

Case In Point

Appellate Court Considers “Appropriate Means” Test, Rejects Extension of Limitation Period

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The Ontario Court of Appeal recently interpreted the “appropriate means” element of the test for discoverability under the *Limitations Act, 2002* (s. 5(1)(a)(iv)) in [Nasr Hospitality Services Inc. v Intact Insurance](#), a matter concerning a claim under a commercial insurance policy.

In this case, the insured promptly reported to the insurer and made a claim under its insurance policy on February 1, 2013. Over the course of the following six and a half months, the insurer made several payments pursuant to the policy, rejected several proof of loss forms submitted by the insured, and then formally denied the claim. The insured then commenced an action against the insurer on April 22, 2015, this being over two years from the date of the claim.

The insurer brought a motion for summary judgment seeking dismissal of the action, arguing that the action was statute-barred as it was brought over 26 months after the date of the claim. The motion judge dismissed the motion, finding that the insured did not realize until July 2013, when its claim was formally denied, that an action would be an “appropriate means” to remedy the loss. Thus, the limitation period began to run in July 2013 when its claim was denied, not on February 1, 2013 when the loss had occurred.

The insurer appealed, arguing that the on-going settlement discussions and attempts to rectify the loss did not effectively extend the limitation period. The insured took the position that there was no basis to interfere with the motion judge’s conclusion that in light of the payments made by the insurer, the insured did not know that a proceeding would be an appropriate means to remedy its loss until its claim was formally denied.

The Court of Appeal allowed the appeal for a variety of reasons. The majority held that the motion judge had not made the requisite findings of fact to grant a declaration about the commencement of the limitation period but rather had proceeded on the basis of certain assumptions. In so doing, the majority held that the motion judge ignored the effect of the insured’s “concession that there was no issue of a promissory estoppel” that precluded the insurer from relying on the *Limitations Act, 2002*. It noted that the effect of the concession was to make the day upon which the insured “knew or ought have known that an action was an appropriate means to remedy the loss the day of the loss – namely February 1, 2013.”

The majority, referring to prior jurisprudence, confirmed the importance of ensuring certainty in the

application of the law of limitations and the need to discourage the use of settlement discussions as a tactical means to delay the commencement of a limitation period. Moreover, the decision confirms a narrow application of the “appropriate means” element of the discoverability test.