

Insurance Act Review

Discussion Paper

March 2007



Introduction and Request for Comments

Insurance is an important tool for risk management and the mitigation of loss. When people suffer a loss or damage to their property or persons, insurance coverage is vital. For businesses and communities too, if disaster strikes, insurance is key to recovery.

The British Columbia *Insurance Act* sets out statutory requirements that apply to contracts of insurance, including provisions that set out the required contents of insurance policies and that establish procedures for making claims and payments. While the *Insurance Act* has generally worked well, it has not been comprehensively reviewed or substantively revised since the 1960s, and a number of problem areas have come to light.

The current review began in November 2005, when industry and consumer organizations, insurers, intermediaries, lawyers, academics, and the public were asked to provide comments on and identify any problems with the current legislation.

Consultation meetings, chaired by Mr. Ralph Sultan, MLA for West Vancouver-Capilano, were held in June 2006. All respondents to the initial request for comments were invited to attend, and participants included consumers and representatives from the insurance industry and legal community. The discussion paper represents the next stage of this consultation process.

The proposals in the discussion paper focus on enhancing consumer protection under the *Insurance Act* and clarifying the legislation. The paper is intended to provide interested parties with the opportunity to comment on a proposed direction for reforms to the act. The proposals do not represent government policy; rather, the paper is intended to elicit discussion. Legislation to implement reforms to the act is targeted for the spring of 2008.

Please direct your comments, by **May 1, 2007**, in electronic form to: fcsp@gov.bc.ca.
If you wish to send comments in paper format, please direct them to:

Financial and Corporate Sector Policy Branch
Ministry of Finance
PO Box 9418 Stn Prov Govt
Victoria BC V8W 9V1

Please note that the ministry will be sharing comments it receives with its counterpart in the Government of Alberta, and others. Even where confidentiality is requested, freedom of information legislation may require that responses be made available to those requesting such access.

Although the review project is intended to involve a comprehensive examination of the *Insurance Act* and its related jurisprudence, not all insurance topics are included. The regulation of insurance companies and brokers, including market conduct and broker compensation, is governed by the *Financial Institutions Act*, which was recently amended

as a result of an extensive review of British Columbia's financial services sector legislation. Similarly, automobile insurance and issues relating to the structure and regulation of the Insurance Corporation of British Columbia are also outside of the scope of the review.

Thank you in advance for your participation in this review.

Public policy objectives and principles for the regulation of insurance contracts

Historically, insurance contracts have been regulated because of the complex nature of insurance. Insurance markets are inherently lopsided in favour of insurers, because insurers usually have greater product knowledge and experience than consumers. In addition, consumers generally pay premiums for insurance services long before the insurer is required to honour potential claims obligations under the contract. Unlike many other marketplace transactions, therefore, consumers have no immediate means of ensuring that they are “getting their money’s worth”. Compounding this is the notorious complexity of insurance contracts, and the fact that they are entered into relatively infrequently by consumers. Given that the very nature of most insurance contracts is to compensate for unusual or catastrophic loss, the failure to obtain proper coverage, or to appreciate its limitations, can be disastrous.

Most non-commercial insurance contracts are offered on a “take it or leave it” basis, without affording consumers any realistic opportunity to bargain. In any event, it would be time-consuming, inconvenient and expensive for most consumers to understand, articulate and negotiate all relevant terms of their insurance contracts. Therefore, in the interests of efficiency as well as fairness, the law steps in to provide standard terms, coverages and procedures.

Reflecting the basic objective of protecting consumers, insurance legislation now carefully regulates the four major types of insurance contract entered into by consumers: fire, life, accident and sickness (A&S) and automobile. For example, the *Insurance Act* requires that all fire insurance contracts contain identical provisions respecting such matters as disclosure and notification obligations, limitation periods and salvage responsibilities, and further provides that fire insurance covers all types of fires unless they are specifically excluded.

Consumer Protection and Clarity of Contractual Provisions: Based on the above, the primary objectives (or outcomes) of regulating insurance contracts in British Columbia (and of this review of the *Insurance Act*) are to maintain and enhance consumer protection and to ensure that the rights and obligations of the parties to the contract are well-understood and clear. These primary objectives break down into a number of component principles:

- Fairness: Consumers’ basic insurance needs should be met. The scope of insurance coverage should be prescribed where necessary and consumers’ basic contractual rights should be protected. Claims settlement processes should facilitate the payment of legitimate insurance claims expeditiously and provide for effective dispute resolution.
- Transparency: Insurance policies should be clear, so that consumers are aware of the key policy terms, conditions and exclusions before entering into an insurance contract. Mandatory coverage requirements should be clear to both the insured and the insurer.

- Innovation and sustainability: Insurance companies should be free to develop new insurance products and services in a competitive environment and should be able to consistently and efficiently implement and manage the delivery of insurance products and services. This will help ensure that consumers' changing insurance needs can be met by appropriate, and affordable, insurance products.

Harmonization: A secondary objective is the continued harmonization of insurance contract provisions with other provinces. The operations of most Canadian insurers are national in scope. Harmonization of contractual provisions helps avoid unnecessary costs implicit in meeting different requirements for different provincial jurisdictions. This benefits insurers, and ultimately consumers, through reduced insurance premiums. Moreover, both groups benefit by having a similar legal framework apply to their insurance transactions, regardless of where they live or operate in Canada.

