SUPREME COURT OF CANADA

CITATION: Ryan *v.* Moore, 2005 SCC 38

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BETWEEN:

Cabot Insurance Company Limited
and Rex Gilbert Moore, deceased,
by his Administratix, Muriel Smith
Appellants
v.
Peter Ryan
Respondent

CORAM: McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 80) Bastarache J. (McLachlin C.J. and Major, LeBel, Deschamps, Abella and Charron JJ. concurring)

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v.

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Indexed as: Ryan *v.* Moore

Neutral citation: 2005 SCC 38.

[2005] S.C.J. No. 38

File No.: 29849.

2004: December 7; 2005: June 16.

Present: McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Abella and Charron JJ.

on appeal from the court of appeal of newfoundland and labrador

Limitation of actions – Survival of action against deceased – Limitation periods – Estoppel by convention – Estoppel by representation – Discoverability rule – Confirmation of cause of action – Limitation period under Survival of Actions Act expiring one year after death of party to action or six months after date when letters of administration granted – Statement of claim for damages in relation to motor vehicle accident issued against defendant within two-year limitation period prescribed by

Limitations Act – Defendant's death unknown to plaintiff until after shorter limitation period in Survival of Actions Act had expired – Whether doctrine of estoppel by convention or by representation applicable to prevent defendant from raising limitation defence – Whether confirmation of cause of action or discoverability rule applicable to extend limitation period of Survival of Actions Act – Survival of Actions Act, R.S.N.L. 1990, c. S-32, s. 5 – Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.

Estoppel – Estoppel by convention – Requirements – Whether requirements of doctrine of estoppel by convention met.

Estoppel – Estoppel by representation – Limitation of actions – Whether defendant's silence regarding shorter limitation period constitutes representation grounding estoppel.

On November 27, 1997, three vehicles operated by the respondent R, the appellant M, and a third party were involved in an accident. R decided to pursue a personal injury claim against M. He was unaware that, on December 26, 1998, M had died of causes unrelated to the accident. On February 16, 1999, letters of administration were granted to M's administratrix. On October 28, 1999, R issued his statement of claim naming M as the defendant; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the limitation period under the *Survival of Actions Act*, namely one year after the death of a party to an action or six months after letters of administration are granted. The appellant insurer sought an order striking out the statement of claim for being out of time. R also filed an application to amend the name of the defendant in the statement of claim. The Supreme Court of Newfoundland and

Labrador denied the insurer's application to have the action dismissed and granted R's application. The Court of Appeal allowed, in part, both the appeal and cross-appeal, concluding that the *Survival of Actions Act* applied to the action, but that the appellants were nevertheless estopped from relying upon the shorter limitation period. [7] [9-11]

Held: The appeal should be allowed on the issue of estoppel and the statement of claim struck out. The decision of the Court of Appeal should otherwise be affirmed. There are no reasons based on any legal doctrine to preclude M's estate or the insurer from relying on the *Survival of Actions Act* limitation period. [80]

The discoverability rule does not apply to the *Survival of Actions Act*. This rule cannot be relied on where, as here, the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. By using a specific event as the starting point of the "limitation clock" under the *Survival of Actions Act*, the legislature displaced the discoverability rule in all situations to which the *Survival of Actions Act* applies. [24-25] [27]

Section 16 of the *Limitations Act* does not apply to the *Survival of Actions Act* either. Any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact that one of the parties has died. In any event, there was no confirmation of the cause of action in this case, as there was no admission of liability through the letters sent between the parties' representatives or through the payments made by the insurer to R's counsel

for property damage or for medical reports. The letters and payments were intended only to promote the investigation and early resolution of certain aspects of the claim. [37] [42] [45-48]

The requirements to establish estoppel by convention – a communicated shared assumption between the parties, reliance on the shared assumption and detriment – are not met. None of the letters exchanged by R's counsel and the adjuster with respect to R's personal injury claim prove the existence of a common assumption that M was alive or that the limitation defence would not be relied on. The letters lack clarity and certainty. Even if one could conclude that there was a mutual assumption between the parties, it cannot realistically be asserted that R communicated to the appellants that he shared the mistaken assumption. Moreover, R not only did not rely on the alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that R changed his position in any way on the basis of this alleged mutual assumption. Rather, the evidence suggests that he never put his mind to the shorter *Survival of Actions Act* limitation period. Given that there was no shared assumption or reliance, the detriment requirement does not need to be addressed. It should be noted, however, that a detriment is not established by a reduced limitation period. [63-66] [70-72] [75]

Finally, R cannot rely on estoppel by representation. Estoppel by representation cannot arise from silence unless a party is under a duty to speak. In the present case, there was no duty on the appellants to advise R of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. [76-77]

