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THE NEW ALBERTA AND BRITISH COLUMBIA INSURANCE ACTS: LEGISLATIVE REFORM FOR THE 21ST CENTURY

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I. INTRODUCTION

A. GENERAL OVERVIEW

Following decades in which there has been virtually no statutory reform of the provincial Insurance Acts, in the spring of 2008 both British Columbia and Alberta concurrently introduced identical legislation to substantially reform their Insurance Acts. In doing so, the Legislatures had three distinct legislative goals: to harmonize legislation in the region, enhance the degree of consumer protection, and thirdly, to increase efficiencies in the insurance industry. Alberta's Bill 11, known as the *Insurance Amendment Act, 2008* (the "New Alberta Act")[1] and B.C.'s Bill 40, also called the *Insurance Amendment Act* (the "New BC Act"), will significantly alter the manner in which insurers do business.[2] Some of these legislative changes will be positive for insurers, especially in the short term; while much of the legislative reform will be beneficial for insureds. Other changes to the Acts will require judicial interpretation so the long-term consequences are yet to be measured.

Changes to the Insurance Acts are overdue. The New BC Act, in setting the minimum statutory requirements for almost every contract of insurance, is the first comprehensive re-write of insurance legislation since the 1960s.[3] The process for the review began in 2005, and has involved stakeholders across the province and the insurance industry. Various amendments to the current Alberta *Insurance Act* R.S.A. 2000, c. I-3 (the current

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[1] Alberta's Bill 11 received Royal Assent on November 4, 2008, and has passed into law as S.A. 2008, c. 19. The full text of the amended *Insurance Act*, R.S.A. 2000, c. I-3, can be found here: http://www.qp.gov.ab.ca/documents/Acts/I03.cfm?frm_isbn=9780779736317. Note that some portions of the new *Act* have not yet come into effect.

[2] The text of British Columbia's Bill 40 as it passed First Reading can be found on the Legislature's website here: http://www.leg.bc.ca/38th4th/1st_read/gov40-1.htm. It is expected that the Bill will be reintroduced in the Legislature's Spring 2009 sitting.

[3] Insurance Act Review Discussion Paper, March 2007, B.C. Ministry of Finance (the "Discussion Paper")

"Alberta Act") were introduced through Amendment Acts in 2003 and 2005, but this is the first recent large scale overhaul to the legislation since 1980.

Other provincial governments across Canada are also legislating changes to their respective Acts. For instance, New Brunswick has enacted a new Insurance Act (along with other Atlantic provinces) [4]. In 2006 Manitoba introduced the first of three phases of change to its legislation to coordinate with the changes taking place in BC and Alberta.[5] These legislative reforms will result in a more consistent approach to the law and to claims handling right across the country.

The most significant changes in the New Alberta and BC Acts are as follows:

- The New Acts are reorganized. The Fire Part of the current BC *Insurance Act*, R.S.B.C. c. 226 (the current "BC Act"), is eliminated, or more precisely, merged with the General Part. Likewise, sections of the Fire Part of the current Alberta Act have been incorporated into the General Part. This ensures that legislative requirements of a general nature are sensibly grouped together in a "General Part" as opposed to the previous approach whereby some provisions were in discrete "Parts" or "Subparts" of the Acts.

- The New Acts introduce uniform limitation periods. The new Acts introduce greater commercial certainty as to the applicable limitation periods. For property policies the limitation period is 2 years from when the insured knew the loss or damage occurred.

[4] *Insurance Act*, R.S.N.B. 1973, c. I-12 (consolidated April 30, 2008).
[5] *The Insurance Amendment Act* Bill C-11 to update *The Insurance Act,* C.C.S.M. c. 140, introduced in 2006 and reintroduced in November 2007.

For liability policies the limitation period is 2 years following the date that the cause of action against the insurer arose. These new "uniform" limitation periods provide clarity for insureds and insurers alike.

- The New Acts introduce new dispute resolution procedures. These new procedures move a wide range of insurance coverage disputes out of the Court House and into the hands of the insurer and insured.

- The New Acts reduce underwriting freedom. New "unjust contract provisions" allow the Courts greater latitude to override exclusions in policies. Recovery by innocent co-insureds is legislated in the context of acts of arson. Insurers are limited in their ability to modify policy terms from those in the "interim binder". Relief from forfeiture will clearly apply to the Statutory Conditions.

- The New Acts expand the Statutory Conditions. Legislated policy conditions are broadened and moved to the General Part of each New Act. The "consumer protection" sections that were in the "Fire Part" will now apply to all policies of insurance except those specifically excepted by the New Acts.

- Allowance is made for electronic communications. The modern reality of e-mail and electronic commerce is recognized, facilitating communication for both the insured and insurer.

The New BC Act is an omnibus statute that will apply to all contracts of insurance in the province, with the exception of insurance governed by other provincial legislation. The "application" section – right after the Definitions section in the New BC Act - states that the Act applies to every insurer and every contract of insurance in BC, with the exception of marine insurance and automobile insurance.[6] Part 2 of the New BC Act – General Insurance Provisions – applies to all insurance with certain exceptions such as contracts of life insurance, accident and sickness insurance, reinsurance and other miscellaneous classes of insurance, to be governed by separate Parts in the New BC Act. Likewise, the New Alberta Act applies to every contract of insurance in the Province, and the new General Insurance Provisions apply uniformly - with the same exceptions for life insurance, accident and sickness insurance and reinsurance found in the New BC Act.

This paper will introduce the New Acts to insurers and provide some guidance (in light of existing caselaw) on the impact the legislative reform will have on the insurance industry. Each of the changes listed above is addressed in the five following sections of this paper:

1. The Abolition of the Fire Part and Introduction of a Uniform General Part;

2. New Limitation Periods for Actions under a Policy;

3. New Claims Handling Procedures including a review of Statutory Conditions and the doctrines Waiver and Estoppel;

[6] Section 2 (2)(a) and (b) of the New BC Act states that "*the Act does not apply to or in respect of (a) a contract of marine insurance…or (b) …vehicle insurance*" which are governed respectively by the *Insurance (Marine) Act,* R.S.B.C. 1996, c. 230, and the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

4. New Dispute Resolution Procedures; and

5. Limits on "Freedom of Contract" in Underwriting a Policy.

B. LEGISLATIVE HISTORY AND CASELAW

To place this legislative reform in context, it is important to understand both the legislative history of the provincial Insurance Acts and the caselaw which accelerated the need for statutory reform. Both must be reviewed because the Insurance Acts of both provinces operate in conjunction with both the common law and equity in dealing with rights and obligations of insurers and insureds.

The current Insurance Acts in British Columbia and Alberta, like most provinces, functionally divide policies of insurance by type. The divisions – otherwise known as "Parts" or "Subparts" - in the Insurance Acts include categories such as fire insurance, life insurance, automobile insurance and accident insurance (and very specific categories such as hail insurance in Alberta). Each Part or Subpart defines the application of the Part and may prescribe certain Statutory Conditions for policies, or otherwise provide the statutory requirements for policies under the Part.

The current BC Act is divided into eight major parts:

Part 1:	Definitions, Interpretations and Application;
Part 2:	General Provisions (insurance policies not otherwise categorized);
Part 3:	Life Insurance;

Part 4: Accident and Sickness Insurance;

Part 5: Fire Insurance;

Part 6: Automobile Insurance (now the *Insurance (Vehicle) Act*);

Part 7: Miscellaneous; and

Part 8: Administration

The current Part 2 of the BC Act (the "General Part") deals with policies of insurance not otherwise specifically categorized, while Part 5 (the "Fire Part") deals exclusively with policies of fire insurance.

In comparison, the current Part 5 of the Alberta Act deals with Insurance Contracts in general (also referred to in this paper as the "General Part"). Part 5 is divided into 10 Subparts, as follows:

Subpart 1: Insurance Contracts in Alberta;

Subpart 2: Fraternal Societies;

Subpart 3: Fire Insurance;

Subpart 4: Life Insurance;

Subpart 5: Automobile Insurance;

Subpart 6: Accident and Sickness Insurance;

Subpart 7: Livestock Insurance;

Subpart 8: Hail Insurance;

Subpart 9: Weather Insurance; and

Subpart 10: Mutual Insurance.

For ease of reference throughout the paper Subpart 3 – Fire Insurance, found under the General Part of the Alberta Act, is also referred to as the "Fire Part".

The current BC Act and Alberta Act provide legislated rules, including limitation periods, based on different and discrete categories of insurance.[7] This is plainly old-fashioned, especially when viewed against the backdrop of modern comprehensive policies of insurance which provide for a range of coverages beyond those in existence when the current Acts were introduced.

This division was historical. In Alberta, the first insurance statute – "*An Act Respecting Insurance*" – was introduced in 1926. It contained Part V – Fire Insurance, which applied to fire insurance and to any insurer carrying on the business of fire insurance in Alberta.[8]

In the 1920s various insurance Acts in BC were consolidated and revised so that there was only one non-marine insurance statute.[9] When the BC Act was first legislated and passed in 1925 it was designed for a world where insurers issued policies geared to specific risks and subjects, such as theft, business loss, and fire. That first consolidated insurance statute contained special provisions relating to fire insurance, stating that a contract including insurance against other risks, as well as the risk of fire, would not be within the Fire Part of the BC Act.[10]

After World War II, the modern "multi-peril" and "all-risk" policy began to achieve consumer acceptance in the wording of commercial and homeowners' property policies

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[7] *KP Pacific Holdings Ltd. v. Guardian Insurance Co. o f Canada,* 2003 SCC 25, at para. 3.
[8] *An Act Respecting Insurance* – Statutes of the Province of Alberta - 1926, c-31, s. 185 (1).
[9] *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada*, 2002 BCCA 176, at para.17.
[10] *Insurance Act,* S.B.C. 1925, c. 20, Part VI (the current Part 5) "Special Provisions Relating to Fire Insurance".

in both provinces. To distinguish the two, the "all risk" policy provides very broad coverage, narrowed primarily by exclusions in the policy, and secondarily, by the "property insured". "Multi-peril" policies, on the other hand, expressly grant coverage for a limited range of specified perils that include the peril of fire.

Over the years there was a confusing evolution of the provisions in the Fire Part of the BC Act, including the application of that Part to various policies. Section 119 of the Fire Part of the current BC Act states:

> ***Application of Part***
>
> ***119*** *This Part applies to insurers carrying on the business of fire insurance and to contracts of fire insurance, whether or not a contract includes insurance against other risks as well as the risks included in the expression "fire insurance" as defined by this Act, except*
>
> *(a) contracts of insurance falling within the classes of aircraft, vehicle, boiler and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance,*
>
> *(b) if the subject matter of the contract of insurance is rents, charges or loss of profits,*
>
> *(c) if the peril of fire is an incidental peril to the coverage provided..*

Section 543(1) of the Fire Part of the current Alberta Act provides:

> *Application of Subpart*
>
> *543(1) This Subpart applies to insurance against loss of or damage to property arising from the peril of fire in any contract made in Alberta, except*

> *(a) insurance falling within the classes of aircraft, automobile, boiler and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance,*
>
> *(b) when the subject-matter of the insurance is rents, charges or loss of profits,*
>
> *(c) when the peril of fire is an incidental peril to the coverage provided, or*
>
> *(d) when the subject-matter of the insurance is property that is insured by an insurer or group of insurers primarily as a nuclear risk under a policy covering against loss of or damage to the property resulting from nuclear reaction or nuclear radiation and from other perils.*

Why the various amendments to Section 119 of the current BC Act were passed was beyond Southin, J.A. of the BC Court of Appeal who stated: "*I confess to not having the foggiest notion of the legislative purpose in the making of those various amendments*".[11]

A major concern that arose from this "application section" was that the limitation period under the Fire Part (found in Statutory Condition 14 of the BC Act) was *one year after the loss or damage*. The limitation period in the General Part of the BC Act, applying to policies falling outside of the Fire Part, was *one year after the furnishing of a reasonably sufficient Proof of Loss.*

The issue was whether an insured who purchased a multi-peril or all risk property policy (which included the peril of fire) who experienced a loss by fire be governed by the limitation period in the Fire Part, or, the limitation period in the General Part? This very question was at the heart of the 2003 Supreme Court of Canada decision which has spurred much of the legislative reform: *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada.*[12] The facts are straightforward. The insured owned a hotel. It burnt down. The insured made a claim under its multi-peril property policy, which included the

[11] *KP Pacific Holdings Ltd.*, *supra*, at para. 30, discussed at length in Section II of the Paper.
[12] *Supra*, at footnote 3.

peril of fire, within one year of filing its Proof of Loss (pursuant to the General Part of the current BC Act). The insurer rejected the claim and contended that the insured was out of time, saying the insured only had a year from the date of loss (pursuant to the Fire Part). The Supreme Court of Canada concluded the action was not statute-barred even when the peril which caused the loss was fire. In its unanimous judgment, the Court wrote:

> ***It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies.*** *In the meantime, the task of resolving disputes arising from this disjunction between insurance law and practice falls to the courts….The comprehensive policy at issue in this appeal cannot be shoe-horned into the Part 5 fire insurance section without contrived reconstruction and anomalous consequences. It simply does not fit. Consequently, it cannot be said that the Legislature intended the Fire Insurance provisions to govern. It follows that comprehensive policies are governed by Part 2, which is of general application.* (emphasis added)

In concluding its judgment, the Court urged legislative change:

> ***To repeat, it is our hope that legislators will rectify the situation by amending the Insurance Act to provide specifically for comprehensive policies. In an insurance era dominated by comprehensive policies, it is imperative that Canada's Insurance Acts specifically and unambiguously address how these statutes are to operate and the rules by which comprehensive policies are to be governed.*** (emphasis added).

The comments of the Chief Justice were the impetus for the legislative reform found in the New BC Act and the New Alberta Act. Its companion case, *Churchland v. Gore Mutual Insurance Co.,*[13] involving an action for theft under a multi-peril policy, had a similar outcome. The Supreme Court stated the basic problem was that insurance policies can no longer be neatly classified into distinct categories, and the "*interpretive gymnastics*" required to analyse a multi-peril property policy under the Fire Part, and

[13] *Churchland v. Gore Mutual Insurance Co.*, 2003 SCC 26.

the impractical consequences of applying the Fire Part to comprehensive policies, meant that these property policies were to fall under the General Part of the BC Act. [14]

C. NOTE OF CAUTION IN THE POTENTIAL ADOPTION OF THE INSURANCE BUREAU OF CANADA GENERAL CONDITIONS

A first note of caution is necessary. In April 2008, the Insurance Bureau of Canada (the "IBC") circulated General Policy Conditions which were to replace the Fire Statutory Conditions in property policies in Canadian common law provinces and territories. These General Policy Conditions (the "IBC General Conditions") were circulated by the IBC for voluntary compliance by Canadian insurers. The adoption of the IBC General Conditions is entirely at the discretion of the individual insurer subject only to any legislative constraints.

The proposed New BC Act and the New Alberta Act contain revised Statutory Conditions (discussed at length in Section IV of this paper). Section 27.1 of the New BC Act addresses the use of the Statutory Conditions. Section 27.1(3) provides that Statutory Conditions #1 and 6 to 13 apply to and must be printed on property policies. These are the only legislatively mandated statutory conditions for property policies. Section 540 of the New Alberta Act accomplishes this goal but it does not go as far as the New BC Act to specify that only certain Statutory Conditions apply to property policies. Under both New Acts, the Statutory Conditions are deemed to be part of every policy or contract and must be printed in every policy or contract.

Under the New BC Act, any insurer who fails to comply with the New BC Act commits an offence against the New Act.[15] The use of the IBC General Conditions, without

[14] *Churchland v. Gore*, *supra*, at para. 4.

regard to the requirements under the New BC, could potentially put an insurer in breach of the New Acts, and may not be binding on an insured. Insurers are advised to proceed with caution in adopting the IBC General Conditions.

The side-by-side comparison below outlines the differences between the IBC General Conditions and the proposed Statutory Conditions in the New Acts (for the purposes of this section defined as the "New Statutory Condition"). The full text of the IBC General Conditions is reproduced as an Appendix to this paper along with the text of the IBC Bulletin regarding the use of the General Conditions.

1. New Statutory Condition 4. - Material Change in Risk

New Statutory Condition	IBC General Condition
4. Material change in risk (1) The insured must promptly give notice in writing to the insurer or its agent of a change that is (a) material to the risk, and (b) within the control and knowledge of the insured. (2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void	**4. Material Change** Any change material to the risk and within the control and knowledge of the insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract

[15] Section 194 of the New BC Act.

as to the part affected by the change. (3) If an insurer or its agent is notified of a change under subparagraph (1) of this condition, the insurer may (a) terminate the contract in accordance with Statutory Condition 5, or (b) notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within 15 days after receipt of the notice, pay to the insurer an additional premium specified in the notice. (4) If the insured fails to pay an additional premium when required to do so under subparagraph (3) (b) of this condition, the contract is terminated at that time and Statutory Condition 5 (2) (a) applies in respect of the unearned portion of the premium.	to continue in force, the insured must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium, and in default of such payment the contract is no longer in force and the insurer shall return the unearned portion, if any, of the premium paid.

The New Statutory Condition 4, "Material Change in Risk" is more specific and states the contract is void as to the part affected by the change that is material to the risk. The IBC General Condition uses the term "*…avoids the contract as to the part affected thereby*". The New Statutory Condition refers to termination of the contract (pursuant to

Statutory Condition 5); the IBC General Condition uses the phrase "…*the contract is no longer in force"* with no reference to the termination conditions.

2. New Statutory Condition 5. - Termination

New Statutory Condition	IBC General Condition
5. Termination of insurance	5. **Termination**
(1) The contract may be terminated	**(1)** This contract may be terminated,
(a) by the insurer giving to the insured 15 days' notice of termination by registered mail or 5 days' written notice of termination personally delivered, or	(a) by the insurer giving to the insured fifteen days' notice of termination by registered mail or five days' written notice of termination personally delivered;
(b) by the insured at any time on request.	(b) by the insured at any time on request.
(2) If the contract is terminated by the insurer,	(2) Where this contract is terminated by the insurer,
(a) the insurer must refund the excess of premium actually paid by the insured over the prorated premium for the expired time, but in no event may the prorated premium for the expired time be less than any minimum retained premium specified in the contract,	(a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but, in no event, shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium

and (b) the refund must accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund must be made as soon as practicable. (3) If the contract is terminated by the insured, the insurer must refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time specified in the contract, but in no event may the short rate premium for the expired time be less than any minimum retained premium specified in the contract. (4) The 15 day period referred to in subparagraph (1) (a) of this condition starts to run on the day the registered letter or notification of it is delivered to the insured's postal address.	specified; and (b) the refund shall accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund shall be made as soon as practicable. (3) Where this contract is terminated by the insured, the insurer shall refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time, but in no event shall the short rate premium for the expired time be deemed to be less than any minimum retained premium specified. (4) The refund may be made by money, postal or express company money order or cheque payable at par. (5) The fifteen days mentioned in clause (1) (a) of this condition commences to run on the day following the receipt of the registered letter at the post office to which it is addressed.

The New Statutory Condition states the insurer "*must*" refund the excess of premium; the IBC General Condition uses the word "*shall*"; both words mean that the insurer has a legal duty to refund the premium. The 15 day notice period in the New Statutory Condition begins to run when the notification is delivered to the insured's postal address; the IBC General Condition uses the phrase "*…at the post office to which it is addressed*". Delivery to the insured's address is much more specific.

