

## The *Insurance Amendment Act*: significant changes to insurance law in Alberta

On November 4, 2008, the *Insurance Amendment Act*, 2008, obtained Royal Assent. This document contains important changes to Alberta's *Insurance Act*, which are intended to harmonize Alberta's insurance law regime with that of British Columbia, to enhance protection of the insurance policy consumer, and to increase the efficiency of the system. Half of the changes gained the force of law at the time of Royal Assent on November 4, 2008, while the remainder requires the further step of Proclamation to become enforceable.

This circular provides a brief summary of some of the important changes that have come into effect as a result of the *Insurance Amendment Act*.

### 1) **LIMITATION PERIODS HAVE BEEN INCREASED TO TWO YEARS**

Part 5 of the *Insurance Act* has been replaced with entirely new rules applicable to insurance contracts, including new rules for limitation periods applicable to suits by policyholders against their insurers under the contract. In the case of damage to insured property, the new s. 526(1) extends the limitation period for an action by the insured against the insurer to two years after the insured knew or should have known that the loss has occurred. In the case of losses other than those to property, the new s. 526(1) extends the limitation period to two years after the cause of action arose. Under the new s. 527, s. 5 of the *Limitations Act*,

which suspends the operation of a limitation period during any period that the plaintiff was experiencing a disability from bringing suit, is now also applicable to actions on insurance contracts.

Pursuant to the new s. 513, the limitation rules in s. 526(1) do not apply to life insurance, accident and sickness insurance or reinsurance and, under s. 526(2), the limitation rules in s. 526(1) do not apply to contracts of automobile or hail insurance. In subsequent sections, however, it is made clear that lawsuits under all of these types of insurance (with the exception of reinsurance) are also bound by new two year limitation periods.

As to both automobile insurance and hail insurance, the new s. 558(1) applies the same two-year limitation periods to actions against insurers under automobile insurance policies. Similarly, the revised s. 636 creates a new statutory condition [condition 16], mandating that actions brought by the insured against the insurer in respect of hail insurance must be commenced no later than two years after the damage occurred to the crop insured under the policy.

The new s. 593 allows limitation periods for actions against the insurer to be set out in the policy, but prescribes a minimum limitation period of two years from the date of the accident. This section applies to insurance against medical, nursing or funeral expenses, insurance against injury or death for which an uninsured driver is responsible, and to accident insurance.

It appears that the drafters of the *Insurance Amendment Act* have overlooked addressing claims of minors and the suspension of those claims during their period of minority, as is addressed in the *Limitations Act*.

New sections 677 and 708 now impose identical new limitation periods for actions against the insurer to recover insurance money payable upon a person's death under a life insurance policy and an accident and sickness insurance policy. With a few exceptions, such actions must be commenced under subsection (1) within two years after the evidence of the claim has been provided to the insurer, or within six years of the decedent's death, whichever comes sooner. However, under subsection (2), when a declaration has been made by a court that the party in question is presumed dead, then the limitation period for suing the insurer to obtain insurance money payable upon the death of the party presumed dead is two years from the date of the declaration. Under subsection (3), actions to recover insurance money under life insurance or accident and sickness insurance contracts in cases other than when the money is payable because of a person's death must be commenced no later than two years after the claimant knew, or should have known, of the loss giving rise to the claim. Actions for insurance money payable on a periodic basis under these types of policies have to be commenced by the later of the dates prescribed under subsections (1), (2), or (3), or, if some insurance money has been paid out, two years after the date when the next payment should have occurred, whichever comes later.

All the changes to the limitation periods

set out in the *Insurance Amendment Act* require the further step of Proclamation. By increasing the length of time in which the insured can bring suit from one to two years, these changes offer greater protection for the consumer of insurance policies.

