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# LIMITATIONS

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# CHAPTER 1

## INTRODUCTION

> The issue of limitation reform has been a favourite of law reform commissions. Limitation periods cry out for simplification and modernization, but rarely command legislative attention.[1]

## A. BACKGROUND

The Manitoba Law Reform Commission has been aware for some time of initiatives under way in other Canadian jurisdictions to make major reforms to the legislation governing the limitation of actions. In the last several years, the initiatives have moved from the recommendations of law reform bodies to the legislative chambers of four Canadian provinces, and have resulted in some dramatic changes to their legislative regimes.

As will be discussed, Manitoba reformed its limitations legislation in a significant way in the 1960s,[2] but no other province has followed a similar path, so that Manitoba's limitations legislation has always been unique in its treatment of some important issues. Now those issues have been addressed by other provinces in a significantly different and, in the Commission's opinion, more satisfactory way for current times. It is time for Manitoba to do the same.

## B. SCOPE OF REPORT

This report concerns itself with a review and discussion of *The Limitation of Actions Act*.[3] While this Act is not the sole source of statutory limitation provisions in Manitoba, it is the single most important one. The Commission has not undertaken a review of specific limitations provisions in other statutes, but it makes a recommendation regarding such a review in order to ensure that Manitoba's entire limitations regime is as consistent and coherent as possible.

In June, 2009, the Commission issued The Limitation of Actions Act: *Draft Report for Consultation*, inviting comments on the issues raised and on the Commission's tentative recommendations. The Commission received a number of helpful comments. A list of the respondents to the draft report is attached as Appendix B.

This report begins with an introduction to limitations law and the purposes of limitations. The report outlines legislative reforms with respect to limitations in other Canadian jurisdictions, and the initiatives of the Uniform Law Conference of Canada. The Commission then makes

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[1] Kent Roach, "Reforming Statutes of Limitations" (2001) 50 U.N.B.L.J. 25 at 35.

[2] See Chapter 2, below.

[3] C.C.S.M. c. L150.

several recommendations for a comprehensive restructuring of limitations law in Manitoba, to modernize and simplify Manitoba's limitations regime and to ensure greater consistency with other reformed jurisdictions.

In accordance with *The Law Reform Commission Act*,[4] the Commission submits this report to the Minister of Justice and Attorney General for consideration.

## C. ACKNOWLEDGEMENTS

The Commission thanks Jonathan Penner, independent researcher, who was retained as our consultant to assist with the preparation of the Commission's draft report for consultation, which preceded this report. The Commission also thanks those who responded to our draft report for consultation; a list of those who provided comments is found in Appendix A. As well, the Commission appreciates the assistance of Tim Rattenbury, of the New Brunswick Office of the Attorney General, and Edward D. (Ned) Brown, of Pitblado, LLP, who provided detailed comments on a number of sections of the draft report. However, the recommendations in this report are those of the Commission and are not necessarily in agreement with those of our consultant or those who provided comments to the Commission.

[4] C.C.S.M. c. L95.

# CHAPTER 2

## OVERVIEW OF LIMITATIONS LAW

### A. CONTEXT

The English common law did not place any time limit on claims. A plaintiff could bring a claim at any time, regardless of how much the effluxion of time might have impaired the defendant's ability to defend against it. Eventually statutory limitations were created to provide that, after a certain period, a plaintiff could no longer seek the assistance of the court to enforce a legal right that he or she might otherwise have. The first enactment providing for such a general limitation was the *Statute of Limitations, 1540*,[1] dealing with claims relating to real property. This was followed by the *Statute of Limitations, 1623*,[2] which limited a variety of actions.[3]

In the decades since confederation the various jurisdictions in Canada have enacted their own limitations statutes. While there have been attempts to accomplish some uniformity of approach among different jurisdictions, the various approaches are rather idiosyncratic. There is reason to believe, however, that it may finally be possible to bring some consistency, along with coherence and simplicity, to limitations legislation across the country, and in that respect Manitoba has the opportunity to build on reforms that have already been introduced in other jurisdictions.

### B. PURPOSES OF LIMITATIONS

The Supreme Court of Canada has repeatedly identified three rationales that underlie limitations legislation, which may be summarized as the certainty, evidentiary and diligence rationales:

> Statutes of limitations have long been said to be statutes of repose. ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations.
> ...
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. ...

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[1] (U.K.), 32 Hen. VIII, c. 2.

[2] (U.K.), 21 Jac. I, c. 16.

[3] Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at 4-5.

> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.[4]

These rationales have been adopted by the Manitoba Court of Appeal as well,[5] and there is no doubt that they are widely accepted as legitimate reasons to prevent the pursuit of an otherwise valid claim in the courts.

In an influential 1989 report, the Alberta Law Reform Institute identified three traditional justifications for a system of limitations, slightly different from those referred to by the Supreme Court, and added a fourth.[6] In addition to the peace and repose and evidentiary reasons, the ALRI suggested that limitations legislation is necessary for economic reasons, and for what it called judgmental reasons. The economic reasons relate to the fact that a defendant's ability to enter into business transactions may be affected by the existence of potential liability of uncertain magnitude. There are two judgmental reasons, the first of which is based on the traditional evidentiary justification: when the evidence is too unreliable, the court cannot make a sound decision with respect to a claim. The second judgmental reason is rather more philosophical in nature:

> With respect to the application of law, the continual evolution of the law to reflect current socio-economic values makes questions of law as it stood at the time of the alleged breach of duty more difficult to determine fairly and accurately with the passage of time, especially where the law is judge-made. It is often very difficult for a judge of a current generation to weigh the reasonableness of conduct which occurred many years ago as a judge of an earlier generation would have weighed it. Because cultural values change, conduct which was acceptable even 20 years ago is unacceptable today. The relative inability of one generation to judge the reasonableness of conduct of members of an older generation could lead to injustice in some cases. When human ability to judge the reasonableness of past conduct has seriously diminished, society must insist that the court stay its hand. Limitations law ensures that conduct giving rise to an action will be judged according to more or less current cultural standards.[7]

This rationale has been recognized by both the Manitoba Court of Appeal[8] and the Supreme Court of Canada[9] as a valid concern in the context of limitations.

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[4] *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at paras. 22-24, quoted in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 34.

[5] See e.g., *Rarie v. Maxwell* (1998), 168 D.L.R. (4th) 579 (Man. C.A.) at para. 15.

[6] Alberta Law Reform Institute, *Limitations* (Report No. 55, 1989) at 16-19 [ALRI Report].

[7] *Ibid*. at 19.

[8] *A.J. v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 at para. 48 (Man. C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. v.

[9] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 121.

Limitations legislation thus serves many purposes. While society certainly has an interest in ensuring that plaintiffs have access to the courts to enable the vindication of their legal rights, that interest must be balanced against the rights of potential defendants. Any legislation that imposes a temporal limitation on the ability of plaintiffs to access the courts must balance these competing sets of rights.

## C. MANITOBA LIMITATIONS LEGISLATION

Prior to 1931 there were two limitations statutes in force in Manitoba. The first was the *Statute of Limitations, 1623*,[10] which was received along with other English law when Manitoba first became a province in 1870.[11] The other was *The Real Property Limitation Act*,[12] which was largely a copy of the English *Real Property Limitation Act, 1874*.[13]

In 1931 the Manitoba Legislature enacted *The Limitation of Actions Act, 1931*.[14] This Act was based on a draft prepared by the Conference of Commissioners on Uniformity of Legislation,[15] although enacted before the Conference finally adopted its Act.[16] The 1931 Act consolidated the *Statute of Limitations, 1623* with other English limitations legislation, along with some other initiatives, and modernized them.[17]

The 1931 Act, with some amendments, essentially continues in effect to this day as *The Limitation of Actions Act*.[18] Significant amendments were enacted in 1967,[19] 1980,[20] and 2002.[21] Nevertheless, Manitoba's current limitations legislation is, in the words of the Alberta Law Reform Institute, "based on a limitations strategy formulated in England over three and a half centuries ago"[22] – except that, with the passage of time since this observation, it is now closer to four centuries since the current limitations strategy was originally formulated.

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[10] *Supra* note 2.

[11] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 33(1).

[12] R.S.M. 1913, c. 116. This statute originated in R.S.M. 1892, c. 89, and was subsequently re-enacted several times: *Colonial Investment and Loan Co. v. Martin*, [1928] S.C.R. 440 at 442.

[13] (U.K.) 37 & 38 Vict., c. 57. See *Covelli v. Keilback*, [1947] 4 D.L.R. 805 at 813.

[14] S.M. 1931, c. 30.

[15] *Covelli v. Keilback*, *supra* note 13.

[16] *Weingarden v. Moss*, [1955] 4 D.L.R. 63 at 68. See Uniform Law Conference of Canada, *Uniform Limitation of Actions Act*, online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l4>.

[17] ALRI Report, *supra* note 6 at 15; *Weingardern v. Moss*, *ibid*., at 66-68.

[18] C.C.S.M. c. L150.

[19] *An Act to Amend The Limitation of Actions Act and to amend Certain Provisions of other Acts relating to Limitation of Actions*, S.M. 1966-67, c. 32.

[20] *An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28.

[21] *The Limitation of Actions Amendment Act*, S.M. 2002, c. 5.

[22] ALRI Report, *supra* note 6 at 16.

## D. LIMITATIONS IN OTHER CANADIAN JURISDICTIONS

The *Uniform Limitation of Actions Act* adopted by the Conference of Commissioners on Uniformity of Legislation in 1931 formed the basis for limitations legislation not only in Manitoba but also in Alberta, Prince Edward Island, Saskatchewan, Yukon and the Northwest Territories.[23] In the 75 years since that Act was adopted, a number of attempts have been made to reform the limitations law in various Canadian jurisdictions. The result has been, for many years, a patchwork of amendments, and diminishing uniformity among provinces. As will become apparent, however, recent years have seen a trend toward increased uniformity, one which the Commission finds encouraging.

### 1. Ontario

The Ontario Law Reform Commission was the first Canadian law reform body to recommend a thorough overhaul of existing limitations legislation, in a comprehensive 1969 report.[24] In 1977, the Ontario Ministry of the Attorney General released a discussion paper with a draft bill incorporating the OLRC recommendations, along with other changes. Several bills were introduced in the Legislative Assembly in subsequent years, but none was enacted until recently.[25] Finally, a new limitations statute, originally introduced in April 2001, was appended as a schedule to Bill 213 in November 2002, and enacted within days.[26] Ontario's new *Limitations Act, 2002* came into effect on January 1, 2004.[27]

### 2. British Columbia

British Columbia's Law Reform Commission was the next to note that limitations legislation was badly in need of an overhaul. In 1974, the B.C. Commission issued a report making recommendations similar in scale to those of the Ontario Law Reform Commission report from 1969.[28] Unlike in Ontario, reform followed promptly, with the enactment in 1975 of

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[23] John Lee, *A New Uniform Limitations Act*, online: <http://www.ulcc.ca/ en/poam2/ CLS2004_New_Uniform_ Limitations_Act_En.pdf> at 1-2 [Lee]; Graeme Mew, *supra* note 3 at 6.

[24] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969).

[25] Bill 160 was introduced in the Legislature in 1983 but did not proceed beyond first reading. A Consultation Group appointed by the Attorney General again recommended reform in a 1991 report, which prompted the introduction of Bill 99, in 1992: Ontario, Ministry of the Attorney General, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Minister of the Attorney General, 1991). Bill 99 also died on the order paper. Bill 163 was introduced in 2000, but died when the Legislature prorogued in early 2001. Bill 10 was introduced in April 2001, but also was not enacted: Mew, *supra* note 3 at 6-8.

[26] *Justice Statute Law Amendment Act, 2002,* S.O. 2002, c. 24.

[27] S.O. 2002, c. 24, Sch. B.

[28] Law Reform Commission of British Columbia, *Limitations: Part II – General* (Report No. 6, 1974).

the *Limitation Act*.[29] Other than minor amendments,[30] by and large the Act remains as it was enacted in 1975. The B.C. Commission issued a further report on the ultimate limitation in 1990.[31] The successor to the B.C. Commission, the British Columbia Law Institute, also issued a report on the ultimate limitation, in 2002.[32]

More recently, the B.C. Ministry of Attorney General began a complete review of the legislation, with a view to overhauling and replacing it with something comparable to the Ontario legislation. A green paper was issued in February 2007, and comments were invited from the public with respect to a number of issues.[33] The comment period closed on April 23, 2007, but there is as yet no indication as to when new legislation might be introduced, or what it might look like.

### 3. Newfoundland and Labrador

The very first report of the Newfoundland Law Reform Commission, in 1986, was on the topic of limitation of actions.[34] Although reform was not immediately forthcoming, the report did eventually lead to the enactment of a new limitations regime by the Newfoundland Legislature[35] in 1995, based on a draft Act proposed by the Uniform Law Conference of Canada in 1982.[36] That draft Act, in turn, adopted many of the features of the 1975 British Columbia legislation.

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[29] S.B.C. 1975, c. 37; now R.S.B.C. 1996, c. 266.

[30] The Act was amended in relation to the ultimate limitation period for actions against hospital employees: *Miscellaneous Statutes Amendment Act, 1977*, S.B.C. 1977, c. 76, s. 19. The *Miscellaneous Statutes Amendment Act (No. 2), 2000*, S.B.C. 2000, c. 26, s. 20 (not in force) would institute a 10 year limitation for an action against a dentist based on professional negligence or malpractice.

[31] Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period:* Limitation Act, *Section 8* (Report No. 112, 1990).

[32] British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, 2002), online: < http://www.bcli.org/sites/default/files/UltimateLimit.pdf>.

[33] British Columbia, Ministry of Attorney General, *Reforming British Columbia's* Limitation Act (Green Paper) (Victoria: Ministry of Attorney General, 2007), online: <http://www.ag.gov.bc.ca/legislation/pdf/GreenPaper.pdf>.

[34] Newfoundland Law Reform Commission, *Report on Limitation of Actions* (Report No. 1, 1986). The report was preceded a year earlier by a working paper on the same topic: Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions*, (Working Paper No. 1, 1985).

[35] As it then was; the name of the province was changed to Newfoundland and Labrador by proclamation of the Governor General (the *Constitution Amendment, 2001 (Newfoundland and Labrador)*) pursuant to s. 43 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[36] *Limitations Act*, S.N. 1995, c. L-16.1 (now S.N.L. 1995, c. L-16.1); see Lee, *supra* note 23 at 2.

## 4. Alberta

The predecessor to the Alberta Law Reform Institute issued a report for discussion on limitations law in September of 1986.[37] Widespread consultation followed, after which the Institute published Report No. 55, *Limitations* in 1989.[38] This report formed the basis for a complete overhaul of Alberta's limitations legislation in 1996.[39] The Alberta initiative was also influential with respect to the subsequent amendment projects in Ontario, Saskatchewan, and New Brunswick, and the deliberations of the Uniform Law Conference of Canada (discussed below).

## 5. Saskatchewan

The Law Reform Commission of Saskatchewan proposed replacement of that province's limitations legislation in 1989.[40] Some years later it published a comparison of its 1989 proposals and the proposals made by the Uniform Law Conference of Canada in 1982, with commentary based on the experience of other jurisdictions that had reformed their limitations legislation in the intervening years.[41] The Saskatchewan Department of Justice circulated a consultation paper in 2000 on the topic of limitations.[42] Ultimately, the Saskatchewan Legislature enacted the *Limitations Act*[43] in 2004, adopting an approach broadly similar to Ontario and Alberta.

## 6. New Brunswick

The New Brunswick Attorney General's Office issued a discussion paper on reform of limitations legislation in 1988,[44] but that discussion paper did not result in legislative amendments. More recently, the same office began actively pursuing thorough-going reform, and as a result, a Bill to enact a new *Limitation of Actions Act* was introduced into the Legislature on

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[37] Institute of Law Research and Reform, *Limitations* (Report for Discussion No. 4, 1986) (now the Alberta Law Reform Institute).

[38] ALRI Report, *supra* note 6.

[39] *Limitations Act*, S.A. 1996, c. L-15.1, proclaimed into force March 1, 1999; now R.S.A. 2000, c. L-12.

[40] Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act* (Report, 1989). This followed the release of two papers outlining the Commission's tentative proposals for change: *Tentative Proposals for Changes in Limitations Legislation; Part I: The Effect of Limitations on Title to Real Property* (1981) and *Tentative Proposals for Changes in Limitations Legislation; Part II: The Limitation of Actions Act* (1986).

[41] Law Reform Commission of Saskatchewan, *Comparison of Proposals for Reform of The Limitation of Actions Act* (Research Paper, 1997) at 17, online: < http://sklr.sasktelwebhosting.com/ResearchPapers.htm>.

[42] Saskatchewan Department of Justice, Limitation of Actions Act: *Consultation Paper* (Regina: Department of Justice, 2000).

[43] *The Limitations Act*, S.S. 2004 c. L-16.1, proclaimed into force May 1, 2005.

[44] New Brunswick Office of the Attorney General, Law Reform Branch, *Limitations Act: Discussion Paper* (Fredericton: Office of the Attorney General, 1988).

December 16, 2008, and received royal assent on June 19, 2009.[45] The new Act is based largely on the legislation now in force in Alberta, Ontario, and Saskatchewan, and the *Uniform Limitations Act* proposed by the Uniform Law Conference of Canada in 2005 (discussed below), although it also differs from all of them in some significant respects.

### 7. Summary

The limitations statutes of Alberta, Saskatchewan, Ontario and New Brunswick are the more recently reformed Canadian regimes, and represent similar concepts and philosophies. The new statutes eliminate the traditional approach, under which different limitations applied to specified causes of action, and replace it with a streamlined structure based on a two year 'basic' limitation and a longer 'ultimate' limitation. In this report, we refer to the limitations statues of these provinces collectively as the modern limitations regimes. British Columbia and Newfoundland and Labrador have semi-reformed legislation, with various limitations applicable to claims according to a system of categories.[46] The remaining provinces and territories have limitations statutes founded on early English legislation, though differing in significant particulars from one another.

## E. UNIFORM LAW CONFERENCE OF CANADA

The Uniform Law Conference of Canada (the ULCC) and its predecessors have made several forays into the area of limitations legislation. The first effort, referred to above, was a *Uniform Limitation of Actions Act* adopted by the former Conference of Commissioners on Uniformity of Legislation in 1931,[47] which formed the basis for limitations legislation in several provinces.[48]

The second effort, launched fifty years later, was a *Uniform Limitations Act* adopted in 1982 by the ULCC,[49] which was intended to update the previous *Uniform Limitation of Actions Act* and was based on the legislation adopted by British Columbia in 1975. It was not as well-received as the earlier proposal, and was only enacted by Newfoundland.[50]

The most recent proposal by the ULCC was adopted in 2005, and is based on the legislation enacted in the last decade or so in Alberta, Ontario, and Saskatchewan – what has

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[45] *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, proclaimed into force May 1, 2010.

[46] Québec also falls into this category. It adopted new rules on prescription in 1991, but they continue to be based on the categorization of claims and contain a variety of different time periods: *Civil Code of Québec*, S.Q. 1991, c. 64, Book Eight, in force January 1, 1994.

[47] Uniform Law Conference of Canada, *Uniform Limitation of Actions Act*, online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l4>.

[48] Lee, *supra* note 23 at 1.

[49] Uniform Law Conference of Canada, *Uniform Limitations Act*, online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l3>.

[50] Lee, *supra* note 23 at 1-2.

been referred to as "modern limitations legislation".[51] The 2005 *Uniform Limitations Act* (the Uniform Act)[52] does not attempt to address limitations rules relating to real property matters,[53] but in general the Commission considers that it provides a model worth considering for Manitoba. The model Act proposed by the Commission for adaptation for Manitoba and attached as Appendix A is based on the Uniform Act.

## F. OTHER LAW REFORM AGENCIES

As mentioned earlier, the limitation of actions has been a favourite topic of law reform agencies. Since the late 1980s, and in addition to the work undertaken in various jurisdictions, there have been a number of significant investigations of limitations legislation by law reform bodies in several common law jurisdictions.[54] Many of these have been of great assistance to the Commission in the preparation of this report. We do not propose to re-till vigorously ground that has been so well worked over so recently, and instead will focus in this report on practical proposals for the transformation of Manitoba's *Limitation of Actions Act* that will bring it into line with those Canadian jurisdictions with modern limitations regimes.

The balance of this report will discuss specific issues in the law of limitations, how those issues have been treated in other jurisdictions and in the Uniform Act, and how we believe they should be addressed in Manitoba.

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[51] *Ibid.* at 1.

[52] Uniform Law Conference of Canada, *Uniform Limitations Act*, online: <http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf> [*Uniform Act*] (adopted by the Uniform Law Conference of Canada at its annual meeting in St. John's, Newfoundland, 21 – 25 August, 2005).

[53] The *Uniform Act*, *ibid*., does specifically refer to personal property; see s. 11.

[54] A search of the Law Reform Database maintained by the British Columbia Law Institute indicates that more than 50 reports or discussion papers have been issued on limitations, or some aspect of limitations, since 1985 by various Canadian and other law reform bodies: online at <http://www.bcli.org/>.

# CHAPTER 3

# RECOMMENDATIONS FOR REFORM

The Manitoba *Limitation of Actions Act*[1] is in need of reform. While the 1931 Act has been amended and improved over the years, it is in need of simplification and modernization. As well, several other provinces have seen fit in recent years to adopt limitations legislation that is based on radically different principles, and greater consistency is desirable.

There are a number of ways in which the Uniform Law Conference of Canada's 2005 *Uniform Limitations Act* (the Uniform Act),[2] and the Commission's proposed legislation, differ from the existing Manitoba Act. This report will not necessarily cover all of them, but will address the significant changes that would result from the adoption of the proposed legislation.

**RECOMMENDATION 1**

**The Limitation of Actions Act *should be repealed and replaced with a new* Limitations Act.**

## A. APPLICATION OF ACT

### 1. Claim

The modern limitations regimes have implemented a simplified and more coherent scheme. As noted in Chapter 3, the new statutes replace the traditional approach, under which different limitations apply to specified causes of action,[3] and create instead a structure based on a general two year 'basic' limitation and a longer 'ultimate' limitation.

The current Manitoba Act applies to any 'action', which is defined to mean:

> … any civil proceeding but does not include any proceeding whether for the recovery of money or for any other purpose that is commenced by way of information or complaint or the procedure for which is governed by *The Summary Convictions Act*.[4]

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[1] C.C.S.M. c. L150 [*Manitoba Act*].

[2] Uniform Law Conference of Canada, *Uniform Limitations Act*, online: <http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf> [*Uniform Act*] (adopted by the Uniform Law Conference of Canada at its annual meeting in St. John's, Newfoundland, 21 – 25 August, 2005).

[3] For example, an action for defamation must be brought within two years, an action for trespass or injury to real property within six years, an action for trespass or injury to chattels within two years and an action for fraudulent misrepresentation within six years: *Manitoba Act*, *supra* note 1, s. 2(1).

[4] *Manitoba Act*, *ibid*., s. 1. "Action" includes an action for a declaration: *Abbott v. Canada*, 2006 FCA 342, 354 N.R. 331, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 24.

Because of the way in which the current Act is structured – that is, because it applies a series of limitations to a number of different types of actions described further in the Act – there is no need for it to be any more precise. Legislation with a simplified structure as proposed in this report, however, has to be clearer about the types of proceedings to which it will apply.

Alberta limits the application of its legislation to any claim, which it defines as "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order". A remedial order is then defined to mean "a judgment or order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right", with certain exclusions.[5] A remedial order is based on an injury; subsection 3(1) speaks of the injury for which the claimant seeks a remedial order.

Ontario, Saskatchewan, and the ULCC have chosen a somewhat different approach. Each also provides that the limitations legislation applies to a claim pursued in court proceedings, but 'claim' is defined as meaning:

> a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.[6]

The definition of 'claim' in the recent New Brunswick Act is very similar.[7]

The Commission is persuaded that, in the interests of certainty and consistency, the ambit of the new Act is best approached in the manner proposed by Ontario, Saskatchewan and the Uniform Law Conference.[8] However, for reasons discussed in section B.1 below, the

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[5] *Limitations Act*, R.S.A. 2000, c. L-12, ss. 1(a), (i). [*Alberta Act*].

[6] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 1 [*Ontario Act*]; *The Limitations Act*, S.S. 2004, c. L-16.1, s. 2(a) [*Saskatchewan Act*]; *Uniform Act*, *supra* note 2, s. 1. The *Saskatchewan Act* applies to claims that are commenced by statement of claim or by originating notice, but not to proceedings in the nature of an application: s. 3(1).

[7] New Brunswick's *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 [*New Brunswick Act*], defines "claim" as "a claim to remedy *the* injury, loss or damage that occurred as a result of an act or omission" [emphasis added]: s. 1(1).

[8] The *Manitoba Act*, *supra* note 1, currently applies to actions, which is defined to include "any civil proceeding". The Act also refers to "proceedings", which is defined in section 1 to include "action, entry, taking of possession, distress, and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute": see also Part III *Charges on Land* and *Hupe v. Manitoba (Residential Tenancies Branch, Director)*, 2009 MBCA 27, 307 D.L.R. (4th) 619. The proposed new Act would not apply to extra-judicial proceedings, including realization by sale or foreclosure under real property security effected through proceedings in the Land Titles Office: submission by E. Brown (March 12, 2010). While s. 23 of the *New Brunswick Act*, *supra* note 7, provides for non-judicial remedies, the Commission prefers consistency with the other jurisdictions on this point. However, in section K.9 of this report, the Commission recommends that a review of other statutes with specific limitations be conducted. The limitations applicable to extra-judicial proceedings should be considered during this review, and greater consistency with the limitations recommended in this report would result in a more coherent approach. It would seem unusual, for example, to be barred from suing on a covenant but not from pursuing foreclosure proceedings. See *Daniels v. Mitchell*, 2005 ABCA 271, 371 A.R. 298; *Blair v. Desharnais*, 2005 ABCA 272, 371 A.R. 196 with respect to mortgage foreclosure court proceedings.

Commission recommends that the Act refer to a claim pursued to remedy an 'injury', defined as set out in that section.

**RECOMMENDATION 2**

***The Act should apply to a claim pursued in a court proceeding to remedy an injury that occurred as the result of an act or omission.***

## 2. Cause of Action

Under traditional limitations law, a limitation generally begins to run when the claimant's cause of action has accrued. A cause of action comprises "those elements necessary to establish the success of a claim",[9] and a cause of action accrues "in the absence of any question of discoverability … when the last element required to support the cause of action occurs".[10]

Exactly when a cause of action will be found to have accrued will depend on the nature of the claim. In relation to torts, the issue may be complex. As the Law Reform Commission of Ireland has explained:

> The first issue that arises is: when does a cause of action "accrue" for the purposes of the section? The answer is that for torts actionable only on proof of damage (such as negligence), the cause of action will accrue when the defendant's wrongful act causes damage. This can be separate in point of time from the act that led to the damage. The cause of action accrues irrespective of whether the plaintiff knew or could with reasonable diligence have discovered the damage. For torts actionable without proof of actual damage (such as trespass), the cause of action will accrue when the tortious act is committed.[11]

As a result, under traditional limitations regimes, "the common law determined when one was first entitled to sue, and [the limitations statute] stipulated that the limitation period began to run on that day".[12]

As will be discussed throughout this report, however, modern limitations statutes no longer refer to time periods commencing when the cause of action arose. While traditional principles still have some relevance, the modern statutes are concerned largely with two points in

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[9] *M.M. v. Roman Catholic Church of Canada*, 2001 MBCA 148, 205 D.L.R. (4th) 253 at para. 31, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 8. The *Manitoba Act*, *supra* note 1, s. 2(1), refers to when "the cause of action arose". In this report we use the terms "accrued" and "arose" interchangeably.

[10] *Abbott v. Canada*, *supra* note 4 at para. 8.

[11] Law Reform Commission (Ireland), *Consultation Paper on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury)* (1998) at 9. See *Burke v. Greenberg*, 2003 MBCA 104, 228 D.L.R. (4th) 257; *Long v. Western Propeller Co. Ltd*. (1968), 67 D.L.R. (2d) 345 (Man. C.A.).

[12] *Hare v. Hare* (2006), 83 O.R. (3d) 766 (C.A.) at para. 74, Juriansz, J.A., dissenting.

time: the day on which the act or omission on which the claim is based occurred, and the day on which the claim was discovered.

## B. LEGISLATING DISCOVERABILITY PRINCIPLES

In the latter half of the 20th century, courts and legislators began to alleviate some of the effects of limitations legislation that they characterized as harsh or absurd. The means of doing so was to interpret the limitations clock so that it did not begin to run when the cause of action arose; rather, it began to run when the plaintiff became aware, or ought reasonably to have become aware, of all the material facts that formed the basis for his or her claim.

In 1963, the House of Lords held that certain plaintiffs who had contracted a lung disease as a result of the improper ventilation of the factory in which they worked were barred from bringing an action against their employer notwithstanding that there was no way they could possibly have known that they had contracted the disease until after the expiration of the applicable limitation.[13] Parliament responded by enacting limitations legislation to permit the court to extend limitations in personal injury cases where the plaintiff did not have actual or constructive knowledge of the material facts.[14]

This discoverability rule was subsequently extended by the courts. The first case in which the discoverability rule was articulated and applied in respect of damage to property was a 1976 English case, *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*[15] In that case Lord Denning M.R. stated:

> … when building work is badly done – and covered up – the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.[16]

While the House of Lords subsequently rejected the discoverability rule in England,[17] the rule was adopted by the Supreme Court of Canada in 1984,[18] and has since been applied in a

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[13] *Cartledge v. E. Jopling & Sons, Ltd*., [1963] A.C. 758 (H.L.).

[14] *Limitation Act 1963* (U.K.), 1963, c. 47; see the subsequent *Limitation Act, 1980* (U.K.), 1980, c. 58, s. 11.

[15] [1976] Q.B. 858 (C.A.) [*Sparham-Souter*].

[16] *Ibid*. at 868.

[17] *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*, [1983] 2 A.C. 1 (H.L.). Parliament again responded, by amending the *Limitation Act 1980*, *supra* note 14, to add a discoverability principle in relation to defective products (s. 11A), *Fatal Accident Act* actions (s. 12) and actions for latent damages for negligence not involving personal injury (s. 14A).

[18] *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

wide variety of circumstances.[19]

Manitoba enacted amending legislation modeled on the 1963 English legislation in respect of person injury claims in 1967, some nine years prior to Lord Denning's extension of the common law discoverability rule.[20] Those provisions, as later expanded,[21] now form Part II of Manitoba's *Limitation of Actions Act*, and allow a person to apply to court for leave to begin or continue an action within twelve months of discovery of the material facts upon which the action is based. As a result, in Manitoba, the common law discoverability rule adopted in Canada has little application, because Part II constitutes a complete statutory code. In *Rarie v. Maxwell*, Philp, J.A. explained:

> I conclude that the Legislature has enacted a comprehensive and exclusive code. Part II of the Act occupies the whole field of discoverability in providing relief against the "harsh and absurd" effects of statutory limitation periods. The provisions are coherent, effective, and just. They make it unnecessary to apply the discoverability rule in Manitoba in order to construe limitation periods under the Act or under any other Act of the Legislature.[22]

The only cases to which Part II does not apply are those causes of action that have their own 'built-in' discoverability rules:

> Part II … has no application, of course, to those causes of action that have their own special discoverability rules. For example, fraudulent misrepresentation has its own discoverability provision – "six years from the discovery of the fraud" (s. 2(1)(j)) – and actions grounded on accident, mistake, or other equitable ground of relief not dealt with under the Act must be commenced "within six years from the discovery of the cause of action" (s. 2(1)(k)).[23]

The main provisions of Part II are sections 14 and 15, which state, in part:

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[19] See *e.g*., *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. The application of the discoverability principle depends on the wording of the statutory limitation: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Fehr v. Jacob*, [1993] 5 W.W.R. 1 (Man. C.A.); *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (C.A.).

[20] *An Act to Amend The Limitation of Actions Act and to amend Certain Provisions of other Acts relating to Limitation of Actions*, S.M. 1966-67, c. 32; *Sparham-Souter*, *supra* note 15.

[21] *An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28.

[22] *Rarie v. Maxwell*, (1998), 168 D.L.R. (4th) 579 (Man. C.A.) at para. 58.

[23] *Ibid*. at para. 31. See also *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.) at para. 300; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71 at para. 288 [*Manitoba Metis Federation*]. Where Part II does not apply, "the limitation will begin to toll when the material facts on which a claim is based have been discovered or ought to have been discovered by the plaintiffs by the exercise of reasonable diligence": *T.L.B. v. R.E.C.*, 2000 MBCA 83, [2000] 11 W.W.R. 436 at para. 75, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 63, 156 Man.R. (2d) 318.

14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between

> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
>
> (b) the date on which the application was made to the court for leave.

. . . . .

15(2) Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

Section 20 elaborates with respect to 'material facts'. Subsections (2) and (3) provide:

20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:

> (a) The fact that injuries or damages resulted from an act or omission.
> (b) The nature or extent of any injuries or damages resulting from an act or omission.
> (c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.
> (d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.
> (e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

20(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

Subsection 20(4) provides that a fact will be taken not to have been known by a person if he or she had taken all actions that a person of his or her intelligence, education and experience would reasonably have taken to ascertain it, or to obtain appropriate advice with respect to circumstances from which the fact might have been ascertained or inferred.