3. New Statutory Condition 6. - Requirements After Loss

New Statutory Condition	IBC General Condition
6. Requirements after loss (1) On the happening of any loss of or damage to insured property, the insured must, if the loss or damage is covered by the contract, in addition to observing the requirements of Statutory Condition 9, (a) immediately give notice in writing to the insurer, (b) deliver as soon as practicable to the insurer a proof of loss in respect of the loss or damage to the insured property verified by statutory declaration, (i) giving a complete inventory of that property and	6. **Requirements After Loss** (1) Upon the occurrence of any loss of or damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11, (a) forthwith give notice thereof in writing to the insurer; (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration, (i) giving a complete inventory of the destroyed and damaged property and

showing in detail quantities and costs of that property and particulars of the amount of loss claimed,	showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,	(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,	(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,
(iv) stating the amount of other insurances and the names of other insurers,	(iv) showing the amount of other insurances and the names of other insurers,
(v) stating the interest of the insured and of all others in that property with particulars of all liens, encumbrances and other charges on that property,	(v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,
(vi) stating any changes in title, use, occupation, location,	(vi) showing any changes in

possession or exposures of the property since the contract was issued, and (vii) stating the place where the insured property was at the time of loss, (c) if required by the insurer, give a complete inventory of undamaged property showing in detail quantities and costs of that property, and (d) if required by the insurer and if practicable, (i) produce books of account and inventory lists, (ii) furnish invoices and other vouchers verified by statutory declaration, and (iii) furnish a copy of the written portion of any other relevant contract. (2) The evidence given, produced or furnished under subparagraph (1) (c) and (d) of this condition must not be considered proofs of loss within the	title, use, occupation, location, possession or exposures of the property since the issue of the contract, (vii) showing the place where the property insured was at the time of loss; (c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value; (d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract. (2) The evidence furnished under clauses (1) (c) and (d) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13.

meaning of Statutory Conditions 12 and 13.	

The New Statutory Condition requires the insured to observe Condition 9 only. The IBC General Condition states that the insured must observe the requirements of Conditions 9 - Salvage, Condition 10 - Entry, Control and Abandonment, and Condition 11 - Appraisal. The IBC General Condition states the insured "*shall give*" to the insurer – if so required - the actual cash value of any undamaged property; the New Statutory Condition does not have this requirement. As discussed above, the use of this New Statutory Condition 6 – Requirements after Loss – is mandatory under the New BC Act for all property policies.

4. New Statutory Condition 10 - Entry, Control and Abandonment

New Statutory Condition	IBC General Condition
10. Entry, control, abandonment After loss or damage to insured property, the insurer has: (a) an immediate right of access and entry by accredited representatives sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and (b) after the insured has secured the	10. **Entry, Control, Abandonment** After loss or damage to insured property, the insurer has an immediate right of access and entry by accredited agents sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and, after the insured has secured the property, a further right of access and entry sufficient to enable them to make

property, a further right of access and entry by accredited representatives sufficient to enable them to appraise or estimate the loss or damage, but (i) without the insured's consent, the insurer is not entitled to the control or possession of the insured property, and (ii) without the insurer's consent, there can be no abandonment to it of the insured property.	appraisement or particular estimate of the loss or damage, but the insurer is not entitled to the control or possession of the insured property, and without the consent of the insurer there can be no abandonment to it of insured property.

The New Statutory Condition requires the insurer to have the insured's consent before being entitled to the control or possession of the insured property; the IBC General Condition does not specify the requirement for the insured's consent. The New Statutory Condition mandates the requirement for consent. As discussed above, the use of this New Statutory Condition 10 – Entry, control and abandonment – is mandatory under section 27.1 (3) the New BC Act.

5. New Statutory Condition 11. - Appraisal

New Statutory Condition	IBC General Condition

11. In case of disagreement (1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act, whether or not the insured's right to recover under the contract is disputed, and independently of all other questions. (2) There is no right to a dispute resolution process under this condition until (a) a specific demand is made for it in writing, and (b) the proof of loss has been delivered to the insurer.	11. **Appraisal** In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

The New Statutory Condition contemplates a broader range of circumstances than the IBC General Condition for when the appraisal remedy applies, including the phrase "*the nature or extent of the repairs or replacement required*", or "*their adequacy*", or the amount of "*loss or damage.*" This means, practically, that the appraisal remedy can be utilized in a wider range of circumstances under the New Acts than under the IBC

General Conditions. As discussed above, the use of this New Statutory Condition 11 is mandatory for property policies under the New BC Act.

6. New Statutory Condition 12. - When Loss Payable

New Statutory Condition	IBC General Condition
12. When loss payable Unless the contract provides for a shorter period, the loss is payable within 60 days after the proof of loss is completed in accordance with Statutory Condition 6 and delivered to the insurer.	12. **When Loss Payable** The loss is payable within sixty days after completion of the proof of loss, unless the contract provides for a shorter period.

The New Statutory Condition is more precise, and specifies that a loss is payable once the requirements of Statutory Condition 6 (Requirements after Loss) are met and the Proof of Loss is delivered to the insurer. The use of this New Statutory Condition is mandatory for property policies under the New BC Act.

7. New Statutory Condition 13. - Repair or Replacement

New Statutory Condition	IBC General Condition
13. Repair or replacement (1) Unless a dispute resolution process	13. **Replacement** (1) The insurer, instead of making

has been initiated, the insurer, instead of making payment, may repair, rebuild or replace the insured property lost or damaged, on giving written notice of its intention to do so within 30 days after receiving the proof of loss. (2) If the insurer gives notice under subparagraph (1) of this condition, the insurer must begin to repair, rebuild or replace the property within 45 days after receiving the proof of loss, and must proceed with all due diligence to complete the work within a reasonable time.	payment, may repair, rebuild, or replace the property damaged or lost, giving written notice of its intention so to do within thirty days after receipt of the proofs of loss. (2) In that event the insurer shall commence to so repair, rebuild, or replace the property within forty-five days after receipt of the proofs of loss, and shall thereafter proceed with all due diligence to the completion thereof.

The New Statutory Condition states the insurer must complete the repair, rebuilding or replacement "*within a reasonable time*"; the IBC General Condition does not mandate a temporal period. The use of this New Statutory Condition is mandatory in any property policy under the New BC Act.

8. Limitation Period Provision

New Provision	IBC General Condition
See discussion below.	14. **Action** Every action or proceeding against the insurer for the recovery of a claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.

The traditional Statutory Condition is eliminated in the new Act. It has been replaced with a 2-year limitation period provision in the General Part of the New Acts.

The limitation provisions in the New Acts are discussed at length in Section III of this paper.

II. THE ABOLITION OF THE FIRE PART AND THE INTRODUCTION OF A "UNIFORM" GENERAL PART IN THE NEW BC ACT

A. INTRODUCTION

As noted in the Introduction to this paper, one of the most significant changes in the New BC Act is the abolition of the Fire Part from the existing legislation and the introduction of a new "uniform" General Part, which will now govern almost all types of insurance contracts in the province. These two major changes are the legislative response to *K.P. Pacific Holdings*, *supra*, and its companion case of *Gore v. Churchland*,

supra. This section of the paper discusses in some detail the legal background to the new sections as well as the specific statutory changes in the New BC Act and the New Alberta Act.

B. LEGAL BACKGROUND

Before discussing the changes proposed in the New BC Act and the New Alberta Act, it is important to understand the historical background which provided the motivation for the change.

In 2003, the Supreme Court of Canada delivered decisions in two companion cases *K.P. Pacific Holdings*, *supra*, and *Churchland v. Gore*, *supra*, the Court concluded that property insurers in British Columbia are prevented in which from relying upon Statutory Condition #14 if the claim arose from a multi-peril or all risk property policy. As a result, the limitation was one year from the furnishing of a reasonably sufficient Proof of Loss.

The only claims governed by the Fire Part of the current BC Act are claims made pursuant to a true fire policy. While these policies may also cover minor incidental risks such as water damage, they must be fire policies for the Fire Part of the current BC Act to apply.

In drafting the New BC Act, the legislators' prime concern was that the General Part of the current BC Act does not provide the Court with the consumer protection powers traditionally found in the Fire Part. More specifically, the General Part does not confer a jurisdiction to ignore unjust or unreasonable terms or conditions of a policy. By confining all multi-peril policies to the General Part, the consumer would not have the protections afforded to them under the Fire Part of the current BC Act. The Legislatures

were concerned that substantially different limitation periods could lead to consumer confusion as to which limitation period applied in a particular situation.

C. PROPOSED ADDITIONS TO THE GENERAL PART FROM THE FIRE PART

The new legislation contemplates that the Fire Part of the current BC Act be abolished, and many of the consumer protection portions previously in the Fire Part be incorporated into the General Part of the New BC Act.

The most significant changes include the following:

- The Fire Part contained in the current BC Act is abolished by the passing of Section 97 of the new BC Act;

- The new General Part applies to all contracts of insurance except life insurance, accident and sickness insurance, re-insurance, or any insurance under Part 7 (which includes miscellaneous insurance such as livestock insurance);

- The proposed wording for the limitation period for all actions against an insurer in relation to a contract of insurance is:

> *"(a) in the case of loss or damage to insured property, not later than 2 years after the date the insured knew or ought to have known the loss or damage occurred, and*
>
> *(b) in any other case, not later than 2 years after the date the cause of action against the insurer arose."*

- The Statutory Conditions from the Fire Part of the current BC Act are substantially transferred to the General Part in the New BC Act, with some minor procedural and wording alterations.

- An "unjust and unreasonable" provision has been added (Section 28.3), which provides that:

> *"28.3 If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 28.4(1), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried."*

- Section 28.4 specifically provides that an insurer may not provide an exclusion relating to the cause or circumstances of a loss caused by fire or other peril, that is not provided for by a regulation to the New BC Act;

- Any exclusion contrary to Section 28.4, unless provided for by regulation, is invalid. These "unjust contract provisions" clauses are discussed at length further in Section VI. A. in this paper.

D. COMPARABLE CHANGES IN ALBERTA

The BC and Alberta governments have worked together drafting changes for the proposed New Acts, and a considerable number of the changes discussed above in regard to the General and Fire Parts in the B.C. legislation are mirrored in New Alberta Act.

The most significant changes in the new Alberta legislation include:

- Under the New Alberta Act, the old General Part which included the Fire Part and Statutory Conditions has been completely repealed.

- A new General Part (Part Five – Subpart 1 – General Insurance Provisions) will apply to all contracts of insurance excluding life insurance, accident and sickness insurance and reinsurance. The new General Part contains New Statutory Conditions.

- The Fire Part of the current Alberta Act has been repealed. The statutory provisions found in the Fire Part of the current Alberta Act have been substantially incorporated into the new General Part of the New Alberta Act.

- Under the General Part of the New Alberta Act the term "fire insurance" is not used. However, reference to "fire" is made in Section 545(3), Special Stipulations which makes it clear that when insuring the peril of fire or other prescribed perils, even if the proximate cause was other than an insured peril (for instance, an earthquake), the damage caused by the fire would still be covered. This is comparable to Section 28.4 in the New BC Act. These two sections in the New Acts are described at length in Section VI. B. in this paper.

- In the New Alberta Act, as with the BC legislation, the limitation period for all actions against insurers pursuant to a contract of insurance is 2 years. The proposed wording in the New Alberta Act is the same as in the New BC Act, as described above. The new limitation sections in both New Acts is the topic of Section III of this paper.

- The consumer protection language, otherwise described as the "unjust and unreasonable" provision now found in Section 552(1) of the Fire Part of the current Alberta Act is reproduced in the General Part of the New Alberta Act. These consumer protection provisions are discussed at length in Section Part VI. A. of this paper.

E. CONCLUSION

The proposed changes to the Fire Part of New BC Act and the New Alberta Act clarify the limitation period in place for claims against insurers. The New BC Act will also provide additional consumer protection to insureds by incorporating statutory remedies available to the Court in terms of striking out unjust or unreasonable policy provisions. Alberta insurers should equally concern themselves with the changes to the General Part under the New Alberta Act, as the same expansion on consumer protection and changes to the limitation period are taking place in that province.

III. NEW LIMITATION PERIODS FOR ACTIONS ON INSURANCE POLICIES

The current BC Act contains four different limitation periods which vary depending on the kind of insurance contract. This has led to confusion in the insurance industry over which limitation period applies. The new limitation periods created by the amendments in the New BC and Alberta Acts are intended to streamline and clarify the current inconsistent limitations periods, as well as to align the limitation periods in both provinces. The greatest changes have occurred in the New BC Act; this section of the paper concentrates on those changes.

In considering the new limitation period, the BC legislature's primary concerns were to ensure that legal disputes were resolved within a reasonable time, to ensure that evidence before the Court was fresh, and to provide closure to claims. These concerns were balanced by a desire to ensure that potential claimants had sufficient time to become aware of loss, damage or liability and understood the facts sufficiently to make a claim. As well, all parties needed time to attempt to resolve the dispute before legal proceedings were required. A further consideration was providing certainty so that insurers could put aside sufficient reserves.[16] However, the revisions to the limitations periods in the New BC and Alberta Acts may create new uncertainties for insurers. This section of our paper will address the current limitation periods in BC and Alberta, the difficulties with the current situation, the changes to the limitation periods in the new Acts, and certain issues which may arise as a result of the New Acts.

[16] Discussion Paper, *supra*.

A. THE CURRENT LIMITATION PERIOD IN THE ALBERTA AND BC ACT

Compared to the complex limitation period scheme in the current BC Act, the limitation period under the existing Alberta Act is relatively straightforward. Statutory Condition 14 in the Alberta Act provides that:

> *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 after the loss or damage occurs.*

The one-year limitation period in Alberta runs from the date of the loss. However, this provision is complicated by the application of the discoverability principle, discussed in more detail below.

The law in regard to limitation periods in BC is more complex. As noted earlier, prior to the two seminal decisions of the Supreme Court of Canada in 2003, the generally-held belief in the B.C. insurance industry was that the limitation period for property claims was one year from the date of loss or damage, as set out at Statutory Condition 14 of Part Five of the BC Act. The decisions in *K.P. Pacific Holdings*, *supra*, and *Churchland v. Gore*, *supra*, made clear that the limitation period in relation to multi-peril property policies in BC was one year from the furnishing of a reasonably sufficient Proof of Loss on a claim under the contract, as set out in s. 22 of the BC Act. Limitation periods were significantly extended as the analysis turned to when "*reasonably sufficient proof of a loss or a claim under the contract*" had been furnished. Secondly, consumer uncertainty increased centering on confusion as to when a Proof of Loss became "reasonably sufficient".

Statutory Condition 6 of the current Fire Part of the BC Act regulates the form and content of a Proof of Loss. When inadequate Proofs of Loss were provided by insureds, some insurers refused indemnity on the basis of the insured's failure to fully satisfy the requirements of Statutory Condition #6. Courts were willing to allow insureds some leeway in determining whether they had provided a sufficient Proof of Loss. In practical terms, the Court's willingness to extend the benefit of the doubt to insureds meant that insurers could not necessarily count on the provision of a Proof of Loss as a starting point from which to calculate when the limitation period commenced.

More confusion resulted from the rule that it fell to the insurer to determine when a reasonably sufficient Proof of Loss had been provided. If the insured had submitted a reasonably sufficient Proof of Loss, which was accepted by the insurer, a limitation period was triggered.[17] The question of whether a reasonably sufficient Proof of Loss had been supplied and when the limitation period began to run became a matter for judicial determination. These problems have been somewhat ameliorated by the new statutory provisions.

B. LIMITATION PERIODS UNDER THE NEW BC AND ALBERTA ACTS

The New Alberta and BC Acts contain identical limitation periods. The two Sections (Section 22 of the New BC Act, and Section 526(1) of the New Alberta Act) provide as follows:

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

[17] *Mameli* v. *American Home*, 2002 BCSC 169, and *Petrisor v. Gore District Mutual Fire Insurance Co.,* [1959] O.J. No. 161 (Q.L.)(C.A.), appeal dismissed [1960] S.C.R. 360.

> *(a) in the case of loss or damage to 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, not later than 2 years after the date that the cause of action against the insurer arose.*

Subsection a) refers to "*…loss or damage to the insured property*", which necessarily refers to a property policy. Subsection b) uses the words "*in any other case…*" which implies that the limitation periods under the New BC Act and the New Alberta Act apply to both property insurance and all other policies of insurance, including liability policies. However, the limitation period in the new Alberta Act does not apply to contracts of automobile or hail insurance.

C. POTENTIAL PROBLEMS ARISING FROM THE LIMITATION PERIODS FOR PROPERTY POLICIES IN THE NEW BC AND ALBERTA ACTS

Although the respective legislatures intended to provide greater certainty with respect to the limitation periods, the wording of the New Acts in regard to property policies still raises uncertainties.

1. Continuous Damage

In certain situations, damage to property can persist unnoticed over a lengthy period of time. Consider a situation where a building begins to rot; the rot continues over a period of a number of years, eventually being discovered when owners notice water marks on their walls. The insured obtains one year policies from a series of differing insurers.

Under the New BC and Alberta Acts, the insured is only able to recover the indemnity in the context of property policies if the insured sues within 2 years of the date the insured knew or ought to have known that the loss or damage occurred. Legal action outside of that two-year period is statute-barred. If the water penetration in the above example occurred over a period of five years, and the damage was discovered in the sixth year, the insurers on risk for the first three years could plead that the new two-year limitation period eliminated their obligation to indemnify the insured for damage occurring in their policy years, leaving the final two policy issuers to pay their portion of the claim. Would the insured's claim be limited to the damage accruing in the last two years? Clearly, this result would be potentially unfair to the insured.

The new two-year limitation period does provide greater clarity with respect to the commencement of the action in the context of property claims. However, the cost of that clarity may be a restriction on the insured's indemnity, as well as increased conflict between insurers, as they attempt to determine when the continuous damage began.

2. The Discoverability Principle

In the context of property policies, the new limitation period provisions state that a limitation period does not begin to run until the insured "*knew or ought to have known*" that the loss or damage had occurred. The question of when an insured "*ought to have known*" that a loss had occurred will attract a great deal of legal attention.

Section 8(1) – Contents of Policy - of the New BC Act provides that:

> *A policy must contain all of the following:*
>
> *(j) the following statement:*

> *Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in the Insurance Act.*

When the insured ought to have known that a loss has occurred is known as the "*discoverability principle*". The principle permits the postponement of limitation periods in cases where the facts and consequences are not immediately apparent to an injured party. The leading case dealing with this rule is the Supreme Court of Canada decision of *Central & Eastern Trust Co. v. Rafuse*[18] where the Court stated:

> *…a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence...*

By virtue of the legislative reforms to the BC Act, the discoverability and incapacity principles now apply to limitation periods under the New BC Act.

Some guidance as to what knowledge the insured must have prior to putting an insurer on notice of a claim is provided by the decision of the New Brunswick Court of Appeal in *Callaghan Contracting v. Royal Insurance Company of Canada.*[19] Three years after the installation of a new sewage line, the City of Moncton discovered the line to be blocked by silt and sludge, left by a contractor. The contractor made a claim under its multi-peril policy of insurance, which was denied by the insurer, relying on the one-year limitation period contained in Statutory Condition 14. The Court of Appeal concluded that although there was no discoverability principle encapsulated in the Statutory Condition, one could be applied at common law, and the limitation period did not

[18] [1986] 2 S.C.R. 147.
[19] (1989), 59 D.L.R. (4th) 753 (N.B.C.A.).

commence to run "*until the **nature and amount** of the city's claim against Callaghan had been determined*" [emphasis added].

This concept of the "*nature and amount*" of the claim being a necessary prerequisite to a claim is elaborated upon in the case of *Stuart Estate v. Royal and Sun Alliance Insurance Co. of Canada*.[20] The insured had an oil burner in her basement. Over the years, she noticed a smell of oil in her basement, especially when the furnace was repaired. The oil burner was replaced several years later, but the tank was stored under the garage. When the insured eventually moved, the source of the smell was determined to be a major oil leak, resulting in a costly remediation to the home. The insurers declined the family's claim for indemnity and claimed that the insured failed to exercise due diligence; she did not investigate the smell or determine when the leak had occurred. The Court disagreed, pointing out that although the insureds were suspicious as to why the smell of oil remained, and had made some efforts to determine its cause, they did not actually know that the oil leak beneath the home was the source of the smell. It took actual knowledge on the part of the insured to trigger the limitation period. The Court ordered the insured indemnified for the cost of the repairs.

