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British Columbia's New Limitations Legislation

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Introduction

British Columbia's limitation laws have been overhauled by a new *Limitation Act* enacted on May 14, 2012 (the New Act). Although it is yet to come into force, when it does it will be the first major alteration of limitations legislation since 1975. This paper sets out some of the key changes that will be made, with a focus on those relevant to insurers.

The Supreme Court of Canada described the intention of limitations legislation as follows[1]:

> (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time.

Both the New Act and the *Limitation Act*, R.S.B.C. 1996, c. 266 (the Old Act) attempt to achieve these purposes and many of the basic principles behind the Old Act are preserved in the New Act. The New Act will, however, make significant changes to limitation law, by simplifying and reducing most of the limitation periods. The balance of this paper will discuss some important changes in detail.

Basic Limitation Periods

There are two types of limitation periods: basic and ultimate. Basic limitation periods apply to claims absent special circumstances which stop the limitation period from running. These clock-stopping special circumstances include discoverability principles and postponement provisions, and are dealt with in more detail below. Ultimate limitation periods are the maximum time that a basic limitation period can be extended.

Limitation periods in the Old Act and the New Act do not apply to limitation periods established under other enactments, such as in the *Insurance Act*[2].

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[1] *Novak v. Bond,* [1999] 1 S.C.R. 808 at para. 67

[2] *Insurance Act*, R.S.B.C. 1996, c. 226 (Old Act at s. 3(5) and New Act at s. 3(2)).

The Old Act contains three basic limitation periods of two, six and ten years duration in which to start a lawsuit[3]. The basic limitation periods are based on the cause of action. For example, a personal injury action falls within the two year limitation period, a claim for conversion or detention of goods has a six year limitation period, and an action on a local judgment for the payment of money has a ten year basic limitation period. The determination of which limitation period applies can be confusing; a claim for breach of contract could fall within the two or six year limitation period depending on the nature of the breach of contract.

Subject to a few limited exceptions, the New Act has moved away from the different limitation periods and has established a basic limitation period for commencing a claim of two years after the day on which a claim is discovered:

> **Basic limitation period**
>
> **6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

There has been no change to the ten year limitation period for the civil enforcement of judgments[4].

The two year basic limitation period greatly reduces the timeframe for bringing a claim for some actions. The legislative intent is to encourage people to act on their legal problems promptly and to prevent stale dated claims[5].

Another major change affects the starting date of the basic limitation period. Under the Old Act, that date was when the right to bring a cause of action arose. With the New Act, the date starts when the claim is discovered. The discoverability question arose under the Old Act only if the claimant claimed the protection of the Old Act's postponement provisions. Under the New Act, discovery principles will have to be considered in each claim. This adds an element of complexity not present in the Old Act. The further difficulty this change brings for defendants is

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[3] See ss. 3(2), (3), (4.1), (5) and (6).

[4] New Act, s. 7.

[5] See British Columbia, Ministry of Attorney General Justice Service Branch Civil Policy and Legislation Office. *White Paper on Limitation Act Reform: Finding the Balance*, (September 2010) at pp. 14 and 15.

the date that a claim has been discovered is something uniquely within the knowledge of the claimant.

Discoverability

Discoverability under the Old Act

The Old Act conceives of discoverability as a postponement mechanism; the limitation period starts when the claimant's right to bring a claim arose, but the running of time can be postponed under section 6 until all the criteria in that cumbersome and much-litigated section are met. The guts of the postponement provisions are in subsection 4:

> Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
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> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

Subsection 6(3) restricts postponement to eight categories of claims including personal injury (i.e. *bodily injury*), damage to property and professional negligence.

The Old Act included some interpretative provisions in subsection 6(5) to aid in determining what "appropriate advice" is and the "facts" are.

The Old Act's awkwardly worded test for discoverability has spawned considerable litigation, much of which seems likely to remain pertinent under the New Act because there has been no fundamental change in the discoverability principles. All aspects of the provisions must be satisfied before the limitation period begins to run. The test has been judicially paraphrased as follows[6]:

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[6] *Ounjian v. St. Paul Hospital*, 2002 BCSC 104 at para. 21.