Justifiable intervention: A final objective is the minimization of unnecessary government intervention in private contracts and the avoidance of over-regulation. Insurance contracts should be regulated only to the extent necessary to meet the objectives of consumer protection, clarity or harmonization. As well, increased costs to insurers caused by changes to the legislative framework should be considered in evaluating any proposed amendments.

Proposed Significant Policy Changes

I. Structural reform

Perhaps the most significant problem identified with the current *Insurance Act* is that its structure has not kept pace with current market practices. The act is divided into several key Parts (in addition to Part 1, containing defined terms):

- Part 2 (General Part): applies to all contracts of insurance (unless another provision in the act applies and deals with the same or a similar subject matter);
- Part 3 (Life Part): applies to contracts of life insurance;
- Part 4 (A&S Part): applies to contracts of personal accident and/or sickness insurance;
- Part 5 (Fire Part): applies to contracts of fire insurance.

The structure of today's legislation reflects the historical regulation of insurance contracts, when contracts were generally issued for specific types of risks or perils. However, modern insurance contracts often cover a variety of risks (multi-peril) or even all risks. For example, the basic home policy no longer insures consumers only for damage to the home by fire, but also typically covers 14 other perils (including vehicle impact, vandalism, wind and hail, window glass breakage and theft), and may also include a component protecting the homeowner from third party liability in certain circumstances.

Since each Part of the act contains specific contract law requirements which sometimes vary, it is often essential to determine what Part applies to a contract of insurance. This need to classify the different types of insurance contracts leads to uncertainty. Courts interpreting the act have struggled to determine what Part applies to what policy, especially where one provision is clearly less favourable to a consumer (e.g., by containing a shorter limitation period).

A. Merger of General and Fire Parts: In particular, problems have arisen in respect of the application of the act to typical multi-peril home insurance. Although the Fire Part has historically been considered to apply, in 2003 the Supreme Court of Canada ruled that the General Part governed these policies on the grounds that they did not fit into a Part designed to regulate fire insurance. This determination is key because these Parts contain significantly different limitation periods (periods of time during which claims must be brought). As well, the Fire Part gives the courts wide discretion to protect consumer interests by ignoring terms and conditions of the insurance contract that are unjust or unreasonable; no such powers are found in the General Part.

During consultations, detailed proposals were put forward to help resolve the classification problem by merging the General Part of the act with the Fire Part. Merging these Parts could reduce classification issues, but it could create other problems. Reflecting the basic objective of protecting consumers, insurance legislation now

carefully regulates the key insurance contracts entered into by consumers (fire, life, A&S and automobile), while imposing only a few, less intrusive rules on other insurance contracts governed by the General Part. The “hands-off” approach of the General Part seems appropriate for commercial contracts negotiated by parties of more equal bargaining strength and knowledge.

If the General and Fire Parts were to be merged, and all the provisions of the merged Part were to apply equally to all types of insurance contracts, the new Part would either under-protect consumers or intrude heavily into commercial contracts. If one merged Part is created, but some provisions are restricted to certain types of consumer or other contracts, then classification issues will still arise. In the end, merging or maintaining separate Parts is not necessarily the most important issue. Rather, the key issues are what do the provisions provide and to what types of insurance should they apply.

Proposal 1: It is proposed that the consumer protection provisions of the Fire Part be extended to cover all basic home insurance policies (multi-peril, all-peril or comprehensive, homeowner, condo, tenants, etc.).

Under this proposal, commercial and other miscellaneous contracts would continue to be regulated by the more flexible outcome-based provisions now found in the General Part (i.e., no Statutory Conditions or court oversight of terms and conditions). This approach will continue to focus the more prescriptive regulation on a key type of consumer contract (the home insurance contract), while allowing more freedom of contract in other areas where contracts are more likely the subject of negotiation. This approach also modifies the legislation to match market developments, namely the development of multi-peril and all-peril home insurance policies.

Classification issues would also be addressed by harmonizing the provisions now found in the different parts where feasible (e.g. limitation periods). As well, a very clear application provision will be required to avoid ongoing classification issues.

With respect to merging of the Parts, no proposal is made. In the interests of harmonization with Alberta, which is considering having one General Part applicable to every type of insurance (other than auto, life, A&S and reinsurance), it may be desirable to create a single Part, with exemptions for certain types of insurance, rather than having a separate part for home insurance policies.

Questions/issues: Many small business owners face similar issues as homeowners when purchasing fire and other property insurance for their businesses, and intervention may be justified to ensure that their interests are protected. In this regard, please comment on whether (and if so, how) the consumer protection provisions of the Fire Part should apply to property insurance policies issued to small, or small and medium-sized, businesses.

B. Merger of Life and A&S Parts: Similar to the issue of the merger of the General and Fire Parts of the act, there have been recommendations that the Life Part (which includes disability insurance) and the A&S Part be merged. Some confusion has arisen as a result of the development of “hybrid” types of policies of insurance, such as critical illness

insurance, which may be classified differently depending on the contents of the policy. There are also difficulties on occasion in classifying a product as “disability” or “accident and sickness”.

Restructuring these parts of the act may lead to greater clarity in the legislation. However, the problems with classification do not appear to be major in this area. Some of the problems may be resolved by adoption of harmonized definitions and other provisions (such as limitation periods), where feasible.

Another important factor is that the life and A&S Parts of the act are largely harmonized with other jurisdictions. Various jurisdictions are now considering a series of improvements to the Parts recommended by the industry (see discussion on page 20, below), but no other jurisdiction is prepared at this time to develop a merged set of provisions. Therefore, major changes in this regard are not timely.

