Manitoba Law Reform Commission
432-405 Broadway, Winnipeg, Manitoba R3C 3L6
T 204 945-2896 **F** 204 948-2184
Email: lawreform@gov.mb.ca
http://www.gov.mb.ca/justice/mlrc

THE LIMITATION OF ACTIONS ACT

DRAFT REPORT FOR CONSULTATION

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The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

Commissioners:

Cameron Harvey, Q.C., President
John C. Irvine
Hon. Mr. Gerald O. Jewers
Alice R. Krueger
Hon. Mr. Justice Perry Schulman

Legal Counsel:

Darlene Jonsson
Leah Craven

Administrator:

Debra Floyd

The Commission offices are located at 432-405 Broadway, Winnipeg, MB R3C 3L6
Tel: (204) 945-2896
Fax: (204) 948-2184
Email: lawreform@gov.mb.ca
Website: http://gov.mb.ca/justice/mlrc

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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 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, meaning 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 consultation report concerns itself with a review and discussion of *The Limitation of Actions Act*.[3] While this 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.

C. ACKNOWLEDGEMENT

The Commission thanks Jonathan Penner, independent researcher, who was retained as our consultant to assist with the preparation of this consultation report. Once again, we

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

[2] See Chapter 3, below.

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

appreciate his skilled assistance. However, the recommendations in this report are those of the Commission and are not necessarily in agreement with those of our consultant.

D. INVITATION TO COMMENT

The Commission is issuing this report to offer interested persons the opportunity to comment on the matters raised and on the Commission's tentative recommendations.

The Commission seeks comments on all aspects of this consultation report, and, in particular, in relation to the abolition of special limitations provisions applicable to real property claims.

Once comments have been received, the Commission will consider them and prepare its final recommendations. In accordance with *The Law Reform Commission Act*,[4] the Commission will then submit its report to the Minister of Justice and Attorney General for consideration.

Anyone wishing to comment on the matters raised is invited to write to the Commission at the following address:

432 – 405 Broadway
Winnipeg, Manitoba
R3C 3L6

Submissions may also be sent by fax to (204) 948-2184 or by email to lawreform@gov.mb.ca. We regret that we are unable to receive oral submissions.

Unless clearly marked to the contrary, the Commission will assume that comments received are not confidential, and that respondents consent to our quoting from or referring to their comments and attributing their comments to them, and to the release or publication of their submissions. Requests for confidentiality or anonymity will be respected to the extent permitted by freedom of information legislation.

The deadline for submissions is October 31, 2009.

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

CHAPTER 2

INTRODUCTION TO 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 LAW 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.

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

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[4] *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 29-30, quoted in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at 562.

[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 #55, 1989) at 16-19.

[7] *Ibid.* at 19.

[8] *J. (A.) 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.

imposes a temporal limitation on the ability of plaintiffs to access the courts must balance these competing sets of rights.

CHAPTER 3

EXISTING SITUATION

A. MANITOBA

Prior to 1931 there were two limitations statutes in force in Manitoba. The first was the *Statute of Limitations, 1623*,[1] which was received along with other English law when Manitoba first became a province in 1870.[2] The other was *The Real Property Limitation Act*,[3] which was largely a copy of the English *Real Property Limitation Act, 1874*.[4]

In 1931 the Manitoba legislature enacted *The Limitation of Actions Act, 1931*.[5] This Act was based on a draft prepared by the Conference of Commissioners on Uniformity of Legislation,[6] although enacted before the Conference finally adopted its Act.[7] The 1931 Act consolidated the *Statute of Limitations, 1623* with other English limitations legislation, along with some other initiatives, and modernized them.[8]

The 1931 Act, with some amendments, essentially continues in effect to this day as *The Limitation of Actions Act*.[9] Significant amendments were enacted in 1967,[10] 1980,[11] and 2002.[12] 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"[13] – except that, with the effluxion of time since the ALRI report, it is now closer to four centuries since the current limitations strategy was originally formulated.

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

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

[3] 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 para. 6.

[4] (U.K.) 37 & 38 Vict., c. 57.

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

[6] *Covelli v. Keilback*, [1947] 4 D.L.R. 805 at 813.

[7] *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>.

[8] Alberta Law Reform Institute, *Limitations* (Report #55, 1989) at 15 [ALRI Report]; *Weingardern v. Moss*, *ibid*., at 66-68.

[9] C.C.S.M., c. L150.

[10] *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.

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

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

[13] ALRI Report, *supra* note 8 at 16.

B. OTHER CANADIAN JURISDICTIONS

The *Uniform Limitation of Actions Act* adopted by the Conference of Commissioners on Uniformity of Legislation in 1931[14] formed the basis for limitations legislation not only in Manitoba but also in Alberta, Prince Edward Island, Saskatchewan, Yukon and the Northwest Territories.[15] 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.[16] 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.[17] 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.[18] Ontario's new *Limitations Act, 2002* came into effect on January 1, 2004.[19]

2. British Columbia

British Columbia's Law Reform Commission was the next to note that limitation 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.[20] Unlike in Ontario, reform followed promptly, with the enactment in 1975 of

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[14] Uniform Law Conference of Canada, *Uniform Limitation of Actions Act*, online: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l4>; John Lee, *A New Uniform Limitations Act*, online: <http://www.ulcc.ca/ en/poam2/CLS2004_New_Uniform_ Limitations_Act_En.pdf> at 1.

[15] Lee, *ibid*. at 2; Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at 6.

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

[17] Bill 160 was introduced in the Legislature in 1983 but did not proceed beyond first reading. A Consultation Group again recommended reform in a 1991 report, which prompted the introduction of amending legislation, Bill 99, in 1992. That Bill 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: Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at 6-8.

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

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

[20] Law Reform Commission of British Columbia, *Limitations: Part II – General* (Report # 15, 1974).

the *Limitations Act*.[21] Other than minor amendments,[22] 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.[23] The successor to the B.C. Commission, the British Columbia Law Institute, also issued a report on the ultimate limitation, in 2002.[24]

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.[25] 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.[26] Although reform was not immediately forthcoming, the report did eventually lead to the enactment of a new limitations regime by the Newfoundland legislature[27] in 1995, based on a draft Act proposed by the Uniform Law Conference of Canada in 1982.[28] That draft Act, in turn, adopted many of the features of the 1975 British Columbia legislation.

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[21] S.B.C. 1975, c. 37.

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

[23] Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period:* Limitation Act, *Section 8* (Report # 112, 1990).

[24] British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (Report # 19, 2002).

[25] 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>.

[26] Newfoundland Law Reform Commission, *Report on Limitation of Actions* (Report # 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 #1, 1985).

[27] As it then was; the name of the province was changed to Newfoundland and Labrador by the *Constitution Amendment, 2001 (Newfoundland and Labrador).*

[28] *Limitations Act*, S.N. 1995, c. L-16.1 (now S.N.L. 1995, c. L-16.1); see John Lee, *A New Uniform Limitations Act*, online: <http://www.ulcc.ca/ en/poam2/ CLS2004_New_Uniform_ Limitations_Act_En.pdf> at 2.

4. Alberta

The Alberta Law Reform Institute issued a report for discussion on limitations law in September of 1986.[29] Widespread consultation followed, after which the Institute published Report No. 55, *Limitations* in 1989.[30] This report formed the basis for a complete overhaul of Alberta's limitations legislation in 1996.[31] 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.[32] 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.[33] The Saskatchewan Department of Justice circulated a consultation paper in 2000 on the topic of limitations.[34] Ultimately, the Saskatchewan legislature enacted the *Limitations Act*[35] in 2005, adopting broadly the same approach as Alberta.

6. New Brunswick

The New Brunswick Attorney General's Office issued a discussion paper on reform of limitations legislation in 1988,[36] 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 amend the *Limitation of Actions Act* was introduced into the Legislature

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[29] Institute of Law Research and Reform, *Limitations* (Report for Discussion #4, 1986) (now the Alberta Law Reform Institute).

[30] Alberta Law Reform Institute, *Limitations* (Report #55, 1989).

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

[32] 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).

[33] Law Reform Commission of Saskatchewan, *Comparison of Proposals for Reform of the Limitation of Actions Act* (Research Paper, 1997).

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

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

[36] New Brunswick Office of the Attorney General, Law Reform Branch, *Limitations Act: Discussion Paper* (Saint John: Queen's Printer, 1988).

on December 16, 2008 (Bill 28).[37] The proposed 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, although it also differs from all of them in some significant respects.

7. Summary

The limitations statutes of Alberta, Saskatchewan, and Ontario, and the forthcoming Act in 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.[38] The remaining provinces and territories have limitations statutes founded on early English legislation, though differing in significant particulars from one another.

C. 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, which formed the basis for limitations legislation in several provinces.[39]

The second effort, launched fifty years later, was a *Uniform Limitations Act* adopted in 1982 by the ULCC,[40] which was intended to update the previous *Uniform Limitation of Actions Act* and was based on the legislation adopted by British Columbia in 1975.[41] It was not as well-received as the earlier proposal, and was only enacted by Newfoundland.[42]

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[37] Bill 28, *Limitation of Actions Act*, 3d Sess., 56th Leg., 2008. The Standing Committee on Law Amendments held public hearings on Bill 28 on February 24, 2009 and reported to the Legislative Assembly on June 2, 2009.

[38] 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 8.

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

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

[41] Lee, *supra* note 14 at 1.

[42] *Ibid*. at 2.

The most recent proposal by the ULCC was adopted in 2005,[43] and is based on the legislation enacted in the last decade or so in Alberta, Ontario, and Saskatchewan – what the ULCC refers to as "modern limitations legislation".[44] The 2005 *Uniform Limitations Act* (the Uniform Act)[45] does not attempt to address limitations rules relating to real property matters,[46] but in general the Commission considers that it provides a model worth considering for adoption in Manitoba. The model Act proposed by the Commission and attached as Appendix A is based on the Uniform Act.

D. 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.[47] 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 herein 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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[43] Uniform Law Conference of Canada, *Uniform Limitations Act*, online: <http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf> [*Uniform Act*].

[44] *Ibid.* at 1.

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

[46] The Uniform Act does contain sections specifically relating to personal property; see s. 11.

[47] 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 4

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, and with 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*.[3]

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[1] *The Limitation of Actions Act*, C.C.S.M., c. L150 [*Manitoba Act*].

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

[3] *Manitoba Act*, *supra* note 1, s. 1. "Action" includes an action for a declaration: *Abbott v. Canada*, 2006 FCA 342, 354 N.R. 331 at para. 4.

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.[4] 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".[5] 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.

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 New Brunswick's Bill 28 is very similar.

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, with some refinements discussed below.

RECOMMENDATION 2

The Act should apply to claims pursued in court proceedings to remedy an injury, loss or damage 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.[7] A cause of action comprises "those elements necessary to establish

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[4] 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 fraudulent misrepresentation within six years and an action on a Canadian judgment for the payment of money within ten years: *Manitoba Act*, *ibid.*, s. 2(1).

[5] *Limitations Act*, R.S.A. 2000, c. L-12, s. 1 [*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. New Brunswick's Bill 28, *Limitation of Actions Act*, 3d Sess., 56th Leg., 2008, 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) [*New Brunswick Bill*].

[7] 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.

the success of a claim",[8] and a cause of action accrues, "in the absence of any question of discoverability, … when the last element to support the cause of action occurs".[9]

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 Irish Law Reform Commission 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.[10]

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".[11]

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 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

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[8] *M.M. v. Roman Catholic Church of Canada*, 2001 MBCA 148, 205 D.L.R. (4th) 253 at para. 31.

[9] *Abbott v. Canada*, *supra* note 3 at para. 8.

[10] Law Reform Commission, *Report on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury)* (Report #64, 2001) (Ireland) at 33-34.

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

applicable limitation.[12] 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.[13]

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 an English case, *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*[14] 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.[15]

While the House of Lords subsequently rejected the discoverability rule in England,[16] the rule was adopted by the Supreme Court of Canada in 1984,[17] and has since been applied in a wide variety of circumstances.[18]

Manitoba enacted amending legislation modeled on the 1963 English legislation in 1967, some nine years prior to Lord Denning's extension of the common law discoverability rule.[19] Those provisions now form Part II of Manitoba's *Limitation of Actions Act*. As a result, in Manitoba, the common law discoverability rule adopted in Canada has little or no application, because Part II constitutes a complete statutory code.[20]

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

[13] *Limitation Act 1963* (U.K.) 1963, c. 47, s. 1; see the subsequent *Limitation Act, 1980* (U.K.) 1980, c. 58, s. 11.

[14] [1976] Q.B. 858 (C.A.).

[15] *Ibid*. at 868 (Q.B.).

[16] *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* (U.K.) 1980, c. 58, to add a discoverability principle in relation to defective products (s. 11A), *Fatal Accident Act* actions (s. 12) and actions for damages for negligence not involving personal injury (s. 14A).

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

[18] 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, 85 Man. R. (2d) 63 (Man. C.A.). See also *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370, 184 D.L.R. (4th) 281 (Ont. C.A.).

[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; Sparham-Souter v. Town & Country Developments (Essex) Ltd., supra note 14.

[20] *Rarie v. Maxwell* (1998), 168 D.L.R. (4th) 579 (Man. C.A.). Clauses 2(1)(j) and (k) also have a "built in "discoverability" provision, that time does not begin to run for limitation purposes until the "discovery of the cause of action"": *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 at para. 300, referring to s. 2(1)(k).

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

> 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 s. 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.