The effect of these provisions is to provide claimants one year after the discovery of a cause of action to apply to the court for leave to bring their action. In *F.M. v. Holder*,[24] the Manitoba Court of Appeal held that the test for determining when an applicant first knew or ought to have known of all material facts of a decisive character was as set out in the comments of Steel, J.A. (then Steel, J.) in *Rebizant v. Greenwood*:[25]

> The test pursuant to the Act is that the application must be initiated within 12 months of the plaintiff becoming aware of the material facts of a decisive nature. She did not need to become "definitively" aware. She needed to become aware on the balance of probabilities that the implant she had was associated with problems and that it had caused her damage.[26]

Part II is not, however, entirely satisfactory. The Court of Appeal has observed that the language is "rather obscure,"[27] and Kaufman J. has noted:

> The original version of s. 14 was incorporated into Manitoba law under Part 1A, ss. 11(a) to 11(g) both inclusive of *The Limitation of Actions Act* on January 1, 1968. There have been some changes but in general the language was very similar to today's legislation. In the case of *McCormick v. Morrison*, (1970), 73 W.W.R. 86 (Man. Q.B.), Tritschler, C.J.Q.B. observed as follows at 88:
>
> > No other province in Canada has enacted similar legislation. Part 1A is copied almost verbatim from the English *Limitation Act, 1963*, 11 & 12 Eliz. II, ch. 47. The English courts have found that Act "somewhat complicated" *per* Pearson, L.J. in *Re Clark v. Forbes Stuart (Thames Street) Ltd*., [1964] 1 W.L.R. 836, 108 Sol J 422, [1964] 2 All E.R. 282, at 284; "very difficult to understand" *per* Denning, M.R. and drafted in an "obscure way" *per* Salmon, L.J. in *Goodchild v. Greatness Timber Co*., [1968] 2 Q.B. 372, [1968] 2 W.L.R. 1283, [1968] 2 All ER 255, at 257, 258. With these comments I respectfully agree.[28]

By contrast, the modern limitations regimes more simply provide that the basic limitation does not begin running until such time as the claimant has actual or constructive knowledge of the fact that he or she had a claim. Alberta's Act provides:

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[24] 2002 MBCA 39, 163 Man.R. (2d) 282 at paras. 32-33, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 284.

[25] [1998] 8 W.W.R. 49 (Man. Q.B.).

[26] *Ibid*. at para. 71.

[27] *Einarsson v. Tamar Mail Order Inc.*, [1992] 2 W.W.R. 84 at para. 10 (Man. C.A.).

[28] *Procyshyn v. Silverman*, 2000 MBQB 78, [2000] 9 W.W.R. 630 at 634.

3. (1) … [I]f a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

…

… the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.[29]

The Ontario Act has similar effect:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).[30]

Thus no application for leave is required, and when a limitations defence is raised the court need only judge whether the claimant actually knew, or ought to have known, of the claim more than two years prior to the date on which he or she instituted proceedings. The Saskatchewan and New Brunswick Acts and the ULCC Uniform Act all incorporate these principles.[31] The Commission considers this to be a far more coherent and rational scheme, and has no hesitation in recommending its implementation in Manitoba, with the modifications discussed in the following sections.

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[29] *Alberta Act*, *supra* note 5. Professor Roach has commented favourably on this approach, suggesting that "[d]iscoverability ought to be defined in a simple fashion that recognizes that courts will have considerable discretion in interpreting the new statutory discoverability provisions": Kent Roach, "Reforming Statutes of Limitations" (2001) 50 U.N.B. L.J. 25 at 43-44.

[30] *Ontario Act*, *supra* note 6.

[31] *Saskatchewan Act*, *supra* note 6, ss. 5-6; *New Brunswick Act*, *supra* note 7, s. 5; *Uniform Act*, *supra* note 2, ss. 4-5. The *Saskatchewan Act* refers to knowledge that the injury, loss or damage *appeared* to have been caused by or contributed to by an act or omission and that the act or omission *appeared* to be that of the person against whom the claim is made [emphasis added]: *Saskatchewan Act*, *supra* note 6, s. 6(1).

## 1. Injury

The Ontario, Saskatchewan, New Brunswick and ULCC Acts do not further expand the concepts of 'injury, loss or damage'. In relation to the Ontario Act, Chapman has questioned whether the use of these terms might restrict the application of the Act in respect of gains-based claims:

> In the vast majority of civil proceedings the remedy sought is based on the impact on the plaintiff by the defendant's conduct. In a subset of cases, however, the remedy sought may not relate to the impact on the plaintiff but instead may be designed to strip a defendant of ill-gotten gains. … In addition to gains-based claims being available in the traditional areas of fiduciary obligations and intellectual property, more recently there are indications that the remedies may be available in certain circumstances in contract or even in tort. Gains-based claims are becoming increasingly common in class proceedings where they may avoid individualistic issues associated with causation and quantification of damages and hence make the claim more amenable to certification and class adjudication.
>
> One could argue that a gains-based claim that is solely designed to strip profit from a wrongdoer does not seek to remedy "loss, injury or damage" and does not therefore fit within the definition of "claim" under the *new Act* and that no limitation period thus exists for such claims.[32]

As Chapman notes, such a result would be "counterintuitive",[33] and it may be that courts would attempt to interpret limitations legislation to avoid such an outcome. The Commission considers, however, that it would be preferable to be clear on this point.

Alberta has taken the approach of defining 'injury' as follows:

> "injury" means
> (i) personal injury,
> (ii) property damage,
> (iii) economic loss,
> (iv) non-performance of an obligation, or
> (v) in the absence of any of the above, the breach of a duty.[34]

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[32] John J. Chapman, "Eight (Unanswered) Questions on the New Limitations Act" (2008) 34 Adv. Q. 285 at 304 [footnotes omitted].

[33] *Ibid*. at 305. Similarly, the failure of a party to a commercial transaction to perform an obligation, such as an obligation of a borrower to report to a lender, for example, may not of itself cause loss: Lisa H. Kerbel Caplan & Wayne D. Gray, "Impact of the Limitations Act, 2002 on Commercial Transactions, Lending and Debt Recovery" (Paper presented to The New Ontario Limitations Regime: Exposition and Analysis, Ontario Bar Association, 18 November 2005) at 2-3, online: http://www.mcmillan.ca/Upload/Publication/LKCaplan_WGray_Impact_ LimitationsAct_2002.pdf>.

[34] *Alberta Act*, *supra* note 5, s. 1(e).

A similar reference to non-performance of an obligation or breach of a duty might help to clarify that the new legislation includes claims that are not founded on loss or damage suffered by the plaintiff.

The Law Reform Commissions of Queensland and Western Australia have suggested that some uncertainty remains with the Alberta definition:

> The Law Reform Commission of Western Australia suggested some refinement to the Alberta definitions. It noted that under the definition of "injury" the same conduct could constitute two different injuries, perhaps occurring at different times. For example, a breach of contract could be classified as "non-performance of an obligation". It might also result in personal injury, property damage or economic loss."[35]

The Queensland Law Reform Commission recommended that the wording of the definition be amended so that non-performance of an obligation is relevant only in the absence of damage such as personal injury, property damage or economic loss. Where damage has occurred, discovery of the damage would be the relevant issue.[36] The Commission agrees with this approach.

**RECOMMENDATION 3**

***'Injury' should be defined to mean***

***(a) personal injury;***
***(b) property damage;***
***(c) economic loss; or***
***in the absence of any of the above,***
***(d) the non-performance of an obligation; or***
***(e) the breach of a duty.***

## 2. Discoverability

Saskatchewan's provision for discovery is very similar to Ontario's, and the ULCC Uniform Act and the New Brunswick Act adopt the same general structure. There are some variations, however, with respect to the concept expressed by s. 5(1)(a)(iv) of the Ontario Act. Ontario's subclause (a)(iv) reads: "A claim is discovered on the earlier of, (a) the day on which the person with the claim first knew, … (iv) that, having regard to the nature of the injury, loss or damage, *a proceeding would be an appropriate means to seek to remedy it* …".[37] The ULCC

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[35] Queensland Law Reform Commission, *Review of the* Limitation of Actions Act 1974 *(QLD)* (Report No. 53, 1998) at 70, online: <http://www.qlrc.qld.gov.au/reports/r53.pdf>, referring to Law Reform Commission of Western Australia: *Report on Limitation and Notice of Actions* (Project No 36 Part II, 1997) at 174.

[36] *Ibid*. at 71; see also the discussion in Chapman, *supra* note 32 at 306.

[37] *Ontario Act*, *supra* note 6, s. 5(1)(a)(iv) [emphasis added].

Uniform Act uses slightly different wording: "that the injury, loss or damage *is sufficiently serious to warrant a proceeding*".[38] The Alberta Act provides "that the injury, *assuming liability on the part of the defendant, warrants bringing a proceeding*",[39] while the New Brunswick Legislature chose not to incorporate a version of (a)(iv).

With respect to the Ontario Act, Chapman has commented that subclause (a)(iv) "is without any obvious parallel in the previous case law and may well, especially when combined with the "objective/subjective" test in s. 5(1)(b), be the focus of very considerable litigation."[40]

This provision, in its different forms, is intended to recognize that the nature or extent of the injury or damage suffered may not be immediately apparent, and to avoid forcing plaintiffs into litigating unnecessarily over minor damage in order to preserve their rights.[41] The Alberta Law Reform Institute recommended wording similar to the provision that was later enacted in Alberta,[42] and which is very similar to the test of 'significant injury' that has existed in English limitations legislation for some time.[43] As the Saskatchewan Department of Justice has noted:

> Time begins to run under the English statute when the plaintiff would reasonably have considered it sufficiently serious to justify him or her instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. Using this test, a plaintiff would not be punished for failing to take action when the first trivial evidence of injury was seen.[44]

The Queensland Law Reform Commission and the Law Reform Commission of Western Australia recommended, with slight variations in wording, "that the injury, assuming liability on the part of some other person, warranted bringing a proceeding".[45] A 2002 Commonwealth of

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[38] *Uniform Act*, *supra* note 2, s. 5(a)(iv) [emphasis added]. The *Saskatchewan Act*, s. 6(1)(d), *supra* note 6, is similar.

[39] *Alberta Act*, *supra* note 5, s. 3(1)(a)(iii) [emphasis added].

[40] Chapman, *supra* note 32 at 294.

[41] *Uniform Act*, *supra* note 2. The ULCC explains in its commentary on s. 5 that "Section 5(a)(iv) recognizes that the first sign of damage should not always be the time for the commencement of the basic limitation period. For example, it would be inappropriate to have the limitation period commence from the time on which a minor ache is felt, as this may not develop into a serious matter to require a legal proceeding. Otherwise, the Act may promote unnecessary litigation", at 3. The Supreme Court of Canada dealt with a similar issue in *Peixeiro v. Haberman*, *supra* note 19, in the context of a specific legislative provision requiring permanent serious impairment to exist before an action could be commenced in respect of a motor vehicle injury.

[42] Alberta Law Reform Institute, *Limitations* (Report No. 55, 1989) at 33 [ALRI Report].

[43] "Significant" or "serious" injury provisions exist in the *Limitation Act, 1980* (U.K.), *supra* note 14, s. 14, and the *Prescription and Limitation (Scotland) Act 1973* (U.K.), 1973, c. 52, ss. 17, 22B.

[44] Saskatchewan Department of Justice, Limitation of Actions Act: *Consultation Paper* (Regina: Department of Justice, 2000) at 14; see Law Reform Commission of Saskatchewan, *Comparison of Proposals for Reform of The Limitation of Actions Act* (Research Paper, 1997) at 17, online: < http://sklr.sasktelwebhosting.com/ResearchPapers.htm>.

[45] Queensland Law Reform Commission, *supra* note 35 at 90; Law Reform Commission of Western Australia, *supra* note 35 at para. 7.21.

Australia review panel on the law of negligence recommended, in respect of personal injury, that the injury be "sufficiently significant to warrant bringing proceedings".[46]

As noted above, Part II of the current Manitoba Act incorporates the principle of 'significant injury'. Subsection 20(3) requires that a person of the intelligence, education and experience of the plaintiff who had obtained appropriate advice would have regarded that, apart from a limitations defence, "an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the [action]".[47]

The New Brunswick Office of the Attorney General took the view that a provision such as subclause (a)(iv) was not necessary:

> A standard example is that the discovery period for a defective foundation should not necessarily begin just because some superficial defects in a building have become apparent. This desirable result, however, is also implicit in s. 5(2) of the Bill, especially para. (a), which refers to the claimant being able to discover "*the* injury, loss or damage" – that is to say, the injury, loss or damage to which the claim relates – not just *some* injury, loss or damage. In the case of the defective foundation, this is the defective foundation, not the minor defects; that the claimant has discovered the latter will be relevant to, but not determinative of, whether he or she should have discovered the former. …
>
> S. 5's omission of the fourth element, therefore, should not be read as meaning that the Bill does not provide for issues of delayed or incomplete discovery. Rather, it leaves them to be addressed through the familiar concepts of loss, causation and identification, without adding the unfamiliar and potentially complex overlay of whether a claimant should recognize a legal proceeding as being "appropriate" or "warranted".[48]

The Commission is not persuaded that such orderly and predictable development of the common law can be presumed with respect to issues of delayed or incomplete discovery.[49] With the increased focus on discoverability in the new Act, it is preferable to be clear that a limitation does not begin to run at the first hint of minor injury or damage; there must be an injury, damage or loss that justifies bringing an action.

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[46] Austl., Commonwealth, Law of Negligence Review Panel, *Review of the Law of Negligence Final Report* (Canberra: Department of Communications, Information Technology and the Arts, 2002) at 7, online: < http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf.

[47] *Manitoba Act*, *supra* note 1, s. 20(3).

[48] New Brunswick, Office of the Attorney General, *Commentary on Bill 28:* Limitation of Actions Act (Fredericton, Office of the Attorney General, 2009) at 5 [emphasis in original], online: <http://www.gnb.ca/legis/bill/pdf/56/3/Limitations-e.pdf> [New Brunswick Commentary].

[49] For example, as discussed below in section J.4, developments in the law in Manitoba in relation to the tort of economic loss for dangerous buildings have resulted in considerable uncertainty.

On balance, the Commission prefers the approach of the Ontario and Saskatchewan Acts: "[a] claim is discovered on the earlier of, (a) the day on which the person with the claim first knew, … (iv) that having regard to the nature of the injury ..., a proceeding would be an appropriate means to seek to remedy it …".[50] While some have observed that courts interpreting this wording may be inclined to consider a potentially broad range of factors to determine whether a proceeding was an appropriate remedy,[51] and that the section "will give rise to a new set of discoverability cases",[52] this wording is more appropriate where the injury may include, as recommended above, the breach of a duty or the non-performance of an obligation.

In the Commission's view, the provision should also encompass circumstances in which developments in the law result in new causes of action where none had previously been recognized;[53] it should be clear that a limitation does not begin to run until a right to make a claim exists and is reasonably discoverable. Where the law is evolving a claimant cannot be presumed to know of rights that do not yet exist.

In *M. (K.) v. M. (H.)*, LaForest, J., discussed the evolution of law in relation to tort claims arising from incest:

> Further, one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their abusers. The English Court of Appeal in Stubbings v. Webb, [1991] 3 All E.R. 949 (C.A.), recently acknowledged that the social climate during the mid-1970s was not at all conducive to bringing an action of this nature. That case involved a remarkably similar fact situation to that in the present case. Although the relevant statute of limitations is quite different from the Ontario Act, the following remarks made by Sir Nicolas Browne-Wilkinson, V.-C., at p. 960, are nevertheless telling:
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> > The question is whether, in 1975, the plaintiff acted reasonably in not then suing Mr Webb and Stephen Webb for the serious wrongs alleged to have been done to her. In my judgment it is important not to consider the question by reference to the

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[50] *Ontario Act*, *supra* note 6, s. 5(1); the *Saskatchewan Act*, *supra* note 6, s. 6(1) is similar.

[51] For example, the ability to prove the claim by admissible evidence and uncertainties about legal doctrines; Chapman, *supra* note 32 at 299.

[52] Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at 60. However, see the comments of the Ontario Court of Appeal in *Placzek v. Green*, 2009 ONCA 83, 307 D.L.R. (4th) 441 at para. 52: "Whether under the former limitations regime or the new Act, in the context of limitations law, "discovered" refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period".

[53] For example, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co*., [1995] 1 S.C.R. 85. This recommendation is consistent with *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. The Supreme Court of Canada held that although the appellant had been denied benefits under 1978 legislation, her cause of action arose on April 17, 1985, when section 15 of the *Charter* came into effect; until then "she had no cognizable legal right upon which to base her claim", at para. 18. This is not the same as delaying a claim hoping that the law may change in one's favour; see *Manitoba Metis Federation*, *supra* note 23 at para. 292.

> social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible, for a plaintiff coming of age in the late 1980s to establish that she acted 'reasonably' in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff's behaviour in the period 1975-78. At that time civil actions based on sexual assaults were unknown in this country. In my judgment, it was accordingly reasonable for the plaintiff not to have considered the injuries done to her sufficiently serious to justify starting proceedings against her adoptive father and brother. In 1975 such proceedings were unthought of and it was therefore reasonable for her not to have started such proceedings.[54]

LaForest, J., later compared the reasonable discoverability rule with the equitable doctrine of acquiescence:

> As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: Re Howlett, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see Taylor v. Wallbridge (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.
>
> It is interesting to observe that in practical terms the inquiry under the heading of acquiescence comes very close to the approach one takes to the reasonable discoverability rule in tort. As we have seen, the latter focuses on more than mere knowledge of the tortious acts -- the plaintiff must also know of the wrongfulness of those acts. This is essentially the same as knowing that a legal claim is possible. That the considerations under law and equity are similar is hardly surprising, and is a laudable development given the similar policy imperatives that drive both inquiries.[55]

One respondent to the Commission's draft report for consultation questioned whether the proposed wording might mean that the provision of a legal or other expert opinion to the plaintiff would extend a limitation.[56] However, Ontario courts have interpreted subsection 5(1) as codifying the common law of discoverability, which has always required the plaintiff to exercise

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[54] *Supra* note 19 at para. 26.

[55] *Ibid*. at paras. 101-102.

[56] "A "viable cause" could be dependent on an expert opinion. Does the provision of any expert opinion to a plaintiff extend a limitation? … And what are "appropriate means"? Does the provision of a legal opinion that litigation is warranted extend a limitation? I would have to hope not": submission by R. Tapper (July 16, 2009).

reasonable diligence,[57] and would require a claimant to act diligently to obtain legal advice where reasonable in the circumstances.[58]

The Commission is of the view that the continued application of the due diligence requirement will restrain any inappropriate extensions of a limitation, and remains of the opinion that the reference to a viable cause of action is appropriate. Where a claimant receives incorrect legal advice, it will be a question of fact in the circumstances as to whether his or her claim was reasonably discoverable.[59]

**RECOMMENDATION 4**

***The basic limitation should begin to run on the discovery of the claim. A claim is discovered on the earlier of***

- ***(a) the day on which the person with the claim first knew***
  - ***that the injury had occurred,***
  - ***that the injury was caused by or contributed to by an act or omission,***
  - ***that the act or omission was that of the defendant, and***
  - ***that having regard to the nature and circumstances of the injury***
    - ***a right to make a claim exists, and***
    - ***a proceeding would be an appropriate means to seek to remedy the injury; and***
- ***(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).***

[57] *Predie v. Ontario*, [2004] O.J. No. 4915 (QL) (S.C.J.), aff'd [2006] O.J. No. 1699 (QL) (C.A.); *Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc*., [2009] O.J. No. 4216 (QL) (S.C.J.), aff'd 2010 ONSC 2129, 318 D.L.R. (4th) 378 (Div.Ct.). See also *T.L.B. v. R.E.C.*, *supra* note 23.

[58] For example, in *Hughes v. Kennedy Automation Ltd*., 2008 ONCA 770, the Court of Appeal affirmed a Superior Court of Justice decision that the two year limitation barred an application to add parties to a statement of claim. The plaintiff knew that he had a cause of action arising from a contract, but failed to provide evidence that he had retained legal counsel to explore which parties should be added. As a result, the presumption in subsection 5(2) that the plaintiff is presumed to have known of the required matters on the day that the act or omission took place, prevailed. See the discussion respecting the burden of proof at section G., below. See also *Alexis v. Toronto Police Service Board*, 2009 ONCA 847, 100 O.R. (3d) 232.

[59] As in other cases of missed limitations arising from the inadvertence or negligence of legal counsel, the claimant may have a remedy in damages against his or her counsel.

## C. BASIC LIMITATION

The current Act contains numerous different limitations, the length of each depending on the cause of action that is being pursued. Actions for trespass to chattels, for example, must be brought within two years after the cause of action arose, while actions for the recovery of money must be brought within six years after the cause of action arose, and actions for fraudulent misrepresentation must be brought within six years after the discovery of the fraud.[60]

In the modern limitations regimes, on the other hand, a single period of two years from discoverability applies to virtually every claim, regardless of the type of action. This is another significant way in which these new regimes are a radical departure from the current scheme, and it provides greatly enhanced simplicity and predictability. The existing distinctions among causes of action are largely irrational and indefensible on grounds of policy, and ought not to be maintained. While there may be differences of opinion on the appropriate length of the basic limitation, in the interests of consistency, the Commission agrees that a single two year limitation ought to apply to virtually all claims.[61] The limited exceptions will be discussed in some detail below.

### RECOMMENDATION 5

***The basic limitation for claims should be two years.***

## D. ULTIMATE LIMITATION

### 1. Ultimate Limitation

A further striking feature of the modern limitations regimes is the institution of an ultimate or longstop limitation to accompany the basic limitation. In order to address the important repose aspect of limitations, there must be some ability to ensure that, after a certain period of time, no action may be brought regardless of the claim's discoverability or late occurring damage. The ultimate limitation therefore prohibits the institution of an action after a date that is calculated based on when the act or omission on which the claim is based took place,

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[60] *Manitoba Act*, *supra* note 1, ss. 2(1)(g), (i) and (j).

[61] The Commission received submissions expressing support for this approach, and no respondents specifically opposed it: see submission by D. Hill (July 22, 2009); submission by P. Brett (September 16, 2009) (regarding the Ontario model generally); submission by E. Brown (March 12, 2010). The joint submission of the Winnipeg Construction Association, the Association of Professional Engineers and Geoscientists of Manitoba, the Consulting Engineers of Manitoba, the Manitoba Association of Architects, the Association of Manitoba Land Surveyors and the Certified Technicians and Technologists Association of Manitoba (October 27, 2009) recommended a limitation of six years from the date on which professional services were substantially completed, along with the possibility of a Part II extension, and an ultimate limitation of 15 years. The joint submission also recommended that "actions against professionals should also be restricted to being brought by only those persons who have contracted for the professional services in issue", at 8, but this point is beyond the scope of the present report.

rather than on when the loss or damage occurred and the cause of action accrued or when the claim is discovered or is reasonably discoverable.[62] As Professor Roach has commented:

> Given the uncertainty and pro-plaintiff orientation of the discoverability cases, this is the only sure way to promote repose. It is reasonably clear that the courts will accept ultimate limitation periods provided the legislation clearly precludes the application of discoverability principles.[63]

The current Manitoba Act contains an ultimate limitation in s. 14(4), which prohibits a court from granting leave to begin or continue an action whose material facts have recently been discovered if more than 30 years have passed since the occurrence of the acts or omissions that gave rise to the cause of action.[64] Subsection 7(5) also provides for a 30 year ultimate limitation relating to the suspension of the calculation of time for actions brought by persons who are or have been under a disability.

General ultimate limitations running from the date that the act or omission giving rise to the claim occurred, rather than from the date that damage was suffered, are currently found in the limitations legislation of Alberta, Saskatchewan, Ontario, New Brunswick and Newfoundland and they have been recommended in British Columbia,[65] the U.K.,[66] Ireland,[67] New Zealand[68]

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[62] Subsection 3(1)(b) of the *Alberta Act*, *supra* note 5, provides for an ultimate limitation of "10 years after the claim arose" but then adds, in s. 3(3)(b) that "a claim based on a breach of a duty arises when the conduct, act or omission occurs". The Alberta Law Reform Institute noted that s. 3(3)(b) "applies to any claim which includes damage as a constituent element", so that the date that the damage occurred is not relevant: ALRI Report, *supra* note 42 at 70.

[63] Roach, *supra* note 29 at 44-45. See *Bowes v. Edmonton (City)*, 2007 ABCA 347, [2008] 5 W.W.R. 70.

[64] This wording is similar to the ultimate limitations in modern limitations statutes, and as noted, this results in a different limitation expiry than one calculated based on when the right to take proceedings accrued. In *M.M. v. Roman Catholic Church of Canada*, *supra* note 9, the Manitoba Court of Appeal considered the calculation of time for the purposes of the ultimate limitation under the 1931 Manitoba Act and under the current Manitoba Act. The court held that the 'right to bring proceedings' under the 1931 Act crystallizes when the injured party first suffers damage or loss, while under the current Act, "the calculation of time begins from the completion of the events giving rise to the cause of action detached from the issue of loss or damage", at para. 56.

[65] Subsection 8(1) of the current B.C. Act provides for three ultimate limitation periods running from the date on which the right to bring an action arose: *Limitations Act*, R.S.B.C. 1996, c. 266 [*B.C. Act*]. The British Columbia Law Institute recommended in 2002 that the Act should provide for a single ultimate limitation running from the date an act or omission that constitutes a breach of duty occurs: British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (Report No. 19, 2002) at 16-18, online: < http://www.bcli.org/sites/default/files/UltimateLimit.pdf>.

[66] Law Commission (U.K.), *Limitation of Actions* (Report No. 270, 2001) at paras. 3.99-3.101, online: <http://www.lawcom.gov.uk/docs/lc270(2).pdf>. The Commission recommended that the ultimate limitation should run from the date of accrual of the cause of action except for tort claims where loss is an essential element of the cause of action and claims based on a breach of statutory duty. In that case, the ultimate limitation should run from the date of the act or omission giving rise to the cause of action: paras. 3.108-3.113.

[67] Law Reform Commission (Ireland), *Consultation Paper: Limitation of Actions* (Consultation Paper No. 54, 2009) at paras. 5.01-5.16, 5.108-5.109.

[68] Law Commission (N.Z), *Tidying the Limitation Act* (Report No. 61, 2000) at paras. 13-14, online: <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_69_137_R61.pdf>.

and Australia.[69] The Commission agrees that such an ultimate limitation is necessary and desirable.

**RECOMMENDATION 6**

***The Act should provide for an ultimate limitation, calculated from the day on which the act or omission on which the claim is based took place, beyond which no claim may be brought.***

## 2. Length of Ultimate Limitation

The next question, if there is to be an ultimate limitation, is how long the period should be. The longer it is, the less usefully it serves the repose purpose of limitations legislation. On the other hand, the shorter it is the more likely it is that it will be unfair to potential plaintiffs. As Professor Roach has noted:

> The Alberta legislation illustrates how the length of an ultimate limitation period is connected with whether there are special exceptions. A shorter ultimate limitation period places pressure on legislatures to either exempt certain categories of claims from that period or to give judges a general discretion to depart from the ultimate limitation period in exceptional cases where it would cause an injustice. The B.C. experience suggests the converse: a longer ultimate limitation period such as 30 years may allow most exceptional cases to be litigated, but places pressures for the existence of special shorter ultimate limitation periods especially in the area of medical malpractice. Legislatures must make a choice: have a long general ultimate limitation period (i.e. 30 years in B.C.) and special shorter ultimate limitation periods (i.e. 6 years in B.C.) or have a shorter general ultimate limitation period (i.e. 10 years as in Alberta) that exempts some types of claims (i.e. claims by Aboriginal people and sexual abuse claims in Alberta).[70]

The Alberta Law Reform Institute recommended an ultimate limitation of 15 years,[71] but the Alberta Legislature opted for a 10 year limit.[72] The Manitoba and B.C. Acts provide for a 30 year ultimate limitation, but the British Columbia Law Institute has recommended reducing the limitation to 10 years,[73] and the B.C. government is considering such a reduction.[74]

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[69] Law Reform Commission of Western Australia, *supra* note 35 at paras. 7.30-7.34; Queensland Law Reform Commission, *supra* note 35 at 90-91.

[70] Kent Roach, *supra* note 29 at 45-46.

[71] ALRI Report, *supra* note 42 at 65-66.

[72] *Alberta Act*, *supra* note 5, s. 3(1)(b).

[73] British Columbia Law Institute, *supra* note 65 at 7-8.

[74] British Columbia, Ministry of Attorney General, *Reforming British Columbia's* Limitation Act (Green Paper) (Victoria: Ministry of Attorney General, 2007), at 5-7, online: <http://www.ag.gov.bc.ca/legislation/pdf/Green Paper.pdf>.

On the other hand, Ontario,[75] Saskatchewan[76] and New Brunswick[77] opted for a 15 year ultimate limitation when enacting their new limitations regimes, and the Uniform Law Conference has recommended that same length.[78]

Overseas, the U.K. Law Commission recommended that the ultimate limitation should be 10 years, except for personal injury cases, which should have no limit at all.[79] The Queensland Law Reform Commission recommended a ten year period,[80] and the Law Reform Commission of Ireland twelve years.[81] The Law Reform Commission of Western Australia recommended an ultimate limitation of 15 years.[82]

The jurisdictions also provide for various exceptions to the ultimate limitation. The Ontario, Saskatchewan and New Brunswick ultimate limitations are subject to an exception for any claim for conversion of property against a purchaser of the property for value acting in good faith, in which case a two year ultimate limitation applies.[83] In Saskatchewan, a second exception creating a two year ultimate limitation applies to a claim based on an act or omission that causes or contributes to the death of an individual. The B.C. Act provides a six year ultimate limitation for hospitals, and hospital employees acting in the course of their employment, for negligence, and medical practitioners for professional negligence or malpractice.[84]

As the Uniform Law Conference (and others) note, "a decision as to the length of this period is arguably arbitrary".[85] Although a number of other law reform agencies have recommended a 10 year ultimate limitation, the Commission is persuaded by the reasoning of the Alberta Law Reform Institute, which suggested that a 15 year period is justified on the basis of

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[75] *Ontario Act*, *supra* note 6, s. 15.

[76] *Saskatchewan Act*, *supra* note 6, s. 7. In its 1997 report, the Law Reform Commission of Saskatchewan recommended against an ultimate limitation; among other things, the Commission argued (in relation to a 30 year ultimate limitation) that the evidentiary difficulties inherent in proving an old claim would act as a practical bar, and the few cases that may be successful may be those that justice and public opinion would regard as having merit: Law Reform Commission of Saskatchewan, *supra* note 44 at 25.

[77] *New Brunswick Act*, *supra* note 7, s. 5(1)(b).

[78] *Uniform Act*, *supra* note 2, s. 6.

[79] Law Commission (U.K.), *supra* note 66 at paras. 3.99-3.107. The Commission noted that there is a concern respecting the application of an ultimate limitation to a person with a disease with a long latency period. Asbestos related diseases, for example, can have a latency period of between 15 and 60 years: at para. 3.102.

[80] Queensland Law Reform Commission, *supra* note 35 at 90-91.

[81] Law Reform Commission (Ireland), *supra* note 67 at para. 5.58.

[82] Law Reform Commission of Western Australia, *supra* note 35 at paras. 7.54-7.55.

[83] *Ontario Act*, *supra* note 6, s. 15(3); *Saskatchewan Act*, *supra* note 6, s. 7(2); *New Brunswick Act*, *supra* note 7, s. 9. In Ontario and Saskatchewan, the limitation runs from the day on which the property was converted. In New Brunswick the limitation runs from the day the purchaser purchased the property; where the defendant is not a good faith purchaser the limitation is two years from the day on which the claimant ought to have known the identity of the person who has possession of the property, or fifteen years from the first conversion.

[84] *B.C. Act*, *supra* note 65, s. 8(1)(a) and (b).

[85] *Uniform Act*, *supra* note 2 at 4 (commentary on s. 6).

the peace and repose purposes of limitations legislation, by economic factors, and by evidentiary considerations.[86] In the Commission's draft report for consultation, we suggested that it would be desirable to strive for uniformity among jurisdictions within Canada, and noted that the 15 year period would be consistent with the ultimate limitations found in Ontario, Saskatchewan, and New Brunswick, as well as any other jurisdictions that adopt the recommendations of the Uniform Law Conference. The Commission received comments supporting the principle of an ultimate limitation, and supporting a 15 year period.[87] No respondents opposed the concept. The Commission considers that 15 years is a reasonable ultimate limitation. The exception in the Ontario, Saskatchewan and New Brunswick statutes in respect of claims for conversion of property against good faith purchasers is discussed in more detail in section K.6 below.

**RECOMMENDATION 7**

***The ultimate limitation should be 15 years.***

## E. EXCEPTIONS FROM THE ACT

As discussed above, the Commission recommends consistency with modern limitations regimes, so that the new Manitoba Act will apply to a claim pursued in court proceedings to remedy an injury that occurred as a result of an act or omission. This is the approach taken in Ontario and Saskatchewan and in the Uniform Act. Each of these three jurisdictions then excludes from the legislation's ambit certain types of claims. All exclude proceedings other than those brought in courts, as well as appeals, applications for judicial review, and applications for declaratory judgments. Ontario and Saskatchewan both have additional exclusions that are not found in the Uniform Act. They deal somewhat differently, for instance, with claims brought with respect to claims of aboriginal rights, and Saskatchewan excludes proceedings in the nature of an application and proceedings for a writ of habeas corpus.[88] Alberta excludes from its definition of 'remedial order' a declaration, the enforcement of a remedial order, judicial review and a writ of habeas corpus.[89]

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[86] ALRI Report, *supra* note 42 at 65-66.

[87] Joint submission by the Winnipeg Construction Association, the Association of Professional Engineers and Geoscientists of Manitoba, the Consulting Engineers of Manitoba, the Manitoba Association of Architects, the Association of Manitoba Land Surveyors and the Certified Technicians and Technologists Association of Manitoba (October 27, 2009). Respecting the general structure: submission by D. Hill (July 22, 2009); submission by P. Brett (September 16, 2009); submission by Manitoba Bar Association Aboriginal Law Section (November 2, 2009); submission by E. Brown (March 12, 2010).