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Cases Cited

Referred to: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Page v. Austin* (1884), 10 S.C.R. 132; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182; *Payne v. Brady* (1996), 140 D.L.R. (4th) 88, leave to appeal refused, [1997] 2 S.C.R. xiii; *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193; *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370; *Canadian Red Cross (Re)*, [2003] O.J. No. 5669 (QL); *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321; *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2d) 149; *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501; *Good v. Parry*, [1963] 2 All E.R. 59; *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481; *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716; *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304; *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382; *Harper v. Cameron* (1892), 2 B.C.R. 365; *Amalgamated Investment & Property Co. (In liquidation) v. Texas Commerce Intenational Bank Ltd.*, [1982] 1 Q.B. 84; *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548; *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL); *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL); *Troop v. Gibson*, [1986] 1 E.G.L.R. 1; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL); *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737; *John v. George*, [1995] E.W.J. No. 4375 (QL); *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ. 67; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934;

32262 B.C. Ltd. v. Companions Restaurant Inc. (1995), 17 B.L.R. (2d) 227; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

Statutes and Regulations Cited

Fatal Accidents Act, R.S.N.L. 1990, c. F-6.

Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.

Survival of Actions Act, R.S.N.L. 1990, c. S-32, ss. 2, 5, 8(1).

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Wells C.J. and Cameron, Roberts and Welsh JJ.A. and Russell J. (*ex officio*)) (2003), 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181, 50 E.T.R. (2d) 8, [2003] N.J. No. 113

(QL), 2003 NLCA 19, reversing, in part, a decision of Orsborn J. (2001), 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 18 C.P.C. (5th) 95, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, [2001] N.J. No. 284 (QL). Appeal allowed.

Sandra Chaytor and *Jorge Segovia*, for the appellants.

Ian F. Kelly, Q.C., and *Gregory A. French*, for the respondent.

The judgment of the Court was delivered by

1 BASTARACHE J. — We are asked to decide whether or not a shortened limitation period under s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32 (see Appendix A), applicable upon the death of one of the parties to an action, can be enforced against a party who had no knowledge of the death until after the limitation period had expired. The respondent, Peter Ryan ("Ryan"), argues that the answer should be no; he invoked in front of our Court and in the courts below a number of legal principles which I shall address: discoverability, confirmation, estoppel by convention and estoppel by representation. The issue of estoppel was raised for the first time by the Court of Appeal itself.

2 The discoverability rule dictates that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224).

3 Section 16(1) of the *Limitations Act*, S.N.L. 1995, c. L-16.1 (see Appendix A), prescribes that confirmation of a cause of action occurs when a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action. Thus, at that moment, the limitation clock stops ticking.

4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption , then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

6 None of these doctrines can find application in the present case. I will address each of these doctrines and in most cases adopt the reasons of the Court of Appeal with mere comment. One legal concept requires more attention from this Court, given that it is being asked to develop a legal test with regard to its application: estoppel by convention.

I. Background

A. *Facts*

7 On November 27, 1997, three vehicles were involved in an accident. They were operated by the respondent, Ryan, the appellant, Rex Gilbert Moore, and a third party (not involved in this matter), David Crummey. Ryan decided to pursue a personal injury claim against Moore. He was unaware that, on December 26, 1998, Moore had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to Moore's administratrix, Muriel Smith. On October 28, 1999, Ryan issued his statement of claim; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the applicable six-month limitation period from the granting of the letters of administration under the *Survival of Actions Act*. Ryan argues that the appellant is estopped from relying upon the shorter limitation period. Alternatively, he argues that the discoverability principle or the confirmation rule apply to extend this shorter limitation period.

8 As this case is centred on issues related to limitation periods, it is important to recollect the important events leading up to this litigation:

November 27, 1997	The accident
November 28, 1997	Cabot Insurance Co. ("Cabot Insurance") appoints adjuster Brian Lacey to look after the claim against its insured Moore. Ryan retains counsel who contacts the adjuster advising of his retainer and that

	Ryan, while his injuries are being assessed, will pursue his property damage claim directly with the adjuster.
	Cabot Insurance pays Ryan's property damage claim directly to him.
December 1997 - December 1998	Correspondence is exchanged between Ryan's counsel and the adjuster concerning Ryan's medical condition, the adjuster seeking documentation and updates on Ryan's condition, and the counsel providing the information requested. The counsel forwards Ryan's hospital chart to the adjuster, for which Cabot Insurance reimburses counsel the $40 fee.
December 26, 1998	Moore dies at age 75 from causes unrelated to the accident.
January 25, 1999	The adjuster writes to Ryan's counsel seeking medical information and reiterating that the insurer would pay a reasonable fee for a medical report. He refers to Moore as "Our Insured".
February 16, 1999	Letters of Administration of the Estate of Rex Moore are granted to Muriel Smith.
April 5, 1999	Ryan's counsel forwards to the adjuster an invoice for a medical report of Ryan's examination by an orthopaedic surgeon.
July 29, 1999	The adjuster forwards to Ryan's counsel a cheque for payment of the medical report. The cheque is payable to Dr. Landells. He refers to Moore as "Our Insured".
August 16, 1999	Six months have passed since the grant of letters of administration of Moore's estate.
October 28, 1999	The statement of claim is issued naming Rex Moore as defendant.
February 10, 2000	Ryan's counsel writes to the adjuster seeking payment for the cost of obtaining the chart from Ryan's family

