

Alberta's New *Limitations Act*

This is Exhibit "2" referred to in the
Affidavit of
Donald H. Broder
Sworn before me this 15 day
of DEC, A.D., 2000
[Signature]
A Commissioner for Oaths in and for Alberta
#0686559

On March 1, 1999 the current *Limitation of Actions Act* will be repealed and the new *Limitations Act* (the *Act*) will come into force. This new Act contains significant changes to the law concerning limitation periods in Alberta.

This paper is intended to summarize provisions of the new Act, while highlighting the changes and how they might be expected to affect insurers who are required to litigate in Alberta.

- Only two limitation periods: the earlier of
 - two years from the time the claimant knew or ought to have known of the claim, or
 - ten years from the time the claim arose
- discoverability applies to *all* claims including breach of contract and medical malpractice
- operation of limitation period may be *suspended* in certain narrow circumstances
- transitional provisions will dramatically reduce limitation periods for some claims known before March 1, 1999
- limitation periods in the Alberta *Insurance Act* and other legislation are still in place.

On March 1st, 1999 the new Alberta *Limitations Act* will come into force. This new *Act* will have a significant impact on the limitation period for the commencement of all causes of action, including tort claims. Insurers should be aware of the new *Limitations Act* as it will significantly affect claims in Alberta.

When the *Limitations Act* comes into force, the current *Limitation of Actions Act* will be repealed.

The Act introduces a number of key concepts, including *claim*, *claimant*, *duty*, *injury* and *remedial order*. The intent of the new Act is to simplify the law pertaining to limitation periods in Alberta and thus, the same limitation period applies to all causes of action.

A *claim* means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order. A *claimant* means the person seeking a remedial order. A *duty* is defined to mean any duty under the law.

An *injury* is broadly defined to mean personal injury, property damage, economic loss, non-performance of an obligation, or the breach of a duty. Injury, as defined in the Act, therefore includes breach of contract and breach of fiduciary duty, for example.

Finally, a *remedial order* means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but it specifically excludes declarations, among other things.

The Act applies where a claimant seeks a remedial order in a proceeding commenced after March 1, 1999 *whether the claim arises before or after the coming into force of the Act*. However, if before March 1, 1999 a claimant knew, or ought

to have known of a claim, the claimant must seek his remedial order (ie. commence the action) before the earlier of the limitation period prescribed under the old *Limitation of Actions Act*, or March 1, 2001.

Thus, any claims which are known (or ought to be known) at the time of proclamation of the new *Limitations Act* must be brought within the earlier of the remaining existing limitation period or within two years of proclamation of the new Act.

The transitional provisions will have the effect of shortening the limitation period for certain claims arising before March 1, 1999 but sued on after that date. For example, a claim currently governed by a six year limitation (such as contract) which has five years left to run on March 1, 1999, must be brought within *two years* of the proclamation of the new Act.

While these transitional provisions will not generally impact the limitation periods for tort actions, they will affect the limitation period for contractual claims and any other claims for which the current limitation period is greater than two years.

The Act provides only two limitation periods for *all* civil claims, but in some circumstances the limitation period is suspended. It is no longer necessary to characterize the cause of action as sounding in tort, negligence, contract, and so on. The primary limitation period is two years from the date of discovery, while the ultimate limitation period is ten year from the time the claim arose.

The principle of *discoverability* will apply to all claims. The situation in Alberta at present is that the principle of discoverability only applies to tort claims other than claims against *professional practitioners* for malpractice or negligence in the provision of professional services.

Under the current legislation, the application of the discoverability principle arises as a matter of common law. However under the new Act, the discoverability principle is explicitly set out in the statute.

The test of discoverability has three components. A claimant must bring a cause of action within two years from the date upon which the claimant knew or ought to have known:

- that the injury has occurred;
- that the injury was attributable to the conduct of the Defendant; and
- that the injury, assuming liability on the part of the Defendant, warrants bringing a proceeding.

The test of discoverability set out in the *Limitations Act* could have a significant impact on tort claims. All three components of the test of discoverability must be met before the claim is *discovered* and the two year limitation period starts to run.

In most cases the first portion of the test, i.e. that an injury has occurred, will be met very soon after if not right at the moment of the injury. It is important to bear in mind the broad definition of *injury* in the Act, as it applies not only to personal injury, but also to property damage, economic loss and the breach of a duty.