[88] *Saskatchewan Act*, *supra* note 6, ss. 3(1)(b), 3(2)(d). Subsection 3(4) also provides that the Act does not apply to a claim that is subject to a limitation in another Act or regulation if the other Act or regulation so specifies.

[89] *Alberta Act*, *supra* note 5, s. 1(i).

The New Brunswick Act applies to any claim, but unlike the other Acts, there are no exclusions from this definition.[90] The Alberta Act excludes claims based on adverse possession of real property owned by the Crown,[91] which, as discussed later in this report, is not applicable in Manitoba.

In our draft report for consultation, the Commission agreed that the exceptions for appeals and proceedings for judicial review and writs of habeas corpus are appropriate. After further discussion, however, the Commission considers it unnecessary to identify appeals or proceedings for writs of habeas corpus. An appeal does not fall within the definition of "a claim to remedy an injury that occurred as a result of an act or omission". A claim relating to a proceeding for a writ of habeas corpus continues as long as the detention continues.[92] The Commission still takes the view that the Act should except proceedings for judicial review; unlike some other jurisdictions, Manitoba's *Court of Queen's Bench Rules* do not provide a specific limitation in respect of judicial review, so that these proceedings would be captured by the Act if not specifically excepted.

Proceedings for declaratory judgments and proceedings based on aboriginal rights are discussed in more detail below.

**RECOMMENDATION 8**

***The Act should not apply to a proceeding for judicial review.***

## 1. Declaratory Judgments

As outlined above, the Ontario and Saskatchewan Acts and the Uniform Act exclude proceedings for declaratory judgments. Ontario and Saskatchewan clarify that this applies to declaratory judgments "if no consequential relief is sought",[93] while Alberta excludes "a declaration of rights and duties, legal relations or personal status".[94] There is also a subtle difference in the treatment of declaratory judgments; the Saskatchewan and Ontario Acts provide that there is no limitation applicable to such claims, while the Uniform Act more simply provides

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[90] The New Brunswick Act does provide, however, that it does not apply to claims to which the *Real Property Limitations Act* applies, and that if there is a conflict between the Act and any other public Act of New Brunswick, the other Act prevails: *New Brunswick Act*, *supra* note 7, ss. 2(2), 4(1).

[91] *Alberta Act*, *supra* note 5, s. 2(4). This subsection also provides that the Act does not apply to a claim that is subject to a limitation provision in any other Act.

[92] D.A. Cameron Harvey, *The Law of Habeas Corpus in Canada* (Toronto: Butterworths, 1974); submission by T. Rattenbury (December 17, 2009).

[93] *Ontario Act*, *supra* note 6, s. 16; *Saskatchewan Act*, *supra* note 6, s. 15. The Manitoba Bar Association Aboriginal Law Section supported the inclusion of a similar provision: submission by Manitoba Bar Association Aboriginal Law Section (November 2, 2009).

[94] *Alberta Act*, *supra* note 5, s. 1(i).

that the Act does not apply to them.[95] The Alberta Act excludes declarations in its definition of remedial order.

The Alberta Law Reform Institute proposed that declaratory judgments be excluded from the application of limitations in its 1989 report, with the following comments:

> A declaration defines right-duty relationships, clarifies them and may recognize the existence of a right-duty relationship sufficient to justify granting a remedy. Declarations should not be subject to a limitations system. In the Report for Discussion, we excepted them on the basis that a declaration merely declares rights. While we continue to recommend this exception, we think it only fair that we do so recognizing the potential of the declaration for use to circumvent the limitation periods set out in the Act. Declarations constitute a growth area in the law, rendering the effect of their exception from the Act something of an unknown factor.[96]

The Commission shares the concern that proceedings for declarations may be used in attempts to circumvent the limitations in the Act. This is relevant both with respect to proceedings between private citizens and proceedings against the Crown. With respect to the Crown, there is strong authority for the principle that the Crown, unlike a private citizen, will not ignore a declaratory judgment. In *Franklin v. The Queen (No. 2)*, Lord Denning said:

> It is always presumed that, once a declaration of entitlement is made, the Crown will honour it. And it has always done so.[97]

As Hogg and Monahan explain:

> Declaration is a remedy that is available against the Crown. The absence of a coercive decree avoids the problem of commanding the Crown and enforcement against the Crown, which led the Courts to create Crown immunity from injunction, specific performance, mandamus and discovery. And yet the absence of a coercive decree is seldom a disadvantage when the Crown is the defendant, because public officials can usually be relied upon to obey the law once it has been declared by a Court.[98]

The Saskatchewan Court of Queen's Bench observed, in *Daniels v. Canada (Attorney General)*:[99]

> If the trial judge were to decide that the Crown breached a fiduciary duty or was guilty of breach of trust, or was unjustly enriched, with respect to the claims of the plaintiffs and that

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[95] *Uniform Act*, *supra* note 2, s. 2(c).

[96] ALRI Report, *supra* note 42 at 38.

[97] [1974] 1 QB 205 at 218.

[98] Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 27.

[99] 2003 SKQB 58, [2003] 6 W.W.R. 72.

> the plaintiffs suffered damages, it is inconceivable that the Crown would ignore the declaratory judgment.[100]

As well, in *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*,[101] the Alberta Court of Queen's Bench recently noted:

> Declarations have become a popular remedy in public law due to their flexible nature and the absence of restrictive technical requirements: Jones & de Villars at 756. The absence of coercive [effect] has not been seen as a problem in that it is expected that government and other public authorities will respect declaratory judgments of the courts: *ibid.*[102]

On the other hand, the Commission recognizes that governments may choose not to comply with declaratory judgments in certain circumstances, or to respond in ways that some may find unsatisfactory.[103] In any event, it is arguable that the use of proceeding for a declaratory judgment to obtain a remedy from the Crown that would otherwise be barred by a limitation undermines the principles that support the establishment of limitations.

Similar issues arise in the context of private disputes, and the courts have forestalled attempts to use declarations to circumvent limitations. In *Bailey v. Canada (Attorney General)*,[104] the plaintiff sought a declaration that a land transaction 'was not constituted legally'. The Ontario Superior Court of Justice observed that there is no limitation in the Ontario Act for "a proceeding for a declaration where no consequential relief is sought", but dismissed the plaintiff's application:

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[100] *Ibid*. at para. 45.

[101] 2009 ABQB 576, [2010] 2 W.W.R. 703.

[102] *Ibid*. at para. 33.

[103] See for example, *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. The Supreme Court of Canada declared that the conduct of the Government of Canada in the interrogation of Khadr, a Canadian citizen held by the U.S in Guantanamo Bay, Cuba, had breached Khadr's *Charter* right to liberty and security of the person, and that Khadr was entitled to a *Charter* remedy. The Supreme Court overturned an order that the government request Khadr's repatriation, instead allowing the government to choose the appropriate means to remedy the breach: "In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. … The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to … grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*." at paras. 46-47. The Government of Canada's response was to seek assurances from the U.S. Government that any evidence shared with U.S. authorities as a result of interviews of Khadr by Canadian agents or officials would not be used against him: Canada, Minister of Justice, "Statement by Justice Minister Rob Nicholson Regarding the Supreme Court of Canada Decision on Omar Khadr" (February 16, 2010), online: <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32482.html>. In *Khadr v. Canada (Prime Minister)*, 2010 FC 715, the Federal Court held that Canada had not cured its breach of Khadr's *Charter* rights and that Canada must provide an effective remedy after giving Khadr an opportunity to be heard. The Federal Court of Appeal stayed the enforcement of the judgment pending the conclusion of the Government's appeal: 2010 FCA 199.

[104] [2008] O.J. No. 4066 (QL).

> At its heart this aspect of the declaration seeks to challenge the validity of the 1994 transaction in which Cameco purchased the property from Bud's Auto. The time period for a direct attack on the 1994 property transaction has expired. … A declaration would accordingly be inappropriate: "[i]f a plaintiff could avoid the *Limitations Act* by the simple stratagem of asking for a declaration of a state of affairs that is not disputed, and then attaching remedial relief to that declaration, there would not be much left of the Act." (*Yellowbird v. Samson Cree Nation No. 444*, [2006] A.J. No. 721, 2006 ABQB 434, para. 38) [aff'd 2008 ABCA 270].
>
> …
>
> The fact … that any relief relating to the underlying property transaction is statute barred is an important factor for the court to consider in determining whether it should grant the declaratory relief sought. Granting a declaration would have the effect of permitting the Applicant to seek relief indirectly when it could not do so directly.[105]

Similarly, in *Daniels v. Mitchell*,[106] the Alberta Court of Appeal rejected an attempt to characterize an *in rem* order in a mortgage proceeding as a 'declaration' (as opposed to a 'remedial order' under the wording of the Alberta Act):

> I do not accept Mitchell's assertion that an in rem order obtained in a mortgage proceeding merely declares rights and duties and is therefore a "declaration" which is excluded from the definition of "remedial order": s. 1(i). …
>
> An order nisi does much more than define or declare the mortgagee's legal rights. It sets in motion a chain of events that, ultimately, permits the mortgagee to realize on his security. Its essence is remedial, not declaratory.[107]

In *Canadian Union of Public Employees v. Saskatchewan School Boards Assn.*,[108] the Saskatchewan Court of Queen's Bench noted that "[s]uffice it to say that the summary process available under *The Queen's Bench Rules* [for a declaration] cannot be utilized as a means to circumvent limitation periods that would apply to the same claims if made in a regular civil action".[109]

A court may apply equitable principles to deny an application for declaratory relief. A declaration must be pursued promptly. Even where no consequential relief is claimed, the court may exercise its discretion to refuse a declaration, "where, for example, there has been an

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[105] *Ibid*. at paras. 14, 18.

[106] 2005 ABCA 271, 371 A.R. 298.

[107] *Ibid*. at paras. 49-51.

[108] 2009 SKQB 332, 340 Sask.R. 102.

[109] *Ibid*. at para. 52.

unreasonable delay in bringing the application, or where the applicant has recourse to a more appropriate alternate remedy or where the issue in dispute is hypothetical or moot."[110]

On balance, it is the Commission's view that an exception should be made for proceedings for declaratory judgments where no consequential relief is sought, but that this should not create an avenue for circumventing limitations with respect to events that concluded decades ago. The exception should be limited to declarations of existing rights.

**RECOMMENDATION 9**

***The Act should not apply to a proceeding for a declaration of existing rights if no consequential relief is sought.***

## 2. Claims Based on Aboriginal Rights

Three of the provinces with modern limitations regimes, Alberta, Ontario and Saskatchewan, specifically address aboriginal claims. Each provides that the current limitations statute does not apply to aboriginal claims; instead, aboriginal claims are governed by the law that governed limitations before the current Act was enacted.

There are differences in approach among the three provinces. The Alberta Act provides that "[a]n action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people"[111] is governed by the previous *Limitation of Actions Act*,[112] rather than the current Act. The previous Act divides claims into a number of different categories, matched with four basic limitation periods of one, two, six and 10 years. For most tort claims the limitation is two years after the cause of action arose, for most contract claims it is six years after the cause of action arose, and for most equitable claims the limitation is six years after discovery of the cause of action. There is no ultimate limitation, rather than 10 years under the current Act.

The Ontario Act provides that it applies to claims other than "proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*",[113] and "proceedings based on equitable claims by aboriginal peoples against the Crown".[114] Like Alberta, aboriginal proceedings are

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[110] *Ibid.* at para. 23. The equitable doctrine of laches and acquiescence also applies: *Wewaykum Indian Band v. Canada* 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*]; *Manitoba Metis Federation, supra* note 23, paras. 336-342.

[111] *Alberta Act, supra* note 5, s. 13.

[112] R.S.A. 1980, c. L-15.

[113] *Ontario Act, supra* note 6, s. 2(1)(e).

[114] *Ibid*., s. 2(1)(f).

governed by the previous (pre-2002) Act,[115] which has no ultimate limitation. The current Ontario Act has a 15 year ultimate limitation.

The Saskatchewan Act, like Ontario's, provides that it does not apply to "proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*".[116] However, the Saskatchewan Act does not include the reference to equitable claims against the Crown. Proceedings based on aboriginal and treaty rights are governed by the previous (pre-2004) Act, which has no ultimate limitation,[117] while the current Act has a 15 year ultimate limitation.

The limitations set by provincial Legislatures have an effect on claims made against the federal Crown. The *Crown Liability and Proceedings Act*[118] provides, in section 32, that

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Further, section 39 of the *Federal Courts Act*[119] adopts provincial limitations legislation in respect of proceedings in the Federal Court and the Federal Court of Appeal:

> 39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.
>
> (2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

The Supreme Court of Canada has confirmed that statutes of limitations and the equitable doctrine of laches and acquiescence apply generally to claims based on aboriginal rights. In *Wewaykum Indian Band v. Canada*,[120] two First Nation bands in British Columbia each claimed the other's reserve land, based on alleged breaches of fiduciary duty by the federal Crown

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[115] *Ibid*., s. 2(2); *Limitations Act*, R.S.O. 1990, c. L.15.

[116] *Saskatchewan Act*, *supra* note 6, s. 3(2)(c).

[117] *Ibid*., s. 3(3); *The Limitation of Actions Act*, R.S.S. 1978, c. L-15.

[118] R.S.C. 1985, C-50. The Commission thanks Kenneth J. Tyler of Borden Ladner Gervais LLP for his comments on an early draft of this section.

[119] R.S.C. 1985, c. F-7; see also s. 50.1.

[120] *Wewaykum*, *supra* note 110.

relating to clerical errors made in the late 1800s and early 1900s. The Court held that the claims were barred by the expiry of the applicable British Columbia limitation periods, which were adopted as federal law by virtue of subsection 39(1) of the *Federal Court Act*.

The Supreme Court held as well that provincial statutes of limitations may apply as provincial law to aboriginal claims, in *Canada (Attorney General) v. Lameman*,[121] an action against the Alberta government claiming breach of fiduciary duty, fraudulent and malicious behaviour and treaty breach. The limitations established in Alberta legislation applied to the claims:

> This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:
>
> > Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.[122]

There may be an argument that, given that the majority of aboriginal claims are brought against the federal government, it is not appropriate for provincial Legislatures to enact special limitations rules for these claims. However, aboriginal claims with the potential for far-reaching consequences do involve the provincial Crown,[123] and it remains open to the federal government to legislate in this area should it choose to do so.

The Commission also recognizes that the law with respect to the reach of provincial limitations statutes is unsettled, particularly with respect to constitutional challenges and claims of aboriginal title.[124] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*,[125] the Manitoba Court of Appeal held that *The Limitation of Actions Act* did not apply to bar a claim for a declaration of constitutional invalidity. The trial court had dismissed claims by the MMF and

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[121] 2008 SCC 14, [2008] 1. S.C.R. 372 [*Lameman*].

[122] *Ibid*. at para. 13. Since the current Alberta *Limitations Act* provides that an action brought by an aboriginal people against the Crown for a breach of fiduciary duty is subject to the limitations in the previous Act, the applicable limitations were those dealing with actions for the recovery of money or for an account, actions grounded on accident, mistake or other equitable ground of relief, and any other action not specifically provided for.

[123] For example, *Manitoba Metis Federation*, *supra* note 23. As well, the Sagkeeng First Nation filed a claim against the federal and Manitoba governments on June 8, 2007, seeking a number of declarations, including a declaration that the First Nation has unextinguished aboriginal title over its traditional land use area falling outside the boundaries of Treaty 1: MBQB File No. CI07-01-52308.

[124] See Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L. Rev. 301.

[125] *Manitoba Metis Federation*, *supra* note 23.

individual plaintiffs for declarations relating to the loss of a land base which they asserted they were to have received under the *Manitoba Act, 1870*,[126] including declarations that certain federal and provincial enactments were *ultra vires*.[127] It was argued by the plaintiffs at trial that limitations do not apply to a constitutional challenge, and the Manitoba government, while submitting that the policy behind limitations should apply to constitutional cases, conceded that "it is unlikely that a provincial statute can remove the right to a constitutional remedy".[128] However, MacInnes, J. dismissed the action, holding that the Manitoba *Limitation of Actions Act* applied to bar the claim, adding:

> If I am incorrect in that conclusion, it is my view that the only aspect of the plaintiffs' action that would not be statute barred is their request for a declaration pertaining to the constitutional validity of the enactments … including the effect of such legislation upon the plaintiffs' rights as claimed; that is, a declaration as to whether those enactments were *ultra vires* the Parliament of Canada and/or the Legislature of Manitoba respectively.[129]

The Manitoba Court of Appeal upheld the trial court's 'alternative ruling' above, holding that the claim for a declaration of invalidity was not statute barred. The court distinguished between a claim for a declaration of invalidity in support of extrajudicial relief and a claim for a personal remedy, such as damages:

> ...the type of relief sought has a significant impact upon whether or not statutory limitation periods will apply to particular constitutional claims. Limitation periods apply to personal actions for constitutional remedies, but they do not apply to applications for declarations of constitutional invalidity of a law".[130]

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[126] S.C. (33 Vict.), c. 3.

[127] Part of the plaintiffs' claim was that the Metis had enjoyed aboriginal title, which was extinguished by statute in 1870, and that in providing for land grants to children of the Metis, Canada intended to recognize the extinguishment of aboriginal title and to ensure the continuance of a land base for the Metis. Because the Metis were aboriginal and had enjoyed aboriginal title, the Crown was in a fiduciary relationship with the Metis children and owed them a fiduciary obligation in respect of the land grant: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2007 MBQB 293, [2008] 4 W.W.R. 402 at para. 559-559, aff'd *Manitoba Metis Federation*, *supra* note 110 [*Manitoba Metis Federation (Q.B.)*]. The trial court held that the Metis did not hold aboriginal title to land in 1870. The Court of Appeal found it unnecessary to decide whether aboriginal title existed "[g]iven my view that Aboriginal title is not a mandatory prerequisite to find a fiduciary obligation, and that any fiduciary obligation that may have existed was not breached in any case": *Manitoba Metis Federation*, *supra* note 23 at para. 474.

[128] *Manitoba Metis Federation (Q.B.), ibid.* at para. 413.

[129] *Ibid.* at para. 448. The court held further that, in any event, the doctrine of laches and acquiescence was applicable and was a successful defence to the claims.

[130] *Manitoba Metis Federation*, *supra* note 23 at para. 315.

Further, the court held that the doctrine of laches does not apply to claims involving the constitutional division of powers, although it may apply to other types of constitutional claims.[131] However, the constitutional claims raised by the plaintiffs were moot.

The question of whether a provincial limitation can apply to a claim of aboriginal title was recently addressed in British Columbia. In *Tsilhqot'in Nation v. British Columbia*,[132] the B.C. Supreme Court expressed the view (decided before *Lameman*) that the B.C. *Limitation Act* could bar claims of an unjustified infringement of an Aboriginal right other than Aboriginal title, but that as provincial legislation, it was constitutionally inapplicable to claims for unjustified infringement of Aboriginal title. The court noted that this question did not arise in *Wewaykum* because that action was brought in Federal Court, so that B.C. limitations law applied not as provincial law but as federal law under the *Federal Court Act*.

*Tsilhqot'in Nation* is under appeal, and the British Columbia Court of Appeal has observed that "clarification of the scope of aboriginal title is likely to come from that process".[133] As well, *Tsilhqot'in Nation* was decided before *Lameman*. The claim in *Lameman* did not involve aboriginal title, and no constitutional issue was raised, so a number of questions are yet to be resolved.

The Commission received a submission that the exemption of aboriginal claims from the limitations established in the new Act is "appropriate and essential, given the *sui generis* nature of aboriginal and treaty rights claims that are being litigated",[134] and that to limit historical claims would be contrary to the intent of the *Constitution Act, 1982*. However, the Commission agrees with the views expressed recently by the courts that the principles underlying the scope of limitations are equally applicable to aboriginal claims and that where a claim is discoverable, it is reasonable to expect that it be pursued promptly. Where a claim could not reasonably have been discovered, the Commission is persuaded that a longer ultimate limitation of 30 years is justified in respect of aboriginal claims.[135]

The Commission is of the view that it is appropriate that no limitation applies with respect to claims of aboriginal title.

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[131] *Ibid.* at para. 347-348. In *obiter*, the court was inclined to the view that the doctrine of laches applies to cases involving constitutional interpretation.

[132] 2007 BCSC 1700, [2008] 1 C.N.L.R. 112.

[133] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107, [2008] 10 W.W.R. 669 at para. 29, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 222. This case was a constitutional challenge to the validity of an order to cease logging made under provincial forestry legislation. The Okanagan Indian Band appealed from an order severing trial of aboriginal rights issues from aboriginal title issues, with the trial of the aboriginal rights issues to proceed first. The Band argued that the severance order deprived it of its central defence of aboriginal title. The Court of Appeal dismissed the appeal, finding that the disparity between the evidence required to decide the two issues provided the judge with a *prima facie* basis for the exercise of discretion to sever.

[134] Submission by Manitoba Bar Association Aboriginal Law Section (November 2, 2009).

[135] As in the current *Manitoba Act*, *supra* note 1, ss. 7(5), 14(4). While aboriginal claims may affect the rights of non-government parties, the Commission takes the view that the limitation should be consistent.

**RECOMMENDATION 10**

***The ultimate limitation should be 30 years in respect of a proceeding based on***

- ***existing aboriginal and treaty rights that are recognized and affirmed in the* Constitution Act, 1982*; and***
- ***an equitable claim by an aboriginal people against the Crown.***

**RECOMMENDATION 11**

***No limitation should apply to a claim of aboriginal title.***

## F. RESIDUAL DISCRETION

### 1. Extending a Limitation

Some commentators have suggested that if an ultimate limitation is to be enacted, it is desirable to give the Court the necessary flexibility within the limitations statute to alleviate what might be unnecessarily harsh results in individual circumstances.

The Queensland Law Reform Commission, for example, recommended that:

> … there should be a judicial discretion to extend the limitation period in the interests of justice if the prejudice to the defendant in having to defend an action after the expiration of the limitation period and the general public interest in the finality of litigation are outweighed by other factors.[136]

None of the modern Canadian limitations regimes, however, have included such discretion. The general consensus in Canada appears to be that permitting courts to waive or extend limitations creates too much uncertainty. The comments of the Saskatchewan Department of Justice are typical:

> Introduction of a substantial discretionary element would leave limitations law in an unpredictable state. Without a strong argument in favour of the use of discretion, this approach should be abandoned.[137]

[136] Queensland Law Reform Commission *supra* note 35 at 104.

[137] Saskatchewan Department of Justice, *supra* note 44 at 3.

Even the New Brunswick Branch of the Canadian Bar Association, which recommended the adoption of a residual court discretion, acknowledged that:

> some of our members have serious reservations about such a change, due to the potential for uncertainty and lack of predictability which might result… . CBANB see this as the most difficult issue to be dealt with in this law reform initiative.[138]

The Commission is not persuaded that there is sufficient reason to leave the court any residual discretion to extend a limitation where no proceeding has been commenced within the limitation. Permitting any discretion simply invites applications to extend, unnecessarily increasing both the burden on the courts and the cost and unpredictability of litigation. The potential difficulties created by such a provision are too great to make additional discretion desirable, and the flexibility built into the new limitations regime is sufficiently broad in any event.

**RECOMMENDATION 12**

***The Act should not retain residual discretion in the court to extend a limitation.***

## 2. Amending a Pleading

As discussed in section B, the current Act allows a court to grant leave to bring an action after a limitation has expired, up to one year after discovery of the material facts on which the action is based. The courts currently have some additional discretion in respect of limitations. Where a pleading has been filed within a limitation, Queen's Bench Rule 5.04(2) permits parties to be added, deleted or substituted at any stage of the proceeding "unless prejudice would result that could not be compensated for by costs or an adjournment".[139] Similarly, Rule 26.01 grants the court the general power to grant leave to amend a pleading on such terms as are just, again unless prejudice would result that could not be compensated by costs or an adjournment.[140]

While this is not evident from a reading of *The Limitation of Actions Act*, the changes to a pleading referred to in the Rules may be made after the expiry of the applicable limitation. If the applicant can demonstrate 'special circumstances' justifying the amendment, an amendment may create a new cause of action, although Manitoba decisions allowing such amendments are not

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[138] David G. O'Brien, "Reforming Limitations in New Brunswick: A Submission to the Government of New Brunswick", Canadian Bar Association, New Brunswick Branch (November 15, 2006) at 29, online: < http://www.cba.org/NB/pdf/RFLNB.pdf>.

[139] *Court of Queen's Bench Rules*, Man. Reg. 553/88.

[140] *Ibid*.

common.[141]

The special circumstances doctrine developed at common law in Manitoba and in other provinces as a method of interpreting the Rules following the decision of the Supreme Court of Canada in *Basarsky v. Quinlan*.[142] As the Ontario Court of Appeal has explained:

> This common law doctrine gradually came to be applied to motions brought under Rule 26 and Rule 5 of the *Rules of Civil Procedure* to amend pleadings or add parties after the expiry of a limitation period. …
>
> Neither of these rules refers specifically to the expiry of a limitation period or to the doctrine of special circumstances. However, following the line of cases that began with *Basarsky v. Quinlan*, these rules have been interpreted to allow a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where special circumstances exist, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment
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> ...
>
> … it is only the interpretation of the Rules by application of the common law that has incorporated the doctrine of special circumstances to extend limitation periods by adding parties or claims after the expiry of a limitation period.[143]

In *Miller v. Jaguar Canada Inc*., the Manitoba Court of Appeal explained the underlying principles as follows:

> It is now well recognized that where the factual underpinnings in the statement of claim disclose the facts and issues upon which the proposed amendments can be based (the factual foundation), amendments will generally be allowed so long as any prejudice to the

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[141] See *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells* (1990), 63 Man. R. (2d) 248 (Man. C.A) (allowing an amendment of a statement of defense to allege contributory negligence); *Baer v. Hofer* (1991), 73 Man. R. (2d) 145 (Man. C.A.) (allowing a second amendment of a statement of claim, even if it created a new cause of action); *Kozak v. Dauphin (Town)* (1993), 86 Man.R. (2d) 1 (Q.B.) (disallowing the addition of a defendant where special circumstances did not exist); *Miller v. Jaguar Canada Inc*. (1997), 123 Man. R. (2d) 161 (Man.C.A.) (disallowing amendments to a statement of claim that would create a new cause of action with no existing factual underpinning where special circumstances did not exist); *J-Sons Inc. v. N.M. Paterson & Sons Ltd*., 2009 MBQB 263, [2010] 5 W.W.R. 750 (allowing amendments to a statement of claim that did not introduce a new cause of action; disallowing amendments that did introduce a new cause of action with no factual underpinnings); *Arctic Foundations of Canada Inc. v. Mueller Canada Ltd*., 2009 MBQB 309, [2010] 6 W.W.R. 732 (disallowing amendments to a statement of claim that would create a new cause of action with no existing factual underpinning where special circumstances did not exist). In *Moran v. McIntosh* (2000), 147 Man.R. (2d) 251 (disallowing the addition of a defendant where special circumstances did not exist), the Court of Queen's Bench rejected the argument that the Manitoba Court of Appeal decision in *Rarie v. Maxwell*, *supra* note 22, that Part II constitutes a complete discoverability code for Manitoba, precludes the court's ability to add a defendant after a limitation period has expired. "Rarie holds that the court can no longer apply the "judge made" discoverability rule to extend the accrual of a limitation period. It did not determine the court's ability to add a party to an action commenced within the limitation period", at para. 18.

[142] [1972] S.C.R. 380.

[143] *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401 at paras. 11-12, 24.

> opposite party can be equitably addressed by way of an award of costs and/or an adjournment. See Basarsky v. Quinlan, [1972] S.C.R. 380. If the amendments requested would permit a cause of action to be set up which, at the date of the amendment, would be barred because of the expiry of the limitation period, such an amendment may only be allowed under "special circumstances".[144]

Where a proposed amendment would create a new cause of action, the threshold is high, and the absence of prejudice and surprise are not equivalent to special circumstances. As explained in *Arctic Foundations of Canada Inc. v. Mueller Canada Ltd.*:

> However perennially relevant prejudice and surprise may be on a motion to amend pleadings, they do not on a motion like the one in the present case (involving a new cause of action which is otherwise statute barred) suggest or denote anything exceptional, peculiar or "special" in the plaintiffs' legal circumstance [so] as to explain or justify the plaintiffs' failure to comply with a well-known limitation period.
>
> ...
>
> An excessive emphasis on prejudice and surprise for the purposes of determining and discerning "special circumstances", could result in the failure to adequately distinguish what is different between motions to amend that do and do not give rise to new causes of action (and whose limitation dates are otherwise statute barred). Such a blurring of that distinction risks minimizing and diluting the high threshold implied in the adjective "special" used to qualify "circumstances".[145]

In *Joseph v. Paramount Canada's Wonderland*, the Ontario Court of Appeal held, in relation to the commencement of a statement of claim after the expiry of a limitation, that the common law doctrine of special circumstances no longer applies in Ontario since the enactment of the *Limitations Act, 2002*. The court referred to section 4 of the new Act, which provides for a basic limitation of two years unless the Act provides otherwise, reinforced by section 21, which provides that if a limitation period in respect of a claim against a person has expired, the claim may not be pursued by adding the person as a party to any existing proceeding.[146]

The Alberta, Saskatchewan and New Brunswick Acts and the Uniform Act take a different approach from that in Ontario, setting out rules under which a new claim or party may be added to a proceeding after the expiry of a limitation. The Saskatchewan provision is brief, providing that a new claim may be added or parties may be substituted if the claim "arises out of the same transaction or occurrence as the original claim ... and … the judge is satisfied that no

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[144] *Supra* note 141 at para. 8.

[145] *Supra* note 141 at paras. 51-54.

[146] *Supra* note 143.

party will suffer actual prejudice as a result of the amendment".[147] The Alberta, New Brunswick and Uniform Acts set out a more detailed list of factors for the court to consider.[148] For example, in Alberta, where the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued, the added claim must be related to the events described in the original pleading, and the defendant must have received, within the limitation applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he or she will not be prejudiced. The court must also be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the original claims. As explained by the Alberta Law Reform Institute:

> The exceptions address issues arising from differences of approach in procedural policy and limitations policy toward the addition of claims. Whereas limitations policy seeks to secure eventual peace and repose for defendants, the rules of civil procedure take a liberal approach to the addition of claims through new and amended pleadings because, for reasons of just adjudication and judicial efficiency, it is desirable to have all of the claims which result from related conduct, transactions and events adjudicated in a single civil proceeding. … Where an exception is operative, the defendant under a claim added in a proceeding is denied a limitations defence he would otherwise have. The exceptions are therefore restricted to the situations in which they are most needed to accommodate the civil procedure objective of permitting the adjudication of related claims in a single proceeding.[149]

The Alberta Court of Appeal considered these provisions in *W.R. v. Alberta (Attorney General)*,[150] explaining that their purpose was to relax the common law rule respecting the addition of new claims:

> [T]he Institute was trying to cure a problem like this example. Tort A was committed on January 3, 2004, and a suit for that tort was begun just in time on January 2, 2006. In March 2006, the same plaintiff decides to sue the same defendant for tort B, also committed on January 3, 2004. It is too late to issue a fresh statement of claim, and at common law an amendment to add tort B to the existing statement of claim is also barred. Before the new Act, such amendment disputes were often litigated, because the amendment would bypass the limitation period. The Institute recommended relaxing the common-law rule and allowing the amendment if torts A and B are related.[151]

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[147] *Saskatchewan Act*, *supra* note 6, s. 20. This wording is nearly identical to the "statutory predecessor" to section 20, which was section 30 of *The Queen's Bench Act*, 1998, S.S. 1998, c. Q-1.01. The only difference in the wording of the two provisions is that *The Limitations Act* refers to "a proceeding" while the former provision referred to "an action". See *Aubichon v. Canada (Attorney General)*, 2007 SKQB 406, 308 Sask.R. 128. Section 30 of *The Queen's Bench Act* was repealed by *The Limitations Consequential Amendment Act, 2004*, S.S. 2004, c. 16, s. 7(2).

[148] *Alberta Act*, *supra* note 5, s. 6; *New Brunswick Act*, *supra* note 7, s. 21, *Uniform Act*, *supra* note 2, s. 13.

[149] ALRI Report, *supra* note 42 at 81.

[150] 2006 ABCA 219, 62 Alta. L.R. (4th) 6.

[151] *Ibid*. at para. 35.

Similarly, the Saskatchewan Court of Appeal held, in relation to a predecessor section to the Saskatchewan provision with very similar wording, that the special circumstances doctrine had been replaced:

> Now, after the expiration of a limitation period, an applicant for an order to amend pleadings involving an addition or substitution of parties, no longer has to show "special" circumstances...
>
> … [t]he judge under the new enactment has an unfettered discretion to grant the application once the twofold threshold onus is met. He is constrained by only one rule: he must exercise that unfettered discretion judicially.[152]

On the other hand, the Saskatchewan provision does not allow a claim to be completely reinvented; in *Cameco Corp. v. Insurance Co. of the State of Pennsylvania*,[153] the Saskatchewan Court of Appeal found that an application to substitute both the plaintiff and the claim was a wholesale transformation of proceedings, such that it fell outside the scope of an amendment provision.