Merger of the life and A&S Parts is not recommended at this time.

II. Mandatory fire coverage

The loss of home or building to fire usually entails catastrophic financial loss for most individuals and businesses, and limits in fire coverage may result in unexpected and unfair consequences, especially for consumers who are poorly advised. Therefore, a core policy assumption of insurance law, applied since the first insurance contracts legislation was adopted in British Columbia in 1893, has been that fire coverage includes fires resulting from any cause – as is sometimes said in the industry, “a fire is a fire is a fire.”

The Fire Part of the act deems that fire insurance policies include coverage for fire following all events, except those risks excluded by the legislation. Specifically, all fire insurance contracts are deemed to cover the insured property against fire whether resulting from explosion or otherwise, so long as the fire was not caused by certain named events (mainly matters along the lines of riot, war and invasion). While it is possible for an insurance company to contractually exclude other risks, these exclusions are not binding on the insured if held to be “unjust or unreasonable” by the courts. Insurers are therefore reluctant to exclude additional risks, and, in fact, very rarely do so, because of concerns that a court will overturn the exclusion and allow an insurance claim to succeed even though the insurer has not collected a premium, or set aside reserves, to cover the risk.

Recently, the issue of mandatory fire coverage has been raised in several ways. First, insurance companies have long asked for more flexibility to exclude fire-related risks, specifically fires caused by terrorism and earthquake. Second, the core policy goal of mandatory fire coverage has been undermined by court decisions dealing with vacant properties damaged by fires caused by vandalism. Lastly, the Supreme Court of Canada decided in 2003 that the Fire Part of the act did not apply to multi-peril insurance policies (even though such policies have a fire component). Accordingly, the mandatory coverage provided by the Fire Part may no longer be legally required in British Columbia in the case of multi-peril policies.

A. Fire following earthquake: For some time, the insurance industry has asked to be able to provide all earthquake coverage (fire and shake) in one separate earthquake policy, rather than including fire coverage as a mandatory coverage in a fire/multi-peril policy and selling shake coverage in a separate earthquake policy. The industry argues that separating earthquake fire coverage from ordinary fire coverage would provide greater transparency for consumers and allow insurance companies to better manage risks.

On the other hand, given modern predictive tools, earthquake coverage can be appropriately priced, and is now backed by sufficient industry reserves or reinsurance. As well, industry’s proposal to remove earthquake fires from ordinary fire coverage raises consumer protection concerns. If earthquake-fire coverage were excluded, consumers who have already purchased this coverage as part of their basic fire package would need to purchase additional coverage, or risk having no protection from losses that

result from an earthquake-induced fire. A consumer who believes that buying a fire insurance policy will provide coverage for fire, whatever the cause, would be unfairly surprised to find that some fires are not covered. This is a particularly important issue for consumers in British Columbia where the risk of a major earthquake is substantial.

Proposal 2: It is proposed that earthquake not be added to the list of permitted exclusions.

B. Fire following terrorism: Coverage for fire following terrorism raises different considerations. Insurers indicate that they cannot cover these risks because they cannot predict the extent of any possible losses and it is difficult to find reinsurance. They argue that because the risk is unpredictable, requiring that an insurer provide such coverage could lead to solvency issues in the event of a major terrorist event. Therefore, mandating coverages is detrimental to the consumer interest because insurers may withdraw from the marketplace rather than offer products they cannot properly price. While there are modeling techniques being developed for this risk, many countries, including the United States, have established a government backstop for these types of losses following the events of September 11, 2001.

As noted above, the current act already excludes fire following a lengthy list of hostile acts. Therefore, the proposed exclusion of terrorism can be seen as a modern refinement of existing policy.

Proposal 3: It is proposed that terrorism be added to the list of permitted exclusions, thereby recognizing insurance companies' legitimate underwriting concerns respecting fire following terrorism.

Questions/issues: A further consideration is whether the term "terrorism" requires a definition, and, if so, how it might be defined.

C. Fire following vandalism: A typical multi-peril homeowners' insurance policy includes coverage for many different perils. One insured peril is fire; another is vandalism. Most homeowner vandalism coverage excludes loss (e.g. broken windows and graffiti) where the premises are left vacant for any period. In contrast, fire coverage typically continues for 30 days after premises are vacated. These different approaches to vacancy have caused problems when a fire in vacant premises is caused by vandalism.

A series of court cases appears to have decided that fire losses from vandalism are to be considered under the vandalism part of the policy, and therefore excluded in accordance with the vandalism/vacancy exclusion clause. From an insurer's perspective, eliminating coverage for fire losses caused by vandalism while the property is vacant could be an important form of risk management. However, these cases undermine a core policy goal of the legislation: that fire coverage includes fires resulting from any cause, except causes that are specifically listed in the policy or the act. These cases may result in unexpected and unfair consequences for consumers, especially if they are poorly advised.

Because the fire provisions are separate, and the act already lists a number of exceptions (for example, fires caused by riot, war and insurrection – but not vandalism – are permitted by law to be excluded under the contract), consumers arguably have a reasonable expectation that fires otherwise caused will be covered. As well, fire coverage is so fundamental and basic, any exclusion to that coverage should occur directly, if at all.

