed standardization of limitation periods to two years and prohibition on shortening limitation periods by contract. The ULCC expressed its view that the limitation periods regarding actions on insurance claims should continue to be contained within the provincial Insurance Acts. It also questioned the practicality of starting the limitation period for all claims on the date on which the plaintiff knew or ought to have known that the injury was attributable to conduct of the defendant, as proposed by ALRI. The ULCC proposed instead a single step that the insurer would have to take to trigger a limitation period which would be consistent to all insurance contracts and would clearly alert the claimant to the consequences of failing to bring an action within the prescribed time limits.

E. RECENT LEGISLATIVE DEVELOPMENTS

The legislatures of Albert and British Columbia have recently passed legislation that will effect significant changes to those province’s Insurance Acts. Alberta’s *Insurance Amendment Act, 2008*¹⁸ and British Columbia’s *Insurance Amendment Act, 2009*¹⁹ are very similar in substance and both introduce important amendments to address, among other things, complexity in the area of limitation of actions against insurers.

The new Acts in Alberta and British Columbia are restructured, thereby eliminating the categorical approach to property insurance which has caused many of the problems discussed in the case-law noted above. Under both Acts, nearly all forms of property insurance will be governed by a general insurance part with a single limitation period of two years for all property and casualty insurance claims. In the case of loss or damage to property, the new Acts provide that an action against an insurer must be commenced within two years from the date the insured knew or ought to have known the loss or damage occurred.²⁰ In all other cases under this part, an insured must commence an action within two years after the date the cause of action against the insurer arose.²¹

¹⁶ Alberta Law Reform Institute, *Limitations Act- Standardizing Limitation Periods for Actions on Insurance Contracts* (Final Report No. 90, 2003).

¹⁷Uniform Law Conference of Canada, Civil Law Section, *Limitation Periods in Insurance Claims*, online:http://www.ulcc.ca/en/poam2/Insurance_Claims_Limitations_EN.pdf.>.

¹⁸ S.A. 2008, c. 19 [in force July 1, 2012].

¹⁹ S.B.C. 2009, c. 16 [not yet in force].

²⁰ *Supra* note 19, s. 22; *supra* note 18, s. 526(1)(a).

²¹ *Supra* note 19, s. 22; *supra* note 18, s. 526(1)(b).

Life insurance and accident and sickness insurance continue to be governed by distinct parts of the Act, but actions against insurers under these parts of the Act are also now generally subject to a two year limitation period, subject to considerations specific to these types of claims. In the case of life insurance, the limitation of actions has been extended from one to two years, or six years in the case of death where a proof of loss is not provided.²² For actions arising from death or declarations of death, the two year limitation period runs from the later of the date the event that caused the loss occurred, the date the claimant ought to have known the event occurred, or in the case of money payable on a period basis, the date the insurer failed to make a payment.²³

Actions with respect to accident and sickness insurance must now be commenced within two years after the proof of claim is furnished or six years after the date of death, whichever comes first. In all other cases, the action must be commenced not later than two years after the date the claimant knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim for insurance money.²⁴

Both the B.C. and Alberta amendments will make the two year limitation period for actions against insurers subject to the postponement or suspension provisions in those jurisdictions' limitations legislation. If the insured is a minor or is under a legal disability, the limitation period is suspended or postponed while those conditions obtain.²⁵

The new Acts will continue to require insurers to expressly state in all insurance contracts that actions must be commenced within the limitation period prescribed by the Act. Despite this requirement, many consumers continue to be caught unaware by the expiry of a limitation period, particularly when involved in negotiations with the insurer. To address this concern, B.C. and Alberta have proposed a regulation requiring the insurer to give an insured notice of an expiring limitation period. British Columbia's proposed regulation would require notification at up to two stages: the first on denial of a claim; and the second between 60 and 120 days before the expiry of the applicable limitation period.²⁶ Alberta's proposed regulation would require notification at up to three stages; on notification of the claim, on denial of the claim and between 60 and 120 days before the expiry of the applicable limitation period.²⁷

F. RECOMMENDATIONS

As indicated above, the Commission is aware that a significant amount of work has been done with respect to possible amendments to *The Insurance Act* in Manitoba. Accordingly, the Commission does not propose to make extensive recommendations in this highly technical area of the law.

²² *Supra* note 19, s. 65; *supra* note 18, s. 677.

²³ *Supra* note 19, s. 65; *supra* note 18, s. 677.

²⁴ *Supra* note 19, s. 91.1; *supra* note 18, s. 708.

²⁵ *Supra* note 19, s. 2.4(1); *supra* note 18, s. 527.

²⁶ British Columbia Ministry of Finance, *Insurance Act Regulations Discussion Paper* (February, 2010) online: http://www.fin.gov.bc.ca/prs/fcsp/insurance_regs_discussion_paper.pdf > at 5-6.

²⁷ Alberta Finance and Enterprise, *Consultation on Proposed Regulations for the amended Insurance Act* (2009), online: http://www.finance.alberta.ca/publications/insurance/2009_0615_consultation_insurance_regs.pdf > at 3.