In *W.R.*, the Alberta Court of Appeal went on to interpret the section of the Alberta Act as "allowing amendments to add new related claims which could have been sued separately at the date of issue of the original statement of claim",[154] but not the addition of claims that were barred as of the original claim. Similarly, the Saskatchewan Court of Queen's Bench has held that section 20 of the Saskatchewan Act must be interpreted in a manner that is compatible with the other provisions of the Act, so that if the court is precluded from extending the time for bringing a claim, "an 'add on' claim arising out of the same transaction or occurrence is similarly statute barred. By its clear and literal meaning, s. 20 enables the court to extend the time for bringing a new claim in an existing action only where a limitation period expires after the original claim is commenced."[155]

The Commission agrees that providing discretion in the Act to permit an amendment to be made to an existing pleading to add a claim after the relevant limitation expires is distinguishable from providing discretion to extend a limitation so that a new proceeding may be commenced. Where a proceeding has already been commenced, the interests of judicial economy may justify the amendment of pleadings so long as there remains a fair opportunity for the other party to defend the claim. While the Alberta, New Brunswick and Uniform Act provisions are more specific, Saskatchewan courts appear to have had little difficulty in interpreting the

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[152] *Stockbrugger Estate v. Wolfe Estate*, [1987] 4 W.W.R. 759 (Sask. C.A.) at 762.

[153] 2008 SKCA 54, [2008] 6 W.W.R. 626.

[154] *Supra* note 150 at para. 49.

[155] *Aubichon v. Canada (Attorney General)*, *supra* note 147 at para. 23. The court held that section 20 did not apply because "no limitation period expired after the original claim was commenced and before the claim was amended", at para. 30. Instead, both the original claim and the proposed amendment were barred.

requirement that an amendment may only be allowed where no party will suffer prejudice,[156] and the Commission prefers the simpler Saskatchewan provision.[157] The Commission recommends a slight modification to retain the existing wording in the Queen's Bench Rules referring to 'prejudice that could not be compensated for by costs or an adjournment'.

**RECOMMENDATION 13**

***The Act should provide that notwithstanding the expiry of a limitation after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if***

- ***the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and***
- ***the judge is satisfied that no party will suffer prejudice as a result of the amendment that can not be compensated for by costs or an adjournment.***

## G. BURDEN OF PROOF

It is trite law that it is for the defendant to plead the limitation defence. As a defence it must be pleaded or the defendant cannot rely on it at trial.[158] But the question of who then bears the burden of proof of persuasion on that issue is a surprisingly obscure one, and few texts even touch upon it.

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[156] See, for example, *Stevenson Estate v. Bank of Montreal*, 2009 SKCA 105, 337 Sask.R. 203 (C.A.) (application to add a claim and a defendant denied on the basis of delay); *Cameco Corp. v. Insurance Co. of the State of Pennsylvania*, *supra* note 153 (amendments denied on the basis that the amendments and the original claim were conceptually and legally distinct matters; the proposed changes would create a wholly new proceeding rather than an amendment, and fell outside the scope of s. 20 of *The Limitations Act*); *Brown v. Standard Life Assurance Co*., 2006 SKQB 247, 282 Sask.R. 297 (amendment to include a claim for aggravated and punitive damages allowed; the defendant was aware of its contractual obligations and was involved in the litigation, the claims arose out of the same transaction or occurrence and the defendant was not prejudiced by the delay); *Murrell v. Moose Jaw Roman Catholic Separate School Division No. 22*, 2006 SKQB 158, 278 Sask.R. 247 (amendments to add third parties as defendants and to add new claims allowed; the claim arose out of the same transaction, the defendants and third parties retained a full and fair opportunity to meet the plaintiff's claims).

[157] See the discussion with respect to different interpretations that may be applied to the time limits set out by reference to "the time provided by law for the service of process" in section 6 of the *Alberta Act, supra* note 5, in *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304, 380 A.R. 195 at paras. 18-24. Although in that case the amendment was not barred under either possible interpretation, in the Commission's view the relevant factor is that the added third party defendant clearly was not prejudiced. The *New Brunswick Act, supra* note 7, s. 21, avoids the difficulty in interpretation found in Alberta by referring instead to a standard six month period.

[158] *Lacroix v. Dominique*, 2001 MBCA 122, 202 D.L.R. (4th) 121, 156 Man.R (2d) 262 at para. 18, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 477; *Cohen v. Jonco Holdings Ltd*., 2005 MBCA 48, [2005] 7 W.W.R. 212 at para. 56.

Intuitively, the common lawyer will be inclined to respond that 'he who asserts must prove', and to conclude that it should be for the defendant to bring himself or herself within the protection of the statute by showing that the cause of action was complete and actionable, or, as the case may be, that its actionability was known or discoverable, at a date so early that the limitation had expired before the statement of claim was filed.

The discussions that exist in texts do not, however, support this view. Mew, for example, states as follows:

> The burden is initially on the defendant to plead a limitation defence. That having occurred, however, the plaintiff will be required to show when time began to run or that some other basis for overcoming the limitation defence (for example, fraud, disability, waiver or estoppel) exists.[159]

It is not entirely clear whether this means that the plaintiff must show affirmatively that the action became viable (e.g. by the infliction of damage in a negligence claim) during the allotted span of years prior to actual commencement of the claim – or that the plaintiff must prove a negative (that is, that the cause of action did not become viable at some point in time prior to that period). On either view, it is a rejection of the intuitive response offered above.

*Halsbury* offers that "where the defendant has pleaded that the action is time-barred, the burden is on the claimant to prove that the relevant limitation period has not expired".[160] The leading case cited in support is the decision of the English Court of Appeal in *London Congregational Union Inc. v. Harriss & Harriss*.[161] That case was a subtle instance of negligence litigation, and if one concentrates solely upon the limitation issues raised, it is by no means clear that the law is as simple or straightforward as the summary in *Halsbury* suggests. In *London Congregational Union*, the Court of Appeal references the comments of Lord Pearce in *Cartledge v. E. Jopling & Sons, Ltd.*,[162] which were as follows:

> I agree with the judgments of the Court of Appeal … . I would only wish to add a gloss to what was said on the onus of proof in the case of the plaintiff South. I agree that when a defendant raises the Statute of Limitations the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years (for instance, the diagnosis by X-ray in 1953 of hitherto unsuspected pneumoconiosis), the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date. As, however, the judge found that South was in fact suffering from pneumoconiosis in 1950, the question of onus was not a deciding factor.[163]

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[159] Mew, *supra* note 52 at 95.

[160] *Halsbury's Laws of England*, 5th ed., vol. 68 (London: LexisNexis Butterworths, 2008) at para. 943.

[161] [1988] 1 All E.R. 15.

[162] *Supra* note 13.

[163] *Ibid*. at 784.

In *London Congregational Union*, the Court of Appeal analyses the effect of this passage.

> It seems to me that on this part of the case the submissions of the counsel for the defendants are correct and that the point is decided in favour of the defendants by the Court of Appeal in *Cartledge*'s case. The point was not argued in the House of Lords but no doubt was cast on the correctness of the decision. The onus lies on the plaintiffs to prove that their cause of action accrued within the relevant period before the writ. … [T]he plaintiffs have contended that if the judge had directed himself properly in accordance with the law laid down in *Cartledge*'s case on the evidence he must have come to the same conclusion. This contention was based on the passage in Lord Pearce's speech, cited above, in which Lord Pearce added a gloss to what had been said in the Court of Appeal by Harman and Pearson LJJ. Counsel for the plaintiff argued that the plaintiffs had proved an 'accrual of damage' within the six-year period before the writ by proving the existence of damage within that period and that, on tendering that proof, the burden passed to the defendants 'to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date'. I cannot accept this contention. It confuses the existence, or continued existence, of damage or its consequences with accrual of damage, which is the coming into existence of damage. In my judgment, the burden on a plaintiff is to show that, on the balance of probabilities, his cause of action accrued, ie came into existence, on a day within the period of limitation. If he shows that, then the evidential burden would, as stated by Lord Pearce, pass to the defendants to show, if they can, that the apparent accrual of the plaintiffs' cause of action was misleading etc.[164]

Finally, in *London Congregational Union*, Sir Denys Buckley explains:

> If, as I think, the burden of proof rests primarily on the plaintiffs, the decision must go the other way, that is to say on the basis that the plaintiffs have not discharged the primary burden of establishing that on the balance of probability the damp first reached the plaster later than 1 February 1971. It is regrettable, in my view, to decide this part of the case on a question of the burden of proof, particularly where, as it seems to me, apart from authority, the question appears to be at least a debatable one, but I think we are bound by the decision of this court in *Cartledge v. E Jopling & Sons Ltd* [1961] 3 All ER 482, [1962] 1 QB 189.[165]

The U.K. Law Commission noted that "under the current law it is not entirely clear who has the burden of proof on limitation",[166] although the Commission observed that the burden seems to be on the plaintiff. Similarly, the Queensland Law Reform Commission commented that, while "[t]he question of which of the parties to a dispute carries the onus of proving whether or not court proceedings were commenced within the relevant limitation period may be of

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[164] *Supra* note 161 at 30.

[165] *Ibid*. at 34.

[166] Law Commission (U.K.), *supra* note 66 at para. 5.29; Law Commission (U.K.), *Limitation of Actions* (Consultation Paper No. 151, 1998) at paras. 14.28-14.32, online: <http://www.lawcom.gov.uk/limitation_actions.htm>.

considerable significance to the outcome of the dispute",[167] the Australian cases are also "by no means clear"[168] on this point.

The proposed restructuring of the limitations regime to a two year discoverability limitation and fifteen year ultimate limitation affects the question of where the burden of proof appropriately lies. The Alberta Law Reform Institute recommended that the plaintiff should bear the burden of proof that the claim was brought within the two year limitation, while the defendant should have the burden of proving that the claim was not brought within the ultimate limitation.[169] The Alberta Institute's recommendation was later supported by the Queensland Law Reform Commission, the Law Reform Commission of Western Australia, and the U.K. Law Commission. As the Law Reform Commission of Western Australia explained:

> The issue of limitation having been raised, it will be for the plaintiff to prove that the discovery period has not expired. This is logical because the discovery rule depends on establishing the date on which the plaintiff first knew that the injury had occurred, that it was in some degree attributable to the conduct of the defendant, and that it was sufficiently serious to warrant bringing proceedings. All these are matters peculiarly within the plaintiff's knowledge, and it would be unreasonable to cast on the defendant the burden of proving what the plaintiff did or did not know at any point in time. Moreover, the necessary evidence will usually be more available to the plaintiff than to the defendant.[170]

This view is consistent with the comments of Sopinka, J. regarding the burden of proof with respect to discoverability in *M. (K.) v. M. (H)*:

> The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not.[171]

On the other hand, the Alberta Institute and the U.K. and Australian Commissions considered it logical that the burden of proof with respect to the expiry of the ultimate limitation should be placed with the defendant, who is best placed to know the date of the act or omission

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[167] Queensland Law Reform Commission, *supra* note 35 at 75.

[168] *Ibid.*

[169] ALRI Report, *supra* note 42 at 74.

[170] Law Reform Commission of Western Australia, *supra* note 35 at para. 8.8.

[171] *Supra* note 19 at para. 114. This principle has been applied in subsequent decisions respecting discoverability: *Manitoba Metis Federation*, *supra* note 23 at para. 290; *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 at para. 137, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 472, [2008] 1 S.C.R. (v); *Mikisew Cree First Nation v. Canada*, 2002 ABCA 110, 2 Alta. L.R. (4th) 1 at para. 83; *Gamey v. Langenburg (Town)*, 2010 SKCA 11, 343 Sask.R. 258 at paras. 33-38.

that is the subject of the claim, and who arguably should carry the burden with respect to a defence as a general principle.

The recommendation of the Alberta Law Reform Institute was implemented in subsection 3(5) of the Alberta Act. The Ontario and Saskatchewan Acts have taken a different approach, however. Both Acts contain a subsection similar to the following Ontario wording (there is no similar provision in the Uniform Act or the New Brunswick Act):

> A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.[172]

The Commission considers that this opportunity should be taken to provide a clear and unequivocal statutory answer with respect to the burden of proof. The Commission agrees with the reasoning of the Alberta Institute and the U.K. and Australian Commissions that it is appropriate for the plaintiff to carry the burden of proof with respect to issues of discoverability, while the defendant should carry the burden with respect to the ultimate limitation period. In the Commission's view, this is more clearly and effectively accomplished by the wording of the Alberta Act.

**RECOMMENDATION 14**

***The Act should provide that***

- ***the claimant has the burden of proving that the claim was brought within two years of discovery of the claim; and***
- ***the defendant has the burden of proving that the claim was not brought within 15 years of the day on which the act or omission on which the claim is based took place.***

## H. CONTRACTING OUT

Under the common law, there is nothing to prevent parties agreeing not to enforce a limitation, or agreeing to a shorter period than would otherwise apply.[173] The Alberta Law Reform Institute recommended that parties be permitted to either extend or shorten limitations, relying on such contractual doctrines as unconscionability to prevent vulnerable plaintiffs from

[172] *Ontario Act*, *supra* note 6, s. 5(2); *Saskatchewan Act*, *supra* note 6, s. 6(2).

[173] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 at para. 88; Mew, *supra* note 52 at 26.

unfair agreements.[174]

This recommendation was not adopted in Alberta, and it has not been adopted in other Canadian jurisdictions since.[175] Modern limitations regimes recognize the potential unfairness inherent in allowing parties to shorten limitations by contract, but for the most part recognize the utility in permitting agreement on lengthening, or waiving, limitations that would otherwise apply. Such an approach minimizes the possibility that plaintiffs will be forced to initiate litigation simply to preserve their right to bring a claim when a limitation is drawing to a close.

This is the approach that has been implemented in Alberta[176] and Saskatchewan,[177] and in the Uniform Act.[178] Ontario's new legislation initially prohibited any agreement to either extend or reduce a limitation, but this was amended in 2006 to permit agreements to extend limitations under most circumstances, and agreements to reduce them in contracts that do not involve 'consumers'.

The Commission agrees with the comments of the Uniform Law Conference on this subject:

> The prohibition on shortening a limitation period in no way precludes the ability to define by contract the underlying obligation, the duration of the obligations, the process for initiating a claim, or the range of remedies to which a claimant may be entitled.
>
> Survival of warranties and indemnities, verification agreements, notices of defect or claim, for example, are not caught by the prohibition on shortening the period of time within which a claim must be brought.[179]

The Commission considers it desirable to permit parties to agree to lengthen limitations, but not to shorten them.

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[174] ALRI Report, *supra* note 42 at 90. However, in a subsequent report, *Limitations Act: Standardizing Limitation Periods for Actions on Insurance Contracts* (Report No. 90, 2003), the Alberta Law Reform Institute recommended that "[i]nsurance companies should not be able to contractually impose shorter limitation periods in insurance contracts" at 35.

[175] New Brunswick's Bill 28, *Limitation of Actions Act*, 3d Sess., 56th Leg., 2008 as introduced in the Legislative Assembly, did provide that "Nothing in this Act precludes any person from entering into an agreement that has the effect of extending or shortening a limitation period established by this Act" (s. 26). Bill 28 was amended in Committee of the Whole and this section was deleted: *New Brunswick Act*, *supra* note 7.

[176] *Alberta Act*, *supra* note 5, s. 7, as am. by *Justice Statutes Amendment Act*, S.A. 2002, c. 17, s. 4(4), proclaimed into force April 1, 2006.

[177] *Saskatchewan Act*, *supra* note 6, s. 21.

[178] *Uniform Act*, *supra* note 2, s. 14.

[179] *Uniform Act*, *supra* note 2 at 10 (commentary on s. 14); *Edmonton (City) v. TransAlta Energy Marketing Corp*. 2008 ABQB 426, 96 Alta. L.R. (4th) 292 at para. 83. The New Brunswick Branch of the Canadian Bar Association strongly supported the approach of the *Uniform Act*: O'Brien, *supra* note 138 at 34. See also the discussion in Caplan & Gray, *supra* note 33 at 24-27.

**RECOMMENDATION 15**

***Parties should be permitted to agree to lengthen, but not to shorten, limitations.***

## I. CONFLICT OF LAWS

Before the 1994 decision of the Supreme Court of Canada in *Tolofson v. Jensen*,[180] there was some uncertainty about whether limitations legislation was procedural or substantive, and it was generally considered to be procedural. However, in *Tolofson*, the Supreme Court definitively held that limitations provisions are substantive.

The effect of classifying limitations legislation as either procedural or substantive is, for current purposes, to determine whether the law of the province, or of another jurisdiction, will apply in circumstances where issues of conflict of laws arise. In *Tolofson v. Jensen*, for example, a British Columbia resident was involved in a car accident in Saskatchewan with a Saskatchewan resident. When the plaintiff brought an action eight years later, he brought it in British Columbia, because Saskatchewan law required it to be brought within 12 months of the accident. The Supreme Court held that the action was barred by the law of Saskatchewan, because limitations law is substantive.[181]

Prior to the decision in *Tolofson*, the Alberta Law Reform Institute had recommended that Alberta's new limitations legislation should include a provision requiring Alberta courts to apply Alberta limitations law, "notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction".[182] The reasoning of the Institute was, in part, as follows:

> S. 12 is based on two underlying policy determinations: first, that limitations law is properly classified as procedural law; and second, that courts should, as a general proposition, apply local procedural law.[183]

Alberta duly enacted the recommended section in 1996, notwithstanding the intervening *Tolofson* decision. When Saskatchewan revised its limitations legislation in 2004, it adopted a similar provision.[184] In a 2005 decision, *Castillo v. Castillo*,[185] however, the Supreme Court of

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[180] *Supra* note 173.

[181] However, in *Yugraneft Corp. v. Rexx Management Corp*., 2010 SCC 19, 318 D.L.R. (4th) 257, the Supreme Court held that a provincial limitation may apply to the recognition and enforcement of foreign arbitral award awards as a "rule of procedure" as that term is used in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43. The court held that for the purposes of the convention, the characterization of limitations in Canadian law as substantive or procedural is immaterial.

[182] ALRI Report, *supra* note 42 at 98.

[183] *Ibid*.

[184] *Saskatchewan Act*, *supra* note 6, s. 27.

[185] 2005 SCC 83, [2005] 3 S.C.R. 870.

Canada held that the provision was ineffective to accomplish what the Alberta Law Reform Institute had suggested. The Court held that the limitations law of California, necessarily being substantive, had extinguished the plaintiff's claim after one year. The Alberta legislation, notwithstanding providing for a two year limitation, could not, and did not even purport to, revive the claim.

Following the *Castillo* decision, the Alberta Legislature amended its *Limitations Act* to provide a two-stage test:

> 12(1) The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.
>
> (2) Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.[186]

This is essentially the approach adopted by New Brunswick in its legislation.[187] Ontario adopted a different approach when it introduced its new limitations legislation in 2002, simply codifying the existing common law:

> For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.[188]

This same approach was recommended by the Uniform Law Conference in the Uniform Act.[189] The Commission is persuaded that this is the simplest, most straightforward, and best manner of proceeding.[190]

**RECOMMENDATION 16**

***The Act should provide that, for conflict of laws purposes, the limitations law of Manitoba and any other jurisdiction is substantive.***

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[186] *Limitation Statutes Amendment Act*, S.A. 2007, c. 22, s. 1, amending the *Alberta Act*, *supra* note 5, s. 12. In *Yugraneft Corp. v. Rexx Management Corp.*, the court commented on the revised s. 12, indicating no reservations, *supra* note 181 at para. 38.

[187] *New Brunswick Act*, *supra* note 7, s. 24.

[188] *Ontario Act*, *supra* note 6, s. 23.

[189] *Supra* note 2, s. 15.

[190] The Commission also made this recommendation in its recent report on *Private International Law* (Report No. 119, 2009) at 13.

## J. RUNNING OF TIME

### 1. Demand Obligations

#### (a) Basic Limitation

The common law rules for the running of time for limitations applying to demand obligations can lead to severe and unexpected results. At common law, a cause of action based on a demand obligation accrues when the debt is made, rather than when the creditor demands payment and the debtor fails to pay (and the wrong occurs). As a result, the limitation applying to the debt may expire before a demand for payment is made.

The Alberta Law Reform Institute noted this problem in its report on limitations, recommending that the ultimate limitation for a claim based on a demand obligation begin when a default in performance occurs after a demand for performance is made.[191] The Institute's recommendation was implemented in the Alberta Act, and the Saskatchewan, Ontario and Uniform Acts contain similar provisions (although with different wording in the Saskatchewan Act and the original Ontario Act, as discussed below).

The Institute did not consider that it was necessary to recommend a similar provision with respect to the basic limitation, observing that "[t]he practical result is that the ultimate period will probably never run against a demand obligation, for when [the creditor] demands payment, if [the debtor] fails to pay, [the creditor] will know that he is being harmed and the 2-year discovery period will begin to run".[192] The British Columbia Law Institute, on the other hand, felt that both limitations should be addressed, recommending that the basic limitation begin to run when a default in performance occurs following a demand, and that the ultimate limitation begin from the date that the demand obligation is first created.[193]

The Ontario Act did not deal the commencement of the basic limitation in respect of demand obligations when it was enacted. However, the Act has since been amended on this point, following the Ontario Court of Appeal decision in *Hare v. Hare*.[194] In *Hare*, the appellant had loaned her son $150,000 in 1997, evidenced by promissory note. No payments were made after 1998, and the appellant made a demand for payment in 2004, without success. The court held that the interpretation of the Act that was consistent with established law was that 'default', in relation to a demand note, is the failure to repay on the day that a demand note is delivered, not the day that there is a failure to pay once a demand for repayment is made.

The court observed that several commentators had suggested that the new Ontario Act should be interpreted as changing the law so that the basic limitation commenced at the date of default of payment, and that the Alberta Act had been interpreted in that manner. However, the

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[191] ALRI Report, *supra* note 42 at 70-71.

[192] *Ibid.* at 71.

[193] British Columbia Law Institute, *supra* note 65 at 26-27; in this case the Institute recommended an ultimate limitation of 30 years.

[194] *Supra* note 12.

majority felt that the Legislature must not have intended limitless liability, and distinguished the Alberta Act on the basis that the definition of 'injury' in that Act includes 'non-performance of an obligation'.[195] The majority explained:

> First, to accede to the appellant's submission, I would have to accept that the legislature intended to change the law relating to demand notes by means of the new Limitations Act, a piece of legislation that is directed at limitation periods, not commercial law. In my view, it would require very clear language evidencing an intention on the part of the legislature to impair existing rights before such a construction, which would overturn centuries' old jurisprudence, would be warranted.[196]

In response, the Ontario Legislature amended the Act in 2008.[197] In relation to the running of the two year discovery period, new subsection 5(3) provides:

> 5. (3) For the purposes of subclause (1)(a)(i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.[198]

In *Bank of Nova Scotia v. Williamson*,[199] the Ontario Court of Appeal observed:

> This amendment demonstrates the intent of the legislature that for all demand obligations, a demand is a condition precedent for the commencement of the limitation period. The legislature may be taken to have recognized that this puts the creditor in the position to extend the limitation period by failing to make a prompt demand. However, it creates more certainty in establishing the commencement date for the limitation period.[200]

The New Brunswick Act, which was introduced in the Legislature and enacted after the *Hare* decision, includes a provision for the commencement of the basic limitation with similar effect. Section 11 provides that "[n]o claim that is based on a failure to repay a demand loan shall be brought after the earlier of (a) two years from the day default in repayment occurs after the demand for repayment is made ...".[201]

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[195] *Ibid.* at paras. 32-41.

[196] Ibid. at para. 39.

[197] *Budget Measures and Interim Appropriation Act, 2008 (No. 2)*, S.O. 2008, c. 19, Sch. L; the amendment also added a provision respecting the application of the *Limitations Act, 2002* to claims about payments made to the government or a public authority for which it is alleged there was no legal authority.

[198] *Ontario Act*, *supra* note 5, s. 5(3).

[199] 2009 ONCA 754, 97 O.R. (3d) 561.

[200] *Ibid*. at para. 19. The Court affirmed that the section applies to third party demand guarantees.

[201] *New Brunswick Act*, *supra* note 7, s. 11.

The Commission shares the view that the basic limitation should not commence in respect of a demand obligation until there has been a demand for payment and a corresponding default.[202] As the Ontario Bar Association and several other commentators have noted, non-arm's length lenders, those lending money to family for the purchase of a home or the launch of a business, for example, are those most likely to be caught unaware by an earlier limitation, as they may not require payments to be made under the loan for a lengthy period.[203] The Act should be clear on this point. The Commission prefers the Ontario approach, which integrates this concept with the two year discovery period, so that an 'injury' in respect of a demand obligation is the day that a default in performance occurs, once a demand for payment is made.

**RECOMMENDATION 17**

***For the purposes of the basic limitation, the day on which an injury occurs, in relation to a demand obligation, should be the day on which a default in performance occurs once a demand for performance is made.***

[202] The Commission received a suggestion that the new provisions for the commencement of a limitation applying to a demand obligation should be retroactive, to keep alive, or even revive, outstanding arrangements: submission by E. Brown (March 12, 2010). The Commission agrees with Mr. Brown that there may be a large number of interfamily and intergenerational arrangements involving demand obligations that were issued with no interest payable or payable after demand only, and in which the creditors would, if asked, say that they wished to keep the payment obligation alive years after the original transfer. However, other demand obligations may have been structured in reliance on the existing law, and, in the absence of a compelling justification, the Commission is reluctant to recommend retroactivity to "revive" agreements whose limitations have expired at the commencement of the new Act. However, as with other types of claims, the new Act is intended to apply to demand obligations whose limitations have not expired at the commencement of the new Act. Under the transitional provisions in section N, below, a claim made after the commencement of the new Act in respect of an injury that was not discovered before the commencement of the new Act is subject to the new limitations. As a result, the new limitations will apply to a demand obligation that exists before the commencement, where no demand for performance has been made. Where a demand for performance has been made before the commencement, the limitation will be the earlier of two years from the commencement of the new Act and the day on which the former limitation period would have expired (which would generally be six years from the creation of the demand obligation). Where the limitation period in respect of a demand obligation expires under the current Act before the new Act commences, the new Act will not apply.

[203] Letter from James Morton, President, Ontario Bar Association, to Hon. Michael Bryant, Attorney General of Ontario (February 26, 2007), online: <http://www.oba.org/en/pdf/Limitations_Letter-Final.pdf>; Caplan & Gray, *supra* note 33 at 20; Chapman, *supra* note 32 at 302. This issue has been addressed in the U.K. by legislative amendment, and reform has been recommended by the law reform bodies of Western Australia, Queensland, New South Wales and Singapore: see Singapore Academy of Law, Law Reform Committee, *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) at paras. 94-137, online: <http://www.agc.gov.sg/publications/docs/Report_of_LRC_on_Review_of_Limitation_Act_February2007.pdf>.

### (b) Ultimate Limitation

In *Hare*, the Ontario Court of Appeal also addressed ultimate limitations for demand obligations. The relevant Ontario provision had read:

> 15(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,
>
> …
>
> (c) in the case of a default in performing a demand obligation, the day on which the default occurs.[204]

The court commented that "[i]t has been suggested that the ultimate 15 year limitation period provided by s. 15 of the new Limitations Act resolves the problem that a claim could exist in perpetuity",[205] but that the ultimate limitation in fact does the opposite – it confirms that a claim could exist in perpetuity if no demand for payment is made. The court said:

> In my view, it would be contrary to common sense to think that a piece of legislation designed to create uniform, simplified limitation periods actually did the opposite by taking a well-settled area of commercial law and creating indefinite liability.[206]

As a result, the court found that, like the two year limitation, the ultimate limitation also begins to run on the date that a demand promissory note is delivered.

The 2008 amendment to the Ontario Act revised clause 15(6)(c) to reverse the effect of the Court of Appeal decision. It now provides:

> (6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,
>
> ...
>
> (c) in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made.[207]

As a result, the basic and ultimate limitations begin to run on the same day, as contemplated by the Alberta Institute.

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[204] *Ontario Act*, *supra* note 6, as it read before the enactment of the *Budget Measures and Interim Appropriation Act, 2008 (No. 2)*, *supra* note 197.

[205] *Supra* note 12 at para. 43.

[206] *Ibid*. at para. 46.

[207] *Budget Measures and Interim Appropriation Act, 2008 (No. 2)*, *supra* note 197, *Ontario Act*, *supra* note 6, s. 15(6)(c).

The Uniform Act and the Alberta Act include provisions in respect of ultimate limitations that are similar to Ontario's amended s. 15(6)(c).[208] The Saskatchewan provision, however, uses wording more similar to the provision considered in *Hare*, with no specific reference to 'a demand for performance'.[209]

The New Brunswick Act takes an approach consistent with the British Columbia Law Institute recommendation; under section 11, the ultimate limitation for a demand loan is 15 years from the day on which the lender is first entitled to make a demand for repayment. In its commentary on Bill 28, the Office of the Attorney General noted that "[t]his will be the day the loan is advanced unless another date is established".[210]

The result of the Ontario, Alberta and Uniform Acts is that the ultimate and basic limitations begin on the same day, so that in practice, the expiry of the basic limitation will determine the matter. On the other hand, the result of the New Brunswick model is that the ultimate limitation may expire before a demand for performance is made. The Commission prefers the approach of the Ontario, Alberta and Uniform Acts.

**RECOMMENDATION 18**

***For the purposes of the ultimate limitation, the day on which an act or omission on which a claim is based occurs, in relation to a demand obligation, should be the day on which a default in performance occurs once a demand for performance is made.***

## 2. Continuing Act or Omission

Four of the modern limitations statutes have specific rules for the running of time where the claim relates to a continuing act or omission. In the Alberta, Ontario and Uniform Acts, the rules apply only to the commencement of the ultimate limitation. Under the Ontario and Uniform Acts, where there is a continuous act or omission, the ultimate limitation begins to run on the day on which the act or omission ceases. Where there is a series of acts or omissions relating to the same obligation, the ultimate limitation begins to run on the day on which the last act or omission in the series occurs. The Alberta Act produces the same result.[211]

The recent New Brunswick Act takes a different approach, which applies to both the basic and ultimate limitations. Section 6 of the New Brunswick Act provides:

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[208] *Uniform Act*, *supra* note 2, s. 6(4)(c); *Alberta Act*, *supra* note 5, s. 3(3)(c).

[209] *Saskatchewan Act*, *supra* note 6, s. 10.

[210] New Brunswick Commentary, *supra* note 48 at 8; *New Brunswick Act*, *supra* note 7, s. 11(b).

[211] *Alberta Act*, *supra* note 5, s. 3(3)(a), *Ontario Act*, *supra* note 6, s. 15(6), *Uniform Act*, *supra* note 2, s. 6(4).

> If a claim is based on a continuous act or omission, the act or omission is deemed for the purposes of calculating the limitation periods in section 5 to be a separate act or omission on each day it continues.[212]

The Saskatchewan Act does not address continuing acts or omissions.

The Alberta Law Reform Institute discussed the treatment of continuing acts or omissions in its report on limitations, observing that one course of conduct may form the basis of a number of different types of claims, accruing at different times. The Institute gave the example of a factory emitting fumes over a neighbour's orchard, which may result in both personal injury and property damage and could support claims based on trespass, negligence and breach of a statute. The Institute concluded that:

> Insofar as the objectives of limitations law are concerned, it doesn't matter how many breaches of duty there were, how many different duties were breached, how many claims there are, or when they accrued, if the claims all resulted from a continuing course of conduct or a series of related acts or omissions. The policy issue is when should the ultimate period begin: when the legally wrongful conduct began or when it ended. Assume that … the defendant's conduct stopped exactly 15 years from the date that it started. If the ultimate period were to begin when the conduct started, the defendant would be entitled to assert his immunity from liability under the claimant's claims a moment after the defendant's conduct stopped. The reasons for a limitation system based on evidence and repose do not require this harsh result. Stale evidence should not present a significant problem, for the evidence will have continually renewed itself with the defendant's repetitive conduct. Justice does not require giving the defendants repose for wrongful conduct which just stopped.[213]

The U.K. Law Commission considered the question of continuing acts or omissions and declined to make a recommendation, noting:

> It has also been suggested by the Association of Personal Injury Lawyers that it could be difficult to determine the date of the act or omission giving rise to the cause of action, particularly where the cause of action depends on an omission by the defendant, rather than a positive act. This type of problem can also occur under the current law where the limitation period starts from the date of the accrual of the cause of action. The courts have held that where the claimant relies on an omission by the defendant, the cause of action accrues on the latest date on which the defendant was under a duty to the claimant to act. The same principle would apply where the starting point for the long-stop limitation period is calculated from the date of the act or omission. Where the defendant

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[212] *New Brunswick Act*, *supra* note 7, s. 6.

[213] ALRI Report, *supra* note 42 at 70; excerpt quoted with approval in *Seidel v. Kerr*, 2003 ABCA 267, 330 A.R. 284 at para. 45. Although the current *Alberta Act* did not apply in *Seidel*, the Court of Appeal said that the same policy considerations apply. In contrast, in *Meek (Trustee of) v. San Juan Resources Inc*., 2005 ABCA 448, 376 A.R. 202, the Alberta Court of Appeal overturned the decision of the trial judge with respect to a continuous course of conduct and held that each of a succession of failures to make periodic royalty payments gave rise to a separate claim.