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. These provisions are not, however, entirely satisfactory. The Court of Appeal has observed that the language is "rather obscure,"[21] and Kaufman J. has noted:

> 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 E.R. 255, at 257, 258. With these comments I respectfully agree.[22]

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:

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

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

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

(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.[23]

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).[24]

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 Act, New Brunswick's Bill 28 and the ULCC Uniform Act all incorporate these principles.[25] The Commission considers this to be a far more coherent and rational approach than that exemplified by Part II, and has no hesitation in recommending its implementation in Manitoba, with the modifications discussed in the following sections.

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[23] *Alberta Act*, *supra* note 5. Professor Roach has commented favourably on this approach, noting that "[d]iscovery 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.

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

[25] *Saskatchewan Act*, *supra* note 6, s. 6(1); *New Brunswick Bill*, *supra* note 6, s. 5; *Uniform Act*, *supra* note 2, s. 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 and ULCC Acts and the New Brunswick Bill 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 action.
>
> 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.[26]

As Chapman notes, such a result would be "counterintuitive",[27] 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:

> 1. (e) "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.

This definition would 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:

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

[27] *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 and 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, November 18, 2005).

> [U]nder 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."

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.[28]

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. Appropriateness of Proceeding

Saskatchewan's provision for discovery is very similar to Ontario's, and the ULCC Uniform Act and New Brunswick's Bill 28 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. The ULCC Uniform Act uses slightly different wording for subclause (a)(iv): "that the injury, loss or damage is sufficiently serious to warrant a proceeding".[29] The Alberta Act provides "that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding",[30] while New Brunswick 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".[31]

Subclause (a)(iv), in its two 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

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[28] See Chapman, *supra* note 26, regarding the concern otherwise that to hold that there can be injury without loss or damage may be problematic as it may trigger commencement of the limitation where an obligation has been breached but no loss or damage has yet been suffered, at 306.

[29] *Uniform Act*, *supra* note 2, s. 5(a)(iv). The *Saskatchewan Act*, *supra* note 6, s. 6, is similar.

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

[31] Chapman, *supra* note 26 at 294.

litigating unnecessarily over minor damage in order to preserve their rights.[32] The Alberta Law Reform Institute recommended wording similar to the provision that was later enacted in Alberta,[33] and which is very similar to the test of "significant injury" that has existed in English limitations legislation for some time.[34] As the Law Reform Commission of Saskatchewan and Saskatchewan Department of Justice have noted.[35]

> 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.[36]

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".[37] A 2002 Commonwealth of Australia review panel on the law of negligence recommended, in respect of personal injury, that the injury be "sufficiently significant to warrant bringing proceedings".[38]

The New Brunswick Office of the Attorney General expressed the view that 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 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

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[32] *Uniform Act*, *supra* note 2, commentary on s. 5. The ULCC explains, at 3, that "s. 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". The Supreme Court of Canada dealt with a similar issue in *Peixerio v. Haberman*, [1997] 3 S.C.R. 549, 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.

[33] Alberta Law Reform Institute, *Limitations* (Report #55, 1989) at 33 [ALRI Report].

[34] "Significant injury" provisions exist in the *Limitation Act, 1980* (U.K.) 1980, c. 58, s. 14, and the *Prescription and Limitation (Scotland) Act 1973* (c. 52), s. 17.

[35] Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act* (Report, 1989) at 32; Saskatchewan Department of Justice, *Limitation of Actions Act: Consultation Paper* (2000) at 14.

[36] Saskatchewan Department of Justice, *ibid.*

[37] Queensland Law Reform Commission, *Review of the* Limitation of Actions Act 1974 *(QLD)* (Report #53, 1998) at 86; Law Reform Commission of Western Australia, *Limitation and Notices of Actions* (Project No 36(II), 1997).

[38] Austl., Commonwealth, Law of Negligence Review Panel, *Review of the Law of Negligence Report* (Canberra: Commonwealth of Australia, 2002).

> 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'".[39]

The Commission is not persuaded that such orderly and certain development of the common law can be presumed with respect to issues of delayed or incomplete discovery.[40] With the shift in focus to 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. In the Commission's view, the provision should encompass circumstances in which developments in the common law result in new causes of action where none had previously been recognized.[41]

The Commission is inclined to recommend the approach of the Ontario and Saskatchewan Acts,[42] but welcomes comments on this point.

RECOMMENDATION 4

The Act should provide that the basic limitation begins 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, loss or damage had occurred,***
  - ***that the injury, loss or damage 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, loss or damage***
    - ***a viable cause of action exists, and***
    - ***a proceeding would be an appropriate means to seek to remedy the injury, loss or damage; and***

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

[40] As discussed below at J.2, for example, developments in the law in Manitoba in relation to the tort of economic loss for dangerous buildings, have resulted in considerable uncertainty.

[41] For example, *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

[42] The Commission notes Chapman's comments that under the Ontario Act, courts may be invited to consider a potentially broad range of factors when determining whether a proceeding was an appropriate remedy; for example, the ability to prove the claim by admissible evidence and uncertainties about legal doctrines: *supra* note 26 at 298. On the other hand, the Ontario wording may be more relevant to commercial claims or claims relating to the breach of a duty or the non-performance of an obligation. Interestingly, the dissenting Court of Appeal justice in *Hare v. Hare* (2006), 83 O.R. (3d) 766 (C.A.), discussed below, reasoned that s. 5(1)(a)(iv) supported his view that the commencement date for a limitation in respect of a demand note could not start until a demand had been made, since the creditor could not know that a proceeding would be appropriate until a default had occurred following a demand.

(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).

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 fraudulent misrepresentation must be brought within six years after the discovery of the fraud, and actions on a judgment must be brought within 10 years after the cause of action thereon arose.[43]

In the modern limitations regimes, on the other hand, a single period of two years 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. 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, 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. As Professor Roach comments:

> Given the uncertainty and pro-plaintiff orientation of the discoverability cases, this it the only sure way to promote repose. It is reasonably clear that the courts will accept ultimate

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

> limitation periods provided the legislation clearly precludes the application of discoverability principles.[44]

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.[45] 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 are currently found in the limitations legislation of British Columbia, Alberta, Saskatchewan, Ontario, and Newfoundland, they are about to be enacted in New Brunswick,[46] and they have been recommended in England,[47] Ireland,[48] New Zealand[49] and Australia.[50] 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:

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[44] Roach, *supra* note 23 at 44-45. See *Bowes v. Edmonton*, 2007 ABCA 347.

[45] 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*, 2001 MBCA 148, 205 D.L.R. (4th) 253, 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.

[46] *New Brunswick Bill*, *supra* note 6.

[47] Law Commission, *Limitation of Actions* (Report # 270, 2001) (U.K) at 66-67.

[48] Law Reform Commission (Ireland), *supra* note 10 at 31-33.

[49] Law Commission, *Tidying the Limitation Act* (Report #61, 2000) (N.Z.) at 6-7.

[50] See, for example, Law Reform Commission of Western Australia, *supra* note 37; Queensland Law Reform Commission, *supra* note 37.

> 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).[51]

The Alberta Law Reform Institute recommended an ultimate limitation of 15 years,[52] but the Alberta Legislature opted for a 10 year limit.[53] The Manitoba Act and British Columbia's legislation provide for a 30 year ultimate limitation, but the British Columbia Law Institute has recommended reducing the limitation to 10 years,[54] and the British Columbia government is considering such a reduction.[55] On the other hand, both Ontario[56] and Saskatchewan[57] opted for a 15 year ultimate limitation when enacting their new limitations regimes, and the Uniform Law Conference has recommended that same length.[58] New Brunswick is also proposing a 15 year limitation.[59]

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.[60] 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

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[51] Kent Roach, *supra* note 23 at 45-46.

[52] ALRI Report, *supra* note 33 at 65.

[53] *Albert Act*, *supra* note 5, s. 3(1)(b).

[54] British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (Report #19, 2002) at 7-8.

[55] British Columbia, Ministry of Attorney General, *Reforming British Columbia's Limitation Act: Green Paper* (Victoria: B.C. Attorney General, 2007) at 5-7.

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

[57] *Saskatchewan Act*, *supra* note 6, s. 7. It is interesting that in its 1997 report, the Law Reform Commission of Saskatchewan recommended against the inclusion of an ultimate limitation period; among other things, the Commission noted 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, *Comparison of Proposals for Reform of the Limitation of Actions Act* (Research Paper, 1997) at 24.

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

[59] *New Brunswick Bill*, *supra* note 6, s. 5(1)(b).

[60] *Ontario Act*, *supra* note 6, s. 15(3); *Saskatchewan Act*, *supra* note 6, s. 7(2); *New Brunswick Bill*, *ibid.*, s. 9.

ultimate limitation for hospitals, hospital employees acting in the course of their employment and medical practitioners for negligence or malpractice.[61]

Overseas, the Law Commission in England recommended that the ultimate limitation should be 10 years, except for personal injury cases, which should have no limit at all.[62] The Irish Law Reform Commission recommended a ten year period,[63] as did the Law Reform Commission in Queensland.[64] The Law Reform Commission of Western Australia recommended an ultimate limitation of 15 years.[65]

As the Uniform Law Conference (and others) note, "a decision as to the length of this period is arguably arbitrary".[66] 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 the peace and repose purposes of limitations legislation, by economic factors, and by evidentiary considerations.[67] The Commission also considers that it is desirable to strive for uniformity among jurisdictions within Canada, and the 15 year period will 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. In the Commission's view the exception in the Ontario, Saskatchewan and New Brunswick statutes with respect to the conversion of property provides reasonable protection for good faith purchasers.

RECOMMENDATION 7

The ultimate limitation should be set at 15 years, with the exception of the following:

- ***in respect of a claim for conversion of property against a purchaser of the property for value acting in good faith, the ultimate limitation should be two years from the day on which the property was converted.***

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[61] *Limitation Act*, R.S.B.C. 1996, c. 266, s. 8 [*B.C. Act*].

[62] Law Commission (U.K.), *supra* note 47 at 66-70. 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 67.

[63] Law Reform Commission (Ireland), *supra* note 10 at 33-34.

[64] Queensland Law Reform Commission, *supra* note 37 at 90-91.

[65] Law Reform Commission of Western Australia, *supra* note 37.

[66] *Uniform Act*, *supra* note 2, commentary on s. 6.

[67] ALRI Report, *supra* note 33 at 67-68.

E. EXCEPTIONS FROM THE ACT

As discussed above, the Commission recommends consistency with modern limitations statutes, so that the new Manitoba Act will apply to a claim pursued in court proceedings to remedy an injury, loss or damage 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.[68] 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,[69] and Saskatchewan, like Alberta, excludes proceedings for a writ of *habeas corpus*.[70]

The legislation introduced in New Brunswick would apply to any claim, but unlike the Ontario and Saskatchewan Acts and the Uniform Act, there are no exclusions from this definition.[71] The Alberta Act excludes only claims based on adverse possession of real property owned by the Crown,[72] which, as discussed later in this report, is not applicable in Manitoba.

The Commission considers that the exceptions stipulated by Saskatchewan are appropriate. There is one subtle difference in the treatment of declaratory judgments as between the Saskatchewan and Uniform Acts, which is that the former provides there is no limitation applicable to such claims, while the latter simply provides that the Act does not apply to them. For the sake of simplicity, the Commission considers that the Uniform Act's approach is preferable.

RECOMMENDATION 8

The Act should apply to claims other than:

- ***a proceeding for judicial review;***
- ***an appeal;***

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[68] *Ontario Act*, *supra* note 6, ss. 2, 16; *Saskatchewan Act*, *supra* note 6, ss. 3, 15; *Uniform Act*, *supra* note 2, s. 2.

[69] Ontario and Saskatchewan both exclude "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*": *Ontario Act*, *supra* note 6, ss. 2(1)(e) and (f); *Saskatchewan Act*, *supra* note 6, s. 3(2)(c). The *Alberta Act* excludes actions "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": *Alberta Act*, *supra* note 5, s. 13. See *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Fairford First Nation v. Canada (Attorney General)* [1999] 2 F.C. 48.

[70] *Saskatchewan Act*, *supra* note 6, s. 3(2)(d). Subsection 3(4) 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.

[71] 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 Bill*, *supra* note 6, ss. 2(2), 4(1).

[72] *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.

- ***a proceeding for a declaratory judgment;***
- ***a proceeding for a writ of habeas corpus; and***
- ***a proceeding based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the* Constitution Act, 1982.**

F. RESIDUAL DISCRETION

Part II of the existing Act is premised, in part, on the idea that it is desirable for there to be some residual court discretion to extend a limitation under certain circumstances.[73] Some commentators have suggested that if an ultimate limitation is to be enacted, it is desirable to give the Court the necessary flexibility 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.[74]

None of the modern Canadian limitations regimes, however, have included such discretion.[75] 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.[76]

Even the New Brunswick Branch of the Canadian Bar Association, which recommended the adoption of a residual discretion in the Court, acknowledged that "some of our members have serious reservations about such a change, due to the potential for uncertainty and lack of predictability that might result", and that "this [is] the most difficult issue to be dealt with in this law reform initiative".[77]

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[73] The leading case on the extension of limitations under the current Act is *Miller v. Jaguar Canada Inc*.(1997), 123 Man. R. (2d) 161 (Man.C.A.). See also *Baer v. Hofer* (1991), 73 Man. R. (2d) 145 (Man. C.A.); *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells* (1990) 63 Man. R. (2d) 248 (Man. C.A.).

[74] Queensland Law Reform Commission *supra* note 37 at 98.