	physician. He refers to Moore as "Your Insured"
March 2, 2000	Ryan's counsel writes to the adjuster requesting payment for the chart of another physician. He refers to Moore as "Your Insured".
	The adjuster learns of Moore's death.
May 18, 2000	
September 22, 2000	Ryan's counsel learns of Moore's death after attempting to serve the statement of claim.
October 24, 2000	Ryan's counsel suggests to Cabot Insurance's claims examiner, Valerie Moore, in a meeting (to discuss claims unrelated to this case) that there might be a problem with the limitation period.
November 9, 2000	Cabot Insurance refuses to settle Ryan's claim because the action is outside the limitation period.

9 Cabot Insurance applied to intervene in the proceedings and sought an order striking out the statement of claim for being out of time. It further claimed that the statement of claim naming a dead person as defendant was a nullity and was not capable of being amended. Ryan also filed an application to amend the statement of claim to describe the defendant as "Rex Moore, Deceased, by his administratrix, Muriel Smith".

B. *Supreme Court of Newfoundland and Labrador* ((2001), 205 Nfld. & P.E.I.R. 211)

10 At the Supreme Court of Newfoundland and Labrador, Orsborn J. denied Cabot Insurance's application to have the action dismissed. First, he held that the discoverability rule did not apply to postpone the running of the *Survival of Actions Act*

limitation period, since the fact of death was not an element of the cause of action and was not required to complete the cause of action (paras. 50-51). Second, Orsborn J. held that the confirmation provisions of s. 16 of the *Limitations Act* are not expressly confined to the limitation periods fixed by the *Limitations Act*. He saw no reason in principle why a cause of action continued under the *Survival of Actions Act* could not be confirmed and the limitation period fixed by that Act thus continued. He concluded that Cabot Insurance's payment for the medical report on July 29, 1999 constituted a confirmation of Ryan's cause of action. Since the action was commenced within six months of this payment, the proceeding was still within the short *Survival of Actions Act* limitation period and was not statute barred (paras. 52-63). Third, Orsborn J. concluded that in any event, on the facts of this case, the cause of action against Moore was not a cause of action to which the *Survival of Actions Act* applies. The *Survival of Actions Act* permits a cause of action to survive "for the benefit of or against" an estate (s. 2(b)). The *Survival of Actions Act* deals with the potential acquisition or dissipation of estate assets. However, in this case, Ryan's claim poses no risk to the assets of the estate. Instead, the risk lies on the insurer. Moore was a defendant in name only, and the real party to the action was the insurer. Thus, Ryan's cause of action was not extinguished on Moore's death (paras. 66-76). Fourth, Orsborn J. held that if Ryan's cause of action had not been confirmed and if the *Survival of Actions Act* was indeed applicable (which he held it was not), then the action would have been a nullity for being commenced outside the limitation period. However, as this was not the case, the plaintiff was not statute barred.

C. *Court of Appeal of Newfoundland and Labrador* ((2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19)

(1) Wells C.J. (for the majority)

11 The majority of the Court of Appeal allowed, in part, both the appeal and cross-appeal. The applications judge's order to permit the intervention of Cabot Insurance and the amendment of the statement of claim was affirmed. Wells C.J. held that the applications judge made no error in considering the existence of insurance in determining whether or not the action posed a financial risk to the estate. He nevertheless held that the applications judge erred in holding that the cause of action against Moore is a cause of action to which the *Survival of Actions Act* did not apply. The court explained that unless the *Survival of Actions Act* applies, the action will be a nullity. The right to institute a tort action after death, or continue an action after death, derives from the statute. Without such a statute, this right does not otherwise exist.

12 The majority agreed with the applications judge that the discoverability rule does not apply to postpone the running of the limitation period under the *Survival of Actions Act*. Concluding that it lied in an event that occurred without the injured party's knowledge, the majority deemed that allowing the application of the discoverability rule would disrupt the exception to the common law rule, the courts thereby intruding into the legislature's jurisdiction.

13 The majority disagreed with Orsborn J.'s holding that the confirmation provisions of the *Limitations Act* also apply to the limitation period under the *Survival of Actions Act*. Wells C.J. held that s. 16 of the *Limitations Act* provides confirmation of a cause of action and not of the right to commence it. The majority pointed out that the nature of the cause of action, or whether it is confirmed, is not relevant to the date of

death or of grant of probate which triggers the limitation period created by the *Survival of Actions Act*. Confirmation did not arise in relation to the limitation period stemming from the *Limitations Act* because the statement of claim was issued within two years of the collision, i.e. within the prescribed delay.

