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LIMITATION PERIODS FOR FIRST PARTY PROPERTY LOSSES

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LIMITATION PERIODS FOR FIRST PARTY PROPERTY LOSSES AND HOW TO GET TIME RUNNING FROM THE PROOF OF LOSS

The law with respect to limitation periods for first party property loss claims in British Columbia has recently undergone a significant change due to two recent decisions of the Supreme Court of Canada. While, as a result of these decisions, the applicable limitation period for commencing first party property claims may have been clarified, the result is that property insurers now have to contend with a different uncertainty – how does a property insurer "activate" the limitation period?

The purpose of this paper is to address the practical problems facing property insurers and adjusters when dealing with a first party property claim. This paper will examine how the courts have treated the criteria for a "reasonably sufficient" Proof of Loss and the consequences for failing to deliver one. The paper will then consider how a property insurer can commence the running of the limitation period contained in Section 22 of the *Insurance Act*[1] and provide practical advice for an insurer attempting to rely on this limitation period. Finally, the paper will address the issue of limitation periods for bad faith claims, which are becoming a more prominent presence in first party property claims against insurers.

I. DO MODERN PROPERTY POLICIES CONSTITUTE A POLICY OF "FIRE INSURANCE"?

In two companion Supreme Court of Canada decisions[2], the court considered the applicable limitation period for the commencement of an action against property insurers under the provisions of the *Act* and the terms of two different multi-peril property policies. The Supreme Court concluded that property insurers in British Columbia are statutorily barred by virtue of s. 22 of the *Act* from incorporating into a multi-peril or "all risk" property policy the one year limitation period from Part 5 of the *Act*. Thus, the applicable limitation period for claims made under a homeowners' or commercial multi-risk property policy of insurance *is one year from the furnishing of a reasonably sufficient Proof of Loss.*

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[1] R.S.B.C. 1996, c. 226 (the"*Act*")

[2] *K. P. Pacific Holdings Ltd. v. Guardian Insurance Company of Canada* (2003), 225 D.L.R. (4th) 193 (S.C.C.) (*"K. P. Pacific Holdings")* and *Churchland v. Gore Mutual Insurance Company* (2003), 225 D.L.R. (4th) 202 (S.C.C.) (*"Churchland"*).

In *K. P. Pacific Holdings* the insured owned a hotel that was damaged by fire. It subsequently made a claim for loss by fire under its all risks insurance policy. The claim was made more than one year after the loss occurred but within one year of filing a Proof of Loss. The insurer argued that the insured's claim was statute barred as the applicable limitation period was one year from the date of loss according to Part 5, the Fire Insurance provisions of the *Act*.

In determining that the policy fell within Part 5 of the *Act*, the trial judge concluded that the insured's claim had been commenced out of time. His reasoning was based on the British Columbia Court of Appeal's earlier decision in *Dressew Supply Ltd. v. Laurentian Pacific Insurance Company*[3]. In *Dressew* the Court of Appeal concluded that the statutory provisions in Part 5 of the *Act*, including the one year limitation period, could be contractually incorporated into a policy of insurance. The Court of Appeal in *K. P. Pacific Holdings Ltd.* upheld the decision of the summary trial judge.

The Supreme Court determined that the multi-risk policy could not be "shoehorned" into and did not fit within Part 5 of the *Act*. As such, the multi-risk policy was governed by Part 2 of the *Act*, which Part is of general application. Section 22(1) in Part 2 states:

> "Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of a loss or claim under the contract and not after."

The court concluded that the applicable limitation period was one year from the filing of a reasonably sufficient Proof of Loss and that the insured's claim was *not* statute barred.

The Supreme Court of Canada noted that the anachronistic *Act* was designed for a time when insurers issued policies designed to respond to specific risks and subjects. The *Act* specifies rules, including limitation periods, based on different and discrete categories of insurance. However, in today's world, the dominant property policy is the "all-risks" or "multi-peril" policy:

> "…which covers a panoply of perils. This is good for consumers. It minimizes the number of policies they need to buy and ensures comprehensive coverage at a lower cost. But it is bad when legal issues arise. The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories.

[3] (1991), 57 B.C.L.R. (2d) 198 (C.A.)

> The result is continued uncertainty about which rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. The rulings that have emerged have been likened to a judicial lottery."

In *Churchland* the Supreme Court considered a theft claim made by the insured under his homeowners' multi-risk property policy. The claim was brought more than one year after the theft, but within one year of the provision of a reasonably sufficient amended Proof of Loss.

The court determined that the type of claim made under a multi-risk property policy was not determinative of whether the policy fell within Part 5 of the *Act*. As in *K. P. Pacific Holdings* the Court concluded that this multi-risk homeowners' property policy fell within Part 2 of the *Act* and was subject to the one year limitation period. The court also concluded that *Dressew* was wrongly decided and an insurer was statutorily barred from including a one year limitation period in the policy.

Thus, the principles that can be gleaned from *K. P. Pacific Holdings* and *Churchland* are as follows:

(a) virtually all multi-risk homeowners and all risk commercial property policies are governed by Part 2 of the *Act,* and as such, there is a one year limitation period from the furnishing of a reasonably sufficient Proof of Loss that applies to actions commenced by insureds whether or not the loss arises from fire; and

(b) the only claims that are governed by Part 5 of the *Act* are claims made pursuant to a true fire policy that may also cover minor incidental risks, such as water damage.

II. WHAT CONSTITUTES A "*...REASONABLY SUFFICIENT PROOF OF LOSS*" FOR THE PURPOSE OF SECTION 22 OF THE *INSURANCE ACT* SO AS TO TRIGGER THE ONE YEAR LIMITATION PERIOD?

What then constitutes a "*reasonably sufficient proof of loss*" so as to trigger the one year limitation period under s. 22 of the *Act*?

The purpose of a Proof of Loss is to afford the property insurer with the means of determining the validity of a claim, both as to nature and amount[4]. An insured is obliged to be specific, within the limits of the possible, and avail itself of the assistance of its agents in completing the Proof of Loss. An insured is also required to take all reasonable steps, and make all necessary inquiries, to obtain available information in the knowledge or possession of third parties. Where it is shown that, from the information in the insured's possession, power or control, the insured could have, but did not, furnish particulars more complete than those in fact furnished, the insured has not discharged the duty reposed on it, and the particulars do not satisfy the conditions for disclosure.

The Supreme Court of Canada considered the obligations on an insured with respect to the contents of a Proof of Loss in the late nineteenth century[5]. The insured's store suffered a fire, causing a loss to inventory. The only document delivered by the insured was an affidavit, which did not contain an inventory of the lost property, but instead provided:

> 5. That I have made as careful an estimate of the value of property covered by said insurance and destroyed by fire as the nature and circumstances of the case will admit of, and find the same to be between three thousand and four thousand (3,000 and 4,000) dollars.

The insured recovered at trial but, on appeal, judgment was entered for the insurer. The Supreme Court of Canada affirmed the appeal court:

> "The plaintiff did not deliver as particular an account of his loss as the nature and circumstances of the case admitted of; the evidence is conclusive on this point. Although the plaintiff may not himself have been personally aware in detail of the goods destroyed by fire yet his clerk, and book-keeper, one Ella Robinson, who was in charge of the store at the time of the fire, stated that she could, with plenty of time immediately after the fire, have made up a tolerably correct list…"

Section 22 of the *Act* does not itself contain a requirement as to the form or content of a Proof of Loss. However, Statutory Condition 6 of Part 5 of the *Act* regulates the form and content of a Proof of Loss:

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[4] *Cedar Hut Restaurants Ltd. v. Wawanesa,* [1986] I.L.R. 1-1992 (Sask. Q.B.).

[5] *Nixon v. Queen Insurance Co.* (1894), 23 S.C.R. 26

Requirements after loss

6. (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,

(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, 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.
>
> (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.

The sufficiency of a Proof of Loss has often been the subject of judicial consideration. We must then turn to the judicial treatment of s. 22 and other cases concerning the sufficiency of a Proof of Loss. Historically, it is the equivalent of Statutory Condition 6(1)(b)(i), above, that is often invoked by property insurers to deny indemnity for a loss. The decision in *Nixon* is tempered to some extent by the reality of judicial relief from forfeiture discussed further below. Property insurers will not often encounter an insured who provides the dearth of information offered by Mr. Nixon, but instead, insureds who provide some, although arguably inadequate, information. However, as the following cases illustrate, inadequate Proofs are rarely the basis for successfully avoiding an indemnity obligation.

In *Creative Touch Millworks Inc. v. Royal Insurance Co. of Canada*[6], the insured claimed for the loss and damage of equipment and tools occasioned by fire from the property insurer. The property insurer took the position, *inter alia*, that there had been imperfect compliance with Statutory Condition 6(1)(b) of the *Act*, which obligated an insured to deliver a Proof of Loss verified by Statutory Declaration.

Evidence at trial established that the property insurer was aware of the fire and had employees at the site during clean-up. An independent adjuster came on site one week after the fire and authorized the retention of a restoration company. The court stated:

> "The proof of loss was completed on a fire proof of loss I.B.C. claim form No. 7. The first page appears to have been completed in compliance with the statutory conditions. However, *it was imperfect in that it did not give a complete inventory of the destroyed and damaged property and did not show in detail quantities, costs, actual cash value and particulars of amount of loss claimed as required pursuant to Statutory Condition 6(1)(b)(i).*
>
> …
>
> I find that the defendant insurers were dilatory, capricious and uncooperative in the handling of the insured plaintiff's claims. They were aware of the fire in the

[6] [1991] I.L.R. 1-2736 (Sask. Q.B.)

> premises and the potential loss as a result thereof but procrastinated in spite of [the insured's] continued efforts to get the matter resolved.
>
> I find that the defendant insurers have suffered no prejudice by reason of the imperfect compliance with respect to the proof of loss delivered to the defendants on September 3, 1987 nor with respect to the proof of loss delivered to the defendants on or about April 15, 1988. I find that it would be inequitable that the insurance should be forfeited or avoided on the ground that there has been imperfect compliance with the statutory condition as to the proof of loss by the insured plaintiffs. Accordingly, relief from forfeiture is granted … with respect to both proofs of loss."

Such is often the result when no prejudice results to the insurer. The insured is forgiven for its breach of the Statutory Conditions by being granted relief from forfeiture and indemnity is granted.

In *Kolida v. QBE Insurance Limited*[7], the insurer had issued a policy of insurance covering a Komatsu tractor, used by the insured in a logging business. The tractor was damaged by fire on a logging site near McBride, B.C. The insured completed a Proof of Loss, showing the tractor's cash value, the total amount of the loss and claimed $90,000 under the policy, being the value of the tractor immediately prior to the fire. The Proof of Loss was rejected by the property insurer, who maintained that the Proof of Loss did not comply with Statutory Condition 6 of the policy which required detailed quantities, costs, actual cash value and particulars of the amount of loss claimed. The tractor was not a total loss and could have been repaired. The court stated:

> "I agree that this is so, but one has to consider the proof of loss in the light of all of the circumstances. It was [an appraiser and an adjuster] who were actively engaged, with the approval of the plaintiffs, in trying to ascertain precisely what parts had to be replaced together with cost of those parts. The defendant certainly did not expect the plaintiff to duplicate those efforts. The defendant had in its possession, to the knowledge of the plaintiff, all of the known particulars relating to the cost of repairs. The defendant did not inquire as to the basis of the claim or ask for particulars."

In the end, the court concluded that there had been substantial compliance with Statutory Condition 6 and, in the alternative, the Court would have granted relief from forfeiture to allow recovery.

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[7] [1978] I.L.R. 1-1049 (B.C.S.C.)