## **2) CHANGES TO THE DISPUTE RESOLUTION PROCESS**

The *Insurance Amendment Act* also contains rules relating to dispute resolution. The new s. 519 slightly changes the old s. 514's alternative dispute resolution process of appraisals. Except for a change in the names of the process (from "appraisal" to "dispute resolution process") and its participants (from "appraiser" to "dispute resolution representative"), the process, itself, remains largely the same: both parties must appoint a representative within 7 days of providing or receiving demand for this process; the representatives appoint an umpire within 15 days of the representatives' appointments; the representatives attempt to resolve the matters in dispute; and if they cannot, the umpire will resolve the matter. Provisions as to who must bear the cost of the process remain the same: each party has to pay her own representative, and the cost of the umpire is shared equally.

New provisions in the *Insurance Amendment Act* include restrictions on who can act as a representative: neither the insured or the insurer, nor any of their employees are permitted to act in such a capacity. Although the process for forcing appointment of, or action on the part of, the representatives basically remains the same (either party can apply to a Court for appointment of a new

representative), penalties for failure to appoint an appropriate representative have been specified in the new Act. It is clarified that the party making the application for appointment of a representative can apply for a costs award calculated on a solicitor-client basis. This should create an additional incentive to appoint a representative willing to act on the matter in a timely fashion and thereby increase efficiency.

Further, under the *Insurance Amendment Act*, the process for appointing an umpire when the representatives fail to do so, or the umpire fails or refuses to act, has been altered. Instead of applying to the courts, an application to the Superintendent of Insurance is now required. The instigating representative is to provide the names of three persons he suggests as umpire, along with their credentials, and the responding representative has an opportunity to do the same. The Superintendent then makes a choice from the names that have been submitted to her. The creation of a specific process for the appointment of an umpire is consistent with the goal of increasing certainty and efficiency under the *Insurance Act*.

A final change made to the dispute resolution process is that the new section limits the discretion of the umpire in reaching any final decision of the matter by stating that he will be bound by the rules of procedural fairness in carrying out his functions.

The new dispute resolution section of the *Insurance Amendment Act* requires Proclamation for it to take effect.

### 3) FIRE COVERAGE

The *Insurance Amendment Act* has entirely eliminated the old Subpart 3 of Part 5 of the *Insurance Act*, relating to fire insurance, and no longer contains any sections that deal solely with fire insurance, apart, arguably, from s. 545. Rather, such policies are dealt with through the generally applicable provisions of Part 5, dealing with Insurance Contracts generally. In s. 540, new statutory conditions are imposed on such contracts, although they are largely identical to the old statutory conditions imposed on fire insurance contracts under the old s. 549. The most significant changes to these conditions are that the old one-year limitation period for lawsuits against the insurer has been eliminated, as it has been replaced by the new two-year limitation period specified in s. 526. Moreover, the old appraisals process has been replaced with the new dispute resolution process.

The only section in the new Act that deals specifically with coverage for loss or damage by fire is the new s. 545, subsection (3) of which disallows insurers from having exclusions of coverage for losses by fire (or other prescribed perils) relating to the cause of the fire or peril, or relating to the circumstances of the fire or peril, if those circumstances are prescribed. In other words, insurers are not allowed to deny coverage for damage caused by fire or other prescribed peril on the basis that the fire or peril was caused in a certain way, or occurred in certain circumstances. Such exclusions are only permitted if “prescribed”, the meaning of which is not clear, although it likely refers to exclusions specifically allowed by legislation or regulation. By reducing the ability of insurers

to limit coverage for such losses, the new Act is offering greater protection to the insured.

The changes set out in the *Insurance Amendment Act* relating to fire insurance require Proclamation to come into force.

#### **4) PROTECTING THE INNOCENT CO-INSURED**

Section 541 of the *Insurance Amendment Act* has been added to limit the applicability of exclusions in insurance contracts that exclude coverage for loss to property caused by a criminal or intentional act or omission by any person, including an insured. Such exclusions will now only exclude coverage for:

- a) those whose act or omission caused the loss;
- b) those who abetted or colluded in the act or omission that caused the loss;
- c) those who consented to the act or omission and knew, or ought to have known, that the loss would result; and
- d) any other persons prescribed by regulation.

