UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

LIMITATION PERIODS IN INSURANCE CLAIMS

REPORT

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[1] I have been asked to advise on two facets of limitations of action on insurance claims.

First, I am asked to suggest the appropriate formulation of a limitation period (or limitation periods) to apply to insurance claims.

Secondly, I am asked for an opinion on whether such limitation period(s) should be set out in the ***Insurance Act*** or in the ***Limitations Act***.

I. An Appropriate Limitation Period for Insurance Claims

[2] I will begin by noting that Part 5 of the ***Insurance Act, R.S.A. 2000, c. I-3,*** at present contains six separate limitation periods as follows: Subpart 3 of Part 5 (Fire) s. 549, stat. cond. 14; Subpart 4 (Life) s. 590; Subpart 5 (Auto) s. 614, stat. cond. 6(3) and s. 647; Subpart 6 (Accident and Sickness) s. 671, stat. cond. 12; Subpart 8 (Hail) s. 728, stat. cond. 16. [The text of these provisions is set out in the Appendix.]

[3] Several of the limitation periods are virtually identical in their prescription of a period of one year "from the occurrence of the loss or damage." Some of this proliferation of provisions is explained by the history of legislative regulation of the insurance industry. A number of the subparts were, at an earlier day, separate statutes enacted to specifically regulate one form of insurance activity.

[4] Some of the proliferation can be explained by a desire to frame a limitation period that reflects the particular process for proving a claim with respect to that particular form of insurance. Thus, s. 590 is designed to take account of the rather elaborate provisions relating to a claim for benefits under a life insurance policy. I will say more at a later stage about this. I will say here, briefly, that I believe it may always be desirable to have at least two, differently worded, limitation provisions in the ***Act.***

[5] Despite the several provisions, certain forms of insurance claims are not subject to a limitation period set out in the ***Act***. Subparts 7 (Livestock) and 9 (Weather) do not contain their own limitation periods but those subparts incorporate stat. cond. 14 from subpart 3. Subpart 1 contains no provision to limit the commencement of action. This subpart regulates a very large part of the insurance market – such products, for example, as Fidelity insurance, General Liability insurance, Credit insurance and a wide range of property insurance (plate glass, boiler and machinery, theft) and others – in short, everything not singled out for specific regulation in the other subparts.

[6] Although I believe, and will submit, that a freshly worded limitation period, or periods, should be drafted to apply to insurance claims, it is fair to note that the largest part of the massive jurisprudence dealing with limitation periods relative to insurance claims relates to the issue that really has little or nothing to do with the propriety or fairness of the limitation provisions currently set out in the ***Act***. The duo of Supreme Court cases, ***K.P. Pacific Holdings Ltd.*** v**. *Guardian Ins. Co. of Canada***, [2003] 1 S.C.R. 433, and ***Churchland*** v**. *Gore Mutual Ins. Co.,*** [2003] 1 S.C.R. 445, that triggered the current enthusiasm for reform are typical of the mass of cases to which I refer. Both were disputes concerning the application of stat. cond. 14 of the Fire insurance subpart. Whatever might be said about the one year period from the date of loss, the real issue in all of the cases was whether that provision should apply to a composite policy that could not be said to be a "policy of fire insurance", or whether the provision should apply to a loss that resulted from theft, windstorm, broken water pipes or some other peril, but did not result from fire. It should be said that Ontario has taken steps to deal with the dysfunctional structure of the statute that still, rather artificially, distinguishes fire as a peril, and fire insurance as a product, deserving of special regulation.

[7] It is possible, and I suggest vital, to distinguish two features of a limitation period – viz. (i) its duration and (ii) its commencement date.

(i) Duration

[8] A period of one year has been the standard in the limitation periods set out in the ***Insurance Act.*** Each of the six provisions mentioned above fixes a minimum period of one year. Three of the provisions recognize the possibility of a longer period. [Section 590 – "six years from the happening of the event on which the insurance money becomes payable" (though this may be shortened); s. 647 and s. 672 recognize the possibility that a policy may contain a provision stipulating a limitation period longer than one year.]