In certain circumstances, the second part of the test could serve to delay the running of the limitation period significantly as the claimant must know that the injury he or she has suffered was attributable to the conduct of the defendant. One example where this could come into play is where a claimant claims a TMJ injury. It is common for claimants to testify that they did not realize the jaw pain and clicking that they were having was because of an accident until a number of months later. Arguably their limitation period would not start to run until the claimants realize (or should have realized) that the jaw pain from which he or she was suffering was attributable to the conduct of the defendant (ie. the accident).

Finally, the third portion of the test could be the most significant. This *Ade minimus* portion of the test is not met until the claimant knows (or should have known) that the injury suffered warrants bringing a proceeding. It is not difficult to conceive of a claimant indicating shortly after the accident that he or she did not think the injury was significant enough to warrant bringing a proceeding. Again, this situation can arise with respect to personal injury as well as property damage.

In the Alberta Law Reform Institute Report No. 55 on Limitations, the Committee noted of this third criterion:

This criterion will protect litigants from incurring unnecessary legal expenses, and bringing unnecessary legal action. The discovery rule will, in effect, invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the cost-benefit analysis which would be reasonable for the actual claimant.

It is not clear how this *de minimus* component will be interpreted. How is a threshold to be set? The comments of the Alberta Law Reform Institute appear to indicate that this is intended to be a subjective test, notwithstanding the requirement that the limitation period begins to run when the claimant knows of, or ought to have known of the existence of all three of the criteria.

The limitation period of two years from the date of discovery will apply in the vast majority of cases. However, the Act limits the possibility of long tail actions in respect of claims which might lie undiscovered for long periods of time, as the Act contains an absolute limitation period of 10 years after the claim arises. Thus, if a claimant does not discover the existence of a claim for 10 years, that claim is barred, with some limited exceptions which will be discussed below.

It might be argued that the discoverability principle set out in the Act will make it more difficult to bring applications for summary judgment based on a lapsed limitation period, and that Courts will be less likely to decide summary judgment applications brought on this basis.

It is important to note that any limitation periods which are found in other Acts continue to apply. Thus, limitation periods found in the Alberta *Insurance Act*, including the Statutory Conditions, continue to apply.

The new Act contains fewer limitation periods and eliminates the need to categorize claims as contractual, tortious, equitable and so on. However, under the old *Limitation of Actions Act*, often the most difficult exercise was determining when the cause of action arose. Although the language has changed in the new Act, it is still necessary to determine when the claim arose.

The Act contains a number of provisions which stipulate when certain claims arise. Among these are provisions dealing with fatal accidents and claims for contribution.

The Act states that a claim under the *Fatal Accidents Act* arises when the conduct which causes the death occurs. With respect to claims for contribution, the Act provides that a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution can be based, whichever comes first. Thus, the limitation period for a claim of contribution begins to run when the defendant is sued or incurs liability through settlement. This provision of the Act appears to only define when the ten year limitation would begin to run. However, it is likely that the same approach will be employed to determine when the two year limitation commences. Clearly a Defendant who contemplates bringing a Third Party Proceeding for contribution would only contemplate doing so once that Defendant is sued by the claimant. It is at that moment that bringing a proceeding for contribution would be warranted to use the language of the two year discoverability provision.

Currently in Alberta, language in the *Tortfeasors Act* which provides that any tort-feasor liable in respect of damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage^Y, has been interpreted by the Court of Appeal to mean that the limitation period for bringing an action for contribution is the same as the limitation period governing the plaintiff's claim. Section 60 of the *Limitation of Actions Act* was subsequently enacted to provide an exception for tort and related actions. Thus, under the old Act, a Defendant in a tort action is not bound by the same limitation period as the Plaintiff when contemplating a claim for contribution (usually in the form of a Third Party Notice). It appears that the new Act will not change the law in this respect.

The new Act also sets out when claims arise in the context of successors, principals, personal representatives, continuing courses of conduct, claims based on breach of duty, and demand obligations.

In certain circumstances, limitation periods under the new Act are suspended.