Therefore, through the inclusion of this new section, those who did not participate or consent to the criminal or intentional act or omission causing the loss to property are entitled to coverage. This extends to a co-insured under a policy where it is another co-insured who was involved in the loss.

Section 541 of the *Insurance Amendment Act* is another amendment aimed at consumer protection, as it protects coverage for those who would otherwise be stripped of it because of another's misconduct. Proclamation is required for section 541 to come into force.

#### **5) CHANGING THE RULES FOR CANCELLING INSURANCE**

New rules, more protective to the insured, have also been adopted in regards to the insurer's ability to terminate an insurance contract. The old s. 518(3) allowed an insurer to terminate a policy "forthwith" by providing written notice by registered mail as soon as a written promise to pay was not honoured. Under the new s. 522(3), the insurer is only allowed to terminate an insurance contract in accordance with a statutory or policy condition. If there is no such condition, however, the previous ability to terminate immediately by notice through registered mail is preserved.

For most kinds of insurance contracts, a statutory condition will apply. Section 540 imposes a statutory termination condition on all contracts except for life insurance, accident and sickness insurance, reinsurance, automobile insurance, hail insurance and surety insurance. Section 705 imposes an identical condition for accident and sickness insurance and s. 556 does the same for automobile insurance. These conditions only allow an insurer to terminate an insurance contract by giving either 15 days' notice of termination via registered mail (with the 15 days commencing on the day the notice is delivered to the insured's postal address) or 5 days' written notice of termination through personal delivery to the insured. Section 636 provides a statutory condition for the cancellation of hail insurance. For life insurance and reinsurance, the ability to terminate upon failure to pay through registered mail is preserved. Moreover, where statutory conditions apply, the insured

remains capable of terminating the contract at any time upon request.

The sections in the *Insurance Amendment Act* relating to terminating an insurance contract now provide greater protection to the insured as, in the vast majority of insurance contracts, the insurer must provide several days' notice before termination can be effective. If an insurable loss occurs within this timeframe, the insured is still covered. These changes will become effective upon Proclamation.

#### **6) EXCHANGE OF INFORMATION THROUGH ELECTRONIC MEANS**

To increase efficiency, s. 547 of the new Act allows any records required or allowed to be exchanged to be provided in electronic form. Section 547 also states that a record provided in electronic form is deemed to have been sent by registered mail for the purposes of the Act. The only records that cannot be communicated through the electronic medium are those specified through regulation. Under the new s. 548, the Lieutenant Governor in Council now has the power to make regulations excluding certain records from electronic exchange.

These sections require Proclamation to come into force.

#### **7) GREATER ACCESS TO DOCUMENTS**

The old s. 558 regarding the issuance of an insurance policy has been changed significantly in the *Insurance Amendment Act* to allow for expanded and easier access to documents for insureds and claimants. The new ss. 642(1) to (3) correspond with the old ss. 558(1) to (3). While the old s. 558(4) only

required the insurer to provide a copy of the application, the new s. 642(4) requires that the insurer provide to the insured or a claimant a copy of the entire contract, and any written statements or other records provided to the insurer as evidence of insurability under the contract.

Further, the new ss. 642(5) and (6) pertain to the documents an insurer is required to provide in the cases of group insurance and creditor's group insurance, respectively.

It should be noted that, under the new s. 642(9), a *claimant's* access to documents under subsections (4) to (6) only extends to information that is relevant to a claim, or denial of a claim, under the contract.

Proclamation is still required for these sections to come into force.