[75] The Ontario Court of Appeal has held that the court's common law discretion to extend limitations by applying the doctrine of special circumstances was not preserved under the new limitations scheme, absent a specific provision in the statute: *Joseph v. Paramount Canada's Wonderland*, [2008] ONCA 469, 294 D.L.R. (4th) 141.

[76] Saskatchewan Department of Justice, *supra* note 35 at 3.

[77] Canadian Bar Association, New Brunswick Branch, *Reforming Limitations in New Brunswick: A Submission to the Government of the Province of New Brunswick* (November 15, 2006) at 29.

The Commission is not persuaded that there is sufficient reason to leave the Court any residual discretion to extend a 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 9

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

G. BURDEN OF PROOF

It is trite law that it is for the defendant to plead the limitation defence. 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.

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.[78]

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.

In the absence of clear Canadian authority on the issue, *Halsbury* offers that "where the defendant has pleaded that the action is time-based, the burden is on the plaintiff to prove that the relevant limitation period has not expired".[79] The case cited in support is the decision of the

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[78] Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2004) at 95.

[79] *Halsbury's Laws of England*, 4th ed., vol. 28 (London: Butterworths, 1980) at 847.

English Court of Appeal in *London Congregational Union Inc. v. Harriss and Harriss*.[80] 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. Jopling*,[81] 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 limitation 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 cause of action accrued at an earlier date. As, however, the learned judge found that South was in fact suffering from pneumoconiosis in 1950, the question of onus was not a deciding factor.[82]

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, i.e. 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.[83]

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

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[80] [1988] 1 All E.R. 15.

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

[82] *Ibid*. at 784.

[83] *Supra* note 80 at 30.

> 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.[84]

The U.K. Law Commission noted that "under the current law it is not entirely clear who has the burden of proof on limitation",[85] 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 considerable significance to the outcome of the dispute",[86] the Australian cases are also "by no means clear"[87] 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.[88] 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.[89]

This approach is consistent with the comments of Sopinka, J. in *M(K.) v. M.(H)*:

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[84] *Ibid*. at 34.

[85] Law Commission (U.K.), *supra* note 47 at 200; Law Commission, *Limitation of Actions* (Consultation Paper # 151, October, 1997) (U.K) at 397-98.

[86] Queensland Law Reform Commission, *supra* note 37 at 71.

[87] *Ibid*.

[88] ALRI Report, supra note 33.

[89] Law Reform Commission of Western Australia, *supra* note 37 at 196.

> 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.[90]

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 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 the following subsection 5(2) (which is not included in the Uniform Act or the New Brunswick Bill):

> 5. (2) 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.[91]

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 10

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.***

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[90] *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at para. 114

[91] *Ontario Act*, *supra* note 6; *Saskatchewan Act*, *supra* note 6.

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.[92] The Alberta Law Reform Institute recommended that parties be permitted to continue to either extend or shorten limitations, relying on such contractual doctrines as unconscionability to prevent vulnerable plaintiffs from unfair agreements.[93]

This recommendation was not adopted in Alberta, though, and it has not been adopted in other Canadian jurisdictions since, with the sole exception of the pending new Brunswick legislation.[94] 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 adopted in Alberta[95] and Saskatchewan,[96] and in the Uniform Act.[97] 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.[98]

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

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[92] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022; see Mew, *supra* note 78 at 26.

[93] ALRI Report, *supra* note 33 at 90.

[94] *New Brunswick Bill*, *supra* note 6, s. 26.

[95] *Alberta Act*, *supra* note 5, s. 7.

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

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

[98] *Uniform Act*, *supra* note 2, commentary on s. 14; see also the discussion in Kerbel Caplan and Gray, *supra* note 27 at 24-27.

RECOMMENDATION 11

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

I. CONFLICT OF LAWS

Prior to the 1994 decision of the Supreme Court of Canada in *Tolofson v. Jensen*,[99] 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.

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".[100] 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.[101]

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.[102] In a 2005 decision, *Castillo v. Castillo*,[103] however, the Supreme Court of 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.

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[99] *Supra* note 92.

[100] ALRI Report, *supra* note 33 at 98.

[101] *Ibid.*

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

[103] [2005] 3 S.C.R. 870.

Following the *Castillo* decision, the Alberta Legislature amended its *Limitations Act* to provide a two-stage test:[104]

> 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.

This is essentially the approach adopted by New Brunswick in its pending legislation.[105] Ontario adopted a different approach when it introduced its new limitations legislation in 2002, simply codifying the existing common law:[106]

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

This same approach was recommended by the Uniform Law Conference. The Commission is persuaded that this is the simplest, most straightforward, and best manner of proceeding.[107]

RECOMMENDATION 12

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

J. RUNNING OF TIME

1. Demand Obligations

(a) Basic Limitation

The Ontario Court of Appeal recently considered the commencement date for the running of time in respect of a demand obligation under the Ontario *Limitations Act, 2002*,[108] in *Hare v.*

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[104] *Limitation Statutes Amendment Act*, S.A. 2007, c. 22, s. 1, amending the *Alberta Act*, *supra* note 5, s. 12.

[105] *New Brunswick Bill*, supra note 6, s. 24.

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

[107] The Commission also made this recommendation in its recent report on *Private International Law* (Report #119, 2008) at 13.

[108] *Supra* note 6.

Hare.[109] 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 of Appeal held that since a demand loan is fully mature and repayable when it is made, the plaintiff discovered her claim in respect of the demand note when it was delivered, rather than when the demand for payment was made. Since the last interim payment had been made in 1998, the applicable six year limitation had expired by the time the court action was commenced in 2005.[110]

In response, the Ontario Legislature amended the Act in 2008 to change the starting point for the running of time for demand obligations.[111] In relation to the running of the two year limitation period, new subsection 5(3) provides:

> (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.

New Brunswick's Bill 28, which was introduced in the Legislature after the *Hare* decision, includes a similar provision, that "no 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".[112]

With respect to the basic limitation period, the Commission also prefers the view that the running of time for limitations in respect of demand obligations should begin when a demand for payment is made. 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.[113] The Act should be clear on this point.

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[109] *Supra* note 11.

[110] The Court of Appeal did not find a decision of the Alberta Court of Queen's Bench to the contrary to be helpful, in part because "injury" is defined in the Alberta Act to include "non-performance of an obligation" (discussed above at B.1) whereas it is not defined in the Ontario Act: *ibid*. at para. 35, referring to *Sawchuk v. Bourne*, [2004] A.J. No. 526 (Q.B.)

[111] *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.

[112] *New Brunswick Bill*, *supra* note 6, s. 11.

[113] 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>; Kerbel Caplan and Gray, *supra* note 27 at 20; Chapman, *supra* note 26 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, *Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)* (February 2007) at 25-34, online: <http://www.sal.org.sg/digitallibrary/LawReform Reports.aspx>.

RECOMMENDATION 13

The basic limitation should begin to run in respect of a demand obligation on the day on which the default in performance occurs, once a demand for performance is made.

(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.[114]

The court held that the interpretation of s. 15(6)(c) that is consistent with established law is again 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 a demand for repayment is made. The majority felt that the Legislature must not have intended 'limitless liability'.[115]

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[116] also addressed this point, revising s. 15(6)(c). 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.

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).[117]

New Brunswick's Bill 28 takes a different approach; 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

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[114] *Ontario Act*, *supra* note 6; section 10 of the *Saskatchewan Act*, *supra* note 6, is very similar.

[115] *Supra* note 11 at para. 41.

[116] *Supra* note 111.

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

a demand for repayment. In its commentary on Bill 28, the Office of the Attorney General notes that "this will be the day the loan is advanced unless another date is established".[118]

The Commission prefers the approach of the Ontario, Alberta and Uniform Acts.

RECOMMENDATION 14

The ultimate limitation should begin to run in respect of a demand obligation on the day on which the default in performance occurs, once a demand for performance is made.

2. 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 v. Heller & Partners*[119] 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").[120] 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 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.*[121] 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

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[118] New Brunswick Commentary, *supra* note 39 at 8.

[119] *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

[120] 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.*, [1995] 1 S.C.R. 85; *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.

[121] *Ibid.*

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.[122]

It is in Manitoba that this issue has arisen most frequently in the courts.[123] 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. 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 factual background to enable the court to decide the complex and unresolved point of law that this case raises.[124]

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,[125] 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:

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[122] *Privest Properties Ltd. v. Foundation Co. of Canada* (1995), 128 D.L.R. (4th) 557 (B.C.S.C., Drost, J., affirmed without reference to the limitations issue (1997) 143 D.L.R. (4th) 635 (B.C.C.A.); *Armstrong v. West Vancouver* (2003), 10 B.C.L.R. (4th) 305 (B.C.C.A.), *passim*.

[123] *Winnipeg Condominium Corporation No. 36 v. Bird Construction (No. 2)* (1999), 131 Man. R. (2d) 283 (C.A.); *Winnipeg Condominium Corporation No. 266 v. 3333 Silver Developments* (2000), 155 Man. R. (2d) 164; *Sentinel Self-Storage Corp. v. Dyregov* (2003), 180 Man. R. (2d) 85 (C.A.), further proceedings (2007), 216 Man. R. (2d) 59; *Valley Agricultural Society v. Behlen Industries* (2004), 184 Man. R. (2d) 263; *Multi-Pork Inc. v. A.G. Penner Farm Services Ltd. et al*, 2008 MBCA 119, 301 D.L.R. (4th) 574. See the summary and analysis of the first four of these cases in Philip Osborne "Manitoba Tort Cases Since the Turn of the Century", (2005) 31 Man. L.J. 25 at 30-37.

[124] *Ibid*. at para. 12.

[125] *Winnipeg Condominium Corporation No. 36 v. Bird Construction (No. 2)* (1999), 130 Man. R. (2d) 203, rev'd 131 Man. R. (2d) 283 (C.A.).

> 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.[126]

In addition, in *Valley Agricultural,*[127] 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 remained 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.
>
> …
>
> [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.[128]

The proposed new limitations structure will assist with resolving this question. 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, loss or damage, 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 damage, a viable cause of action existed and a proceeding would be an appropriate means to remedy the damage. 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.

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[126] *Supra* note 123 at para. 70.

[127] *Valley Agricultural Society v. Behlen Industries* (2003), 172 Man. R. (2d) 248, rev'd (2004), 184 Man. R. (2d) 263 (C.A.).

[128] Osborne, *supra* note 123 at 36-37

3. 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.[129] 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:

> 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.

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".[130]

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 15

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

- ***wilfully conceals from the claimant the fact that injury, loss or damage 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, loss or damage.***

4. Minors and Persons Under a Disability

(a) Suspension

All of the modern Acts suspend the running of time in respect of a limitation while the claimant is a minor. However, there are two approaches in the Acts in relation to adult 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

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[129] See also *Guerin v. Canada*, [1984] 2 S.C.R. 335 at para. 115; *M.(K.) v. M.(H.)*, *supra* note 18 at para. 54-66; *Giroux (Estate) v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (Ont. C.A.).

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

condition". The New Brunswick bill, on the other hand, does not suspend the ultimate limitation. The commentary to the bill notes:

> [I]n 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] piece together enough 'periods in which' the ultimate period was suspended to demonstrate that the full fifteen years has not run.[131]

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 ...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.[132]

While we welcome comments, the Commission is inclined to recommend 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 appointment of a litigation guardian for the person under a disability.

RECOMMENDATION 16

Subject to recommendation 17, 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

Section 8 of 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 in a stipulated form, and in a stipulated manner. Once the notice has been properly served, time begins to run as if the person's disability had ceased on the date of service.

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[131] New Brunswick Commentary, supra note 39 at 12-13.

[132] British Columbia Law Institute, *supra* note 54 at 24.

British Columbia has a similar provision in its Act.[133] Neither Saskatchewan's nor New Brunswick's recent legislation contains an analogous provision,[134] and nor does the Uniform Act. Ontario's new 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.[135]

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,[136] 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 their 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.[137]

The Commission is concerned, however, that the existing section 8 does 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 Law Commission in England in a slightly different context:

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[133] *B.C. Act*, *supra* note 61, s. 7(6).

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

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

[136] *Justice Statutes Amendment Act, 2002*, S.A. 2002, c. 17, s. 4.

[137] ALRI Report, *supra* note 33 at 78.

> 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.[138]

It would appear much more desirable to have the court involved in order to ensure that such vulnerable persons' interests are not ignored. Alberta has done that by requiring service on the Public Trustee, who is then under a duty to investigate; Ontario has done it by requiring the court to appoint a litigation guardian, who must agree to "attend to the potential plaintiff's interests diligently".[139] On balance, the Commission is persuaded that the Ontario approach is preferable. The Commission is also persuaded that there is no reason to restrict the provision to minors, as in Alberta; rather, the procedure ought to be equally available against adults under a disability.

RECOMMENDATION 17

The Act should include a provision similar to Ontario's section 9, permitting a potential defendant to apply to court for the appointment of a litigation guardian for a potential plaintiff who is a minor or a person under a disability. The appointment of the litigation guardian should commence the running of time against the potential plaintiff if the court is satisfied that the litigation guardian:

- ***has been served with the motion;***
- ***has consented to the appointment in writing or before the judge;***
- ***knows, in connection with the claim, that an injury, loss or damage occurred and was caused by or contributed to by an act or omission of the potential defendant, that a viable cause of action exists, and that a proceeding would be an appropriate means to seek to remedy the injury, loss or damage;***
- ***does not have an interest adverse to that of the potential plaintiff; and***
- ***agrees to attend to the potential plaintiff's interests diligently and to take all necessary steps for their protection, including the commencement of a proceeding, if appropriate.***

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[138] Law Commission (U.K.), *supra* note 47 at 73.