Rather, the Commission confines its comments to a general endorsement of the changes that have been made in Alberta and British Columbia, and makes two specific suggestions to enhance accessibility and clarity in the law of limitations in the province of Manitoba.

The Commission endorses the introduction of a standard two year limitation period for actions against insurers in the B.C. and Alberta legislation. As noted above, Manitoba's Act already provides a two-year limitation period for many types of property claims. Extending the two year limitation period to all types of insurance claims would help to promote clarity and consistency in this area of the law, and would be consistent with the Commission's proposals in its *Limitations* report.

The Commission also approves the amendments which expressly make limitations of actions against insurers subject to the suspension provisions of the applicable limitations legislation.

In addition, the Commission supports the introduction of a regulation requiring insurers to give an insured person notice of expiry of a limitation period. Such a provision would enhance the consumer protection aspect of *The Insurance Act*, and promote accessibility in limitations law in general.

While generally approving the changes introduced in Alberta and British Columbia, some uncertainty and inconsistency remain in respect of the events that trigger the running of the limitation period, particularly with respect to liability policies.

The General Insurance Parts in both the Alberta and British Columbia Acts set out the following limitation period:

An action or proceeding against an insurer under a contract must be commenced

- (a) In the case of loss or damage to the insured property, not later than 2 years after the date the insured knew or ought to have known that the loss or damage occurred, and*
- (b) In any other case, no later than 2 years after the date that the cause of action against the insurer arose.²⁸*

Clause (a) in the above provision clearly refers to claims for loss or damage to property. Clause (b) governs all other insurance policies not otherwise provided for in the Act, including, most significantly, liability policies.

The language of clause (b) above does not clarify when the cause of action against an insurer arises in respect of liability policies. There are at least three possibilities discussed in some recent commentary on the Alberta and B.C. Acts:

- a.) The cause of action arises when liability attaches to the insured person, or the date of loss;²⁹

²⁸ *Supra* note 19, s. 22; *supra* note 18, s. 526(1).

²⁹ Whitelaw Twining Law Corporation, J. Moshonas, J. Vamplew, R. Lilly, *An Overview of Substantive Changes to the Insurance Act* (2009) online: <http://www.whitelawtwining.com/documents/article-pdfs>. > at 5.

- b.) The cause of action arises when the insurer denies coverage;³⁰ or
- c.) The cause of action arises when the insured incurs defence costs.³¹

As the Uniform Law Conference of Canada has remarked, providing a clear definition of the trigger of a limitation period is at least as important in terms of clarifying the law as the adoption of a standard two year limitation period.³²

When considering amendments to *The Insurance Act*, the Commission urges the Legislature to examine alternatives to a formulation of a limitation period commencing on the date the cause of action arises in respect of non-property related claims. If the legislative intent is that the limitation period for claims in respect of liability policies begins running on the occurrence of one of the events enumerated above, or at some other time, the Commission recommends spelling this out in the legislation. The Commission's *Limitations* report refers to the complexities involved in tying a limitation period to the accrual of a cause of action.³³ Maintaining this trigger in *The Insurance Act* is contrary to the overall direction of limitations legislation and does little to enhance clarity.

A specific recommendation in this regard would require consultation and analysis which is beyond the scope of this informal report. The Commission simply urges the Legislature to consider alternatives to tying the limitation period to the accrual of the cause of action. At a minimum, it would seem to be beneficial to clarify what is meant by the concept of the cause of action arising, if a similar amendment is being considered in Manitoba. Such a clarification could take the form of a more specific provision, or an explanatory note.

RECOMMENDATION #1:

In respect of non-property related policies governed by a General Insurance Part of a new Insurance Act, the Legislature should consider alternatives to a provision that the limitation period begin running on the date the cause of action arises.

The Commission also recommends introducing a consequential amendment to the *Limitations of Actions Act* to cross-reference the limitation periods contained in an amended *Insurance Act*. This is consistent with a proposal of the Uniform Law Conference of Canada³⁴ and would serve to enhance accessibility of the law in this area. An insured person should be able to determine the applicable limitation periods applicable to his or her situation with ease. A cross-reference in the *Limitations of Actions Act* would alert the reader to the need to consult *The Insurance Act* for the limitation periods applicable to insurance claims.

³⁰ *Ibid.*

³¹ Dolden Wallace Folick LLP, *The New Alberta and British Columbia Insurance Acts: Legislative Reform for the 21st Century* (2008), online:<<http://www.dolden.com/content/files/1235176509150-new-alberta-and-british-columbia-insurance-acts-november-2008.pdf>> at 40.

³² *Supra* note 17 at 5.

³³ *Supra* note 6 at 13.

³⁴ *Supra* note 17 at 13.

RECOMMENDATION #2:

The Limitations of Actions Act should contain a cross-reference to The Insurance Act with respect to limitation periods governing actions against insurers.

This is informal report no. 28 submitted pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L96, signed this 1st day of September, 2011.

Yours sincerely,

Prof. Cameron Harvey, Q.C.
President