The issue of when the insured has sufficient information to determine that a loss has occurred will attract a fair amount of litigation.

3. Postponement of the Limitation Period

Section 2.4 of the New BC Act states as follows:

Application of Limitation Act

[20] 2005 Carswell N.S. 105.

> *2.4 (1) Section 7 of the Limitation Act applies to a limitation period established under this Act in respect of an action or proceeding on a contract as if the limitation period were established under the Limitation Act.*
> *(2) A limitation period established under this Act in respect of an action or proceeding on a contract may be varied by a contract to provide a longer period.*

That means the limitation period under the New BC Act will be postponed if a person is a minor, or, is incapable of managing his or her affairs. Section 7 of the B.C. *Limitation Act*[21] will apply to the consideration of the commencement, length and duration of a limitation period under the New BC Act. Section 7 of the *Limitation Act* provides that if a person is under a disability (defined as either being a minor or being incapable of managing their affairs) at the time the right to bring an action arises, the running of time is postponed. Further, if the person comes under a disability after a limitation period has begun to run, the limitation period will be suspended while the person remains under a disability. Effectively the limitation period will be further postponed until such a time as the person reaches the age of majority or is no longer under a disability. If a person is under or comes under a disability during the time the limitation period is running, the limitation period may extend beyond the two years expressed in the New BC Act.

Section 5 of the Alberta *Limitations Act* [22] contains a provision similar to that in Section 7 of the BC *Limitation Act*. Section 527 of the new Alberta Act specifically provides that Section 5 of the Alberta *Limitations Act* will apply.

[21] R.S.B.C. 1996, c. 266.
[22] R.S.A. c.L-12.

D. LIABILITY POLICIES - WHEN DOES THE INSURED'S RIGHT OF ACTION ARISE?

For recovery on a liability policy, Section 22 provides that an action against a liability insurer must be commenced within two years after the cause of action arose. The wording does not clarify what the "*cause of action*" means. It may be that the cause of action arises when the insurer denies the insured's request for coverage. On the other hand it may mean that the cause of action does not arise until the insured has incurred defence costs. What if an insurer fails to pay defence costs on a liability policy? This failure would presumably be a breach of contract, which would then "trigger" the "*cause of action against the insurer*". The two year limitation period would begin to run after that time.

E. NOTICE REQUIREMENTS

The New BC Act provides that insurers may be required, by Regulation, to provide the insured with notice prior to the expiry of a limitation period under the New BC Act. The Regulations, which have not yet been disclosed, may include the following:

(a) the content, time, and manner of giving notice; and

(b) the consequences of failing to give the notice, which may include dispensing with, suspending, or extending the limitation period.

Insurers should be aware that Regulations may be passed pursuant to the New Act which will change the notice requirements for insurers. Insurers must be alert to these regulations in order to ensure that the limitation period remains in effect.

The New Alberta Act also modifies the present Section 511(1) to indicate that Alberta insurers may be required by Regulation to provide an insured with notice prior to the expiry of a limitation period, in prescribed circumstances and in the prescribed manner.

F. CONCLUSION

The limitation periods proposed under the New BC and Alberta Acts reveal that the legislature is committed to ensuring that limitation periods are clear, certain and fair to both insurers and insureds. However, there are a number of potential concerns, particularly from the insurers' point of view, with the new limitation period that will no doubt require judicial attention. In the long run, however, the synchronization of the limitation periods in both New Acts with the general principles ensconced in the *Limitation Acts* of both provinces will result in greater certainty and clarity for insurers and insureds alike.

IV. NEW CLAIMS HANDLING PROCEDURES

PART 1

A. STATUTORY CONDITIONS

1. Current BC and Alberta Legislation

The Fire Part of the current BC Act and Alberta Act prescribe a series of Statutory Conditions which regulate the content of fire insurance policies and which must be printed on every policy. As described earlier, these Statutory Conditions provide certain "consumer safeguard" provisions. The Statutory Conditions in the Fire Parts in the two current Acts are almost identical and provide conditions relating to:

- misrepresentation;
- the property of others;
- change of interest and material change of risk;
- termination of the insurance contract;
- requirements to be complied with after a loss has occurred;
- fraud;
- who may give notice of the loss and provide proof of the loss;
- salvage and protection of property after the loss;
- entry, control and abandonment of the property;
- appraisal of loss in the event of a dispute between the insurer and the insured;
- when the loss is payable;
- replacement and repair of property;
- the limitation period for an insured commencing action for recovery under the policy; and
- procedure for providing written notice to the insurer/insured.

As noted earlier, the application of the current Acts to more modern multi-peril insurance policies have caused problems for insurers and insureds where there are conflicting provisions in different parts of the same Acts. The Fire Part of the current BC Act applies to all policies of fire insurance which fit within the general clause, as long as the policy is not "caught" by the four exceptions listed in the opening Section.

Section 543 in the Alberta Act defines the application of the Fire Part in a similar way, again with four exceptions. In other words, if a policy of insurance "fits" within the boundaries defined in the Fire Part, the rest of that part of the current BC Act and current Alberta Act do not apply.

Both the current BC Act and the Alberta Act contain Statutory Conditions which are deemed to be part of every fire insurance policy and must be printed on every policy. Prior to the Supreme Court of Canada ruling in *K.P. Pacific Holding*, *supra*, the insurance industry assumed that if a multi-peril policy included fire coverage, then the Statutory Conditions (with a shorter limitation than the General Part) would automatically form part of the policy.

2. The Merger of the General and Fire Parts

As discussed earlier, the merger of the General Parts and the Fire Parts in the proposed New Acts removes the Fire Part in both Acts and incorporates the relevant aspects, including the Statutory Conditions, into the General Parts. For insurers, that means that the Statutory Conditions must now be included in every insurance policy (with limited exceptions as discussed below). This merger removes the difficulties faced in deciding which Part applies to a multi-peril insurance contract when there are conflicting provisions from different parts of the Acts. It is also a move towards general inter-jurisdictional harmony across Canada. All Canadian jurisdictions, except Quebec, use virtually identical Statutory Conditions to regulate the same insurance products.

3. The Statutory Conditions in the New BC and Alberta Acts

Currently the Statutory Conditions only apply to the Fire Part of both the BC and Alberta Acts. Under the proposed changes the Fire Part is to be merged into the General Part; the result being that the Statutory Conditions apply to all types of insurance, with limited exceptions. This is the most fundamental change to the Statutory Conditions.

The current Statutory Conditions are in Section 126 of the BC Act (in the Fire Part) and Section 549 of the Alberta Act (again, in the Fire Part); they are essentially the same conditions in both Acts. The new Statutory Conditions are found in the General Part at Section 27.1 of the New BC Act and Section 540 of the New Alberta Act. Again, these Sections are essentially identical and provide:

> *(1) Subject to subsections (2) and (3),* ***the conditions set out in this section are deemed to be part of every contract, and must be printed on every policy under the heading "Statutory Conditions",*** *and no variation or omission of or addition to a statutory condition is binding on the insured.*
>
> *(2) This section does not apply to contracts of surety insurance or a class of insurance prescribed by regulation.*
>
> *(3) Statutory Conditions 1 and 6 to 13 apply only to, and need only be printed on, contracts that include insurance against loss or damage to property.*
>
> *(4) In this section, "policy" does not include an interim receipt or binder.*

The wording of subsection (1) is similar to the old wording, but now it is clear that the Statutory Conditions apply to *all* insurance contracts, except as provided. Subsection (2) states that the Statutory Conditions do not apply to policies for surety insurance or a class of insurance prescribed by regulation. Subsection (3) states that in property policies, only certain Statutory Conditions apply, namely Statutory Condition 1 and 6 through 13.

Below in a side-by-side comparison is a review of the changes resulting from the new Statutory Conditions and commentary on some of the implications for claims handling:

1. Misrepresentation:

Current Statutory Condition	New Statutory Condition
1. Misrepresentation If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.	**1. Misrepresentation** If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.

The proposed Statutory Condition in regard to misrepresentation contains almost the same wording as the current Statutory Condition.

2. Property of Others:

Current Statutory Condition	New Statutory Condition
2. Property of others	**2. Property of others**

Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured in it is stated in the contract.	The insurer is not liable for loss or damage to property owned by a person other than the insured unless: (a) otherwise specifically stated in the contract, or (b) the interest of the insured in that property is stated in the contract.

The proposed Statutory Condition #2 expands the current wording. This broader wording reflects the fact that insurers are, broadly speaking, insuring a wider range of commercial interests in modern policies than ever before. At the same time, a property policy will only protect an interest that is fully disclosed to the insurer. An example is the Course of Construction policy (also called a "Builders Risk policy") which can provide coverage to contractors and subcontractors as unnamed insureds since the latter contribute integrally to the construction process.[23] To limit the scope of coverage, insurers are now using various wordings to delineate the range of unnamed insureds who may be an "insured." For example, on a Course of Construction policy, the policy may cover any sub-contractor that contributes labour or materials to the project. The language in the New Acts seeks to address this evolution towards broader coverage in the insurance marketplace.

3. Change of Interest:

Current Statutory Condition	New Statutory Condition

[23] *Sylvan Industries Ltd. v. Fairview Sheet Metal Works Ltd.* (1989), 89 B. C..L.R. (2d) 18 (C.A.); *Canadian Pacific Ltd. v. Base-Fort Security Services (British Columbia) Ltd.* (1991), 52 B.C.L.R. (2d) 393 (C.A.).

3. Change of interest The insurer is liable for loss or damage occurring after an authorized assignment under the *Bankruptcy Act* or change of title by succession, by operation of law, or by death.	**3. Change of interest** The insurer is liable for loss or damage occurring after an authorized assignment under the *Bankruptcy and Insolvency Act (Canada)* or a change of title by succession, by operation of law or by death.

The proposed Statutory Condition contains essentially the same wording as the current Statutory Condition, and its legal meaning remains the same.

4. Material Change:

Current Statutory Condition	New Statutory Condition
4. Material change Any change material to the risk and within the control and knowledge of the insured avoids the contract as to the part affected by the change, unless the change is promptly notified in writing to the insurer or its local agent; and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract	**4. Material change in risk** (1) The insured must promptly give notice in writing to the insurer or its agent of a change that is (a) material to the risk, and (b) within the control and knowledge of the insured. (2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by

to continue in force, the insured must, within 15 days of the receipt of the notice, pay to the insurer an additional premium; and in default of such payment the contract is no longer in force and the insurer must return the unearned portion, if any, of the premium paid.	the change. (3) If an insurer or its agent is notified of a change under subparagraph (1) of this condition, the insurer may (a) terminate the contract in accordance with Statutory Condition 5, or (b) notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within 15 days after receipt of the notice, pay to the insurer an additional premium specified in the notice. (4) If the insured fails to pay an additional premium when required to do so under subparagraph (3) (b) of this condition, the contract is terminated at that time and Statutory Condition 5 (2) (a) applies in respect of the unearned portion of the premium.

The basic premise of this Statutory Condition remains the same. An insured must communicate with his or her insurer if a change material to the risk occurs after the policy incepts.

The current Statutory Condition uses the words "*avoids the contract as to the part affected by the change*". The proposed Statutory Condition uses the words "*the contract is void as to the part affected by the change*". Both imply that the insurance policy will be voided as to the part affected.

5. Termination of Insurance:

Current Statutory Conditions	New Statutory Conditions
5. Termination of insurance (1) This contract may be terminated (a) by the insurer giving to the insured 15 days' notice of termination by registered mail, or 5 days' written notice of termination personally delivered, or (b) by the insured at any time on request. (2) If this contract is terminated by the insurer, (a) the insurer must refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but, in no event, is the proportionate premium for the expired time to be	**5. Termination of insurance** (1) The contract may be terminated (a) by the insurer giving to the insured 15 days' notice of termination by registered mail or 5 days' written notice of termination personally delivered, or (b) by the insured at any time on request. (2) If the contract is terminated by the insurer, (a) the insurer must refund the excess of premium actually paid by the insured over the prorated premium for the expired time, but in no event may the prorated premium for the expired time be less than any minimum retained premium

less than any minimum retained premium specified, and (b) the refund must accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund must be made as soon as practicable. (3) If this contract is terminated by the insured, the insurer must refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time, but, in no event, must the short rate premium for the expired time be deemed to be less than any minimum retained premium specified. (4) The refund may be made by money, postal or express company money order, or by cheque payable at par. (5) The 15 days mentioned in clause (a) of subcondition (1) commences to run on the day following the receipt of the registered letter at the post office to which it is addressed.	specified in the contract, and (b) the refund must accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund must be made as soon as practicable. (3) If the contract is terminated by the insured, the insurer must refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time specified in the contract, but in no event may the short rate premium for the expired time be less than any minimum retained premium specified in the contract. (4) The 15 day period referred to in subparagraph (1) (a) of this condition starts to run on the day the registered letter or notification of it is delivered to the insured's postal address.

The New Statutory Condition contains several changes from the current version. First, it does not include the current sub-condition (4) which sets out the acceptable means by which the refund of the unearned premium is made to the insured (i.e. by money, postal order or by cheque). The lack of specificity in the proposed Statutory Condition recognizes the growing number of methods by which money can be transferred, such as direct deposit, electronic money transfer etc.

Second, the 15-day period currently begins to run following receipt of the registered letter at a local post-office; under the new wording the period begins when delivery is made to the insured's address. From a claims handling perspective, the new language means the insurer cannot terminate the policy until, for example, an out-of-town insured who has temporarily stopped his mail delivery returns home after months of absence and actually receives the notification of termination at his address.

6. Requirements after Loss:

Current Statutory Condition	New Statutory Condition
6. Requirements after loss (1) On the occurrence of any loss of or damage to the insured property, the insured must, if such loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11, (a) forthwith give notice of it in writing to the insurer,	**6. Requirements after loss** (1) On the happening of any loss of or damage to insured property, the insured must, if the loss or damage is covered by the contract, in addition to observing the requirements of Statutory Condition 9, (a) immediately give notice in writing to the insurer, (b) deliver as soon as practicable to the

(b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration, (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed, (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes, (iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured, (iv) showing the amount of other insurances and the names of other insurers, (v) showing the interest of	insurer a proof of loss in respect of the loss or damage to the insured property verified by statutory declaration, (i) giving a complete inventory of that property and showing in detail quantities and costs of that property and particulars of the amount of loss claimed, (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes, (iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured, (iv) stating the amount of other insurances and the names of other insurers, (v) stating the interest of the

the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property, (vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract, and (vii) showing the place where the property insured was at the time of loss, (c) if required give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value, and (d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.	insured and of all others in that property with particulars of all liens, encumbrances and other charges on that property, (vi) stating any changes in title, use, occupation, location, possession or exposures of the property since the contract was issued, and (vii) stating the place where the insured property was at the time of loss, (c) if required by the insurer, give a complete inventory of undamaged property showing in detail quantities and costs of that property, and (d) if required by the insurer and if practicable, (i) produce books of account and inventory lists, (ii) furnish invoices and other vouchers verified by statutory declaration, and (iii) furnish a copy of the

(2) The evidence furnished under clauses (c) and (d) of subparagraph (1) of this condition must not be considered proofs of loss within the meaning of conditions 12 and 13.	written portion of any other relevant contract. (2) The evidence given, produced or furnished under subparagraph (1) (c) and (d) of this condition must not be considered proofs of loss within the meaning of Statutory Conditions 12 and 13.

This Statutory Condition enumerates the steps required of an insured following a loss. There are several wording changes between the current and proposed Statutory Condition which will impact claims handling, namely:

1. Under the current Statutory Condition the insured must "*forthwith*" give notice; under the proposed wording the insured must give notice "*immediately*". Both terms are consistent and imply that the insured must give notice without delay.

2. The current Statutory Condition uses the word "*showing*" in subsection (v) through (vii); the proposed wording uses the word "*stating*". The former implies that documents must be shown; the latter wording implies that a statement in words will suffice.

3. In respect of materials to evidence the loss, subsection 1(d) has some minor differences. Currently an insured is required, if requested by the insurer, to produce "*books of account, warehouse*

receipts and stock lists". The proposed Statutory Condition has narrowed this to "*books of account and inventory lists*".

4. Finally, the insured is no longer required to comply with the requirements of Statutory Condition 10 - Entry, Control, Abandonment, and Statutory Condition 11 – Appraisal, immediately after the loss. However, the insured is still required to adhere to Statutory Condition 9 - Salvage in order to protect and mitigate their loss. From a claims handling perspective, this means that both the insurer and the insured can proceed directly with getting the Proof of Loss completed, and the evidence to support the claim, without needing to consider superfluous requirements which do not impact on the initial Proof of Loss.

7. Fraud:

Current Statutory Condition	New Statutory Condition
7. Fraud Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars vitiates the claim of the person making the declaration.	**7. Fraud** Any fraud or wilfully false statement in a statutory declaration in relation to the particulars required under Statutory Condition 6 invalidates the claim of the person who made the declaration.

The new Statutory Condition alters the word "*vitiates*" to "*invalidates*" in the proposed new version.

8. Who May Give Notice and Proof:

Current Statutory Condition	New Statutory Condition
8. Who may give notice and proof Notice of loss may be given, and proof of loss may be made, by the agent of the insured named in the contract in case of absence or inability of the insured to give the notice or make the proof, and absence or inability being satisfactorily accounted for, or in the like case, or if the insured refuses to do so, by a person to whom any part of the insurance money is payable.	**8. Who may give notice and proof** Notice of loss under Statutory Condition 6 (1) (a) may be given and the proof of loss under Statutory Condition 6 (1) (b) may be made: (a) by the agent of the insured, if (i) the insured is absent or unable to give the notice or make the proof, and (ii) the absence or inability is satisfactorily accounted for, or (b) by a person to whom any part of the insurance money is payable, if the insured refuses to do so or in the circumstances described in clause (a) of this condition.

The wording of the proposed Statutory Condition in respect of who may give notice "cleans up" the current version of the Statutory Condition, making it easier to read by breaking down the constituent elements.

9. Salvage:

Current Statutory Condition	New Statutory Condition
9. Salvage (1) The insured, in the event of any loss or damage to any property insured under the contract, must take all reasonable steps to prevent further damage to any such property so damaged and to prevent damage to other property insured under this contract including, if necessary, its removal to prevent damage or further damage to it. (2) The insurer must contribute proportionately towards any reasonable and proper expenses in connection with steps taken by the insured and required under subparagraph (1) of this condition according to the respective interests of the parties.	**9. Salvage** (1) In the event of loss or damage to insured property, the insured must take all reasonable steps to prevent further loss or damage to that property and to prevent loss or damage to other property insured under the contract, including, if necessary, removing the property to prevent loss or damage or further loss or damage to the property. (2) The insurer must contribute on a prorated basis towards any reasonable and proper expenses in connection with steps taken by the insured under subparagraph (1) of this condition.

Subsection (1) of the proposed Statutory Condition adds the phrase "*to prevent* ***loss or damage*** *to other property under the contract*", implying a wider, and continuing duty on the insured to protect any other property after the initial loss or damage to insured property.

Subsection (2) of the proposed wording differs in two respects. First, the proposed subsection provides that an insurer must contribute towards the reasonable expense of the "salvage" and protection [described in subsection (1)] of the insured's property on a "*pro-rated*" basis instead of using the term "*proportionately*". Second, the new subsection removes the phrase "*according to the respective interests of the parties*".