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

K. SPECIAL LIMITATIONS

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 limitations regime. To some extent this is done by defining the kinds of proceedings to which the limitations legislation applies. Most 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 squarely within the ambit of the legislation. As Professor Roach has noted, "[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".[140]

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;[141]
- to enforce an arbitration award;
- by a debtor in possession of collateral to redeem it;
- by a creditor in possession of collateral to realize on it.[142]

Ontario has a very similar list of exemptions in its legislation.[143] Its list is slightly longer, however, and includes proceedings to obtain or enforce an order or agreement for support or maintenance under the *Family Law Act*.[144] The New Brunswick bill, on the other hand, does not provide for exemptions from its limitations provisions.[145]

The Commission is persuaded both that there is a strong case to be made in favour of some exemptions being made to the general limitations regime, and that the legislatures in Saskatchewan and Ontario have identified the most important ones, along with additional provisions discussed below. The exemption relating to declaratory relief, of course, does not apply 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 to obtain or enforce family support or maintenance. In Manitoba sections 61 and 63 of the *Family*

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[140] Roach, *supra* note 23 at 49.

[141] Other than a proceeding to enforce a judgment or order for the payment of money, which is subject to a 10 year limitation period from the date of the judgment or order: *Saskatchewan Act*, *supra* note 6, s. 7.1.

[142] *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 under "Public Authorities".

[143] *Ontario Act*, *supra*, note 6, s. 16.

[144] 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 "Sexual Abuse and Sexual Assault", below.

[145] *New Brunswick Bill*, *supra* note 6.

Maintenance Act abolish any limitation in respect of these matters, and these provisions should continue in effect.[146]

RECOMMENDATION 18

The Act should provide that there is no limitation applicable to proceedings:

- ***to enforce an order of a court, or any order that may be similarly enforced;***[147]
- ***to enforce an arbitration award;***
- ***by a debtor in possession of collateral to redeem it; or***
- ***by a creditor in possession of collateral to realize on it.***

1. 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.[148] Ontario goes further, and exempts proceedings:

- seeking forfeiture under the *Civil Remedies Act, 2001* of "instruments of unlawful activity" (s. 8) and vehicles likely to be "engaged in vehicular unlawful activity" (s. 11.2);[149]
- 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, if brought by the Crown or a delivery agent; and
- to recover money owing in respect of student loans, awards, and grants.[150]

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.[151] Two other types of remedies are available under the *Civil Remedies Act*:

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[146] *The Family Maintenance Act*, C.C.S.M. c. F20, ss. 61(1), 63. See the discussion at K.9 below; the provisions in *The Family Maintenance Act* abolishing limitations in respect of support and maintenance should be incorporated in a schedule to the new *Limitations Act* that identifies the limitation provisions in other Acts that continue in effect, including those that provide that no limitation is applicable to a claim.

[147] Note that the Manitoba *Court of Queen's Bench Act* defines "order" to mean " … an order of the court and includes a judgment": *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 1

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

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

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

[151] *Civil Remedies Act, 2001, supra* note 149, ss. 8(5), 11.2(6).

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,[152] and Ontario's *Limitations Act* confirms these limitations in its schedule.[153]

Manitoba's recent *Criminal Property Forfeiture Act*[154] 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.[155] Again, the Commission agrees with this approach and considers that this provision should continue in effect.[156]

With respect to the remainder of the Ontario exemptions, the Commission is persuaded that similar exemptions would be appropriate in a new Act.[157] It is generally in the public interest that the Crown's ability to recover money owing to it resulting from unlawful activity ought not to be subject to being forfeited through the expiration of a limitation.

RECOMMENDATION 19

The Act should provide that no limitation applies 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.***

2. 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:

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

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

[154] *The Criminal Property Forfeiture Act*, C.C.S.M. c. C306. Note that the Manitoba 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.

[155] *The Criminal Property Forfeiture Act, ibid*., s. 22

[156] As noted above, *supra* note 146, section 22 of *The Criminal Property Forfeiture Act, ibid*., would similarly be incorporated in a schedule to the new *Limitations Act* that identifies the limitation provisions in other Acts that continue in effect, including those that provide that no limitation applies to an action. See the discussion at K.9, below.

[157] 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: see *e.g*. *The Insurance Agents and Adjusters Regulation*, Man. Reg. 389/87, s. 10(6).

> 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 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.[158] The more comprehensive and updated Saskatchewan section seems to the Commission to be an eminently sensible and fair provision.

RECOMMENDATION 20

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).

3. Sexual Abuse and Sexual Assault

In *M. (M.) v. Roman Catholic Church of Canada*,[159] the Manitoba Court of Appeal held that all causes of action were subject to the 30-year ultimate limitation set out in s. 7(5) of the *Limitation of Actions Act*, including claims based on allegations of sexual assault. Subsequent to that decision, the Legislature enacted an amendment to the *Act* that is intended to have retroactive application.[160] Subsection 2.1(2) of the *Act* now exempts sexual assaults, assaults committed by a person in a fiduciary relationship with the plaintiff and assaults by a person on whom the plaintiff was financially, emotionally, physically or otherwise dependent from both the basic limitation and the 30-year longstop provision of the *Act*.[161]

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[158] *Farmers' Creditors Arrangement Act, 1943* (Canada), as rep. by the *Farm Debt Review Act*, S.C. 1988, c. 2, s. 68, in force February 4, 1988. The latter Act was then repealed and replaced by the *Farm Debt Mediation Act*. S.C. 1997, c. 21, in force April 1, 1988.

[159] 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.

[160] *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, 40 C.P.C. (6th) 314 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.

[161] See *Raubach v. Canada (Attorney General)*, 2004 MBQB 154, [2005] 1 W.W.R. 334 at para. 6.

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,[162] including Ontario,[163] Saskatchewan,[164] British Columbia,[165] and Newfoundland.[166] The Uniform Act also provides such protection.[167] The Commission considers that the protection extended by the Legislature in 2002 should continue in the new Act.

RECOMMENDATION 21

The Act should exempt claims based on sexual assaults and assaults within intimate or dependent relationships, and the exemption should be expressly retroactive.

4. Fraudulent Breach of Trust

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 the Commission's view, no limitation should apply to such claims.

RECOMMENDATION 22

The Act should provide that no limitation applies to a proceeding by a beneficiary under a trust in respect of a fraud or fraudulent breach of trust by a trustee, or to recover from the trustee trust property or its proceeds.

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[162] But not the *New Brunswick Bill*, *supra* note 6.

[163] *Ontario Act*, *supra* note 6, ss. 10, 16.

[164] *Saskatchewan Act*, *supra* note 6, s. 16.

[165] *B.C. Act*, *supra* note 61, ss. 3(4)(k), (l).

[166] *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 8(3), (4).

[167] *Uniform Act*, *supra* note 2, s. 9

5. *International Sales Conventions Act*

The Uniform Law Conference Working Group noted in its report to the Conference in 2005 that "the limitation period in the *Uniform International Sales Conventions Act* will need to be listed in the schedule if that Act is to be adopted".[168] While Manitoba has not as yet adopted that Act, it may be desirable to address that possibility now rather than having to revisit the Act in the future.

Saskatchewan's Act has dealt with this issue quite satisfactorily. That Act exempts from its operation "a claim that is subject to a limitation period in an international convention or treaty that is adopted by an Act".[169] The Commission recommends the adoption of a similar provision.

RECOMMENDATION 23

The 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.

6. Environmental Claims

Ontario's new limitations legislation makes a special provision for environmental claims: "There is no limitation period in respect of an environmental claim that has not been discovered".[170] 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.[171]

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".[172] 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

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[168] Uniform Law Conference of Canada, Uniform Limitations Act Working Group, *Uniform Limitations Act* (August 2005) at 4, online: <http://www.ulcc.ca/en/poam2/Uniform_Limitations_Act_Rep_En.pdf>.

[169] *Saskatchewan Act*, *supra* note 6, s. 3(5).

[170] *Ontario Act*, *supra* note 6, s. 17.

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

[172] John Lee, *A New Uniform Limitations Act*, online: <http://www.ulcc.ca/en/poam2/ CLS2004_New_Uniform_ Limitations_Act_En.pdf> at 1.

specifically consider whether the adoption of a special limitation was appropriate for inclusion in the Uniform Act.[173]

Some of 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".[174] 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.[175] In Yukon, every adult or corporate resident has been granted the right to a "healthful natural environment," 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 years of the date on which the cause of action arose.[176] Under the *Canadian Environmental Protection Act, 1999*,[177] a person may commence an 'environmental protection action' 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.[178]

In British Columbia, by contrast, the statutory cause of action created by the *Environmental Management Act* is not subject to any limitation.[179]

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.*,[180] 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":[181]

> [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

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[173] Uniform Law Conference of Canada, Uniform Limitations Act Working Group, *supra* note 168 at 4.

[174] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 218.

[175] *The Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21, s. 15.

[176] *Environment Act*, R.S.Y. 2002, c. 76, ss. 6, 8, 9.

[177] S.C. 1999, c. 33.

[178] *Ibid.*, 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.

[179] *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.

[180] 2002 MBQB 145, [2002] 7 W.W.R. 732 (Q.B.).

[181] *Ibid*. at para. 17.

> 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 defective 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.[182]

The Supreme Court of Canada has established that damages may be claimed for harm to the environment as a remedy in public nuisance,[183] and although it is not yet clear whether members of the public would have standing to bring such a claim, the law may be evolving in that direction.[184]

The Commission invites comments as to whether the new legislation should include a special limitation, or none at all, in respect of environmental claims.

7. 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 the 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 Commission recommended that the right and title to personal property should be extinguished upon the expiry of the limitation.[185]

The New Brunswick bill 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 limitation for a claim to recover interest is the basic limitation of two years. 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.[186]

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[182] *Ibid*. at para. 39.

[183] *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74.

[184] 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.

[185] Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act*, *supra* note 35.

[186] *New Brunswick Bill*, *supra* note 6, s. 12.

The Commission has recommended specific limitations relating to proceedings dealing with the conversion of property, proceedings by creditors in possession of collateral to realize on it and proceedings by debtors in possession of collateral to redeem it.[187] Otherwise, the Commission sees no compelling reason under the new limitations scheme to continue specific provision for claims in respect of personal property. Again, the Commission welcomes comments on this point.

8. 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*, which contains a wealth of specialized limitations provisions.[188]

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. Such reconsideration has been recommended by others, including the Alberta Law Reform Institute[189] and the Uniform Law Conference of Canada.[190] 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 24

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.

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[187] The Commission recommends, as did the Law Reform Commission of Saskatchewan, 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. With respect to conversion, the Commission recommends that the ultimate limitation should be two years against a purchaser of the property for value acting in good faith. The Saskatchewan Commission recommended that the limitation for actions for conversion should run from the date of the original conversion notwithstanding that further conversions may subsequently occur.

[188] See, *e.g.*, *The Insurance Act*, C.C.S.M. c. I40, ss. 131, 142(1)(14), 184, 211(12), 237(6), 258(2), 269, and 299(16).

[189] Alberta Law Reform Institute, *Limitations Act: Standardizing Limitation Periods for Actions on Insurance Contracts* (Report #90, 2003).

[190] Uniform Law Conference of Canada, *Limitation Periods in Insurance Claims: Report* (St. John's, August 2005), online: <http://www.ulcc.ca/en/poam2/Insurance_Claims_Limitations_En.pdf>.

9. Schedule of 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.[191] The section specifically applies only to limitations provisions that were in place in 1968, however, and any limitation provision enacted since then prevails over the Act.[192]

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*[193] and *The Real Property Act*.[194] 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. 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.

When the Alberta and Saskatchewan Legislatures modernized their limitations legislation, they repealed numerous special limitations.[195] The New Brunswick Legislature is considering repealing a few special limitations, but also providing that most special limitations prevail over the *Limitation of Actions Act*.[196] In Ontario, a great many special limitations were repealed or otherwise amended,[197] 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.[198] The Uniform Act adopts a similar approach.

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[191] *Manitoba Act*, *supra* note 1, s. 4.

[192] *Tauber-De Pape v. De Pape*, 1998 CarswellMan 281, 129 Man. R. (2d) 131, 180 W.A.C. 131, [1999] 1 W.W.R. 80, 22 C.P.C. (4th) 266, 42 R.F.L. (4th) 112 (C.A.).

[193] C.C.S.M. c. H175, s. 24.

[194] C.C.S.M. c. R30; see also, for example, *The Veterinary Medical Act*, C.C.S.M. c. V30, s. 54; *The Dental Hygienists Act*, C.C.S.M. c. D34, s. 64; *The Garage Keepers Act*, C.C.S.M. c. G10, s. 13(7); and *The Naturopathic Act*, C.C.S.M. N80, s. 20.

[195] *Alberta Act*, *supra* note 5, *Saskatchewan Act*, *supra* note 6, ss. 32-88

[196] *New Brunswick Bill*, *supra* note 6, ss. 4, 28-33, 35-39.

[197] *Ontario Act*, *supra* note 6, ss. 25, 27, 29-32, 34, 39, 41, 46.

[198] *Ibid.*, s. 19.

The Commission considers the general approach adopted by Ontario and the Uniform Act to be a commendable improvement on the existing Manitoba provisions, and recommends its adoption in this province. The schedule should identify the limitation provisions of other statutes that should apply notwithstanding *The Limitation of Actions Act*, including those that provide that no limitation applies to a claim.