#### **8) NEW REGULATION-MAKING POWERS**

The Lieutenant Governor in Council's power to make regulations has been amended and expanded in s. 511(1) of the *Insurance Amendment Act*. The Lieutenant Governor may now make regulations, under s. 511(1)(e), respecting an insured's right to rescind a contract of life insurance or a contract of accident or sickness insurance and an insurer's obligation to refund premiums if the contract is rescinded. The new s. 511(1)(g.1) also provides that regulations may be made requiring an insurer to notify a claimant of applicable limitation periods. The new s. 511(1)(g.2) allows regulations to be made with regards to the dispute resolution process established by s. 519.

Further changes regarding the Lieutenant

Governor's power include the new s. 511(1)(g.3), allowing regulations to be made concerning telephonic communications. The new s. 511(1)(h.1)(v.1) permits the Lieutenant Governor to make regulations that require an insurer to be a member of a prescribed organization for the purpose of dealing with complaints. Finally, the new s. 511(1)(h.2) allows regulations to be made respecting the administration of group insurance and creditor's group insurance in respect of life insurance and accident and sickness insurance.

These sections will become effective upon Proclamation.

#### **9) CHANGES TO SUBROGATION RULES**

As stated above, the specific provisions for fire insurance in the old Subpart 3 of Part 5 have been eliminated. As such, the old s. 553, relating to subrogation, has been eliminated and s. 546 of the *Insurance Amendment Act* now applies to subrogation generally. Section 546(1) contains the same standard statement of subrogation of the insurer to all rights of recovery. Section 546(2) provides, as before, that when the net amount recovered, after deducting costs, is not sufficient to provide complete indemnity, the remaining amount is divided proportionately between the insurer and insured. Further, ss. 546(3) to (6), which are the same as the old ss. 651(3) to (6) under the old Subpart 5 for Automobile Insurance, now apply generally to insurance contracts, excluding life insurance, accident and sickness insurance and reinsurance.

Proclamation is required for these provisions to come into force.

#### **10) NEW RULES FOR INSURANCE APPLICATIONS**

The new s. 518 has expanded upon the old s. 547 with regards to the policy of insurance reflecting the contents of the application. Section 518(1), like the old s. 547, states that a policy is deemed to be in accordance with the terms of the application. Where the policy does vary from the application and the insurer gives immediate notice of the difference, the insured may reject the policy within two weeks of receiving notice. According to the new s. 518(4), if the insured does not reject the policy, it is deemed accepted.

Sections 518(2) and (3) stipulate the refund that must be given to the insured where the policy is rejected. In general cases, s. 518(2) states that the insurer must refund the excess of premium actually paid by the insured over the prorated premium for the expired time. Further, in determining the refund, the prorated premium for the expired time cannot be less than any minimum retained premium specified in the policy.

Where the insured fails to disclose material information that would have resulted in a higher premium, according to s. 518(3), the refund is the excess of premium actually paid by the insured over the short rate premium for the expired time, calculated as if the higher premium had been charged.

These provisions require the further step of Proclamation.

#### **11) STANDARD POLICY TERMS ARE NOW PRESUMED**

A new s. 517 has been added to the Act and is specifically intended to cover situations

where insurance is effective before the policy is issued. Section 517(1) states that an insurance contract is deemed to include the standard policy terms and conditions for the particular type of insurance. In addition, the contract is deemed to include any other terms or conditions that the insured is advised of by way of written notice.

Section 517(2) does provide limits to the terms and conditions that are deemed to be included in the contract under section 517(1). Where written notice does not disclose the existence and contents of a term or condition, the term or condition does not apply to the contract where the insured would not reasonably be able to comply with the term or condition. This ensures that insureds are not being held subject to terms or conditions that are not apparent and not easily complied with.

It should be noted that the above provisions of the *Insurance Amendment Act* do not apply to contracts of automobile insurance. Proclamation is required for this section to come into force.

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.

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For more information on the *Insurance Amendment Act* and its impact, please contact Susan E. Remmer (sremmer@parlee.com) or any member of our Insurance Litigation Practice Group.