Where a defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred, the

operation of the ultimate 10 year limitation period is suspended. Obviously, the two year limitation does not by definition begin to run in such a case, as the claimant has not discovered the claim. This provision will continue to have a significant effect on abuse claims. Under the current law, the Courts have been very willing to find that the perpetrator fraudulently concealed the injury. It is likely that this line of case authority will continue to have application under the new Act.

Both the two year and the ten year limitation periods are suspended during any period of time that the claimant is a person under disability. Three categories of persons are under disability for the purposes of the Act.

First, minors who are *not under the actual custody of a parent or guardian* are persons under disability. This is similar to the situation under the current Act, but as set out below, the new Act qualifies this further. Secondly, a dependent adult under the *Dependent Adults Act* is a person under disability. The final category is that of a functional disability,⁶ and any adult who is unable to make reasonable judgments in respect of matters relating to the claim is a person under disability.

In certain prescribed instances, a minor who is in the actual custody of a parent or guardian may nevertheless be a person under disability. This occurs when the claim is against the parent or guardian, or is against any person for a cause of action based on conduct of a sexual nature, in which cases neither the two year nor the ten year limitation period begins to run until the minor turns eighteen.

This has significant implications for tort claims. For example, if a minor is a passenger in a vehicle driven by the minor's parent and that parent causes an accident for which the minor could claim compensation, under the new *Limitations Act*, that minor would be considered to be under a disability and therefore the limitation period does not start to run until the minor turns eighteen years old.

An agreement may expressly extend a limitation period as long as the agreement is:

- in writing; and
- signed by the person adversely affected by the extension.

The only persons bound by an agreement to extend a limitation period are the makers of the agreement, and any person liable in respect of a claim as a successor of a maker, or through the acquisition of an interest in property from or through a maker who was liable.

As originally presented to the Alberta Legislature, the *Limitations Act* contained language which allowed for agreements both to extend and shorten limitation periods, but the Act in final form only contemplates extensions. This raises the issue whether application of the interpretive principle *expressio unius exclusio alterius* (to express one thing is to exclude another⁷), particularly in light of the legislative history of this provision, means that limitation periods prescribed under the Act cannot be shortened.

At the present time, as a matter of common law, parties can agree to extend or shorten the limitation periods provided by law, and the doctrine of estoppel will operate to defeat any limitation defence based on the statutory limitation. It is unclear whether such an estoppel argument will succeed under the new Act, given the deliberate limitation of the Act to agreements to extend limitation periods.

In most cases this should not have any effect in the insurance context in any event. Many insurance policies dictate that actions against the insurer must be commenced within one year. Obviously this is a shorter limitation period than that contained in the Act. However, the Act also stipulates that limitation periods set by other statutes continue to operate. Thus, so long as a shorter limitation period is derived from statute, it should continue to operate. For example, a limitation period contained within a Statutory Condition derived from the *Insurance Act* will still apply even if it is shorter than the limitation set out in the *Limitations Act*.

Under the Act, the limitations law of Alberta must be applied whenever a remedial order is sought in Alberta, notwithstanding that, in accordance with the conflict of law rules, the claim will be decided under the substantive law of another jurisdiction.

This provision was originally intended to curtail forum shopping, but this was largely accomplished by the Supreme Court

of Canada in *Tolofsen v. Jensen*. In that case, the Supreme Court ruled that limitations were substantive in nature and not merely procedural. Thus, under conflict of law rules, the limitation period of the place where the cause of action arose applies, and the limitation period of the forum is not relevant. This has changed under the new Act.

At first glance, it would appear that the new Act attempts to overrule the principle established in *Tolofsen*. The Act seems to indicate that it is only the Alberta limitation period which would apply to any action commenced in Alberta. However, it is the writers' opinion that under the new Act, both the limitation law in Alberta *and* the limitation law in the jurisdiction whose substantive law is involved must be taken into account. If the action which has been brought in Alberta is out of time under *either* the limitation law of Alberta or under the limitation law of the jurisdiction whose substantive laws governs the action, the action will be out of time in Alberta.

For example, suppose there is a car crash in Saskatchewan and the Saskatchewan limitation period is one year. The action was brought in Alberta after one year but less than two after the accident (or after all the discoverability criteria have been met.) The action would be out of time in Alberta under the new Act.

