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Insurance Observer

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LITIGATION PRIVILEGE VS. DISCLOSURE

Jay A. Stolberg

The tension between the protection afforded by litigation privilege and the broad disclosure requirements under the *Rules of Civil Procedure* was the subject of the recent Ontario Court of Appeal decision *Conceicaco Farms Inc. v. Zeneca Corp.* ("*Conceicaco*"). The Court of Appeal decision centred around whether communications between counsel and a retained expert were required to be disclosed.

The facts in *Conceicaco* were straightforward – the defendant's original counsel had a lengthy telephone discussion with an expert, following which, the solicitor prepared a memo to file. The file was later transferred to new counsel. The memo was not specifically listed in the defendant's Affidavit of Documents, although litigation privilege was generally claimed for all documents and memorandum in the solicitor's possession. In 2003, the expert provided a report to the defendant's new counsel which was served on the plaintiff.

The expert testified at trial. During the trial, plaintiff's counsel requested production of the expert's notes and records and inquired whether the expert had prepared a report for the previous solicitor of record. Defence counsel responded that there had been no prior report. A review of the trial transcript confirmed that defence counsel advised the trial judge that he had no notes of any discussions between previous counsel and the expert. The expert testified that he did not recall any discussions with prior counsel. Plaintiff's counsel did not pursue the issue further at trial. The trial judge found in favour of the defendant.

While reviewing defence counsel's dockets for cost submissions, plaintiff's counsel became aware of the telephone discussion and memo between the expert and the previous defence counsel. He moved for production of the memo.

Defence counsel refused to produce the memo, arguing it was disclosed at trial and the plaintiff did not seek production at that time. Alternatively, defence counsel refused to produce the memo, arguing that it was protected by litigation privilege. The defence asked the court reporter to review her recordings from the trial, which indicated that the court had not been advised of its existence at trial.

The plaintiff brought a motion before the trial judge seeking production of the expert's entire file, including the memo, and asking the court to strike out the expert's evidence and grant judgment in the plaintiff's favour. The alternative relief sought was a mistrial. The trial judge dismissed the motion holding that he would have come to the same conclusion and rendered the same decision, even if he had disregarded the expert's report.

The plaintiff appealed. The issue on appeal involved the disclosure required by rule 31.06(3), which provides that, on an examination for discovery, the examining party is entitled to disclosure of the "findings, opinions and conclusions" of an expert engaged by the opposing party as well as the expert's name and address. Disclosure is required only where the party being examined undertakes to call the expert at trial.

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The appeal judge, Justice Gillese, noted that the modern trend is towards increased disclosure where a conflict exists with litigation privilege. However, based on the twenty-four page length of the memo, the appeal judge concluded that it was "fair to assume that it contains foundational information for [the expert's] final findings, opinions and conclusions." Justice Gillese ordered production of the memo.

The decision was appealed to a three-member panel of the Court of Appeal, which unanimously overturned Justice Gillese's decision. The panel noted that rule 31.06(3) dealt with the disclosure of *information*, not the production of documents. The panel held that the memo was otherwise protected by litigation privilege and that the rule did not require its disclosure. The memo, therefore, was held not to be producible.

The Court noted that rule 31.06(3) dealt with *pre-trial* disclosure of information during the discovery process. It held that the plaintiff was not entitled to seek disclosure under the rule following trial. Rather, the plaintiff should have sought disclosure under rule 31.06(3) after being served with the report.

Having concluded that rule 31.0(3) was unavailable to the plaintiff, the panel observed that it was not required to decide the scope of disclosure under rule 31.06(3). However, it did offer some comments.

The panel rejected the principle at one extreme which would require disclosure of all communications between counsel and an expert before preparation of a report as this was litigation privilege. However, without limiting the scope of the disclosure required, the panel held that in addition to the name and address of the expert, the rule requires disclosure of the solicitor's *instructions* to the expert and the facts on which the *final opinion* is based.

The panel's decision affirms that there are limits to the disclosure reasonably required to allow a party to test the veracity of the opposing party's expert opinion. The panel's decision affirms that it is not "open season" on the communications between a solicitor and an expert. However, the parameters of disclosure remain a source of debate in the lower courts which strongly invites appellant review. ■

BILL 14: AMENDMENTS TO SECTION 22 OF THE LIMITATIONS ACT, 2002

Julia Anagnostakis

Bill 14, the *Access to Justice Act, 2005,* received Royal Assent on October 19, 2006. Of significance, the *Act* contains an amendment to section 22 of the *Limitations Act, 2002*, S.O. 2002, c. 24 (the *"Act"*). Prior to the amendment, parties (including business parties) were prohibited from altering the limitation periods prescribed by the *Act* in contracts and agreements entered into on or after January 1, 2004.