RECOMMENDATION 25

The limitation provisions found in all Manitoba legislation other than the new Act should be considered for abolition or incorporation into a schedule to the Act, including those that provide that no limitation applies to a claim. Any limitation provision, whenever enacted, not expressly incorporated into the schedule should be declared to be of no force or effect.

L. REAL PROPERTY LIMITATIONS

It will be recalled that the very first general limitations legislation dealt with claims relating to real property.[199] 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,"[200] and possibly "ineffectual or inconsistent with … the Torrens system of land registration".[201]

The Act's provisions relating to real property have rarely been the subject of comment by the courts.[202] The reason for this is fairly straightforward: the Torrens system of land titles registration introduced in 1885 and governed by the *Real Property Act*,[203] covers most privately-held land in the province and is intended as a complete codification of title to real property interests.[204] However, it is also important to note that the previous deed registry established in

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[199] *Statute of Limitations, 1540* (U.K.), 32 Hen. VIII, c. 2.

[200] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969) at 65.

[201] Saskatchewan Department of Justice, *supra* note 35 at 18.

[202] Most of the cases that have arisen deal with s. 21 and its application to mortgages. Examples include *Canada Mortgage & Housing Corp. v. Horsfall*, 2004 MBQB 124, [2004] 11 W.W.R. 761(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.

[203] C.C.S.M. c. R30.

[204] See the discussion in Manitoba Law Reform Commission, *Private Title Insurance* (Report #114, 2006) at chapter 2.

1870 by *The Registry Act*[205] 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.[206] 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,[207] 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".[208] 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.[209]

Alberta, which has a land titles system similar in most respects to Manitoba's,[210] and where the former *Limitations Act* 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,[211] 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.[212] 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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[205] 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.

[206] Telephone conversation with Irvine Simmonds, A/District Registrar, Manitoba Property Registry (April 22, 2009).

[207] *Manitoba Act*, *supra* note 1, s. 2(1)(l).

[208] C.C.S.M. c. J10, s. 11(1).

[209] *The Real Property Act* provides that "where 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 ... may apply to the court for a declaration and order extinguishing the mortgage": *supra* note 203, s. 106

[210] 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 #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.

[211] The Alberta Court of Appeal confirmed in 2005 that the two year basic limitation applies to mortgage foreclosure proceedings: *Daniels v. Mitchell*, 2005 ABCA 271, 257 D.L.R. (4th) 663; *Blair v. Desharnais*, 2005 ABCA 272, 52 Alta. L.R. (4th) 54.

[212] Alberta Law Reform Institute, Limitations Act: *Adverse Possession and Lasting Improvements (*Report #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*, C.C.S.M. c. R30, 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". 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.[213] 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.[214] This recommendation was implemented in the Alberta Act.[215]

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.[216] 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 is advised that this has caused no difficulties since the Act was introduced in 2005, and that the Act has been well received.[217]

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.[218]

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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[213] Institute of Law Research and Reform, *Limitations* (Report for Discussion # 4, 1986) at 208ff.

[214] ALRI Report, *supra* note 33 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. 4.

[215] *Alberta Act*, *supra* note 5, s. 3(3). Following a 2003 report by the ALRI 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 211; *Limitation Statutes Amendment Act, 2007*, S.A. 2007, c. 22.

[216] Saskatchewan Department of Justice, *supra* note 35 at 18.

[217] Telephone conversation with Madeleine Robertson, Crown Counsel, Saskatchewan Justice (January 22, 2008).

[218] 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 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 Bardestani, Information Services Corporation of Saskatchewan, February 18, 2009. Similarly, most land in Alberta 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 Woollard, Director of Land Titles North, Service Alberta, May 4, 2009.

system in operation.[219] 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.[220] 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.[221]

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*.[222] Claims relating to real property in Ontario thus continue to be subject to an archaic and problematic limitations regime.[223]

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:[224]

> 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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[219] In Manitoba, most privately owned land is registered in the land titles system under *The Real Property Act*, *supra* note 208, 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* (Report # 114, 2006) at chapter 2.

[220] Ontario Law Reform Commission, *supra* note 200.

[221] Ontario Ministry of the Attorney General, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Minister of the Attorney General, 1991) at 49.

[222] *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24, s. 26; *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

[223] There have been problems identified resulting from the failure to deal with all claims in a holistic fashion in a single piece of legislation: see *e.g.*, Chapman, *supra* note 26 at 308.

[224] *Real Property Limitations Act*, *supra* note 221, ss. 4, 15. The length of adverse possession required to extinguish title is ten years: see *Teis v. Ancaster (Town)* (1997), 35 O.R. (3d) 216, 152 D.L.R. (4th) 304 (C.A.); *Elliott v. Woodstock Agricultural Society*, 2008 ONCA 648, 72 R.P.R. (4th) 1, 298 D.L.R. (4th) 577. 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 208, 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.[225]

In Manitoba, section 25 of the current 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 the Act.[226]

The New Brunswick approach is similar to that of Alberta. However, like Ontario and Manitoba, New Brunswick has had a deed registry system,[227] with the associated doctrine of adverse possession, for many years (New Brunswick began converting to a land titles system in 2001).[228] 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". [229]

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.[230]

In the result, the bill that was introduced in the New Brunswick Legislative Assembly does not change the limitation provisions in the existing Act with respect to the recovery of possession of land. The Office of the Attorney General explained that "[t]hough these are long overdue for reform, the Department has decided to review them further before presenting

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[225] Brian Bucknall, "Limitations Act, 2002 and Real Property Limitations Act: Some Notes on Interpretative Issues" (2005) 29 Adv. Q. 1 at 9.

[226] *Supra* note 205; see also the Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act*, *supra* note 35 at 24.

[227] *Registry Act*, R.S.N.B. 1973, c. R-6.

[228] 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.

[229] 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.

[230] *Ibid.*

legislation".[231] These sections are retained and renamed the *Real Property Limitations Act*. The bill does, however, apply to other actions dealing with real property, such as rents and mortgages, for example.[232] 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.[233]

The Commission has not come to even a tentative view on real property limitation reform and presents three options, hoping for input from the real property bar and other interested persons.

1. Option 1: Repealing Real Property Limitations

The first option is the general approach adopted by the Saskatchewan and Alberta Legislatures (and largely proposed by New Brunswick). One of the Commission's primary objectives when proposing reform of the existing law is simplification and clarification. If the real property provisions of the *Limitations Act* are indeed superfluous and unnecessary if a modern limitations regime is adopted, their repeal would greatly simplify and clarify limitations law in Manitoba.

Invitation to comment: Can Manitoba go so far as Alberta, Saskatchewan or New Brunswick has in limitations reform, particularly insofar as our deed registry system land is concerned? Are exceptions necessary?

RECOMMENDATION 26/A

The existing provisions dealing specifically with claims relating to real property should be repealed.

2. Option 2: Recommendations of the Law Reform Commission of Saskatchewan

The second option considers the recommendations of the Law Reform Commission of Saskatchewan, contained in two draft reports and its final report: *Tentative Proposals for Changes in Limitations Legislation; Part I: The Effect of Limitations on Title to Real Property*, 1981;[234] *Tentative Proposals for Changes in Limitations Legislation; Part II: The Limitations of*

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[231] New Brunswick Commentary, *supra* note 39 at 1.

[232] *Ibid*. at 3.

[233] *New Brunswick Bill*, *supra* note 6, s. 12; New Brunswick Commentary, *supra* note 39 at 8.

[234] Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation; Part I: The Effect of Limitations on Title to Real Property* (1981).

Actions Act, 1986;[235] and *Proposals for a New Limitation of Actions Act*.[236] For reasons which the Commission has been unable to ascertain, the Saskatchewan Legislature did not implement the recommendations of the Law Reform Commission of Saskatchewan; instead it enacted legislation to implement Recommendation 26/A, above. Nonetheless, the Commission thinks that the recommendations of the Law Reform Commission of Saskatchewan for the reasons contained in its two draft reports and its final report are worth consideration.

The recommendations of the Saskatchewan Commission, adapted slightly for Manitoba, are reproduced below for comment (some recommendations dealt with elsewhere in this report have been deleted, and section 4 below discusses in more detail the subject of actions for the recovery of possession of land). Relevant excerpts from the Saskatchewan Commission reports mentioned above are contained in Appendices B, C and D respectively to this draft Report.

Note: The recommendations below were made before the enactment of the new limitations regimes in other jurisdictions providing for a two year discoverability limitation and a longer ultimate limitation. The approach of the Saskatchewan Commission would have provided for three limitations, of two, six and ten years. The six year period was as a residual limitation applying to "any other action not specifically provided for in this Act or any other Act".[237] For example, the Commission said, in relation to (b) below, that "the Commission is of the opinion that the same limitation period should apply to all charges, whether on land or on personal property, and that the period should be six years – the same as that for an action for recovery on an ordinary debt".[238]

Because the specific limitations recommended by the Saskatchewan Commission are not transferable to the proposed new Manitoba regime, these periods have been left blank below. The Commission welcomes comments.

Invitation to comment: Are the recommendations of the Law Reform Commission of Saskatchewan, or some of them, appropriate for implementation in Manitoba?

RECOMMENDATION 26/B

(a) An action for recovery of land where an owner has been dispossessed in circumstances amounting to trespass should not be subject to a limitation;[239]

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[235] Law Reform Commission of Saskatchewan, *Tentative Proposals for Changes in Limitations Legislation; Part II: The Limitation of Actions Act* (1986) at 34-56.

[236] *Supra* note 35 at 23-29, 64-67.

[237] *Supra* note 35 at 66, s. 7(1).

[238] *Supra* note 235 at 43.

[239] See the discussion with respect to actions for the recovery of possession of real property at L.4 below; as noted above, Saskatchewan does not have deed registry land.

(b) An action by a secured party to realize upon a mortgage should be subject to a __ year limitation;

(c) An action by a purchaser under an agreement for sale of land to obtain title to the land should not be subject to a limitation;

(d) An action for cancellation of an agreement for sale should not be subject to a limitation;

(e) The amount required to be paid by the purchaser in order to obtain title under an agreement for sale of land should be limited to the principal owing together with interest accruing in the __ year period following the date when the last payment under the agreement for sale became due;

(f) A new section should be added to* The Real Property Act *to allow a purchaser to pay into court the balance of the purchase price where the vendor cannot be located;[240]

(g) An action by a tenant against his or her landlord for possession of land should be subject to a __ year limitation;

(h) An action by a life tenant or remainderman for possession of land should not be subject to a limitation;

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[240] The section should be as follows:

1. Where land is hereinafter sold by a registered owner of land under an agreement for sale and the purchaser is entitled to pay off the purchase price under the terms of the agreement, and

(a) the registered owner is absent from the province or cannot be found and there is no person authorized by registered power of attorney to receive payment of the purchase price and execute a transfer; or

(b) the registered owner is deceased and has no legal representative

a judge of the Court of Queen's Bench may

(c) on ex parte application, and

(d) on proof of the facts and of the amount, if any, due for principal, interest, and all other sums rightly payable to the registered owner under the agreement for sale

order

(e) within a time limited in the order, the payment into court of any sums owing under the agreement for sale and such interest as the judge deems just

(f) upon payment of such sums as prescribed in subsection (e), that title to the land vest in the name of the purchaser to give effect to the agreement for sale.

2. Any monies paid into court pursuant to this section shall, subject to the rules of court, be dealt with according to the orders of the court.

3. In this section the terms registered owner and purchaser shall include the executors, administrators and assigns of each of them.

[A similar provision already exists in *The Real Property Act* to deal with absentee mortgages, s. 105.]

(i) An action based on a right to enter for a condition broken should be subject to a __ year limitation;

(j) No limitation should apply to actions for the enforcement of easements, restrictive covenants and profits-a-prendre.

3. Option 3: Continue Real Property Limitations in a Discrete Act

A third option is to recommend following what Ontario has done (and New Brunswick proposes to do with respect to claims for the recovery of possession of land), which is to simply continue the real property Parts in a discrete Act, pending further reform.

RECOMMENDATION 26/C

The real property Parts of the existing Act should be continued in a discrete Act.

4. Adverse Possession

The Commission considers that that the application of limitations to actions based on adverse possession warrants 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.*[241] 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:

[241] (U.K.), 3 & 4 W. 4, c. 27.

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.[242]

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,*[243] 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.

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.[244]

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 (s. 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.

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.

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[242] *Supra* note 203.

[243] (U.K.), 9 Geo. III c. 16.

[244] C.C.S.M. c. 340.

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 27

The Act should provide that no limitation applies 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.[245] *The Limitation of Actions Act* does not contain such a provision. In our 1990 Informal Report #20A, the Commission suggested that the Act was anachronistic and unfair, and recommended that it be amended so that it binds the Crown.[246] 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".[247] 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.[248]

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 s. 3, binding the Crown.

Alberta, Saskatchewan, Newfoundland, British Columbia, and Ontario all bind the Crown, as will New Brunswick.

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[245] C.C.S.M. c. I80. See *Hupe v. Manitoba*, 2009 MBCA 27, [2009] 3 W.W.R. 597 in which the Court of Appeal held that the Crown was not bound by a limitation in the *Limitation of Actions Act*.

[246] Manitoba Law Reform Commission, *Limitation of Actions Brought by the Crown* (Informal Report #20A, 1990).

[247] *Ibid.* at 1.

[248] *Ibid*. at 1.

RECOMMENDATION 28

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.[249] This approach was also adopted by New Brunswick in its pending legislation.[250]

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.[251] 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 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.[252]

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.

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[249] *Alberta Act*, *supra* note 5 , s. 2.