This new conflict of law provision in the *Limitation Act* applies to *all* Alberta limitation periods, not just those set out in the *Limitations Act*

Often when defending an insured, or when pursuing a subrogated claim, the existence of other parties or claims becomes known after the original action has been brought, and the applicable limitation period has elapsed. The Act alters the law with respect to when claims and parties may be added after the expiration of a limitation period (so long as the claim to which additions are sought was brought in time).

These new provisions cover three situations:

- claims added to a proceeding;
- claimants added to a proceeding; and
- defendants added to a proceeding.

The provisions governing these additions are conditioned on two principles: related claims and prejudice.

a. adding claims but no new parties

Where an added claim is made and that claim does not add or substitute a claimant or defendant, or alter the capacity in which either party sues or is sued, the added claim must be related to the conduct, transaction or events described in the original pleading. This is really a codification of the principle set down by the Supreme Court of Canada in *Cahoon v. Franks*.

b. adding claims and new claimants

Where an added claim adds or substitutes a claimant:

- the added claim must be related to the conduct, transaction or events described in the original pleading;
- the defendant must have received, within the limitation period applicable to the added claim (plus the time provided for service), sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits; and
- the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted.

c. adding claims and new defendants

When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued:

- the added claim must be related to the conduct, transaction or events described in the original pleading; and

- the defendant must have received, within the limitation period applicable to the added claim (plus the time provided for service), sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

The new Act does not affect any of the limitation periods currently set out in the *Insurance Act*, including those incorporated into policies as part of the relevant Statutory Conditions. It also appears that the common law rules regarding discoverability will still apply to these limitation periods.

The codified discoverability test in the new Act clearly makes it more difficult for defendants and their insurers to determine when a limitation period has elapsed. Knowledge of when the third criterion has been met, namely that the injury warrants bringing a proceeding, lies within the exclusive knowledge of the claimant, although it might be argued that the claimant ought to have known sooner than he or she claims. Obviously, there is no case law interpreting this criterion at present.

Accordingly, it will be very important to determine at the outset in all cases whether the parties were injured, and if so, how seriously. Even if the accident seems very minor, insurers should make it a habit to speak with everyone involved in an accident within a very short time frame after that accident to determine if the individuals were injured in any way.

If a potential claimant indicates that he or she was injured, this should mean that the limitation period will start to run immediately, although the claimant might still argue that immediately after the accident, the injury was not serious enough to warrant bringing a proceeding.

As soon as a potential claimant claims an injury, it would be prudent for insurers to attempt to obtain written statements in order to set up a future limitation defence. For example, if the insurer does not speak with a party involved in an accident, it is open to that party to later claim that it was not for a number of months that he or she realized he or she was injured or that he or she realized it was because of the accident and then the limitation period does not begin to run until that time. However, if the insurer has a statement from the claimant stating that he or she has been injured within a few days of an accident, this may crystallize the time at which the claimant discovered the injury.

Unfortunately, the new Act will enhance the possibility of *long tail* claims where minors are involved and have a claim or potential claim against their parents or guardians. When a child is a passenger in a car operated by his parent, and is injured in an accident in respect of which the parent may be at fault, the limitation period for an action to be brought against that parent by the child will not start to run until that child turns eighteen years old (or even longer if at 18 the claimant has a *functional disability*).

For example, if a five year old is injured in an accident where his or her mother was driving, that child's limitation period for commencing an action against his or her mother will not start until the child turns eighteen years old. Obviously this will make it very difficult for an insurer to determine when it may close its files and it could have the unfortunate effect of actions being commenced more than a decade after the accident occurred.

Accordingly, insurers may need to develop a diarization system which takes this into account where there are potential claimants who are minors at the time of accident and who have claims or potential claims against a parent or guardian.

When faced with defending in Alberta a claim which arose in another jurisdiction, insurers must be aware of two limitation periods: the Alberta limitation period and the applicable limitation period in the jurisdiction in which the claim arose. If either limitation period has elapsed, the insurer will have a limitation defence.

Although the transitional provisions do not significantly affect the limitation periods for torts, they do affect the limitation periods for other actions, and this must be kept in mind when assessing claims against insureds and subrogated claims. All claims which are known or ought to be known as of March 1, 1999 must be brought either before the expiry of the limitation period under the old act, or within two years of the new Act coming into force.