> is under a continuing duty to perform, but fails to do so, there would be a fresh omission on each day on which he or she failed to perform. For limitation purposes the long-stop limitation period would start on the latest day on which the defendant should have performed the relevant act. The position is the same where the claimant's cause of action is founded on a continuing act by the defendant. In practice, a fresh cause of action will accrue on each day the act continues, and a new long-stop limitation period will start in respect of that cause of action. When, in contrast, the cause of action is only complete when there has been a series of acts or omissions, the long-stop limitation period will start from the date of the last act (or omission) necessary to complete the cause of action.[214]

Caplan and Gray have questioned the impact of the Ontario Act on loan agreements, particularly in light of the fact that the Act does not address how the basic limitation applies to continuous acts or omissions:

> It is common for credit agreements to provide that, until cured, an event of default is continuous and gives rise to an ongoing right of the lender to avail itself of the remedies provided by the loan agreement.
>
> In the case of payment defaults and other defaults that give rise to a loss on occurrence and that are characterized as continuous defaults, s. 15(6) of the New Act provides that, for the purpose of the ultimate limitation period, the day the act or omission takes place is the day on which the continuing act or omission ceases. Accordingly, a lender may be able to rely on s. 15(6) to postpone the running of the 15-year period until the continuous default has ceased. The lack of a corresponding provision for purposes of the basic limitation period raises an interesting issue. Will the common law, which indicates that a claim is not discoverable until the conduct giving rise to the claim ceases, apply so that the basic 2-year period also begins to run on cessation of the default? Or, due to the lack of an express legislative provision, does the fact that a default is declared to be continuous under the loan agreement have no impact on the beginning of the 2-year period?
>
> The common law rule that a cause of action based on a continuing act is discoverable only upon cessation of the act is consistent with the approach in s. 15(6) of the New Act and appears to dictate that the 2-year limitation period will not begin to run until the continuous default has ceased. However, the fact that the Legislature has expressly addressed this issue in the context of the 15-year period and not the 2-year period probably means that, for the 2-year period, the fact that a default is continuous is irrelevant. The issue remains as to the date that the claim, continuous or otherwise, was first discovered or first became discoverable. Furthermore, a contractual provision declaring that a default continues until cured, if effective in postponing discovery or discoverability, would run afoul of s. 22(1), which precludes contracting out of any limitation period.[215]

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[214] Law Commission (U.K.), *supra* note 66 at para. 3.110 [footnote omitted].

[215] Caplan & Gray, *supra* note 33 at 7-8.

Caplan and Gray note that if it is correct that "self-declared continuous defaults are ineffective for the purposes of the 2-year limitation period",[216] it is possible that the basic limitation could expire, terminating the claim, before the ultimate limitation commences.

As one respondent to our draft report for consultation observed, there are drawbacks to the approach of the Alberta, Ontario and Uniform Acts. With respect to the ultimate limitation, a claimant could claim for injury dating back to the day the continuous act or omission commenced, which could be a very long time. With respect to the basic limitation, if the interpretation outlined by Caplan and Gray is correct, a person would be required to sue within two years of discovery of the continuous act or omission, or be barred forever from taking any action, notwithstanding that the harmful activity continues.[217] An additional issue is the difficulty of identifying which acts are 'continuous' or within a series (where there is, for example, a week of emissions followed by a week of containment followed by a week of emissions, the decision as to whether the acts are 'continuous' is key).[218] To counter these difficulties, as noted above, New Brunswick adopted a 'day by day' rule for the purposes of both the basic and ultimate limitations, so that a continuous act or omission is deemed for limitations purposes to be a separate act or omission on each day that it continues. This limits the 'reach back' period to 15 years, provides for a less harsh result with respect to the basic limitation and reduces the impact of the decision as to whether a number of acts or omissions are continuous. As explained in the commentary on the New Brunswick bill before it was enacted:

> This section follows the established day-by-day approach to calculating the limitation periods for continuous claims such as nuisance. Alberta, Ontario and ULCC follow a different approach that (a) does not indicate how the discovery period operates when a continuous act or omission is discovered, and (b) delays the beginning of the ultimate period until the act or omission ceases, the effect apparently being that as long as the act or omission continues there is no ultimate period governing how far back in time a claim can reach. …
>
> Rather than follow either of these models, the Bill spells out that the day-by-day approach is to be applied to both the discovery period and the ultimate period. The effect, since these operate in parallel, is that if the claimant brings the claim within the first two years of discovery, the claim can relate back fifteen years from the date the claim is brought. If though, he or she delays beyond the two years, the claim can still be brought, but can only relate back for the past two years. In either event, the claimant can seek declaratory or injunctive relief if the act or omission is still continuing, and in many cases this will be the most important of the claimant's objectives.[219]

This approach results in additional difficulties around proof of damages, however. Where an act continues over several years, a remedy may only be available for damage caused

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[216] *Ibid*. at 8.

[217] Submission by T. Rattenbury (December 17, 2009).

[218] Submission by T. Rattenbury (December 17, 2009).

[219] New Brunswick Commentary, *supra* note 48 at 5.

during a portion of the relevant period (for example, where an underground oil leak continues over six years, but a remedy is available only for damage caused during the last three years of the leak).[220] This will be a nearly impossible line to draw in some cases.

The Commission recognizes that there are complications with both approaches, but on balance prefers the approach that has been adopted in the Alberta, Ontario and Uniform Acts with respect to the ultimate limitation, and recommends a similar provision for the basic limitation. The Act should provide that in the case of a continuous act or omission, the ultimate limitation begins to run on the day on which the act or omission ceases, or where there is a series of acts or omissions, on the day on which the last act or omission occurs. The basic limitation should begin to run on the same date. In other words, in the case of a continuous act or omission an injury does not occur, and a claim is not discoverable, until the day on which the act or omission ceases. In the case of a series of acts or omissions, an injury does not occur until the day on which the last act or omission occurs.

**RECOMMENDATION 19**

***For the purposes of the basic limitation, the day on which an injury occurs should be***

- ***in the case of a continuous act or omission, the day on which the act or omission ceases;***
- ***in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs.***

[220] In *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co*, 2001 ABQB 803, 300 A.R. 201, the court explained, at para. 182: "... the Defendants have confused a continuing cause of action with a continuing obligation. There can be no doubt that contracts can contain both obligations that are time specific and obligations that continue during the life of the contract and which are capable of one or more breaches. For example, Clause F.1 of the 1959 Agreement states that the manager operator shall "conduct (the operations) in a good and workmanlike manner and in accordance with prevailing field practice…". Surely this imposes a continuing obligation on the part of that manager operator for so long as they hold that position. Moreover, such a clause is capable of many or successive breaches, each of which would raise a cause of action. In this case, assuming commercial feasibility, a failure to market at all would be a continuing breach of the continuing obligation under clause 3.1(D) and, until rectified in some meaningful way, is actionable although clearly damages could only be awarded back six years from the date of the filing of the claim." In *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp*., 2008 MBQB 296, 300 D.L.R. (4th) 577, the court agreed with the plaintiffs' claim that there was "not one breach of the management fee agreement with continuing damages, but rather … a requirement, pursuant to the agreement, to establish management fees on a yearly basis. …[I]n asserting such a contract, they are alleging successive breaches on a yearly basis and that each alleged breach constitutes a separate cause of action for which the plaintiffs may recover damages within the appropriate limitation period", at para. 82. See also *Seidel v. Kerr*, *supra* note 213 at para. 54: "The limitation period may define the time during which a remedy will be awarded, but does not eliminate the entire claim: Amoco Canada Resources v. Amax Petroleum of Canada (1992), 2 Alta. L.R. (3d) 168 (C.A.)."

**RECOMMENDATION 20**

***For the purposes of the ultimate limitation, the day on which an act or omission on which a claim is based occurs should be***

- ***in the case of a continuous act or omission, the day on which the act or omission ceases;***
- ***in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs.***

## 3. Contribution

All provinces in Canada have legislation that overrides the common law rule that a tortfeasor who is found liable for a loss has no right to claim a contribution of the damages paid from another tortfeasor.[221] In Manitoba, *The Tortfeasors and Contributory Negligence Act*[222] establishes the right of the first tortfeasor to recover contribution from another.

The current *Limitations of Actions Act* establishes a two year limitation for a claim by one tortfeasor to recover contribution from another tortfeasor, beginning on the date on which the right to recover contribution accrued. The right accrues on the date on which judgment is given in a civil proceeding or an award is made in an arbitration, or, where the tortfeasor admits liability, on the earliest date on which a settlement agreement is reached. After the limitation has expired, a court may not grant leave to begin or continue an action. A judgment or award given on appeal is not to be taken into account to the extent that it varies the amount of the damages awarded.[223]

The Alberta, Ontario, Saskatchewan and Uniform Acts specify when the ultimate limitation begins to run for a claim for contribution and indemnity, whether the claim arises with respect to a tort or otherwise. The ultimate limitation begins to run on the day on which the first 'wrongdoer' is served with the claim for which contribution and indemnity is sought (or in Alberta 'is made a defendant' in respect of a claim). Under the Alberta and Uniform Acts, the settlement of the first claim also triggers the ultimate limitation.

The Alberta, Ontario, Saskatchewan and Uniform Acts reflect the recommendations of the Alberta Law Reform Institute, which identified three options for the commencement of the ultimate limitation (although there are others): when the injured party's claim accrued against the first tortfeasor, when liability is imposed on the first tortfeasor and when the first tortfeasor is made a defendant under a claim upon which a claim for contribution could be based. The Institute did not discuss the application of discoverability to claims for contribution, and the Western Australia Law Reform Commission commented on this point:

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[221] See the discussion in G.H.L. Fridman, *The Law of Torts in Canada*, 2d ed. (Toronto: Carswell, 2002) at 897-907.

[222] C.C.S.M. c. T90, s. 2(1)(c).

[223] *Manitoba Act*, *supra* note 1, s. 17.

> However, since the discovery period runs from the date on which the plaintiff knew, or should have known, that he has suffered injury for which the defendant is responsible and which is sufficiently serious to warrant bringing proceedings, it would seem that in a contribution action this point must be the time when the tortfeasor's liability is finally confirmed, either by a court judgment, or an arbitration award, or a settlement, with or without admission of liability. In the case of a settlement, the result would be that the discovery period and the ultimate period would both begin to run from the same point, and so in practice the ultimate period would never be required. However, in cases where liability is put in issue, either in court proceedings or by submitting the matter to arbitration, there is an important difference between the point when possible liability first becomes an issue and the later point when liability is finally confirmed. Before the latter point, the tortfeasor might be put on inquiry … but he cannot be regarded as having suffered an injury.[224]

In the view of the Western Australia Law Reform Commission:

> (1) the discovery period should run from the time when the tortfeasor's liability is finally confirmed, either by a court judgment, or an arbitration award, or by a settlement (with or without admission of liability);
> (2) in cases where the tortfeasor's liability is the subject of court proceedings or an arbitration, the ultimate period should run from the time when the tortfeasor was made a defendant in respect of the compensation claim.[225]

The New Brunswick Act adopts yet a different approach, distinguishing between claims under its tortfeasors statute and other types of claims. With respect to tortfeasors, the basic limitation begins to run on the day on which the claimant, after settling or having been served with the pleading for the original claim, first knew or ought reasonably to have known that the other person was liable to make the contribution. The ultimate limitation begins on the day of the act or omission in respect of which the claim for contribution is brought. For other types of claims, the limitations apply only after the claimant has made a payment or incurred a liability under a settlement or judgment. As with tortfeasors, the basic limitation begins to run on the day on which the claimant first knew or ought reasonably to have known that the person was liable to make the contribution. The ultimate limitation begins on the later of 15 years from the day of the act or omission giving rise to the payment, settlement or judgment and five years from the day of the payment, settlement or judgment. According to the commentary on the New Brunswick bill, the second five year period "is designed to reduce the period over which people are, in theory, exposed to claims for contribution even after they can no longer be sued directly in relation to the conduct that is the basis of the claim".[226]

The Commission agrees that it is not helpful to identify the trigger for the ultimate limitation but not the basic limitation, and that, like the New Brunswick Act, the Manitoba Act

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[224] Law Reform Commission of Western Australia, *supra* note 35 at para. 12.64.

[225] *Ibid.* at para. 12.65.

[226] New Brunswick Commentary, *supra* note 48 at 10.

should recognize that not all claims for contribution are triggered when a person is sued.[227] In the New Brunswick Act, an attempt has also been made to deal with the possibility of an ongoing string of contribution claims, as one tortfeasor claims against the next.

The U.K. Law Commission also considered the concern regarding an endless chain of claims:

> We provisionally proposed in the Consultation Paper that claims for a contribution under section 1 of the Civil Liability (Contribution) Act 1978 should be subject to the core regime, subject to the modification that, to avoid the problem of a chain of contribution claims, there should be a single long-stop limitation period running from the date of the judgment or settlement in the original proceedings to which the contribution claim relates. …
>
> … We appreciate that, if the long-stop is to start from the date of judgment or settlement the long-stop limitation period will be considerably extended from the date of the events giving rise to liability in the original proceedings. However, the relevant liability of the defendant to a contribution action is his or her liability to make contribution to his or her co-obligor and this is triggered not by the act or omission of the contributor vis-à-vis the claimant in the original proceedings but by the judgment or settlement giving rise to the contribution action ... . We believe that in practice the long-stop limitation period is unlikely to be relevant in many cases, because a person entitled to contribution will normally have the relevant knowledge to start the primary limitation period shortly after the judgment or settlement in the original proceedings.
>
> We have however been persuaded to reconsider our original proposal that a *single* long-stop limitation period should apply to all claims for a contribution which arise out of the same facts, because of the significant problems that we discuss below in relation to claims for a contractual indemnity [relating to concerns raised by the insurance industry]. We do not believe that a sufficient distinction can be drawn between a claim for contribution under the Civil Liability (Contribution) Act 1978, and a claim for a contractual contribution or indemnity, to justify applying a different limitations regime to a claim in respect of each cause of action. We therefore propose that each claim for a contribution should be subject to a separate long-stop limitation period, which will run from the date of the judgment or settlement in the proceedings to which the claim relates. This leaves open the risk that there could be a chain of contribution claims, with a final trial of the claim several years after the events which gave rise to it. However, we have received no evidence to suggest that this is a significant problem under the current law (which can in theory also give rise to a chain of limitation periods, each starting from the date of the judgment or settlement giving rise to the cause of action).[228]

In the Commission's view, the appropriate trigger for the commencement of the limitation for discoverability purposes is the determination of the claimant's liability for the original loss. The Commission considers that the day of the 'injury', for the purposes of the two year discoverability period, should be the day on which the liability of the

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[227] Submission by T. Rattenbury (December 17, 2009).

[228] Law Commission (U.K.), *supra* note 66 at paras. 4.80-4.82 [footnote omitted].

claimant, through tort or otherwise, is confirmed by a court judgment, arbitration award or settlement. The ultimate limitation should begin when the claimant is served with a claim or a notice that commences an arbitration, or incurs a liability through a settlement agreement, in respect of the matter for which contribution and indemnity is sought.

**RECOMMENDATION 21**

***For the purposes of the basic limitation, in the case of a claim for contribution and indemnity, the day on which an injury occurs should be the day on which the liability of the claimant in respect of the matter for which contribution or indemnity is sought is confirmed by a court judgment, arbitration award or settlement agreement.***

**RECOMMENDATION 22**

***For the purposes of the ultimate limitation, in the case of a claim for contribution and indemnity, the day on which an act or omission on which the claim is based occurs should be the day on which the claimant***

***(a) is served with a claim or a notice that commences an arbitration; or***

***(b) incurs a liability through a settlement agreement,***

***in respect of the matter for which contribution and indemnity is sought.***

## 4. Economic Loss – Dangerous Buildings

Claims in the tort of negligence for purely economic loss – loss unconnected with and not derivative from tangible injuries to person or property – are of relatively recent origin in our law, dating from *Hedley Byrne & Co. v. Heller & Partners Ltd.*[229] decided by the House of Lords in 1963, and gradually expanding their range ever since. In Canada, the well-established principle, repeatedly affirmed and applied by the Supreme Court of Canada, is that all such claims should be initially considered with an eye to characterizing them as belonging (or not) to five situational categories (the 'Feldthusen labels').[230] If the claim belongs to none of these categories, its recognition will at best be problematical.

So far as most of the five categories are concerned, the limitations issue has so far been relatively straightforward. These are negligence actions, and time therefore has begun to run when the cause of action is complete; that is, when legally recognized damage, attributable to the

[229] [1964] A.C. 465 (H.L.).

[230] See *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, *supra* note 53; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356.

defendant's breach of duty occurs – or (when applicable) that time, potentially much later, when that damage becomes apparent to the eye of ordinary vigilance.

It is in one of the five recognized viable categories that this issue has provoked real and persistent difficulty. To use the Feldthusen labels consistently applied by the Supreme Court of Canada, this is the category of 'shoddy goods and structures' exemplified and established by the Supreme Court in the well known case of *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co*.[231] In that case, the court refused to strike out a negligence claim brought by a second (i.e. non-original, non-privity) building owner against parties involved in its construction, an action seeking compensation for the costs of repairing it, when seriously dangerous defects manifested themselves in its structure. The Supreme Court, characterizing the plaintiff's loss as essentially economic – the cost of putting right the sub-standard structure – held that such a tort action is viable if and only if the building represented a real and substantial danger to its occupants. It declined to take the further step of allowing a tort action should the building be shown to be defective but not dangerous.

The development of the dangerous-structure cause of action in negligence resulted in the posing of the subsequent question as to when the cause of action of this kind 'arises': when the building becomes dangerous, or when the danger is discovered. If the building must be dangerous for a cause of action to be viable, what does this mean? Is a building containing a defective component (an underdesigned beam) or toxic substance (e.g. asbestos or urea formaldehyde foam insulation) dangerous when the component or substance is installed, even though it as yet poses no threat? Courts in B.C. have suggested, without much discussion and arguably *obiter*, that the moment of installation is the moment when danger exists and time for the basic limitation begins to run.[232]

It is in Manitoba that this issue has arisen most frequently in the courts.[233] However, the litigation has not resulted in clear and settled law. Confronted with issues upon motions for summary judgment, the Manitoba Court of Appeal has deferred engaging the question until it may be considered against a full matrix of evidence adduced at trial. As Scott, C.J.M. said in *Valley Agricultural*:

> In my opinion, this is not an appropriate case for summary judgment based on affidavit evidence alone. This is because there is a lack of evidence to establish the essential

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[231] *Supra* note 53.

[232] *Privest Properties Ltd. v. Foundation Co. of Canada* (1995), 128 D.L.R. (4th) 577 (B.C.S.C.), Drost, J., affirmed without reference to the limitations issue (1997) 143 D.L.R. (4th) 635 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 216, *Armstrong v. West Vancouver* 2003 BCCA 73, 223 D.L.R. (4th) 102, *passim*.

[233] *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1999), 131 Man. R. (2d) 283 (C.A.); *Winnipeg Condominium Corp. No. 266 v. 3333 Silver Developments Ltd.*, 2000 MBQB 233, 155 Man. R. (2d) 164; *Sentinel Self-Storage Corp. v. Dyregrov*, 2003 MBCA 136, 233 D.L.R. (4th) 18 (C.A.); *Valley Agricultural Society v. Behlen Industries Inc*., 2004 MBCA 80, 241 D.L.R. (4th) 169 (C.A.); *Brett-Young Seeds. Ltd. v. K.B.A. Consultants Inc*., 2008 MBCA 36, 291 D.L.R. (4th) 688; *Multi-Pork Inc. v. A.G. Penner Farm Services Ltd.*, 2008 MBCA 119, 301 D.L.R. (4th) 574. See the summary and analysis of the first four of these cases in Philip H. Osborne, "Manitoba Tort Cases Since the Turn of the Century", (2005) 31 Man. L.J. 25 at 30-37.

> factual background to enable the court to decide the complex and unresolved point of law that this case raises.[234]

There have been some helpful views expressed by the courts. In *Winnipeg Condominium Corporation (No. 2)*, for example, the motions judge clearly indicated the view that the cause of action did not arise when the defective component of the building (its exterior stone cladding) was installed, but only at that later date when its dangerous deficiency became manifest,[235] but the Court of Appeal declined to express a concluded view on the matter. In *Sentinel Self-Storage Corp. v. Dyregov*, Steel, J.A. stated:

> If this action is categorized as one of economic loss due to defective structure, the damage is not inflicted until the building is found to contain defects which pose a real and substantial danger to the occupants of the building or other property. It is only when a defect poses a real and substantial danger or there is an imminent possibility of such danger that the cause of action is complete.[236]

In addition, in *Valley Agricultural*,[237] Schulman, J. at first instance, had some helpful ideas as to when a 'real and substantial danger' might be considered sufficiently 'manifest' to mark the accrual of the cause of action in these cases. However, the question remains unresolved. Professor Osborne has noted:

> [T]he interpretation of the concept of harm or loss sufficient to complete a cause of action in a negligence action for pure economic loss is, in Manitoba, in a state of great uncertainty and is often counter-intuitive. … The cause of action for dangerous premises causing economic loss is complete when the dangerous defect "manifests itself". On two occasions (*Winnipeg Condominium* and *Valley Agriculture*) the Court has declined to provide guidance on the meaning of that phrase. The cause of action may be complete on the completion of the building, at the first sign of some dangerous defect or when such a defect has manifested itself in tangible adverse consequences. This creates severe difficulties for any practitioner whose client seeks a remedy for economic loss suffered more than six years after the negligent conduct of the defendant. In some situations the loss will complete the cause of action from which time runs. In other cases a s. 14(1) application is called for.
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> …

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[234] *Valley Agricultural Society v. Behlen Industries Inc., ibid*. at para. 12.

[235] *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1998), [1999] 2 W.W.R. 379, aff'd on other grounds (1999), 131 Man. R. (2d) 283 (C.A.).

[236] *Supra* note 233 at para. 70.

[237] *Valley Agricultural Society v. Behlen Industries Inc.*, 2003 MBQB 51, 225 D.L.R. (4th) 357, rev'd 2004 MBCA 80, 241 D.L.R. (4th) 169 (C.A.).

> [T]he interpretation of when the harm arises in these cases suggests that it will not be uncommon in economic negligence cases for the cause of action to have lapsed before the plaintiff is aware of the consequences of the negligent conduct.[238]

The proposed new limitations structure will assist with resolving this question, and provide a more useful framework for analysis. For the purposes of the basic and ultimate limitations, the question as to when 'the cause of action arose' will no be longer determinative. Under the new Act, the basic limitation will begin to run when the claimant knew or ought to have known that the injury, including economic loss, had occurred, that it was caused by or contributed to by an act or omission of the defendant, and that having regard to the nature and circumstances of the injury, a viable cause of action existed and a proceeding would be an appropriate means to remedy the injury. Where the claimant could not reasonably be aware of the defect or danger, he or she will not be aware of the economic loss or that a proceeding is warranted to remedy it, and the limitation will not begin to run. The ultimate limitation will run from the day on which the defendant's act or omission occurred.

The Commission also recognizes, however, that "the law with respect to what constitutes a real and substantial danger is developing,"[239] and the question of when a real and substantial danger will be found to be manifest in a negligence action remains elusive. While the reforms proposed in this report will provide some assistance with analysis of the issues,[240] unfortunately, a definitive resolution of this question lies beyond the scope of limitations reform.

## 5. Delay Caused by Defendant

A common feature of modern limitations regimes is to suspend the running of the ultimate limitation during any time that the defendant fraudulently conceals the wrong or misleads the plaintiff regarding the claim.[241] The Commission considers that such a provision is necessary to avoid the possibility of deserving plaintiffs being deprived of the right to pursue a claim by fraud on the part of the defendant.

Currently, a similar function is served by section 5 of the current Act:

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[238] Osborne, *supra* note 233 at 35-36.

[239] *Brett-Young Seeds. Ltd. v. K.B.A. Consultants Inc*., *supra* note 233 at para. 42.

[240] One respondent specifically supported "the effect that your proposals will have on pure economic loss in construction cases": submission by D. Hill (July 22, 2009) at 1.

[241] Regarding the doctrine of fraudulent concealment at equity and common law see *Guerin v. Canada*, [1984] 2 S.C.R. 335 at para. 115: "It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it."; *M. (K.) v. M. (H.)*, *supra* note 19 at paras. 56-66; *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.). Under the current Manitoba Act, "the availability of the doctrine both in equity and at common law is confirmed by s. 5 of the Act.": *T.L.B. v. R.E.C.*, *supra* note 23 at para. 86.

> Where the existence of a cause of action has been concealed by fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.[242]

The Alberta Act provides that the operation of the ultimate limitation "is suspended during any period of time that the defendant fraudulently conceals the fact that the injury … has occurred".[243]

The Commission is of the opinion, however, that the broader wording of the Ontario and Saskatchewan legislation, which is similar to the wording of the Uniform Act, better achieves the desired goal, and advances the goal of uniformity across Canadian jurisdictions.

**RECOMMENDATION 23**

***The running of the ultimate limitation should be suspended during any time in which the defendant***

- ***wilfully conceals from the claimant the fact that an injury has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the defendant; or***
- ***wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury.***

## 6. Minors and Persons Under a Disability

### (a) Suspension

All of the modern Acts, and the current Manitoba Act, suspend the running of time in respect of a limitation while the claimant is a minor. However, there are two approaches in the modern Acts in relation to adults who are under a disability. Most Acts suspend both the two year and the ultimate limitations while a person is incapable of bringing a claim because of his or her physical, mental or psychological condition. The New Brunswick Act, on the other hand, does not suspend the ultimate limitation. The commentary to the bill notes:

> In relation to these periods a person who lacks capacity is no worse situated than a person who has full capacity but is unable to sue because he or she has not discovered the claim. Furthermore the approach taken elsewhere of suspending the operation of the ultimate periods "during any period which" the claimant lacks capacity appears to invite any claimant who discovers a claim late to look back over the past fifteen years and to try [to]

[242] *Manitoba Act*, *supra* note 1, s. 5.

[243] *Alberta Act*, *supra* note 5, s. 4(1).

> piece together enough "periods in which" the ultimate period was suspended to demonstrate that the full fifteen years has not yet run.[244]

The B.C. Law Institute also recommended in 2002 that the ultimate limitation continue to run during adult incapacity. The Institute felt that this was necessary to provide certainty:

> [U]nlike minority, the duration of the postponement or suspension is unknown and could extend many years beyond the time the basic limitation period would otherwise have expired. Accordingly, where the plaintiff is a person under a legal disability (other than minority) there is a concern to protect the rights of potential defendants against the postponement or suspension of the limitation period for an unlimited number of years.[245]

The Commission prefers to maintain consistency with the majority of the limitations statutes, so that the running of the ultimate limitation is suspended during the time in which the claimant is a minor or is incapable of commencing a proceeding because of his or her physical, mental or psychological condition. The suspension would be subject to our recommendation in the next section respecting the service of a notice to proceed by a potential defendant.

**RECOMMENDATION 24**

***Subject to recommendation 25, the running of the ultimate limitation should be suspended during any time in which the claimant is***

- ***a minor; or***
- ***incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition.***

### (b) Appointment of Litigation Guardian

The current Act permits a potential defendant to start the running of time against a person under a disability (including a minor) by serving her or him with a notice to proceed. Once the notice has been properly served, time begins to run as if the person's disability had ceased on the date of service. The current Act requires that the notice be served, in the case of a minor, on the minor's parent or guardian, and in the case of a person who is incapable of managing his or her affairs because of disease or impairment of his or her physical or mental condition, on the person's parent, committee or substitute decision maker appointed under *The Vulnerable Persons Living with a Mental Disability Act*.[246] In all cases, the notice must also be served on the Public

[244] New Brunswick Commentary, *supra* note 48 at 12-13.

[245] British Columbia Law Institute, *supra* note 65 at 24.

[246] C.C.S.M. c. V90.

Trustee. A notice to proceed must warn that the cause of action arising out of the facts stated in the notice is liable to be barred by the Act, and is not an admission of liability.[247]

British Columbia also provides for service of a notice to proceed on the Public Trustee, where the potential defendant is under a disability and has a guardian.[248] Neither Saskatchewan's nor New Brunswick's recent legislation contains an analogous provision,[249] and nor does the Uniform Act.

Ontario's Act, on the other hand, permits potential defendants to apply to the court to appoint a litigation guardian for a potential plaintiff who is under a disability (including a minor), and once the litigation guardian has been appointed and certain conditions have been met time will begin to run against that plaintiff.[250]

Alberta's Act initially provided that time would not run against minors *unless* they were in the custody of a parent or guardian. That was amended in 2002,[251] to provide that time did not run against *any* minors, except that (as in Manitoba) a potential defendant may start time running by serving a potential plaintiff who is a minor with a notice in stipulated form. The Alberta provision also requires the potential defendant to serve the Public Trustee, who is then required to investigate and determine whether the potential plaintiff's interests are adequately protected by his or her parent or guardian. If not, the Public Trustee must apply to the court for directions, and may be appointed to protect the minor's interests.

The Alberta Act has no similar provision applying to persons under a disability other than minors.

The purpose of section 8 is clearly to enable potential defendants to ensure that, if possible, they are not faced with a claim many years after the occurrence of the events that give rise to the claim. This is the classic repose rationale for limitations. It is also an attempt to balance that need for certainty with the special circumstances of persons under a disability (including minors). As the Alberta Law Reform Institute stated:

> The discovery period is designed to give a claimant sufficient opportunity after discovery to conduct further investigations, to attempt to negotiate a settlement, and to bring a proceeding seeking a remedial order if necessary. As such, it is based on the assumption that a person who obtains the requisite knowledge has the ability to make reasonable judgments in decisions relating to a claim. This assumption does not fit an adult under disability who is deemed unable to make reasonable judgments in respect of matters relating to his estate, and that applies to decisions relating to a claim.[252]

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[247] *Manitoba Act*, *supra* note 1, s. 8.

[248] *B.C. Act*, *supra* note 65, s. 7(6).

[249] As discussed in the previous section, such a provision in New Brunswick would not be needed to commence the running of the ultimate limitation in respect of an adult who is under a disability.

[250] *Ontario Act*, *supra* note 6, s. 9.

[251] *Justice Statutes Amendment Act, 2002*, S.A. 2002, c. 17, s. 4; *Alberta Act*, *supra* note 5, s. 5.1.

[252] ALRI Report, *supra* note 42 at 78.

In our draft report for consultation, the Commission expressed the concern that the existing section 8 may not offer sufficient protection to persons who may be in the custody of a parent or guardian who will not adequately safeguard their interests in the event that they are served with a notice under that section. As was noted by the U.K. Law Commission in a slightly different context:

> Wherever the minor has a representative adult who is conscious of his or her responsibilities, and willing and able to take action, it is likely that proceedings will be issued on behalf of the child promptly even under the current law. The only practical effect of providing that time runs where there is a representative adult would be to penalise those minors where the representative adult is negligent.[253]

The Commission suggested that it would be appropriate to provide for a potential defendant to apply to court for the appointment of a litigation guardian, who, as in Ontario, would be required to agree to "attend to the potential plaintiff's interests diligently".[254] The Commission received no submissions on this point, and after further discussions, considers that the model in the existing Act is less cumbersome and more efficient. An undertaking by a litigation guardian to represent the potential plaintiff's interests is no guarantee that he or she will do so. Under the current Manitoba Act, subsection 8(7) provides that where the Public Trustee is served with notice by a potential defendant and it appears that any other person to whom the notice was delivered is failing to take reasonable steps to protect the interest of the person under the disability or is otherwise acting to the prejudice of that person, the Public Trustee must investigate the circumstances and may commence an action for the benefit of the person. This more effectively protects the interests of the persons under a disability.

As noted, the Alberta Act has a similar provision requiring service on the Public Trustee, but only in the case of a minor;[255] the Commission considers that this procedure ought to continue to apply equally in the case of an adult under a disability.

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[253] Law Commission (U.K.), *supra* note 66 at para. 3.117. See also *Shirley Christensen. v Archeveque catholique romain de Quebec*, 2009 QCCA 1349, leave to appeal to S.C.C. granted January 21, 2010. The plaintiff alleged that she had confided in her parents when she was eight years old, in the late 1970s, that she had been sexually abused by a priest. Her parents chose not to bring proceedings, and the plaintiff alleged that she did not become aware of the magnitude of the psychological trauma that she had suffered until 2006. The Superior Court dismissed the plaintiff's action on the ground of prescription; the Court of Appeal affirmed the judgment on different grounds.

[254] *Ontario Act*, *supra* note 6, s. 9(3)2.v.

[255] *Alberta Act*, *supra* note 5, s. 5.1.

**RECOMMENDATION 25**

***The Act should retain section 8 of the current Act, allowing a potential defendant to serve a notice to proceed on a potential claimant who is a minor or is incapable of commencing a proceeding because of his or her physical, mental or psychological condition and on the Public Trustee. When a notice to proceed is served, the limitation should begin to run against the potential claimant. Where it appears to the Public Trustee that another person upon whom the notice was served is failing to take reasonable steps to protect the interests of the potential claimant, the Public Trustee should be required to investigate the circumstances, and may commence and maintain a proceeding for the benefit of the potential claimant.***

## K. SPECIAL LIMITATIONS

### 1. General

Despite the undoubted desirability of a simple and straightforward limitations regime, the Commission recognizes that there are sound public policy reasons for providing for certain exemptions from the standard regime. To some extent this is done by defining the kinds of proceedings to which the limitations legislation applies. Some jurisdictions have seen fit, however, to make additional provision for a small number of particular cases where no limitation applies, notwithstanding that the proceedings otherwise fall within the ambit of the legislation. As Professor Roach has commented, "[s]pecial limitation periods are not inherently good or bad; in every case, they must be justified in the particular context as consistent with the public interest".[256]

Saskatchewan, for instance, provides that there is no limitation applicable to proceedings:

- for a declaration if no consequential relief is sought;
- to enforce an order of a court, or any order that may be similarly enforced;
- to enforce an arbitration award to which *The Arbitration Act, 1992*[257] applies;
- by a debtor in possession of collateral to redeem it;
- by a creditor in possession of collateral to realize on it.[258]

Ontario has a very similar list of exemptions in its legislation.[259] Its list is slightly longer, however, and includes proceedings to obtain support or to enforce an agreement for support or

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[256] Roach, *supra* note 29 at 49 [footnote omitted].

[257] S.S. 1992, c. A-24.1.

[258] *Saskatchewan Act*, *supra* note 6, s. 15. The Saskatchewan Act also provides that there is no limitation applicable to proceedings by the Crown to collect unpaid fines, discussed below in section K.1.