There are certain situations where the “vandalism while vacant” exclusion, as applied to fire loss, is particularly unfair. If a person who sells their house moves out a day early (thus leaving the house vacant), and the house is burnt down by an act of vandalism, coverage for the loss could be denied. Similarly, a landlord could be left uninsured for fire losses if a tenant suddenly vacates without notice. Since fire often results in total devastation of the property (as opposed to broken windows and water damage), these results are particularly harsh.

Proposal 4: It is proposed that

- **the provisions in the act stating that fire coverage includes fires resulting from any cause be retained and clarified.**
- **the meaning of “vacancy” be defined to provide a statutory “grace period” of 30 days during which coverage for fire, and for vandalism resulting in fire loss, would continue.**

These proposals would maintain and enhance consumer protection and provide increased clarity to contracts of insurance.

Questions/issues: Another consideration is whether the above proposal to protect consumers from fires that occur during vacancy should be expanded to include other vandalism losses, such as breakage to windows or theft. The above proposed approach re-establishes the long standing protection for basic fire coverage; the option to expand protection for consumers to other kinds of vandalism damage arising during vacancy of 30 days or less would presumably impact on current underwriting practices and could lead to increased insurance costs.

III. Amendments to preserve and enhance consumer protection

A number of other changes are proposed to the *Insurance Act* to enhance consumer protection and foster contractual clarity. These changes are generally proposed for application to the modified fire/home insurance part (Part 5) of the act.

A. Statutory Conditions: The insurance contract is one of the most heavily regulated contracts, and the four main kinds of insurance contracts entered into by consumers – fire, life, A&S and automobile – are all regulated in particular detail. Three of these four consumer contracts (all except life insurance) have legislated statutory conditions that must be printed in every contract and cannot be changed or added to. For other types of insurance contracts, including commercial liability policies, a number of statutory requirements are applicable, but these are generally fewer in number and do not need to be printed verbatim in the contract.

The insurance industry has proposed eliminating the statutory conditions now found in the A&S and Fire Parts of the act. Any essential contractual terms that set out rights and duties would be retained as mandatory requirements in the statute, but there would no longer be an obligation to reprint them word-for-word in insurance contracts.

The issue is whether the consumer protection provided by the *Insurance Act* can be maintained or enhanced while providing more flexibility to insurers in designing insurance contracts. A more flexible approach would be more consistent with the government's initiative to reduce unnecessary red tape and create a modernized "results-based" regulatory regime. In a market economy, freedom of contract is often seen as the most efficient and fair means to allow people to interact in the marketplace. In this light, prescribing specific conditions and wording that must be printed in insurance contracts appears very prescriptive.

The historical rationale for regulation in this area is that the nature of the insurance contract demands intervention, given the unequal bargaining power and knowledge of the parties. For individual consumers, the insurance contract is essentially a "contract of adhesion" (that is a contract that one party must accept or reject as a whole, without any opportunity to bargain over the terms). Certainty and uniformity of the statutory conditions protect consumers from unfair surprise, and assist with contract standardization. Other approaches to protecting the consumer interest (such as requiring regulator approval of "tailor-made" terms in insurance contracts or broadening the courts' powers to ignore such terms) involve greater regulatory/judicial involvement and potential uncertainty.

Finally, since statutory conditions are required to be printed on all insurance policies, inter-jurisdictional harmonization is of paramount concern. All Canadian jurisdictions, except Quebec, use identical statutory conditions to regulate the same insurance products.

Proposal 5: It is proposed that statutory conditions be maintained and updated to protect consumers and enhance contractual standardization.

As the existing statutory conditions were last significantly reviewed and updated 50 years ago, they will be updated and streamlined. The Alberta government is contemplating updating the statutory conditions and unless there is a very strong policy reason for a different wording, British Columbia would generally seek to adopt the same statutory conditions, as these terms must be printed verbatim in contracts.

B. Innocent co-insured: When persons who are jointly insured suffer loss that is caused by the acts of one of them, recovery by the “innocent” party may be denied. One situation involves a co-owned family home that is damaged due to the acts of an abusive spouse. The problem can also arise where family property is damaged by a child, or where loss to partnership property is caused by the acts of a partner.

Typically, homeowners’ policies exclude loss caused by the intentional or criminal acts of any person insured under the policy. In one case, this type of term was used to deny recovery by the parents whose house was burned down by their 16 year old son, on the basis that the son’s personal property was covered by the insurance policy, and therefore the son was “an insured”.

The rationale for denying recovery in these circumstances stems from the familiar legal doctrine that prohibits a wrongdoer from profiting as a result of his or her misconduct. In cases where property is jointly owned (or where property is jointly insured), the assumption is that the interests of the insured parties are inseparably connected, so that a loss or gain necessarily affects both. In other words, to allow recovery by the innocent party would indirectly benefit the guilty one.

As well, insurers are concerned that allowing recovery by an “innocent” co-insured might create a loophole. This is because in cases involving arson, the “innocent” spouse may actually be complicit (although this may be difficult to prove), and, if recovery were allowed, would share in the proceeds of insurance. On the other hand, allowing coverage to be denied can be seen as a punitive approach to persons most in need of support – in particular, women and children in abusive relationships.

The State of Washington addresses this issue by focusing only on the domestic abuse scenario. It prohibits insurance companies from denying otherwise valid claims on the basis that the loss was caused by an act of domestic abuse by another insured under the policy, so long as the innocent co-insured files a police report, cooperates with the investigation of the domestic violence, and did not participate in causing the loss. In contrast, under Quebec’s Civil Code, insurers are obliged to cover any co-insured person, unless they have committed an intentional fault. The other Canadian provinces do not address the problem.