It will be gathered from the foregoing that the new *Limitations Act* is going to result in a great deal of litigation over the next few years. Obviously there is no judicial consideration at this point of the various provisions within the Act. Some of the first matters which will likely be tested include the interpretation of the discoverability test and the effect of the *Tolofsen* decision in Alberta in the face of the new Act. This paper is meant to briefly summarize some of the main

provisions of the legislation but there will undoubtedly be more questions raised as the Act is put into practice in the next year.

Limitations Act, R.S.A. 2000, c. L-12

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LIMITATIONS ACT

Chapter L-12

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

- (a) “claim” means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;
- (b) “claimant” means the person who seeks a remedial order;
- (c) “defendant” means a person against whom a remedial order is sought;
- (d) “duty” means any duty under the law;
- (e) “injury” means

- (i) personal injury,
- (ii) property damage,
- (iii) economic loss,
- (iv) non-performance of an obligation, or
- (v) in the absence of any of the above, the breach of a duty;
- (f) “law” means the law in force in the Province, and includes
 - (i) statutes,
 - (ii) judicial precedents, and
 - (iii) regulations;
- (g) “limitation provision” includes a limitation period or notice provision that has the effect of a limitation period;
- (h) “person under disability” means
 - (i) a dependent adult or a person in respect of whom a certificate of incapacity is in effect pursuant to the *Dependent Adults Act*, or
 - (ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim;
- (i) “remedial order” means a judgment or an order made by a court in a civil proceeding requiring a party to comply with a duty or to pay damages for the violation of a right, but excludes
 - (i) a declaration of rights and duties, legal relations or personal status,
 - (ii) the enforcement of a remedial order,
 - (iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or the exercise of a power conferred by statute or regulation, or
 - (iv) a writ of habeas corpus;
- (j) “right” means any right under the law;
- (k) “security interest” means an interest in property that secures the payment or other performance of a claim.

RSA 2000 c

Application

2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.

(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of

- (a) the time provided by the *Limitation of Actions Act*, RSA 1980 cL-15, that would have been applicable if this Act, or
- (b) two years after the *Limitations Act*, SA 1996 cL-15.1, came into force,

the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(2.1) With respect to a claim for the recovery of possession of land as defined in the *Limitation of Actions Act*, RSA 1980 cL-15, subsection (2) shall be read without reference to clause (b) of that subsection.

(3) Except as provided in subsection (4), this Act is applicable to any claim, including a claim to which this Act would not be applicable under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if

- (a) the remedial order is sought in a proceeding before a court created by the Province, or
 - (b) the claim arose within the Province and the remedial order is sought in a proceeding before a court of the Parliament of Canada.
- (4) This Act does not apply where a claimant seeks
- (a) a remedial order based on adverse possession of real property owned by the Crown, or
 - (b) a remedial order the granting of which is subject to a limitation provision in any other enactment
- (5) The Crown is bound by this Act.

RSA 2000 c

Limitation periods

3(1) Subject to section 11, if a claimant does not seek a remedial order within

- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding
 or
- (b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from respect of the claim.

(2) The limitation period provided by subsection (1)(a) begins

- (a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim actually acquired or ought to have acquired the knowledge prescribed in subsection (1)(a),
- (b) against a principal when either
 - (i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), or
 - (ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) to the principal actually acquired that knowledge,
 and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

- (i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;
- (ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) at that time;
- (iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the representative acquired the knowledge after being appointed.

(3) For the purposes of subsection (1)(b),

- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

- (b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;
 - (c) a claim based on a demand obligation arises when a default in performance occurs after a demand performance is made;
 - (d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that caused which the claim is based, occurs;
 - (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution is based, whichever first occurs;
 - (f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.
- (4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the *Law of Property Act*.
- (5) Under this section,
- (a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a), and
 - (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).
- (6) The re-entry of a claimant to real property in order to recover possession of that real property is effective if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).
- (7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),
- (a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and
 - (b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to commence proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgment was given, or the last of the acknowledgments if there was more than one, was given.
- (8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.

RSA 2000 c

Concealment

- 4(1)** The operation of the limitation period provided by section 3(1)(b) is suspended during any period of time in which the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.
- (2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) was suspended.