1. The identity of the defendant is known to the plaintiff.
2. The plaintiff has certain facts within her means of knowledge, including that the existence of a duty to her by the defendant the breach of which has caused her injury, damage or loss.
3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

The test is not subjective, but rather an objective/subjective test. This means that in order to determine when the claim was discovered, the court will consider what a reasonable person in the plaintiff's particular circumstances would have known or done.

It is not uncommon that a plaintiff does not know the identity of a would-be defendant; however, that is not enough to postpone the running of the limitation period. The plaintiff must show that even acting with due diligence she could not have ascertained the identity of the defendant[7].

With respect to facts known to the plaintiff, it is not enough to look at the facts the plaintiff actually knew, but what was within his or her or its means of knowledge exercising due diligence and after seeking (hypothetical) appropriate advice, whether it be medical, legal or otherwise. This was explained in *Levitt v. Carr*[8]:

> We think it clear that those who drafted the British Columbia Statute rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time. The solution adopted by the Law Reform Commission and by the legislature was to introduce another level of abstraction: notional advice by notional advisors. This advice is given the conceptual status of facts and, when added to those within the plaintiff's means of knowledge, forms the body of information upon which the reasonable man decides whether an action on the cause of action would have a reasonable prospect of success and whether the plaintiff ought to be able to bring that action.

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[7] *Tutinka v. Mainland Sand & Gravel Ltd.* (1993), 86 B.C.L.R. (2d) 145 (CA).

[8] (1992), 66 B.C.L.R. (2d) 58 (CA).

With respect to the final factor, whether a plaintiff would have known that she could bring an action taking into account the plaintiff's own interests and circumstances, is probably the most difficult aspect of the postponement test to analyze. The leading case is *Novak v. Bond*. In *Novak*, the defendant, Dr. Bond, had failed to properly diagnose the plaintiff's breast cancer in 1989. The plaintiff, Ms. Novak, learned about the misdiagnosis in 1990 when she discovered she had breast cancer and that it may have spread. She considered suing her doctor but decided instead to concentrate on treatment and getting healthy. In 1995, she learned that the cancer had spread significantly. She sued him in 1996, clearly outside of the two year limitation period when she first learned of the misdiagnosis.

The Supreme Court of Canada found that the limitation period was postponed even though Ms. Novak knew all the facts necessary to sue Dr. Bond in 1990. The Court used what it called a "restrictive subjective/objective test" in interpreting this section. The Court decided the section did not postpone the limitation period until the plaintiff "ought" to bring an action in her own best interests; rather, the limitation period was postponed until the plaintiff "could" bring an action, taking into account her own personal circumstances. If a plaintiff met all the other aspects of the postponement test, the only thing that could stop the commencement of the limitation period under s. 6(4)(b) of the Old Act is if there are "serious, significant, and compelling" circumstances regarding the plaintiff that make litigation unrealistic to a reasonable person. Ms. Novak's decision not to sue early on and concentrate on her fight with cancer was considered sufficient to postpone the limitation period until the cancer recurred and she (now more or less doomed) sought compensation.

The Court also made it clear that tactical decisions regarding the litigation itself would not meet this test, though it did mention as well that part of the policy reason for this type of postponement was to recognize that litigation is not always the best route whenever the possibility of litigation arises.

Discoverability under the New Act

The basic underlying principles of discoverability appear to remain the same in the New Act as compared to the Old Act. The wording has changed dramatically, thus opening the door to alternative judicial treatment.

The relevant sections of the New Act are:

> **General discovery rules**
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> 8. Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
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> a. that injury, loss or damage had occurred;
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> b. that the injury, loss or damage was caused by or contributed to by an act or omission;
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> c. that the act or omission was that of the person against whom the claim is or may be made; and
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> d. that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Burden of Proof

One notable difference between the statutes is that the Old Act conceives of discoverability as a postponement mechanism that delays the starting of the limitation clock. Under the New Act, the basic limitation period does not start until the claim is discovered. This means discoverability is not a postponement mechanism as much as a condition precedent for the basic limitation period to start running. Under the postponement mechanisms of the Old Act, the burden of proof is on the plaintiff to prove that her claim has been postponed[9]. The New Act does not have a clause dealing with burden of proof.