Proposal 6: It is proposed that the act be amended to require insurance contracts to maintain coverage of an innocent co-insured.

C. Group insurance: Group insurance products are sold on a group, rather than an individual, basis and typically involve group life and disability plans offered through an employer to its employees. In a group insurance contract, the person who enters the insurance contract (e.g. the employer) is a different person than the insured party (the employee), and therefore, group products raise some unique issues. There are specific provisions in the act that allow consumers insured by group life and A&S contracts, for example, to sue on those contracts even though they are not a contracting party.

Currently, the act requires that consumers of life and A&S group insurance receive a certificate outlining the major terms and coverages of the policy, and in most cases, this is sufficient. They have no right to obtain a copy of the policy itself. However, in order to determine whether or not insurance coverage is adequate, or whether a claim can be made, scrutiny of the full policy may be necessary.

Also under the current act, there are no provisions governing group property and casualty (P&C) insurance, even though it is routinely available in the marketplace (for example, credit insurance can include coverage for loss of employment, and product warranty coverage is often provided in association with credit cards). In these circumstances, since the actual contract lies between the financial institution and the insurance company, consumers have no direct right of recourse against the insurer in the event that problems arise. As well, in contrast to the life and A&S side, there is no requirement that consumers be notified when contractual provisions are changed or when coverage is terminated.

Proposal 7: It is proposed that

- **consumers be given a statutory right to obtain, upon request, a copy of a group insurance policy, while insurers be permitted to withhold personal and commercially sensitive information.**
- **consumers of group P&C insurance be given the same rights as consumers of group life and A&S insurance, including the right to sue on the contract, and the right to be notified of termination or changes in coverage.**

Questions/issues: Broader concerns have been raised about group insurance and various products being sold on a group basis, including the value to consumers of some group products. It is unclear at this time whether further regulation or restriction of group insurance products is required. No proposal is made on this matter, but comments are requested on the issue.

D. Disclosure obligations: Insurance contracts are considered to be contracts of “utmost good faith”, and accordingly require disclosure of all known material information by an applicant for insurance. Generally, a fraudulent failure to inform the insurer of a “material” circumstance results in nullification of the contract, as does failure (whether or

not it is fraudulent) to notify about a material change in circumstances after a policy has been written. For example, if a homeowner installs a wood stove, or leaves their home vacant for a period of time, they may be required to inform the insurance company of these facts.

This requirement for disclosure of material information makes good sense, in that it enables the insurance company to determine the underwriting risk and to either increase premiums or refuse to insure where there has been an increase in risk. However, there are problems with the requirement:

- Consumers may not be aware of what constitutes a “material” change to the risk. Consumer confusion may be compounded by court decisions holding that “materiality” is to be determined from the point of view of the insurance company.
- The consequence of failing to notify (nullification of the insurance contract) may be unconnected or completely disproportional to the breach. For example, a homeowner’s failure to notify the insurer about a temporary vacancy could void vandalism coverage even if the vandalism occurs after the home has been re-occupied, and a failure to notify about the installation of a wood stove could completely void fire coverage even if the risk is only marginally increased.
- It is an anomaly that, at the time of entering into the contract, when a consumer generally has the advice of an agent, a failure to disclose will not nullify the contract unless that failure is both material and fraudulent. However, the ongoing disclosure obligation (applicable when there may be little contact between the insured, insurer and the agent) is more onerous, in that even an innocent failure to disclose can void the contract.

There is some potential relief for consumers under the act, which provides that the courts can ignore terms of the insurance contract (including those imposed by statutory conditions) if they operate in an unjust or unreasonable way. It has already been proposed (see page 6, above) that the courts’ power to ignore conditions be clarified to ensure that it applies not just to fire insurance contracts, but also to other homeowner multi-peril contracts. However, even with this clarification, additional consumer protection may be appropriate.

In most Canadian jurisdictions, the disclosure provisions are the same or similar to B.C. – if an insured person fails to notify the insurance company of changes that increase the risk, the insurance policy is nullified. However, Quebec (like Australia) takes a less punitive approach, and also treats initial and ongoing disclosure obligations in the same manner: unless it is established that the person insured has acted in bad faith, or that the insurance company would not have covered the risk at all had the true facts been known, the failure to notify (or to disclose in an application) only results in a proportionate reduction of coverage.

One option would be to amend the legislation to adopt a proportionate approach for failure to disclose. Another option would be to provide examples of what constitutes a “material” change in risk, to help ensure consumers are aware of their notification obligations in the most common situations. A third, non-legislative option would be to improve consumer understanding of disclosure and other obligations, through education and enhanced disclosure by insurance agents.

Questions/issues: No proposal is made on this matter, but comments are requested on the issue and options.

IV. Procedural amendments to enhance clarity, certainty and fairness

A. Limitation Periods: The act contains four different limitation periods. Whether or not a particular one applies depends on the classification of the insurance contract (e.g. a fire insurance contract has a different limitation period than a multi-peril contract), and this has led to much litigation over the past 15 years. The courts in several recent cases have urged the government to clarify the legislation.

During the consultation process, clarification of limitation periods was identified as a priority issue by many stakeholders. Streamlining the current inconsistent limitation periods is seen as necessary to reduce confusion for consumers, advisors and insurers, all of whom need certainty in order to appropriately deal with insurance claims. To meet this goal, some stakeholders argued in favour of a single, perhaps longer, limitation period triggered by a consistent event, while others recognize that “one size fits all” might not be appropriate given the different types of claims.