10. Entry, Control, Abandonment:

Current Statutory Condition	New Statutory Condition
10. Entry, control, abandonment After any loss or damage to insured property, the insurer has an immediate right of access and entry by accredited agents sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and, after the insured has secured the property, a further right of access and entry sufficient to enable them to make appraisement or particular estimate of the loss or damage, but the insurer is not entitled to the control or possession of the insured property, and without the consent of the insurer there can be no abandonment to it of insured property	**10. Entry, control, abandonment** After loss or damage to insured property, the insurer has: (a) an immediate right of access and entry by accredited representatives sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and (b) after the insured has secured the property, a further right of access and entry by accredited representatives sufficient to enable them to appraise or estimate the loss or damage, but (i) without the insured's consent, the insurer is not

	entitled to the control or possession of the insured property, and (ii) without the insurer's consent, there can be no abandonment to it of the insured property.

The proposed wording in this Statutory Condition has one difference. Under the current version the insurer "*is not entitled to the control or possession of the insured property*"; in other words, there is no presumptive right of salvage. The common law right of salvage arises when the insurer has fully indemnified the insured for the loss.

Under the proposed wording, the insurer can seek the insured's consent for the control or possession of the insured's property after the loss or damage has occurred. From a claims handling perspective, this could have a beneficial effect on any subrogated claims against third parties. For example, in the case of a property destroyed by fire, the insurer could seek the insured's consent to take control and possession of the premises in order to preserve the evidence.

Typically property insurers have used forms, signed by the insured, when gaining access to the property to investigate the cause, origin and extent of the loss and to provide security for the site. However, these "Consent Forms" are limited in scope, and generally state the following:

> *The Undersigned acknowledges that the granting of rights of access to the Property, and the other rights granted herein, shall not constitute the Insurer as a*

party having control over or possession of the Property, and that such rights granted in this consent shall be in addition to those contained in the relevant statutory conditions of the insurance policy and the undersigned shall take all necessary actions incumbent upon an owner of property.

Property insurers will require an express consent of insureds to take control of and possession of the property in question.

11. Appraisal/In Case of Disagreement:

Current Statutory Condition	New Statutory Condition
11. Appraisal In the event of disagreement as to the value of the property insured, the property saved, or the amount of the loss, those questions must be determined by appraisal as provided under the Insurance Act before there can be any recovery under this contract, whether the right to recover on the contract is disputed or not, and independently of all other questions; but there is no right to an appraisal until a specific demand for it is made in writing and until after proof of loss has been delivered.	**11. In case of disagreement** (1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act, whether or not the insured's right to recover under the contract is disputed, and independently of all other questions. (2) There is no right to a dispute resolution process under this condition until

	(a) a specific demand is made for it in writing, and (b) the proof of loss has been delivered to the insurer.

This Statutory Condition has changed significantly. The "appraisal" procedure under the current BC Act, when there is a dispute as to the value of the property insured, is to be replaced with a more comprehensive "dispute resolution process".

The current appraisal procedure is found in Section 9 of the BC Act and Section 514 of the Alberta Act and is triggered only when the claim is made under a fire or a related multi- peril policy. This remedy is available only where the disputes pertains to value of the property insured, the value of the property saved or the amount of the loss.

The new dispute resolution process applies to all forms of property insurance (like the new Statutory Conditions) except automobile and marine insurance and those delineated in other parts of the New Acts. Secondly, the new provision applies more broadly to a question of "*the amount of loss or damage*", not just the "*amount of the loss*". The proposed Statutory Condition requires dispute resolution where a disagreement arises over the value of the property insured, the value of the property saved, the amount of the loss or damage, as well as the nature, extent, or adequacy of repairs or replacement of insured property.

Claims handlers should be aware that the dispute resolution process can be initiated by an insured (or insurer) for a broader range of situations. For example, an insured could initiate this process alleging that the repairs to the insured's property, or the replacement property, are substandard.

The new dispute resolution procedures under the New Acts are discussed at length in Section V. of this paper.

12. When Loss Payable:

Current Statutory Condition	New Statutory Condition
12. When loss payable The loss is payable within 60 days after completion of the proof of loss, unless the contract provides for a shorter period.	**12. When loss payable** Unless the contract provides for a shorter period, the loss is payable within 60 days after the proof of loss is completed in accordance with Statutory Condition 6 and delivered to the insurer.

The wording of the proposed Statutory Condition is much more specific. The 60 day period for payment of the loss by the insurer does not commence until the insured has completed a Proof of Loss in accordance with the provisions of Statutory Condition 6 - Requirements after Loss, *and* delivered it to the insurer; putting more onus on the insured. The property insurer must make payment within 60 days from when the completed Proof of Loss was "*delivered*" (not "*received*").

13. Replacement:

Current Statutory Condition	New Statutory Condition
13. Replacement (1) The insurer, instead of making payment, may repair, rebuild, or replace	**13. Repair or replacement** (1) Unless a dispute resolution process has been initiated, the insurer, instead of

the property damaged or lost, giving written notice of its intention so to do within 30 days after receipt of the proofs of loss. (2) In that event the insurer must commence to so repair, rebuild, or replace the property within 45 days after receipt of the proofs of loss, and after that must proceed with all due diligence to the completion of the repair, rebuilding or replacement.	making payment, may repair, rebuild or replace the insured property lost or damaged, on giving written notice of its intention to do so within 30 days after receiving the proof of loss. (2) If the insurer gives notice under subparagraph (1) of this condition, the insurer must begin to repair, rebuild or replace the property within 45 days after receiving the proof of loss, and must proceed with all due diligence to complete the work within a reasonable time.

This Statutory Condition describes the insurers' right to elect to rebuild, repair or replace the lost or damaged property; an option which, in reality, is rarely used by property insurers. Under the current BC Act if a property insurer intends to repair, rebuild or replace property damaged or lost, the insurer must give notice of their intention to proceed on this basis and commence the repair, rebuilding or replacement within 45 days of being provided with a Proof of Loss. Under the new Statutory Condition, the insurer must not only proceed on this current basis but is now also under an obligation to complete the repair, rebuild or replacement within a "*reasonable time*". Finally, under the proposed wording, if the dispute resolution process has been initiated, the insurer no longer has a right to proceed with the repair, rebuilding or replacing of lost or damaged property.

14. Action:

Current Statutory Condition	New Statutory Provision
14. Action Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.	Section 22 (1) of the New BC Act and Section 526(1) of the New Alberta Act state: (1) An action or proceeding against an insurer in relation to a contract must be commenced, (a) in the case or loss of damage to insured property, not later than 2 years after the date the insured knew or ought to have known the loss or damage occurred, and (b) in any other case not later than 2 years after the date the cause of action against the insurer arose.

This is one of the most significant differences between the current BC and Alberta Acts and the proposed New Acts. Under the New BC and Alberta Acts the limitation period has been removed from the Statutory Conditions. *The new limitation period in the case of loss or damage to property will be 2 years from the date the insured knew or ought to have known that the loss or damage occurred, and in any other case, no more than 2 years after the cause of action against the insurer arose.* These limitation periods are discussed at length in Section III of this paper.

15. Notice:

Current Statutory Condition	New Statutory Condition
15. Notice (1) Any written notice to the insurer may be delivered at, or sent by registered mail to, the chief agency or head office of the insurer in British Columbia. (2) Written notice may be given to the insured named in this contract by letter personally delivered to the insured or by registered mail addressed to the insured at the insured's latest post office address as notified to the insurer, and in this condition the expression "registered" means registered in or outside Canada.	**14. Notice** (1) Written notice to the insurer may be delivered at, or sent by registered mail to, the chief agency or head office of the insurer in the province. (2) Written notice to the insured may be personally delivered at, or sent by registered mail addressed to, the insured's last known address as provided to the insurer by the insured

For the most part, the proposed Statutory Condition in regard to Notice is the same as the current Statutory Condition. The only difference between the current and the proposed Statutory Condition is that the new version has omitted the phrase "*and in this condition the expression "registered" means registered in or outside Canada*" in respect of the use of registered mail, acknowledging the increase in people and businesses who reside primarily outside of Canada who have insurable interests within Canada.

B. INSURER TO FURNISH FORMS

Both the current BC and Alberta Acts contain provisions in the General Parts requiring the property insurer to provide the insured with the requisite Proof of Loss forms in a timely manner.

1. Current Requirements to Provide Forms in BC

Section 25 of the current BC Act provides:

> ***25 Insurer to furnish copy of application and form for claim***
>
> *(1) It is the duty of an insurer to furnish the insured or the beneficiary on request*
>
> *(a) with a true copy of the application or proposal for insurance and the policy, and,*
>
> *(b) immediately on receipt of the request and in any event not later than 60 days after receipt by it of notice of a loss or claim under the contract, with printed forms on which proof of the loss or claim may be made.*
>
> *(2) The insurer, by furnishing forms to make proof of loss, must not be taken to have admitted that a valid contract is in force or that the loss in question falls within the insurance provided by the contract.*
>
> *(3) An insurer who neglects or refuses to comply with subsection (1) commits an offence.*

Three aspects of this provision are noteworthy. First, the insurer has 60 days from the date of receiving notice of a loss or claim to provide the insured with the Proof of Loss forms. Second, by providing the forms the insurer is *not* confirming coverage for the

loss nor confirming that there is a valid insurance policy to cover the loss. Finally, Section 25 provides that an insurer's failure to comply with subsection (1) is an offence.

2. Current Requirements to Provide Forms in Alberta

In Alberta the current statutory requirements to provide the Proof of Loss forms are found in the General Part (Insurance Contracts in Alberta) at Section 519 of the Act, which provides:

> ***519. Insurer to furnish forms***
>
> *(1) Every insurer, immediately on receipt of a request, and in any event not later than 60 days after receipt of notice of loss, must furnish to the insured or person to whom the insurance money is payable forms on which to make the Proof of Loss required under the contract.*
>
> *(2) An insurer that neglects or refuses to comply with subsection (1) is guilty of an offence, and, in addition, the provisions of section 520 are not available to the insurer as a defence to an action brought, after the neglect or refusal, for the recovery of money payable under the contract of insurance.*
>
> *(3) If the insurer has, within 30 days after notification of loss, adjusted the claim acceptably to the claimant and the adjustment has been signed by the claimant or the claimant's agent, or if the amount of loss has been determined by arbitration or appraisal as provided for in this Act, the insurer is deemed to have complied with this section.*
>
> *(4) An insurer by furnishing forms to make proof of loss is not to be taken to have admitted that a valid contract is in force or that the loss in question falls within the insurance provided by the contract.*

The current Alberta Act is more expansive than the current BC Act. The basic provisions are the same (the insured to be furnished with the Proof of Loss forms within 60 days and failure by the insurer to comply is an offence under the Act), however, the

Alberta Act states that, should the insurer fail to comply with subsection (1) the insurer cannot rely on Section 520 of the Alberta Act in defending an action by the insured. That Section provides that no action under the insurance contract can be commenced until after 60 days from the submission of the Proof of Loss or the date of the loss. This prevents an insured from commencing an action immediately, regardless of the insurer's position on coverage for the loss.

Section 519 also provides that if the insurer and the insured agree as to the value of the loss and the insured signs off on the value of the loss, or, if the value of the loss is agreed upon by means of arbitration or appraisal, within 30 days of the date of loss, the insurer is deemed to have complied with this section of the Act. Essentially, this means that if the loss is adjusted expeditiously to the satisfaction of both parties, these sections will not apply.

3. Proposed Changes in BC and Alberta

The proposed changes to the requirements for the insurer to furnish the Proof of Loss to the insured follow the current Alberta Act provisions. The new sections (Section 25.1 in the New BC Act and Section 523 in the New Alberta Act) are almost identical to the existing Section 519 in the current Alberta Act. Accordingly, in Alberta there is no change to this section of the legislation. However, the New BC Act is changed considerably. Section 25.1 of the proposed New BC Act reads as follows:

> ***25.1 Insurer to furnish forms***
>
> *(1) Immediately on receipt of a request, and in any event no later than 60 days after receiving a notice of loss, an insurer must furnish to the insured or person to whom insurance money is payable forms on which the proof of loss required under the contract may be made.*

(2) *If an insurer does not comply with subsection (1), section 22 (2) is not available to the insurer as a defence to an action brought for the recovery of insurance money payable under the contract.*

(3) *If, within 30 days after a notice of loss is given, the insurer has adjusted the loss acceptably to the person to whom the insurance money is payable, the insurer need not comply with subsection (1).*

(4) *An insurer, by reason only that the insurer furnishes forms on which to make the proof of loss, must not be taken to have admitted that a valid contract is in force or that the loss in question falls within the insurance provided by the contract.*

The most fundamental difference between this proposed wording and both the current Alberta and BC Act wording is that this Section does *not* include a provision stating that an insurer's failure to comply with the 60 day timeline to provide the Proof of Loss to the insured is an offence. This offence provision has been entirely removed, even though the proposed changes to the New Alberta Act include this provision. This change may prove helpful in some circumstance for BC insurers.

Other additions to Section 25.1 in the New BC Act include subsection (2) which provides that should the insurer fail to comply with subsection (1) the insurer cannot rely on Section 22(2) in defending an action by the insured. Section 22(2) of the proposed New BC Act provides that no action under the insurance contract can be commenced until after 60 days from the submission of the Proof of Loss or the date of the loss.

Subsection (3) also provides that, if the insurer and the insured agree on the value of the loss and the insured signs off on the value of the loss, within 30 days of the date of loss, the insurer is deemed to have complied with this section of the New Act. For insurers in BC, a streamlined procedure has been introduced which did not exist before.

C. SUBROGATION

The principles of subrogation - under both the common law and statute - provide that when an insurer fully indemnifies the insured under an insurance policy, the insurer is "subrogated" to the rights of the insured to sue for the recovery of that payment against the wrongdoer who caused the damage. As a result, the insurer is entitled to commence an action in the insured's name to recover the loss. However, where an insurer has paid the full amount required by a policy but that amount does not fully indemnify an insured for its loss, it is still the insured who is entitled to control any litigation against the person said to have caused the loss. This is a long-standing position at common law, which has not been changed by the current insurance legislation.[24]

Like the Statutory Conditions, the subrogation sections are found in the Fire Part of both the current BC and Alberta Acts. As a result of the proposed changes, the subrogation section will now be merged into the General Part of the New Acts and the subrogation terms will apply to all types of insurance policy governed by the General Parts in the New Acts.

1. Current Subrogation Provisions in BC and Alberta

Currently, subrogation is addressed only in the Fire Part of both the current BC and Alberta Acts. Section 130 of the BC Act and Section 553 of the Alberta Act provide as follows:

[24] *Farrell Estates Ltd. v. Canadian Indemnity Co.* (1990), 45 B.C.L.R. (2d) 223 (C.A.).

> *(1) The insurer, on making any payment or assuming liability for making any payment under a contract of fire insurance, is subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce those rights.*
>
> *(2) If the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount must be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them.*

Subsection (1) provides that if the insurer makes a payment under the insurance contract to the insured for a loss, the insurer is "subrogated" the rights to commence a lawsuit (i.e. the insurer is given the rights to bring an action against the wrongdoer) in the insured's name against the responsible third party. Subsection (2) provides for the division of any proceeds recovered, where the recovery is insufficient to indemnify the full amount sought (either through settlement or judgment), where the action includes both the insured "subrogated" claim and additional uninsured claims brought by or on behalf of the insured (i.e. any loss or damage suffered by the insured which was not covered by any payment by the insurer to the insured pursuant to the insurance policy). The division of the recovered proceeds must be divided between the insurer and the insured based on the values of their respective claims.

One of the problems with the current BC and Alberta Acts is that both Acts fail to state who controls the subrogated litigation and ultimately is responsible for the immediate cost of the litigation. This has often led to a duplication of proceedings as both the insurer and the insured bring actions for the respective subrogated and uninsured losses. However, as discussed below, these problems have been addressed in the new legislation.

1. Proposed Changes to the Subrogation Provisions in BC and Alberta

The most fundamental change is that the subrogation sections in both the New BC and Alberta Acts will apply to *all* insurance policies and not just to policies under the Fire Part. In the New BC Act Section 28.6 has an entirely new section added. The proposed Section 546 in the Alberta Act is modelled on the subrogation provisions found in the Automobile Insurance Part and provides:

> ***546 Subrogation of insurer to rights of recovery***
>
> *(1) Subject to section 570(6), an insurer that makes any payment or assumes liability for making any payment under a contract is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights.*
>
> *(2) When the net amount recovered by an action or on settlement is, after deduction of the costs of the recovery, not sufficient to provide complete indemnity for the loss or damage suffered, the amount remaining must be divided between the insurer and the insured in the proportion in which the loss or damage has been borne by them.*
>
> *(3) When the interest of an insured in any recovery is limited to the amount provided under a deductible or co-insurance clause, the insurer has control of the action.*
>
> *(4) When the interest of an insured in any recovery exceeds that referred to in subsection (3) and the insured and the insurer cannot agree as to*
>
> *(a) the solicitors to be instructed to bring the action in the name of the insured,*
>
> *(b) the conduct and carriage of the action or any related matters,*
>
> *(c) any offer of settlement or the apportionment of an offer of settlement, whether an action has been commenced or not,*

(d) the acceptance or the apportionment of any money paid into Court,

(e) the apportionment of costs, or

(f) the launching or prosecution of an appeal,

either party may apply to the Court for the determination of the matters in question, and the Court may make any order it considers reasonable having regard to the interests of the insured and the insurer in any recovery in the action or proposed action or in any offer of settlement.

(5) On an application under subsection (4), the only parties entitled to notice and to be heard on the application are the insured and the insurer, and no material or evidence used or taken on the application is admissible on the trial of an action brought by or against the insured or the insurer.

(6) A settlement or release given before or after an action is brought does not bar the rights of the insured or the insurer unless they have concurred in the settlement or release.

The significant additions to the subrogation provisions of the legislation begin with subsections (3) to (5) which address who controls the litigation process when both the insurer and the insured are seeking to recover for the loss (i.e. there is both a subrogated action and an action for the uninsured loss). Subsection (3) provides that where the insured is seeking to recover their deductible or an amount provided for under a "co-insured" clause, the insurer will have control of the litigation. However, when the amount sought by the insured is more than that provided for under subsection (3), and there is no agreement as to who should control the litigation, subsection (4) provides that either the insurer or the insured may apply to Court for a determination as to who should have control of the litigation process. The Court can also decide on matters of conduct of the litigation, settlement, apportionment of costs and any subsequent appeal.

Subsection (5) provides that during an application to the Court only submissions by the insured and the insurer will be heard (and no other party can make submissions). It

also provides that any evidence and materials used by the parties in such an application are not to be relied on in any subsequent action brought against either the insured or the insurer.

Finally, subsection (6) provides that any release or settlement prior to commencing a subrogated action does not bar the rights of the insurer to commence a subrogated action against the wrongdoer, unless the insurer has concurred to that settlement or release.

In Alberta, the new wording addresses a number of the problems faced by insurers where both the insurer and the insured have an interest in recovering the loss from the tortfeasor. The legislation will now address the difficult issues of control of the litigation process, the decision making process and also the costs of the litigation.

D. CONCLUSION

The merging of the General Part and the Fire Part in the New Acts will eliminate many of the difficulties caused by multi-peril policies under the current BC and Alberta Acts. This merging has allowed the Legislatures the opportunity to streamline the wording of the Statutory Conditions. The changes introduced in the New BC Act to the obligations of an insurer to furnish the insured with the Proof of Loss will result in the smaller, simpler claims being handled more expeditiously. Finally, the expansion of the subrogation provisions in the New Alberta Act will help subrogating insurers deal with insureds who have uninsured claims by providing a process to decide who controls the litigation.