In *Uswak v. ICBC*[8], the insured's car collided with a parked vehicle on January 27, 1976. The following day, a report was completed to an adjuster for ICBC. On the 29th, the insured gave a written statement setting out, amongst other things, that he did not know why his vehicle struck the parked car and that he was watching the road in front of him at the time of the accident. There was clear evidence that the insured had been drinking at the time of the accident. On February 18, 1976, ICBC received a statement from the insured indicating that prior to the accident he had been drinking but not in an amount sufficient to make him impaired. In turn, ICBC took the position that this statement was inadequate and delivered to the insured a blank Proof of Loss form, which the insured completed and returned on February 27, 1976. This first Proof failed to disclose a lien in favour of the Bank of Montreal and failed to disclose both the cause of the accident and the name of the driver.

The insured then attended at the insurer's claim centre where a second Proof was filed. While filled out in the presence of and assisted by an ICBC adjuster, this second Proof did not disclose the cause of the accident.

Regulations made pursuant to British Columbia's *Insurance (Motor Vehicle) Act* obligated the plaintiff to provide a written statement "*containing the fullest information available at that time regarding the manner in which the loss or damage occurred*". The court did not find that the insured was in breach of the relevant regulations:

> "In the case before me, despite the initial reticence of the insured with respect to his consumption of alcohol, the cause of the accident, and the state of title of his motor vehicle, from the time when the plaintiff secured the assistance of legal representation, the plaintiff made every reasonable effort to comply with the requests and demands for information from the defendant, and was told by the defendant's adjuster on at least one occasion that his proof of loss form was in order, despite the fact that it was not. *It is difficult to understand why the defendant would not specify in any of its letters to the plaintiff exactly what further information it required to process his claim.*"

Therefore, in circumstances where an insured requests instructions from the insurer on how to properly complete a Proof of Loss, and the insurer fails to provide that information, the insurer may be estopped from alleging that the insured had not complied with the requirements in filing a proper Proof of Loss.

In *Jensen v. Grenville Patron Mutual Fire Insurance Co.*[9], the insured's home and contents were completely destroyed by fire in the fall of 1976. Several days after the fire, the

[8] [1978] I.L.R. 1-997 (B.C.S.C.)
[9] [1978] I.L.R. 1-1028 (Ont. H.J.C.)

insured's broker and an adjuster attended at the destroyed premises and gave the insured a Proof of Loss form with instructions for completion. House and contents were insured for $20,000 and $10,000 respectively. The court stated:

> "In that proof of loss form, he stated the replacement cost of the dwelling house to be $40,000, its cash value to be $30,000, that the loss was total and claimed the full amount of $20,000 insurance provided by the policy. Insofar as the contents were concerned, he stated the replacement cost to be $30,000, the cash value to be $30,000, the loss to be total and claimed the full amount of $10,000 insurance provided by the policy. Attached to the proof of loss form were six sheets divided into four columns each bearing the following heading respectively over each column: column 1 - description; column 2 - approximate cost; column 3 - approximate age; column 4 - approximate value at time of loss. These sheets were completed by the plaintiffs without the assistance of the plaintiffs' solicitor. … Under the heading description in column 1, the plaintiffs inserted a rather cursory description of the items said to have been destroyed in the fire. Under the heading, approximate cost, the plaintiffs inserted various amounts opposite each item listed in column 1. The evidence of plaintiff, Arthur Jensen, indicated that in some instances he inserted the amount he had actually paid for the items, in others he inserted the amount it would cost to replace the items, and in still other cases where he thought the item could not be replaced he inserted an amount which he thought represented its fair value. There can be no doubt that he was somewhat inconsistent in the manner in which amounts were determined for insertion in column 2.
>
> Under the heading approximate age in column 3, the plaintiffs put the date upon which the item was purchased if it was new at the time of purchase. In other places, they put the designation antique where the items were deemed to have more than the usual intrinsic value by reason of their age, and in still others, where the age of the item was uncertain, they put no date.
>
> The 4th column, under the heading "approximate value at the time of loss", was left completely blank."

The insurer in turn requested the completion of column 4 and invoices evidencing the purchase of items claimed. Invoices could not be located.

The Court was asked to consider whether the insureds were in breach of the Statutory Conditions of the policy and, if so, the resulting effect of that breach. The court agreed with the property insurer that there had been a breach of Statutory Condition 6, but granted relief from forfeiture:

> "It is my view, however, that the defendant was entitled to receive from the plaintiffs more particulars with respect to the value of the destroyed contents than were in fact provided to them by the plaintiffs. The plaintiffs failed to give particulars of the amount claimed for individual items when requested to do so by letter from the defendant. They took the position that the claim was obviously far in excess of the amount claimed under the insurance policy. The plaintiffs also failed to produce invoices or vouchers for any items. Although it was not practicable for them to produce invoices for all of the items with respect to which a request had been made by the defendant, I am satisfied that by the exercise of some diligence the plaintiffs could have obtained invoices for at least some of the major appliances. … *Under the circumstances, there has been a failure on the part of the plaintiffs to comply strictly with Statutory Condition Number 6. Having regard to the circumstances of this case however, it is my opinion that it would be grossly inequitable that the insurance be forfeited or avoided on that ground.*"

Despite the insureds' failure to provide a proper Proof of Loss, recovery was allowed in any event.

In *McCoy v. Alliance Insurance Co. of Philadelphia et al*[10], the insureds' house was destroyed by fire while being moved from one location to another. The Proof of Loss delivered by the plaintiff did not comply with the Statutory Conditions because it included a printed term declaring that no other person, firm or corporation had an interest in the damaged property during the policy term. This statement was not true as there was a mortgage on the property. The court stated:

> "I am satisfied that [the proof] was inadvertently signed by the plaintiff. The insurance company knew of the proposed mortgage to be placed on the house and had attached the usual mortgage clause and consent, so that it could not possibly have been misled by the statement nor was any objection raised to it or the form of the proof of loss until after action was commenced.
>
> … This matter is also dealt with in Laverty op. cit., p. 240 as follows:
>
> > *'If imperfect proofs of loss are filed before the expiration of the time stipulated for in the policy, and no objection is made to them until the prescribed time has elapsed, but the refusal to pay is put on other grounds, that constitutes an estoppel, as the imperfections might have been remedied in due time if the objection had been properly made' ".*

[10] [1951] 2 D.L.R. 296 (Ont. H.C.)

In *Adams v. Glen Falls Insurance Co.*[11], the insured's building, housing his general store, home and related contents, was allegedly damaged by smoke from an adjacent building. The Proof of Loss was objected to by the property insurer as being insufficient. The insured supplemented the Proof of Loss by delivering a Statutory Declaration exhibiting a copy of a 'stock-sheet' dated a few days before the fire. The insured also sent a letter stating, "*if there is anything further you require you might let me know*." No answer was made to this inquiry, and no further complaint was made as to the sufficiency of the Proofs.

In his first Declaration, the insured simply made a claim for 20% of the value of his stock. No details of the kinds of goods damaged were given. At trial, the court described this estimate as "*a manifestly absurd and inadequate presentation of the claim*".

The property insurer requested further and better Proofs of Loss. A second Declaration was then received which attached the 'stock-sheet' and varying degrees of loss on the different kinds of goods. This stock-sheet contained a detailed list of the various descriptions of articles of which the stock was composed, together with their values. In another column was the percentage of damage to the different articles and in a third column the total amount of damages to them, based on percentages. The court stated:

> "It seems to me absurd to say that a statement to the effect that all of a certain lot of "pants", suits, underwear, and overcoats were damaged to the extent of 40 per cent and other classes of goods to the extent of 30, 20, 10 and 5 percent, is furnishing and delivering as particular an account of the alleged loss as the nature of the case would permit and as would be reasonable to expect. The manner in which the plaintiff has presented his claim indicates either a complete inability, from any statements or facts in his possession, to make up a reasonably accurate and detailed statement - and in consequence his estimate is an unsafe and unreliable one - or, more likely, as I think and find, a deliberate attempt to prepare and present a grossly exaggerated claim. I cannot believe that the plaintiff's goods were damaged to any such extent as he claims, or to any considerable extent at all."

On appeal, this decision was reversed:

> "This declaration and the statement were sent by the appellant's solicitors to the respondents' solicitors and in the letter which accompanied them the writers say, "If there is anything further you require you might let me know." So far as I have been able to discover, no answer was made to this inquiry, and no further complaint was made as to the sufficiency of the proofs of loss, if indeed it was

[11] (1916), 37 O.L.R. 1 (S.C. A.D.)

> open to them to object to them when they had definitely rejected and refused to pay the appellant's claim or any part of it."

In *Sever v. Economical Mutual Insurance Co.*[12] the insured experienced a loss by theft from her home, which she discovered April 27, 1982 upon returning from vacation. On April 30, she was given Schedule of Loss forms by an adjuster. On May 17, 1982, the insurer made an interim payment for lost contents. One of the grounds upon which the insurer sought to avoid an indemnity obligation at trial was that insured had failed to deliver a complete inventory of losses. It was not until September 1982 that the insured delivered a partial list of her losses to the adjuster. The adjuster, in turn, prepared a Schedule of Loss and delivered it back to the insured so that values could be supplied. The insured neither completed the Schedule of Loss forms nor gave to the adjuster any repair bills or estimates. Further correspondence from the adjuster confirmed the prescription date for the loss, provided additional blank Proof of Loss forms and requested the presentation of a detailed claim.

In March 1983, the insured and the adjuster met on the assumption that the Schedules were now complete. However, values were missing for many items. On April 26, 1983, with the assistance of counsel, the insured had her Schedule of Losses notarized and delivered them to the offices of the defendant. Unfortunately, her Schedules were not supported by a Proof of Loss verified by a Statutory Declaration.

The court refused the insurer's position on this point:

> "Mrs. Sever notified the insurance company of her loss as soon as she became aware of it on April 27, 1982. She signed a proof of loss in the usual statutory declaration form on May 17, 1982, in which she declared all details ordinarily contained in a proof of loss form, including the date of loss, that it was caused by burglary and that she was the sole owner of the property stolen or damaged. While some portions of the schedule of loss which she delivered to the insurance company on April 26, 1983, were difficult to read, the portions that were legible indicated a loss by her in excess of the insurance coverage provided by the defendant. In any event, she was prepared to, and indeed tried to give the defendant a completely legible copy of the schedule of loss a few days after April 26, 1983, and the defendant refused it.
>
> The defendant was not prejudiced in any significant way by Mrs. Sever's tardiness in giving it details of her loss. Indeed it has enjoyed the advantage of not being called on sooner to pay her loss. *I have no hesitation then in relieving*

[12] (1986), 57 O.R. (2d) 159 (H.C.); reversed on other grounds, (1989), 66 O.R. (2d) 799 (C.A.)

Mrs. Sever from forfeiture of her insurance coverage caused by her imperfect compliance with stat. con. 6."

In *Cedar Hut*[13], the plaintiff claimed for indemnity under a subscription policy of property insurance, in respect of a building, contents and business interruption. The insurers resisted indemnity on the basis that the insured failed to afford a complete inventory of the damaged property and had failed to deliver a Proof of Loss stating when and how the loss occurred.

The density of the smoke and the heat from the fire prevented the insured from entering the premises and making any determination, based on a personal inspection of the premises, of the origin or cause of the fire. An adjuster was on site within a matter of hours after the fire was first observed. Several days after the fire, the insured gave a statement to the adjuster containing all the information concerning the fire of which she was aware. The court considered the statement along with the Proof of Loss in determining whether the insured had complied with the Statutory Conditions. The court stated:

> "The evidence establishes to my satisfaction that there has been full disclosure by the plaintiff of the origin and cause of the fire, so far as it is, or any of its principals, agents or servants have been able to ascertain. The evidence does not support the conclusion that there has been non-disclosure of a material fact. It does not support the defendants' submission that the plaintiff has wilfully misrepresented its claim. … In the circumstances, I find that the notice received by the defendants was both prompt and reasonable; that the plaintiff has complied with the requirements of [the statutory conditions]."