The policy behind limitation provisions is to require that legal disputes be resolved within a reasonable time, to ensure that evidence presented to the courts is fresh, and to enable those affected to effectively “move on”. The periods must be long enough, however, to enable potential claimants to become aware of any loss, damage or liability and to understand the facts sufficiently to make a claim, and to give all parties sufficient time to seek to resolve any dispute before expensive legal proceedings are required. From a public policy perspective, insurance regulation also requires certainty with respect to the limitation period so that insurers may put aside sufficient reserves for potential liability.

Most of the limitation periods under the act are one year in length. While this period is short (relative to other legal claims), it does encourage faster resolution of claims, and also limits the reserves that insurers must maintain. However, a short limitation period can also impose a hardship on the insured. Many persons may still be providing information to the insurer, working with adjusters or waiting for a decision from the insurer late into the year. As a result, the period may expire even before they realize they have been denied recovery or need to seek legal advice.

The limitation periods in the act start to run on the occurrence of various events (triggers). For example, the limitation period for fire insurance begins to run on the date of the loss (i.e. when the fire occurs). Other triggers are not as clear. For example, the General Part limitation period that applies to most insurance claims is triggered by “the furnishing of reasonably sufficient proof”. This start date can be unfair to claimants, since it depends on the subjective, and possibly not communicated, determination of the insurance company as to the sufficiency of the evidence, and it does not provide the needed certainty to either party. As well, it is not clear how this limitation period works where there has been no claim or, if there was a claim, no proof of loss is furnished.

In most legal claims, the running of the limitation period is “postponed” when a person is a minor or is otherwise incapable in managing his or her affairs. As well, the period does not run until the facts within a plaintiff’s means of knowledge are such that would lead a

reasonable person to bring a legal action. This legislated “discoverability” provision has been applied by the courts in a very flexible manner to extend limitation periods, for example when salient facts are not known by the plaintiff or when a plaintiff is seriously ill or has other reasons for delay.

The concepts of incapacity and discoverability do not, however, apply to insurance contracts. In a recent insurance case, the British Columbia Court of Appeal asked the Legislature to consider amending the act to apply incapacity and discoverability to insurance claims, in order to relieve late-filing claimants in appropriate circumstances.

Unfairness in the application of short limitation periods sometimes arises from situations where the insured was (or thought they were) still in negotiations with the insurer. The insurance company that indicates it is closing the file due to insufficient evidence to support the claim often encourages the claimant to submit new evidence if any arises. While a lawyer may understand that the limitation period has started running, consumers may not, and may be busily trying to obtain further information, including doctors’ reports supporting proof of disabilities or injuries. Requiring that insurance companies inform claimants when the limitation period is about to expire would help remedy this problem.

Proposal 8: It is proposed that

- **the limitation period in *Insurance Act* be extended to 2 years.**
- **a single general provision be adopted for the act, with the trigger being “the date the cause of action arises against the insurer” (the trigger found in vehicle insurance legislation and the current *B.C. Limitation Act*¹). This general trigger would then be refined for certain types of claims, such as the “date of loss” for property claims and the “date of the last payment” for ongoing disability and A&S claims.**
- **the incapacity and discoverability provisions of the general *Limitation Act* be applied to insurance claims.**
- **insurers be required to give notice to the consumer before the expiry of the limitation period.**

The current provisions in the *Insurance Act* governing limitation periods are confusing, unfair and need to be reformed. This combination of reforms will ensure clarity, certainty and fairness for both consumers and insurers.

B. Dispute Resolution: Currently, the act provides for two types of alternative dispute resolution (ADR). First, the “appraisal” remedy, which applies automatically to fire insurance contracts but can also be adopted for other types of insurance disputes, is used where there is disagreement over the value of the property insured or the amount of the

¹ Various aspects of the *Limitation Act*, including the appropriate commencement mechanism, are under review by the Ministry of Attorney General in its February 2007 paper “Reforming British Columbia’s Limitation Act”.

loss. This legislated appraisal process is not available to help resolve the issue of whether the claim is valid under the contract. Second, regulations made under the act provide for mandatory mediation of home warranty insurance disputes. This requirement was adopted as part of the broader regulation of mandatory home warranty insurance and applies only to that type of insurance.

Although not referred to in the act, there are other ADR options available both privately and as a result of other initiatives. For example, all federally-regulated insurance companies are required, by federal law, to establish procedures to resolve complaints received by the company and, for disputes not resolved through that process, to be members of an independent organization to deal with unresolved complaints. Federally-regulated property companies are members of the General Insurance OmbudService, whereas life insurance companies participate in the Canadian Life and Health Insurance OmbudService. Similarly, in British Columbia, the Insurance Brokers Association of B.C. has established a dispute resolution service that is available to help resolve P&C insurance disputes.

Several submissions by ADR providers commented on the act's deficiencies with respect to ADR processes. Many insurance claims are small and legal action to resolve them would be too expensive. Even in disputes involving larger claims, consumers may not be legally sophisticated and may be reluctant to commence legal proceedings. A cost-effective method for resolving disputes may be an important means to assist consumers and to avoid expensive and acrimonious legal proceedings.