[9] The Alberta Law Reform Institute (Report No. 90, August 2003) proposes to standardize limitation periods at a duration of two years, and I think that no one could challenge the wisdom of such standardization. I would also endorse, very strongly, the comments in the Report about abbreviation of limitation periods – first, to recognize some special need of insurers or, secondly, to permit contracting out of prescribed limitation periods.

[10] Insurers, if anything, have a less compelling case than other litigation defendants for a shortened limitation on action. I will say more about this below.

[11] Insurers have, until now, been able to contract out of the ***Insurance Act*** only insofar as, by doing so, an advantage is conferred on the insured. The one apparent example to the contrary, introduction of subpart 3 statutory conditions as contract terms in a policy governed by subpart 1, is not a case of contracting out of the ***Insurance Act***, though it may be said to be contracting out of the general law (including the ***Limitations Act*** provisions) that would otherwise apply.

(ii) Commencement

[12] Notwithstanding anything said above about the desirability of enlarging the standard limitation period for insurance claims to two years, I would urge that it is more important to define the "trigger" for the limitation period in a way that reflects the special circumstances that surround the insurance claim. I would go so far as to say that I think this to be more important than an increase in the limitation period from one year to two years.

[13] There are several factors that may be observed to be singularly typical of, (though perhaps not unique to) insurance claims:

> (a) the defendant (the insurer) is not exposed to the risk of claims that it had no reason to imagine might arise;
> (b) the defendant will very frequently enjoy an advantage over the plaintiff in terms of financial resources, access to legal assistance and, generally, in terms of experience with litigation.

[14] The numerous notice provisions, in the ***Insurance Act*** and in the insurance policy serve to compel very prompt notice to the insurer of a loss that may support a claim.

[15] The insurance claims process is a classic example of an imbalance in power, knowledge and resources and a classic example of the hardship that may be imposed by a stubborn defendant on a (relatively) impecunious plaintiff.

[16] Perhaps most importantly of all, insurers will always have a lively awareness of limitation provisions; frequently, insurance claimants will not know of such provisions, or will have a very imperfect awareness of them.

[17] Without for a moment suggesting that it is standard industry strategy in dealing with claims, it is nevertheless observable as a fact that, in too many cases, insurers deliberately prolong the claims negotiation process and sometimes succeed in thus exhausting the limitation on

action. A classic example of this technique was ***Webb Real Estate Ltd. v. Canadian Security Co.*** (1975), 60 D.L.R. (3d) 738 (N.S.T.D.). While we may sympathize with the insurers in that case who were dealing with a claimant who was widely believed to have burned his own building, and while we may say that the claimant was represented by a lawyer who should certainly have been alert to the limitation period, that does not answer the basic concern. Insurance claims are notoriously protracted and the claimant often does not have legal advice and does not know of the limitation period that is looming. To its credit, the insurance industry sometimes warns claimants of the impending limitation, though it is doubtful that such warnings are adequately framed to truly acquaint the claimant with the peril.

[18] I will propose that, with respect to insurance claims, the limitation on action should not begin to run until it is properly "triggered" by a notice from the insurer that would clearly identify the statutory provision on which the insurer will rely (be it in the ***Insurance Act*** or the ***Limitations Act*** or elsewhere), would clearly state the consequence of a failure to meet the limitation period, and would advise the claimant to seek legal advice on the point.

[19] The Alberta Law Reform Institute's Report No. 90 included a proposal that, apparently, was thought to be some reasonable approximation of this proposal that I now make.

[20] If the purpose of reform is to improve fairness and certainty, it seems a poor beginning to introduce a provision that "in most cases ... would ***likely*** [start the limitation period] when the insurer denies the claim." [emphasis added] I am troubled by a statutory prescription that states a requirement whose result can be stated only in such precatory terms, and troubled also by a concern to know what cases might not be captured by the "likely" result, and by a concern as to what the starting point for those cases might be. I suggest that it is a serious step backward to

frame a statutory prescription in a fashion that might apply only to some (undetermined) cases and even then only to some degree of likelihood.