14 Turning to the last issue, the majority held that Moore's estate and Cabot Insurance were barred by the principle of estoppel from relying on the fact of Moore's death and the granting of letters of administration. The particular form of estoppel invoked was estoppel by convention. Wells C.J., having reviewed Canadian and foreign authorities and decisions, concluded that estoppel by convention was established (para. 79). The majority held that detrimental reliance was not required. Consequently, Cabot Insurance and Moore were estopped from pleading that Moore died or that letters of administration were granted prior to May 2000 in order to invoke the shorter *Survival of Actions Act* limitation period. As a result, nullity could not be established and the statement of claim was amended to name the administratrix of Moore as defendant in the action.

(2) Cameron J.A. (dissenting)

15 In dissenting reasons, concurred in by Welsh J.A., Cameron J.A. disagreed with the estoppel analysis and held that it did not apply to the case at bar. After analysing case law and doctrine, she concluded that mutual misunderstanding (both parties assuming that Moore was alive) did not amount to a common assumption. The dissenting judges did not find that the letters sent by Cabot Insurance to Ryan's counsel referring to "Our Insured — Rex Moore" formed the basis on which the parties governed

their conduct. The failure to commence the action within the *Survival of Actions Act*'s limitation period was not due to any arrangement between the parties, and consequently, there was no reliance on any convention. Therefore, this principle did not apply. Ryan's action was therefore time barred. The dissenting judges would have allowed the appeal.

II. Analysis

A. *Discoverability*

(1) Statutory Limitation Periods

16 The situation here is governed by two limitation periods: s. 5 of the *Limitations Act* (see Appendix A) and s. 5 of the *Survival of Actions Act*. The limitation period in s. 5 of the *Limitations Act* applies initially. Section 5 of the *Survival of Actions Act* superimposes itself on s. 5 at a later point of time, but does not eliminate it. This follows from the fact that the *Survival of Actions Act* does not create a new cause of action, as will be explained later.

17 Pursuant to s. 5 of the *Limitations Act*, a person can bring an action for damages in respect of injury based on contract or tort within two years of the date on which the right to do so arose. Ryan, by issuing a statement of claim on October 28, 1999, naming Rex Moore as the defendant, therefore, met the prescribed limitation period in the *Limitations Act*. Nevertheless, unknown to the parties, Rex Moore had died on December 26, 1998, altering the fact scenario.

18 As stated by the Court of Appeal, it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* (see G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 253). Being unable to sue the estate of a deceased tortfeasor was particularly severe as it left injured survivors of motor vehicle accidents without any means of recovery . This led legislatures to enact statutes to diminish the hardship of the common law rule. The *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, and the *Survival of Actions Act* were such statutes. Under the *Fatal Accident Act*, the estate of a person who died as a result of the accident, or the survivors of that person, are accorded the right to maintain an action for death by wrongful act. Also, pursuant to s. 2 of the *Survival of Actions Act*, (see Appendix A) an action vested in or existing against a person who has died can be maintained by or against the deceased person's estate. However, s. 5 of the *Survival of Actions Act* prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death. Hence, the provision is meant to keep the action "alive" for a specific period of time. The *Survival of Actions Act* imposes an additional limitation period. As eloquently affirmed by Orsborn J., the *Survival of Actions Act* does not create a cause of action. It grafts its provision onto an existing cause of action, one which is complete in all of its elements before the operation of the *Survival of Actions Act* (para. 45).

19 In the case at bar, the *Survival of Actions Act* has the effect of shortening the time period within which the action could be taken because "an action founded in tort may only be taken by or against the estate of a deceased person if it is commenced within that period of time that is common to both limitations periods": Wells C.J., at para. 37.

20 Ryan argues that the *Survival of Actions Act* contemplates that a cause of action can arise under the *Survival of Actions Act*. I fail to see how the expression "[c]auses of action under this Act" or "an action ... under this Act" found in ss. 8(1) and 5 respectively can be seen to indicate the creation of a new cause of action. The *Survival of Actions Act* expressly contemplates the survival of causes of action existing against a person who has died (s. 2). I take that to mean that the cause of action existed prior to the application of the *Survival of Actions Act*. The survival of a cause of action for a time and its creation are two different things.

(2) Discoverability: The Judge-Made Rule

21 The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6.

22 The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.

23 While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 36), it

must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, at p. 206). See also *Peixeiro*, at para. 37; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (N.L.C.A.).

24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55).

(3) Discoverability Principle Does Not Apply to the *Survival of Actions Act*

25 Ryan submits that the discoverability rule applies to the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the limitation period should not begin to run until he knew, or ought reasonably to have known, the material facts which determine (i) his cause of action under the *Survival of Actions Act* and (ii) the limitation period. In sum, Ryan claims that the death of Moore is integral to the cause of action and that the limitation period should not start to run until he knew that he had a cause of action against the estate of Rex Moore. The appellants submit that the discoverability rule does not apply to the *Survival of Actions Act* as it would transcend the logic of statutory interpretation and the scheme enacted by the legislature. In addition, they say that the rule does not apply where time runs from a fixed event.