The limitations legislation of both Ontario and Saskatchewan, in which the discoverability sections are worded very similarly to the New Act, have sections that create a statutory

[9] Section 6(6).

presumption that a plaintiff discovers the claim on the date the act or omission occurred unless proved otherwise[10]. It would then be up to the plaintiff to prove otherwise.

Given the absence of a presumption clause in the New Act, it is open to plaintiffs to argue the burden of proof is on the defendant asserting the limitation period has expired. Although the New Act does not have an explicit presumption, the most likely judicial treatment of the New Act will require a plaintiff to prove that the claim was discovered on a date other than when the act or omission occurred. The foundation for this proposition is in the Supreme Court of Canada's decision in *M. (K.) v. M. (H.)*[11]:

> The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The lack of awareness will be established largely on the basis of the plaintiff's own testimony bolstered by the evidence of experts whose testimony will likewise depend on personal information supplied by the plaintiff. In most of these cases the defendant will have ceased all contact with the plaintiff for many years and have no knowledge of the plaintiff's circumstances during that period.

Subjective/Objective Test

Other than that notable change, the principles relating to discoverability are similar in the New Act as in the Old Act. The use of the term "reasonably ought to have known" imports the objective component into the analysis. That will likely keep intact the principles in the Old Act that (1) the facts must be within the means of knowledge of the plaintiff acting with due diligence and (2) those facts include the advice a reasonable plaintiff would receive from appropriate experts.

Section 8(d) is the provision that allows judicial discretion to postpone a limitation period. Though it is worded significantly differently than the Old Act, the question remains: should the plaintiff have known, with regard to the facts, that a court proceeding would be an appropriate

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[10] *Limitations Act*, S.O. 2002, c. 24, Sch B. at s. 5(2) and *Limitations Act*, S.S. 2004, c. L-16.1 at s. 6(2).

[11] [1992], 3 S.C.R. 6; 14 C.C.L.T. (2d) 1; 1992 CarswellOnt 841 at para. 114, per Sopinka J in *obiter*.

remedy? Given the decision in *Novak*, the courts will still have discretion to postpone a basic limitation period if there are "serious, significant, and compelling" reasons why a person, acting reasonably, would not consider a court proceeding appropriate at a given time. The situation outlined in *Novak* will likely remain a special circumstance for postponing a limitation period under the New Act.

Special Discovery Rules

The New Act also has special rules on when a claim is "discovered" for the purposes of starting the limitation clock in specific situations[12]. These include claims by a minor, a person under disability, claims for fraud or breach of trust, or claims for realizing security.

For insurance related claims, one special discovery rule warrants particular attention: section 16 "*discovery rule for claims for contribution or indemnity*". The Old Act does not provide a start date for claims for contribution and indemnity and the courts have held that the limitation period for such claims does not start until the defendant has been found liable. When it does start running, the six year limitation under the Old Act applies[13]. This can lead to some stale claims for contribution and indemnity.

The New Act both starts the basic limitation period for contribution and indemnity running earlier and shortens it to the standard two years. Under section 16, the date of discovery for such claims is the later of:

1. The day the claimant is served with a pleading; or
2. The day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

This will significantly affect the time period in which a defendant in an action can bring a third party claim against a potential third party as most third party claims are based on contribution or indemnity under a contract or the *Negligence Act*. As a result of these new provisions, defendants will have to identify potential third parties early in the claim and limitation dates to add third parties must be diarized appropriately.