Persons under disability

- 5(1)** The operation of the limitation periods provided by this Act is suspended during any period of time that a person is under disability.
- (2) The claimant has the burden of proving that the operation of the limitation periods provided by this Act is suspended under this section.

RSA 2000 c

Minors

- 5.1(1)** In this section,

- (a) "guardian" means a parent or guardian having actual custody of a minor;
 - (b) "potential defendant" means a person against whom a minor may have a claim.
- (2) Except as otherwise provided in this section, the operation of limitation periods provided by this Act is the period of time that the claimant is a minor.
- (3) A potential defendant may cause the limitation periods provided by this Act to run against a minor by
- (a) delivering a notice to proceed in the prescribed form to
 - (i) a guardian of the minor, if the minor has a guardian, and
 - (ii) the Public Trustee,
 and
 - (b) paying the Public Trustee's prescribed fee.
- (4) Where a potential defendant has complied with subsection (3), the notice to proceed takes effect and the periods provided by this Act begin to run
- (a) on the date the notice to proceed is received by the Public Trustee, which must be shown in the notice by the Public Trustee under subsection (6)(a) or (b), or
 - (b) on the date determined by an order of a judge under subsection (7) or (8).
- (5) Where a potential defendant delivers a notice to proceed to the Public Trustee under subsection (3) and pays the Public Trustee's prescribed fee, the Public Trustee must
- (a) if the claimant has a guardian, make such inquiries as the Public Trustee considers necessary and regarding the ability and intention of the claimant's guardian to act in the best interest of the minor; claim, or
 - (b) if the claimant does not have a guardian, apply by originating notice of motion to a judge of the Court of Queen's Bench, on notice to such persons as may be directed or approved by the judge, for directions.
- (6) After making the inquiries referred to in subsection (5)(a), the Public Trustee must do one of the following
- (a) if satisfied as to the guardian's ability and intention to act in the best interest of the minor regarding the claim, deliver to the potential defendant and the guardian a notice in the prescribed form of the Public Trustee not to intervene in the matter;
 - (b) with the consent of the claimant's guardian, deliver to the potential defendant a notice in the prescribed form stating that the Public Trustee intends to act as next friend of the minor in relation to the claim;
 - (c) if for any reason the Public Trustee thinks it necessary or appropriate to do so, apply by originating notice of motion to a judge of the Court of Queen's Bench, on notice to such persons as may be directed or approved by the judge, for directions.
- (7) On an application under subsection (5)(b), a judge may make an order
- (a) directing the Public Trustee to take no further steps in the matter and stipulating that the limitation periods provided by this Act continue to be suspended with respect to the minor despite subsection (3), or
 - (b) doing all of the following:
 - (i) stipulating that the limitation periods provided by this Act begin to run against the minor on the date specified in the order;
 - (ii) authorizing and directing the Public Trustee to act as next friend of the minor;
 - (iii) giving such authority and directions to the Public Trustee and any other person as may be necessary to ensure that the Public Trustee may effectively prosecute the claim on behalf of the minor.