[250] *New Brunswick Bill*, *supra* note 6, 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: David G. O'Brien, *Reforming Limitations in New Brunswick: A Submission to the Government of New Brunswick* (Canadian Bar Association, New Brunswick Branch, 2006).

[251] *Ontario Act*, *supra* note 6, s. 24.

[252] *Saskatchewan Act*, *supra* note 6, s. 31.

RECOMMENDATION 29

The Act should apply to all proceedings commenced after its implementation. Claims that were discovered while the existing regime was in effect should be statute barred after the earlier of:

- ***the date that would have applied under the existing Act, and;***
- ***two years from the implementation of the new Act.***

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 30

The Act should be in substantially the form of Appendix A.

CHAPTER 5

LIST OF RECOMMENDATIONS

1. *The Limitation of Actions Act* should be repealed and replaced with a new *Limitations Act.* (p. 12)

2. The Act should apply to claims pursued in court proceedings to remedy an injury, loss or damage 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. 19)

4. The Act should provide that the basic limitation begins 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, loss or damage had occurred,
      - that the injury, loss or damage 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, loss or damage
         - a viable cause of action exists, and
         - a proceeding would be an appropriate means to seek to remedy the injury, loss or damage; 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. 21)

5. The basic limitation for claims should be two years. (p. 22)

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. 23)

7. The ultimate limitation should be set at 15 years, with the exception of the following:
    - in respect of a claim for conversion of property against a purchaser of the property for value acting in good faith, the ultimate limitation should be two years from the day on which the property was converted. (p. 25)

8. The Act should apply to claims other than:
    - a proceeding for judicial review;
    - an appeal;
    - a proceeding for a declaratory judgment;
    - a proceeding for a writ of habeas corpus; and
    - a proceeding based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*. (p. 26)

9. The Act should not retain residual discretion in the court to extend a limitation. (p. 28)

10. 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. 31)

11. Parties should be permitted to agree to lengthen, but not to shorten, limitations. (p. 33)

12. The Act should provide that, for conflict of laws purposes, the limitations law of Manitoba and any other jurisdiction is substantive. (p. 34)

13. The basic limitation should begin to run in respect of a demand obligation on the day on which the default in performance occurs, once a demand for performance is made. (p. 36)

14. The ultimate limitation should begin to run in respect of a demand obligation on the day on which the default in performance occurs, once a demand for performance is made. (p. 37)

15. The running of the ultimate limitation should be suspended during any time in which the defendant:
    - wilfully conceals from the claimant the fact that injury, loss or damage 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, loss or damage. (p. 40)

16. Subject to recommendation 17, 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. 41)

17. The Act should include a provision similar to Ontario's section 9, permitting a potential defendant to apply to court for the appointment of a litigation guardian for a potential plaintiff who is a minor or a person under a disability. The appointment of the litigation guardian should commence the running of time against the potential plaintiff if the court is satisfied that the litigation guardian:
    - has been served with the motion;
    - has consented to the appointment in writing or before the judge;
    - knows, in connection with the claim, that an injury, loss or damage occurred and was caused by or contributed to by an act or omission of the potential defendant, that a viable cause of action exists, and that a proceeding would be an appropriate means to seek to remedy the injury, loss or damage;
    - does not have an interest adverse to that of the potential plaintiff; and
    - agrees to attend to the potential plaintiff's interests diligently and to take all necessary steps for their protection, including the commencement of a proceeding, if appropriate. (p. 43)

18. The Act should provide that there is no limitation applicable to proceedings:
    - to enforce an order of a court, or any order that may be similarly enforced;
    - to enforce an arbitration award;
    - by a debtor in possession of collateral to redeem it; or
    - by a creditor in possession of collateral to realize on it. (p. 45)

19. The Act should provide that no limitation applies 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. 46)

20. 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. 47)

21. The Act should exempt claims based on sexual assaults and assaults within intimate or dependent relationships, and the exemption should be expressly retroactive. (p. 48)

22. The Act should provide that no limitation applies to a proceeding by a beneficiary under a trust in respect of a fraud or fraudulent breach of trust by a trustee, or to recover from the trustee trust property or its proceeds. (p. 48)

23. The 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. (p. 49)

24. 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. 52)

25. The limitation provisions found in all Manitoba legislation other than the new Act should be considered for abolition or incorporation into a schedule to the Act, including those that provide that no limitation applies to a claim. Any limitation provision, whenever enacted, not expressly incorporated into the schedule should be declared to be of no force or effect. (p. 54)

26. Option 1: Repealing Real Property Limitations – *Can Manitoba go so far as Alberta, Saskatchewan or New Brunswick has in limitations reform, particularly insofar as our deed registry system land is concerned? Are exceptions necessary?*

26/A - The existing provisions dealing specifically with claims relating to real property should be repealed. (p. 59)

Option 2: Recommendations of the Law Reform Commission of Saskatchewan - *Are the recommendations of the Law Reform Commission of Saskatchewan, or some of them, appropriate for implementation in Manitoba?*

26/B -

(a) An action for recovery of land where an owner has been dispossessed in circumstances amounting to trespass should not be subject to a limitation;

(b) An action by a secured party to realize upon a mortgage should be subject to a __ year limitation;

(c) An action by a purchaser under an agreement for sale of land to obtain title to the land should not be subject to a limitation;

(d) An action for cancellation of an agreement for sale should not be subject to a limitation;

(e) The amount required to be paid by the purchaser in order to obtain title under an agreement for sale of land should be limited to the principal owing together with interest accruing in the __ year period following the date when the last payment under the agreement for sale became due;

(f) A new section should be added to *The Real Property Act* to allow a purchaser to pay into court the balance of the purchase price where the vendor cannot be located;

(g) An action by a tenant against his or her landlord for possession of land should be subject to a __ year limitation;

(h) An action by a life tenant or remainderman for possession of land should not be subject to a limitation;

(i) An action based on a right to enter for a condition broken should be subject to a __ year limitation;

(j) No limitation should apply to actions for the enforcement of easements, restrictive covenants and profits-a-prendre. (p. 60)

Option 3: Continue Real Property Limitations in a Discrete Act

26/C - The real property Parts of the existing Act should be continued in a discrete Act. (p. 62)

27. The Act should provide that no limitation applies to a proceeding to recover possession of real property. (p. 63)

28. The Act should provide expressly that it binds the Crown. (p. 64)

29. The Act should apply to all proceedings commenced after its implementation. Claims that were discovered while the existing regime was in effect should be statute barred after the earlier of:
    - the date that would have applied under the existing Act, and;
    - two years from the implementation of the new Act. (p. 65)

30. The Act should be in substantially the form of Appendix A. (p. 66)

APPENDIX A

DRAFT *LIMITATIONS ACT*

(BASED ON THE UNIFORM LAW CONFERENCEOF CANADA *LIMITATIONS ACT*)

CONTENTS

INTRODUCTORY MATTERS

Definition

1. The following definitions apply in this Act.

> "claim" means a claim to remedy an injury, loss or damage 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. (1) This Act applies to a claim pursued in a court proceeding other than,

(a) a proceeding for judicial review;
(b) an appeal;
(c) a proceeding for a declaratory judgment;
(d) a proceeding for a writ of habeas corpus; and
(e) a proceeding based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*.

(2) This Act does not apply to a claim that is subject to a limitation in an international convention or treaty that is adopted by an Act.

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, 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 defendant, and
(iv) that having regard to the nature and circumstances of the injury, loss or damage
(A) a viable cause of action exists, and

(B) a proceeding would be an appropriate means to seek to remedy the injury, loss or damage;

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), in the case of a default in performing a demand obligation, the day on which injury, loss or damage occurs is the day on which the default in performance occurs, once a demand for performance is made.

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) 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) The limitation established by subsection (2) does not run during any time in which the defendant,

(a) wilfully conceals from the claimant the fact that injury, loss or damage 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, loss or damage.

(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 continuous act or omission, the day on which the act or omission ceases;

(b) 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;

(c) 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.

(5) For the purposes of this section, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer is served with the claim in respect of which contribution and indemnity is sought, or incurs a liability through the settlement of that claim, shall be deemed to be the day the act or omission on which that alleged wrongdoer’s claim is based took place.

(6) Subsection (5) 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.

Incapable persons
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.

Appointment of litigation guardian
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 make an application or a motion to have a litigation guardian appointed for a potential plaintiff.

(3) Subject to subsection (4), the appointment of a litigation guardian ends the postponement or suspension of the running of the limitation if the following conditions are met:

(a) the appointment is made by a judge on the application or motion of a potential defendant;
(b) the judge is satisfied that the litigation guardian
    (i) has been served with the motion,

(ii)has consented to the appointment in writing, or in person before the judge,

(iii) in connection with the claim, knows of the matters referred to in clause 5(1)(a),

(iv) does not have an interest adverse to that of the potential plaintiff, and

(v) agrees to attend to the potential plaintiff's interests diligently and to take all necessary steps for their protection, including the commencement of a proceeding if appropriate.

(4) The limitation shall be deemed not to expire against the potential plaintiff until the later of

(a) the date that is six months after the potential defendant files, with proof of service on the litigation guardian,

(i) a notice that complies with subsection (5), and

(ii) a declaration that, on the filing date, the potential defendant is not aware of any proceeding by the litigation guardian against the potential defendant in respect of the claim; and

(b) the date on which the limitation would otherwise expire after it resumes running under subsection (3).

(5) The notice

(a) shall not be served before the first anniversary of the appointment;

(b) shall identify the potential plaintiff, the potential defendant and the claim; and

(c) shall indicate that the claim could be extinguished if a proceeding is not promptly commenced.

NO LIMITATION

Certain claims

11. (1) In this section, "assault" includes trespass to the person and battery.

(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) even if 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.

(4) There is no limitation for a proceeding
(a) by a beneficiary under a trust
(i) in respect of a fraud or fraudulent breach of trust to which the trustee was a party,
(ii) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or converted to the trustee's use;
(b) to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;
(c) to enforce an award in an arbitration to which the *Arbitration Act* applies;
(d) to recover possession of real property;
(e) by a debtor in possession of collateral to redeem it;
(f) by a creditor in possession of collateral to realize on it;
(g) to recover money owing to the Crown in respect of fines, taxes, and penalties or interest on fines, taxes or penalties;
(h) brought by the Crown or a Crown agent in respect of a claim relating to the administration of social, health or economic programs; or
(i) to recover money owing in respect of student loans, awards and grants.

(5) This section prevails over anything in section 6.

GENERAL RULES

Successors, principals and agents
12. (1) For the purpose of clause 5(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 purpose of clause 5(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 (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

13. (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).

Other Acts, etc.

14. (1) A provision in or under another Act that establishes a limitation, or provides that no limitation exists, and that applies to a claim to which this Act applies is of no effect unless

(a) the provision is listed in the Schedule to this Act; or

(b) the provision

(i) is in existence on the day this Act comes into force, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

(2) Subsection (1) applies despite any other Act.

(3) If there is a conflict between a provision referred to in subsection (1)(a) or (b) and any other provision of this Act, the limitation established by the provision referred to in subsection (1) prevails.

(4) Sections 8 and 9 apply, with necessary modifications, to a limitation established by a provision referred to in subsection (1).

Amending pleadings

15. (1) When a proceeding is commenced before the expiry of a limitation and, after the expiry, a claim is added to the proceeding, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the added claim is related to the conduct, transaction or events described in the original pleading and the conditions set out in one of the following paragraphs are satisfied:

(a) the added claim is made by a defendant against a claimant, or does not change the capacity in which a claimant sues or a defendant is sued;

(b) where the added claim adds or substitutes a claimant or changes the capacity in which a claimant sues,

(i) the defendant has received, within the limitation applicable to the added claim plus the time provided by law for service, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and

(ii) the court is satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims asserted or intended to be asserted in the original pleadings;

(c) where the added claim adds or substitutes a defendant or changes the capacity in which a defendant is sued, the defendant has received, within the limitation applicable to the added claim plus the time provided by law for service, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits.

(2) Under this section,

(a) the burden of proving that the added claim is related to the conduct, transaction or events described in the original pleading is on the person seeking to add the claim;

(b) the burden of proving that the added claim is necessary or desirable as set out in clause (1)(b) is on the claimant; and

(c) the burden of proving that the defendant did not receive sufficient knowledge as set out in clause (1)(b) or (c) is on the defendant.

Agreements
16. (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
17. For the purpose of applying the rules regarding conflict of laws, the limitations law of Manitoba or any other jurisdiction is substantive law.

Bankruptcy and Similar Proceedings
18. 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
19. (1) The following definitions apply in this section.

"effective date" means the day on which this Act comes into force.

"former limitation" means the limitation that applied in respect of the claim before the coming into force of this Act.

(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

(3) If the claim was discovered before the effective date, a proceeding shall not be commenced in respect of the claim after the earlier of the following:
(a) the second anniversary of the effective date;
(b) the day on which the former limitation expired or would have expired.

(4) Despite subsection (3), there is no limitation in respect of a claim to which section 11 would apply if the claim were based on an injury that took place on or after the effective date.

SCHEDULE

(SECTION 14)
[Contents of schedule to be determined by the Legislature. The schedule should include the provisions in other Acts that contain limitations or provide that no limitation exists in respect of a matter, and that should continue in effect.]

APPENDIX B

Excerpt from:

TENTATIVE PROPOSALS FOR CHANGES IN LIMITATIONS LEGISLATION

PART I: THE EFFECT OF LIMITATIONS ON TITLE TO REAL PROPERTY

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

July, 1981

Note: It is the understanding of the Commission that an agreement for sale is much more commonly used in Saskatchewan than in Manitoba. Nonetheless, even though the Commission is not aware of any reported Manitoba cases, presumably the same problems exist under Manitoba's legislation.

