

## ***The Uncertainty Surrounding The Extension of Limitation Periods at the LAT***

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In 2017, the Executive Chair of the Licence Appeal Tribunal (“LAT”) held that, under specific circumstances, the LAT can apply s.7 of the *Licence Appeal Tribunal Act*<sup>1</sup> (“LAT Act”) to relieve against a missed limitation period.

The directive of the Executive Chair was clear. Nevertheless, a recent reconsideration decision of the LAT held that s.7 does not apply to SABs matters and created much confusion in the process.

The following article will discuss the 2017 case and then address cases that followed that decision and the competing case. The article will then address how LAT 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 issue.

The writer will also comment on how insurers should address cases where a claimant is seeking to relieve a missed limitation period pursuant to s.7 of the *LAT Act*.

### ***Background***

In *A.F. v. North Blenheim Mutual Insurance Company* (“*A.F. v. North Blenheim*”),<sup>2</sup> the Executive Chair of the LAT reconsidered two decisions where the Tribunal applied the two-year limitation under s.56 of the *Statutory Accident Benefits Schedule* (“*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 as follows:

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<sup>1</sup> S.O. 1999, c. 12, Sch. G.

<sup>2</sup> 2017 CanLII 87546 (ON LAT).

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 showed 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*,<sup>3</sup> 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*,<sup>4</sup> 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*,<sup>5</sup> 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 section 7 of the *LAT Act*.

### ***The Decision of 18-001196 v. Certas – Wait, s.7 Does Not Apply?***

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<sup>3</sup> 2018 CanLII 39443 (ON LAT)

<sup>4</sup> 2018 CanLII 83515 (ON LAT)

<sup>5</sup> 2019 CanLII 58501 (ON LAT).

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 *18-001196 vs. Certas Home and Auto Insurance Company*.<sup>6</sup>

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 set out 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.

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<sup>6</sup> 2016 CanLII 153125 (ON LAT) (note “2016” is the year noted in the citation despite this being incorrect).

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*.<sup>7</sup>

### ***But Wait, is A.F. v. North Blenheim Correct After All?***

Three recent decisions have rejected the decision in *18-001196 v. Certas* regarding the application of s.7 of the *LAT Act*.

In the reconsideration decision of *V.M.L. v. Aviva General Insurance Company*<sup>8</sup> the adjudicator highlighted that the Executive Chair in *A.F. v. North Blenheim* analyzed the Legislature’s intent and concluded that the Legislature could have amended this section of the *LAT Act* but did not do so, despite amending other sections of the *Act*.

The adjudicator noted that, while both decisions are in direct contrast, and that he is not bound by another member’s decision, he prefers the opinion of the Executive Chair and “the reasoning in *North Blenheim* that the legislature is presumed to know the law and not make mistakes.”

In this regard, he stated that section 7 of the *LAT Act* was “not repealed or amended when the Tribunal assumed jurisdiction for matters under the *Schedule* as of April 1, 2016.” As

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<sup>7</sup>2019 CanLII 119731 (ON LAT).

<sup>8</sup> 2020 CanLII 12745 (ON LAT).

such, he agreed with the Executive Chair that section 7 of the *LAT Act* applies to SABs claims.

In *S.W. v. Aviva General Insurance*<sup>9</sup> Aviva relied on the decision in *18-001196 v. Certas* and argued that the Tribunal does not have jurisdiction to extend the limitation period under s.7 of the *LAT Act*. The adjudicator found as follows at para 14 regarding the decision in *18-001196 vs. Certas*:

Respectfully, I disagree with its analysis and ultimate conclusion and note that it is currently under appeal. In any event, I note that that decision is not binding on me here. Absent direction from a court of superior jurisdiction on the applicability of s. 7, I follow the significant body of existing jurisprudence from this Tribunal indicating that this Tribunal does have jurisdiction under s. 7 of the *LAT Act* to extend a limitation period if the justice of the case supports it. Here, I find evidence to justify exercising the Tribunal's discretion to extend the limitation period under s. 7 of the *LAT Act*.

In a very recent decision of *R.M. v. Certas Home and Auto Insurance Company*<sup>10</sup> the same adjudicator that decided the reconsideration decision of *V.M.L. v. Aviva General Insurance Company* stated once again that he prefers the decision of the Executive Chair in *North Blenheim* at it pertains to the applicability of s.7.

### ***The Takeaway - Where Do We Go From Here?***

While the *18-001196 v. Certas* decision certainly favours insurers, it is notable that there are no other adjudicators at the LAT that have followed this decision. Conversely, the decision in *A.F. v. North Blenheim* was widely followed prior to the *18-001196 v. Certas* decision and has since been favoured by adjudicators.

It is the opinion of this writer that an appellate court will likely find that s.7 applies to applicants seeking relief in SABs claims from a missed limitation period based on the reasoning set out in *North Blenheim*.

The writer understands that this issue is likely to be addressed on an appeal in the near future. However, until a decision is rendered by an appellate court, insurers should raise the *Certas* case in all matters wherein an applicant is seeking to extend a limitation period pursuant to s.7 and should take the position that s.7 of the *LAT Act* does not apply to extend the limitation period in SABs matters.

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<sup>9</sup> 2020 CanLII 12727 (ON LAT).

<sup>10</sup> 2020 CanLII 19575 (ON LAT).