Recent decisions of the British Columbia courts should hearten property insurers wishing to invoke the limitation period contained in s. 22 of the *Act*. Although rarely successful in avoiding an indemnity obligation, the insured's provision of a reasonably sufficient Proof triggers a limitation period. As the next case illustrates, it is the insurer, *acting in good faith*, who determines whether a reasonably sufficient Proof of Loss has been tendered.

In *Mameli v. American Home*[14], the insured brought an action against two life and disability insurers on January 20, 1998. The plaintiff's husband had life insurance under two polices of group insurance, insuring him against "accidental death". He died February 24, 1993. An initial application for benefits to the Workers' Compensation Board was unsuccessful and thereafter, when she learned of the policies issued by the

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[13] *supra*, note 4

[14] 2002 BCSC 169

defendant insurers, the plaintiff made an application for benefits under each of them. On November 5, 1996 a "Proof of Death-Claimant's Statement" was provided to the first life insurer. On November 25, 1996 a Proof of Loss form was submitted to the second life insurer. On December 2 and 11, 1996, both insurers declined to pay any benefits. Counsel was retained in February 1997 and a Writ was issued January 20, 1998.

The beneficiary attempted to argue that the evidence she provided was not "*reasonably sufficient*" and effectively postponed the running of time. However, the court concluded that Section 22 of the *Act* does not require objective certainty; that is, it does not require that the information provided must compel an insurer to either decline or accept a claim. There must be a *reasonably sufficient* proof of loss. The court stated:

> "In the absence of reasonably sufficient proof, it would be open to the court to find that the limitation period did not begin to run; however, if there is a reasonable basis for the decision of the insurer I am satisfied that the court should not substitute its opinion for that of the insurer.
>
> *When the limitation period begins to run, the starting point is "the date upon which the insurer receives a reasonable amount of information permitting it to carry out an assessment of liability in good faith". The insurer makes the decision as to what is reasonably sufficient evidence. If there is a reasonable basis for the decision of the insurer, the court will not intervene*. Objective certainty is not required. Ordinarily, an insurer would be entitled to assess a claim on receipt of the completed proof of loss forms provided by the insurer, assuming, of course, that the forms require sufficient information to allow a reasonable assessment as to the sufficiency of the evidence. If additional information beyond that contained in the proof of loss forms is provided, an insurer would be obliged to consider it."

Having provided the first life insurer with the place and date of death, cause of death, the names of physicians who had treated the insured over the past 5 years, the name of the claimant and an authorization for the release of medical information, the first life insurer could make an assessment of liability *in good faith*. Time began to run when the information sent to the first life insurer had been received. The action against the first life insurer was accordingly dismissed.

In *Petrisor v. Gore District Mutual Fire Insurance Co.*[15], the insured provided the property insurer with a fully itemized statement of the articles alleged to have been destroyed in a fire, including the age and alleged cost of the articles. The property insurer then requested that each of the items in the list be ascribed a cost and the list be returned notarized. The insured failed to comply with this request. The court determined that

[15] [1959] O.J. No. 161 (C.A.), appeal dismissed [1960] S.C.R. 360

the insurer was in a position to satisfy itself as to whether or not a proper claim had been made by the insured and allowed recovery, even though the insurer's request for further information was not complied with by the insured.

From the foregoing, the following principles emerge to guide property insurers in the aftermath of *K. P. Pacific Holdings* and *Churchland*:

(a) the limitation period contained in Section 22 of the *Act* will not be triggered until such time as the insured has provided enough information to allow the insurer to make a good faith decision to either accept or decline the claim;

(b) it is the decision of the insurer, acting in good faith, which establishes that reasonably sufficient information has been provided;

(c) the insured has an obligation to provide particulars of the loss, however, an indemnity obligation will rarely be avoided on this ground;

(d) if an insured requests assistance from the insurer to complete the Proof of Loss and the insurer fails to provide that assistance, the court will not give effect to an insurer's complaints about the inadequacy of the Proof;

(e) if no objection is made to a Proof of Loss prior to prescription and a denial is subsequently made on other grounds, the insurer will not be heard to complain of the inadequacies of the Proof of Loss thereafter;

(f) the "sufficiency" of a Proof will be determined with regard to all of the surrounding circumstances; and

(g) above all, the question of a Proof's "sufficiency" is a matter for judicial determination and will vary from case to case. It is exceedingly difficult for property insurers to know whether Section 22 presents a reliable defence before trial. However, as discussed below, British Columbia's courts have gone beyond the plain meaning of Section 22 and afforded a degree of predictability should the insurer properly invoke Section 22.

III. RELIEF FROM FORFEITURE AND THE DELIVERY OF A SWORN PROOF OF LOSS

Section 24 of the *Law and Equity Act*[16] provides the Courts with the jurisdiction to grant relief from forfeiture when it would be just and equitable to do so:

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

In general terms, relief from forfeiture may be granted when the court considers that it would be unjust to sanction the forfeiture of legal rights. This may occur, for example, in situations where a party loses a non-refundable deposit in a contract which is found to be a "penalty" rather than a true indicator of the party's good faith intention to complete the contract.

Section 24 of the *Law and Equity Act* is more specifically mirrored in the insurance context by means of Section 10 of the *Act* in circumstances where an insurer has denied coverage. Section 10 of the *Act* states:

> **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."

In broad terms, these statutory relief from forfeiture provisions allow the court to prevent a property insurer from relying upon a technical defence to deny its coverage obligations when an insured's failure to comply with the insurance policy's Statutory Conditions, or other terms, has not caused the insurer a prejudice.

Canadian courts have categorized different types of breach on the insured's part as either "imperfect compliance" or "non-compliance". Section 10 of the *Act* will provide

[16] R.S.B.C. 1996, c. 253

an insured relief from forfeiture in cases where the breach is of this first kind – being "imperfect" compliance – unless the insurer can prove that the insured's "imperfect" compliance has caused it prejudice.

The benchmark case considering relief from forfeiture is the Supreme Court of Canada decision in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*[17] In *Falk Bros.* Chief Justice McLachlin determined that Section 109 of the Saskatchewan Insurance Act (the equivalent of Section 10 of our Act) allowed relief against contractual provisions as well as Statutory Conditions. In general terms, McLachlin J. described the purpose of Section 109 in this way:

> "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*. This purpose is consistent with interpreting s. 109 as permitting the court to grant relief from contractual and statutory conditions."

In *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.,* the court categorized an insured's failure to commence an action within the statutory limitation period as "non-compliance" with a Statutory Condition. As a result, the court determined that an insured cannot rely upon relief from forfeiture when he or she has failed to commence a first party action within the limitation period.

However, in circumstances where the insured is late in giving notice of the loss[18], or has delivered an inadequate Proof of Loss, or failed to deliver a Proof of Loss altogether, courts will conclude that relief from forfeiture is available *as long as the imperfect compliance does not result in substantial prejudice to the property insurer, and the insured has not attempted to deceive or mislead the insurer.*

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[17] [1989] 2 S.C.R. 778

[18] In this context it is important to distinguish between "claims made and reported" policies, and "occurrence" based policies. In cases of claims made and reported policies, an insured will not be able to claim relief from forfeiture when he or she fails to report the claim during the policy period, provided that this is a term of the grant of coverage. See *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321 (C.A.) where the Ontario Court of Appeal ruled that reporting the claim within the policy period was a condition precedent to coverage, and overruled the trial judge who granted relief from forfeiture.

A. Cases Where Insureds Are Granted Relief from Forfeiture

The following summary of case reviews the different circumstances in which an insured has not complied with the Proof of Loss and notice provisions in the *Act* and yet nonetheless was afforded coverage.

1. P & M Management Consultants Ltd. v. Sovereign General Insurance[19]

In *P & M,* the insured was a long term care home which had a policy of property insurance which provided coverage for monetary losses resulting from employee theft. During the period of coverage, the insured lost several thousand dollars as a result of employee theft. When the policy lapsed the insured hired an accountant, who then discovered that funds had gone missing during the policy period. A more detailed investigation was conducted, and the accountant gave a written report in November 1991, roughly 8 months after the policy had expired.

The insured's board of directors advised the insured to wait until the police investigation was complete before it made a claim to its insurer. As a result, the insured reported the loss to its insurance agent in April 1992. When the insured's policy with Sovereign General lapsed in 1991, it purchased continuing coverage with Commercial Union. As a result, in April 1992, the insured's broker reported the loss to Commercial Union, but Sovereign General was not notified until June 1992. After a cursory investigation, Sovereign denied the insured coverage on the basis of late notification and late filing of a sworn Proof of Loss. Sovereign did not speak to the wrongdoer, did not carry out its own investigation, and did not send the insured blank Proofs of Loss.

At trial Sovereign successfully argued that it was prejudiced by the delay because it had not been afforded an opportunity to pursue the wrongdoer, investigate completely, and could not trace and recover the lost funds. However, the Court of Appeal concluded that the insurer had not bee prejudiced. The court noted that an insurer must provide *actual evidence of prejudice*, and that mere speculation of prejudice is insufficient. The court also noted that there was no allegation of dishonesty or misleading behaviour on the part of the insured. Due to the fact that Sovereign General *did not prove clear evidence of prejudice*, the court ruled that the insured was entitled to relief from forfeiture.

[19] (1996), 37 C.C.L.I. (2d) 76 (Man. C.A.)

2. Harry v. Insurance Corporation of British Columbia[20]

In this case the insured became entitled to no-fault accident benefits when her common law husband was killed in a motor vehicle accident. However, she was poorly educated and was unable to provide the claims examiner at ICBC with sufficient information to prove that the deceased was her common law husband. She did not submit a Proof of Loss.

The court decided that this was a clear case where relief from forfeiture should be granted, remarking that the insurer had purposefully relied upon the ignorance of the insured to deny coverage. Justice Wallace stated:

> "In the circumstances of this case, where there is no question of the Corporation's responsibility for the claims – it ill-behoves the Corporation to seek to escape from its contractual responsibility by relying on this technical defence. Mr. Hill does not serve the Corporation's interest by stating a position is indefensible on other than strictly technical grounds. If it were necessary to avoid such a consequence, in these circumstances I would relieve against forfeiture of the plaintiff's right to receive payment."

While this decision pre-dates the *Falk Bros.* decision, the spirit of the judgment is reflected in later decisions – namely that a property insurer will not be able to avoid contractual obligations by relying upon "technicalities".

3. Gautron v. Wawanesa Mutual Insurance Company[21]

In *Gautron* the insureds suffered a loss as a result of a fire at their principal residence. The fire occurred on November 18, 1992, and the insureds informed the property insurer of the loss on November 23, 1992. After a series of meetings, the adjuster for the property insurer made cash advances in anticipation of a Proof of Loss. On April 12, 1993 the adjuster forwarded an additional blank Proof of Loss to the insureds, and an additional advance of $36,500. In its letter, the property insurer reminded the insureds that they had to file a Proof of Loss detailing their contents loss. On September 10, 1993, the property insurer again wrote to the insureds reminding them that the anniversary date of their loss was November 18, 1993, and that they should retain the services of a lawyer. The insureds were unable to provide the Proof of Loss, and filed a Writ to preserve the limitation date. Ultimately, the insured did not file a Proof of Loss until December of 1994.

[20] (1983), 50 B.C.L.R. 260 (S.C.)
[21] (1995), 2 B.C.L.R. (3d) 330 (S.C.)

Section 22(2) of the *Act* states that an action can be commenced 60 days *after* the Proof of Loss is filed. In this case, the insured filed the Writ prior to the provision of a Proof of Loss. The insurer argued that the action should be dismissed because the insured had not complied with the requirement in s. 22(2). However, the court rejected this assertion, relying upon the decision of *Hipkins v. Pitts Insurance Co.*[22] where Galligan J. stated:

> "No case binding on me was cited that would lead me to such a draconian decision, that the right to bring an action cannot be protected by doing so within a statutory limitation, even if the action is technically premature at that time…In this case a writ was issued within the statutory limitations. Also, eventually, even though it was some 5 or 6 months later, an acceptable proof of loss was in fact delivered. *If I were to deny the plaintiffs recovery on this basis, I think that I would be elevating technical niceties above simple justice*."