26 Like the Court of Appeal, I am of the view that the appellants' position is correct. For ease of reference, I reproduce s. 5 of the *Survival of Actions Act*:

> **5.** An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

27 Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two

specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies.

28 A number of the appellate courts have dealt with the question of discoverability in the context of actions by or against estates of deceased persons. The appellants rely extensively on *Payne v. Brady* (1996), 140 D.L.R. (4th) 88 (N.L.C.A.), leave to appeal refused, [1997] 2 S.C.R. xiii. While the facts of that case are very similar to the present, it is not clear whether the Court of Appeal of Newfoundland and Labrador decided that the rule of discoverability did not apply because death is always a possibility or because the appellant Payne had ample time after she became aware of the death of Brady to commence her action. What is clear is the point advanced by O'Neill J.A.: the death of a prospective defendant and the possibility of a shortened period to commence an action is a reality that claimants and their counsel have to guard against: *Payne*, at p. 94.

29 The Nova Scotia Court of Appeal decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193, is invoked by the respondent. However, the reasoning of that case cannot be applied in the case at bar. In *Burt*, the Court of Appeal held that the

discoverability rule applied to s. 10 of the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. The Nova Scotia Court of Appeal stated its position in the following manner (at p. 208):

> If the discoverability rule applies to a limitation period running from "when the damages were sustained" (*Peixeiro*) and from "the final determination of the action against the insured" (*Grenier*), I think it is not unreasonable to apply it to the period one year after the death so as to start time running only when the claimant knows or ought to know that the death might be a wrongful one. This, having in mind the statutory scheme of the *Fatal Injuries Act*, is no greater a stretch of the language than was made by the courts in *Peixeiro*, *Grenier* and other cases, all for the purpose of preventing a potential injustice.
>
> We must avoid the accusation of usurping the role of the Legislature, but in my opinion to apply the discoverability rule here is consistent with what has already been done before. On the true consideration of s. 10 of the *Fatal Injuries Act*, time does not run simply from a fixed event, but from constituent elements of the cause of action created by the statute. [Emphasis added.]

30 In *Burt*, the death of a person for which an action can be brought under the *Fatal Injuries Act* does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful death". It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent elemen[t] of the cause of action", contrary to the present case.

31 In my view, the case that best assists this Court in the present matter is the one giving rise to the Ontario Court of Appeal's decision in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370. The court had to determine the possible application of the discoverability rule to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23, the statutory

provision in Ontario permitting an action in tort by or against the estate of a deceased person and limiting the period during which such actions may be commenced. Abella J.A., as she then was, concluded, at para. 16, that the discoverability rule did not apply to the section since the state of actual or attributed knowledge of an injured person in a tort claim is not germane when a death has occurred. She explained at paras. 8-9:

> In s. 38(3) of the *Trustee Act*, the limitation period runs from a death. Unlike cases where the wording of the limitation period permits the time to run, for example, from "when the damage was sustained" (*Peixeiro*) or when the cause of action arose (*Kamloops*), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the *Trustee Act* prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.
>
> The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the *Trustee Act* was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate. [Emphasis added.]

See also *Canadian Red Cross (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), and *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3rd) 321 (C.A.).

32 Ryan's cause of action arose prior to Moore's death and Ryan was well aware of his cause of action both before Moore's death and before the expiration of the *Survival of Actions Act* limitation period. In fact, the day following the accident, Ryan retained a solicitor to pursue a claim for damages against Moore for injuries alleged to

have resulted from the accident. At that point, Ryan could have sued Moore as all the elements of his cause of action were known. He did not need to have knowledge of the death in question to prove his claim or issue and serve the statement of claim. Moore's subsequent death had no impact whatsoever on the accrual of Ryan's cause of action. Consequently, I agree with the conclusion of the applications judge, at para. 50:

> The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated.

33 A further reason for the non-application of the discoverability rule is the evident impact such a rule would have on the distribution of assets to the beneficiaries. Without a time limit, an executor or an administrator would not feel free to distribute the assets of an estate until all reasonable possibilities of claim had been addressed. This would be cumbersome and unrealistic. "An estate should not be held to ransom interminably by the advancement of claims which are not proceeded with in a timely manner": *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2nd) 149 (Q.B.), para. 18, cited in *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), p. 510.

34 The *Survival of Actions Act* is itself a legislative exception to a common law rule. Thus, it would displace the intention of the legislature to "stretch" the limitation period. Borrowing the words of Marshall J.A. in *Snow*, at para. 43, to apply the rule of construction of reasonable discoverability to such a provision would be tantamount to mounting a fiction transcending the limits of logical statutory interpretation. Hence, it would constitute an impermissible incursion into the legislative process.