PART 2

A. WAIVER AND ESTOPPEL

1. Introduction

Waiver and estoppel are legal doctrines which are relied upon by both insureds and insurers to contend that the other party, by words or conduct, cannot rely strictly upon their contractual rights as provided for in a policy of insurance. The legislatures of both Alberta and BC have codified the law of waiver in the current BC and Alberta Acts. Caselaw, however, has modified the statute; in 1999 the B.C. Court of Appeal held that s. 11 of the current BC Act did not apply to conduct which constitutes estoppel, only to waiver by the insurer of a term or a condition in the policy.[25] Both New Acts deal with this and broaden the scope of both waiver and estoppel. This section of the paper will briefly summarize the law of waiver and estoppel, outline the current and proposed legislation in both Provinces, outline the changes to the legislation and address how those changes will impact insurers.

2. What is Estoppel?

Estoppel arises in situations where either the insured or the insurer has, by words, by silence or by conduct, made a representation of fact that the other party has acted upon to its detriment. The doctrine of estoppel most often arises in circumstances where the insurer, in its conduct of the defence of an action on behalf of the insured, leads the insured to believe that the claim is covered under the policy. In *Cadboro Investments Ltd.*

[25] *Bell Pole v. Commonwealth Insurance Co.*, [1999] B.C.J. No. 956 (Q.L.)(C.A.).

v. Canada West Insurance Co. [26] the British Columbia Court of Appeal described the three essential factors that must be present to conclude that an insurer is "estopped" from denying coverage. These factors are as follows:

a) the making of a representation or conduct that amounts to a representation intended to induce a course of conduct;

b) an action or omission by the person to whom the representation was made, done or omitted in reliance upon the representation; and

c) the existence of detriment [or prejudice] to such person as a consequence of the action or omission.

The Courts can even interpret silence, or inaction on the insurer's part as a representation leading to estoppel. For instance, an insurer was unsuccessful (in other words, "estopped") in its attempt to get a claim dismissed against it when the insured failed to report its claim within the six month notice provision, but the insurer had both actual notice of the accident and written material from witnesses. Only after the six months had passed did the insurer bring the limitation period to the notice of the insured, after it had already made payments for some medical treatments.[27] In this case, the insurer was estopped from relying on the limitation period defence because of its silence about the defence early on.

3. What is Waiver?

The Supreme Court of Canada has defined waiver and provided a two-part test of its constituent elements:

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[26] [1987] CarswellBC 364 (B.C.C.A.) ("*Cadboro Investments*").
[27] *Bissett (Guardian ad litem) v. Insurance Corporation of BC*, [1985] B.C.J. No. 248 (Q.L.)(S.C.).

> *Waiver occurs where one party to a contract…takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party.*
>
> *Wavier will be found only where the evidence demonstrates that the party waiving had (1) full knowledge of rights and (2) an unequivocal and conscious intention to abandon them.*[28]

The following fact pattern helps illustrate the doctrine of waiver as applied to insurance law

- A. issues a multi-peril home property policy to B.
- B.'s house burns down.
- B. makes a claim under its policy to A. but is delayed in providing receipts for the Proof of Loss.
- A. grants an extension of time to B. to provide receipts.
- A. later denies the claim, saying it was out of time.

In these circumstances, the insurer waived its right to rely on the limitation period defence to any first party claim because it informed the insured that it could have an extension of time to provide a verified Proof of Loss. The insurer knowingly abandoned its rights to insist on timely compliance.

4. Current BC and Alberta Legislation

Section 11 of the current BC Act acknowledges the potential application of the doctrine of waiver and mandates what is required for a waiver to occur.

[28] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] Carswell Alta 769 (S.C.C.) at para. 19 ("*Saskatchewan River Bungalows*").

Waiver of term or condition

11 *(1) A term or condition of a contract is not deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.*

(2) Neither the insurer nor the insured are deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract.

Section 517 of the current Alberta Act states:

Waivers

517(1) No term or condition of a contract is deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.

(2) Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract.

The sections in the current acts are identical. However, neither deals with estoppel or waiver by conduct.

5. The New BC and Alberta Act Wording

The New BC Act contains the following provision:

Waiver and estoppel

11 (1) The obligation of an insured to comply with a requirement under a contract is excused to the extent that

(a) the insurer has given notice in writing that the insured's compliance with the requirement is excused in whole or in part, subject to the terms specified in the notice, if any, or

a) (b) the insurer's conduct reasonably causes the insured to believe that the insured's compliance with the requirement is excused in whole or in part, and the insured acts on that belief to the insured's detriment.

b) (2) Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by reason only of

(a) the insurer's or insured's participation in a dispute resolution process under section 9,

(b) the delivery and completion of a proof of loss, or

(c) the investigation or adjustment of any claim under the contract.

Section 521 of the New Alberta Act is identical to the New BC Act with the exception of setting out Section 519 as Alberta's dispute resolution process under subsection 521(2)(a). In all other respects the language is the same.

6. What has Changed in BC and Alberta?

The heading of the new provision in both New Acts is "Waiver and estoppel". In their respective New Acts, both legislatures have used language to recognize waiver by conduct; the one critical issue not addressed in either current Act. Courts have stated that the current Section 11 in the BC Act does not apply to conduct which constitutes estoppel. In *Cadboro Investments* the Court held that:

A waiver is in the nature of an agreement to forego legal rights, and it is understandable that it is required that such an agreement be in writing if for no

> *other reason than to ensure certainty. Conduct justifying estoppel, however, is not something which lends itself to confirmation in written form. It is for that reason that I do not think that section 13* [currently section 11] *of the Insurance Act is of any assistance in this case.*[29]

The legislature of both Provinces has added subsection (1)(b) to the sections on Waiver and Estoppel in each New Act. Subsection (1)(b) provides insureds with statutory protection in circumstances where the insurer's conduct leads the insured to believe a certain set of facts, and to act in reliance on those facts to its detriment. The codification of waiver by conduct will give insureds another avenue to argue for coverage and highlights the need for insurers to manage any new claim from the outset so as to not forego any possible defences. In addition, the new language refers to a waiver of a "*requirement under the contract*" rather than a waiver of a "*term or condition of the contract*". This language dictates that waiver and estoppel can apply to <u>any</u> requirement under an insurance contract.

Subsection (2) remains primarily the same as the current legislation; only adding that participation in a dispute resolution process does not constitute waiver.

B. RELIEF FROM FORFEITURE

1. Introduction

Insurance contracts contain certain terms and conditions, including the Statutory Conditions under the current Acts, that must be complied with by the insured. If an insured fails to comply with these terms and conditions, some of which may be imposed by statute, then the insurer, in some circumstances, has the right to void or

[29] *Supra* note 33 at para. 14.

terminate the policy and thereby avoid all obligations under the contract. In some cases this would cause undue hardship or injustice to the insured. For example, what if an insured inadvertently failed to comply with a condition of minor importance to the insurer? The insurer would unduly benefit by being able to void or terminate the entire policy based on a minor breach of a term or condition. To avoid this situation, "*relief from forfeiture*" legislation was created to provide the courts with the power to provide a remedy to relieve against the consequences of an insured's imperfect compliance with a term or condition under the policy.

This section of the paper will first summarize the law, outline the statutory provisions dealing with relief from forfeiture in the current and New BC and Alberta Acts and outline the significant changes between the two.

2. What is Relief from Forfeiture?

The power of the Courts to grant relief against forfeiture is an equitable remedy. The remedy is granted by the Court to insureds who would otherwise lose the benefits under a policy of insurance for which they have been paying premiums.

The leading case in this area is *Elance Steel Fabricating Co. v. Falk Brothers Industries Ltd.*[30]. In *Elance* the Court considered a provision of the Saskatchewan *Insurance Act*[31] which is substantially similar to that in the current BC Act. The Court held that the relief from forfeiture section in the legislation was remedial and should be broadly interpreted. The Court stated:

[30] [1989] 2 S.C.R. 778 ("*Elance*").
[31] *Insurance Act*, R.S.S. 1978, c. S-26.

> *The purpose of allowing relief from forfeiture in insurance cases is to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer....*[32]

The prevention of hardship to the insured and the absence of prejudice to the insurer are primary considerations in determining whether to grant relief from forfeiture. Other considerations include whether the applicant's conduct was reasonable, the gravity of the breaches, and the disparity between the value of the property forfeited and damage caused by the breach. The Court ruled that the provision could be read as giving the Court the power to grant relief for breaches of terms of insurance contracts in addition to breaches of statutory conditions as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss.

3. Current BC and Alberta Legislation

The current BC Act addresses relief from forfeiture under Section 10:

> *Court may relieve against forfeiture*
>
> *10 If there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, or if there has been a termination of the policy by a notice that was not received by the insured owing to the insured's absence from the address to which the notice was addressed, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court may, on terms it deems just, relieve against the forfeiture or avoidance or, if the application for relief is made within 90 days of the date of the mailing of the notice of termination, against the termination.*

Sections 515 and 521 of the Alberta Act deal with relief from forfeiture:

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[32] *Supra*, note 37.

Relief against forfeiture

515 When there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted to be done by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on any terms it considers just.

Relief from forfeiture

521 When there has been imperfect compliance with a condition or term of the contract as to proof of loss to be given by the claimant and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the Court considers it inequitable that the insurance be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on any terms it considers just.

The current Acts state that relief from forfeiture is available in circumstances where the insured has imperfectly complied with a term of the policy or statutory condition as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss. As such, the discretion the Court has under the current Acts is a narrow one pertaining only to those policy conditions – statutory or contractual – that relate to proof of loss. It does not apply generally to all policy conditions.

There is a distinction between "imperfect compliance" and "non-compliance". This distinction was discussed by the Court in *Elance*:

> *The distinction between imperfect compliance and non-compliance is akin to the distinction between breach of a term of the contract and breach of a condition precedent. If the breach is of a condition, that is, it amounts to non-compliance, no relief under s. 109 is available.*[33]

[33] *Supra*, note 37.

In applying this distinction Courts have determined that failure to give timely notice of a claim under an occurrence based policy is "imperfect compliance";[34] whereas failing to give timely notice of a claim in accordance with the provisions of a "claims made and reported" policy is considered as non-compliance.[35] In cases of non-compliance relief from forfeiture is unavailable to the insured.

4. The New BC and Alberta Acts

Under the New BC Act, the relief from forfeiture provision reads as follows:

> *Court may relieve against forfeiture and termination*
>
> ***10*** *Without limiting section 24 of the Law and Equity Act, if*
>
> *(a) there has been*
>
> *(i) imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted by the insured with respect to the loss, and*
>
> *(ii) a consequent forfeiture or avoidance of the insurance in whole or in part, or*
>
> *(b) there has been a termination of the policy by a notice that was not received by the insured because of the insured's absence from the address to which the notice was addressed,*
>
> *and the court considers it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court, on terms it considers just, may*
>
> *(c) relieve against the forfeiture or avoidance, or*

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[34] *Canadian Equipment Sales & Service Co. v. Continental Insurance Co* (1975), 59 D.L.R. (3d) 333 (Ont C.A.), *Minto Construction Ltd v. Gerling Global General Insurance Co.* (1978), 86 D.L.R. (3d) 147 (Ont C.A.).
[35] *Stuart v. Hutchins* (1988), 164 D.L.R. (4th) 67 (Ont. C.A.); *Brelih v. St. Paul Cos*., [2006] CarswellOnt 2206 (Sup.Ct.).

(d) if the application for relief is made within 90 days of the date of the mailing of the notice of termination, relieve against the termination.

The proposed changes in the New Alberta Act are contained in Section 520:

Relief from forfeiture

520 If the Court considers it inequitable that there has been a forfeiture or avoidance of insurance, in whole or in part, on the ground that there has been imperfect compliance with

(a) a statutory condition, or

(b) a condition or term of a contract

as to the proof of loss to be given by the insured or the claimant or another matter or thing done or omitted to be done by the insured or the claimant with respect to the loss, the Court may relieve against the forfeiture or avoidance on any terms it considers just.

5. What has Changed In BC and Alberta?

There are several major changes worth noting in the new relief from forfeiture provisions. The first change to note is the addition of the words *"Without limiting section 24 of the Law and Equity Act"* in the preamble of the section. This addition clarifies that Section 24 of the *Law and Equity Act* R.S.B.C. 1996, c. 253 (the "*LEA*"), which is the general non-insurance statutory provision dealing with relief from forfeiture, applies in addition to the provisions under the New BC Act.

Section 24 of the *LEA* states:

a) Relief against penalties and forfeitures

24 *The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.*

The relief from forfeiture provision in the *LEA* offers broader relief than the current Statutory Condition. Historically, the *LEA* did not apply to insurance policies, or the Courts applied it inconsistently. The rationale for this is that in older cases the Courts were of the view that the *Insurance Acts* codified the whole law of insurance and as such, the *LEA* did not apply to insurance policies. However, in 1994, the Supreme Court of Canada in *Saskatchewan River Bungalows* [36] had to consider whether or not the provisions of the Alberta *Judicature Act*[37] (which is similar to the *LEA*) dealing with relief from forfeiture could apply to a case involving a life insurance policy, which policy was excluded from the relief from forfeiture provisions in the Alberta *Insurance Act*.[38] The Court determined that the insured's unreasonable conduct precluded relief on the facts of the case, but stated that the remedy under the *LEA* (or its equivalent provisions in other provincial Acts) was an equitable remedy and "*purely discretionary*". The Court also stated:

> *...the existence of a statutory power to grant relief where other types of insurance are forfeited...does not preclude application of the Judicature Act to contracts of life insurance. The Insurance Act does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the Insurance Act must therefore be rejected.*[39]

In order to determine whether relief from forfeiture should be granted, the Court reviewed the conduct of the insured, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach. The Court did not specifically address whether the relief from forfeiture provisions could be

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[36] *Supra*, note 35.
[37] R.S.A. 1980, c.J-1.
[38] R.S.A. 1980, c. I-5.
[39] *Supra*, note 35.

used as a pre-loss remedy in the context of an insurance contract, but nor did it rule this application out.

The addition of the words "*…without limiting Section 24 of the Law and Equity Act*" to the New BC Act clarify that both the broader *LEA* and the comparatively more "narrow" provisions in the New Acts dealing with relief from forfeiture will apply. This express statement in regard to dual application favours insureds who seek the discretionary remedy from the Courts, provided that the insured's conduct can withstand judicial scrutiny required under the *LEA* provisions.

A second change is Section 10(b) and (d) to the relief from forfeiture provision. The current wording addressed "*imperfect compliance*" with the statutory condition, which meant in general, post-loss behaviour of the insured, such as a problematic Proof of Loss. Again, in favour of the insured, Section 10(b) and (d) of the New BC Act encompasses other activities during the life of the policy for which relief from forfeiture is now available. Under this subsection, if the insurer terminates the policy by sending a written notice to the address of the insured, but the insured does not receive the notice because of absence from the address to which the notice was addressed, the insured may apply to the Court for relief against the termination of the policy. In order to be granted this relief, the insured must apply to the Court within 90 days of the date of mailing of the notice. For example, if the insured was on an extended absence from the country and a property insurance policy was terminated for that location during his or her absence, and a loss occurred during the absence, coverage may still be available for the loss pursuant to this new subsection.

Like BC, the Alberta legislation has been amended to make the section easier to read by adding subsections and by combining Sections 515 and 521 into one section. However,

unlike BC, Alberta legislators have chosen not to add a remedy for relief from forfeiture in the event of a termination notice being sent to an address in the insured's absence. Unlike in BC, if an Alberta insured receives a termination notice at an address where he is not present he may not be able to obtain coverage through the relief from forfeiture provision under the New Alberta Act.

C. OVERLAPPING INSURANCE

1. Introduction

Frequently a loss will arise for which the insured will have two or more policies that could potentially respond to the loss. This section of the paper will deal with the issues surrounding overlapping insurance, how those issues are dealt with in law, what the current and proposed statutes provide and the implication of changes between the two.

2. Overlapping Insurance

It is a well-established principle of insurance law that where an insured holds more than one policy of insurance that covers the same risk, the insured may never recover more than the amount of the full loss but is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary. That insurer is entitled to contribution from all other insurers who have covered the same risk. This doctrine of equitable contribution among insurers is founded on the general principle that parties under a coordinate liability to make good a loss must share that burden pro-rata.

The Supreme Court of Canada set out the general principles concerning the right of contribution among insurers as follows:

1. *All the policies concerned must comprise the same subject-matter.*

2. *All the policies must be effected against the same peril.*

3. *All the policies must be effected by or on behalf of the same assured.*

4. *All the policies must be in force at the time of the loss.*

5. *All the policies must be legal contracts of insurance.*

6. *No policy must contain any stipulation by which it is excluded from contribution.*[40]

Once this issue is clarified another issue arises. Many policies contain "other insurance" clauses which are designed to govern how each insurer should contribute towards the loss in the event of overlapping policies.

There are several types of "other insurance" clauses including "pro-rata" clauses, "excess" clauses and "escape" clauses, to name a few. There has been substantial litigation over which policy should respond and in what proportion given the various "other insurance" clauses in each policy. The law in regard to other insurance clauses is summarized by the Ontario Court of Appeal in *Canadian Universities' Reciprocal Insurance v. Halwell Mutual Insurance Co.*[41]:

> *…[There are] three propositions which form the basis of interpreting and applying "other insurance" clauses contained in two applicable insurance policies:*
>
> *(1) If the two clauses are irreconcilable and effectively cancel each other out, then both insurers are liable and must share the obligation rateably as between themselves.*

[40] *Family Insurance Corp. v. Lombard Canada Ltd.,* [2002] 2 S.C.R. 695.
[41](2002), 217 D.L.R. (4th) 314 (Ont. C.A.).

(2) However, if the two clauses can be read as working together so that they do not effectively cancel each other out, then the policies apply as they are stated with one primary and the other either excess or excluded as the case may be.

(3) In interpreting the policies, one determines the intent of each insurer by an examination of the policy language and not by otherwise attempting to determine the subjective intentions of the insurers.

3. Current BC and Alberta Legislation

Section 127 of the current BC Act - in the Fire Part – provides as follows:

a)
b) Several policies

127 *(1) If, on the happening of any loss or damage to property insured, there is in force more than one contract covering the same interest, the insurers under the respective contracts are each liable to the insured for its rateable proportion of the loss, unless it is otherwise expressly agreed in writing between the insurers.*

(2) For the purpose of subsection (1), a contract is deemed to be in force despite any term of it that the policy must not cover, come into force, attach, or become insurance with respect to the property until after full or partial payment of any loss under any other policy.

(3) Nothing in subsection (1) affects the validity of any divisions of the sum insured into separate items, or any limits of insurance on specified property, or any paragraph referred to in section 128, or any contract condition limiting or prohibiting the having or placing of other insurance.

(4) Nothing in subsection (1) affects the operation of any deductible clause, and

(a) if one contract contains a deductible, the prorated proportion of the insurer under that contract must be first ascertained without regard to the clause, and then the clause must be applied only to affect the amount of recovery under that contract, and

(b) *if more than one contract contains a deductible, the prorated proportion of the insurers under those contracts must be first ascertained without regard to the deductible clauses, and then the highest deductible must be pro rated among the insurers with deductibles, and these pro rated amounts must affect the amount of recovery under those contracts.*

(5) Nothing in subsection (4) is to be construed to have the effect of increasing the prorated contribution of an insurer under a contract that is not subject to a deductible clause.

(6) Despite subsection (1), insurance on identified articles is a first loss insurance as against all other insurance.

The equivalent Alberta provision is in Section 551 - also under the Fire Part - and reads almost identically to the BC legislation:

Rateable contributions

551(1) When, on the happening of any loss or damage to insured property, there is in force more than one contract covering the same interest, the insurers under the respective contracts are each liable to the insured for its rateable proportion of the loss unless it is otherwise expressly agreed in writing between the insurers.

(2) For the purpose of subsection (1), a contract is deemed to be in force despite any term of the contract that the policy does not cover, come into force, attach or become insurance with respect to the property until after full or partial payment of any loss under any other policy.