- (8) On an application under subsection (6)(c), a judge may make an order
- (a) directing the Public Trustee to take no further steps in the matter and stipulating that the limitation provided by this Act
 - (i) begin to run against the minor on a date specified in the order, or
 - (ii) continue to be suspended with respect to the minor despite subsection (3),or
 - (b) doing all of the following:
 - (i) stipulating that the limitation periods provided by this Act begin to run against the minor on a date specified in the order;
 - (ii) authorizing and directing the Public Trustee to act as next friend of the minor;
 - (iii) giving such authority and directions to the Public Trustee, guardian, if any, and any other person necessary to ensure that the Public Trustee may effectively prosecute the claim on behalf of the minor.
- (9) On an application by the Public Trustee under subsection (5)(b) or (6)(c), a judge may consider
- (a) the apparent seriousness of the minor's injury;
 - (b) the apparent legal merits of the claim;
 - (c) the views of the Public Trustee and the guardian, if any, as to whether the minor's best interest would be served by pursuing or by not pursuing the claim;
 - (d) the view of the minor regarding the claim, where the judge considers that the minor is able to appreciate the nature of the issue;
 - (e) where the guardian or the minor is opposed to pursuing the claim, the apparent likelihood that the minor would be able to prosecute the claim effectively as next friend;
 - (f) whether directing the Public Trustee to take no further steps and stipulating that the limitation periods provided by this Act continue to be suspended with respect to the minor is likely to cause serious prejudice to the minor or the potential defendant, having regard to any matters that the judge considers relevant, including:
 - (i) the minor's age,
 - (ii) whether the minor will be, or is likely to be, a person under disability on becoming an adult,
 - (iii) whether it would be practicable to preserve relevant evidence during the period the limitation periods would be suspended, and
 - (iv) any harm that may be suffered by the minor as a result of any delay in recovering compensation that the minor may be entitled to;
 - (g) any other matters the judge considers relevant.
- (10) Where the Public Trustee makes an application to the Court of Queen's Bench under this section, no costs are awarded against any party to the application.
- (11) Subsection (4) operates only in favour of a potential defendant on whose behalf the notice to proceed is only with respect to a claim arising out of the circumstances specified in the notice.
- (12) A notice to proceed delivered under this section is not an acknowledgment for the purposes of this Act for admission for any purpose.
- (13) Subsections (3) to (12) do not apply
- (a) where the potential defendant is a guardian of the minor, or

- (b) where the claim is based on conduct of a sexual nature including, without limitation, sexual assault.
- (14) Under this section, the claimant has the burden of proving that at any relevant point in time the claimant was not aware of the claim.
- (15) The Minister may make regulations prescribing
 - (a) the form, contents and mode of a delivery of a notice to proceed or any other notice referred to in subsection (14), and
 - (b) the fee to be paid by a potential defendant under subsection (3)(b).
- (16) This section applies where a claimant seeks a remedial order in a proceeding commenced after this section comes into force, regardless of when the claim arises, except that a defendant who would have had immunity from liability if the proceeding had been commenced immediately before this section came into force continues to have immunity from liability for that claim.

Claims added to a proceeding

- 6(1)** Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
- (2) When the added claim
 - (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
 - (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant or a defendant is sued,
 the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
 - (3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
 - (a) the added claim must be related to the conduct, transaction or events described in the original pleading,
 - (b) the defendant must have received, within the limitation period applicable to the added claim plus provided by law for the service of process, sufficient knowledge of the added claim that the defendant was not prejudiced in maintaining a defence to it on the merits, and
 - (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective resolution of the claims originally asserted or intended to be asserted in the proceeding.
 - (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
 - (a) the added claim must be related to the conduct, transaction or events described in the original pleading, and
 - (b) the defendant must have received, within the limitation period applicable to the added claim plus provided by law for the service of process, sufficient knowledge of the added claim that the defendant was not prejudiced in maintaining a defence to it on the merits.
 - (5) Under this section,
 - (a) the claimant has the burden of proving
 - (i) that the added claim is related to the conduct, transaction or events described in the original pleading, and
 - (ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,
 and

- (b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in i satisfied.

Agreement

7(1) Subject to section 9, if an agreement expressly provides for the extension of a limitation period provide the limitation period is altered in accordance with the agreement.

- (2) An agreement that purports to provide for the reduction of a limitation period provided by this Act is not
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Acknowledgment and part payment

8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of and interest on any of them.

(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, t the limitation period begins again at the time of the acknowledgment or part payment.

(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum cla unpaid, but an acknowledgment is effective

- (a) whether or not a promise to pay can be implied from it, and
(b) whether or not it is accompanied with a refusal to pay.

(4) When a claim is for the recovery of both a primary sum and interest on it, an acknowledgment of either a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the otl

Persons affected by exceptions for agreement, acknowledgment and part payment

9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.

(2) An agreement made by or with an agent has the same effect as if made by or with the principal.

(3) An acknowledgment or a part payment made by or to an agent has the same effect as if it were made by principal.

(4) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made

- (a) with or to the person,
(b) with or to a person through whom the person derives a claim, or
(c) in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy and Ins.* (Canada).

(5) A person is bound by an agreement, an acknowledgment or a part payment only if

- (a) the person is a maker of it, or
(b) the person is liable in respect of a claim
(i) as a successor of a maker, or
(ii) through the acquisition of an interest in property from or through a maker who was liable in respect of the claim.