[21] A further, serious, difficulty would be to determine what amounts to a "denial" of a claim sufficient to launch the limitation period. Numerous cases, many dealing with disability insurance claims, illustrate this problem; four such will serve to introduce the reader to a wider jurisprudence: ***Thomas v. Manufacturers Life Insurance Co.*** (2001), 40 C.C.L.I. (3d) 126 (Alta. Q.B.); and ***Perra v. Sun Life Assurance Co. of Canada*** (2002), 43 C.C.L.I. (3d) 270 (Alta. Master); ***Balzer v. Sun Life Assurance Co. of Canada*** (2001), 33 C.C.L.I. (3d) 157 (B.C.S.C.), aff'd (2003), 50 C.C.L.I. (3d) 29 (B.C.C.A.); ***Dachner Investments Ltd. v. Laurentian Pacific Insurance Co.*** (1989), 37 C.C.L.I. 212 (B.C.C.A.).

[22] Moreover, while I acknowledge the underlying appeal of connecting the limitation period to denial of the claim, I believe, on balance, that it is a poor formula, especially in the rather mysterious phraseology

> "(ii) that the injury was attributable to conduct of the defendant."

[23] Among other objections, the discussion in the Report says nothing about the "denial" that would launch the limitation period – a final, unambiguous, irreversible denial, or something short of that.

[24] But more seriously, perhaps, I question the wisdom of providing an insurer with an artificial motive to deny a claim in order, as a standard practice, to start the limitation period. (I suggest this possibility without intending to attribute bad motives or discreditable design.)

[25] I submit that it would be better to disconnect denial of the claim from the limitation period and to state a step that the insurer must take which would be defined with more precision,

would reliably (not "likely") launch the limitation period, and would clearly alert the claimant in a way that merely denying the claim could not be expected to do unless the claimant were a student of limitation periods and law reform proposals (and thus, presumably, little in need of further protection).

[26] I acknowledge that my proposal would involve a form of language that would not blend well with the generalized, somewhat generic, phrasing of the ***Limitations Act.***

[27] In the second part of this paper I will offer several reasons for proposing that the limitation provisions applicable to insurance claims should be set out in the ***Insurance Act***. This matter of suitable language will be revisited there.

(iii) Some Further Details

[28] Attention must be drawn to the distinctly different limitation provision set out in ***Insurance Act*** s. 590, a provision that reflects the singular features of a claim under a life insurance policy, and that reflects also some of the singular problems besetting proof of such claims.

[29] As a starting point, sometimes it will not be known when the life insured died, or even, in some cases, whether he/she ***has*** died. Thus, subpart 4 contains provisions for a judicial declaration of sufficiency of proof of death (s. 592), and a separate provision (s. 593) for a declaration of presumption of death on the basis of 7 years' absence.

[30] Thus, the limitation provision set out in s. 590 is framed to recognize the various possibilities concerning proof of a claim under a life insurance policy.

[31] I submit that it would be a seriously retrograde step to replace s. 590 with the formulation proposed in Report No. 90

– i.e. "two years from the time when the claimant ought to have known:

. . .

(ii) that the injury was attributable to conduct of the defendant."

[32] Surely to make that substitution would be an exercise in obfuscation. This leads to a proposal that one of two things must be done,

> ***either*** a limitation period must be framed to regulate ***when*** an insurer might start theperiod running,
>
> ***or*** a separate limitation period for claims under life insurance policies must be preserved.

[33] Admittedly, there is a serious flaw in the way in which ss. 590(1) is framed. That provision depends on a conclusion, under s. 587, that "sufficient evidence" of the matters required to establish the claim has been presented to the insurer. If the insurer refuses to acknowledge the "sufficiency" of the evidence the insured may have recourse to s. 592 which authorizes an application to the court for a declaration as to the sufficiency of the evidence. The more serious hazard for the claimant is that the insurer may be engaged in a process of consideration of the claim, and occasional requests for more particulars, and may then, at a later date, argue that the limitation period began to run during that interval during which the claimant would be quite uncertain as to the insurer's opinion on the question of "sufficiency" of the evidence presented. Two examples of this phenomenon are found in ***Thomas v. Manufacturers Life Insurance Co.*** (2001), 40 C.C.L.I. (3d) 126 (Alta. Q.B.), and in ***Watterson v. Sun Life Assurance Co. of Canada*** (2001), 34 C.C.L.I. (3d) 134 (B.C.S.C.), aff'd (2003), 48 C.C.L.I. (3d) 172 (B.C.C.A.).