(3) Nothing in subsection (1) affects the validity of any division of the sum insured into separate items, any limits of insurance on specified property, any clause referred to in section 550 or any contract condition limiting or prohibiting the having or placing of other insurance.

(4) Nothing in subsection (1) affects the operation of any deductible clause, and

> (a) *if one contract contains a deductible, the prorated proportion of the insurer under that contract must be first ascertained without regard to the clause and then the clause must be applied only to affect the amount of recovery under that contract, and*
>
> (b) *if more than one contract contains a deductible, the prorated proportion of the insurers under those contracts must be first ascertained without regard to the deductible clauses and then the highest deductible must be prorated among the insurers with deductibles, and those prorated amounts affect the amount of recovery under those contracts.*
>
> *(5) Nothing in subsection (4) may be construed to have the effect of increasing the prorated contributions of an insurer under a contract that is not subject to a deductible clause.*
>
> *(6) Despite subsection (1), insurance on identified articles are a first loss insurance as against all other insurance.*

Both sections stipulate that if there are two or more policies insuring the same property both insurers are liable to the insured for their respective rateable proportion of the loss. An insurer cannot avoid its liability by including a clause which stops the policy from taking force until after payment is made on any other policy. Subsection (2) of both current Acts deems a policy to be in force despite such a clause. Both current Acts also state that the existence or non-existent of deductible clauses cannot operate to increase the liability of an insurer.

4. The New BC and Alberta Acts

The New BC Act addresses proportionate contributions under the General Part of the legislation, in Section 28.1, as follows;

Proportionate contributions

28.1 *(1) If, on the happening of loss or damage, there is in force more than one contract covering the loss or damage, the insurers under the respective contracts are each liable to the insured for their rateable proportion of the loss, unless it is otherwise expressly agreed in writing between the insurers.*

(2) For the purpose of subsection (1), a contract is deemed to be in force despite any term or condition of it that the contract does not cover the loss or damage or attach, come into force or become insurance with respect to the loss or damage until after full or partial payment of any loss under any other contract.

(3) Nothing in subsection (1) affects

(a) the validity of any divisions of the amount of insurance into separate items,

(b) the limits of insurance on specified property,

(c) a clause referred to in section 28.2, or

(d) a contract condition limiting or prohibiting the having or placing of other insurance.

(4) Nothing in subsection (1) affects the operation of a deductible clause, and

(a) if one contract contains a deductible clause, the prorated proportion of the insurer under that contract must be first ascertained without regard to the clause, and then the clause must be applied only to affect the amount of recovery under that contract, and

(b) if more than one contract contains a deductible clause, the prorated proportions of the insurers under those contracts must be first ascertained without regard to the deductible clauses, and then the highest deductible must be prorated among the insurers with deductibles, and these prorated amounts affect the amount of recovery under those contracts.

(5) Nothing in subsection (4) is to be construed to have the effect of increasing the prorated contribution of an insurer under a contract that is not subject to a deductible clause.

(6) Despite subsection (1), insurance on identified articles is a first loss insurance as against all other insurance.

Section 544 of the New Alberta Act reads as follows:

Rateable contributions

544(1) If, on the happening of loss or damage, there is in force more than one contract covering the loss or damage, the insurers under the respective contracts are each liable to the insured for their rateable proportion of the loss, unless it is otherwise expressly agreed in writing between the insurers.

(2) For the purpose of subsection (1), a contract is deemed to be in force despite any term or condition of it that the contract does not cover, attach, come into force or become insurance until after full or partial payment of any loss under any other contract.

(3) Nothing in subsection (1) affects the validity of any division of the sum insured into separate items, any limits of insurance on specified property, any clause referred to in section 543 or any contract condition limiting or prohibiting having or placing other insurance.

(4) Nothing in subsection (1) affects the operation of any deductible clause, and

(a) if one contract contains a deductible clause, the prorated proportions of the insurer under that contract must be first ascertained without regard to the deductible clause and then the clause must be applied only to affect the amount of recovery under that contract, and

(b) if more than one contract contains a deductible clause, the prorated proportions of the insurers under those contracts must be first ascertained without regard to the deductible clauses, and then the highest deductible must be prorated among the insurers with deductible clauses, and those

prorated amounts affect the amount of recovery under those contracts.

(5) Nothing in subsection (4) may be construed to have the effect of increasing the prorated contributions of an insurer under a contract that is not subject to a deductible clause.

(6) Despite subsection (1), insurance on identified articles is a first loss insurance as against all other insurance.

(7) This section does not apply to a subscription contract issued by 2 or more insurers.

5. What Has Changed in BC and Alberta?

As discussed earlier in this paper, as a direct result of the Supreme Court of Canada rulings in the *KP Pacific Holdings*, *supra*, and *Gore. v. Churchland*, *supra*, rulings, the Fire Parts in both the New BC Act and the New Alberta Act have been merged with the General Part. The consequence of this legislative shifting is that now any provision in the General Part will apply not only to fire policies but to all insurance policies (unless specifically excepted), including property policies, fidelity loss policies, or jewellers block policies, to name a few diverse examples.

More specifically, under the proposed wording of the New Acts in regard to proportionate or rateable contribution between insurers, the new legislation deletes the word "property" from subsection (1). The section now reads "*on the happening of any loss or damage*" rather than "*on the happening of loss or damage* ***to property***". One issue left unresolved is in the context of two insurance policies covering the same loss. The phrase "*loss or damage*" applies in the context of first party insurance, whatever the kind of policy. But where there are overlapping insurance policies, and the issue of defence costs arises, is a failure to reimburse for defence costs in any underlying action "*loss or*

damage" under the wording of the New Act? This question of interpretation of the New Act may require judicial review.

The only other change is the addition of subsection (7) to the New Alberta Act which specifically excludes a subscription contract from being caught by this legislation. There are no other significant changes to the legislation.

6. Conclusion

The provisions in regard to proportionate or rateable contribution amongst insurers in the New Acts will now appear under the General Parts (as a result of the merger of the Fire Parts with the General Parts). In the past, the application of the overlapping insurance sections has been limited to pure fire policies rather than to multi-peril policies that include fire risk coverage. The New Acts will apply to fire, multi-peril and general liability policies, among other types of policies, which provides clarification for the insurer and insured alike.

D. ELECTRONIC RECORDS

Considering advances in technology and the way in which communication has changed, the legislatures of each Province have enacted a new provision dealing with electronic communications in the insurance context. Under the New BC Act, Section 2.5 authorizes documents, that under the Acts must or may be provided to another person, to be provided electronically in accordance with the *Electronic Transactions Act*, S.B.C. 2001, c. 10 (the "*ETA*"):

Electronic communications

2.5 (1) If under this Act a record is required or permitted to be provided to a person personally, by registered mail or by any other means, unless regulations referred to in subsection (4) of this section or under section 192 (2) (e.2) provide otherwise, the record may be provided to the person in electronic form in accordance with the Electronic Transactions Act.

(2) Despite section 2 (4) (a) and (b) of the Electronic Transactions Act, in this section "record" includes a declaration or a contract that designates the insured, the insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance money is to be payable.

(3) For the purposes of time periods under this Act, a record provided in electronic form is deemed to have been sent by registered mail to the address required under this Act.

(4) The Electronic Transactions Act and subsection (1) of this section do not apply to a record, or in relation to a provision, under this Act that is excluded from their application by regulation.

Under the New Alberta Act, Section 547 reads:

Electronic Communications

547(1) In this section and section 548, a reference to "this Act" includes the regulations made under this Act.

(2) If under this Act a record is required or permitted to be provided to a person personally, by mail or by any other means, unless regulations referred to in subsection (4) or under section 511(1)(g.3) provide otherwise, the record may be provided to the person in electronic form in accordance with the Electronic Transactions Act.

(3) For the purposes of time periods under this Act, a record provided in electronic form is deemed to have been sent by registered mail to the address required under this Act.

(4) The Electronic Transactions Act and subsection (2) do not apply to a record under or in relation to a provision of, this Act that is excluded from their application by regulation.

Regulations

548 The Lieutenant Governor in Council may make regulations

(a) Prescribing any matter that is required or permitted to be prescribed under this Subpart;

(b) Excluding a record under or a provision of this Act from the application of the Electronic Transactions Act and section 547(2).

Both sections in the New Acts allow records that formerly had to be delivered in person or by registered mail to be delivered in accordance with the *ETA* of each Province. This is a welcome change to the insurance industry given that email and scanned documents have now become widely used forms of communication in the insurance world. The practical implications for insurers are positive; communication will be more timely, and less expensive, if both parties can use the new method of communication.

In BC, the *ETA* states that the writing requirement is satisfied if the record is in electronic form and is accessible for future reference:

Requirement for a record to be in writing

5 *A requirement under law that a record be in writing is satisfied if the record is*

(a) in electronic form, and

(b) accessible in a manner usable for subsequent reference.

The delivery of a written record is satisfied if delivered in electronic format if the record is accessible for future reference and capable of being retained:

Requirement to provide information or a record to be in writing

> ***6*** *A requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is*
>
> *(a) accessible by the other person in a manner usable for subsequent reference, and*
>
> *(b) capable of being retained by the other person in a manner usable for subsequent reference.*

The Alberta *ETA* is very similar to its counterpart in BC. The wording of the New Acts, with reference to the *ETA*, will facilitate business transactions in the insurance world and make it easier, less expensive, and potentially much faster for both the insured and insurer to communicate with each other.

V. DISPUTE RESOLUTION PROCEDURES

A. INTRODUCTION

Due to escalating claims costs, insurers need alternative and cost-effective means to settle claims. In the context of first party property claims, an often-overlooked way to settle claims is the appraisal process provided for under Section 9 of the current BC Act and Section 514 of the current Alberta Act. Changes are planned to these dispute resolution mechanisms to provide for broader application and use of alternative resolutions of insurance disputes. The legislative thrust of these changes is to move certain insurance "disputes" out of the Courts – and out of litigation – and into alternate dispute venues. This section of our paper will address the appraisal procedures now in place, the proposed amendments to those procedures, and some of the practical issues and limitations concerning both.

B. THE APPRAISAL PROCESS IN BC

Section 9 of the BC Act provides:

> *(1) This section applies to a contract that*
>
> *(a) provides insurance against loss or damage*
>
> *(i) by fire, lightning or explosion, or*
>
> *(ii) from any of the other perils referred to in section 120,*
>
> *(b) provides insurance against loss of rents or profits or loss from business interruption, resulting from a peril referred to in paragraph (a), or*
>
> *(c) contains a condition, statutory or otherwise, that requires that a disagreement in respect of specified matters be determined by appraisal.*
>
> *(2) An insurer must give notice to an insured of the availability of the appraisal process established by this Act within 21 days after the insurer becomes aware that,*
>
> *(a) in respect of a contract referred to in subsection (1)(a) or (b), there is a disagreement between the insurer and the insured as to the value of the property insured, the value of the property saved or the amount of the loss, or*
>
> *(b) in respect of a contract referred to in subsection (1)(c), there is a disagreement between the insurer and the insured as to a matter for which an appraisal is required in the contract.*
>
> *(3) The value or amount in dispute in a disagreement referred to in subsection (2)(a) or the matter in respect of which there is a disagreement referred to in subsection (2)(b) must, unless the insurer and the insured are able to resolve their disagreement, be determined by an appraisal under this section.*
>
> *(4) An appraisal under this section must not be conducted until*

(a) the insured has delivered to the insurer a proof of loss, and

(b) one of the parties to the disagreement has delivered to the other a written demand for an appraisal.

(5) An appraisal must be conducted under this section

(a) before any recovery is made under the contract,

(b) independently of any other question, and

(c) whether or not the right to recover on the contract is disputed.

(6) For an appraisal under this section, the insured and the insurer must each appoint an appraiser, and the 2 appraisers appointed must appoint an umpire.

(7) The appraisers must determine the matters in disagreement and, if they fail to agree, they must submit their differences to the umpire, and the finding in writing of any 2 determines the matters.

(8) Each party to the appraisal must pay the appraiser appointed by that party and must bear equally the expense of the appraisal and the umpire.

(9) If

(a) a party fails to appoint an appraiser within 7 clear days after being served with written notice to do so,

(b) the appraisers fail to agree on an umpire within 15 days after their appointment, or

(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

the Supreme Court may appoint an appraiser or umpire, as the case may be, on the application of the insured or of the insurer.

The current BC Act mandates an appraisal process in circumstances where the insured and insurer cannot agree as to an issue of value after a loss. This provision creates a simple and inexpensive procedure to resolve disputes. However, the application of the appraisal process under the current BC Act is actually quite narrow; it only applies to disputes pertaining to the valuation of claims arising under three circumstances:

1. Contracts of fire insurance;

2. Policies providing coverage for damage caused by falling aircraft, earthquake, wind storm, tornado, limited hail, sprinkler leakage, riot, malicious damage, weather, water damage, smoke damage, civil commotion and impact by vehicles; and

3. Contracts containing a condition requiring use of the appraisal process.

Practically speaking, the appraisal remedy is now triggered only when the claim is made under a fire or a related multi-peril policy. The appraisal remedy does <u>not</u> extend to the adjudication of any matters other than value. The right to an appraisal does not arise until two conditions have been met. First, a written demand must be delivered by one party to the other. Second, a Proof of Loss must be provided by the insured. Once those conditions are met, the insured and insurer will each appoint an appraiser and the two appraisers appoint an umpire. The insurer will typically appoint an adjuster who has adjusted the claim as its appraiser; the insured will appoint a public adjuster or an appraiser of their choice. These individuals have often been involved in the claim from its inception. The appraisers are not required to be impartial but an umpire will be called upon when the two appraisers nominated by the parties cannot agree on the

values. However, the umpire appointed by the two appraisers is meant to be an independent party and is often a lawyer.

The role of the appraiser is to attempt to resolve the matters in disagreement. An umpire is only called upon if the two appraisers cannot reach a resolution. It has been recommended that the proper procedure for an appraisal under the current statutory regime is:

1. The two appraisers will endeavour to identify the matters with respect to which the parties are in disagreement.

2. The two appraisers will then try to resolve those differences.

3. It they are unable to resolve the differences, then they will refer those matters to the umpire.

4. Any two of them may determine the matters at issue.

If a party refuses to appoint an appraiser within seven days of written demand, the other party can apply to Court for an Order that an appraiser be appointed. If the two parties cannot agree on an umpire, application can also be made to Court for the appointment of an umpire. The costs of the procedure are borne by each party; the parties share the cost of the umpire.

The objective of the appraisal process under the current Acts is to arrive at an amount that represents a single global award (even if there are a number of items in dispute) and this award is binding once signed by two of the three appointees. The obvious

benefit of the single global award is to eliminate multiple appraisal awards stemming from the same loss.

Under the current appraisal process, an umpire's statutory authority extends only to disputes involving the "*…value of property insured, the property saved and the amount of the loss*". All other disputed issues, including construction of the policy, are left to negotiate or litigate. Umpires are not authorized to address issues of coverage. Nor is the umpire required to hold a hearing, administer oaths to witnesses, or receive oral evidence or sworn Affidavit evidence. Counsel do not have to appear before them to argue issues. However, it has been held that umpires may hear oral testimony under oath and receive evidence by sworn Affidavit or hear submissions of counsel. The appraisal process is intended to address the value of the goods only and caselaw has imposed other limitations on an umpire's jurisdiction, and has established that umpires are not entitled to determine:

- the quantity of items claimed;
- the age and condition of items claimed; or
- the meaning of method by which "actual cash value" or "replacement value" is to be determined.

C. THE APPRAISAL PROCESS IN ALBERTA

Section 514 of the Alberta Act provides:

> *514(1) This section applies to a contract, other than a contract of hail insurance, containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.*

(2) The insured and the insurer must each appoint an appraiser, and the 2 appraisers so appointed must appoint an umpire.

(3) The appraisers must determine the matters in disagreement and, if they fail to agree, they must submit their differences to the umpire, and the finding in writing of any 2 determines the matters.

(4) Each party to the appraisal must pay the appraiser that the party appointed, and each party must bear equally the expense of the appraisal and the umpire.

(5) If

(a) a party fails to appoint an appraiser within 7 clear days after being served with written notice to do so,

(b) the appraisers fail to agree on an umpire within 15 days after their appointment, or

(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

the Court may appoint an appraiser or umpire, as the case may be, on the application of the insured or of the insurer.

The procedures involved in the current appraisal process in Alberta are very similar to those in BC. However, the application of the process is different; rather than automatically applying to disputes arising under certain types of policies (as well as those specifically incorporating it) as in BC, appraisal in Alberta is mandatory only where the policy contains a condition - statutory or otherwise - providing for an appraisal. By virtue of the Alberta Act's statutory provisions, the appraisal remedy is currently available only for claims under fire and first party automobile insurance policies. As a result, the application and availability of the appraisal remedy in Alberta is now very limited. The Alberta Act also excludes disputes under hail insurance

policies from the general appraisal provisions, but provides for a unique, "stand-alone" appraisal mechanism that applies only to hail claims.

Generally speaking, appraisals in Alberta are also limited to questions of "*...the value of the property insured, the property saved, or the amount of the loss*". Similar to BC, Alberta appraisers or umpires cannot determine issues such as coverage under policies. In the case of first party automobile coverage, appraisals can also address disagreements as to the nature or extent of repairs and replacements required, or their adequacy.

D. THE PROPOSED DISPUTE RESOLUTION LEGISLATION IN BRITISH COLUMBIA AND ALBERTA

1. British Columbia

British Columbia's proposed new dispute resolution mechanisms are set out under Sections 9 and Statutory Condition 11.1 of the New BC Act, which state:

Dispute resolution

*9 (1) In this section, **"representative"** means a dispute resolution representative appointed under subsection (4).*

(2) This section applies to disputes between an insurer and an insured about a matter that under Statutory Condition 11 set out in section 27.1, or another condition of the contract, must be determined using this dispute resolution process.

(3) Either the insured or the insurer may demand in writing the other's participation in a dispute resolution process after proof of loss has been delivered to the insurer.

(4) Within 7 days after receiving or giving a demand under subsection (3), the insured and the insurer must each appoint a dispute resolution representative and, within 15

days after their appointment, the 2 representatives must appoint an umpire.

(5) A person may not be appointed as a representative if the person is

(a) the insured or the insurer, or

(b) an employee of the insured or the insurer.

(6) The representatives must

(a) determine the matters in dispute by agreement, and

(b) if they fail to agree, submit their differences to the umpire,

and the written determination of any 2 of them determines the matters.

(7) Each party to the dispute resolution process must pay the representative whom the party appointed, and each party must bear equally the expense of the dispute resolution process and the umpire.

(8) If

(a) a party to a dispute resolution process fails to appoint a representative in accordance with subsection (4), or

(b) a representative fails or refuses to act or is incapable of acting and the party that appointed that representative has not appointed another representative within 7 days after the failure, refusal or incapacity,

on application of the insurer or insured, on 2 days' notice to the other, the Supreme Court may appoint a representative.

(9) On an application under subsection (8), the court may award special costs against the person whose representative is appointed by the court, whether or not that person appeared on the application.

(10) If

(a) the representatives fail to appoint an umpire in accordance with subsection (4), or

(b) the umpire fails or refuses to act or is incapable of acting,

either representative may make an application to the superintendent for the appointment of an umpire, containing

(c) the names of 3 persons the applicant believes are capable of performing the functions of the umpire, and

(d) the credentials of the 3 persons.

(11) Before making an application under subsection (10), the applicant must give notice in writing to the other representative of the intention to make the application, which notice must contain the names and credentials the applicant is submitting to the superintendent under subsection (10).

(12) An application under subsection (10) must be accompanied by a copy of the notice, and the date it was given, under subsection (11).