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[12] ss. 13 – 19

[13] *Strata Plan LMS 1751 v. Scott Management Ltd*., 2010 BCCA 192 at para. 23 & 24

Although the BC Supreme Court Civil Rules already limit to 42 days after service the time limited for filing a third party notice as of right, the Rules are procedural, not substantive. The New Act is substantive law. So, failing to file a third party notice in 42 days is not fatal to a claim for contribution or indemnity. Missing the new two year limitation will be.

Ultimate Limitation Period

A basic limitation period cannot be postponed indefinitely. An ultimate limitation period sets the maximum time within which a claim can be brought, regardless of whether the running of time has been postponed or the cause of action confirmed by the defendant. This brings certainty as to when a defendant's exposure to potential liability ends. Under the Old Act, most actions may be postponed up to 30 years after they arise with the exception of a limited class of actions against hospitals, hospital employees and medical practitioners, which have an ultimate limitation period of six years. A number of claims outlined in section 3(4) of the Old Act are not subject to any ultimate limitation period (like damages for sexual assault), but these are unlikely ever to be covered by liability insurance so will not be reviewed here.

The 30 year ultimate limitation period has been criticized as having little practical effect with regard to protecting defendants from stale claims. Defendants must keep insurance and business records for indefinite periods as the ultimate limitation period may extend beyond the 30 years from the original act or omission. Further, it can be difficult to pinpoint when damage actually occurred.

Under the Old Act, the clock starts to run for the ultimate limitation period from the date on which the plaintiff's right to bring an action arose[14]. This is known as the "accrual of the cause of action". A plaintiff's cause of action is said to accrue when all of the elements that constitute the cause of action are present[15]. This is in contrast to the New Act's basic limitation periods which run from the time that the cause of action is discovered. The Court of Appeal has held that the common law discoverability principles do not apply to the accrual of a cause of action under the

[14] Section 8

[15] *Wittman v. Emmott* (1991), 53 B.C.L.R. (2d) 228, 1991 CarswellBC 19, at para. 34 (CA), leave to appeal to SCC refused, [1991] 3 SCR xii.

Old Act provision[16]. This means that the Old Act's ultimate limitation clock starts to run as soon as all of the elements that constitute the cause of action are present but regardless of whether or not the claimant knew about the cause of action.

Under the New Act, the ultimate limitation period is 15 years and the clock starts running the day the act or omission on which the claim is based took place[17]. There is no longer a shorter six year ultimate limitation period applicable to health care claims. The ultimate limitation period is subject to certain exceptions outlined in Parts 4 and 5 of the New Act, including postponement provisions for disabled adults[18] and where liability has been acknowledged[19].

The combination of the reduction of the ultimate limitation period from 30 to 15 years and the act or omission trigger for starting of the ultimate limitation period will significantly reduce the ultimate limitation period in most claims. This is a positive step for potential defendants and their insurers, who will have more certainty as to when a claim is ultimately barred by limitations legislation.

Counterclaim or other Claim or Proceeding

The Old Act contains an important exception to the basic limitation period for counterclaims, set off claims, third party proceedings, adding or substituting parties and amending pleadings[20]. This exception has been preserved in the New Act in section 22, with the exception of third party proceedings involving claims for contribution or indemnity.

Once an action is commenced within the limitation period, both the Old Act and the New Act do not bar counterclaims against the plaintiff, adding new defendants, adding new plaintiffs, adding third parties or changing pleadings to allege a new cause of action. This could result in the odd situation where a defendant cannot add a third party based on a claim for contribution or

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[16] *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1, 1986 CarswellBC 42 at para. 86 (CA).

[17] Section 21.

[18] ss. 25 & 26.

[19] Section 24

[20] Section 4

indemnity because the limitation period has expired, but the plaintiff in the same action can add the same prospective party as a defendant despite the fact that the limitation period has long since expired.

In adding a new party, there is still a legal test that must be met: the expiry of a limitation period is relevant, but not determinative, as most of the cases turn on the question of prejudice[21].

Once an action has been started within the limitation period, there is essentially a different set of limitation rules when it comes to adding new parties or changing pleadings to allege new causes of action. The Old Act and the New Act give discretion to the courts whether to allow such changes, and there is a large body of jurisprudence on the matter. The distinction between these statutes lies in the New Act's provisions about claims for contribution or indemnity and the absence of such provisions in the Old Act.