(4) Special Circumstances

35 Ryan submits, as an alternative, that if the discoverability rule does not apply, the limitation period should be extended because of the "special circumstances" principle. He claims that, pursuant to this principle, fairness and justice require that an innocent plaintiff should not be deprived of compensation through no fault of his own. This argument was not invoked in front of the applications judge or the Court of Appeal, and is not supported by any evidence; under these circumstances, it is, in my view, without merit.

B. *Confirmation*

36 Ryan claims that the confirmation of the cause of action pursued under s. 16 of the *Limitations Act* applies to extend the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the correspondence exchanged between Cabot Insurance's adjuster and his previous counsel, the payment made by Cabot Insurance for his property damage claim, as well as a payment of $500 to his previous counsel for a

medical report, prove acknowledgment (as contemplated by the *Limitations Act*) and therefore confirmation.

37 The appellants submit that s. 16 of the *Limitations Act* does not apply to the *Survival of Actions Act*. They claim that any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact that one of the parties has died. Finally, they argue that there was no confirmation of the cause of action in this case as there was no admission of liability through the letters nor the payments made.

38 I agree with the appellants' position as accepted by the Court of Appeal.

39 The relevant portions of s.16 of the *Limitations Act* provide:

> **16.** (1) A confirmation of a cause of action occurs where a person
>
> (a) acknowledges that cause of action, right or title of another person; or
> (b) makes a payment in respect of that cause of action, right or title of another.
>
> (2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.
>
> (3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.
>
> . . .
>
> (5) In order to be effective a confirmation must be in writing and signed by
>
> (a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

40 When a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action, a confirmation of that cause of action occurs. Consequently, the time accrued before the date of that confirmation shall not be considered when determining the limitation period (s. 16(2)). Confirmation must, of course, be made prior to the expiration of the limitation period (s. 16(3)).

41 Section 16 can only apply to a limitation period which limits the time during which an action may be taken. Since the limitation period which arises under the *Survival of Actions Act* supersedes the first limitation period of the *Limitations Act*, and does not create or revive an action, but merely permits it to continue, s. 16 cannot apply to it as found by the Court of Appeal (para. 67).

42 Even if this were not the case, the facts here do not support a finding of confirmation on the part of the appellants. I will address this issue briefly as a matter of principle.

43 In order to establish confirmation, one of two events must be proven: 1) that the party acknowledged the cause of action; or 2) that there was a payment made in respect of the cause of action (see Mew, at p. 115).

44 The term “acknowledges” as used in s. 16(1)(a) of the *Limitations Act* has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (C.A.), at p. 61,

as requiring an "admission". While care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481 (Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716, at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

46 Consequently, the letters from the adjuster to Ryan's counsel (i.e., letters of November 18, 1998 and January 25, 1999) do not restart the clock as they do not constitute an admission of liability on the part of Cabot Insurance. These were obviously only requests for information and part of the normal investigation process. As submitted by the appellants, if mere investigation of claims were to constitute confirmation, then potential defendants, in order to protect limitation defence, would have no choice but to refuse to investigate until a statement of claim is issued. This would destroy the possibility of early settlements and lead to increased litigation and costs.

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland and Labrador Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 44 B.C.L.R. (3rd) 382, at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action:

> The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. The payment here, as in *Germyn*, was

> intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].

48 The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

C. *Estoppel*

49 Moore's estate and Cabot Insurance submit that the majority of the Court of Appeal erred when it concluded that they were estopped from relying on the fact of Moore's death and the granting of letters of administration, thus preventing them from arguing that Ryan's action was outside the *Survival of Actions Act* limitation period. They claim that neither estoppel by convention nor estoppel by representation applies to the facts of the present case. Ryan argues that the appellants are precluded or estopped from relying on the limitation period in the *Survival of Actions Act* because of the application of either of these two types of estoppel.

50 While the principle of estoppel is often referred to in connection with cases of waiver, election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1892), 2 B.C.R. 365 (S.C.), at p. 383).

51 The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel,

> estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

52 The jurisprudence discloses six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence (see Bower, at pp. 3-9). I will examine here the ones at the centre of this dispute, estoppel by convention and estoppel by representation.

(1) Estoppel by Convention

(a) *Definition and Principles*

53 The origin of the doctrine of estoppel by convention can be traced to estoppel by deed for which sealing and delivery were essential, and for which the foundation of duty lay not in the agreement itself, or any reliance thereon, but in the

formal solemnity of the deed, reflecting the concern of ancient jurisprudence with form as opposed to substance. The modern rule has evolved enormously (see Bower, at pp. 179-80; T. B. Dawson, "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16)

54 Spencer Bower defines the modern concept of estoppel by convention as follows (p. 180):

> An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary.