Similarly, in *Gautron* the court rejected the insurer's attempt to rely upon a technical argument to dismiss the claim. However, the court did stay the action pending the submission of a Proof of Loss which was acceptable to the insurer.

The property insurer also argued that the insureds' claim should be struck because they had failed to comply with their obligation to deliver a Proof of Loss "as soon as practicable". The court disagreed, saying that in circumstances where there was some justification for the delay and no evidence of prejudice to the insurer, relief from forfeiture should be granted. Justice Clancy stated:

> "Notice of the loss was given and the plaintiffs co-operated with the insurers in endeavouring to quantify the loss. Mr. Gautron has given a reasonable explanation for his delay in furnishing a proof of loss. I can see no prejudice to the insurer in refusing to strike out the claim. The prejudice to the plaintiffs in dismissing their action is self-evident."

4. N & H Contracting Ltd. v. Royal Insurance Co.[23]

In *N & H* a fire caused extensive damage to the insured's building and contents. However, the insured's owner, Mr. Gordon, proved very difficult to deal with and refused to submit a Proof of Loss, fearing that he would "lock in" his loss and not be indemnified for unforeseen future costs of repair.

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[22] (1986), 54 O.R. (3d) 592 (H.C.J.)
[23] [1993] B.C.J. No. 45 (C.A.)

The adjuster, recognizing that the loss fell within coverage, and attempting to find a practical solution to the problem, arranged to start repairs to the building using a third party contractor on a "cost plus" basis. At the time of the appeal, the insured had still deliberately not provided a Proof of Loss. This was, in part, because the repairs which were conducted on a costs plus basis were ongoing, and a final damage amount could not be ascertained.

The court rejected the property insurer's argument that the insured forfeited his claim because he had not submitted a Proof of Loss. In the circumstances, the insurer was essentially estopped from denying coverage because it had authorized commencement of repairs to the building, implicitly acknowledging coverage. In the circumstances the court found that it was appropriate to grant relief from forfeiture.

5. K & R Landscaping and Snow Removal Ltd. v. Federation Insurance Co. of Canada[24]

In this recent decision of the British Columbia Supreme Court, the insured made a claim for an allegedly stolen bobcat under very suspicious circumstances. The court dismissed the claim on other grounds, finding that the insured was not credible and had not proven that the loss actually occurred.

However, the court also considered whether the fact that the insured never filed a Proof of Loss entitled the property insurer to deny the claim. The insured had reported the alleged theft three weeks after the date of loss. However, at no time did the insured provide a Proof of Loss.

The court found that the insured had no justifiable reason for failing to provide a Proof of Loss. However, it also determined that no prejudice to the property insurer had occurred as a result, because the insurer had notice of the loss soon after the date of loss, and the insured was generally co-operative.

6. Wilson v. INA Insurance Co. of Canada[25]

In *Wilson* the insured made a claim for property damage caused to her basement by a burst water boiler. The insured's claim was resolved through arbitration. Subsequently, the insured found cracks in her foundation and believed that these had resulted from the initial water damage. Nearly eighteen months after the first loss, the insured filed a Writ against the property insurer alleging that the settling in her foundation was caused by the previous water damage and attracted coverage under her

[24] 2003 BCSC 521
[25] [1995] B.C.J. No. 40 (S.C.)

property policy. The insured did not file a Proof of Loss for this second allegedly related loss.

The property insurer argued that, because notice of the damage from the settlement was not given in a timely fashion, it had been prejudiced and the insured should not be entitled to relief from forfeiture. However, the court disagreed, stating:

> "INA underscores the fact that the relief sought is available only where there has been imperfect compliance and that the facts of this case constitute non-compliance. The insurer submits that even if the insured's failure to provide it with any notice prior to the issuance of the writ were characterized as imperfect compliance, relief is inappropriate because the insurer was prejudiced by the delay between the discovery of the damage in early March and its discovery of the writ in late May. Specifically, INA says that it was prejudiced in its ability to inspect the residence as to the cause of the distress and to take any steps to immediately rectify the situation.
>
> *I am unable to accept that argument. There is no evidence that when INA learned of the insured's claim, it took any timely steps to inspect or repair or prevent further damage. The insured had not undertaken any work which would prevent inspection. The foundations were not shored up until the plaintiff performed that work in 1989. The insurer did not dispatch experts to investigate the cause of the damage to the foundations.*
>
> I find that the insurer had notice of the loss when it first became aware that the insured had issued pleadings which described the loss. Couch, supra, vol. 13A, at para. 49:29 states:
>
> > *A provision relating to the manner of giving notice to the insurer is to be liberally construed, for the fact that the insurer received actual notice of a loss is more important than the manner in which such notice was given.*
>
> The purpose of requiring notice is to give the insurer an opportunity to investigate and adjust the damage at an early date. I conclude that, in the circumstances, the object of the notice provisions in the policy was satisfied and that INA was not prejudiced by any delay."

This judgment underlines two important points:

1. When an insurer has an opportunity to inspect or investigate a loss and does not take it, it will not be able to later argue that it was prejudiced by the delay; and

2. The method of notice of the claim does not have to be a formal Proof of Loss. If the insured reports the claim to the insurer in an informal way, the court will deem the insurer notified of the loss.

B. CAN "IMPERFECT COMPLIANCE" WITH STATUTORY NOTICE PROVISIONS LEAD TO FORFEITURE OF COVERAGE?

The case law leaves little doubt that failure to provide a Proof of Loss at all, or in adequate time, constitutes "imperfect compliance". As such, in most cases where a Proof of Loss has not been adequately provided, courts will apply the relief from forfeiture doctrine and uphold the insured's right to coverage.

However, in certain circumstances, equitable considerations may warrant forfeiture of the claim owing to prejudice suffered by the insurer as a result of the insured's conduct. In the *Permaform* case discussed at length below, the Manitoba Court of Appeal canvassed the circumstances where an insured will *not* be entitled to relief from forfeiture even though his or her breach constitutes "imperfect" compliance with contractual provisions and/or Statutory Conditions.

1. Permaform Plastics Ltd. v. London & Midland General Insurance Co.[26]

In *Permaform* the insured, relying upon government grants, produced industrial rollers for use in the grain industry. Ultimately, the company was unable to produce the rollers, the government grants ceased, and the company incurred insurmountable debts. An explosion occurred at its business premises. The insurer learned that the explosion had been caused when somebody turned on a natural gas valve which filled the building with gas and caused an explosion some 21 hours later. The investigator concluded that the explosion was deliberately caused by the insured.

In light of a possible arson, the insurer gave the insured's representative and insured the option of withdrawing the claim and having the investigation discontinued. The insured agreed to withdraw its claim, and signed a release, waiving his rights to indemnity under the policy.

The Court observed:

> "On November 2, 1984, the adjuster wrote to Mr. Berkowits formally advising him (as a result of the execution of the release) that his file was being closed. This

[26] [1996] 7 W.W.R. 457 (Man. C.A.)

> letter was given by Mr. Berkowits to his lawyer along with a non-waiver agreement and his typewritten statement. All adjustment activity then came to an end. *As a result, no investigation was done with respect to the scope and extent of damage (while there had been a major explosion, the fire damage apparently was not significant). No work was done to determine the replacement value or to compare it with actual cash value. No investigation was done to determine if the co-insurance clauses were operational, no inventory was taken of equipment contents in stock, nor was any substantiation obtained from Mr. Berkowits or any further investigation undertaken by the adjuster into the cause or origin of the fire."*

These judicial comments are critical, as they highlight the importance of the post-loss investigation in property loss cases. There may be substantial prejudice to the property insurer when it is unable to properly investigate and independently evaluate the damage claimed in a loss. In circumstances where this loss of opportunity to investigate is caused in some measure by the insured, courts will weigh this factor in determining whether the insured should be granted relief from forfeiture. The court went on to observe:

> "Thus, some two years later, when the insurers were unexpectedly presented with a proof of loss claiming the full amount of the insurance coverage, they had no file and no particulars. Mr. Berkowits himself was in no better position, testifying at trial, without any supporting evidence or documentation, that the $175,000 claim for the building was "the replacement value of the building" and that the $180,000 for equipment and inventory was "a guess -- estimate of the value, replacement value."
>
> It was not until 1992, when Mr. Berkowits produced at his examination for discovery a list of inventory and equipment based on replacement value totalling some $311,000, that any details were provided to the insurers by which time it was too late for them to investigate the claim in any meaningful way. This is especially important given the evidence earlier described of the minimal inventory of assets consequent upon the seizure by the City for unpaid business taxes in November of 1984. (This, too, was a "guess.") This renders inexplicable the trial judge's conclusion that "I have no doubt that Berkowits genuinely believed this was a fair value assessment" (at p. 36).
>
> Despite all of this, the trial judge relieved against forfeiture concluding that not to do so ... argues that as a result of the insurers' procuring by duress an unconscionable advantage the plaintiffs have breached the policy (at p. 33)."

As the court observed, the insured's behaviour created serious problems for the insurer, principally because it was unable to independently quantify the loss. The court further stated to point out that the insured failed to comply with his obligation to submit a

Proof of Loss "as soon as practicable" and had no valid reason for doing so. The court observed:

> "Statutory Condition No. 6(1)(b) of the policy obliges an insured who wishes to make a claim under the policy to file with the insurer a proof of loss, fully describing the inventory of destroyed and damaged property, giving details as to quantities, cost, actual cash value and the like. It is to be delivered "as soon as practicable." This was clearly not done. In fact, no satisfactory evidence was ever presented as to the actual cash value of the inventory and equipment even though Mr. Berkowits remained in possession of the premises throughout."

The court then reviewed the common law treatment of situations where insureds do not comply with the requirement to submit a Proof of Loss in a timely manner, or at all. This review leads the court to conclude that this failure, in and of itself, provides a *prima facie* right to relief from forfeiture because it constitutes "imperfect" as opposed to "non" compliance with the insured's statutory and contractual obligations. The court stated:

> "There is direct authority for the proposition that failure to file a proof of loss on a timely basis should be categorized as imperfect compliance: see Schwartz v. Providence Washington Insurance Co. (1963), 43 D.L.R. (2d) 585 (Man.C.A.). In that case, a proof of loss was never filed yet the court granted relief from forfeiture. Freedman J.A. (as he then was) reasoned that the requirements of statutory condition 15 (identical to Statutory Condition No. 6(1)(b) in this instance) should be read cumulatively so that noncompliance with any of the conditions could be said to constitute imperfect compliance with the statutory condition. To the same effect, see Kruger v. Mutual Benefit Health and Accident Association, [1944] 1 D.L.R. 638 (Ont.H.C.).
>
> More pertinent to the facts of this case, there is also authority to support the view that delay, even a long delay, in filing a proof of loss amounts to imperfect compliance. In Thomas v. Hickey (1995), 22 O.R. (3d) 331 (Ont.Ct. Gen.Div.) Lederman J. wrote (at p. 341):
>
> > The length of delay in providing such notice does not seem to affect the question of whether the breach is imperfect compliance, although it obviously could have a bearing on the question of prejudice to the insurer and whether relief from forfeiture should be granted."

Despite this finding, the court looks further at equitable considerations to determine whether relief from forfeiture should be granted in the circumstances, stating:

> "The weight of authority leads us to conclude that on the facts of this case there was imperfect rather than non-compliance with the statutory requirement to file a proof of loss. Thus the relief against forfeiture provision found in sec. 130 of The Insurance Act is preliminarily engaged. *But ought DeGraves J. to have relieved against forfeiture? Has there been prejudice to the insurers? Is it equitable that Mr. Berkowits not be held responsible for the lengthy delay?"*

In the highlighted portion of this passage, the court alludes to the fact that any consideration of relief from forfeiture does not end once it has been determined that the insured's failure amounts to "imperfect" compliance. Other equitable factors must be considered to determine whether the insured's failure to file a Proof of Loss in a timely manner has prejudiced the insurer.