Some reference detail has been omitted.

III. LIMITATIONS AFFECTING AGREEMENTS FOR SALE

A. Agreement for Sale Defined

While the term "agreement for sale" is not defined in any Saskatchewan statute, there is little doubt as to its meaning. An agreement for sale of land is simply a sales transaction under which the vendor rather than a third party such as a bank provides financing for all or a part of the purchase price of the land. Under the agreement, the purchaser is given the right to defer payment of the purchase price. Most agreements provide for regular instalment payments over a period of months or years, and often the purchaser agrees to pay interest at a specified rate on the unpaid portion of the purchase price. In order to secure payment of amounts owing under the agreement, the vendor retains in his name title to the land. As soon as all amounts owing under the agreement by the purchaser to the vendor have been paid, the purchaser is entitled to have the title transferred to him. In most cases, the purchaser goes into possession of the land immediately after the agreement is executed.

B. Statutory Limitations on Rights Arising Under an Agreement for Sale

The Limitation of Actions Act contains provisions which deal specifically with agreements for sale. Section 36 of *The Limitation of Actions Act*[1] purports to limit the right of a purchaser to bring an action on an agreement for sale to the ten-year period within which the right first accrued. If during that ten-year period a purchaser makes payments on the agreement or the vendor gives an acknowledgement in writing that the purchaser has a right to make payments, the purchaser is limited to the ten-year period following the last payment or the acknowledgement in which to bring his action.

Section 37 of the *Act*[2] limits the right of a vendor to bring action under an agreement for sale to the ten-year period from when the right of action first accrued. If during that ten-year period, the purchaser makes a payment or acknowledges in writing that money is owing under the agreement, the vendor has ten years from the date of payment or acknowledgement in which to institute his action.[3]

Section 46 of the *Act* provides as follows:

> At the determination of the period limited by this act, to any person for taking proceedings to recover any land, rent charge or money charged on land, the right and title of such person to the land, or rent charge or the recovery of any money out of the land is extinguished.

It is also necessary to consider the effect of section 71(2) of *The Land Titles Act*[4] in order to appreciate the scope of the problem. This section provides:

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[1] R.S.S. 1978, c. L-15, s. 36 reads as follows: [text omitted].

[2] *Supra* footnote 7 [note 1 in this text], section 37 reads as follows: [text omitted].

[3] *Supra* footnote 7 [note 1 in this text], section 38. Section 38 reads as follows: [text omitted].

[4] *Supra* footnote 1.

> After land has been brought under this *Act* no right, title or interest adverse to or in derogation of the title or of the right to possession of the registered owner shall be acquired, or be held to have been acquired since the nineteenth day of December, 1913, by possession of another, and the right of the registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been impaired or affected by any such possession since the said date.

C. The Purchaser's Position

No problem arises in cases where the limitation period set out in section 36 of *The Limitation of Actions Act* has expired but the purchaser has paid the full purchase price of the land without having obtained a transfer of the title to his name. The courts have held that when the purchase price is paid the vendor is a bare trustee of the title for the purchaser, and it can be vested in the purchaser by virtue of the provisions of *The Trustee Act*.[5]

It is, however, a very different situation in cases where the full purchase price has not been paid prior to expiry of the limitation period. In several Saskatchewan cases purchasers or their successors who have found themselves in this position have argued that the court should vest title in their names under the vesting powers which the court has under section 87 of *The Land Titles Act*. This section provides:

> 87. A judge of the Court of Queen's Bench may, upon such notice as he deems fit or, where in his opinion the circumstances warrant, without notice:
>
> (a) make a vesting order and may direct the registrar to cancel the certificate of title to the lands affected and to issue a new certificate of title and duplicate thereof in the name of the person in whom by the order the lands are vested;
> (b) direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument or any memorandum or entry relating thereto in such manner as the judge deems necessary or proper.

They have argued that by the application of section 37 and section 46 of *The Limitation of Actions Act* the vendor's right to the land cease to exist.

This argument was approved and accepted in the unreported case of *In re section 82 of The Land Titles Act, In re Scheidt*.[6] In his judgment, Chief Justice Hall of the Court of Queen's Bench concluded that he must deal realistically with the situation and that title should be vested in the name of the purchaser under the agreement for sale.

However, the opposite conclusion was reached in the case of *Turner v. Waterman*.[7] In that decision Mr. Justice Davis of the Court of Queen's Bench ruled that the provisions of *The*

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[5] *See, O'Dell v. Hastie* (1968) 63 W.W.R. 632 (Sask. Q.B.). Also see, *The Trustee Act*, R.S.S. 1978, c. T-23, ss. 2 and 23.

[6] *See,* (1966), 31 Sask. Bar Rev. 31.

[7] (1965), 53 W.W.R. 595 (Sask. Q.B.).

Limitation of Actions Act were negative only and did not create any positive rights for the defaulting purchaser under an agreement for sale. He concluded that the combined effect of sections 37 and 46 of *The Limitation of Actions Act* could at most only negate any rights the vendor might have, but did not create a right for the purchaser to claim title. The court further held that the effect of section 71(2) of the *Act* was to bar a defaulting purchaser from gaining title to land simply by the passage of time. The court concluded that section 71(2) applied to squatters, trespassers and also defaulting purchasers under an agreement for sale. Further, the court expressed the view that it was inconsistent with the indefeasibility provisions of *The Land Titles Act* for a defaulting purchaser under an agreement for sale to be able to defeat the registered owner of land (the vendor) simply by the passage of time.

The decision in *Turner v. Waterman* was approved by the Saskatchewan Court of Appeal in the case of *Montreal Trust Co. v. Murphy*.[8] Speaking for the Court, Mr. Justice Hall stated that the decision in *In re Scheidt* was in error and that a

> purchaser can only obtain title through the terms of his agreement for sale. This he cannot do if he himself is in default, unless performance by him has been waived by the vendor.[9]

In dealing with the application of *The Limitation of Actions Act* to *The Land Titles Act*, the Court of Appeal concluded:

> The title of the registered owner must under our *Land Titles Act* remain intact and indefeasible. It therefore cannot be extinguished by effluxion of time. *The Land Titles Act* being a particular enactment dealing with land must override the general enactment of *The Limitation of Actions Act*.[10]

The *Montreal Trust Co*. case involved an action by a vendor for cancellation after the limitation period set out in section 37 had expired. The action was not opposed by the purchaser and no representations were made on behalf of the purchaser. The Court ruled only that section 46 of *The Limitation of Actions Act* was made inapplicable by *The Land Titles Act*. With respect to the effect of section 37, Mr. Justice Hall stated:

> It is not necessary to determine whether section 37 of *The Limitation of Actions Act* is also made inapplicable by the effect of *The Land Titles Act* as, in my opinion it does not purport to extinguish the rights of a plaintiff but only its remedy. Section 37 must therefore, be pleaded before it can operate against the plaintiff.[11]

The Court appears to have concluded that a vendor, being the holder of an indefeasible title, does not lose his interest by the passage of time and, perhaps could obtain cancellation of the purchaser's interest after the expiration of the limitation period.[12]

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[8] (1967), 58 W.W.R. 430 (Sask. C.A.).

[9] *Ibid*., at p. 434.

[10] *Ibid*., at p. 435.

[11] *Ibid*., at pp. 435-436.

[12] *See also, Armstrong v. Guaranty Trust Company of Canada* (1974), 45 D.L.R. (3d) 740 (Sask. Q.B.).

In view of these court decisions it seems clear that a vendor does not lose his rights, even though the limitation period has run against him. Conversely, the purchaser cannot gain title simply because the limitation period has run against the vendor.

An additional problem may confront the purchaser. Section 36 of *The Limitation of Actions Act* establishes a limitation period on a purchaser's right to sue under an agreement for sale. The combined effect of sections 36 and 46 may be to extinguish the purchaser's interest after the passage of the limitation period.

In *Armstrong v. Guaranty Trust Company of Canada*,[13] Chief Justice Bence of the Court of Queen's Bench suggested sections 36 and 46 of *The Limitation of Actions Act* might defeat any interest the purchaser under an agreement for sale had after the limitation period has expired.[14] In *Turner v. Waterman*, Mr. Justice Davis also suggests that section 36 may defeat the purchaser's interest after the passage of the limitation period.[15] *Wilkes v. Greenway*[16] and *Tichborne v. Weir*[17] ruled that the provisions of limitation statutes are negative only, extinguishing but not creating rights.

In view of such decisions and judicial comments, there is a strong argument that the purchaser may no longer have an interest in land after the expiration of the limitation period mentioned in section 36 of *The Limitation of Actions Act* because his rights are extinguished.

Saskatchewan courts have never had to rule on the purchaser's position after the expiration of the limitation period in section 36 of *The Limitation of Actions Act*. However, support for the proposition that a purchaser does not have an interest in land after the expiration of the limitation period may be found in the way courts have dealt with mortgages after the limitation period.

Section 34 of *The Limitation of Actions Act*[18] limits a mortgagee's right of action. In the *Re Hadwin* case[19] the Saskatchewan Court of Appeal ruled that the combined effect of section 34 and section 46 of *The Limitation of Actions Act* is to extinguish the mortgagee's rights after the expiration of the limitation period.[20] In the *Montreal Trust Co*. case, the Saskatchewan Court of Appeal confirmed the position it had taken in the *Hadwin* case regarding mortgages. If the same reasoning were applied to a purchaser under an agreement for sale, his interest would be extinguished after the limitation period in section 36.

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[13] *Ibid*.

[14] *Ibid*., at pp. 744-745.

[15] *Supra* footnote 12 [note 6 in this text], at p. 604

[16] (1890), 6 T.L.R. 449 (Eng. C.A.).

[17] (1892) 67 L.T. 735 (Eng. C.A.).

[18] *Supra* footnote 7 [note 1 in this text]. Section 34 reads as follows: [text omitted].

[19] (1954), 12 W.W.R. (NS) 414 (Sask. C.A.).

[20] See also, *Cockshutt Plow Company Limited v. Kornyssyn*, (1932), 1 W.W.R. 369, (Sask. C.A.).

The court's decision the *Re Hadwin* case is reconcilable with its later decision in the *Montreal Trust Co*. case. Limitation statutes only negate, but do not create rights.[21] In removing a mortgage in *Hadwin*, the court was only extinguishing a right. However, the court in *Montreal Trust* could not give title to the purchaser. To have done so, would not only have meant extinguishing the vendor's rights, but also creating rights for the purchaser. Because the purchaser had not paid the full purchase price he was, of course, not entitled to title by the terms of his agreement.

The Limitation of Actions Act would appear to operate against the purchaser in two ways. First, simply because the limitation period has run against the vendor does not mean the purchaser can claim title. Secondly, once the limitation period restricting the purchaser's rights has run, the purchaser may be in a position of no longer having an interest in land.

D. The Vendor's Position

If the full purchase price has been paid, the vendor is a bare trustee of the title for the purchaser and the rights of the parties are not affected by *The Limitation of Actions Act*.[22] In such a case limitation periods do not operate to deny title to the purchaser. However, if the full purchase price has not been paid, the situation is very different. Limitation periods in such a case operate against the purchaser but not against the vendor.

In view of the Court of Appeal decision in *Montreal Trust Co. v. Murphy*, it would appear that the vendor does not lose his interest in land after the passage of the limitation period in section 37 of *The Limitation of Actions Act*. Indeed, a vendor may be able to proceed to cancel an agreement for sale even after the passage of the limitation period. The *Montreal Trust Co*. case dealt with a cancellation action after the passage of the limitation period mentioned in section 37. The court ruled that *The Land Titles Act* being a specific enactment dealing with land must override the provisions of *The Limitation of Actions Act*. In view of the indefeasibility provisions of *The Land Titles Act*, the court held that it was inconsistent for title to land to be defeated simply by the passage of time. The court held that section 46 of *The Limitation of Actions Act* was overruled by *The Land Titles Act*. The court stated it did not have to rule on the effect of section 37 of *The Limitation of Actions Act* because it had not been pleaded. It remains a matter of speculation as to whether or not Saskatchewan courts will take the position that the vendor can ignore section 37 of *The Limitation of Actions Act* and obtain cancellation of an agreement for sale and possession of the land involved.

E. A Comparison: The Position of the Vendor with the Position of the Purchaser under *The Limitation of Actions Act*

The application by the courts of *The Limitation of Actions Act* to agreements for sale has resulted in purchasers being treated differently from vendors. A vendor's rights may well be

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[21] See, *Turner v. Waterman*, *supra* footnote 13 [note 7 in this text]. See also *Wilkes v. Greenway*, *supra* footnote 22 [note 16 in this text] and *Tichborne v. Weir*, *supra* footnote 23 [note 17 in this text].

[22] *Supra* footnote 11 [note 5 in this text].

unaffected by *The Limitation of Actions Act*.[23] A purchaser, however, is in a much different position. A purchaser cannot claim title simply because the limitation period affecting the vendor has passed.[24] And the limitations on a purchaser's rights[25] may operate to extinguish the purchaser's interests.

Such an application of *The Limitation of Actions Act* raises practical difficulties. If a vendor of land disappears and his whereabouts are unknown, title to the land is left in limbo. Title remains in the name of the absentee vendor and is not extinguished by the operation of *The Limitation of Actions Act*. The purchaser therefore may be unable to obtain title in such circumstances. In fact the effect of section 36 of *The Limitation of Actions Act* may even be such that the purchaser does not have an interest in land after the passage of the limitation period mentioned in that section. Title, therefore, is left in limbo.