[34] If a limitation period of the sort found in s. 590 were to be continued it would be necessary to prescribe a formal notice to be sent by the insurer informing the insured that "sufficient evidence" to establish the claim had been received. A much simpler, and more satisfactory, so-

lution would be to prescribe that an insurer simply could not send out the notice of intention to launch the limitation period until it was satisfied about the "sufficiency" of the evidence supporting the claim. Sending out that notice would be taken as an acknowledgment on the matter of the sufficiency of the evidence.

[35] It is possible that a similar rule should apply to all insurance claims – i.e. that sending the notice should be treated as acknowledgment of the adequacy of the proof of claim. To meet the objection that this would introduce a technique that would allow the claimant to endlessly prolong the process, it might be necessary to examine existing provisions that require promptitude of reporting and dispatch in submitting proofs of loss.

II. The Proper Location for the Limitation Provision for Insurance Claims

[36] I will present three arguments for locating the limitation period for insurance claims in the ***Insurance Act*** and then, under a fourth heading, will say a few words about cross-referencing between the ***Insurance Act*** and the ***Limitations Act.***

(i) General Comments

[37] In general, I suggest that, while assembling an index of limitation periods in one place, as in the ***Limitations Act***, has much virtue, such consolidation is not, in itself, the paramount value for those affected by, and working with, the law. The paramount value, surely, is to increase the likelihood that important provisions will be found, and to facilitate researching and working with legal materials.

[38] Whether that value is better served by locating a limitation provision affecting insurance claims in the ***Insurance Act*** or in the ***Limitations Act***, would seem to depend upon the structure of your legal universe. If you are a student of limitation periods, undoubtedly a comprehensive

Limitations Act represents consolidation for you. If you are a student of insurance law, removal of limitation provisions affecting insurance claims to another location represents fragmentation of your materials. In the same way, all relief from forfeiture provisions could be centralized in, for example, the ***Judicature Act***. Indeed, s. 515 and s. 521 of the ***Insurance Act*** do not apply to policies of life insurance and, for life insurance claims, recourse may be had to s. 10 of the ***Judicature Act*** [see: ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*** (1994), 23 C.C.L.I. (2d) 161 (S.C.C.).

[39] Notice provisions must be even more numerous in the law than limitation on action provisions. A "centralized" register of notice of claim provisions would seem to be desirable; but such an initiative would require either removal of some important provisions from the ***Insurance Act*** (not to mention various other statutes) or a major exercise in cross-referencing.

[40] There are other provisions in the ***Insurance Act*** that might be candidates for "centralization" – survivorship provisions, for example, or provisions to deal with problems of privity of contract or to govern the rights of unilateral termination of contract.

[41] The case for "centralization" is obviously much more compelling in respect of largely uncodified areas of the law, such as contracts or tort law in general, than it is for an area of law that is extensively codified.

[42] In the end, the only important point is that removal of limitation provisions affecting insurance claims to the ***Limitations Act*** pretty clearly does not make our law clearer, better organized and easier to work with for everyone; indeed, on balance, it may undermine those objectives. (I have not yet touched on the interest of insured parties.) Thus, the wisdom of proposals for cross referencing.

(ii) The Particular Design of Insurance Claim Limitation Provisions

[43] A case is made in the first part of this paper for (a) limitation provision(s) that would be specific to insurance claims and would be framed quite differently from anything presently in the ***Limitations Act***, and quite differently from the proposal in the Alberta Law Reform Institute Report No. 90.