With respect to whether the insured's conduct has prejudiced the insurer, the court in *Permaform* cites the B.C. Court of Appeal's decision in *312630 British Columbia Ltd. v. Alta Surety Co.*[27] In that case, the court stated that the test was simply:

1. "whether the insurer by reason of the late notice lost a realistic opportunity to do anything that it might otherwise have done"; and

2. Did this loss of opportunity cause actual prejudice to the insurer?

In *Permaform* the court concluded that there was clear prejudice to the insurer by the insured's failure to provide proper notice. The court stated:

> "The foregoing brief review of the principles to be considered in deciding whether relief against forfeiture ought to be granted leads inexorably to the conclusion that DeGraves J. erred in answering that question in the affirmative. Whatever he may have meant by his puzzling statement that not to do so gave the insurer an unconscionable advantage, *it is demonstrably clear that manifest prejudice has been suffered by the insurers. If the release was unenforceable, as found by the trial judge, then it was unenforceable on and after October 22, 1984. At the latest, by November 15, 1984 when he was arrested, Mr. Berkowits knew that the "investigation" had not stopped, yet he did nothing for two years and, thereafter, did not provide the proof which he was obliged to provide to the insurers "as soon as practicable." The only conclusion to be drawn from the evidence is that Mr. Berkowits's decision to sign the release and then not file proof of loss until two years thereafter was a deliberate action on his part. The insurers were misled into believing that the insured would not be pursuing any claim against them.*

[27] (1995), 10 B.C.L.R. (3d) 84 (C.A.)

> The "key question" (see 312630 British Columbia Ltd. v. Alta Surety at p. 89) -- whether there was prejudice -- having been answered in the affirmative, that is the end of the matter."

The court also states that whether or not the insured "deliberately misled" the insurer is another factor to consider in this context. In other words, did the insured mislead the insurer into thinking that no claim would be filed? Did the insured have "clean hands" in relation to the claim filed? These factors may also impact the insured's ability to obtain relief from forfeiture. The court further stated:

> "In addition to asking the question whether the insurer would have acted differently if the insured had complied with the statutory conditions of the policy subsequent to the loss, it is also relevant to consider the conduct of the insured. If the insured deliberately misled the insurer, relief from forfeiture will not be granted: see Canadian Equipment Sales v. Continental Insurance (at p. 343); Moore v. Canadian Lawyers (at p. 372); and Union Marine & General Insurance v. Bodnorchuk et al., [1958] S.C.R. 399 where Locke J. noted (at p. 415) that relief against forfeiture ought not to be granted where "The failure to give the notice required by the statutory condition was deliberate."
>
> In dealing with the issue of the insured's conduct, many cases speak in terms of the insured having "clean hands": see, for example, 300201 Alberta Ltd. v. Western Surety Co. (unreported, released March 6, 1989, Alta.C.A.). *Indeed, there is some authority for the proposition that if an insured does not have "clean hands" the insurer need not demonstrate prejudice for the court to refuse relief from forfeiture: see Weatherbie v. Home Insurance Co. (1990), 76 D.L.R. (4th) 461 (P.E.I.C.A.).*"

2. *Demitri v. General Accident Indemnity Co.*[28]

In *Demitri,* the insured was described by the court as "judgment proof and a deadbeat". Demitri was involved in a boating accident. The plaintiff sued the insured successfully, but was unable to realize on the judgment. Subsequently the plaintiff brought an action against the defendant's insurer pursuant to s. 24 of the *Act*.

The accident occurred on September 25, 1991. The insured was served with a Writ of Summons on November 21, 1992, and advised the claims manager that he "might be making a claim" arising from a boating accident. The insurer resisted the plaintiff's action by asserting that the insured had not complied with the notice provisions in his policy. The insured argued that the insured's failure to comply with the policy provisions constituted "imperfect compliance" and that he should be relieved from forfeiture as a result.

[28] (1996), 41 C.C.L.I. (2d) 49 (B.C.S.C.)

However, the court disagreed stating:

> "In Sumitomo Canada Ltd. v. Canadian Indemnity Co. (1981) 125 D.L.R. (3d) 356, McEachern J (as he then was) applied this test to interpretation of a policy limitation clause: "*... the condition should be applied not absolutely but in the background of the ordinary and reasonable understanding of such a requirement* ..."
>
> Sumitomo was a commercial case but there is no reason the test should not be applied here so long as it is recognized that, in Sumitomo the evidence did not satisfy the court of "any occurrence which came to the attention of (the insured) giving rise to the necessity to give notice" and that the insured had notified its insurance broker in time, although not the insurer.
>
> *It is not within the ordinary and reasonable understanding of such a requirement that an insured wait 14 months to give notice without explanation and then not act until served with a writ after an event of this kind. The insured's delay was not imperfect compliance. It was a failure to comply in a reasonable way. He was as unreasonable as was the truck driver in Marcoux v. Halifax Fire Ins. Co. [1948] 4 D.L.R. 143 (S.C.C.) who asserted he did not know a pedestrian he had run over was injured.*
>
> …Dealing with a section similar to s. 12 of the B.C. Act (s. 103 of the Insurance Act R.S.O. 1970, C. 224) in Canadian Equipment Sales and Service v. Continental Insurance (1975) 59 D.L.R. (3d) 333 at 342, MacKinnon J.A. (Ontario) observed:
>
> > Section 103 is an ameliorating clause. It is not to be used to allow contracts entered into in good faith to be broken with careless disregard for the insurer... On the other hand, it should not be so encrusted with authorities as to become a circumscribed rule of law rather than a principle of equity to be exercised with judicial discretion.
>
> The action or lack of action by the insured throughout spoke to the issue of bad faith in the conduct of his duty to the insurer...I find the insured breached the condition of the policy requiring immediate, prompt notice and, consequently neither he nor the plaintiff had any continuing right to claim compensation for the injuries herein."

In *Demitri,* the court displayed a clear contempt for the insured, noting that he was frequently on the run, or in jail, and that he was a "deadbeat". The analysis in this judgment does not adhere to a strict prejudice test, but rather subjects the requirement to give reasonable notice to principles of contract construction. Concluding that the insured had not come close to acting as a reasonable insured, in this case giving notice

of a claim in a vague fashion and waiting until after a Writ had been filed, the court denied relief from forfeiture.

It is possible that this decision will not be widely followed, as Boyle J. takes a different analytical approach, looking simply at whether the conduct of the insured was reasonable in the circumstances, as opposed to whether the conduct caused the insurer prejudice in the circumstances.

C. If an Insured Does not Submit a Proof of Loss, When does the Limitation Period Start to Run?

If an insured fails to submit a Proof of Loss, but would otherwise be entitled to relief from forfeiture, property insurers still will be able to commence the operation of the limitation period by providing the insured with an unequivocal denial of coverage. As discussed in more detail below, once an insurer has provided an unequivocal denial of coverage, the limitation period commences, whether or not the insured has provided a Proof of Loss.

However, the cases considering the limitation period in situations where the insurer has denied coverage have considered circumstances where there were valid reasons in the policy for denying coverage, including, for example, an exclusion, or, the loss in question fell outside the coverage umbrella. The question which arises in circumstances where the insured has failed to provide a Proof of Loss at all, but has an otherwise covered claim, is whether the insurer can simply deny the claim on the basis that the insured has failed to provide a Proof of Loss "*as soon as practicable*".

In the *Gautron* decision discussed earlier, the property insurer argued that because the insured had failed to provide the Proof of Loss "as soon as practicable" it was entitled to deny coverage. While the court agreed that the insured does have an obligation to provide a Proof of Loss as soon as practicable, a breach of this requirement does not, in and of itself, vitiate coverage. However, it is probably open for property insurers to take measured steps towards issuing a denial of coverage letter based upon the insured's failure to comply with the Proof of Loss requirements in the policy. Insurers should take steps to regularly request the Proof of Loss from the insured, and write letters documenting their efforts to do so. Ultimately insurers should inform their insured that, if certain deadlines are not met, coverage will be denied.

Attached as Appendix "A" to this paper is a sample letter that can be used by a property insurer to advise the insured that indemnity under the policy is being denied on the basis that the insured's failure to provide a Proof of Loss is being treated as a

repudiation of the insured's obligations under the insurance contract and that the limitation period has commenced to run accordingly.

D. Relief from Forfeiture - Summary of Principles

1. An insured's failure to comply with the notice requirements of a loss and a failure to comply with the requirements for a reasonably sufficient Proof of Loss, are considered "imperfect" compliance as opposed to "non" compliance with Statutory Conditions.

2. Subject to equitable considerations relating to the prejudice suffered by the insurer, the insured will be entitled to relief from forfeiture even in cases where he or she has delivered late notice of a claim, or failed to submit a Proof of Loss.

3. In some cases, a property insurer may be able to demonstrate that the late notice or failure to submit a Proof of Loss in a timely manner, or at all, has caused the insurer prejudice. In the context of property loss claims, the prejudice to the insurer will most likely occur because the insurer was unable to properly investigate the loss. This type of conduct prejudices the insurer's ability to properly quantify the loss, and investigate whether the loss resulted from perils covered under the policy.

4. Courts will also examine the conduct of the insured and, in particular, whether the insured intentionally misled the insurer to the conclusion that a claim would not be filed. The court will scrutinize the insured's conduct to ensure that he or she is making a claim with "clean hands". There is authority to suggest that an insured who does not have "clean hands" will be barred from claiming the equitable relief provided by Section 10 of the *Act* or Section 24 of the *Law and Equity Act*.

5. Section 10 of the *Act* is most likely restricted to occurrence based policies. A court will likely not provide relief from forfeiture in cases of "claims made and reported" policies where the insured has not reported a claim within the policy period. The Ontario Court of Appeal has ruled definitively that reporting the claim within the policy period is a condition precedent to coverage a breach of which bars coverage.

6. If the property insurer has actual notice of the claim, it will be prevented from claiming prejudice at a later date if it choses not to investigate the loss. Formal

requirements for notice will not be given a great deal of weight in the context of occurrence based, property damage policies.

7. An insured may be denied coverage if he or she fails to act as a "reasonable insured" would have in respect of providing notice of the claim. As in the *Demitri* case, the insured's failure to give notice before a Writ of Summons was filed represented such a flagrant departure from the conduct of a reasonable insured that the court denied relief from forfeiture.

8. If an insured fails to provide a Proof of Loss within a reasonable period of time the property insurer should deliver several requests to the insured, requesting the Proof of Loss and setting deadlines for its delivery. The insurer should then warn the insured that if no Proof of Loss is provided by a set date, coverage for the loss will be denied. The last step is to issue a denial of coverage letter setting out the number of requests made for the Proof of Loss, citing the final request and advising that the limitation period under Section 22 has commenced. The insurer must use its judgment when issuing these letters, taking into account the circumstances of the insured and the loss in question. Once the denial letter is received by the insured, the limitation period will start to run.

IV. DOES DENYING THE CLAIM START THE RUNNING OF TIME AND HOW UNEQUIVOCAL DOES THE DENIAL HAVE TO BE SO AS TO START THE RUNNING OF TIME FOR THE PURPOSE OF SECTION 22 OF THE INSURANCE ACT?

A literal reading of Section 22 of the *Act* would allow an insured to prevent the commencement of a limitation period by simply neglecting or refusing to supply a Proof of Loss, either at all or deficiently. The question confronting property insurers in British Columbia, in light of the willingness of courts to grant relief from forfeiture, is not just what constitutes "*reasonable sufficiency*" but what to do in the event an insured fails to provide a Proof at all.