Minors and Persons under Disability

The New Act only introduces slight changes to the law with regard to minors and adults persons under a legal disability. For both, a claim is not discovered until he or she turns 19 or ceases to be under a disability[22]. While the plaintiff is a minor or is under a disability, a potential defendant can serve a Notice to Proceed which forces the limitation period to start running despite the would-be claimant's age or disability[23].

The rules regarding the ultimate limitation period for such plaintiffs have changed slightly. Under the Old Act, the ultimate limitation period does not begin to run with regard to a minor until he or she reaches age 19[24]. Under the Old Act, the ultimate limitation period for an incapable adult runs despite the disability. The New Act harmonizes the running of the ultimate limitation period with regard to minors and persons under a disability by postponing the ultimate

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[21] See *Amezcua v. Taylor*, 2010 BCCA 128.

[22] See Old Act, section 7, and New Act, sections 10, 11, 18 and 19.

[23] See Old Act, section 7(6), and New Act, section 20.

[24] Section 8(2).

limitation period for both until the person is of the age of majority and no longer under a disability, subject to the defendant serving a Notice to Proceed[25].

Transition Provisions

Once the New Act comes into force, insurers will have to pay close attention to whether the new limitation periods apply to their claim. If a former limitation period has already extinguished a cause of action, it will not be revived under the New Act[26]. A pre-existing claim that was discovered before the effective date will be subject to the Old Act. The "effective date" is defined in section 30 as the day on which the transition section, comes into force. Pre-existing claims that were discovered after the effective date are subject to the following limitation periods:

1. The New Act applies to a pre-existing claim within section 3 of the New Act (*exempted claims*)[27].
2. Claims against hospitals, hospital employees and medical practitioners will be subject to the 6-year ultimate limitation period of the Old Act, but the two year basic limitation period of the New Act[28].
3. Any other pre-existing claims are subject to the two year basic limitation period in the New Act and the 15 year ultimate limitation period. The ultimate limitation period runs from the later of the effective date or the date the act or omission takes place under section 21(2)[29].

Coming Into Force

The New Act is not yet in force. All that is needed is an Order in Council – no further act of the Legislature is needed. As of the date of this writing (July 20, 2012), the BC Ministry of Justice advises that no date has been selected for the coming into force of the New Act. We will post a notice on the Risk Management Counsel of Canada website, www.rmc-agr.com, and on Carfra & Lawton's own website, www.carlaw.ca, when we have any further news.

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[25] Sections 21(2)(d) & (e).

[26] Section 30(2).

[27] Section 30(4)(a).

[28] Section 30(4)(b).

[29] Section 30(4)(c).

Conclusion

Limitations by their nature are very technical and a complete discussion of the New Act is outside the scope of this paper. One should always reference the applicable legislation to determine the correct limitation period. The rationale behind limitations legislation remains intact in the New Act. Defendants need certainty in their affairs and should not be required to keep records or insurance for an unreasonable amount of time and plaintiffs should be required to bring their claims within reasonable time frame. Plaintiffs on the other hand need to be treated fairly, with regard to their special circumstances.

In general, the New Act shifts the balance in favour of defendants. The Old Act contains three different basic limitation periods. The New Act has made the basic limitation period for most claims two years from the date the claim is discovered, reduces the ultimate limitation period for most claims from 30 years to 15 years and does away the six year limitation period for hospitals, hospital employees and medical practitioners. Under the Old Act, the ultimate limitation period starts to tick when all of the elements of the cause of action have accrued. Under the New Act, the ultimate limitation period starts to run once the act or omission which results in the claim occurs.

The New Act also aims to bring clarity to limitations law. Reducing the number of limitation periods and changing the awkward wording of the discoverability provisions seem to have accomplished this goal, though no doubt there will be curious circumstances and crafty lawyers who will put the New Act through its paces in court.

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