[259] *Ontario Act*, *supra* note 6, s. 16. As discussed in section E, above, the Uniform Act excludes declarations by providing that the Act does not apply to them.

maintenance under the *Family Law Act*.[260] The Alberta Act excludes declarations and the enforcement of court orders and judgments from its definition of remedial order.[261] The New Brunswick Act, on the other hand, does not provide for exemptions from its limitations provisions.

The Commission considers that some of the exemptions found in other jurisdictions are appropriate for Manitoba. The exemption relating to declaratory relief does not apply in this respect because the Commission has recommended that the Act not apply at all to such claims. The Commission agrees that there should be no limitation applicable to proceedings by a debtor in possession of collateral to redeem it, by a creditor in possession of collateral to realize on it, or to obtain or enforce family support or maintenance. In Manitoba, sections 61 and 63 of *The Family Maintenance Act*[262] abolish any limitation in respect of family support and maintenance proceedings, and these provisions should continue in effect.

**RECOMMENDATION 26**

***No limitation should apply to proceedings***

- ***by a debtor in possession of collateral to redeem it; or***
- ***by a creditor in possession of collateral to realize on it.***

## 2. Court Orders and Arbitral Awards

The Commission also agrees that there should be an exemption from the general limitations regime for the enforcement of a court order, or any order that may be similarly enforced.[263] There are different approaches to the enforcement of court orders among the provinces. As mentioned, Saskatchewan and Ontario provide that there is no limitation applicable to the enforcement of a court order, while Alberta excludes the enforcement of a remedial order from the definition of a remedial order. New Brunswick does not include these exemptions. However, Saskatchewan, Alberta and New Brunswick each set a specific limitation, with no discoverability period, for a claim based on a judgment or order for the payment of

[260] R.S.O. 1990, c. F.3. There are also certain other exemptions that are discussed below under "Public Authorities", as well as an exemption for a proceeding arising from a sexual assault if one of the parties to the assault had charge of the person assaulted, was in a position of trust or authority in relation to the person or the person was dependent on the party; see section K.3, below.

[261] Along with proceedings for judicial review and writs of habeas corpus: *Alberta Act*, *supra* note 5, s. 1(i). See the discussion in Section E, above.

[262] C.C.S.M. c. F20.

[263] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 1, defines "order" to include a judgment. "Any order that may be similarly enforced" would include a foreign judgment or arbitral award once recognized by the court: see notes 269 and 270, *infra*.

money.[264] In Alberta and Saskatchewan, the ultimate limitation for these proceedings is 10 years from the date of the order.[265] In New Brunswick, the limitation is 15 years.[266]

In the Commission's view, there should be no limitation placed on the enforcement of a court order. A plaintiff who has obtained a judgment has already complied with the original limitation applicable to his or her claim and brought suit in a timely fashion, and a final determination has been reached in court. The Commission agrees with the comments of the former Law Reform Commission of British Columbia:

> Few would deny that a judgment should occupy a special position in any scheme of limitation laws. A judgment is something more than a mere contract debt or a debt due under a specialty. It is a declaration by the Court under which the rights of the parties have been determined. Once the time for an appeal has passed there is no room for dispute. Furthermore, the successful plaintiff cannot be said to have slept on his rights. He has taken action, and as a consequence recovered judgment. It might be argued, with considerable justification, that no limitation period whatsoever should exist with respect to the enforcement of judgments. It may seem unfair that the plaintiff who has been put to the trouble and expense of obtaining a judgment to enforce a right or obligation should face a further limitation period with respect to the exercise of his rights under the judgment.[267]

The Commission sees no reason to distinguish between the enforcement of a judgment or order by action and enforcement by execution.

The Commission's recommendation on this point does not apply to the recognition of foreign court orders. In the absence of legislation, a foreign judgment (including an order from another Canadian jurisdiction) cannot be enforced by execution. An action on a foreign judgment is treated as an action on a contract debt, to which the new basic and ultimate limitation periods

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[264] While a judgment or order is typically enforced by execution, an action may be brought on a judgment or order for the payment of money. In *Lax v. Lax* (2004), 70 O.R. (3d) 520, 239 D.L.R. (4th) 683, the Ontario Court of Appeal confirmed that the expiry of a limitation applying to "an action on a judgment" under the former Ontario *Limitations Act*, R.S.O. 1990, c. L.15 barred a plaintiff both from suing on the judgment and from applying to the court under the *Rules of Civil Procedure* for leave to issue a writ of seizure and sale on the judgment: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 60.07-60.11; *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rules 60.07- 60.10. See also ALRI Report, *supra* note 42 at 42-43.

[265] *Saskatchewan Act*, *supra* note 6, s. 7.1; *Alberta Act*, *supra* note 5, s. 11. This time period is also found in most provinces that have not enacted modern limitations legislation. The current *Manitoba Act* limits actions on a judgment or order for the payment of money to 10 years, or in the case of a Canadian judgment, to any shorter time for enforcement in the province or territory where the judgment was made. It also prohibits successive actions on such judgments: *Manitoba Act*, *supra* note 1, ss. 2(1)(l), (l.1).

[266] *New Brunswick Act*, *supra* note 7, s. 8. In Alberta and New Brunswick, this period is consistent with the general ultimate limitation in the Act, but in Saskatchewan it is shorter, to maintain consistency with the 10 year period used in most provinces and territories: Saskatchewan Legislative Assembly, *Official Report of Debates (Hansard)* No 9A (8 November 2006) at 292 (Hon. Mr. Quennell).

[267] Law Reform Commission of British Columbia, *Report on Limitations, Part 2: General* (Report No.15, 1974) at 33-34. See *Young v. Verigin*, 2007 BCCA 551, 289 D.L.R. (4th) 368 at paras. 6-7, and Law Reform Commission of Western Australia, *supra* note 35 at paras. 12.38-12.45.

would apply.[268] While Manitoba does have legislation dealing with the registration and enforcement of judgments from most other provinces and territories and some international jurisdictions,[269] a review of the limitations in these Acts and the supporting agreements with other jurisdictions is beyond the scope of this report. In section K.9 of this report, the Commission notes that there are a number of specific limitations provisions in existing Manitoba statutes that must be assessed to ensure consistency with the principles of the new Act. This review should include an assessment of the limitations applying to the registration and enforcement of foreign judgments.[270]

The Commission has also considered issues surrounding the enforcement of domestic and foreign arbitral awards. The Saskatchewan and Ontario limitations statutes provide that no limitation applies to the enforcement of an award in an arbitration to which that province's *Arbitration Act* applies.[271] The Alberta and New Brunswick limitations statutes are silent with respect to arbitral awards.[272]

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[268] *Canada Mortgage and Housing Corp. v. Horsfall*, 2004 MBQB 124, [2004] 11 W.W.R. 761; *Lax. v. Lax*, *supra* note 264.

[269] *The Enforcement of Canadian Judgments Act*, C.C.S.M. c. E116 [*ECJA*], *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20 [*REJA*], and *The Canada-United Kingdom Judgments Enforcement Act*, C.C.S.M. c. J21. By virtue of Man. Reg. 319/87R the *REJA* applies to all provinces and territories except Quebec, to the Australian states, the Australian Capital Territory and the Northern Territory and to the U.S. states of Washington and Idaho. The *REJA* and the U.K. enforcement statute set a limitation of six years for an application for registration of a foreign judgment or arbitral award for the payment of money. The *ECJA*, enacted in 2005, adopts the Uniform Law Conference of Canada *Uniform Enforcement of Canadian Judgments and Decrees Act* and sets a 10 year limitation for the registration or enforcement of the provisions of a Canadian judgment for the payment of money. Under the current *Limitation of Actions Act*, an action relating to a contract debt is subject to a limitation of six years, and an action on a Canadian or non-Canadian judgment for the payment of money is subject to a limitation of 10 years. Manitoba has not yet adopted the Uniform Law Conference of Canada *Uniform Enforcement of Foreign Judgments Act* or the *Uniform Court Jurisdiction and Proceedings Transfer Act*: Uniform Law Conference of Canada, online: <http://www.ulcc.ca/en/us>. See Manitoba Law Reform Commission, *Private International Law* (Report No. 119, 2009).

[270] Once registered as provided for in the statutes, a foreign judgment or arbitral award is treated as a Manitoba Court of Queen's Bench judgment, and under the proposed new Act there would be no limitation for its enforcement.

[271] Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 52(3) and Saskatchewan's *Arbitration Act, 1992*, S.S. A-24.1, s. 52(3) are each based on the Uniform Law Conference *Uniform Arbitration Act*, online: <http://www.ulcc.ca/en/us/Arbitrat_En.pdf>, and set a two year limitation for an application for enforcement of an arbitral award. However, it appears that the provinces' respective *Limitations Acts* prevail over these Acts, so that no limitations would apply. While Saskatchewan's *Limitations Act* does not apply to proceedings in the nature of an application (s. 3(1)(b)), s. 52(1) of *The Arbitration Act, 1992* provides that "The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action". *The Arbitration Act, 1992* does not provide that its limitation with respect to an application for enforcement applies notwithstanding *The Limitations Act*.

[272] The Alberta *Arbitration Act*, R.S.A. 2000, c. A-43 and New Brunswick *Arbitration Act*, S.N.B. 1992, c. A-10.1, like the Manitoba *Arbitration Act*, C.C.S.M. c. A120, s. 51(3) and the Ontario and Saskatchewan Acts, *supra* note 271, set a two year limitation for an application for the enforcement of an arbitral award. The Alberta and New Brunswick limitations statutes provide that a limitation set in another Act prevails: *New Brunswick Act*, *supra* note 7, s. 4(1) (with respect to public Acts), *Alberta Act*, *supra* note 5, s. 2(4)(b).

In our draft report for consultation, the Commission preferred the approach of Saskatchewan and Ontario, and suggested that no limitation should apply to the enforcement of a domestic arbitral award. However, the recent Supreme Court of Canada decision in *Yugraneft Corp. v. Rexx Management Corp.*,[273] dealing with the limitation applying in Alberta to the enforcement of a foreign arbitral award, raises implications for the recognition and enforcement of foreign and domestic arbitral awards.

In *Yugraneft*, the court addressed the limitation that applies to an application for the recognition and enforcement of a Russian arbitral award under Alberta's *International Commercial Arbitration Act*.[274] Alberta's *ICAA* implements the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) and the *UNCITRAL Model Law on International Commercial Arbitration*.[275] The New York Convention was ratified by Canada in 1986, and each province and territory has enacted legislation to implement it and the model law. However, the convention, model law and implementing statutes do not set a limitation for an application for the recognition and enforcement of an international arbitral award. Alberta, like most other provinces and territories, does have a six year limitation applying to applications for the recognition and enforcement of foreign judgments and arbitral awards under its *Reciprocal Enforcement of Judgments Act* (*REJA*),[276] but this limitation did not apply in *Yugraneft*, because Russia is not a reciprocating state under the *REJA*.

In *Yugraneft*, the Supreme Court held that the New York Convention permitted the application of a provincial limitation as a 'rule of procedure' as that term is understood under the convention. An application for recognition and enforcement of a foreign arbitral award was an application for a remedial order under the Alberta *Limitations Act*, and was subject to the two year basic limitation.

In addition to statutes similar to Alberta's *ICAA* and *REJA*, Manitoba and other provinces and territories have legislation dealing with the registration and enforcement of judgments and arbitral awards originating in the U.K. These statutes adopt the *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (the U.K. Convention),[277] which sets a six year limitation for the registration and enforcement of U.K. judgments. 'Judgment' is defined in the U.K. Convention to include an arbitral award.

The application of the various provincial and territorial statutes results in a patchwork of limitations for the recognition and enforcement of arbitral awards. In Alberta, applications for the registration of foreign arbitral awards from reciprocating jurisdictions under the *REJA* and

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[273] *Supra* note 181.

[274] R.S.A. 2000, c. I-5.

[275] The Convention and the UN Model Law are attached to the Act as schedules.

[276] R.S.A. 2000, c. R-6.

[277] *The Canada-United Kingdom Judgments Enforcement Act*, *supra* note 269. The Convention is set out in the schedule to the Act. The *ECJA*, *supra* note 269, does not apply to arbitral awards.

from the United Kingdom are subject to a six year limitation.[278] As decided in *Yugraneft*, applications from non-reciprocating jurisdictions are subject to the two year basic limitation. In New Brunswick, the *REJA* does not apply to arbitral awards,[279] although the six year limitation for United Kingdom arbitral awards is in effect.[280]

While the Saskatchewan and Ontario limitations statutes provide that there is no limitation in respect of a domestic arbitral award, they have no reference to limitations for the enforcement of foreign arbitral awards. Each province has a six year limitation for an application for the recognition and enforcement of a foreign arbitral award in its *REJA*. Each has also adopted the U.K. Convention. The *Limitations Acts* of both provinces prevail over the limitations set out in other Acts unless otherwise specified, but Ontario has listed the *REJA* and the *Reciprocal Enforcement of Judgments (U.K.) Act*[281] in its schedule of prevailing limitations in other Acts, and the Saskatchewan *Limitations Act* does not apply to proceedings in the nature of an application.[282]

There are additional related issues. As recognized in *Yugraneft*, Article III of the New York Convention requires an enforcing jurisdiction to provide foreign awards with treatment as generous as that provided to domestic awards rendered in the jurisdiction.[283] If Manitoba's new *Limitations Act* provides that no limitation applies to the enforcement of domestic arbitral awards, it must also provide that no limitation applies to the enforcement of foreign awards in order to comply with Canada's international obligations under the convention.[284] Further, a provision that no limitation applies to the enforcement of foreign arbitral awards would require an amendment to the U.K. Convention in order to apply to U.K. awards. If the United Kingdom were not included in the scheme, this would lead to a result described by Rothstein, J., as "incongruous":[285] an award from a non-reciprocating jurisdiction would be accorded more favourable treatment than one from a jurisdiction with which Manitoba has concluded a reciprocal enforcement agreement

While clarification is unquestionably needed around these matters, their resolution is beyond the scope of this report. The review of limitations provisions in other Manitoba statutes should include a consideration of the appropriate limitations applying to arbitral awards, taking

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[278] *Supra* note 276, s. 2(1); *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, Part 3.

[279] As a result, it appears that applications relating to foreign awards from jurisdictions other than the U.K. would be subject to the two year limitation in the *New Brunswick Act*, *supra* note 7.

[280] *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Act*, S.N.B. 1984, c. R-4.1.

[281] R.S.O. 1990, c. R.6.

[282] *Supra* note 6, s. 3(1)(b). As a result, it is not clear whether any limitation applies to an application for the enforcement of an award under Saskatchewan's *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2.

[283] *Yugraneft*, *supra* note 179 at paras. 31-33.

[284] The Saskatchewan and Ontario limitations statutes may be in contravention of the convention in this respect.

[285] *Yugraneft*, *supra* note 179 at para. 48.

into account the relevant agreements and conventions for the recognition and enforcement of foreign arbitral awards and their implications for domestic arbitral awards.

**RECOMMENDATION 27**

***No limitation should apply to proceedings to enforce an order of a Manitoba court, or any order that may be similarly enforced.***

## 3. Public Authorities

As a matter of public policy, it may be desirable for a new Act to exempt certain types of actions brought by the Crown. The Uniform Act does not contain any such provision, and neither do Alberta's or New Brunswick's, but both Saskatchewan's and Ontario's statutes do. The Saskatchewan Act provides simply that no limitation applies to proceedings brought by the Crown to collect unpaid fines.[286] Ontario goes further, and exempts proceedings:

- seeking forfeiture under the *Civil Remedies Act, 2001* of "an instrument of unlawful activity" or a vehicle "likely to be used to engage in vehicular unlawful activity";[287]
- to recover money owing to the Crown in respect of fines, taxes, and penalties, or interest on taxes or penalties;
- in respect of claims relating to the administration of social, health or economic programs or the provision of support to members of the public, if brought by the Crown or a delivery agent; and
- to recover money owing in respect of student loans, awards, and grants.[288]

Ontario's exemptions relating to forfeiture under the *Civil Remedies Act, 2001* duplicate the provisions in that Act that provide that no limitation applies to forfeiture proceedings under sections 8 and 11.2.[289] Two other types of remedies are available under the *Civil Remedies Act*: the court may make an order forfeiting property that is proceeds of unlawful activity, and, in the case of conspiracy to engage in unlawful activity, the court may make any order that it considers just. The *Civil Remedies Act* provides for a 15 year limitation for these proceedings,[290] and Ontario's *Limitations Act* confirms these limitations in its schedule.[291]

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[286] *Saskatchewan Act*, *supra* note 6, s. 15(f).

[287] *Civil Remedies Act, 2001*, S.O. 2001, c. 28, ss. 8, 11.2.

[288] *Ontario Act*, *supra* note 6, ss. 16(1)(e), (i), (j), (k).

[289] *Supra* note 287, ss. 8(5), 11.2(6).

[290] *Ibid*., ss. 3(5) and 13(7).

[291] *Ontario Act*, *supra* note 6, Sch.

Manitoba's recent *Criminal Property Forfeiture Act*[292] is similar to Ontario's *Civil Remedies Act*. However, section 22 of the Manitoba Act provides that no limitation applies to applications brought under it.[293] The Commission agrees with this approach and considers that this provision should continue in effect.[294]

With respect to the remainder of the Ontario exemptions, the Commission is persuaded that similar exemptions would be appropriate in a new Act.[295] The Crown is the manager of public funds, and it is generally in the public interest that the Crown's ability to recover money owing to it resulting from unlawful activity or from the administration of public programs ought not to be subject to being forfeited through the expiration of a limitation.

**RECOMMENDATION 28**

***No limitation should apply to proceedings***

- ***to recover money owing to the Crown in respect of fines, taxes and penalties, or interest on fines, taxes or penalties;***
- ***in respect of claims relating to the administration of social, health or economic programs; and***
- ***to recover money owing in respect of student loans, awards, and grants.***

## 4. Bankruptcy and Similar Proceedings

In its 2004 legislation, Saskatchewan enacted a provision providing for the suspension of limitations for periods of time during the bankruptcy, creditor arrangement or farm debt mediation process. Section 26 of that Act provides:

> The limitation periods established by this Act are suspended for the time during which a stay of proceedings is in effect pursuant to the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act*, (Canada) or the *Farm Debt Mediation Act* (Canada).

The stays of proceedings referred to in this section typically prevent creditors from initiating proceedings against a debtor who is seeking relief under the statutes in question. The

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[292] *The Criminal Property Forfeiture Act*, C.C.S.M. c. C306. The Manitoba *Criminal Property Forfeiture Act* does not include provisions for the forfeiture of a vehicle used in vehicular unlawful activity or for a finding of conspiracy to engage in unlawful activity.

[293] *Ibid.*, s. 22.

[294] See the discussion regarding limitations in other Acts at section K.9, below.

[295] The Ontario provision exempts proceedings to recover interest on taxes and penalties but not interest on fines. The Commission sees no reason to make this distinction. There are examples in Manitoba of provisions allowing interest to be charged on unpaid fines: e.g. *The Insurance Agents and Adjusters Regulation*, Man. Reg. 389/87R, s. 10(6).

effect of this provision is that those stays of proceedings do not prejudice the creditors in respect of the limitations applicable to their claims. Section 61 of the current Manitoba Act contains a similar provision in respect of the *Farmers' Creditors Arrangement Act* (Canada), which was repealed in 1988.[296] The more comprehensive and updated Saskatchewan section seems to the Commission to be a sensible and fair provision.[297]

**RECOMMENDATION 29**

***The Act should provide that the limitations established therein are suspended for the time during which stays of proceedings are in effect under any of the* Bankruptcy and Insolvency Act *(Canada), the* Companies' Creditors Arrangements Act *(Canada), or the* Farm Debt Mediation Act *(Canada).***

## 5. Sexual Assault and Assaults Within Intimate Relationships

In *M.M. v. Roman Catholic Church of Canada*,[298] the Manitoba Court of Appeal held that all causes of action were subject to the 30 year ultimate limitation set out in subsection 7(5) of *The Limitation of Actions Act*. Subsequent to that decision, the Legislature enacted an amendment to the *Act* that is intended to have retroactive application.[299] Subsection 2.1(2) of the Act now exempts sexual assaults, assaults committed by a person in an intimate relationship with the plaintiff and assaults by a person on whom the plaintiff was financially, emotionally,

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[296] *Farmers' Creditors Arrangement Act, 1943*, RS.C. 1952, c. 111, as rep. by the *Farm Debt Review Act*, RS.C. 1985, c. 25 (2nd Supp.), s. 68, in force August 5, 1986. The latter Act was then repealed and replaced by the *Farm Debt Mediation Act*, S.C. 1997, c. 21, in force April 1, 1998. See *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp*., [1999] 2 S.C.R. 961: the Supreme Court of Canada held that an order made under the Manitoba *Family Farm Protection Act*, C.C.S.M. c. F15, authorizing foreclosure proceedings during a stay of proceedings granted under the *Farm Debt Review Act* was invalid under the doctrine of federal paramountcy. A suspension of collection activities is required during the stay.

[297] The Commission received submissions in support of this provision from members of the Manitoba Bar Association Bankruptcy and Insolvency Law Section: submission by D. Kroft (November 2, 2009); submission by D. Perlov (November 2, 2009). G.B. Taylor noted that the provision may not be necessary in relation to the *BIA* and the *CCAA*, because in practical terms a claim would have to be brought within the period of a stay before claims are discharged: submission by G.B. Taylor (November 2, 2009). D. Perlov suggested that consideration be given to including other stays that come into effect under federal or provincial legislation or court order; however, a matter stayed by court order would already be before the court, and the Commission has not identified any other federal or provincial stays that would be applicable.

[298] 2001 MBCA 148, 205 D.L.R. (4th) 253. The Court of Appeal held the matter was governed by the 1931 *Limitation of Actions Act*, S.M. 1931, c. 30, but noted that the application of section 7 of the current Act would have produced the same result.

[299] *The Limitation of Actions Amendment Act*, S.M. 2002, c. 5. It has been suggested that the amendment may not in fact have retroactive effect: *Semple v. Canada (Attorney General)*, 2006 MBQB 285, 213 Man.R. (2d) 220 at para. 10. The amending Act did include a transitional provision, s. 5(2), that provides that the exemption applies whether an action was commenced before or after the coming into force of that Act, and even if a person acquired a vested legal right because a limitation had expired. Subsection 5(2) was not included in the consolidated statute.

physically or otherwise dependent from both the basic limitation and the 30 year longstop provision of the Act.[300]

Most other jurisdictions with reformed limitations regimes have enacted similar protection for persons bringing claims based on sexual assaults and, in some cases, assaults within intimate relationships, including Ontario, Saskatchewan, British Columbia, and Newfoundland.[301] The Uniform Act also provides such protection.[302]

The provisions are broadly similar. The Saskatchewan Act provides that:

> There is no limitation period with respect to a claim in the nature of trespass to the person, assault or battery if:
>
> (a) the claim is based on misconduct of a sexual nature; or
>
> (b) at the time of the injury on which the claim is based:
>
> (i) one of the parties who caused the injury was living with the claimant in an intimate and personal relationship; or
>
> (ii) the claimant was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury.[303]

The New Brunswick Act was amended during the Standing Committee review of the bill to provide that "[t]here is no limitation period in respect of a claim for damages for trespass to the person, assault or battery if the act complained of is of a sexual nature".[304] The Ontario Act provides that the basic limitation does not run in respect of a claim based on assault or sexual assault while the claimant is incapable of commencing the proceeding because of his or her physical, mental or psychological condition. The Act includes a presumption that a person with a claim based on an assault was incapable of commencing the proceeding earlier than it was commenced where the parties were in an intimate or dependent relationship. A person with a claim based on sexual assault is presumed to have been incapable of commencing the proceeding earlier than it was commenced.[305]

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[300] This provision was applied in *Raubach v. Canada (Attorney General)*, 2004 MBQB 154, [2005] 1 W.W.R. 334.

[301] *Ontario Act*, *supra* note 6, ss. 10, 16; *Saskatchewan Act*, *supra* note 6, s. 16; *B.C. Act*, *supra* note 65, ss. 3(4)(k), (l); *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 8(2).

[302] *Uniform Act*, *supra* note 2, s. 9. The Alberta Act has one reference to sexual assault; a potential defendant may not give a notice to proceed, which begins the running of a limitation against a minor, where the claim is based on conduct of a sexual nature, including sexual assault: *Alberta Act*, *supra* note 5, s. 5.1(13)(b).

[303] *Saskatchewan Act*, *supra* note 6, s. 16(1).

[304] *New Brunswick Act*, *supra* note 7, s. 14.1. The original bill was tabled in January 2009. The New Brunswick Standing Committee on Law Amendments reported to the Legislative Assembly on its review of the tabled bill on May 12, 2009, and noted recommendations of respondents that, among other things, the bill follow the approach of other jurisdictions that have eliminated limitation periods for claims based on conduct of a sexual nature: New Brunswick, Legislative Assembly, Standing Committee on Law Amendments, *Second Report of the Standing Committee on Law Amendments* (12 May 2009) at 3, online: < http://www.gnb.ca/legis/business/committees/reports /56-3/2law-e.pdf>.

[305] *Ontario Act*, *supra* note 6, s. 10.

The Commission considers that the protection extended by the Legislature in 2002 is necessary and appropriate in light of the significant barriers that the courts and Legislatures have recognized that claimants frequently face in pursuing claims related to sexual assaults and assaults within intimate or dependent relationships.[306] The protection should continue in the new Act.

**RECOMMENDATION 30**

***The Act should provide that no limitation applies to claims based on sexual assaults and assaults within intimate or dependent relationships, and the provision should be expressly retroactive.***

## 6. Fraudulent Breach of Trust

Section 49 of the current Manitoba Act provides that no limitation applies to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust by the trustee, or to recover from the trustee trust property or its proceeds. Other actions to recover trust property or in respect of a breach of trust are subject to a six year limitation.

Saskatchewan provides, in sections 12 and 13, that a limitation is postponed in respect of a fraudulent breach of trust or conversion of trust property until the beneficiary becomes 'fully aware' of the act on which the claim is based. The other recent Acts do not specifically deal with this point. Saskatchewan also provides that where property was vested in a trustee on an express trust and conveyed to a purchaser for valuable consideration, the day on which the act or omission on which the claim took place is the day of transfer, as against the purchaser only.

In our draft report for consultation, the Commission suggested that a provision similar to the current section 49 should be included in the new Act. However, the Commission agrees with the submission of one respondent that recommendations 23 and 24 adequately deal with circumstances of fraudulent breach of trust.[307] The running of the ultimate limitation would be suspended during any period of minority or incapacity and during any period in which the defendant wilfully conceals the injury or its cause or wilfully misleads the claimant as to the appropriateness of a proceeding. The provision specific to breaches of trust in the current Act is no longer necessary.

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[306] See *M. (K.) v. M. (H.), supra* note 19. The Commission recognizes that concerns may exist with the current approaches as well. Sexual and non-sexual assaults range in severity, from the most egregious conduct to comparatively minor unwanted contact: submission by E. Leven (July 20, 2009). As well, there may be multiple defendants to a claim. For example, where an assault is alleged to have occurred within an employment context, the person's supervisor may be named on the basis of negligent supervision, and the person's employer may be named on the basis of vicarious liability. The ability of additional defendants, in particular, to defend a claim will be compromised where the conduct occurred years previously.

[307] Submission by E. Brown (March 12, 2010).

## 7. Environmental Claims

Ontario's new limitations legislation makes special provision for environmental claims: "There is no limitation period in respect of an environmental claim that has not been discovered".[308] An environmental claim is defined to mean:

> … a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect.[309]

None of the other modern limitations statutes includes such a provision. Manitoba currently has no equivalent provision.

In a submission to the Uniform Law Conference, the Uniform Limitations Act Working Group suggested that Ontario's approach was "unprecedented" and "debatable".[310] In its subsequent report to the Conference, the Working Group noted that "several jurisdictions in Canada have set out special limitation periods for environmental claims", although it did not specifically consider whether the adoption of a special limitation was appropriate for inclusion in the Uniform Act.[311]

The special limitations referred to by the Working Group include those in Alberta, Saskatchewan and Yukon. The Alberta *Environmental Protection and Enhancement Act* provides that the court may extend any applicable limitation where the basis for the claim is "an alleged adverse effect resulting from the alleged release of a substance into the environment".[312] Saskatchewan's *Environmental Management and Protection Act, 2002*, creates a statutory right of compensation in favour of anyone suffering loss or damage as the result of certain types of environmental harm, and stipulates a special six year limitation period applicable to such claims.[313] In Yukon, every adult or corporate resident has been granted the right to a "healthful natural environment,"[314] and the right to commence an action against anyone who has impaired, or is likely to impair, the natural environment, but any such action must be brought within 15

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[308] *Ontario Act*, *supra* note 6, s. 17. This provision did not assist the applicant in *Bailey v. Canada (Attorney General)*, [2008] O.J. No. 4066 (S.C.J.), because the court found that he and the purchaser of the property in question knew of the environmental contamination at the time of the purchase.

[309] *Ontario Act*, *supra* note 6, s. 1.

[310] John Lee, Uniform Law Conference of Canada, Uniform Limitations Act Working Group, *A New Uniform Limitations Act*, online: <http://www.ulcc.ca/en/poam2/ CLS2004_New_Uniform_ Limitations_Act_En.pdf> at 14.

[311] Uniform Law Conference of Canada, Uniform Limitations Act Working Group, *Uniform Limitations Act* (St. John's, 21-25 August 2005), online: <http://www.ulcc.ca/en/poam2/Uniform_Limitations_Act_Rep_En.pdf> at para. 7.

[312] R.S.A. 2000, c. E-12, s. 218. The application for an extension may be made before or after the expiry of the limitation.

[313] S.S. 2002, c. E-10.21, s. 15.

[314] *Environment Act*, R.S.Y. 2002, c. 76, s. 6.

years of the date on which the cause of action arose.[315] Under the *Canadian Environmental Protection Act, 1999*, an individual who has applied for an investigation may commence an 'environmental protection action' where the Minister has failed to conduct an investigation and report within a reasonable time or where the Minister's response to the investigation was unreasonable. The action must be commenced within two years of the time that the person became aware, or should have become aware of, conduct that caused significant harm to the environment.[316]

In British Columbia, by contrast, the statutory cause of action created by the *Environmental Management Act* is not subject to a special limitation.[317]

The question of whether or not to impose a special limitation for environmental claims, or none at all, is a complex one. In Manitoba, there is no statutory right of action under environmental legislation, but actions for personal injury or property damage arising from environmental harms may be pursued in some circumstances. In *66295 Manitoba Ltd. v. Imperial Oil Ltd*.,[318] the Court of Queen's Bench declined to recognized a new category for recovery for tort for economic loss in the case of the purchase of land that was impacted, though not contaminated, by petroleum chemicals through the use of the property as a gas station by a previous owner. Schulman, J. commented on the concern in negligence law "against allowing claims that would tend to establish what is described as indeterminate recovery".[319]

> [T]here is a serious question of indeterminate liability. As Curtis Carpets has no intention of remedying the impaction of the soil, the soil will remain in its present state forever. It follows that, over the years as title changes, every subsequent purchaser would be able to bring a claim against Imperial Oil, so long as they bring the application within one year of discovering the decisive fact of the existence of the state of the soil. There will be no closure for Imperial Oil. Moreover, several purchasers down the line would have a right of action against a succession of prior owners … [I]n commercial dealings, there is a need for stability and finality.[320]

The Supreme Court of Canada has established that damages may be claimed by the Crown, in a proper case, for harm to the environment as a remedy in public nuisance, or negligence causing environmental damage to public lands,[321] and although it is not yet clear

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[315] *Ibid*, s. 8, 9.

[316] S.C. 1999, c. 33, ss. 22-38; the period of time during which the person waited for the Minister to conduct an investigation is not included in the limitation.

[317] *Environmental Management Act*, S.B.C. 2003, c. 53, s. 47; *First National Properties Ltd. v. Northland Road Services Ltd*., 2008 BCSC 569, 70 C.L.R. (3d) 27 at para. 36.

[318] 2002 MBQB 145, [2002] 7 W.W.R. 732.

[319] *Ibid*. at para. 17.

[320] *Ibid*. at para. 39.

[321] *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74.

whether members of the public would have standing to bring such a claim, the law may be evolving in that direction.[322]

A statutory right of action for environmental harm may be an option worth consideration for Manitoba. In the absence of a statutory right of action, however, the Commission considers that it is not appropriate to provide for a specific environmental limitation in the new Act. In the event that a statutory right is created, the limitation applying to that right should be included in that statute.

## 8. Conversion and Detinue

At common law, wrongful interference with another person's personal property may constitute the torts of conversion or detinue. Intentional interference with property that is inconsistent with the rights of the owner is conversion; detinue is continuing wrongful detention of property that does not require denial of the owner's title.[323] Both conversion and detinue may exist in a single fact situation, but they are separate and discrete torts, with different starting points for the running of limitations, and different remedies and valuation dates for the purposes of calculating damages:

> The act of conversion obliges the defendant to pay for the chattel. Consequently, when the act of conversion occurs, the plaintiff must mitigate his loss by promptly replacing it. Damages are assessed, therefore, at the time of the conversion or, at the latest, when the plaintiff is aware of the conversion. Detinue is a continuing wrong and the cause of action may be defeated by a return of the chattel at any time before judgment. Damages are thus assessed at the date of the trial. This disparity in valuation dates has led to the guideline that detinue is the tort of choice on a rising market and conversion is preferable on a falling market.[324]

Where property is converted or wrongfully detained a second or subsequent time before the rightful owner regains possession, each conversion or wrongful detention after the first results in a new cause of action. Limitations statutes have frequently included special provisions to deal with successive conversions or detentions. The current Manitoba Act provides that no action may be brought after six years from the day the cause of action accrued in respect of the original conversion or detention. As well, on the expiry of the limitation, the title of the person to the property is extinguished.[325]

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[322] See Stewart A.G. Elgie and Anastasia M. Lintner, "The Supreme Court's Canfor Decision: Losing the Battle but Winning the War for Environmental Damages" (2005) 38 U.B.C.L. Rev. 223.