Where a property insurer has denied liability in clear and unequivocal terms, the filing of a Proof of Loss serves no purpose. It is illogical to conclude that a cause of action arises upon the date of filing a Proof of Loss. The limitation period will commence to run from the time when the insured has notice of a clear and unequivocal denial of coverage by the insurer. The time within which the action may be commenced will run

from the earlier of the filing of the Proof of Loss or the denial of coverage by the insurer[29].

In *Mameli v. American Home*[30], discussed above, the beneficiary brought an action against two group life insurers for failure to pay benefits under two polices of group insurance insuring her husband against "accidental death". The insurers relied on the lapse of the limitation period in s. 22 of the *Act*.

The beneficiary attempted to argue that the evidence she provided was not "*reasonably sufficient*" and effectively postponed the running of time:

> "Counsel conceded that Mrs. Mameli should have said in her proof of loss why the event should be treated as an accident but, not having done so, the limitation period does not start to run. I cannot accept that submission. If that were so, by withholding relevant information, Mrs. Mameli could avoid the commencement of the limitation period indefinitely after submitting her claim. Such an interpretation of the section is unreasonable."

Section 22 does not require objective certainty. That is, the Section does not require that the information provided must compel an insurer to either decline or accept a claim. There must be a *reasonably sufficient* Proof of Loss. The court stated:

> "In the absence of a reasonably sufficient proof, it would be open to the court to find that the limitation period did not begin to run; however, *if there is a reasonable basis for the decision of the insurer I am satisfied that the court should not substitute its opinion for that of the insurer.*
>
> I conclude therefore that the limitation period under s. 22(1) of the Act is not dependent on acceptance or rejection of a claim. *There must, however, be an unequivocal determination of liability before the limitation period begins to run. … It is the decision of the insurer to reject a claim that establishes that reasonably sufficient information has been provided.*
>
> *When the limitation period begins to run, the starting point is "the date upon which the insurer receives a reasonable amount of information permitting it to carry out an assessment of liability in good faith". The insurer makes the decision as to what is reasonably sufficient evidence*. If there is a reasonable basis for the decision of the insurer, the court will not intervene. Objective certainty is not required. Ordinarily, an insurer would be entitled to assess a claim on receipt of the completed proof of loss forms provided by the insurer, assuming, of course, that

[29] *Dachner Investments Ltd. v. Laurentian Pacific Insurance Co*. (1989), 59 D.L.R. (4th) 123 (B.C.C.A.)
[30] *supra,* note 14

> the forms require sufficient information to allow a reasonable assessment as to the sufficiency of the evidence. If additional information beyond that contained in the proof of loss forms is provided, an insurer would be obliged to consider it."

Having provided the life insurer with the place and date of death, cause of death, the names of physicians who had treated the deceased over the past 5 years, the name of the claimant and an authorization for the release of medical information, the life insurer could make an assessment of liability *in good faith*. Time began to run when the information sent to Seaboard had been received. That action was accordingly dismissed.

With respect to the second life insurer, the beneficiary argued that the insurer's denial of coverage, expressed as follows, had not been unequivocal:

> "From the minimal information that you have provided us, it appears that your husband's death was not due to accidental bodily injury and therefore at the present we cannot consider this claim as presented. However, as you indicated in your letter of November 25, 1996, you have additional information showing that his death was a result of accidental bodily injury, please submit this to us for consideration."

The court disagreed. The second insurer's denial of coverage was clear and unequivocal in providing that there was no coverage for the death of the insured and that the claim would therefore not be considered. The remainder of the letter which agreed to consider additional information was simply a courtesy. There was no doubt that the beneficiary understood that her claim had been rejected. The claim against the second life insurer was also dismissed.

In January, 2003, the British Columbia Court of Appeal heard two appeals concurrently, one from a decision dismissing a claim against an insurer for the payment of disability benefits and one from the refusal of an insurer's summary trial application based on s. 22 of the *Act*[31].

In *Watterson*, the plaintiff claimed to have been disabled commencing June 3, 1997. Her insurer paid weekly indemnity benefits to September 1997, when the plaintiff's long term disability eligibility began. By October 30, 1997, she had delivered to her disability insurer her employer and employee statements, the statement of her doctor and consult reports from her rheumatologist, neurologist and chiropractor. The claim was denied

[31] *Watterson v. Sun Life Assurance Co. of Canada* (2003), 14 B.C.L.R. (4th) 58 (C.A.) and *Balzer v. Sun Life Assurance Co. of Canada* (2003), 15 B.C.L.R. (4th) 6 (C.A.), respectively.

by the disability insurer on December 3, 1997. The insurer advised the insured in writing:

> "At the present time we do not have the objective medical evidence of total disability as required under the contract terms and, therefore, we are closing our handling of this claim."

By February 1998, Ms. Watterson sought legal advice. On April 6, 1999, she re-submitted her medical information and an additional specialist's report. A week later she issued a Writ. On August 11, 1999, the disability insurer acknowledged receipt of the medical material and advised that its previous decision remained unchanged. The Writ was served October 4, 1999.

At trial, the court concluded that the limitation period began to run on "*the date upon which the insurer receives a reasonable amount of information permitting it to carry out an assessment of liability in good faith*". The Court of Appeal agreed:

> "While the application of s. 22(1) to income replacement insurance is often problematic, this is not such a case. The group policy makes clear a separate notice and a separate proof of claim are required for the long-term "any occupation" coverage. *The insurer unequivocally denied her claim.* She understood that too. There is no basis in the evidence for the application of principles of waiver or estoppel, or the need for what the appellant called a "plaintiff-oriented approach" to the interpretation of either the statutory or contractual limitation provisions. Nor is there reason to apply the discoverability rule."

In *Balzer*, the policy issued to the insured did not require a proof of claim for "any occupation" benefits and one was therefore not provided. The insurer made the decision to decline further benefits based on the information already on file, effective October 28, 1994, when the definition of "disability" changed.

> "What emerges from this brief discussion is that s. 22(1) does not easily fit with income replacement insurance policies or with the practice of the insurance industry. Its application requires adaptation if the Legislature's intention to create a one-year limitation period on all insurance claims is to be given effect. *One promising approach is that the limitation period may be triggered by a clear and unequivocal denial of a potential claim*. Such a denial precludes any claim because it tells the insured no purpose will be served by making one. This will have the effect of telling the insured she may want to consider commencing an action if she wants to pursue her claim.
>
> …

> It is at denial of coverage or termination of benefits that an insured would have reason to sue the insurer. That is when a limitation period should begin to run, not while benefits are being received, not on some later date when an insured decides to file a proof of loss or commence an action. This sensible result is at the root of the reasoning in the authorities cited to us.
>
> …
>
> A clear and unequivocal denial of coverage precludes the need to furnish a claim (where the policy does not require the filing of a proof of claim) and triggers the commencement of the limitation period. This general rule permits a case-by-case application of the one-year limitation period appropriate to the wide variety of factual circumstances that may give rise to disputes about continuing coverage under generic group accident and sickness policies. It avoids the absurd results a literal reading of the words of s. 22(1) would otherwise produce in this and like cases. It leaves room for their application to cases where the policies permit that reading."

In *Balzer*, the Court of Appeal concluded, in dismissing the insurer's appeal, that there was no unequivocal denial. The plaintiff has been paid for a period of time and had been left with the impression that coverage could be reconsidered if additional information was supplied. Sun Life had not effectively engaged s. 22(1) and time therefore had not commenced to run. No part of the plaintiff's claim was barred by the passage of time:

> "*Any ambiguity in the communication of a refusal of benefits, as to whether it is a clear and unequivocal denial, should be resolved in favour of the insured*. To avoid any doubt, the preferred course for an insurer intending to deny coverage should be to include an alert in the letter drawing the insured's attention to the one year limitation in s. 22 and informing the insured that the insurer will rely on the denial as starting the running of time."

Accordingly, when a property insurer seeks to rely on the running of a limitation period, commenced by the conduct of the insurer in denying coverage under a policy of insurance, the denial of coverage must be clear and unequivocal. Evidence of equivocation need not be extensive or strong in order for the court to conclude that the limitation period has not commenced to run.

In *Dachner*[32], the insured sued to recover under a policy of marine insurance for damage caused to his vessel by the incursion of seawater. The insurer based its denial of

[32] *supra*, note 18

coverage on a report written by its expert, Mr. Hopkinson. In the final paragraph of its declination letter to its insured, the property insurer wrote:

> "We understand that Mr. Gait will be recommending the employment of a surveyor on your behalf and we will give him every co-operation in conducting his investigation. We must, however, naturally consider that the report of Mr. Hopkinson is privileged at this time."

The Court of Appeal agreed that this paragraph contained an intimation to the insured that, should he provide his own surveyor's report, Laurentian would consider it, despite other language in the letter which declined "your claim in its entirety". The court reasoned that the insurer always has the ability to give clear and unequivocal notice to its insured that coverage is denied. Specifically:

> "If such notice is given, *then the insurer will be entitled to say that the period of limitation will begin to run on the day when the insured has notice of clear and unequivocal denial of coverage by the insurer*. If the insurer wishes to avoid any possibility of misunderstanding in its letter it can expressly draw attention to the limitation period and state its position to be that the time limit begins to run on receipt by the insured of that letter."

At Appendix "B" there is a sample letter that can be utilized by property insurers to inform an insured that the Proof of Loss is being treated as "reasonably sufficient" for the purpose of commencing the running of the limitation period in the event that a dispute later arises in the adjustment of the claim.

It should be noted that the failure of the property insurer to take any action after receiving a Proof of Loss from the insured will allow the insured to commence an action on the contract 60 days after the Proof of Loss was submitted to the insurer, by virtue of s. 22(2)(a) of the *Act*. Accordingly, insurers are advised to either return the Proof of Loss requesting further particulars, or, inform the insured that the claim is being rejected and the reasons for that rejection.

The following principles emerge to guide British Columbia's property insurers for commencing the running of the limitation period post *K. P. Pacific Holdings* and *Churchland*:

(a) time will begin to run under s. 22 from either the date of a "reasonably sufficient" Proof of Loss or a clear, unequivocal denial by the insurer;

(b) it is the unequivocal decision of the insurer, acting in good faith, which establishes that reasonably sufficient information has been provided;

(c) any ambiguity in an insurer's denial will be resolved in favour of the insured;

(d) the insurer's denial should contain reference to s. 22 and state that time begins to run on the insured's receipt of the denial letter; and

(e) as a practical matter, in the case of a difficult insured, consideration should be given to serving the insured with the denial letter in a manner which allows the date of service to be easily proved, for example by registered mail.

V. DOES REJECTING AND RETURNING THE PROOF OF LOSS COMMENCE THE RUNNING OF THE ONE YEAR LIMITATION PERIOD IN SECTION 22 OF THE *INSURANCE ACT*?

In British Columbia, the courts have concluded that filing a Proof of Loss is not necessary to trigger the commencement of the one year limitation period under s. 22 of the *Act*, in circumstances where a claim has already been clearly and unequivocally rejected on the basis of information provided to the property insurer on the insured's behalf.

In *First City Trust Co. v. Madill*[33], the fidelity insurer denied coverage of a claim resulting from a customer's forgery on the basis that the claim as submitted in the Proof of Loss failed to disclose which sections of the policy under which coverage was being sought. At the claims handling stage, there had been a handing back and forth of the Proof of Loss with a refusal by the insurer to accept it and a corresponding refusal by the insured to amend it by indicating where the claim might lie.

The British Columbia Court of Appeal concluded that the rights of the insurer nor the insured under the policy were crystallized at the Proof of Loss stage:

> "The essential purpose of a proof of loss, of course, is to advise the insurer of the fact of a loss and of the facts known to the insured. The issue, I think, has arisen out of the view that the insurer, were it not to reject the proof of loss at this stage,

[33] (1984), 58 B.C.L.R. 138 (C.A.)