55 S. Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd ed. 2002), at p. 223, affirms that estoppel by convention will occur where:

> (i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis;
> (ii) on that basis the parties have regulated their subsequent dealings;
> (iii) one party would suffer detriment if the other were to be permitted to resile from that convention.

See also *Chitty on Contracts* (29th ed. 2004), vol. 1, at p. 283.

56 The Court of Appeal of Newfoundland and Labrador, after a review of the case law in the United Kingdom and in Canada, formulated the following four elements which need to be proven (para. 79):

> (i) The evidence establishes an assumption in common between the parties as to a state of facts;
>
> (ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;
>
> (iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and,
>
> (iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.

These requirements were accepted by the respondent.

57 The appellants submit that there are six requirements for the estoppel by convention. They cite as support the New Zealand Court of Appeal decision in *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see, e.g., *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1 (H.L.), at p. 10; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28 (C.A.), at pp. 34-35; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343 (C.A.), at pp. 349-53).

59 This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).

2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

See Wilken, at pp. 227-28; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Gen. Div.), at para. 31.

(b) *Application of the Law*

60 The majority of the Court of Appeal held that estoppel by convention applied in the circumstances of this case. It concluded that there was an assumption between the parties as to a state of facts, namely: that Moore was alive; that the parties adopted this assumption as the basis upon which their transactions relating to Ryan's claim were to be conducted; that the dispute in respect of which the estoppel was asserted arose out of the transactions between the parties in dealing with Ryan's claim; and that detriment would flow to Ryan if Moore's estate or the insurer were permitted to resile from the common assumption. As will be evidenced from the analysis below, I cannot agree with this conclusion.

(i) Assumption Shared and Communicated

61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), at p. 5; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any

enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737 (C.A.), at para. 84.

62 While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (*John v. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line". In *The "August Leonhardt"*, at pp. 34-35, Kerr L.J. held that

> [a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. ...
>
> There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]

See also *The "Vistafjord"*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*The "Indian Grace"*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's (*ex hypothesi*) mistaken assumption (*John*, at para. 81; Bower at p. 184).

63 In the present case, the record discloses fourteen letters exchanged by Ryan's counsel and the adjuster with respect to the respondent's personal injury claim (A.R., Vol. II, at pp. 150-70). However, none of these prove the existence of a common assumption. The letters lack clarity and certainty. The mere fact that communications occurred between the parties does not establish that they both assumed that Moore was alive. It is unlikely the question of whether Moore was alive or dead crossed the minds of either the appellants or the respondent. The fact that Ryan's counsel had originally diarized the claim as having a two-year limitation period under the *Limitations Act* shows that he had not turned his mind to the possibility of a shorter limitation period under the *Survival of Actions Act*. Effectively, this Court is in the presence of mutual ignorance, not mutual assumption.

64 Ryan submits, and it was agreed by the Court of Appeal, that the subject line in the letters exchanged between his counsel and the adjuster which read "Your Insured: Rex Moore" or "Our Insured: Rex Moore" is self-explanatory and indicates an assumption by both parties, that Moore was alive. I strongly disagree. This is an unrealistic interpretation of the subject line in the letters. Such an expression can mean one thing only: the named insured under the automobile insurance policy was Rex

Moore. The words are a mere identification of the file the undersigned is dealing with. The Court of Appeal erred by giving weight to the subject line of these letters, which, properly interpreted, provide no evidence of a mutual assumption that Moore was alive.

65 Nor did the fact that the parties were conferring without regard to the limitation period establish a shared assumption that the limitation defence would not be relied on. The letters contain limited and simple requests for details of the claim, and do not establish a convention between the parties (see *Hillingdon London Borough*, at paras. 57 and 60; *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ. 67, at p. 396). In fact, the matter did not proceed beyond the preliminary stage of investigating the merits of the personal injury claim. There were no negotiations or settlement discussions, no admission of liability, and no agreement to forego a possible limitation defence.

66 Even if one could conclude that there was a mutual assumption between the parties, I am of the view that it cannot realistically be asserted that the respondent communicated to the appellants that he indeed shared the mistaken assumption. In this regard, I agree with the dissenting members of the Court of Appeal when they affirm (at para. 108):

> It is true that both parties assumed Mr. Moore was alive. That, as noted above, is not sufficient to establish estoppel by convention. Prior to Mr. Moore's death, any reference to him implying he was alive was a reflection of the truth at that time. That cannot be said to be a communication which becomes the basis of a convention that they will proceed on the assumption

> that Mr. Moore is alive, even beyond his death. There is no direct or circumstantial evidence which would lead to such a conclusion. The question becomes: could any agreement have arisen after Mr. Moore's death? The two letters written by the adjuster after Mr. Moore's death were in error when they said "Our insured — Rex Moore" but there is no communication to the other party and acceptance that they are to govern their future conduct on that basis.