Proposal 9: It is proposed that:

- **insurance companies offering home, life or A&S insurance be required to have in place an internal dispute resolution system and to participate in a dispute resolution service that offers mediation of disputes between consumers and insurers. The list of acceptable services would be set out in the regulations or, alternatively, established by order of the Financial Institutions Commission. In addition, insurance companies would be required to notify consumers of their right to take a dispute to a dispute resolution service.**
- **the appraisal remedy be retained and updated to allow the courts to award actual costs to an intransigent party who attempts to subvert the appraisal process by refusing to appoint an appraiser or agree to an umpire.**

Another problem raised during consultations was that the limitation periods set out in the act make no allowance for "stopping the clock" while ADR processes are explored. The Ontario *Limitations Act* provides for a suspension of the limitation period during ADR. The above proposals respecting limitation periods (see page 17) would lengthen the period, eliminating or reducing the need for stopping the clock for ADR; therefore, no proposal for a change in this regard is made.

C. Examination of insured: With respect to automobile insurance, the act provides that an insurance company can require a claimant to submit to an examination under oath. There is no statutory provision for examinations under oath for other types of insurance claims, although some insurance contracts contain an obligation for claimants to submit to such examinations. During consultations, it was recommended that British Columbia follow the approach adopted in some American states that requires claimants under all types of insurance policies to submit to examination under oath.

The requirement to submit to examination under oath is intended to provide insurance companies with a tool to combat the serious problem of insurance fraud. However, the mechanism could be subject to abuse (for example, if used to deter or delay the payment of claims or to intimidate an unsophisticated claimant). Jurisdictions that allow for such examinations often provide significant limitations on the power (for example, by limiting the number and timing of examinations and by expressly protecting the insured person's right to be represented by legal counsel). Given that examinations of this type are sometimes required by the terms of the contract, a sound statutory foundation for the procedure would be beneficial.

Proposal 10: It is proposed the act be amended to state that insured parties making claims under insurance policies can be required to submit to an examination under oath and to allow for regulations to prescribe protections for insured parties, including notification of the right to be represented by counsel.

D. Statutory declarations: An issue related to the above is the current statutory requirement for an insured to verify the proof of loss with a statutory declaration (a sworn statement). The March 2006 B.C. Law Institute "Report on Unnecessary Requirements for Sworn Statements" recommends replacing many types of statutory declarations throughout various pieces of B.C. legislation, including the *Insurance Act*, with signed statements. This proposal is intended to eliminate the expense and inconvenience of having to go before a lawyer or other commissioner for oaths to make a declaration.

However, there are some concerns with eliminating statutory declarations for proof of loss under the act. Given that the consequence of wilfully making false statements is complete denial of the claim, requiring a person to take an oath may serve a cautionary function. As well, the process may help ensure a person has some legal advice before submitting their claim.

Questions/issues: No proposal is made on this matter, but comments are invited.

IV. Other issues

In addition to the matters discussed above, amendments in several distinct areas as described below are also now being considered.

A. Other issues under active consideration

Life insurance and A&S: Life and A&S insurers have for many years sought a series of largely technical changes to the “uniform” life and A&S provisions. These amendments have been implemented, or are being considered for implementation, in reforms to the insurance acts of other provinces, including Alberta. Unless there is a very strong policy reason for adopting a different approach in a particular case, it is proposed that the same technical updates be adopted in British Columbia. The ministry will work with industry in the coming months to examine in detail these and other proposed technical changes.

Marine and home warranty insurance: Consultation sessions have been held with the marine and home warranty insurers, legal experts and other stakeholders. The ministry is actively considering submissions received for changes in these areas. Further consultations with interested stakeholders on proposed reforms will be held in the coming months.

Classes of insurance: Insurance regulators and the insurance industry have worked together to develop a set of harmonized classes of insurance for adoption across the country. The federal government has already adopted these classes, and Ontario and Manitoba have made legislative changes to allow for their adoption. The ministry is reviewing the proposed new classes, along with necessary amendments to the *Financial Institutions Act*, the *Insurance Act* and other laws and regulations that refer to the classes. Under specific review is the expansion of the definition of title insurance to include personal property as well as real property.

However, unless there is a strong policy reason not to do so, it is proposed that the harmonized approach be adopted wherever possible to reduce red tape and regulatory costs for insurers, most of which operate in more than one jurisdiction in Canada.

Modern distribution methods: The act typically requires that policies of insurance and notices of termination be delivered or sent by registered mail. The act fails to take into account electronic means of delivery. As part of its insurance act reforms, Alberta is considering specific amendments to allow for use of modern means of delivery for some but not all insurance documents. Unless there is a very strong policy reason for adopting a different approach, it is proposed that the same updates be adopted in British Columbia to allow insurers to use the same distribution and administrative practices in both provinces.

Livestock insurance: Section 189 of the act prohibits contracts of livestock insurance for terms exceeding 3 years. This limitation does not appear to have any modern-day relevance, but rather stems from a time when other insurance contract terms were similarly limited. An amendment to repeal the prohibition is under consideration. More

broadly, section 189 applies key parts of the Fire Part to livestock insurance. The ministry intends to consult further with the livestock and insurance industries to determine if this approach continues to make sense.

B. Issues for which amendments are not proposed

The ministry has considered the following further issues raised during consultations, but no legislative amendments are proposed at this time.