(13) Within 15 days after receiving a notice under subsection (11), the other representative may provide to the superintendent and the applicant

(a) the names of 3 persons the representative believes are capable of performing the functions of the umpire, and

(b) the credentials of the 3 persons.

(14) The superintendent must appoint an umpire from the names provided under subsection (10) or (13) as soon as practicable after the earlier of the following occurs:

(a) the superintendent receives names and credentials under subsection (13);

(b) the period for providing names and credentials under subsection (13) expires.

Statutory Condition 11 (s.27.1) – In case of disagreement

11. (1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act, whether or not the insured's right to recover under the contract is disputed, and independently of all other questions.

(2) There is no right to a dispute resolution process under this condition until

(a) a specific demand is made for it in writing, and

(b) the proof of loss has been delivered to the insurer."

The proposed dispute resolution process in BC is procedurally very similar to the existing legislation. However, there are four notable changes to alternative dispute resolution under the New BC Act:

1. Mandatory dispute resolution is no longer limited to fire or related multi-peril policies. Instead, the provisions of Statutory Condition 11 mean that dispute resolution will be available to address applicable disputes between insurers and insureds arising under virtually any kind of insurance policy in BC. In other words, the type of policy under which a claim is made is irrelevant, so long as the disagreement is of the type set out in Statutory Condition 11.

2. The type of dispute that can be addressed by the mandatory dispute resolution process is widened. Previously, this remedy was only available where the disputes pertained to value of the property insured, the value of the property saved or the amount of the loss. The new amendments require dispute resolution where the disagreement arises over the nature, extent, or adequacy of repairs or replacement of insured property.

3. The existing BC Act requires insurers to notify insureds of the dispute resolution process once the insurer becomes aware of a disagreement. The New BC Act does not yet contain any such notice requirements, but Section 192 permits the enactment of regulations prescribing procedures to be followed by an umpire, and requiring an insurer to give notice of the availability of the dispute resolution process.

4. The new provisions specifically provide that participation in a dispute resolution process, by itself, will <u>not</u> amount to waiver of any term or condition of an insurance contract. This appears to be

an attempt to further promote the use of alternative dispute resolution, by removing any concerns that a party might be said to have waived its rights by engaging in the process.

2. Alberta

Alberta's new dispute resolution provisions are set out in the New Alberta Act under Section 519 and Statutory Condition 11(1) under Section 540, as follows:

Dispute resolution

519(1) In this section, "representative" means a dispute resolution representative appointed under subsection (5).

(2) This section applies to disputes between an insurer and an insured about a matter that under Statutory Condition 11 set out in section 540 or another condition of the contract must be determined using this dispute resolution process.

(3) This section does not apply to a contract of hail insurance.

(4) Either the insured or the insurer may demand in writing the other's participation in a dispute resolution process after proof of loss has been delivered to the insurer.

(5) Within 7 days after receiving or giving a demand under subsection (4), the insured and the insurer must each appoint a dispute resolution representative, and within 15 days after their appointment, the 2 representatives must appoint an umpire.

(6) A person may not be appointed as a representative if the person is

(a) the insured or the insurer, or

(b) an employee of the insured or the insurer.

(7) *The representatives must determine the matters in dispute by agreement and, if they fail to agree, submit their differences to the umpire, and the written determination of any 2 of them determines the matters.*

(8) *Each party to the dispute resolution process must pay the representative whom the party appointed, and each party must bear equally the expense of the dispute resolution process and the umpire.*

(9) *If*

(a) *a party to a dispute resolution process fails to appoint a representative in accordance with subsection (5), or*

(b) *a representative fails or refuses to act or is incapable of acting and the party that appointed that representative has not appointed another representative within 7 days after the failure, refusal or incapacity, on application of the insurer or the insured on 2 days' notice to the other, the Court may appoint a representative.*

(10) *On an application under subsection (9), the Court may award costs on a solicitor and client basis against the person whose representative is appointed by the Court, whether or not that person appeared on the application.*

(11) *If*

(a) *the representatives fail to appoint an umpire in accordance with subsection (5), or*

(b) *the umpire fails or refuses to act or is incapable of acting, either representative may make an application to the Superintendent for the appointment of an umpire, containing*

(c) the names of 3 persons the applicant believes are capable of performing the functions of the umpire, and

(d) the credentials of the 3 persons.

(12) Before making an application under subsection (11), the applicant must give notice in writing to the other representative of the intention to make the application, which notice must contain the names and credentials the applicant is submitting to the Superintendent under subsection (11).

(13) An application under subsection (11) must be accompanied with a copy of the notice, and the date it was given, under subsection (12).

(14) Within 15 days after receiving a notice under subsection (12), the other representative may give the Superintendent and the applicant

(a) the names of 3 persons the representative believes are capable of performing the functions of the umpire, and

(b) the credentials of the 3 persons.

(15) The Superintendent must appoint an umpire from the names submitted under subsection (11) or (14) as soon as practicable after the earlier of the following occurs:

(a) the Superintendent receives names and credentials under subsection (14);

(b) the period for providing names and credentials under subsection (14) expires.

(16) An umpire is bound by the rules of procedural fairness in carrying out the umpire's functions under this section.

Statutory Condition

11(1) (Section 540) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act whether or not the insured's right to recover under the contract is disputed, and independently of all other questions.

(2) There is no right to a dispute resolution process under this condition until

(a) a specific demand is made for it in writing, and

(b) the proof of loss has been delivered to the insurer.

The New Alberta Act also contains non-waiver provisions which are applicable to dispute resolution and which are identical to those under the New BC Act.

In keeping with the stated intention of harmonizing the BC and Alberta legislation, the Alberta dispute resolution provisions are virtually identical to the new BC provisions, with only a few exceptions:

1. The amendments do not apply to hail insurance (which retains its own unique dispute resolution process).

2. The amendments do not apply to automobile insurance policies. However, auto insurance is subject to its own dispute resolution process for disagreements over the nature and extent of repairs and replacements required, the adequacy of any such repairs or replacements, or the amount of loss and damage; and

3. The amendments permit the enactment of regulations providing for the resolution of complaints by an insured or an applicant for insurance against an insurer, insurance agent, or broker, regarding matters such as premiums or how they are determined, the availability of insurance, and fault in relation to a claim. This authority to make regulations creates an "option" for the Alberta legislature to provide for an ever broader scope of dispute resolution which could apply to any one or more of the above in the future.

E. SUMMARY AND CONCLUSIONS

The amendments to the appraisal provisions in the New Alberta Act and the New BC Act demonstrate that each government has recognized the value of alternative dispute resolution, and seeks to increase its use in insurance disputes. The proposed amendments have broadened the scope of alternative dispute resolution under the statutes in two significant ways. First, this mechanism will now be available for disputes arising under almost all types of policies, and will not be limited to claims under fire policies. Second, while still largely limited to "value" disputes, the scope of alternative dispute resolution has been expanded to include disputes over the nature and extent of repairs to, or replacement of, property. These changes should lead to more disputes being resolved under the new legislation, and a greater number being resolved away from the Courts.

One aspect of the proposed appraisal remedy provisions that is not addressed in either New Act is the availability of the mechanism for "mixed" claims; those involving both a claim against the insurer for indemnity, combined with an allegation of bad faith

calling for punitive damages for an insurer's conduct. If these sorts of claims are made, can the applicant invoke the appraisal remedy in the Statutory Condition of each New Act, which allows for the remedy to be used "…*independently of all other questions*" and once the determination is made of the amount owing, start or continue an action for "bad faith" damages? There is nothing in the new legislation that would prevent an insurers' counsel from doing so.

Despite the significant changes in the appraisal provisions, and the outstanding question of "mixed" claims for damages, most of the procedural aspects of dispute resolution under the proposed legislation remain the same. The existing limitations on an umpire's jurisdiction or authority would appear to remain under the new legislation, as no substantive changes are being enacted in that area. In the long run, the increased availability and scope of dispute resolution under the New Acts should be welcomed by insurers seeking cost-effective and timely ways to resolve disputes with insureds and to stay out of litigation and out of the Courts.

VI. LIMITS ON "FREEDOM OF CONTRACT" IN UNDERWRITING A POLICY

A policy of insurance is fundamentally a contract. As such, it is generally left open to the parties to the contract to negotiate and agree upon its terms, including the subject matter that is to be insured, any exclusions which may apply, and the premium that is charged for the policy. However, given the sophistication of insurance companies in comparison to many of their consumers, and as a form of consumer protection, governments across Canada have enacted a variety of legislative provisions which reduce "freedom of contract" between the negotiating parties. For example, there are legislative provisions which allow the Courts to declare certain "unreasonable" exclusion clauses invalid. The proposed New Acts in BC and Alberta will introduce

more expansive consumer protection provisions, further reducing "freedom of contract" in underwriting an insurance policy.

A. UNJUST OR UNREASONABLE EXCLUSIONS

Insurance companies have far more experience with contracts than most consumers purchasing insurance policies. As a method of consumer protection to address this imbalance, one issue arises as to what extent the Courts may declare an "unjust or unreasonable" exclusion clause as invalid in a given insurance policy.

The current BC Act provides that:

> ***Unjust exclusions***
>
> ***129*** *If a contract*
>
> *(a) excludes any loss that would otherwise fall within the coverage prescribed by section 122, or*
>
> *(b) contains any stipulation, condition or warranty that is or may be material to the risk, including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,*
>
> *the exclusion, stipulation, condition or warranty is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.*

The current Alberta Act provides that:

> ***Special stipulations***
>
> *552(1) When a contract*
>
> *(a) excludes any loss that would otherwise fall within the coverage described in section 544, or*

> *(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,*
>
> *the exclusion, stipulation, condition or warranty is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.*

Both of these provisions are contained in the Fire Part of their respective Insurance Acts.

As a result of the Supreme Court of Canada's decisions in *KP Pacific Holdings, supra, and Gore v. Churchland, supra, the application of these above provisions to multi-peril insurance policies is questionable under the current Acts. The Court in KP Pacific Holdings, supra, in considering the applicability of the limitation provisions contained in the Fire Part of the BC Act to a multi-peril policy, noted that* it does not make sense to apply them when considering the modern multi-peril policy. As a result, the "unjust or unreasonable" provisions contained in the Fire Parts of the current Acts in both provinces do not apply in the case of multi-peril policies. Consumers – in other words, insureds – lost the statutory protections under the Fire Part. As discussed at length earlier, the proposed New BC and Alberta Acts will merge the General Part of the Insurance Acts with the Fire Part and re-instate the consumer protection safeguards (including the unjust or unreasonable provision) to apply to all types of policy.

Some authors have suggested that "[t]*he express statutory discretion granted to the courts to relieve the insured from provisions in a fire policy that are unjust and unreasonable is unique... The section granting judicial discretion does not set out the criteria that should be applied and is therefore fairly opened-ended and problematic*".[42] The leading case on this provision is

[42] Brown and Menezes, *Insurance Law In Canada*, 2d ed., Carswell, pg. 188.

Marche v. Halifax Insurance Co.[43] The facts were straightforward: a property owned by the insured was occupied at the time of the renewal of the property policy, but vacant when it later burned down. The vacancy was only temporary, and had been "rectified" prior to the loss. The insurer had not been advised about the earlier vacancy. The insurer took the position that the "vacancy" constituted a material change in risk and that Statutory Condition 4, applicable to the fire policy in issue, entitled the insurer to reject the claim. The Supreme Court of Canada had to interpret section 171 of the Nova Scotia legislation, which section read as follows:

> ***171*** *Where a contract*
>
> > *(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,*
>
> *the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.*

The majority concluded that section 171 (similar to section 129 in the BC Act and section 552 in the Alberta Act) was remedial and was worded broadly enough to apply to Statutory Conditions. The result was that the Court concluded that it was unreasonable that Statutory Condition 4 should apply and rendered it ineffective in the case.

The decision by the Supreme Court was not unanimous, a strong dissent argued that providing relief from forfeiture from a Statutory Condition would defeat the purpose of the legislation and render any legislated condition pointless. However, pursuant to *Marche* a Court now has a discretion to refuse to apply any term in a fire policy, including a Statutory Condition, if it is deemed to be unjust or unreasonable.

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[43] 2005 SCC 6, 18 C.C.L.I. (4th) 1 ("*Marche*").

The caselaw under section 129 of the current BC Act demonstrates the willingness of the Court to exercise discretion in the application of this provision on a very limited case-specific basis, and the cases mostly involve an interpretation of the vacancy and vandalism provision. For instance, the B.C. Court of Appeal in *Morton v. Canadian Northern Shield*[44] reviewed the intentions of the insureds with respect to the vacancy of the building and concluded that it was reasonable for an insurer to exclude coverage under the "vandalism" peril when the building was vacant. In this case, the plaintiff owned a rental building which it intended to demolish; the tenant had vacated the building in anticipation. Vandals burned down the building prior to the demolition.

The Court of Appeal found that the plaintiff's intention at the time of the loss was to demolish the building; the building was vacant and therefore not covered for damage or loss due to vandalism. The Court reasoned that the vacancy did not just happen; it was brought about by the deliberate act of the insured, as per the judgment:

> *[I]t cannot be demonstrated by the respondents, as it must be, that Section 129 of the Insurance Act permits the Court to conclude the vacancy condition under the "Vandalism" peril is not binding on the respondent as being unjust or unreasonable…*
>
> *I reach this conclusion because in my opinion vacancy does not just happen. The state of vacancy is brought about by deliberate acts of the insured or his agents. I think it is reasonable for an insurer to exclude coverage under the "vandalism" peril where the premises are vacant for however a short period of time.*

The New BC Act provides:

> *a) Unjust contract provisions*
> *b)*
> ***28.3*** *If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 28.4 (1), that is or may be*

[44] [1998] B.C.J. No. 1094 (Q.L.)(C.A.).

material to the risk, including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

The New Alberta Act provides:

Special Stipulations

545(1) *If a contract contains a stipulation, condition, term, proviso, or warranty, other than a prescribed exclusions referred to in subsection (3)(a), that is or may be material to the risk, including but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the stipulation, condition, term, proviso, or warranty is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.*

Both of the proposed New Acts clarify the power of the Courts to declare "unjust or unreasonable" terms, conditions, or exclusions non-binding on insureds extends to most multi-peril policies of insurance, not just fire policies. This is a legislative response to the Supreme Court of Canada's reasons in *KP Pacific Holdings, supra,* and *Gore v. Churchland*, *supra*, which addresses the changed landscape in the insurance industry demonstrated through multi-peril insurance policies.

B. MANDATORY FIRE COVERAGE

Both of the proposed New Acts include specific provisions regarding exclusions in policies that provide for fire loss coverage, whether contained in a separate fire loss policy or a multi-peril policy. These clauses are a further restriction on insurers, limiting what can and cannot be excluded by contract.

Section 28.4 of the New BC Act provides:

Exclusions from coverage

28.4 (1) An insurer must not provide in a contract that includes coverage for loss or damage by fire, or another peril prescribed by regulation, an exclusion relating to the cause of the fire or peril other than an exclusion prescribed by regulation.

(2) An insurer must not provide in a contract that includes coverage for loss or damage by fire or another peril prescribed by regulation an exclusion relating to the circumstances of the fire or peril if those circumstances are prescribed by regulation.

(3) An exclusion contrary to subsection (1) or (2) is invalid.

(4) For greater certainty, subsections (1) and (2) apply in relation to loss or damage by fire, however the fire is caused and in whatever circumstances and whether the coverage is under a part of the contract specifically covering loss or damage by fire or under another part.

The New Alberta Act provides:

545(3) *No insurer may provide in a contract that includes coverage for loss or damage by fire or by another prescribed peril an exclusion relating to:*

(a) the cause of the fire or other prescribed peril other than a prescribed exclusion, or

(b) the circumstances of the fire or peril if those circumstances are prescribed.

(4) An exclusion in a contract contrary to subsection (3) is invalid.

(5) For greater certainty, subsection (3) applies in relation to loss or damage by fire, however the fire is caused and in whatever circumstances and whether the coverage is under a part of the contract specifically covering loss or damage by fire or under another part.

The Discussion Paper states "…*insurance companies have long asked for more flexibility to exclude fire-related risks, specifically fires caused by terrorism and earthquake*".[45] Indeed, the

[45] Discussion Paper, *supra*, at page 8.

insurance industry has long wanted to include all earthquake-related coverage (including fire risk) within a separate earthquake policy, rather than having two separate policies, one for fire loss provided as mandatory under the Fire Part and another separate "shake" policy. However, the Discussion Paper indicates that this approach raised serious consumer-related concerns for the government. In particular, "*…a consumer who believes that buying a fire insurance policy will provide coverage for fire, whatever the cause, would be unfairly surprised to find that some fires are not covered*".[46] The proposed New Acts make it clear that an exclusion which purports to exclude coverage on the basis of the cause of a fire is invalid in relation to coverage for a fire loss.

In the New BC Act, s.28.4(4) addresses the issue created by the Supreme Court of Canada's decision in *Derksen v. 539938 Ontario Ltd.*[47]. Historically, when faced with a claim for coverage under either a property or liability policy, insurers looked to determine if there was a single, dominant, or "proximate" cause of the loss. If that single cause of the loss was an included peril of coverage, then coverage was granted. If that cause of the loss was an excluded peril, then coverage was denied. In *Derksen*, *supra*, the Court held that where there are concurrent causes there is no presumption that all coverages are ousted if one of the concurrent causes is an excluded peril; this was a matter of interpretation and had to be expressly stated in the policy. The Court further noted that insurers have language available to them that would remove all ambiguity from the meaning of an exclusion clause in the event of concurrent causes. In other words, and by example, when a house was destroyed by a fire (covered peril) which was caused by an earthquake (an excluded peril), the decision in *Derksen*, *supra*, suggests that coverage will not necessarily be ousted.

[46] Discussion Paper, *supra*, also at page 8.
[47] [2001] 3 S.C.R. 398; 205 D.L.R. (4th) 1.

Section 28.4(4) of the New BC Act makes it clear that insurers cannot exclude coverage for fire loss damage where there is a concurrent cause of the loss, unless permitted in regulation as a concurrent cause exclusion. In other words, the suggestion by the Supreme Court of Canada that it was open to insurers to remove ambiguity in their exclusions in the event of concurrent causes has now been removed by s.28.4(4). By virtue of this provision, insurers will not be able to use "anti-concurrent causation" language in any part of the policy, including a warranty, to avoid coverage.

The applicable regulations to the proposed New Acts have not yet been prepared; at this time no list of permitted exclusions in relation to concurrent causes for fire losses exists. We anticipate that when the regulations are drafted and passed that fire following earthquakes will not be a permitted exclusion.[48] It is also likely that "terrorism" will be added to the permitted exclusions. That is, coverage for fire following an act of terrorism will be excluded by regulation. Coverage for fire following terrorism cannot be accurately predicted or even underwritten. Insurers may be unable to buy reinsurance, leading to solvency issues and insurers withdrawing from the marketplace.

The end result for insureds will be that unless fire following either earthquake or terrorism (as examples) is referenced in a specific regulation, coverage cannot be excluded. Both the Alberta and BC legislatures have reserved the right, through regulation, to specifically deal with fire coverage exclusions and in doing so, have further limited the insurers' freedom to contract.

C. INNOCENT CO-INSURED

[48] Discussion Paper, *supra*.

One of the most perplexing and difficult issues in insurance law is whether and to what extent an insurer must indemnify an insured for property owned by a co-insured or an unnamed insured when loss results from the international act of the co-insured or the unnamed insured. There are compelling reasons why an insurer should not have to indemnify in such circumstances. Insurance is intended to cover losses occasioned by fortuitous perils. For example, arson by an insured is not a fortuitous peril. Policies are written (or interpreted by the Courts) so as to deny recovery to an insured who deliberately sets fire to his insured property. This approach is consistent with the underlying purposes of the insurance contract; it also prevents wrongdoers from taking advantage of their own wrong, deters crime, and avoids fraud against insurers.

