

Insurance**Uncertainty surrounding extension of limitation periods at LAT**By **Alon Barda**

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(May 5, 2020, 11:15 AM EDT) -- In 2017, the executive chair of the Licence Appeal Tribunal (LAT) held that, under specific circumstances, the tribunal may apply s. 7 of the *Licence Appeal Tribunal Act* (LAT Act) to relieve against an otherwise missed limitation period.

The directive of the executive chair and the ability of a tribunal to apply s. 7 was clear. Nevertheless, a recent reconsideration decision of the LAT held otherwise and found that s. 7 does not apply to statutory accident benefits schedule (SABS) matters.

The following two-part article will first discuss the 2017 case from the executive chair and then address cases that followed that decision. The article will then discuss the conflicting case that found that s. 7 does not apply to SABS matters.

The second part of the article (published separately) will address how cases since the release of the competing case have applied s. 7 and will conclude with a discussion of the need for an appellate decision on the application of s. 7 and provide comment as to how an appellate court might decide this issue.

Background

In *A.F. v. North Blenheim Mutual Insurance Company* (file numbers 16-002336/AABS, 16-002606/AABS), the executive chair of the LAT reconsidered two decisions where the tribunal applied the two-year limitation under s. 56 of the SABS (Schedule) and dismissed the claims as statute barred.

The executive chair on her own initiative ultimately held that it was a significant error of law for the tribunal not to consider s. 7 of the LAT Act and sent both matters back for a hearing on the application of s. 7, which states: "Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal ... if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may, a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and b) give the directions that it considers proper as a result of extending the time."

In her decision, the executive chair highlighted that the tribunal, in determining whether to grant an extension of time under s. 7 of the LAT Act, generally weighs the following four factors to determine whether the case is one that warrants an extension to be granted:

1. The existence of a *bona fide* intention to appeal within the appeal period;
2. The length of the delay;
3. Prejudice to the other party; and,
4. The merits of the appeal [*challenge of insurer's denial*].

Initial decisions rendered after *A.F. v. North Blenheim*

Cases that followed the *A.F. v. North Blenheim* decision demonstrated that the tribunal was both applying s. 7 and even doing so to relieve against missed limitation periods.

In *D.A. v. Aviva Insurance Canada* (file number 16-001381/AABS) the tribunal ultimately found that, while it was unnecessary to invoke s. 7, the applicant's claim for non-earner benefits (NEB) nevertheless met the criteria for granting an extension.

In *17-004874 v. Economical Mutual Insurance Company* (file number 17-004874/AABS), the tribunal held that, even if it were to find the applicant's NEB claim had merit, a consideration of all of the factors together with the facts of the case resulted in a finding that the justice of the case favoured not extending the limitation period.

In *A.O. v. Unifund Assurance Company* (file number 18-003798/AABS). The tribunal held that the application that was filed with the tribunal for income replacement benefits after the expiry of the limitation period of two years was permitted to proceed pursuant to s. 7 of the LAT Act.

Decision of [*S.S.*] v. *Certas* – wait, s. 7 does not apply?

While the issue appeared well settled, the application of s. 7 of the LAT Act was set into a state of flux with the reconsideration decision of adjudicator Deborah Neilson in [*S.S.*] v. *Certas Home and Auto Insurance Company* (file number 18-001196/AABS).

In the underlying decision, the tribunal found that the application was filed after the expiry of the two-year limitation period for all the benefits claimed. Nevertheless, the tribunal held that the claim was permitted to proceed under s. 7 of the LAT Act.

As outlined above, s. 7 of the LAT Act applies "despite any limitation of time fixed by or under any Act." On reconsideration, the insurer argued that the tribunal erred in finding that s. 7 of the LAT Act applies to limitation periods fixed under a regulation.

The tribunal had rejected this argument and held that the limitation period in question is contained within a regulation (the Schedule), which in turn was enacted under the *Insurance Act*, such that the applicable limitation period is one that was prescribed under an Act.

The applicant relied on the decision of *A.F. v. North Blenheim* wherein, as discussed above, the executive chair found that the intention of the legislature was for s. 7 of the LAT Act to apply to SABS claims because there was nothing in that section excluding *Insurance Act* matters.

The adjudicator stated that the insurer's argument regarding the difference between a regulation and an Act was not before the executive chair. Furthermore, the adjudicator highlighted that the executive chair was not asked (the executive chair reconsidered the tribunal decision on her own initiative and presumably considered all relevant issues) to consider that both the terms "Act" and "Regulation" are used in s. 3 of the LAT Act, which references the duties assigned to the tribunal "by or under any Act or Regulation." Conversely, in s. 7 only the term "Act" is used.

As such, the adjudicator found that, if "by or under any Act" is meant to include Regulations made under the Act, then the use of "Regulation" in s. 3 of the LAT Act is redundant. She found such an interpretation to be contrary to the principles of statutory interpretation.

The adjudicator further highlighted that the *Insurance Act* used to have a section that imposed a limitation period for SABS claims that was repealed when the dispute resolution process was transferred to the LAT.

The adjudicator held that, if the legislature intended to give the tribunal the discretion to extend the limitation period, then the one contained in the *Insurance Act* would not have been repealed but would have been amended to state that it was subject to the discretion of the tribunal in accordance with the LAT Act.

For the reasons above, the adjudicator agreed with the insurer that "on a plain reading, the Legislative intent was to remove the limitation period from the jurisdiction of s. 7 of the LAT Act, as it

is no longer a limitation of time fixed by or under any Act, but rather it is fixed under a regulation.”

Accordingly, she agreed with the respondent and held that the tribunal erred in law in finding that it had the discretion under s. 7 of the LAT Act to extend the limitation period designated by a regulation and not an Act.

Subsequent to this decision, adjudicator Neilson made a similar finding regarding s. 7 of the LAT Act in *M.N. v. Aviva General Insurance Company* 2019 ONLAT 19-001096/AABS (file number 19-001096/AABS).

This decision has created ongoing issues regarding the applicability of s. 7 of the LAT Act. This was most recently demonstrated in a decision released on April 3, by the tribunal on the issue of whether a claim for a non-earner benefit was barred for the failure to dispute a denial within the two-year limitation period.

In *V.C. and Unifund Assurance Company* 2020 27394 ONLAT 18-005144/AABS (file number 18-005144/AABS), the applicant appeared to concede that the filing of the dispute was outside the two-year limitation period but requested that the tribunal exercise its discretion under s. 7 of the LAT Act to permit the applicant to proceed with her claim for non-earner benefits.

In addressing whether s. 7 applies to the case, the tribunal stated: “I note there is conflicting authority of whether s. 7 applies to matters under the Schedule. Neither party addressed that topic in their submissions. Thus, for the sake of argument, I will assume that s. 7 does apply.”

The fact that the tribunal addressed this central issue “for the sake of argument” and that both parties did not provide submissions on the applicability of s. 7 highlights the uncertainty surrounding this important issue.

This is part one of a two-part series. The second part of this article will discuss cases that have addressed whether s. 7 applies and the obvious need for appellate intervention to put the uncertainty to rest.

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