Regulation of credit scoring: Credit scoring refers to the practice of using individual credit histories in deciding whether to accept or reject applications for insurance and in establishing premium rates. During consultations, it was recommended that credit scoring be prohibited, on the grounds that the practice unfairly disadvantages certain groups of individuals and could be used in a discriminatory way. It is uncertain how widespread the practice is, but no consumer complaints on this issue have been received. In the absence of clear evidence of harm to the public, regulating this practice at this time could be seen as an unwarranted intrusion into an insurer's ability to write the risks that they want at the rates they consider appropriate. Therefore, no amendments are recommended at this time.

Viatical Settlements: A viatical settlement is an arrangement between the holder of a life insurance policy and a third party, whereby the holder sells their policy to the third party in return for an immediate payment. Viatical settlements are prohibited in British Columbia, and in all other Canadian provinces except Quebec, Nova Scotia, New Brunswick and Saskatchewan. The four provinces allowing viatical settlements do not regulate the transactions. An amendment to the Ontario *Insurance Act* in 2000 would have allowed viatical settlements subject to regulatory requirements, but the amendment has never been brought into force.

No amendment is recommended at this time. Currently, there appears to be little demand for viatical settlements, and considerable further policy work on the issue is required. A May 2006 Study Paper on Viatical Settlements by the Canadian Centre for Elder Law Studies (a division of the B.C. Law Institute) has proposed conducting a law reform project to determine whether the prohibitions should be removed and, if so, what sort of legal framework should be created.

Other issues: Certain other recommendations made during consultations, by both individual consumers and insurance companies, are not proposed to be dealt with in this review. In some cases, these recommendations raise concerns that are not borne out by current evidence; in others, they call for a level of government intervention in contractual relations disproportionate to any problems identified.

For example, one consumer recommendation was that the act be amended to require insurers to offer "assessed value" policies in addition to the more expensive "replacement value" insurance. An insurance company recommended that the "standard mortgage clause", requiring the financial institution to notify the insurance company of any material changes in risk, including vacancy of the property, within its knowledge or control, be made a statutory requirement.

These, and other similar issues, are currently not the subject of proposals for amendment. With respect to the first issue, a healthy, competitive insurance marketplace has generally responded well to consumer demand for alternative insurance products, and in practice, assessed value policies continue to be available. With respect to the second issue, there is no inequality of bargaining power and expertise between insurers and commercial lenders that would justify such government intervention. Insurers and lenders can redesign the clause to clarify coverage as appropriate.

During consultations, some participants recommended broader reforms to the regulation of insurance contracts and companies, including the regulation of home insurance premiums and the possible creation of a public insurer for home insurance. Again, no proposals to deal with these suggestions are recommended, on the grounds that the currently healthy and competitive marketplace for home insurance ensures that consumers have a broad choice of products, fair prices and reasonable terms and conditions. Core protections for consumers found in the *Financial Institutions Act* and the *Insurance Act*, updated with the proposed amendments, will continue to effectively protect consumers.

IV. Summary of Major Proposals

Proposal 1: It is proposed that the consumer protection provisions of the Fire Part be extended to cover all basic home insurance policies (multi-peril, all-peril or comprehensive, homeowner, condo, tenants, etc.).

Proposal 2: It is proposed that earthquake not be added to the list of permitted exclusions.

Proposal 3: It is proposed that terrorism be added to the list of permitted exclusions, thereby recognizing insurance companies' legitimate underwriting concerns respecting fire following terrorism.

Proposal 4: It is proposed that

- the provisions in the act stating that fire coverage includes fires resulting from any cause be retained and clarified.
- the meaning of "vacancy" be defined to provide a statutory "grace period" of 30 days during which coverage for fire, and for vandalism resulting in fire loss, would continue.

Proposal 5: It is proposed that statutory conditions be maintained and updated to protect consumers and enhance contractual standardization.

Proposal 6: It is proposed that the act be amended to require insurance contracts to maintain coverage of an innocent co-insured.

Proposal 7: It is proposed that

- consumers be given a statutory right to obtain, upon request, a copy of a group insurance policy, while insurers be permitted to withhold personal and commercially sensitive information.
- consumers of group P&C insurance be given the same rights as consumers of group life and A&S insurance, including the right to sue on the contract, and the right to be notified of termination or changes in coverage.

Proposal 8: It is proposed that

- the limitation period in *Insurance Act* be extended to 2 years.
- a single general provision be adopted for the act, with the trigger being “the date the cause of action arises against the insurer” (the trigger found in vehicle insurance legislation and the current B.C. *Limitation Act*). This general trigger would then be refined for certain types of claims, such as the “date of loss” for property claims and the “date of the last payment” for ongoing disability and A&S claims.
- the incapacity and discoverability provisions of the general *Limitation Act* be applied to insurance claims.
- insurers be required to give notice to the consumer before the expiry of the limitation period.

Proposal 9: It is proposed that:

- insurance companies offering home, life or A&S insurance be required to have in place an internal dispute resolution system and to participate in a dispute resolution service that offers mediation of disputes between consumers and insurers. The list of acceptable services would be set out in the regulations or, alternatively, established by order of the Financial Institutions Commission. In addition, insurance companies would be required to notify consumers of their right to take a dispute to a dispute resolution service.
- the appraisal remedy be retained and updated to allow the courts to award actual costs to an intransigent party who attempts to subvert the appraisal process by refusing to appoint an appraiser or agree to an umpire.

Proposal 10: It is proposed the act be amended to state that insured parties making claims under insurance policies can be required to submit to an examination under oath and to allow for regulations to prescribe protections for insured parties, including notification of the right to be represented by counsel.