[44] At this point I would again emphasize the importance that I think should attach to a limitation provision that recognizes the special dynamics between an insurance claimant and its insurer, and that would be framed to reflect that singular set of dynamics. The sentiment in favour of "centralization" of limitation periods seems to include not only a desire to standardize limitation periods in respect of their duration, but also to standardize their "trigger" or commencement date and to standardize their drafting – in short, to render them as generic as possible. I have explained why I recommend different treatment for insurance claim limitation periods.

(iii) Warning to the Insured

[45] One of the singular features of the statutory regulation of insurance law is the provision for statutory conditions that are prescribed as terms of every insurance contract governed by subparts 3, 5, 6 and 8 of the ***Insurance Act***, and that must be printed in every policy of fire, auto, accident and sickness, and hail insurance. This prescription is designed to give the insured notice of some of the central provisions of his/her policy.

[46] Though the attempt to put insured persons on notice of limitation provisions in their policies has been, obviously, not entirely successful, it would surely be a seriously retrograde step to remove from the policy of insurance those safeguards that are now in the policies, imperfect as they may have been.

[47] This point is of little concern if, as I propose, the limitation period is to be framed so that it only begins to run when the insurer gives the insured clear notice that the insurer is launching the limitation period. The point, I suggest, should be of very real concern if the limitation period adopted proves to be in the generic form proposed in Report No. 90.

[48] Even if that limitation were to be printed in every policy in dazzling red, what would the average insured be expected to understand of a clause saying that the limitation period for action under its policy was

> "two years from the date on which the claimant first knew, or in the circumstances ought to have known
>
> . . . .
>
> (b) that the injury was attributable to the conduct of the defendant."

[49] At least the limitation periods presently set out in the ***Insurance Act***, hardships though they may have imposed, are much more intelligible to the average citizen.

[50] Again, I suggest that a major problem with limitation periods, as they affect insurance claims, has been the manner in which those claims are negotiated. That concern speaks to the substance of the limitation periods and to the importance of giving the insured the best information possible to equip him/her to understand the hazard.

(iv) Cross-referencing

[51] I certainly endorse the proposal to cross-reference between the ***Insurance Act*** and the ***Limitations Act***.

[52] For the reasons given, I would urge that the limitation period(s) should be set out in the ***Insurance Act*** and could then be referred to in the ***Limitations Act***.

[53] Conversely, if a generic limitation period, as in Report No. 90, were located in the ***Limitations Act***, and were cross-referenced in the ***Insurance Act***, we would pretty much guarantee that the average insured would have no possibility of even suspecting the nature of the limitation on his/her right of action.

[54] To enlarge the limitation period to two years would be an improvement for the insured. To remove any intelligible statement about the limitation from the insured's policy would be a step backward.

APPENDIX

INSURANCE ACT, R.S.A. 2000, c. I-3.

FIRE INSURANCE

s. 549, stat. cond. 14

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.

LIFE INSURANCE

Proof of claim

587 When an insurer receives sufficient evidence of

(a) the happening of the event on which insurance money becomes payable,

(b) the age of the person whose life is insured,

(c) the right of the claimant to receive payment, and

(d) the name and age of the beneficiary, if there is a beneficiary,

it must, within 30 days after receiving the evidence, pay the insurance money to the person entitled to it.

Limitation of actions

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.

Declaration of presumption of death

593 When a claimant alleges that the person whose life is insured should be presumed to be dead by reason of the person not having been heard of for 7 years, and there is no other question in issues except a question under section 592, the insurer or the claimant may, before or after action is brought and on at least 30 days' notice, apply to the Court of Queen's Bench in accordance with the ***Surrogate Rules*** for a declaration as to presumption of the death, and the Court may make the declaration.

AUTO INSURANCE (vehicle damage)

s. 614, stat. cond. 6(3)

LIMITATION OF ACTIONS (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.

AUTO INSURANCE (accident benefits)

Limitation re commencement of action

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

ACCIDENT AND SICKNESS INSURANCE

s. 671, stat. cond. 12

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

HAIL INSURANCE

s. 728, stat. cond. 16

> ACTION BROUGHT WITHIN ONE YEAR 16 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.