

## company's financial statements capable of confirming causes of action under the *Limitation Act*

British Columbia companies should be aware that the financial statements of a business are capable of confirming a creditor's cause of action and extending the expiration of the limitation period for the creditor to commence an action under the *Limitation Act*.<sup>1</sup>

In the recent decision of *Freeway Properties Inc v Genco Resources Ltd*,<sup>2</sup> the Court of Appeal of British Columbia considered whether two separate actions in debt against a common debtor were statute barred under the *Limitation Act*, section 3(5), which provides that no such action may be brought after the expiration of six years after the right to sue arises.

The main issue of the appeal involved whether the debtor company had confirmed the causes of action of its creditors (who were also shareholders of the company), when it mailed to its shareholders a copy of the company's financial statements. Although the financial statements did not specifically name the creditor companies (and merely referred to them as "related parties"), the balance sheets contained the current liability of the debtor company, which had been approved and signed by the company's directors.

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<sup>1</sup> RSBC 1996, c 266.

<sup>2</sup> 2012 BCCA 258.

Section 5 of the *Limitation Act* provides that if a party confirms a cause of action before the expiration of the limitation period, the limitation period is renewed and starts afresh. The confirmation of a cause of action under the *Limitation Act* requires three elements, namely: (i) the acknowledgement of or payment in respect of the cause of action, right, or title of another; (ii) the acknowledgement being in writing and signed by the maker; and (iii) the confirmation being made to the person or to a person through whom the person claims.

On appeal, the creditor companies relied on section 5 of the *Limitation Act* to argue that the limitation period had been renewed when the debtor company confirmed the causes of action through its financial statements before the expiration of the limitation period. Relying on English jurisprudence, the Court concluded that a company's balance sheet is capable of containing an acknowledgment of "a cause of action, right or title of another." The test in determining if there is such an acknowledgment is an objective one that asks whether "the 'maker' of the alleged acknowledgment intended by it to admit liability." The Court determined that the debtor company undoubtedly intended to admit liability to the "related parties" referenced on the balance sheet, and that the extrinsic evidence considered by the lower court proved that the creditors were the "related parties."

The next issue on appeal was whether the confirmation had been properly "made to the person or to a person through whom the person claims" in accordance with the *Limitation Act*. The Court held that "acknowledgment actually received by the creditor would be effective under [the *Limitation Act*] whether or not the 'maker' of the acknowledgment intended that the creditor should receive it, and it is not necessary to imply such an intention." Accordingly, the Court affirmed the lower court's finding that the *Limitation Act* does not require that the acknowledgment be "specifically written to the plaintiff, or that the communication be addressed to the plaintiff."

On the issue of the effective date of the confirmation, the parties made submissions on whether the effective date was either the year end to which the balance sheet related, or the date on which the signed acknowledgement was delivered to the creditor parties. Relying on English and Australian jurisprudence, the Court rejected both submissions and affirmed the lower court's decision that the effective date of the confirmation was the date of the balance sheet – the date to which the financial statements were "directed."

As the actions had been commenced after the expiration of six years after the date of the confirmation, the Court concluded that both creditors' actions were statute barred under the *Limitation Act*. Accordingly, both plaintiffs' actions were dismissed.

Of note, a new *Limitation Act* will be in force in the near future, as Bill 34 - 2012 recently underwent third reading in the Legislature. Section 24(1) of the new act, similar to its predecessor, provides that the limitation period may be extended if a person acknowledges liability in respect of a claim before the expiry of the applicable limitation period. Section 24(6) of the new act, just as provided in the current act, requires that an acknowledgement must be: (i) made in writing; (ii) signed either by hand or by electronic signature; and (iii) made by the party to the person making the claim.

The new *Limitation Act* is expected to be in force June 1, 2013. Given the similar wording of the provisions dealing with confirmation in the current and new acts, we may expect that the reasoning from *Freeway Properties* will continue to apply to companies in British Columbia.

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[a cautionary note](#)

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