As before, subsection 22(2) of the *Act* upholds the validity of pre January 1, 2004 agreements which had modified (excluded, extended, suspended or abridged) limitation periods.

INSURANCE OBSERVER

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However, the new provisions of the *Act* make further allowances under the following subsections:

(3) A limitation period under this *Act*, other than one established by section 15 [the 15 year ultimate limitation period], may be suspended or extended by an agreement made on or after the effective date;

(4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after the effective date, but only if the relevant claim has been discovered;

(5) The following exceptions apply only in respect of business agreements:

1. A limitation period under this *Act*, other than one established by section 15, may be varied or excluded by an agreement made on or after the effective date;

2. A limitation period established by section 15 may be varied by an agreement made on or after the effective date, *except* that it may be suspended or extended only in accordance with subsection (4).

"Effective date" means the day the *Access to Justice Act, 2005* receives Royal Assent. This occurred on October 19, 2006. "Vary" includes extend, shorten and suspend.

Subsection (6) defines a "business agreement" as an agreement made by parties, none of whom is a consumer as defined in the *Consumer Protection Act, 2002,* S.O. 2002, C. 30. Pursuant to the *Consumer Protection Act, 2002,* a consumer means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes.

"Business purposes" is not defined in the *Act*. However, reference may be made to the definitions of "consumer agreement"[1] and "consumer transaction"[2] in the *Consumer Protection Act, 2002* to obtain further guidance in this respect. For most purposes, the distinction between "business purposes" and those of a consumer nature should be fairly clear.[3]

As a result of the above amendments, there are now two types of agreements that can vary a limitation period.

1. If the agreement does not satisfy the definition "business agreement", then the basic (two year) limitation period can be suspended or extended but not abridged, pursuant to subsection (3).

An agreement to suspend or extend an ultimate limitation period is legal but only if the claim has been discovered. Therefore, if there was an extension agreement incorporated as a general term in a contract, but the claim was not discovered when the agreement was made, then only the basic limitation period would be extended and not the ultimate limitation period.

2. If we are dealing with a business agreement, then the basic limitation period can be **excluded**, suspended, extended or ABRIDGED. A business agreement can abridge an ultimate limitation period but cannot extend or suspend an ultimate limitation

[1] "Consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment.

[2] "Consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement.

[3] Coffin, A. Graeme, *Ontario's Limitations Act, 2002 – Where Do We Stand? The Latest Wrinkle for Representations and Warranties – Ontario's Limitations Act, 2002,* The Six-Minute Business Lawyer 2006, Continuing Legal Education.

period unless the claim has been discovered, pursuant to subsection (5).

However, you cannot exclude the ultimate limitation period in a business agreement.

It follows that standstill or tolling agreements which comply with the requirements of the amendments to the new *Act* are now legal. The *Act* has always provided for the suspension of the operation of limitation periods when the parties have entered into mediation agreements. Some of our clients have entered into mediation agreements as a way to create *de facto* tolling agreements notwithstanding the former blanket prohibition of such agreements in section 22 of the *Act*. With these new amendments, it is now possible to create standstill or tolling agreements in a more direct and transparent manner.

An important fact to keep in mind is that Bill 14 only applies to agreements made *on or after* it received Royal Assent, being October 19, 2006. There are no retroactive provisions that apply to agreements made between January 1, 2004 to October 18, 2006.

It is our view that most personal lines insurance policies would not be considered to be business agreements. This means that any limitation period placed in such a policy could not provide for a limitation period shorter than two years. Most commercial lines policies would be considered to be business agreements and could contain shorter limitation periods. Of course, attention would need to be drawn to any term which shortens the basic limitation period.

Additionally, the limitation periods provided for in statutory conditions contained in the *Insurance Act* cannot be varied. We have some concern that commercial lines policies insuring very small businesses could be held not to be business agreements. For example, a commercial lines policy insuring a family that has one artisan vehicle or that is operating a farm may not be found to be a business agreement. Therefore, we would admonish insurers who wish to alter limitation periods to do so on a policy by policy basis using a change endorsement.

Although the full effects and limitations of the amendments likely will not be known for some time, the amendments do provide business parties with greater flexibility to negotiate their own terms, as long as they comply with the *Limitations Act, 2002,* while at the same time, protecting consumers from potentially unfair results. ■

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Insurance Observer is a publication of the Insurance Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.
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