> would be taken in some way to have accepted that there is a good claim…That, *in my view, is not at all the result of a proof of loss. In that sense, the insurer is not called on to either accept or reject; it must, of course, within the sixty days either accept or reject the claim that is put forward in the proof of loss, and if that is not done then litigation will ensue.*"

This judicial view of the effect of filing of a Proof of Loss by an insured was reaffirmed by the Court in *Dachner*[34], where it was recognized that when the insurer has provided an unambiguous denial of liability, the insured is not obligated to file a Proof of Loss before commencing an action on the policy:

> "That is not to say that an insured may not thereafter file a proof of loss, but only that *the time within which an action may be commenced will, depending on the terms of the policy, run from the earlier of the filing of the proof of loss or the denial of coverage in a clear and unequivocal fashion by the insurer*."

And in the later decision of *Balzer*[35], the court found that the filing of a Proof of Loss was unnecessary once a clear denial is received by the insured:

> "*It is at denial of coverage or termination of benefits that an insured would have reason to sue the insurer. That is when a limitation period should begin to run*, not while benefits are being received, not on some later date when an insured decides to file a proof of loss or commence an action. This sensible result is at the root of the reasoning in the authorities cited to us… A clear and unequivocal denial of coverage precludes the need to furnish a claim (where the policy does not require the filing of a proof of claim) and triggers the commencement of the limitation period."

By the same reasoning, if the insured files a Proof of Loss before the insurer communicates a clear and unequivocal denial of the claim to the insured, *merely returning the Proof of Loss to the insured without stating anything further would likely be found by a court to be insufficient to commence the running of the one year limitation under s. 22 of the Act*. Under such circumstances, the insured may be left with the impression that the Proof is merely defective or inadequate and the claim will be reconsidered by the insurer on submission of further details.

Support for this proposition is to be found in the decision of the House of Lords in *Chilean Nitrate Sales Corporation v. Marine Transportation Co. Ltd. ("The Hermosa")*[35] where it was determined:

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[34] *supra*, note 30
[35] *supra*, note 32
[35] [1982] 1 Lloyd's Law Reports 570

> "What does or does not amount to a sufficient refusal is to be judged in the light of whether a reasonable person in the position of the party claiming to be freed from the contract would regard the refusal as being clear and absolute."

This principle was applied in *Balzer*, where the court, in dismissing the disability insurer's appeal, found that there had been no unequivocal denial of the insured's claim, as the insured, prior to receiving the denial, was paid her benefits under the policy for a period of time and had been left with the impression that coverage could be reconsidered if additional information on the claim was forthcoming. The actions of the insurer in its denial of the claim were, therefore, viewed by the court as more comparable to a termination of benefits for want of proof of continuing eligibility, rather than an unambiguous denial of the claim itself. As such, the insurer had not effectively triggered the one year limitation period in s. 22 of the *Act*:

> "Any ambiguity in the communication of a refusal of benefits, as to whether it is a clear and unequivocal denial, should be resolved in favour of the insured. To avoid any doubt, the preferred course for an insurer intending to deny coverage should be to include an alert in the letter drawing the insured's attention to the one year limitation in s. 22 and informing the insured that the insurer will rely on the denial as starting the running of time."

However, the opposite conclusion was reached by the court in the companion decision in *Watterson*, where it was found the insurer's advice to the insured that *"at the present time we do not have the objective medical evidence of total disability as required under the contract terms and, therefore, we are closing our handling of this claim"* was sufficient language to commence the running of the limitation period:

> "The insurer unequivocally denied her claim. She understood that too. There is no basis in the evidence for the application of principles of waiver or estoppel, or the need for what the appellant called a "plaintiff-oriented approach" to the interpretation of either the statutory or contractual limitation provisions."

Similarly, in *Ng v. Royal and Sun Alliance Insurance Co.*[36], the British Columbia Supreme Court decided, in an application by the insured for production of documents from the file of the insurer's investigating adjuster, over which privilege had been claimed, that such documents are producible if they were created prior to the period that the insured was provided with a clear, unequivocal denial of the claim, as the insurer and insured were not in an adverse position prior to that time. Where the insured had submitted a number of Proofs of Loss and received a number of corresponding rejection letters by the insurer indicating that the forms were inadequate and incomplete, the court

[36] 2003 BCSC 1174

determined that it was not until the following letter was delivered to the insured that the insured would have had reason to sue the insurer:

> "The Royal & Sun Alliance Insurance Company has reviewed the Proof of Loss and has reached a decision that the claim is unsubstantiated. Accordingly, we have been instructed to reject same. A copy of the Proof of Loss is attached for your reference."

In conclusion, these recent decisions are in accordance with the court's earlier decision in *Dachner*:

> "*It is open to the insurer, at any time, to give a clear and unequivocal notice to the insured that coverage under the policy of insurance is denied. If such notice is given, then the insurer will be entitled to say that the period of limitation will begin to run on the day when the insured has notice of clear and unequivocal denial of coverage by the insurer.* If the insurer wishes to avoid any possibility of misunderstanding, in its letter it can expressly draw attention to the limitation period and state its position to be that the time limit begins to run on receipt by the insured of that letter."

Therefore, where a property insurer has already denied liability in clear and unequivocal terms, a later formal rejection of the Proof of Loss is unnecessary to commence the limitation period. The one year limitation period within which an action must be commenced will begin to run from the earlier of the filing of a reasonably sufficient Proof of Loss, or the denial of coverage by the insurer in a clear and unequivocal manner.

At Appendix "C" is a sample letter than can be used by property insurers to accompany a returned Proof of Loss to communicate to the insured that the claim is being denied and that the reason for returning the Proof is because the claimed loss does not fall within the coverage of the policy.

It should be noted that if the limitation period is not commenced by either the insured submitting a reasonably sufficient Proof of Loss or the property insurer rejecting the claim, the outside limitation period in which an insured can commence an action is six years from the date of loss. This limitation period arises from the operation of Section 3(5) of the *Limitation Act* and Section 22(2) of the *Act*, which provides, respectively, as follows:

> **3(5)** Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of *6 years* after the date on which the right to do so arose.

22(2) An action must not be brought for the recovery of money payable under a contract of insurance until the expiration of 60 days after proof, in accordance with the contract

(a) of the loss, or
(b) of the happening of the event on which the insurance money is to become payable,

or such shorter period of time as may be set by the contract of insurance.

Since the failure to indemnify under a contract of insurance is a breach of contract which is not injury to property or person, it is governed by the six year limitation period in Section 3(5) of the *Limitation Act*. Secondly, the date on which the limitation period commences is the date of loss since this is the event on which the insurance money becomes payable as provided for under s. 22(2)(b). Section 22(2)(a) will not govern the ultimate limitation period since the provision of a Proof of Loss triggers the one year limitation period under s. 22(1).

VI. DO CLAIMS FOR "BAD FAITH" HAVE A ONE YEAR LIMITATION PERIOD, OR, CAN THE INSURED SUE FOR THOSE CLAIMS LATER?

A. Limitation Periods for Bad Faith Claims:

1. What is the applicable limitation period?

Section 22 of the *Act* creates a one year limitation period for commencing an action *on a contract* after the provision of a reasonably sufficient Proof of Loss. Does this limitation period apply to bad faith claims by an insured against the property insurer? To answer this question, the nature of a bad faith claim in relation to an action for breach of a contract of insurance must be considered.

Typically, an action "on a contract", as contemplated by s. 22, is one for failure to indemnify for a loss covered by the insurance contract. However, the relationship between an insurer and its insured is characterized by the contractual duty on each party to act with the utmost good faith in their dealings with the other. The principle imposes the obligation on an insurer to deal with its insured's claim fairly and in which it investigates and assesses whether or not to pay the claim. In the context of a "bad

faith" claim, the conduct of the insurer examined at in light of the circumstances that existed at the time to determine whether or not the insurer acted fairly.

What then is the legal nature of a claim for bad faith? This question is not clearly answered in the case law. In *Suchy v. Zurich Insurance Co.*,[36] the plaintiffs brought a claim for bad faith against their property insurers for the manner of processing, negotiating and settling their fire loss claim. Prior to concluding that the property insurers had not acted in bad faith, the court considered whether or not there existed a tort of bad faith in insurance law:

> "The weight of authority binding upon me suggests that there is a somewhat undefined implied contractual obligation of good faith and fair dealing although *it is not an independent tort* and the obligation of the insurers is not a fiduciary obligation."

and later:

> "The plaintiffs urge me to conclude that there is a tort of bad faith in insurance law in first party claims. The trend in our law does not suggest the development of such a tort and it is not necessary for me to decide that."

In *Kantolic v. Peace Hills General Insurance Co.,*[37] the plaintiff applied to add a bad faith claim to an action against her disability insurer for failure to pay benefits. The insurer argued that the amendment sought added a new cause of action and was time-barred. The court determined that the bad faith claim was merely a further particular of the insurer's breach of contract and did not amount to a new cause of action:

> "I conclude that the proposed amendment merely expands on the allegation that the defendant is in breach of the insurance contract, if there is one. *It does not advance a new cause of action*. Mesa Operating Ltd. Partnership, Kempling and Warrington justify not treating the proposed amendment as a "new cause of action". A contract breaker can breach a contract in more than one way. The breach may consist of several acts, all collectively called a breach of contract. Adding to the particulars of the breach is merely an expansion of the complaint, not an "independent" complaint. If Gertrude Stein was a poetic legal author today she might say – a breach of contract is a breach of contract is a breach of contract is a breach of contract."

[36] [1999] B.C.J. No. 304 (S.C.)
[37] [2000] 4 W.W.R. 113 (Alta. Q.B.)

Many decisions characterize a bad faith claim as "an actionable wrong" based on a breach of the duty to act in good faith that arises out of the contract of insurance, without explicitly considering whether it is an action on the insurance contract or an action in tort. However, the Supreme Court of Canada, in *Whiten v. Pilot Insurance Co.*[38], characterized a bad faith claim as follows:

> "However, in my view, a breach of the *contractual duty* of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an "actionable wrong" within the Vorvis rule, which does not require an independent tort. I say this for several reasons."

Arguably then, a bad faith claim is "an action on a contract" within the wording of Section 22 of the *Act*. The question then becomes, if the insured's action is barred by Section 22, can the insured still sue the property insurer for bad faith? The facts upon which a bad faith claim would be based cannot arise until an insured makes a claim under the contract of insurance and the insurer has undertaken a course of conduct with respect to dealing with that claim. Thus, it is conceivable that in many cases the conduct which would attract a bad faith claim has occurred before the provision of a Proof of Loss or the denial of the claim by the property insurer. There is scarce judicial consideration of this issue, especially in the context of first party property claims.

In *Shewchuk v. London Life Insurance Co.*[39], the plaintiff brought an action for failure to pay long term disability benefits and also claimed bad faith and breach of fiduciary duty against the insurer. The insurer pleaded that the action was barred under the contract of insurance and the *Statute of Limitations*. The court found that the two year contractual limitation period applied to the claim for failure to pay benefits as it was more generous to the insured than Section 24 of the *Act* [now Section 22] and that the two years had lapsed. In considering the applicable limitation period for the bad faith and breach of fiduciary duty claims, *the court considered these claims to be "extra-contractual" causes of action and accepted that the six year limitation period under Section 3(4) [now Section 3(5)] of the Limitation Act applied*. However, the court found that this limitation period had also expired. The court further determined that the bad faith claim did not fall within any of the enumerated claims in s. 6(3) of the *Limitation Act* to allow the plaintiff to argue postponement of the limitation period.