However, this can produce a harsh and inequitable result for a named insured. It is unfair to deny insurance protection to an innocent insured by imputing to him fraud caused by another wrongdoer. While insurance coverage might be "joint", liability for the fraud or arson is several and separate. Invariably the co-insured or unnamed insured will ask why one insured's wrongdoing should be attributed or imputed to another "insured" who is not implicated in the fraud.

The problem is most acute in policies of fire insurance. Most standard homeowner policies which include indemnity for loss attributable to fire contain a provision which extends coverage to family members or relatives resident on the premises. A typical fire policy in British Columbia defines "insured" in the following terms:

> *The unqualified word "insured" includes:*
>
> > *the named insured, and*
> >
> > *if residents of his household, his spouse, the relatives of either and any other person under the age of twenty-one in the care of the insured.*

The wide definition extends insurance coverage to a range of persons, including children and relatives, who may be temporarily living on the premises and who will likely sustain property damage should a fire occur. Ironically, this same provision can deny recovery if the child or relative causes loss which is attributable to their own act, such as arson, which is criminal in nature. This results from an exclusion clause in most fire insurance policies, which states:

> "*This policy does not insure: ... loss or damage caused by a criminal or wilful act or omission of the insured* ***or any other persons whose property is insured hereunder***." (emphasis added)

Prior to 1980 few Canadian decisions dealt directly with these issues. On the other hand there was an extensive body of law in the United States in which the subject was exhaustively and authoritatively discussed. These cases, most of which involve a husband/wife relationship between the co-insureds, reveal a fundamental disagreement among the various State Courts as to the nature of the law applicable to an innocent co-insured's right to recover and the policy considerations involved in the issue. Two distinct and conflicting lines of authority developed, one of which would bar, the other of which would not bar, an "innocent" co-insured from recovery.[49]

What case law did exist in Canada by 1989 suggested that an innocent co-insured was barred from collecting the proceeds of a fire insurance policy when jointly owned property was intentionally destroyed by a co-insured. That view is substantially at odds with the current American position.

[49] *Higgins v. Orion Insurance Co.*, [1985-86] I.L.R. 7245 (Ont.C.A.), at para. 14.

In the 1989 decision in *Scott v. Wawanesa Mutual Insurance Co.*[50], the Supreme Court of Canada considered circumstances where the parents of a 15-year-old held a standard homeowners policy of insurance on their family home. The son deliberately set the house on fire. The parents' claim for indemnity was denied because of an exclusion clause which provided that there was no coverage for "*loss or damages caused by a criminal or wilful act or omission of the insured*". The definition of "insured" included residents of the household, including relatives and other *persons under the age of 21 in the care of an insured.* The majority of the Supreme Court held that:

> *…when the wording of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that which is expressed by its clear terms, unless the contract is unreasonable or has an effect contrary to the intention of the parties. In the present case, the policy of insurance excludes liability of the insurer for damage caused by the criminal or wilful acts of the insured. The definition of "Insured" clearly includes the minor children living in the home. It may well be that insurance companies do not wish to pay for the delinquency of teenagers within the home. I do not see how they could word their policy to exclude such a risk other than by the precise terms used in this policy.*[51]

In other words, the parents in *Scott*, though clearly innocent co-insureds, were denied coverage on the basis of the exclusion. Similarly, in *Canadian Insurance Co. v. Walsh*,[52] the Newfoundland Court of Appeal considered the claim of a woman whose husband had purposely set fire to their jointly owned home. The relevant exclusion clause provided that coverage was excluded for loss from "your" intentional or criminal acts. The definition of "your" in the policy included the spouse of the named insured, and on this basis, coverage was excluded.

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[50] [1989] 1 S.C.R. 1445.
[51] *Supra*, at p. 1451.
[52] (1989), 38 C.C.L.I. 189 (Nfld. C.A.).

In the event that the policy does not specifically exclude coverage for innocent co-insureds as described above, the Court in *Scott* indicated that the policy may otherwise provide for coverage for an innocent co-insured. For example, a policy may provide that coverage is preserved for "*each and every insured who did not participate in or acquiesce in*" the loss.[53] In the event that coverage is neither specifically preserved nor excluded, the majority in *Scott* suggests that a presumption arises that coverage for co-insureds will be excluded where the interests of the co-insured in the subject property are "inseparably connected". For example, in *Inland Kenworth Ltd. v. Insurance Corporation of British Columbia*,[54] the British Columbia Supreme Court considered a case where a co-insured lien-holder could seek indemnity under a policy of automobile insurance in circumstances where the registered owner of the vehicle had damaged the vehicle through arson. The Court found that the interest of a lien-holder in the vehicle was of such a separate nature from that of the owner that their interests in both the car and the insurance were several; coverage was not excluded for the lien-holder.

The issue of the innocent co-insured can also arise in the commercial context. For example, if three dentists form a general partnership, purchase and insure an office building and one of the partners burns down the clinic, can the other partners recover? There are few Canadian cases on point, however the Ontario Court of Appeal decided on similar facts that to deny recovery to an innocent partner because of the guilt of a co-partner would be imputing the guilt to the innocent party and punishing him or her vicariously for the co-partners' crime. The ruling in *Higgins v. Orion Insurance*, *supra*, clarifies that a Court must ascertain in each case whether the arsonist will benefit by the recovery and fashion its judgment accordingly.[55] In that case, the Court allowed one

[53] See *Fisher v. Guardian Insurance Co. of Canada* (1995), 28 C.C.L.I (2d) 74 (B.C.C.A.), cited in Brown & Menzies, *Insurance Law in Canada*, looseleaf, 2007 – Release 3, Thomson Carswell.
[54] (1990), 43 B.C.L.R. (2d) 95, 42 C.C.L.I. 160 (S.C.).
[55] *Higgins v. Orion*, *supra*, at para. 53.

partner to recover under the policy when it was clear that the other partner, who set the fire, would not in any way benefit financially from the arson. Under the New Acts, there are no limiting words that restrict the application of the clause to a particular context, commercial or otherwise.

The proposed New Acts will significantly change the law as it relates to innocent co-insureds in any context and their ability to achieve recovery. The New BC Act provides:

> *Recovery by innocent persons*
>
> ***28.5*** *(1) Despite section 2.3, if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person*
>
> *(a) whose act or omission caused the loss or damage,*
>
> *(b) who abetted or colluded in the act or omission,*
>
> *(c) who*
>
> *(i) consented to the act or omission, and*
>
> *(ii) knew or ought to have known that the act or omission would cause the loss or damage, or*
>
> *(d) who is in a class prescribed by regulation.*
>
> *(2) Nothing in subsection (1) allows a person whose property is insured under the contract to recover more than their proportionate interest in the lost or damaged property.*
>
> *(3) A person whose coverage under a contract would be excluded but for subsection (1) must comply with any requirements prescribed by regulation.*

Section 541(1) of the New Alberta Act provides similar wording. Both sections reverse the Supreme Court of Canada's ruling in *Scott.* Under the new legislation a "*criminal or intentional act*" exclusion is effective as against only the person who either caused the loss, abetted in causing the act causing the loss, or consented to the act causing the loss knowing that the loss or damage would result. It is important to note that the ability of an innocent co-insured to recover under this section is limited to their proportionate interest in the lost or damaged property.

D. CONSTRAINTS ON INTERIM BINDERS

The current Acts in Alberta and BC limit the extent to which conditions or warranties can be inserted into policies of insurance without being brought to the insured's attention. This has particular import when dealing with "interim binders" of insurance. Insureds often wish to be covered for insurance at the time that an application is made – on the other hand insurers want to investigate a risk prior to covering it.[56] To address this, insurers provide temporary coverage, or an "interim binder" of insurance, during the period while the underwriting investigation proceeds. An issue arises as to what extent special warranties or conditions, which may be included in the final policy of insurance, can be applied to an "interim binder" of insurance, even in circumstances where those conditions may be referenced in the "interim binder". The current Acts provide constraints on the ability of insurers to rely on warranties and conditions not referenced in the "interim binder" and thus represent another limit on "freedom of contract" in underwriting a policy.

Section 11.1 of the New BC Act provides:

[56] *MacGillivray on Insurance Law,* 9th ed, Sweet & Maxwell (London, 1997), p. 116.

11.1 After an application or proposal for insurance is made by an insured, any policy issued or coverage provided by the insurer is deemed, for the benefit of the insured, to be in accordance with the terms of the application or proposal, unless the insurer immediately gives notice to the insured in writing of the particulars in which the policy or coverage differs from the application or proposal, in which case the insured, within 2 weeks after receiving the notice, may reject the policy.

Section 12 of the current BC Act reads as follows:

Effect of terms of contract not set out in policy

12 *(1) A term or condition of a contract which is not set out in full in the policy or in a document in writing attached to it, when issued, is not valid or admissible in evidence to the prejudice of the insured or a beneficiary.*

(2) This section does not apply to an alteration of the contract agreed on in writing between the insurer and the insured after the issue of the policy.

Under the proposed amendments, the wording has changed:

Effect of terms of contract not set out in policy

12(1) Each term and condition of a contract must be set out in full in the policy or in writing securely attached to it when it is issued and, unless so set out, is not valid or admissible in evidence to the prejudice of the insured or a person to whom insurance money is payable under the contract

(2) This section does not apply to an alteration of the contract agreed on in writing between the insurer and the insured after the issue of the policy.

(3) If a contract, whether or not it provides for its renewal, is renewed by renewal receipt, it is sufficient compliance with subsection (1) if the terms and conditions of the contract were set out as required by that subsection and the renewal receipt identifies the contract by its number or date.

An application (or proposal) form for insurance, once filled out by an insured and delivered, possibly through a broker, to the insurer, represents an "offer" by the insured for a contract of insurance.[57] As one author stated:

> *The proposal form, when duly filled in and signed by the proposed assured and forwarded to the insurers, operates as a formal offer by the proposed assured to the insurers to enter into contracts of insurance. The proposal form shows the terms on which he is willing to contract, and if the offer is accepted, he cannot insist on having an insurance differing in its terms from those specified in the proposal.*
>
> *Since the proposal form, in practice, proceeds from the insurers, it further shows the terms on which they too are willing to contract. They are bound, therefore, after acceptance, to issue a policy in accordance with the proposal.*[58]

As noted by the BC Supreme Court in *Scottish & York Insurance Co. Limited v. Metrix Professional Insurance Brokers Inc*, …"[s]*ection 12 of the Insurance Act, R.S.B.C. 1996, c. 226, is triggered when two instruments are intended to form the whole contract but only one instrument is received by the insured.*"[59] In *Scottish & York*, *supra*, an interim binder was issued to the insured, however, the interim binder did <u>not</u> contain a series of warranties which were required by the insurer as a condition of the insurance. As the warranties which were submitted by the insurer were not made known to the insured at the time the interim binder was provided, they constituted a counter-offer, and pursuant to Section 12 of the current BC Act, could not be effective as against the insured. Section 12(3) of the New BC Act makes it clear that any conditions or warranties provided for in an existing policy will continue to operate on renewal provided that the terms or conditions of the policy were originally "*set out in full in the policy or in writing securely attached to it when it is issued*" and that the renewal notice identifies the original policy by number or date.

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[57] *Scottish & York Insurance Co. Limited v. Metrix Professional Insurance Brokers Inc*., [2006] 11 W.W.R. 544 (B.C.S.C.), para.76.
[58] Ivamy, *General Principles of Insurance Law*, at p. 110-111, 116-117, cited in *Scottish & York*, *supra*, para. 76.
[59] *Scottish & York*, *supra*, at para. 83.

Section 11.1 of the New BC Act clarifies that no condition or warranty contained in a policy can modify the terms of the "interim binder" unless the insured is immediately given notice of how the terms differ. Interestingly, Section 11.1 suggests that any warranty or condition contained in the policy which modifies the "interim binder" will be automatically binding on the insured, unless the insured specifically provides notice the insurer within 2 weeks that they reject the policy. In other words, the insured's approval of the modified terms, conditions, or warranties is deemed to take place 2 weeks after receiving notice of them.

E. CONCLUSION

The New Acts in Alberta and BC aim to introduce further restrictions on the ability of negotiating parties to an insurance contract to "freely" contract on all terms. The legislative reasoning behind these provisions focuses on the need to ensure a level of "consumer protection" in light of the perceived imbalance between "sophisticated" insurance companies and the average consumer. The provisions relating to mandatory fire coverage and the ability of innocent co-insureds to recover indemnity mark a significant change in the insurance landscape. Lastly, insurers are limited in their ability to modify terms, warranties, or conditions of a policy from those set out in an "interim binder" unless they are brought to the attention of the insured.

VII. CONCLUSION

The collaborative work by the BC and Alberta provincial governments to both revise and ensure legislative uniformity is laudatory. This joint legislative initiative recognizes that insurance disputes and claims handling frequently transcend provincial borders and that businesses require uniformity from province to province in the

handling of disputes. The New Acts in both provinces will assist insurers and insureds alike by clarifying certain provisions in the current Acts, changes which were required as a result of recent rulings from the Supreme Court of Canada. The New Acts recognize and provide greater certainty in regard to multi-peril policies. The old system of delineating specific types of insurance, like fire coverage and specific statutory conditions for each type of insurance is largely revised and as a result, the legislative response will be more consistent across both jurisdictions.

In the long term, the impact of the legislative reform will be seen most in stronger consumer protection for insureds. These protections include the expedited resolution of a wide range of insurance disputes under the appraisal remedy, and a streamlined claims process that now allows for electronic communications. Other examples include relief from forfeiture sections that will be broadened to encompass activity over the life of a policy. Likewise, innocent co-insureds have been guaranteed coverage in specified situations. On the other hand, for insurers, there are greater restrictions on underwriting and these translate into stronger protection for the insured.

The language in the New Acts seek to balance the insurers rights to continue doing business with the insureds need for clarity of coverage. The legislative reforms bring positive change, however long overdue. The last judicial word on the legislative reforms belongs to the Supreme Court of Canada, which stated "…[*t*]*he Insurance Act does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry.*"[60] How the Courts will interpret the New Acts will largely depend on how insurers and insureds deal with the legislative reforms which set the new minimum standards in the New Acts. These minimum standards are higher now in the New Acts than ever before. The new legislation is just the beginning; once out of the statutory

[60] *Saskatchewan River Bungalows*, *supra*, at p. 488.

starting gate, insureds and insurers across both Provinces can use the new laws to raise the standards of the industry as a whole.

APPENDIX A – IBC GENERAL POLICY CONDITIONS

ICBC GENERAL POLICY CONDITIONS

The following policy conditions, as modified or supplemented by the attached forms or endorsements, apply to all of the perils insured by this Policy (including fire) unless applicable legislation provides otherwise.

In respect of SECTION II - LIABILITY COVERAGE, only policy conditions 1., 3., 4., 5. and 15. apply.

1. Misrepresentation

If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.

2. Property of Others

Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract.

3. Change of Interest

The insurer is liable for loss or damage occurring after an authorized assignment under the Bankruptcy Act (Canada) or change of title by succession, by operation of law, or by death.

4. Material Change

Any change material to the risk and within the control and knowledge of the insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within fifteen days of the receipt of the notice, pay to the

insurer an additional premium, and in default of such payment the contract is no longer in force and the insurer shall return the unearned portion, if any, of the premium paid.

5. Termination

(1) This contract may be terminated,

(a) by the insurer giving to the insured fifteen days' notice of termination by registered mail or five days' written notice of termination personally delivered;

(b) by the insured at any time on request.

(2) Where this contract is terminated by the insurer,

(a) the insurer shall refund the excess of premium actually paid by the insured over the proportionate premium for the expired time, but, in no event, shall the proportionate premium for the expired time be deemed to be less than any minimum retained premium specified; and

(b) the refund shall accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund shall be made as soon as practicable.

(3) Where this contract is terminated by the insured, the insurer shall refund as soon as practicable the excess of premium actually paid by the insured over the short rate premium for the expired time, but in no event shall the short rate premium for the expired time be deemed to be less than any minimum retained premium specified.

(4) The refund may be made by money, postal or express company money order or cheque payable at par.

(5) The fifteen days mentioned in clause (1) (a) of this condition commences to run on the day following the receipt of the registered letter at the post office to which it is addressed.

6. Requirements After Loss

(1) Upon the occurrence of any loss of or damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,

(a) forthwith give notice thereof in writing to the insurer;

(b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,

(i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,

(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,

(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,

(iv) showing the amount of other insurances and the names of other insurers,

(v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,

(vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,

(vii) showing the place where the property insured was at the time of loss;

(c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;

(d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.

(2) The evidence furnished under clauses (1) (c) and (d) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13.

7. Fraud

Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

8. Who May Give Notice and Proof

Notice of loss may be given and proof of loss may be made by the agent of the insured named in the contract in case of absence or inability of the insured to give the notice or make the proof, and absence or inability being satisfactorily accounted for, or in the like case, or if the insured refuses to do so, by a person to whom any part of the insurance money is payable.

9. Salvage

(1) The insured, in the event of any loss or damage to any property insured under the contract, shall take all reasonable steps to prevent further damage to such property so damaged and to prevent damage to other property insured hereunder including, if necessary, its removal to prevent damage or further damage thereto.

(2)The insurer shall contribute proportionately towards any reasonable and proper expenses in connection with steps taken by the insured and required under subcondition (1) of this condition according to the respective interests of the parties.

10. Entry, Control, Abandonment

After loss or damage to insured property, the insurer has an immediate right of access and entry by accredited agents sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and, after the insured has secured the property, a further right of access and entry sufficient to enable them to

make appraisement or particular estimate of the loss or damage, but the insurer is not entitled to the control or possession of the insured property, and without the consent of the insurer there can be no abandonment to it of insured property.

11. Appraisal

In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

12. When Loss Payable

The loss is payable within sixty days after completion of the proof of loss, unless the contract provides for a shorter period.

13. Replacement

(1) The insurer, instead of making payment, may repair, rebuild, or replace the property damaged or lost, giving written notice of its intention so to do within thirty days after receipt of the proofs of loss.

(2) In that event the insurer shall commence to so repair, rebuild, or replace the property within forty-five days after receipt of the proofs of loss, and shall thereafter proceed with all due diligence to the completion thereof.

14. Action

Every action or proceeding against the insurer for the recovery of a claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.

15. Notice

Any written notice to the insurer may be delivered at, or sent by registered mail to, the chief agency or head office of the insurer in the Province. Written notice may be given

to the insured named in the contract by letter personally delivered to the insured or by registered mail addressed to the insured at the insured's latest post office address as notified to the insurer. In this condition, the expression "registered" means registered in or outside Canada.

II. APPENDIX B – IBC BULLETIN RE: GENERAL POLICY CONDITIONS

LEGAL SERVICES

TO: All Members

DATE: April 9, 2008

BULLETIN NO.: Underwriting UW 2008-03

SUBJECT: **NEW HABITATIONAL FORM - GENERAL POLICY CONDITIONS**

The Board of Directors has approved the release of the attached new form entitled "General Policy Conditions". This form was developed to replace the Fire Statutory Conditions in Habitational Property policies in the Canadian common law provinces and territories only. It will be recalled that the Supreme Court of Canada determined that the Fire Part of the Insurance Acts which contain the Fire Statutory Conditions, do not apply to multi-peril policies. This new form follows the existing Fire Statutory Conditions and is not applicable in the province of Quebec. It should be noted that this new form does not include any Additional Conditions, such as the pair and set clause found in many companies' wordings.

The adoption of IBC advisory wordings is entirely at the discretion of each individual insurer and may require editorial changes to reflect an insurer's own policy language.

R.J. Bundus
Vice President, General Counsel and Corporate Secretary

Staff Reference: Dave Way, Underwriting Coordinator

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