[323] Other torts protecting interests in personal property are trespass to chattels and the action on the case to protect an owner's reversionary interest: see Philip H. Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law, 2007) at 288-295; Fridman, *supra* note 221 at 135-161.

[324] Osborne, *ibid*. at 292. "The most common remedy for detinue is a judicial order that the defendant *either* give up the chattel *or* pay for its value and pay damages for its detention": Osborne, *ibid*. at 291. See *Steiman v. Steiman* (1982), 143 D.L.R. (3d) 396 (C.A.) and *Dominion Securities v. Glazerman* (1984), 29 C.C.L.T. 194 (Man. C.A.).

[325] *Manitoba Act*, *supra* note 1, s. 54.

The Ontario and Saskatchewan Legislatures set out a different exception, applying to the conversion of property. The Acts provide an exception from the 15 year ultimate limitation for good faith purchasers following a conversion. A two year ultimate limitation applies to any claim for conversion of property against a purchaser of the property for value acting in good faith, running from the day on which the property was converted. The provisions do not address the title to the converted property.[326]

The New Brunswick Act is more detailed than the Ontario and Saskatchewan Acts, in an effort to more effectively deal with the 'chain of conversions' scenario. It was suggested to the Commission that the Ontario and Saskatchewan approach "leaves everyone along the chain exposed to a greater or lesser extent forever".[327]

The New Brunswick Act provides:

> 9(1) No claim to recover possession of personal property that has been converted shall be brought
>
> (a) if the defendant is a purchaser of the personal property for value acting in good faith, after 2 years from the day the purchaser purchased the personal property, and
>
> (b) in any other case, after the earlier of:
>
> (i) two years from the day on which the claimant first knew or ought reasonably to have known the identity of the person who has possession of the personal property, and
>
> (ii) fifteen years from the day on which a conversion of the personal property first occurred.
>
> (2) On the expiry of a limitation period under this section, the claimant's title to the personal property is extinguished.
>
> Conversion
>
> 10(1) Subject to subsection (2), Part 2 [general and ultimate limitations] applies to a claim for damages for conversion.
>
> (2) If there have been 2 or more conversions of the same personal property, a claim for damages for conversion shall not be brought against a defendant if, under section 9, a claim to recover the possession of the personal property from that defendant cannot be brought, or could not be brought if that defendant were still in possession of the property.

The U.K. Law Commission made a recommendation with respect to conversions that was similar to the current Manitoba Act. In the case of successive conversions that are not theft-

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[326] *Ontario Act*, *supra* note 6, s. 15(3); *Saskatchewan Act*, *supra* note 6, s. 7(2). The Alberta and Uniform Acts do not deal with conversion.

[327] Submission by T. Rattenbury (December 17, 2009). It was suggested that the Ontario and Saskatchewan approach protects only bona fide purchasers, not donees or heirs, protects each bona fide purchaser only two years after his or her own purchase, even if from another bona fide purchaser, and never protects a donee receiving from a bona fide purchaser.

related, the Law Commission felt that the ten year ultimate limitation should run from the date of the first conversion only:

> We noted that if the long-stop limitation period is to start running from every fresh conversion, it would be deprived of most of its purpose. That is, in any claim by the claimant against a subsequent converter, the circumstances surrounding the original conversion, which could have been many years previously, may need to be considered in order to establish the cause of action. In addition, where there has been an extended chain of conversions, to permit claims against subsequent innocent converters, who would no longer be able to bring a claim against the person from whom they obtained the goods because such a claim would be time-barred by the limitation period, might cause injustice.[328]

The comments of the U.K. Law Commission also refer only to conversion, but it is important to note that the legal context in the U.K. is quite different from that in Canada. The common law of conversion and detinue continues to exist in Canada, but in the U.K. detinue has long been abolished; detinue was subsumed within the tort of conversion by the *Torts (Interference with Goods) Act 1977*.[329] The U.K has also provided for exceptions in its limitations statute for conversions that amount to theft: section 4 of the *Limitation Act 1980*[330] provides that limitations do not apply to the right to bring an action in respect of theft and allied offences.

The U.K. Law Commission recommended that claims for conversion should be subject to the 'primary' limitation (based on discoverability), which would not begin to run in the case of theft-related claims until the claimant knows, or ought to know, both the facts giving rise to the cause of action and the location of the stolen property. In the case of theft, the ultimate limitation should not run until the purchase of the goods by a good faith purchaser. The Law Commission recommended the continuation of the principle that the claimant's title is extinguished on the expiry of the limitation.

In the Commission's view, broader reforms are needed to rationalize the substantive law of conversion and detinue in Manitoba, including the law relating to remedies and limitations, the ownership of converted or detained goods following the expiry of the basic and ultimate limitations, and the application of limitations in the case of theft. The Commission intends to release a separate report recommending reforms to the law of conversion and detinue. As a result, the Commission makes no recommendation in this report on these points.

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[328] Law Commission (U.K.), *supra* note 66 at para. 4.52; the Law Reform Commission of Western Australia made a similar recommendation that once the limitation for the first conversion has expired, no action should be available in respect of any subsequent conversion: Law Reform Commission of Western Australia, *supra* note 35 at paras. 12.36-12.37.

[329] (U.K.), 1977, c. 32.

[330] (U.K.), *supra* note 14.

## 9. Personal Property

Part VII of the current Manitoba Act contains provisions dealing specifically with the sale and lease of goods under security agreements and lease to purchase agreements. It sets a limitation of six years for proceedings by a seller, or a person claiming through the seller, respecting the sale of goods or the recovery of goods that are the subject of a sale or lease. A payment or acknowledgement by the purchaser extends the running of the limitation.

The Saskatchewan Law Reform Commission recommended a six year limitation in respect of charges on personal property, which under that Commission's overall approach (providing for three limitations of two, six and ten years), would have been the same as the limitation for an action for recovery on an ordinary debt and an action in respect of a charge on land. An action by a debtor not in possession of property subject to a security interest to redeem the property would also have been subject to a six year limitation. The Saskatchewan Commission recommended that the right and title to personal property should be extinguished upon the expiry of the limitation.[331]

The New Brunswick Act also has specific limitations applying to secured debt, applying to both personal property and real property. The limitation for a claim to recover the principal of a debt secured on property is 15 years from the day the security is taken. The general basic limitation of two years applies to a claim to recover interest. If a creditor takes possession of the property, the debtor may not bring a claim to redeem the property after 15 years from the date of possession.[332]

The Commission has recommended specific limitations relating to proceedings by creditors in possession of collateral to realize on it and proceedings by debtors in possession of collateral to redeem it.[333] Otherwise, the Commission sees no compelling reason under the new limitations scheme to continue specific provision for claims in respect of personal property.

## 10. Insurance Claims

In addition to the specific limitation provisions in *The Limitation of Actions Act*, there exist in Manitoba and other Canadian jurisdictions a multitude of very specific provisions relating to insurance claims. The schedule to the existing Act lists a number of Acts and limitations contained in other Acts as of January 1, 1968 that prevail over the limitations in *The Limitation of Actions Act.* Among these is *The Insurance Act*,[334] which contains a wealth of specialized limitations provisions.

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[331] Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act* (Report, 1989).

[332] *New Brunswick Act*, *supra* note 7, s. 12.

[333] The Commission recommends, as did the Law Reform Commission of Saskatchewan, *supra* note 331, that no limitation should apply to a proceeding by a creditor in possession of collateral to realize on it. As in the Saskatchewan Act, *supra* note 6, s. 15(d), the Commission also recommends no limitation respecting a proceeding by a debtor in possession of collateral to redeem it.

[334] *The Insurance Act*, C.C.S.M. c. I40.

It would make sense for such provisions to be considered in detail in the context of a revision of *The Limitation of Actions Act*, if only because there is otherwise a risk that the overall limitations regime may become incoherent or inconsistent. Recommendations for insurance limitations reform have been made by others, including the Alberta Law Reform Institute[335] and the Uniform Law Conference of Canada.[336] Unfortunately, such a review is beyond the scope of this report. The Commission will therefore content itself with a recommendation that such a review and reconsideration be undertaken in conjunction with reform of *The Limitation of Actions Act*.

**RECOMMENDATION 31**

***The limitation provisions found in* The Insurance Act *should be examined and revision of them considered in order to ensure consistency with the new Act.***

## 11. Limitations in Other Acts

As mentioned, insurance legislation is not, however, the only type of legislation that makes provision for specific limitation periods. The existing Act includes a schedule of limitations provisions in other legislation extant on January 1, 1968, and provides that the Act prevails over any contrary limitations provisions other than those in the schedule.[337] The precedence specifically applies only where the conflicting limitations provision was in place in 1968, however, and any limitation provision enacted since then prevails over the Act.[338]

It is beyond the scope of this report to discuss the extent to which limitations provisions exist in Manitoba outside the Act, and beyond those listed in the schedule to the Act. Suffice it to say, they exist; statutes with specific limitations include those with broad impact such as *The Human Rights Code*[339] and *The Real Property Act*.[340] Nevertheless, the Commission is concerned that steps should be taken to identify all the limitations and notice provisions in order to ensure consistency as much as possible among all such provisions.

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[335] Alberta Law Reform Institute, *Limitations Act: Standardizing Limitation Periods for Actions on Insurance Contracts*, *supra* note 174.

[336] Uniform Law Conference of Canada, Civil Law Section, *Limitation Periods in Insurance Claims: Report* (St. John's, 21-25 August 2005), online: <http://www.ulcc.ca/en/poam2/Insurance_Claims_Limitations_En.pdf>. See *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada*, 2003 SCC 25, [2003] 1 S.C.R. 433; *Churchland v. Gore Mutual Insurance Co.*, 2003 SCC 26, [2003] 1 S.C.R. 445.

[337] *Manitoba Act*, *supra* note 1, s. 4.

[338] *Taubner-De Pape v. De Pape*, [1999] 1 W.W.R. 80 (Man. C.A.).

[339] C.C.S.M. c. H175, s. 23(1).

[340] C.C.S.M. c. R30, discussed in section L, below; see also, for example, *The Medical Act*, C.C.S.M. c. M90, s. 61, *The Dental Hygienists Act*, C.C.S.M. c. D34, s. 64, *The Naturopathic Act*, C.C.S.M. N80, s. 20, *The Veterinary Medical Act*, C.C.S.M. c. V30, s. 54 and *The Garage Keepers Act*, C.C.S.M. c. G10, s. 13(7). The new *Regulated Health Professions Act*, S.M. 2009, c. 15 (not in force) includes a limitation, in s. 175, in an action for negligence or malpractice of two years after the date when the services or procedures ended.

When the Alberta and Saskatchewan Legislatures modernized their limitations legislation, they repealed or amended numerous special limitations.[341] The New Brunswick Legislature repealed a few special limitations, but also provided that most special limitations prevail over the *Limitation of Actions Act*.[342] In Ontario, many special limitations were repealed or otherwise amended,[343] but the Legislature also enacted a schedule to the Act, not unlike the existing schedule in Manitoba's Act, listing all other Acts containing limitations that continue to be in effect. Any statutory limitation not listed in the schedule, or incorporating a listed limitation, is of no force or effect.[344] The Uniform Act adopts a similar approach. The Uniform Law Conference described the rationale for this succinctly:

> [A] schedule of special limitation periods effectively consolidates limitation periods found in other statutes that a legislature wishes to be exceptions to the general limitations regime to allow for greater accessibility and transparency. It also imposes a legislative discipline to ensure that the enactment of any new limitation period is assessed in light of the established general limitations regime.[345]

In our draft report for consultation, the Commission recommended the approach adopted by Ontario and the Uniform Act for Manitoba. On further consideration, however, the Commission prefers the 'traditional' approach advocated by one respondent, that each Act means what it says, without cross-referencing to the new Act.[346] It will be necessary in any event to identify the limitations provisions that exist in other statutes, to ensure consistency with the new Act.[347] This review should include limitations applicable to extra-judicial proceedings, such as realization of real property security by sale or foreclosure,[348] and limitations applicable to the recognition and enforcement of arbitral awards and foreign court orders,[349] to ensure consistency

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[341] *Limitations Act*, S.A. 1996, c. L-15.1, *Saskatchewan Act*, *supra* note 6, ss. 32-88. The *Alberta Act*, *supra* note 5, does not apply to a claim that is subject to a limitation in any other enactment: s. 2(4)(b). Subsection 3(4) of the *Saskatchewan Act* provides that the Act "does not apply to a claim that is subject to a limitation provision in another Act or a regulation if that Act or regulation states that the limitation provision applies notwithstanding this Act."

[342] *New Brunswick Act*, *supra* note 7, ss. 4, 28-33, 35-39.

[343] *Ontario Act*, *supra* note 6, ss. 25-49.

[344] *Ibid.*, s. 19.

[345] Uniform Law Conference of Canada, Uniform Limitations Act Working Group, *supra* note 311 at para. 5.

[346] Submission by T. Rattenbury (December 17, 2009). As pointed out, this also avoids the uncertainty that may arise in determining whether a time limit is or is not a limitation. If a time limit that was not included in the schedule was later held to be a limitation, it would be invalid.

[347] In our draft report for consultation, the Commission suggested that the new Act should exempt from its operation claims that are subject to a limitation in an international convention or treaty that is adopted by another Act (see for example, the *International Sales Conventions Act* proposed by the Uniform Law Conference of Canada but not yet implemented in Manitoba: online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u6>. However, under Recommendation 32, this exemption would not be necessary.

[348] The *Manitoba Act*, *supra* note 1, currently applies to proceedings including "entry, taking of possession, distress and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute": s. 1. See the *New Brunswick Act*, *supra* note 7, s. 23.

[349] Discussed in section K.2, above.

with the new limitations. But once the government completes that project, and makes any necessary amendments to other legislation, each Act will contain the limitation appropriate in the circumstances.

Where no other specific limitation is provided, the new *Limitations Act* should apply.

**RECOMMENDATION 32**

***The limitation provisions found in all Manitoba statutes other than the new Act should be considered for abolition or amendment. The new Act should provide that if there is a conflict between the new Act and any other Act, the other Act prevails.***

## L. REAL PROPERTY LIMITATIONS

It will be recalled that the very first general limitations legislation dealt with claims relating to real property.[350] The existing Manitoba Act contains Parts III to VI, comprising sections 21 to 45, relating to real property claims, descended for the most part more or less directly from ancient English legislation. The provisions are complex and sometimes unintelligible. They bear strong resemblances to similar provisions in other provinces, which have been described as "complex, confused and obscure,"[351] and possibly "ineffectual or inconsistent with what the Torrens system of land registration attempts to accomplish".[352]

The Act's provisions relating to real property have rarely been the subject of comment by the courts.[353] The reason for this is fairly straightforward: the Torrens system of land titles registration introduced in 1885 and governed by *The Real Property Act*,[354] covers most privately-held land in the province and is intended as a complete codification of title to real property interests.[355]

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[350] *Statute of Limitations, 1540* (U.K.), 32 Hen. VIII, c. 2.

[351] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at 65.

[352] Saskatchewan Department of Justice, *supra* note 44 at 17.

[353] Most of the cases that have arisen deal with s. 21 and its application to mortgages. Examples include *Canada Mortgage & Housing Corp. v. Horsfall*, *supra* note 268 (the claim for breach of payment obligations on a mortgage was within the 10 year limitation period under s. 21); *Perron v. Perron Estate* (1998), 133 Man. R. (2d) 157 (Q.B.) (s. 21 does not require that a payment on or acknowledgement of a mortgage be made); *Partridge v. Andrusko* [1994] M.J. No. 160 (Man. C.A.) (the limitation in respect of a mortgage requiring monthly payments started to run upon the first default in payment). In the recent case of *Wolch v. Ataliotis*, 2008 MBQB 147, 229 Man. R. (2d) 170, aff'd 2008 MBCA 149, the court considered sections 22 and 44, holding that the claim for the unpaid purchase price for real property was clearly brought within the ten year limitation.

[354] *Supra* note 340.

[355] See the discussion in Manitoba Law Reform Commission, *Private Title Insurance* (Report No. 114, 2006) at chapter 2.

It is also important to note, however, that the previous deed registry established in 1870 by *The Registry Act*[356] still exists in Manitoba. Land under the deed registry system includes both Crown land and privately owned land, and the Manitoba Property Registry regularly receives applications to bring deed registry land into the land titles system.[357] As well, the limitations in the current Act do have an impact on Registry operations. For example, the right of action on a judgment under the Act is ten years,[358] and *The Judgments Act* provides that "where the right of action on a certificate of judgment registered against any land is barred under *The Limitation of Actions Act*, the Court of Queen's Bench may … order the certificate to be vacated and any endorsement thereof on the certificate of title to the land to be removed".[359] Similarly, section 21 of the current Act places a ten year limitation on the right of action under a mortgage, following which an application may be made for a court order extinguishing the mortgage.[360]

Alberta, which has a land titles system similar in most respects to Manitoba's,[361] and where the former limitations statute contained provisions similar to those in Manitoba's existing Act, chose to eliminate most provisions specific to real property in its new limitations regime. The new Act applies to claims in respect of real property,[362] with one exception. Alberta is unique among Canadian jurisdictions in retaining the common law concept of adverse possession in the face of a Torrens land titles regime.[363] The Alberta Law Reform Institute initially recommended that the Alberta Act not apply to legal or equitable claims for the possession of

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[356] C.C.S.M. c. R50. The deed registry provides for a public record of deeds but offers no certainty in relation to the comprehensiveness of the register or the validity of the deeds registered.

[357] Telephone conversation with Irvine Simmonds, A/District Registrar, Manitoba Property Registry (April 22, 2009).

[358] *Manitoba Act*, *supra* note 1, s. 2(1)(l), (l.1).

[359] C.C.S.M. c. J10, s. 11(1).

[360] *The Real Property Act*, *supra* note 340, provides that "[w]here a limitation imposed by *The Limitation of Actions Act* in regard to a mortgage or encumbrance made under this Act, comes into effect, a mortgagor under the mortgage or a person whose land is charged with the encumbrance may apply to the court for a declaration and order extinguishing the mortgage": s. 106(1).

[361] Alberta's system of land title registration has been in effect since 1886, before the establishment of the province and "before there was a significant amount of private land ownership in the province": Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No. 69, 1993) at 17; *Territories Real Property Act*, S.C. 1886, c. 26, replaced by the *Land Titles Act*, S.C. 1894, c. 28, in turn replaced by the *Land Titles Act*, S.A. 1906, c. 24, once Alberta became a province.

[362] The Alberta Court of Appeal confirmed in 2005 that the two year basic limitation applies to mortgage foreclosure proceedings pursued in court: *Daniels v. Mitchell*, *supra* note 8; *Blair v. Desharnais*, *supra* note 8.

[363] Alberta Law Reform Institute, Limitations Act: *Adverse Possession and Lasting Improvements (*Report No. 89, 2003) at 4. Regarding Manitoba Torrens system land, "title" adverse to or in derogation of the title of the registered owner of land titles system land cannot be acquired by adverse possession; see *The Real Property Act*, *supra* note 340, s. 61(2). However, *Stall et al. v. Yarosz et al*. (1964), 43 D.L.R.(2d) 255 (Man. C.A.) indicates that an interest less than title, such as an easement, can be acquired by adverse usage. *The Crown Lands Act*, C.C.S.M. c. C340, s. 34, provides more broadly than *The Real Property Act*: "No person may acquire title to or any claim upon Crown land by any length of possession"; see also ss. 27-29 regarding removal of a person in adverse possession. The former *Municipal Act*, R.S.M. 1988, c. M225 set out a process, in s. 209, for the removal by a municipality of a person in adverse possession of municipal land. This provision was not included in the current *Municipal Act*, C.C.S.M. c. M225 or in any other statute.

real or personal property.[364] This position was revised, however, when the time came for its final report, and the Institute then recommended more narrowly that claims for remedial orders for the possession of real property be exempt from the two year discoverability limitation, but not from the 15 year ultimate limitation.[365] This recommendation was implemented in the Alberta Act.[366]

When the government of Saskatchewan considered modernizing its limitations regime, it asked interested individuals and organizations for submissions with respect to the real property provisions in its legislation, which were again broadly similar to those found in Manitoba's existing Act.[367] Although some interest was apparently expressed by real property lawyers in working with the government to fashion the applicable rules, the Legislature chose to abolish the real property provisions when it enacted the new Saskatchewan legislation. The Commission was advised that this has caused no difficulties since the Act was introduced in 2005, and that the Act has been well received.[368]

The land registration systems of Alberta and Saskatchewan differ from Manitoba's in some respects, however. Unlike Manitoba, Alberta and Saskatchewan do not have a deed registry system for land, although a significant portion of land in both provinces is unsurveyed and not entered into the land titles system.[369]

Ontario adopted a very different approach when it enacted its new limitations regime. Ontario, like Manitoba, has both a Torrens-style land titles system and an old style registry

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[364] Alberta Institute of Law Research and Reform, *Limitations* (Report for Discussion No. 4, 1986) at 208ff (now the Alberta Law Reform Institute).

[365] ALRI Report, *supra* note 42 at 39-40. The Institute noted that the original recommendation was made because they wished to eliminate the acquisition of ownership through adverse possession. At the time of the final report, the Institute continued to hold the view that the law governing adverse possession was in need of reform, but felt that the reform should be addressed in the context of another project. The *Alberta Act* does exclude claims for remedial orders based on adverse possession of real property owned by the Crown: *supra* note 5, s. 2(4).

[366] *Alberta Act*, *supra* note 5, s. 3(4). Following a 2003 report by the Alberta Law Reform Institute on limitations and adverse possession, the Alberta Legislature amended the *Limitations Act* to clarify the effect of the legislation on such claims: Alberta Law Reform Institute, *supra* note 363; *Limitation Statutes Amendment Act, 2007*, *supra* note 186.

[367] Saskatchewan Department of Justice, *supra* note 44 at 17.

[368] Telephone conversation with Madeleine Robertson, Crown Counsel, Saskatchewan Justice (January 22, 2008).

[369] When the Torrens system was introduced in Saskatchewan in 1887, all documents that were registered in the former deed registry system were brought into the Torrens system. However, a significant portion of land, primarily in the north, is Crown land that is unsurveyed. This land is divided into abstracted parcels; these parcels make up part of the Saskatchewan abstract directory (along with a small number of parcels created through surveys but not titled). The abstract directory is a component of the land registry but is not considered to fall within the Torrens system: email correspondence with Amin J. Bardestani, Information Services Corporation of Saskatchewan, February 18, 2009. In Alberta, most land is "non-patent" land owned by the province in remote areas that has not been entered into the land titles system. Certain interests (e.g. oil and gas leases and trapping leases) can be placed against the land and a separate inventory is maintained for these interests. Should any land need to be held in private ownership, the land would be surveyed and titles created so that they could be brought within the land titles system: email correspondence with Curtis D. Woollard, Director of Land Titles North, Service Alberta, May 4, 2009.

system in operation.[370] Unlike the governments of Alberta and Saskatchewan, the Ontario Law Reform Commission has been ambivalent about reforming the real property provisions. In the original Law Reform Commission report in 1969, reform of those real property provisions was recommended.[371] However, the report resulting from the last set of consultations that occurred before the enactment of the new Act stated:

> Despite the expertise of the Real Property Registration Branch of the Ministry of Consumer and Commercial Relations, the rest of the Consultation Group felt that it did not have the background necessary to determine whether complex or technical issues raised by Part I [the part dealing with real property claims] could be sufficiently addressed by the proposed new scheme. …
>
> While recognizing the need for further review of Part I, the Consultation Group was very concerned that any such review not delay progress on implementation of the rest of the reforms.[372]

In the event, the Ontario Legislature chose to retain the real property provisions of the old Act and rename them the *Real Property Limitations Act*.[373] Claims relating to real property in Ontario thus continue to be subject to an archaic and problematic limitations regime.[374]

One commentator has suggested that Ontario's decision to keep its real property limitations resulted from the fact that, as in Manitoba, the concept of adverse possession applies to real property that is not within the Torrens system:[375]

> One might ask why, in principle, issues associated with property law should be the subject of special limitation analysis. The question has apparently been considered on several occasions by the government. Conventional limitation analysis outside of the property context often focuses on individual events. A breach of contract or a tort would

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[370] In Manitoba, most privately owned land is registered in the land titles system under *The Real Property Act*, *supra* note 340, although like Alberta and Saskatchewan, a significant portion of land is Crown land that is outside the land titles system. In Ontario, most land in the southern part of the province was recorded under the registry system until relatively recently; efforts have been under way since 1994 to transfer this real property into the land titles system: see the discussion in Manitoba Law Reform Commission, *Private Title Insurance*, *supra* note 355 at chapter 2.

[371] Ontario Law Reform Commission, *supra* note 351.

[372] Ontario, Ministry of the Attorney General, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Minister of the Attorney General, 1991) at 49.

[373] *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 26; *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

[374] See e.g. Chapman, *supra* note 32 at 308-311.

[375] *Real Property Limitations Act*, *supra* note 373, ss. 4, 15. The length of adverse possession required to extinguish title is ten years: *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216 (C.A.). This concept does not apply to land registered under the *Land Titles Act*, R.S.O 1990, c. L.5, by virtue of s. 51 of that Act. In Manitoba, s. 61(1) of *The Real Property Act*, *supra* note 340, provides that "Every certificate of title is void as against the title of a person adversely in actual occupation of, and rightly entitled to, the land at the time the land was brought under the new system, and who continues in such occupation."

> be examples. The real property area frequently involves long-term relationships. More to the point, in the area of real property, the events which may be put under review create rights in one party while they destroy the rights of another party. The person in possession of property that he or she does not own is not simply committing the tort of trespass, he or she is creating a new title. The limitation period in this context both cuts off and establishes rights and must be treated with more caution.[376]

In Manitoba, section 25 of the current *Limitation of Actions Act* provides that no person may take proceedings to recover land after ten years from the time at which the right to do so first accrued to the person, or to a person through whom he or she claims. This limitation applies to land that has not been brought under *The Real Property Act*, and may also be relevant to interests in Torrens system land that are not registered under that Act.[377]

The New Brunswick approach is similar to that of Alberta. However, like Ontario and Manitoba, New Brunswick has had a deed registry system,[378] with the associated doctrine of adverse possession, for many years (New Brunswick began converting to a land titles system in 2001).[379] The New Brunswick Office of the Attorney General expressed the following view in 2005:

> [W]e cannot imagine preparing a new Limitation of Actions Act but leaving the real property limitation periods in their current state. We believe, also, that the exercise is not as complicated as it might seem. ... We believe that many of the issues that New Brunswick's property limitation periods now address can be dealt with satisfactorily under the 'basic' and 'ultimate' limitation periods described above. They are, in substance, 'contract' issues more than 'property' issues".[380]

The Office felt that the main exception related to actions to recover land or other property, since the expiry of the limitation bars actions and also extinguishes the owner's title. The Office was considering using the ultimate limitation of 15 years for actions to recover possession of land, with no discoverability period.[381]

In the result, the new New Brunswick Act does not change the limitation provisions in the previous Act with respect to the recovery of possession of land. The Office of the Attorney

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[376] Brian Bucknall, "Limitations Act, 2002 and Real Property Limitations Act: Some Notes on Interpretative Issues" (2005) 29 Adv. Q. 1 at 9.

[377] *Supra* note 363; the Law Reform Commission of Saskatchewan, *supra* note 331 at 24, gives the examples of life interests and other future estates in land that may not be protected by caveat.

[378] *Registry Act*, R.S.N.B. 1973, c. R-6.

[379] Service New Brunswick, *What Should I Know About Land Titles?* (January, 2001), online: <http://www.snb.ca/e/4000/4106e.asp>; *Land Titles Act*, S.N.B. 1981, c. L-1.1.

[380] New Brunswick Office of the Attorney General, *Law Reform Notes*, December 2005. The Office commented that details such as when a limitation begins to run in relation to joint owners, expired tenancies and future interests would need to be considered so that new uncertainties are not created.

[381] *Ibid*.

General explained that "[t]hough these are long overdue for reform, the Department has decided to review them further before presenting legislation".[382] These sections are retained and renamed the *Real Property Limitations Act*. The Act does, however, apply to other actions dealing with real property, such as rents and mortgages, for example.[383] There is a specific provision in relation to a claim for recovering the principal of a secured debt on either real or personal property; in this case, only the ultimate limitation of 15 years applies.[384]

In our draft report for consultation, the Commission presented three options for consideration: repealing real property limitations, implementing some or all of the recommendations of the Law Reform Commission of Saskatchewan respecting real property limitations,[385] or continuing the existing real property limitations in a discrete Act. The Commission received no submissions with respect to real property limitations.

On further consideration, the Commission is satisfied that the first option, adopted by the Saskatchewan and Alberta Legislatures, and partly by New Brunswick, is the preferable approach. As we noted in our draft report for consultation, one of the Commission's primary objectives when proposing reform of the existing law is simplification and clarification. It appears that the real property provisions of the *Limitations Act* are indeed superfluous and unnecessary in the context of a modern limitations regime. They have rarely been raised before Manitoba courts; where issues have arisen, the subject matter of the claim, usually the breach of a mortgage agreement, has not warranted special limitations treatment.[386] Subject to our comments with respect to the recovery of possession of real property below, the Commission considers that the real property provisions of the existing Act should be repealed and not replaced. This will greatly simplify and clarify limitations law in Manitoba.

**RECOMMENDATION 33**

***Subject to recommendation 34 respecting proceedings to recover possession of real property, the provisions in the current Act dealing specifically with claims relating to real property should be repealed.***

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[382] New Brunswick Commentary, *supra* note 48 at 1.

[383] *Ibid*. at 3.

[384] *New Brunswick Act*, *supra* note 7, s. 12; New Brunswick Commentary, *supra* note 48 at 8.

[385] Contained in two draft reports and a final report: *Tentative Proposals for Changes in Limitations Legislation; Part I: The Effect of Limitations on Title to Real Property* (1981), *Tentative Proposals for Changes in Limitations Legislation; Part II: The Limitation of Actions Act* (1986) and *Proposals for a New Limitation of Actions Act*, *supra* note 331.

[386] *Supra* note 353; as noted, one case dealt with a claim for the unpaid purchase price for real property, and would also be appropriately dealt with under the limitations structure proposed in the new Act.

## 1. Recovery of Possession of Real Property

The Commission considers that that the application of limitations to actions based on adverse possession warrants specific attention. The situation is one of considerable complexity.

Early English statutes of limitation provided that if a person took possession, however unlawfully, of the land of another, the owner would have only a limited period to bring an action to recover possession of the land. The statutes extinguished the owner's remedy, but not the owner's title, and they conferred no title on the 'squatter'. That changed, to some extent, with the enactment of the *Real Property Limitation Act, 1833*.[387] This Act provided that after time had run against a claimant (the ousted owner), the owner's title, and not merely the right of action, was extinguished.

This would leave the squatter with possession (or 'seisin') of the land with virtually no exposure to challenge, and possession was from the earliest times the root of title. The squatter therefore acquired a possessory title to the land and was to all intents and purposes the new owner.

This possibility was anathema to the proponents of Torrens-type land title systems, which provide a guarantee of title to registered land. As a result, Manitoba's *Real Property Act* provides:

> Title by possession abolished
> 61(2) After land has been brought under this Act, no title thereto adverse to, or in derogation of, the title of the registered owner is acquired by any length of possession merely.[388]

This provision does not make *The Limitation of Actions Act* irrelevant where land titles system land is concerned. The limitation provision still would seem to bar the ousted registered owner from filing stale claims to recover possession.

The situation with respect to Crown lands is more complicated and obscure. At common law, squatters could be the object of legal actions by the Crown, no matter how delayed, since time does not run against the King (*nullum tempus occurrit regi).* This doctrine was altered by the *Crown Suits Act, 1769,*[389] commonly known as the *Nullum Tempus Act*, which fixed a limitation of 60 years for Crown actions to recover land. The *Nullum Tempus Act* extinguished the Crown's right to bring actions to recover land after a period of time, but did not deal with the Crown's title. As the *Real Property Limitation Act, 1833* did not by its terms bind the Crown, it would appear that the Crown's title was not extinguished.

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[387] (U.K.), 3 & 4 W. IV, c. 27.

[388] *Supra* note 340.

[389] (U.K.), 9 Geo. III c. 16.

Against this backdrop, Manitoba's *Crown Lands Act* provides:

> No title by possession
> 34. No person may acquire title to or any claim upon Crown land by any length of possession.[390]

This appears to bring the law governing squatters on Crown land into line with that governing squatters on private land held under the land titles system. Again, this does not mean that the limitation statutes are irrelevant (section 25 of the Manitoba Act with respect to land titles land, and the *Nullum Tempus Act* with respect to Crown land); rather, all they do is prevent the advancement of claims in law for the recovery of those lands, once the limitation has elapsed. After that, the squatter is immune from suit, though he or she has no prospect of acquiring title to the land. Although under the old laws of adverse possession the only expectation the squatter could have had was for a possessory title, it must be assumed that a possessory title is no longer possible, or both s. 61(2) of the *Real Property Act* and s. 34 of the *Crown Lands Act* would be redundant.

As noted above, one situation remains – the case of privately held land that has not yet been brought under the land titles system and is not governed by *The Real Property Act*. In such cases, it appears that the limitation under the Manitoba Act will still bar actions against an adverse possessor after ten years have elapsed, and the *Real Property Limitation Act, 1833* will extinguish the title of the party dispossessed.