(ii) Detrimental Reliance

67 The appellants submit that detrimental reliance is a requirement that must be proven in order to find convention estoppel. I agree. The Court of Appeal erred in finding this condition fulfilled by simple proof that a detriment would flow to the party asserting the estoppel if the other party were permitted to resile from the assumed stated facts, without a finding of reliance.

68 The jurisprudence and academic comments support the requirement of detrimental reliance as lying at the heart of true estoppel (see Bower, at pp. 6 and 184; *John*, at para. 86; *Hillingdon London Borough*; *The "August Leonhardt"*, at p. 35; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459 (B.C.C.A.), at pp. 469-70; *Canacemal*, at paras. 33-35; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934, at para. 74; *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2nd) 227 (S.C.), at pp. 235-36.

69 Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption , detriment will be suffered by the estoppel raiser because of the change from his or her assumed position (see Wilken, at p. 228; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Austl. H.C.), at p. 674).

70 Returning to the case at bar, even if one were to assume the existence of a communicated common assumption between the parties, there is no evidence that the respondent relied on this assumption. The evidence suggests that the respondent never put his mind to the shorter *Survival of Actions Act* limitation period. First, Ryan's counsel diarized the matter as a two-year limitation period. Second, the issue of estoppel by convention was raised for the first time by the Court of Appeal itself and was never discussed before the applications judge. Moreover, in the affidavit of Ryan's counsel, nowhere does he state that he believed that the adjuster intended him to act or refrain from acting in reliance on any agreement (A.R., Vol. II, at pp. 137-46). From the date of the accident, November 27, 1997, to the expiry of the *Survival of Actions Act* limitation period, August 16, 1999, there was never any discussion by the respondent of the limitation period. On October 24, 2000, when Ryan's counsel indicated for the first time to Cabot Insurance's claim examiner that there might be a problem with the limitation period, he did not refer to a mutual understanding that Moore was to be treated as being alive for the purposes of Ryan's claim, nor did he raise the existence of an agreement.

71 It was not open to Ryan's counsel to refrain from bringing an action against Rex Gilbert Moore based solely on the limited communications between counsel. The letters relied upon were limited to the collection of medical information and documentation about Ryan's alleged injuries – nothing more. I have already spoken about the subject line; one cannot disregard the fact that all negotiations/communications were also done on a "without prejudice" basis.

72 Consequently, I agree with the dissenting members of the Court of Appeal that the respondent not only did not rely on this alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties.The record does not disclose that the respondent changed in any way his position on the basis of this alleged mutual assumption.

(iii) Detriment

73 Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (Wilken, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment:"This is because there is an element of injustice inherent within the concept of the shared assumption - one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": Wilken, at p. 228.

74 This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; *John*; *The "Indian Grace"*; *The "Vistafjord"*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

75 In the case at bar, given that there was no shared assumption or reliance, the detriment criterion does not need to be addressed. I would note, however, that a detriment is not established by a reduced limitation period, as suggested by the respondent. Limitation periods and prescriptions, in the diverse areas of the law, have the similar effect and impact. The *Survival of Actions Act* has provided a benefit not available at common law; this benefit cannot legitimately be characterized as unfair and unjust.

(2) Estoppel by Representation

76 Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a

disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

77 Ryan submits that in the present case silence constituted a representation grounding estoppel because there was a duty to disclose relevant information as it would be unfair for the appellants to benefit from non-disclosure. I disagree. In the present case, there was no duty on the appellants, who were at the time only potential defendants, to advise Ryan of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. There is no fiduciary or contractual relationship here (contrast with *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87). The appellants had no duty to exercise reasonable care, nor to divulge any information.

78 Hence, there was no representation, no duty to speak, no intention to affect legal relations and no reliance in this case.

III. Conclusion

79 The legislature created an exception to the common law rule by enacting the *Survival of Actions Act*. It extended the rights of the parties to permit them to continue an action against a deceased. The relevant provision modifies the common law. It is not this Court's role to interfere with the scheme established by the legislature.

80 There are no reasons based on estoppel, or any other legal doctrine, to preclude Moore's estate or Cabot Insurance from relying on the *Survival of Actions Act*

limitation period. Accordingly, I would allow the appeal on the issue of estoppel, affirm the decision of the Court of Appeal on the other issues, and strike the statement of claim, with costs throughout, at all levels of court.

Appendix A

Limitations Act, S.N.L. 1995, c. L-16.1
[Limitation period 2 years]

5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action

(a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

. . .

[**Confirmation]**

16. (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or
(b) makes a payment in respect of that cause of action, right or title of another.

(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or
(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

Survival of Actions Act, R.S.N.L. 1990, c. S-32

[Causes of action to survive]

2. Actions and causes of action

(a) vested in a person who has died; or
(b) existing against a person who has died,

shall survive for the benefit of or against his or her estate.

[Limitation of action]

5. An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

Appeal allowed with costs.

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