In *Lloyd's of London v. Norris*[40], the insureds discovered that their property was contaminated from an underground oil tank in June 1993. The independent adjuster

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[38] [2002] 1 S.C.R. 595
[39])1996), 38 C.C.L.I. (2d) 282 (B.C.S.C.)
[40] (1998), 205 N.B.R. (2d) 29 (C.A.)

hired by the property insurer informed the insureds that their property insurance policy did not cover ground contamination. In December 1996, the insureds commenced an action against the property insurer for denial of coverage and for breach of the duty of good faith. The property insurer successfully applied to have the insureds' action struck out on the basis that it was brought outside the one year limitation period contained in both the insurance policy and New Brunswick's *Insurance Act*. The Court of Appeal determined that the insureds' action was not barred because the bad faith claim was a tort independent of the insurance policy. Accordingly, the insureds' action did not amount to a proceeding "for the recovery of any claim under or by virtue of this contract" such as to be subject to the one year contractual and statutory limitation period, but rather was governed by the six year limitation period in New Brunswick's *Limitation of Actions Act*.

When one examines the conflicting caselaw the applicable limitation period to a claim for "bad faith" will depend on how the court characterizes the legal nature of the claim, and, in particular, whether the court characterizes the bad faith claim as incidental to the contract or as an independent tort. If the court characterizes the claim as "extra-contractual", as in *Shewchuk*, or as a tort independent of the insurance policy, as in *Norris*, the limitation period will likely be six years. If the court characterizes it as a claim on the contract, as in *Suchy* and *Kantolic*, the limitation period will be one year. Also, in *Gordon*, the court applied a two year limitation period after assuming, but not explicitly deciding, the bad faith claim to be contractual in nature.

It is difficult to predict how a British Columbia court will characterize a bad faith claim since both the *Shewchuk* and *Suchy* decisions are British Columbia cases and come to different conclusions. However, property insurers may be guided by the fact that *Suchy* was a property policy and imposed a one year limitation period while *Shewchuk* was a disability policy and decided that a six year limitation period was applicable.

2. When does the limitation period begin to run for a "bad faith" claim?

Conceivably, the conduct which an insured alleges as founding an action for bad faith may occur after the provision of a reasonably sufficient Proof of Loss. The *Limitation Act* provides that a limitation period expires, after the lapse of a specified time, after the date on which the right to commence the action arises. Section 22 of the *Act* provides a one year limitation period for an action on the insurance contract after the provision of a reasonably sufficient Proof of Loss. What, then, is the triggering event for the running of the limitation period – the provision of the reasonably sufficient Proof of Loss or the conduct which the insured alleges to be bad faith?

There is no direct judicial consideration of this issue in British Columbia. However, in *Norris*, the conduct attracting the bad faith claim was the insurer's denial that the claim was covered under the insurance policy and this date was the implicit triggering event upon which the court accepted that the bad faith claim arose, and from which the six year limitation period commenced to run.

3. Postponement of the limitation period:

Can an insured argue that the limitation period is postponed because of the discoverability provisions in Section 6(3) and Section 6(4) of the *Limitation Act*?

In *Shewchuk*, the court determined that the plaintiff's claim for bad faith arising from the insurer's failure to pay long term disability benefits did not come within any of the types of claims enumerated in Section 6(3) which would allow consideration of postponement under Section 6(4).

Again, there is scarce judicial authority on this point, but it seems likely that the reasoning in *Shewchuk* is applicable and a bad faith claim would not attract the postponement provision under Section 6(4) because it does not fall within any of the claims set out in Section 6(3) which are a precondition to the application of Section 6(4).

4. Adding a bad faith claim to an action that has been commenced in time:

It is easier for an insured to add a claim for bad faith to an already existing action against the property insurer that was commenced within the limitation period. This is so whether or not a court characterizes the claim as a breach of contract or an independent cause of action.

For example, in *Kantolic*, the court determined that the insured's application to add a bad faith claim to her already existing action for failure to pay disability benefits under the insurance contract was not a new cause of action. The insurer had also argued against the amendment on the basis that the insured knew of the facts upon which she was basing the bad faith claim when she commenced her action for breach of the contract and would not apply after the expiry of the limitation period to add the bad faith claim. The court disagreed and permitted the amendment after deciding that the facts upon which the bad faith claim were based were only discovered by the insured after an examination for discovery of the insurer. Accordingly, the passage of the limitation period and the failure to advance the claim at the onset of litigation did not bar the insured's amendment.

Even if a court characterizes a bad faith claim as an new cause of action, an insured will still be permitted to amend a Statement of Claim to add this claim after the expiry of the limitation period. Such an application would be based upon s. 4(4) of the *Limitation Act,* which provides:

> "In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time."

Accordingly, the expiry of the limitation period in s. 22 of the *Act* is not necessarily a bar to *amending* a first party property action, otherwise brought in time, to add a new claim for bad faith.

The British Columbia Court of Appeal's decision in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*[41] while not dealing with bad faith, is instructive on this point. In this case, the roof of the insured's building collapsed causing damage to building and contents. The insured was informed by the property insurers that repair costs were not covered by the policy of insurance. The insured commenced an action, originally only claiming vicarious liability against the property insurers for both the negligent misrepresentation by the adjuster that the claim would be covered by the policy and the negligent engineering services of the building engineer that had caused delay in the repairs. After the lapse of the one year limitation period, the insured sought to amend its Statement of Claim to assert a claim for breach of contract against the property insurers for failure to indemnify for the repair costs. The court determined that the proper inquiry when deciding whether or not to permit the amendment of a pleading to advance a new cause of action after the expiry of the limitation period was whether or not it was just and convenient in all the circumstances. Relevant to this determination was the length of the delay in seeking to add the new cause of action, the explanation for the delay, the prejudice to the insurer and the connection between the claim to be added and the existing claim. In the result, the court allowed the amendment.

Practically speaking, the decision in *Teal Cedar Products* demonstrates that a claim for bad faith will likely be allowed even if the one year limitation period in s. 22 of the *Act* has passed. Since it will more often than not be the case that the facts upon which the bad faith claim are being asserted will have occurred between the time the insured has submitted a claim and the provision of a Proof of Loss or the denial of the claim, it is unlikely that a significant period of time will have elapsed between the bringing of the application to add the bad faith claim and the expiry of the limitation period. It is also

[41] (1996), 19 B.C.L.R. (3d) 282 (C.A.)

likely that the commencement of the action for failure to indemnify under the contract of insurance will allow the insured to discover facts to support a bad faith claim through the normal discovery procedures that are available in litigation. The explanation for the delay in adding a claim for bad faith in these circumstances will meet the requirements set out in *Teal Cedar Products*.

Accordingly, property insurers and adjusters should be aware that their conduct, from the time the insured submits a claim, to after the onset of litigation, is subject to forming the basis upon which an insured can seek to obtain addition recovery in the courts.

B. Other Claims Against the Property Insurer:

It must be remembered that there are a number of claims that can be maintained by an insured against a property insurer that are not actions "on a contract" which are governed by the limitation periods set out in the *Limitation Act*. For example, if the conduct of the employees or agents of the property insurer, including independent adjusters, amounts to the tort of defamation or inducing breach of contract, then an action commenced by an insured will not be subject to Section 22 of the *Act*. Such actions are not "on a contract", *but rather arise from conduct independent of the indemnity and good faith obligations that are inherent in a contract of insurance.*

VII. CONCLUSION

Property insurers can achieve some certainty for dealing with first party property claims. Due to the two decisions of the Supreme Court of Canada, it is clear that the limitation period for commencing an action against a property insurer is one year from the provision of a reasonably sufficient Proof of Loss, unless the insurer has issued a policy that principally insures against loss from fire. Since such a situation is rare in today's world, property insurers now know that the limitation period is governed by Section 22 of the *Act*.

However, what constitutes a "reasonably sufficient Proof of Loss" upon which a property insurer can rely to commence the running of the one year limitation period is ultimately subject to generous court interpretation which is generally favourable to the insured. This is also complicated by the willingness of the courts to grant relief from forfeiture, finding that the insured's failure to submit either a detailed Proof of Loss or a Proof of Loss at all, amounts to "imperfect" compliance with the Statutory Conditions of the *Act* or the insurance contract. With this understanding, it is clear that property insurers must communicate to the insured that either the inadequate Proof of Loss, or

the failure to submit a Proof of Loss at all, is being treated as a repudiation of the insured's contractual obligations by the insurer and the one year limitation period has commenced to run.

Additionally, a property insurer can commence the running of a claim by rejecting the claim and/or returning the Proof of Loss, as long as the letter accompanying this conduct clearly communicates the reasons the claim is being rejected and the Proof of Loss returned.

In spite of the ability of the property insurer to achieve some certainty with respect to the commencement of the limitation period, an insured may still have the ability to advance claims for bad faith beyond the lapse of any applicable limitation period. Insurers and adjusters should make certain that clear and compete disclosure of the reasons for rejection of a claim or Proof of Loss are communicated to an insured. This will guard against both the potential ability to advance a bad faith claim when the insured can no longer advance a claim for indemnity.

APPENDIX "A" – Failure to provide a Proof of Loss

[date]

Company Name
Street Address
City, Province
Postal Code

Attention:

Dear Sirs/Mesdames:

Re: Policy No:
Date of Loss:

Despite our requests in our letters dated [insert all dates], we have not received a Proof of Loss from you as required by Statutory Condition 6 of your policy, which provides:

Requirements after loss

6. (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,

(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, 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.

(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.

We also draw your attention to s. 22(1) of the *Insurance Act*, R.S.B.C. 1996, c. 226, which reads:

> *Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of loss or claim under the contract and not after.*

We consider your failure to provide a Proof of Loss, notwithstanding our numerous requests, to be a repudiation of your obligations pursuant to the policy. As a result of your repudiation, we will not afford indemnity for your claim. Accordingly, the limitation period under s. 22(1) of the *Insurance Act*, noted above, commences to run on the date of this letter and you have one year from that date in which to commence legal action seeking recovery on your policy. Failure to commence an action within this time will result in any claim you may have under your policy being time barred.

Yours truly,

Insurance Company

APPENDIX "B" – Proof of Loss is "Reasonably Sufficient"

[date]

Company Name
Street Address
City, Province
Postal Code

Attention:

Dear Sirs/Mesdames:

Re: Policy No:
Date of Loss:

We acknowledge receipt of your sworn Proof of Loss dated [insert date]. We note that Statutory Conditions 6 of your policy provides:

> ***Requirements after loss***
>
> *6. (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,*
>
> *(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, 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.

(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.

The Proof of Loss dated [insert date] provides us with the information required by Statutory Condition 6 so that we may consider your claim and we are treating it as "reasonably sufficient" for the purpose of s. 22(1) of the *Insurance Act*, R.S.B.C. 1996, c. 226 which reads as follows:

> *Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of loss or claim under the contract and not after.*

Despite your provision of a "reasonably sufficient" proof of loss, there may be other coverage grounds upon which indemnity may not be available.

Given that your Proof of Loss is "reasonably sufficient", the limitation period under s. 22 of the *Insurance Act* commenced on [insert date of Proof of Loss]. In the event that it is necessary for you to commence a legal action, you must do so by [insert date one year from date of Proof of Loss], after which any claim you may have will be time barred.

Yours truly,

Insurance Company

APPENDIX "C" – Reason for Returning Proof of Loss

[date]

Company Name
Street Address
City, Province
Postal Code

Attention:

Dear Sirs/Mesdames:

Re: Policy No:
Date of Loss:

We acknowledge receipt of your Proof of Loss dated [insert date]. We advise that, for the purpose of s. 22(1) of the *Insurance Act*, R.S.B.C. 1996, c. 226, we find this Proof of Loss to be "reasonably sufficient". Section 22(1) reads:

> *Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of loss or claim under the contract and not after.*

We are returning your Proof of Loss. We have considered your claim and regret to advise you that indemnity is not available under your policy because of the following exclusion:

> *[insert exclusion clause from policy].*

Given that your Proof of Loss is "reasonably sufficient" for the purposes of s. 22(1) of the *Insurance Act*, noted above, and our advice that indemnity for your claim is not available under your policy, please be advised that the limitation period under s. 22(1) commenced on [insert date of Proof of Loss]. You have until [insert one year from the date of the Proof of Loss] to commence an action with respect to this claim under your policy.

Yours truly,

Insurance Company