Rather than attempt to reflect the various complex strands of law in the new limitations regime, the Commission considers that it would be clearer, simpler and more elegant to provide, in a manner consistent with s. 61(2) of the *Real Property Act* and s. 34 of the *Crown Lands Act*, that no limitation applies to an action for the recovery of possession of land.

**RECOMMENDATION 34**

***No limitation should apply to a proceeding to recover possession of real property.***

## M. BINDING THE CROWN

Under section 49 of Manitoba's *Interpretation Act*, an Act does not bind the Crown unless it so expressly states.[391] *The Limitation of Actions Act* does not contain such a provision. In our 1990 Informal Report No. 20A, the Commission suggested that the Act was anachronistic

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[390] *Supra* note 363.

[391] C.C.S.M. c. I80. See *Hupe v. Manitoba (Residential Tenancies Branch, Director)*, 2009 MBCA 27, 307 D.L.R. (4th) 619, in which the Court of Appeal held that the Crown was not bound by *The Limitation of Actions Act* with respect to an inquiry under s. 140 of *The Residential Tenancies Act*, C.C.S.M. c. R119.

and unfair, and recommended that it be amended so that it binds the Crown.[392] The Commission noted that the Crown differs from all other plaintiffs, in that it "can bring suits governed by this Act whenever it pleases, no matter how long the passage of time since the cause of action arose".[393] On the other hand, "[i]f the plaintiff has not complied with the limitation period, the Crown has a full defence, as would any other defendant.[394]

No such amendment has been enacted by the Legislature. The reasons for binding the Crown remain persuasive, however, and the Commission still considers such an amendment to be desirable. The draft Act includes a provision, at section 3, binding the Crown.

Alberta, Saskatchewan, Newfoundland, British Columbia, Ontario and New Brunswick all bind the Crown.

**RECOMMENDATION 35**

***The Act should provide expressly that it binds the Crown.***

## N. TRANSITIONAL PROVISIONS

Assuming that the Legislature is persuaded to adopt a new limitations regime, the question arises as to how to deal with the transition from the old to the new scheme. There are essentially two approaches, epitomized by Alberta and Ontario.

When Alberta introduced its new limitations legislation, it provided for a fairly clean, but dramatic, break with the old regime. The new legislation applies to any claim brought after March 1, 1999, regardless of when the claim arose. A claim that could have been brought prior to that date, but was not, will be statute-barred on the earlier of the old limitation date and two years from March 1, 1999.[395] This approach was also adopted by New Brunswick in its new Act.[396]

When the new Ontario limitations regime was introduced, on the other hand, it included several provisions setting out how to deal with claims that arose before the coming into force of the new legislation.[397] These provisions are clearly intended to minimize the effect of the new legislation on claims that arose before its introduction. The corollary to this, of course, is that the

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[392] Manitoba Law Reform Commission, *Limitation of Actions Brought by the Crown* (Informal Report No. 20A, 1990).

[393] *Ibid*. at 1.

[394] *Ibid*. at 1.

[395] *Alberta Act*, *supra* note 5, s. 2.

[396] *New Brunswick Act*, *supra* note 7, ss. 2(1), 27. The Canadian Bar Association, New Brunswick Branch, supported this "more straightforward approach", noting that the Ontario transitional provisions have led to complications: O'Brien, *supra* note 138 at 36.

[397] *Ontario Act*, *supra* note 6, s. 24.

repealed limitations legislation will continue to have effect long after its repeal, since claims that arose while it was in effect will generally continue to be governed by it, rather than the new legislation.

Ontario's approach was largely adopted by Saskatchewan when it introduced its new limitations legislation.[398]

The Commission accepts that the kind of interference with vested rights that results from the relatively abrupt imposition of a new limitations regime, as in Alberta, can be seen as unfair. Nevertheless, such an approach avoids much litigation over which limitations regime applies, and many years during which lawyers, judges, and litigants must be conversant with the intricacies of two very different limitations regimes. On the whole, the Commission is persuaded that the transition to the new Act ought to be accomplished in the same manner as occurred in Alberta.

**RECOMMENDATION 36**

***The Act should apply to all proceedings commenced after the Act comes into force.***

**RECOMMENDATION 37**

***The Act should provide that claims that were discovered in accordance with the Act while the former Act was in effect are barred after the earlier of***

- ***the date that would have applied under the former Act; and***
- ***two years from the date that the new Act comes into force.***

**RECOMMENDATION 38**

***The Act should provide that no proceeding may be commenced in respect of a claim if the limitation that applies to the claim under the former Act expires before the date that the new Act comes into force.***

[398] *Saskatchewan Act*, *supra* note 6, s. 31.

## O. CONCLUSION

The Commission has made numerous recommendations for improvement of the existing *Limitation of Actions Act*. Most of the recommendations are based on the *Uniform Limitations Act*, and the Commission's final recommendation is that the existing Act be repealed and replaced with an Act substantially in the form attached to this report as Appendix A. Appendix A tracks the Uniform Act very closely, with certain modifications to implement some of the recommendations that the Commission has made in this report.

The Commission believes that the enactment of Appendix A as Manitoba's new limitations legislation will bring about a marked improvement in the province's limitations regime, and will bring Manitoba in line with the modern limitations regimes in Alberta, Saskatchewan, Ontario, and New Brunswick, marking greater consistency both within the province and across Canadian jurisdictions.

**RECOMMENDATION 39**

***The Act should be in substantially the form of Appendix A.***

## CHAPTER 4

## LIST OF RECOMMENDATIONS

1. The *Limitation of Actions Act* should be repealed and replaced with a new *Limitations Act*. (p. 11)

2. The Act should apply to a claim pursued in a court proceeding to remedy an injury that occurred as the result of an act or omission. (p. 13)

3. 'Injury' should be defined to mean
   (a) personal injury;
   (b) property damage;
   (c) economic loss; or
   in the absence of any of the above,
   (d) the non-performance of an obligation; or
   (e) the breach of a duty. (p. 20)

4. The basic limitation should begin to run on the discovery of the claim. A claim is discovered on the earlier of
   (a) the day on which the person with the claim first knew
      - that the injury had occurred,
      - that the injury was caused by or contributed to by an act or omission,
      - that the act or omission was that of the defendant, and
      - that having regard to the nature and circumstances of the injury
        - a right to make a claim exists, and
        - a proceeding would be an appropriate means to seek to remedy the injury; and
   (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). (p. 25)

5. The basic limitation for claims should be two years. (p. 26)

6. The Act should provide for an ultimate limitation, calculated from the day on which the act or omission on which the claim is based took place, beyond which no claim may be brought. (p. 28)

7. The ultimate limitation should be 15 years. (p. 30)

8. The Act should not apply to a proceeding for judicial review. (p. 31)

9. The Act should not apply to a proceeding for a declaration of existing rights if no consequential relief is sought. (p. 35)

10. The ultimate limitation should be 30 years in respect of a proceeding based on
    - existing aboriginal and treaty rights that are recognized and affirmed in the *Constitution Act, 1982*; and
    - an equitable claim by an aboriginal people against the Crown. (p. 40)

11. No limitation should apply to a claim of aboriginal title. (p. 40)

12. The Act should not retain residual discretion in the court to extend a limitation. (p. 41)

13. The Act should provide that notwithstanding the expiry of a limitation after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if
    - the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
    - the judge is satisfied that no party will suffer prejudice as a result of the amendment that can not be compensated for by costs or an adjournment. (p. 46)

14. The Act should provide that
    - the claimant has the burden of proving that the claim was brought within two years of discovery of the claim; and
    - the defendant has the burden of proving that the claim was not brought within 15 years of the day on which the act or omission on which the claim is based took place. (p. 50)

15. Parties should be permitted to agree to lengthen, but not to shorten, limitations. (p. 52)

16. The Act should provide that, for conflict of laws purposes, the limitations law of Manitoba and any other jurisdiction is substantive. (p. 53)

17. For the purposes of the basic limitation, the day on which an injury occurs, in relation to a demand obligation, should be the day on which a default in performance occurs once a demand for performance is made. (p. 56)

18. For the purposes of the ultimate limitation, the day on which an act or omission on which a claim is based occurs, in relation to a demand obligation, should be the day on which a default in performance occurs once a demand for performance is made. (p. 58)

19. For the purposes of the basic limitation, the day on which an injury occurs should be
    - in the case of a continuous act or omission, the day on which the act or omission ceases;
    - in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs. (p. 62)

20. For the purposes of the ultimate limitation, the day on which an act or omission on which a claim is based occurs should be
    - in the case of a continuous act or omission, the day on which the act or omission ceases;
    - in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs. (p. 63)

21. For the purposes of the basic limitation, in the case of a claim for contribution and indemnity, the day on which an injury occurs should be the day on which the liability of the claimant in respect of the matter for which contribution or indemnity is sought is confirmed by a court judgment, arbitration award or settlement agreement. (p. 66)

22. For the purposes of the ultimate limitation, in the case of a claim for contribution and indemnity, the day on which an act or omission on which the claim is based occurs should be the day on which the claimant
    (a) is served with a claim or a notice that commences an arbitration; or
    (b) incurs a liability through a settlement agreement,

    in respect of the matter for which contribution or indemnity is sought. (p. 66)

23. The running of the ultimate limitation should be suspended during any time in which the defendant
    - wilfully conceals from the claimant the fact that an injury has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the defendant; or
    - wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury. (p. 70)

24. Subject to recommendation 25, the running of the ultimate limitation should be suspended during any time in which the claimant is
    - a minor; or
    - incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition. (p. 71)

25. The Act should retain section 8 of the current Act, allowing a potential defendant to serve a notice to proceed on a potential claimant who is a minor or is incapable of commencing a proceeding because of his or her physical, mental or psychological condition and on the Public Trustee. When a notice to proceed is served, the limitation should begin to run against the potential claimant. Where it appears to the Public Trustee that another person upon whom the notice was served is failing to take reasonable steps to protect the interests of the potential claimant, the Public Trustee should be required to investigate the circumstances, and may commence and maintain a proceeding for the benefit of the potential claimant. (p. 74)

26. No limitation should apply to proceedings
    - by a debtor in possession of collateral to redeem it; or
    - by a creditor in possession of collateral to realize on it. (p. 75)

27. No limitation should apply to proceedings to enforce an order of a Manitoba court, or any order that may be similarly enforced. (p. 80)

28. No limitation should apply to proceedings
    - to recover money owing to the Crown in respect of fines, taxes and penalties, or interest on fines, taxes or penalties;
    - in respect of claims relating to the administration of social, health or economic programs; and
    - to recover money owing in respect of student loans, awards, and grants. (p. 81)

29. The Act should provide that the limitations established therein are suspended for the time during which stays of proceedings are in effect under any of the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangements Act* (Canada), or the *Farm Debt Mediation Act* (Canada). (p. 82)

30. The Act should provide that no limitation applies to claims based on sexual assaults and assaults within intimate or dependent relationships, and the provision should be expressly retroactive. (p. 84)

31. The limitation provisions found in *The Insurance Act* should be examined and revision of them considered in order to ensure consistency with the new Act. (p. 91)

32. The limitation provisions found in all Manitoba statutes other than the new Act should be considered for abolition or amendment. The new Act should provide that if there is a conflict between the new Act and any other Act, the other Act prevails. (p. 93)

33. Subject to recommendation 34 respecting proceedings to recover possession of real property, the provisions in the current Act dealing specifically with claims relating to real property should be repealed. (p. 98)

34. No limitation should apply to a proceeding to recover possession of real property. (p. 100)

35. The Act should provide expressly that it binds the Crown. (p. 101)

36. The Act should apply to all proceedings commenced after the Act comes into force. (p. 102)

37. The Act should provide that claims that were discovered in accordance with the Act while the former Act was in effect are barred after the earlier of
    - the date that would have applied under the former Act; and
    - two years from the date that the new Act comes into force. (p. 102)

38. The Act should provide that no proceeding may be commenced in respect of a claim if the limitation that applies to the claim under the former Act expires before the date that the new Act comes into force. (p. 102)

39. The Act should be in substantially the form of Appendix A. (p. 103)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 30th day of July, 2010.

**"Original Signed by"**
Cameron Harvey, President

**"Original Signed by"**
John C. Irvine, Commissioner

**"Original Signed by"**
Gerald O. Jewers, Commissioner

**"Original Signed by"**
Perry W. Schulman, Commissioner

## APPENDIX A

## DRAFT *LIMITATIONS ACT*

## (BASED ON THE UNIFORM LAW CONFERENCE OF CANADA *LIMITATIONS ACT*)

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### INTRODUCTORY MATTERS

**Definition**
**1.** In this Act,

"claim" means a claim to remedy an injury that occurred as a result of an act or omission;

"claimant" means a person who has a claim, whether or not the claim has been brought;

"defendant" means a person against whom a claimant has a claim, whether or not the claim has been brought;

"injury" means
(a) personal injury;
(b) property damage;
(c) economic loss; or
in the absence of any of the above,
(d) the non-performance of an obligation; or
(e) the breach of a duty.

**Application**
**2.** This Act applies to a claim pursued in a court proceeding other than
(a) a proceeding for judicial review; and
(b) a proceeding for a declaration of existing rights if no consequential relief is sought.

**Crown**
**3.** This Act binds the Crown.

## BASIC LIMITATION AND ULTIMATE LIMITATION

**Basic limitation**
**4.** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

**Discovery**
**5.** (1) A claim is discovered on the earlier of
(a) the day on which the claimant first knew
(i) that the injury had occurred,
(ii) that the injury was caused by or contributed to by an act or omission,
(iii) that the act or omission was that of the defendant, and
(iv) that having regard to the nature and circumstances of the injury
(A) a right to make a claim exists, and
(B) a proceeding would be an appropriate means to seek to remedy the injury;
and
(b) the day on which a reasonable person with the abilities and in the circumstances of the claimant first ought to have known of the matters referred to in clause (a).

(2) For the purposes of subclause (1)(a)(i), the day on which an injury occurs is

(a) in the case of a default in performing a demand obligation, the day on which the default in performance occurs, once a demand for performance is made;

(b) in the case of a continuous act or omission, the day on which the act or omission ceases;

(c) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs; and

(d) in the case of a claim for contribution and indemnity, the day on which the liability of the claimant in respect of the matter for which contribution or indemnity is sought is confirmed by a court judgment, arbitration award or settlement agreement.

**Ultimate limitation**

**6.** (1) Even if the limitation established by section 4 in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of the limitation established by this section.

(2) Subject to subsection (3), no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

(3) No proceeding shall be commenced in respect of

(a) existing aboriginal and treaty rights that are recognized and affirmed in the *Constitution Act, 1982*; or

(b) an equitable claim by an aboriginal people against the Crown,

after the 30th anniversary of the day on which the act or omission on which the claim is based took place.

(4) For the purposes of this section, the day an act or omission on which a claim is based takes place is

(a) in the case of a default in performing a demand obligation, the day on which the default in performance occurs after a demand for performance is made;

(b) in the case of a continuous act or omission, the day on which the act or omission ceases;

(c) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs; and

(d) in the case of a claim for contribution and indemnity, the day on which the claimant

(i) is served with a claim or a notice that commences an arbitration, or

(ii) incurs a liability through a settlement agreement,

in respect of the matter for which contribution or indemnity is sought.

(5) Clause (4)(d) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

**Burden of proof**

**7.** (1) The claimant has the burden of proving that a proceeding was commenced within the limitation established by section 4.

(2) The defendant has the burden of proving that a proceeding was not commenced within the limitation established by section 6.

## SUSPENSION OF LIMITATIONS

**Minors**

**8.** The limitations established by sections 4 and 6 do not run during any time in which the claimant is a minor.

**Persons incapable of commencing proceeding**

**9.** (1) Subject to section 10, the limitations established by sections 4 and 6 do not run during any time in which the claimant is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition.

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

(3) If the running of a limitation is postponed or suspended under this section and the limitation has less than six months to run when the postponement or suspension ends, the limitation is extended to include the day that is six months after the day on which the postponement or suspension ends.

**Notice to proceed**

**10.** (1) The following definitions apply in this section:

> "potential defendant" means a person against whom another person may have a claim but against whom the other person has not commenced a proceeding in respect of the claim;
>
> "potential claimant" means a person who may have a claim against another person but who has not commenced a proceeding against that person in respect of the claim.

(2) If the running of a limitation in relation to a claim is postponed or suspended under section 8 or 9, a potential defendant may give a notice to proceed in accordance with this section.

(3) A notice to proceed given in accordance with this section ends the postponement or suspension of the running of a limitation under section 8 or 9.

(4) A notice to proceed given under this section must

(a) be in writing;

(b) be addressed

(i) in the case of a potential claimant who is a minor, to his or her parent or guardian, as the case may be, and to the Public Trustee, and

(ii) in the case of a potential claimant who is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, to

(A) the potential claimant's parent, committee, or substitute decision maker appointed under *The Vulnerable Persons Living with a Mental Disability Act* if the substitute decision maker has the power to act with respect to the claim, as the case may be, and

(B) the Public Trustee;

(c) state the name of the potential claimant;

(d) give a clear and concise statement of the facts out of which the claim may arise with enough information as is necessary to enable a determination to be made as to whether the potential claimant has a claim;

(e) contain a warning that the claim arising out of the facts stated in the notice is liable to be barred by the Act;

(f) state the name of the potential defendant; and

(g) be signed by the potential defendant or his solicitor.

(5) A notice to proceed under this section shall be given by delivery or personal service

(a) in the case of a potential claimant who is a minor, to or upon his or her parent or guardian and to or upon the Public Trustee; and

(b) in the case of a potential claimant who is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, to or upon the potential claimant's parent, committee or substitute decision maker referred to in subclause (4)(b)(ii), and to or upon the Public Trustee;

and the notice shall be deemed to have been given on the latest date on which a delivery or service of the notice required under this section is made.

(6) This section does not apply to a potential claimant who is incapable of commencing a proceeding in respect of a claim against his or her parent or guardian or the Public Trustee.

(7) A notice to proceed given under this section is effective for the benefit only of the potential defendants on whose behalf the notice is given and only with respect to a claim arising out of the facts stated in the notice.

(8) A notice to proceed given under this section is not an admission of liability on behalf of any potential defendant and is not a confirmation of any of the facts stated in the notice.

(9) Where a notice to proceed is given to the Public Trustee under this section, and it appears to the Public Trustee that any other person to whom the notice was delivered is failing to take reasonable steps to protect the interest of the potential claimant or is otherwise acting to the prejudice of the potential claimant, the Public Trustee

(a) shall investigate the circumstances specified in the notice; and

(b) may commence and maintain an action for the benefit of the potential claimant.

**Wilful concealment or misleading**

**11.** A limitation established by section 6 does not run during any time in which the defendant

(a) wilfully conceals from the claimant the fact that injury has occurred, that it was caused by or contributed to by an act or omission, or that the act or omission was that of the defendant; or

(b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury.

**NO LIMITATION**

**Certain claims**
**12.** (1) In this section,

"assault" includes trespass to the person and battery;

"former Act" means *The Limitation of Actions Act* as it read at any time before this Act comes into force.

(2) There is no limitation for a proceeding in respect of a claim relating to an assault if
(a) the assault was of a sexual nature; or
(b) at the time of the assault, the claimant
(i) had an intimate relationship with the defendant or one of the defendants, or
(ii) was financially, emotionally, physically or otherwise dependent on the defendant or one of the defendants.

(3) Subsection (2) applies
(a) whether or not the claimant's right to commence the proceeding was at any time governed by a limitation under any Act;
(b) whether a proceeding was commenced before or after the coming into force of this Act; and
(c) whether or not a person acquired a vested legal right because a limitation under the former Act, or any other Act, had expired.

(4) Subsection (2) operates to revive a person's right to commence a proceeding if
(a) the person had commenced a proceeding before the coming into force of this Act;
(b) the proceeding commenced by the person was dismissed for the sole reason that a limitation under the former Act or any other Act had expired; and
(c) the right to commence the proceeding is not barred under this Act.

(5) There is no limitation for a proceeding
(a) to enforce an order of a Manitoba court, or any other order that may be enforced in the same way as an order of a Manitoba court;
(b) in respect of a claim of aboriginal title;
(c) to recover possession of real property;
(d) by a debtor in possession of collateral to redeem it;
(e) by a creditor in possession of collateral to realize on it;
(f) to recover money owing to the Crown in respect of fines, taxes, and penalties or interest on fines, taxes or penalties;
(g) brought by the Crown or a Crown agent in respect of a claim relating to the administration of social, health or economic programs; or

(h) to recover money owing in respect of student loans, awards and grants.

(6) This section applies notwithstanding any other provision of this Act.

## GENERAL RULES

### Successors, principals and agents

**13.** (1) For the purposes of clause 5(1)(a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the claimant shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:

(a) the day the predecessor first knew or ought to have known of those matters;

(b) the day the claimant first knew or ought to have known of them.

(2) For the purposes of clause 5(1)(a), in the case of a proceeding commenced by a principal, if the agent had a duty to communicate knowledge of the matters referred to in that clause to the principal, the principal shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:

(a) the day the agent first knew or ought to have known of those matters;

(b) the day the principal first knew or ought to have known of them.

(3) The day on which a predecessor or agent first ought to have known of the matters referred to in clause 5(1)(a) is the day on which a reasonable person in the predecessor's or agent's circumstances and with the predecessor's or agent's abilities first ought to have known of them.

### Acknowledgments

**14.** (1) If a defendant acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the limitations begin anew.

(2) An acknowledgment of liability in respect of a claim for interest is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.

(3) An acknowledgment of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral is an acknowledgment by any other person who later comes into possession of it.

(4) A debtor's performance of an obligation under or in respect of a security agreement is an acknowledgment by the debtor of liability in respect of a claim by the creditor for realization on the collateral under the agreement.

(5) A creditor's acceptance of a debtor's payment or performance of an obligation under or in respect of a security agreement is an acknowledgment by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the agreement.

(6) An acknowledgment by a trustee is an acknowledgment by any other person who is or who later becomes a trustee of the same trust.

(7) An acknowledgment of liability in respect of a claim to recover or enforce an equitable interest in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

(8) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.

(9) Subject to subsections (8) and (10), this section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.

(10) This section does not apply unless the acknowledgment is made to the claimant, the claimant's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada) before the expiry of the limitation applicable to the claim.

(11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the defendant or by the defendant's agent has the same effect as the acknowledgment referred to in subsection (1).

**Conflict with other Acts.**
**15.** If there is a conflict between this Act and a provision of any other Act, the provision of the other Act prevails.

**Amending pleadings**
**16.** Notwithstanding the expiry of a limitation after the commencement of a proceeding, a judge may allow an amendment to the pleadings that asserts a new claim or adds or substitutes parties if

(a) the claim asserted by the amendment, or by or against the new party, arises out of the same transaction or occurrence as the original claim; and
(b) the judge is satisfied that no party will suffer actual prejudice as a result of the amendment that cannot be compensated for by costs or an adjournment.

**Agreements**
**17.** (1) A limitation under this Act may be extended, but not shortened, by agreement.

(2) Subsection (1) does not affect an agreement made before the day this Act comes into force.

**Conflict of laws**
**18.** For the purposes of applying the rules regarding conflict of laws, the limitations law of Manitoba or any other jurisdiction is substantive law.

**Suspension during stay of proceedings**
**19.** The limitations established by this Act are suspended for the time during which a stay of proceedings is in effect pursuant to the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Farm Debt Mediation Act* (Canada).

**Transition**
**20.** (1) In this section, "former limitation", in relation to a claim, means the limitation that applied in respect of the claim under *The Limitation of Actions Act* before the coming into force of this Act.

(2) This section applies to claims based on acts or omissions that took place before the coming into force of this Act and in respect of which no proceeding has been commenced before the coming into force of this Act.

(3) No proceeding shall be commenced in respect of a claim that was discovered in accordance with this Act before the coming into force of this Act after the earlier of

(a) two years from the coming into force of this Act; and

(b) the day on which the former limitation expired or would have expired.

**Expiry of former limitation**
**21.** No proceeding shall be commenced in respect of a claim if the former limitation in respect of the claim expired before the coming into force of this Act.

**Repeal**
**22.** *The Limitation of Actions Act* is repealed.

## APPENDIX B

## DRAFT REPORT FOR CONSULTATION RESPONDENTS

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Association of Professional Engineers and Geoscientists of Manitoba
Consulting Engineers of Manitoba
Manitoba Association of Architects
Association of Manitoba Land Surveyors
Certified Technicians and Technologists Association of Manitoba

## LIMITATIONS

## EXECUTIVE SUMMARY

The law of limitations prevents a litigant with an otherwise viable claim from pursuing that claim in the courts after a certain period of time has passed. This area of the law has always been purely statutory, from its origins in England in the 16th century. Canada inherited the English statutes of limitations, but different provinces have adapted them in different ways over the years – and typically at a glacial pace.

The Manitoba *Limitation of Actions Act* was originally enacted in 1931. Although amended three times since then (in 1967, 1980, and 2002) it is fundamentally based on an amalgam of limitations provisions that originated in England centuries ago. In other words, it is highly dated, and it is showing its age.

There have been efforts over the years to modernize and to impose some uniformity on these various provincial limitations regimes, but none have been conspicuously successful. In recent years, however, limitations legislation based on some radically different principles has been adopted by the Legislatures of Alberta, Ontario, Saskatchewan and New Brunswick. This legislation, based ultimately on work done by the Alberta Law Reform Institute in the late 1980s, has the potential to bring a great deal more clarity and fairness to an area of the law that has too often been characterized by obscurity and irrationality. The Manitoba Act badly requires modernization, and it is time for Manitoba to adopt limitations legislation based on similar principles.

In this report the Commission has identified what it sees as the primary areas of Manitoba limitations law requiring modernization, as well as the best ways of accomplishing that goal. In light of the work that has been done in recent years in other Canadian jurisdictions, the Commission sees no need to reinvent this wheel. For the most part, in this report we have described the structure of the 'modern' limitations regimes found in other jurisdictions, and analyzed whether they are suitable for Manitoba and how, if at all, they ought to be adapted for Manitoba's conditions.

The most dramatic change the Commission is recommending is the abolition of the various categories of claims set out in the current Act, and their replacement with a single, basic two year limitation applicable to all claims unless they are otherwise dealt with. This two year limitation would begin running when the existence of a claim was *discovered* or *discoverable*, instead of when the cause of action arose. This would provide ample time for a claimant to investigate the option of litigation. In order to serve the repose goal of limitations legislation, the new Act would also provide for a 15 year ultimate limitation, running from the date on which the act or omission on which the claim is based took place. After this, no claim could be brought, regardless of discoverability.

There are, of course, exceptions to these basic rules, but the Commission has attempted to keep those to a minimum. Examples include claims arising out of sexual assaults or assaults in intimate or dependent relationships, claims of aboriginal title, proceedings for a declaration of existing rights if no consequential relief is sought, and proceedings to recover fines or taxes owing to the Crown. Limitations would be suspended where the claimant is a minor or incapable of bringing a claim, or where the defendant wilfully conceals the claim. Provision is also made for specific circumstances such as demand obligations and continuous acts or omissions. Parties would be permitted to lengthen, but not to shorten, limitations by agreement.

Another significant change recommended by the Commission is the repeal of the current limitations applying to claims related to real property. The Commission recommends that no limitation apply to a proceeding to recover possession of real property, but that otherwise, claims related to real property should be subject to the overall limitations regime.

Finally, the Commission recommends that the limitations provisions in all Manitoba statutes be examined, and abolished or amended where appropriate. The new *Limitations Act* should then provide that if there is a conflict between it and any other Act, the other Act would prevail.

The Commission has appended a draft *Limitations Act*, which we consider could form the basis of a new limitations regime in Manitoba. It is based on the Uniform Act proposed by the Uniform Law Conference of Canada, which in turn is based on the Alberta and Ontario legislation. The draft Act incorporates the best of the modifications adopted in other jurisdictions, as well as other improvements identified by the Commission.

The Commission is hopeful that a new limitations regime, based on this draft legislation, could provide a more sensible and reliable 21st century framework to govern civil litigation in the province.

## LA PRESCRIPTION

## RÉSUMÉ

Les règles de droit en matière de prescription empêchent une partie plaidante, dont l'action est par ailleurs recevable, de poursuivre celle-ci devant les tribunaux après un certain temps. Ce domaine du droit a toujours été de nature purement législative, depuis ses origines en Angleterre au 16e siècle. Le Canada a hérité des lois anglaises sur la prescription, mais diverses provinces les ont adaptées de façon variée au fil des ans, et cela à un rythme généralement très lent.

La *Loi sur la prescription* du Manitoba date de 1931. Bien que modifiée à trois reprises (en 1967, 1980 et 2002), elle demeure essentiellement fondée sur un amalgame de dispositions en matière de prescription qui sont apparues en Angleterre il y a plusieurs siècles. En d'autres termes, elle est très ancienne, et cela se voit.

Des efforts ont été accomplis au fil des ans pour moderniser les divers régimes de prescription provinciaux et pour les uniformiser un tant soit peu, mais les résultats sont demeurés modestes. Ces dernières années, cependant, les assemblées législatives de l'Alberta, de l'Ontario, de la Saskatchewan et du Nouveau-Brunswick ont adopté des dispositions en matière de prescription fondées sur des principes radicalement différents. Ces dispositions législatives, fondées en définitive sur les travaux effectués par le Alberta Law Reform Institute à la fin des années 1980, pourraient apporter beaucoup plus de clarté et d'équité à un domaine du droit qui s'est trop souvent caractérisé par son obscurité et son irrationalité. La *Loi sur la prescription* du Manitoba a grandement besoin d'être modernisée, et il est temps que le Manitoba se dote d'une législation sur la prescription basée sur de tels principes.

Dans le cadre du présent rapport, la Commission a examiné les règles de droit du Manitoba en matière de prescription et a répertorié les principaux domaines qui ont besoin d'être modernisés. Elle a également indiqué les meilleurs moyens d'atteindre cet objectif. Au vu du travail effectué ces dernières années dans d'autres provinces ou territoires du Canada, la Commission juge qu'il n'est pas nécessaire de réinventer la roue. Pour l'essentiel, nous avons décrit dans le présent rapport la structure des régimes de prescription « modernes » que l'on trouve dans d'autres provinces ou territoires, et nous avons analysé ceux-ci pour déterminer s'ils conviennent au Manitoba et comment, le cas échéant, on devrait les adapter aux conditions du Manitoba.

Le changement le plus radical recommandé par la Commission est l'abolition des diverses catégories de demandes énoncées actuellement dans la *Loi* et leur remplacement par une prescription de base unique d'une durée de deux ans, applicable à toutes les demandes dès lors qu'elles ne sont pas visées par d'autres dispositions. Cette prescription de deux ans commencerait à courir à partir du moment où l'existence des faits est *découverte* ou *pouvait être découverte*, et non plus à partir de la naissance de la cause de l'action. Un requérant aurait ainsi amplement le temps d'explorer la possibilité d'engager une procédure. Afin de répondre à l'objectif de « tranquillité d'esprit » des dispositions législatives sur la prescription, la nouvelle version de la *Loi* comprendrait également un délai ultime de prescription de 15 ans, courant à

partir de la date d'accomplissement de l'action ou de l'omission sur laquelle la demande est fondée. Après ce délai, aucune demande ne pourrait être présentée, indépendamment de la découverte des faits.

Il existe, bien sûr, des exceptions à ces règles de base, mais la Commission s'est efforcée de les limiter au minimum. Ces exceptions comprennent les demandes liées à : une agression sexuelle, une agression par le partenaire intime ou une agression dans le cadre d'une relation de dépendance; un titre ancestral; une procédure judiciaire visant la déclaration de droits existants sans demande de réparation en conséquence; et une procédure judiciaire visant le recouvrement d'amendes ou de taxes ou impôts exigibles par la Couronne. La prescription serait suspendue lorsque le requérant est un mineur ou une personne incapable de présenter une demande, ou lorsque le défendeur dissimule volontairement les faits à l'origine de la demande. Des dispositions sont également prévues pour les circonstances particulières telles que les obligations à demande et les actions ou omissions répétées. Les parties auraient le droit de prolonger, mais non de raccourcir, la durée des prescriptions, d'un commun accord.

En ce qui concerne les délais d'appropriation et de détention illicites, la Commission estime qu'il est nécessaire de rationaliser le droit substantiel. Elle publiera un rapport distinct portant sur le droit dans ce domaine, y compris les recours et les prescriptions.

L'abrogation des prescriptions actuelles qui s'appliquent aux demandes relatives à des biens réels est un autre changement important recommandé par la Commission. La Commission recommande que la loi ne prévoie pas de prescription applicable aux procédures judiciaires visant à reprendre possession d'un bien réel, mais qu'à la place, le régime global de prescription s'applique aux demandes portant sur un bien réel.

Enfin, la Commission recommande que les dispositions en matière de prescription contenues dans tous les textes législatifs du Manitoba soient examinées et, au besoin, abrogées ou modifiées. La nouvelle loi sur la prescription stipulerait qu'en cas de conflit entre elle et toute autre loi, c'est l'autre loi qui prévaudrait.

La Commission a annexé une ébauche de loi sur la prescription qui, a son avis, pourrait constituer la base d'un nouveau régime de prescription au Manitoba. Cette ébauche se base sur la loi uniforme proposée par la Conférence pour l'harmonisation des lois au Canada, loi uniforme elle-même fondée sur la législation de l'Alberta et de l'Ontario. L'ébauche englobe les meilleurs aspects des modifications adoptées dans d'autres provinces ou territoires ainsi que d'autres améliorations que la Commission a recensées.

La Commission espère qu'un nouveau régime de prescription, fondé sur cette ébauche de loi, pourra fournir un cadre plus fiable et plus adapté aux réalités du 21$^{e}$ siècle pour l'administration du contentieux civil dans la province.