However, a purchaser who receives title from the vendor and gives a mortgage back to the vendor as security is in a very different position from a purchaser who buys under an agreement for sale. Section 34 of *The Limitation of Actions Act* places a time limit on a mortgagee's right to take action. After that time period passes a mortgagee's rights are extinguished and the mortgage can be removed from the title.[26]

Agreements for sale and transfers with mortgages back as security are both legitimate ways of financing the purchase of land. It seems inconsistent for the courts to come up with different results depending on the form of financing used by the vendor and purchaser.

IV. INADEQUACY OF SOLUTIONS UNDER PRESENT LAW

There is no adequate remedy in law to assist the purchaser under an agreement for sale who finds title to the land he is purchasing left in limbo by the operation of *The Limitation of Actions Act*. The only possible solutions available to this dilemma are for the purchaser to prove that the vendor has abandoned the land or that the vendor has agreed to accept part payment (payments already made) in full satisfaction of the agreement.[27]

Purchasers who have found themselves in this dilemma have in several cases applied for title to be vested in their names pursuant to the vesting power contained in *The Land Titles Act*.[28] Saskatchewan courts have consistently held that the vesting provisions in *The Land Titles Act* do not create substantive rights. They have held that title can be vested under the vesting power in *The Land Titles Act* only in cases of hardship where the facts are not in dispute and where there

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[23] See, *Turner v. Waterman*, *supra* footnote 13 [note 7 in this text]. See also, *Montreal Trust Co. v. Murphy*, *supra* footnote 14 [note 8 in this text].

[24] *Ibid.*

[25] See discussion earlier in this paper on the combined effect of sections 36 and 46 of *The Limitation of Actions Act.*

[26] *Re Hadwin*, *supra* footnote 25 [note 19 in this text]. See also, *supra* footnote 26 [note 20 in this text].

[27] These remedies were suggested in *Turner v. Waterman*, *supra* footnote 13 [note 7 in this text].

[28] *Supra* footnote 1, section 87.

is no question concerning the applicant's right to have title vested in his name.[29] The vesting power is not wide enough to assist a purchaser who is claiming title by reason of the fact that the limitation period has run against the vendor.[30]

The courts have given a similar interpretation to the vesting power contained in *The Trustee Act*.[31] Nor is the purchaser likely to be successful in an action for specific performance in such a case.

Three hurdles face the purchaser seeking specific performance. Time is of the essence in a contract for the sale of land and proceedings for specific performance must generally fail if the plaintiff has been late in performing his obligations.[32] If the limitation period has run against the vendor, it would mean in most cases that the purchaser himself has been in default.

Secondly, if the vendor's whereabouts are unknown, it is doubtful whether specific performance can be granted. Specific performance is a court order requiring an individual or his legal representative to take certain action, such as transferring title pursuant to an agreement for sale. It is doubtful that the court could grant specific performance if the whereabouts of the vendor are unknown and there is no legal representative.[33] Nor is there legislative authority allowing the court to appoint a representative or to act in the place of the vendor in such a situation.[34]

Finally, if the limitation period has passed against the purchaser, the combined effect of sections 36 and 46 of *The Limitation of Actions Act* might be to extinguish the purchaser's interest. If the purchaser's interest has been extinguished, the purchaser would have no basis for maintaining an action for specific performance, whether or not the vendor can be found.

Thus, if the limitation periods have run, and the full purchase price is unpaid, title is left in a state of limbo. Title remains with the vendor and there is virtually nothing the purchaser can do to get it transferred to him, even though he is prepared to pay the balance owing under the

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[29] See, *Re Yanow Estate*, (1956-57) 20 W.W.R. 81 (Sask. Q.B.); *In re Section 82, Land Titles Act, Ralph Estate*, (1954), 12 W.W.R. (NS) 245 (Sask. C.A.); *In re Weber Estate*, (1951) 2 W.W.R. (NS) 401 (Sask. K.B.); *Re Schmidt*, (1956) 19 W.W.R. 620 (Sask. K. B.).

[30] See, *Turner v. Waterman*, *supra* footnote 13 [note 7 in this text] and *Armstrong v. Guaranty Trust Co*., *supra* footnote 13 [note 7 in this text].

[31] See, *In re Trustee Act, Re Woodbury's Will, Re Certain Lands*, (1959) 29 W.W.R. 591 (Sask. C.A.). The relevant provisions of *The Trustee Act*, R.S.S. 1978, c. T-23, read as follows: [text omitted].

[32] See I.C.F. Spry; *Equitable Remedies*; Sydney; The Law Book Company; 1971 at pages 188-189. See also, *Fraser v. Robinson*, (1952-3), 7 W.W.R. (NS) 378, (Sask. Q.B.).

[33] See Sir Edward Fry; *The Specific Performance of Contracts*; 6th ed., London; The Carswell Co. Ltd., 1921, at page 93.

[34] The only legislative authority by which a court can appoint a representative in an action or give judgment without a legal representative is found in section 23 of *The Queen's Bench Act*, R.S.S. 1978, c. Q-1. That provision appears to apply only if a person is known to be dead, and may have no application to actions commenced by a purchaser. Section 23(1) provides: [text omitted].

agreement for sale. There is no solution in the law as it now stands for dealing with this situation.

V. A COMPARISON WITH OTHER JURISDICTIONS

Problems arising from the application of *The Limitation of Actions Act* to agreements for sale seem to be fairly unique to Saskatchewan. A review of case reports from other Torrens' jurisdictions shows that there are virtually no problems arising from the application of limitation statutes to agreements for sale.

In some instances this is due to legislative differences. *The Limitation Act*[35] in British Columbia contains no limitation periods dealing with either agreements for sale or mortgages. *The Limitation of Actions Act* in Alberta has the same limitation periods dealing with agreements for sale as does the Saskatchewan *Act*.[36] However, in Alberta, *The Land Titles Act*[37] specifically allows for title to be gained by adverse possession.[38] Thus once a vendor is barred from taking action and the purchaser can show at least ten years' continuous possession,[39] the purchaser can apply for title to vest in his name.

VI. RECOMMENDATIONS

Two alternatives are available for dealing with this problem.

Firstly, the court's vesting powers could be widened to allow the court to override the troublesome provisions of *The Limitation of Actions Act* and section 71(2) of *The Land Titles Act*. This approach has several disadvantages. It may not resolve the problem. Courts in exercising judicial discretion tend to be conservative and they may interpret such discretionary powers as not being sufficient to deprive the vendor of title. Such an approach also tends to complicate the law. Confusion can only result when one statute states the provisions of another can be overruled.

The second alternative and the one which the Commission recommends, is to repeal those sections of *The Limitation of Actions Act* dealing with agreements for sale, namely Part V of the *Act*.[40] Such a change would place both the vendor and purchaser in the same position. Neither party could lose his rights in land by the passage of time. A vendor who transferred title and

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[35] R.S.B.C. 1979, c. 236.

[36] R.S.A. 1970, c. 209, ss. 27, 36 and 44.

[37] R.S.A. 1970, c. 198.

[38] *Ibid*., s. 73. See also, Jeremy S. Williams, *Title by Limitation in a Registered Conveyancing System*, (1968) 6 Alta. Law Rev. 67.

[39] See, *Nessman v. Bonke*, (1979) 1 W.W.R. 210 (Alta. S.C.). Also, *Boyczuk v. Perry*, (1948) 1 W.W.R. 495 (Alta. C.A.).

[40] Sections 36, 37, 38.

took a mortgage back as security would still face a limitation on his right to take action. No limitations, however, would face the vendor who sold under an agreement for sale.

In spite of such a difference, it is recommended that section 34, limiting the right of mortgagees to take action, remain in the *Act*. There are two reasons for such a recommendation. Section 34, together with section 46, provides an easy way for a mortgagor to clear his title.[41] Secondly, most mortgages arise from lender credit, not vendor credit. Limitation periods exist on the collection of debts.[42] On policy grounds it would be difficult to justify exempting a loan secured by a mortgage from any limitation period, while loans not secured by a mortgage are subject to such periods.

Coupled with the repeal of Part V of *The Limitation of Actions Act*, it is recommended that there be some provision for dealing with title in the event the whereabouts of the vendor are unknown.

RECOMMENDATIONS

1. Sections 36, 37 and 38 of *The Limitation of Actions Act* should be repealed.

2. The following new section should be added to *The Land Titles Act*.

   (1) Where land is hereinafter sold by a registered owner of land under an agreement for sale and the purchaser is entitled to pay off the purchase price under the terms of the agreement, and
      (a) the registered owner is absent from the province or cannot be found and there is no person authorized by registered power of attorney to receive payment of the purchase price and execute a transfer in form I; or
      (b) the registered owner is deceased and has no legal representative

   a judge of the Court of Queen's Bench may
      (c) on *ex parte* application, and
      (d) on proof of the facts and of the amount, if any, due for principal, interest, and all other sums rightly payable to the registered owner under the agreement for sale

   order
      (e) within a time limited in the order, the payment into court of any sums owing under the agreement for sale and such interest as the judge deems just
      (f) upon payment of such sums as prescribed in subsection (e), that title to the land vest in the name of the purchaser to give effect to the agreement for sale.

   (2) Any monies paid into court pursuant to this section shall, subject to the rules of court, be dealt with according to the orders of the court.

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[41] *Supra*, *Re Hadwin*, footnote 25 [note 19 in this text]. Also see footnote 26 [note 20 in this text].

[42] *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, ss. 3(1)(f), 12, 13, 14 and 16.

(3) In this section the terms registered owner and purchaser shall include the executors, administrators and assigns of each of them.

A similar provision already exists in *The Land Titles Act* to deal with absentee mortgagees.[43]

[43] Section 139. The said section reads as follows: [text omitted].

APPENDIX C

Excerpt from:

TENTATIVE PROPOSALS FOR CHANGES IN LIMITATIONS LEGISLATION

PART II: THE LIMITATION OF ACTIONS ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

May, 1986

Note: In the Law Reform Commission of Saskatchewan's *Tentative Proposals, Part II*, Manitoba's comparable legislation to s. 213(1) of Saskatchewan's *Land Titles Act* is *The Real Property Act* s. 59.

III. APPROPRIATE PERIODS – PROPERTY ACTIONS

A. General

The present *Limitation of Actions Act* is to a large extent a consolidation of the earlier English limitation statutes inherited by Saskatchewan. For this reason the Saskatchewan statute shares the English preoccupation with real property. The striking feature of this transplant is the almost complete disregard of the predominant position of the Torrens system of land registration. This has created complex problems. It seems that some provisions of the *Limitation of Actions Act* have lost their effect. In some cases the interplay between the limitations law and land titles law have led to a "state of limbo" in which one party has possession of the land but cannot obtain title, while the other has title but cannot obtain possession.

B. Actions to Recover Land – The Present State of the Law

Under the English system of land law, title to land depended not so much upon ownership, but upon possession. Underlying this was the recognition that possession of land over a long period of time should not be disturbed. The Saskatchewan *Limitation of Actions Act* reflects this philosophy. Section 18 provides a ten year limitation period within which an action to recover land must be brought. Section 46 provides:

> At the determination of the period limited by this Act, to any person for taking proceedings to recover any land, rent charge or money charged on land, the right and title of such person to the land, or rent charge or the recovery of the money out of the land is extinguished.

This extinguished the owner's title to the property. It did not, however, act as a conveyance of the title. No transfer was necessary under English real property law. The title of the person in possession was not derived from the former owner, but from the very fact of possession:

> Whenever you find a person in possession of property, that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute when once you have extinguished the right of every other person to challenge it.[1]

In 1913, *The Land Titles Act* was amended by the addition of a provision[2] which now appears as section 71:

> 71(1) Every certificate of title shall be void as against the title of any person adversely in actual occupation of and rightly entitled to the land at the time when the land was brought under this Act.
>
> (2) After land has been brought under this Act no right, title or interest adverse to or in derogation of the title or of the right to possession of the registered owner shall be acquired, or be held to have been acquired since December 19, 1913, by the possession of

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[1] *Cheshire's Modern Law of Real Property* ed. E.H. Burn, 11th ed., London: Butterworths, 1972, 891.

[2] *An Act to amend The Land Titles Act*, S.S. 1913, c. 30, s. 6.

> another, and the right of the registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been impaired or affected by any such possession since the said date.

The Limitation of Actions Act provisions relating to the recovery of land are specifically made subject to the provisions of *The Land Titles Act*.[3] Thus, title to land brought under the land titles system can no longer be acquired by adverse possession, and the provisions of the limitations statute are of no effect. The limitation provision will still apply to land that has not been brought within the land titles system.

Actions for the recovery of land by a vendor or for cancellation of the agreement are governed by a ten year limitation period. It has been argued that section 71 of *The Land Titles Act* was intended to govern only where title is claimed by adverse possession, and not where the action relates to an agreement for sale or mortgage.[4] This is evidenced by the fact that, unlike the general limitation provision for the recovery of land, the provisions respecting agreements for sale and mortgages are not made subject to *The Land Titles Act*.[5] This argument was accepted by the Court of Queens' Bench in *In re Scheidt*.[6]

The decision has not been accepted by other courts. In *Turner v. Waterman*[7] it was decided that section 71 of *The Land Titles Act* applies not only to a squatter or trespasser, but also to a defaulting purchaser under an agreement for sale. But quite apart from section 71, the court found that "the doctrine of title by prescription is inconsistent with indefeasibility of title accorded, by section 207 (now s. 213) of *The Land Titles Act, 1960*, to the registered owner and cannot prevail".[8] Subsection 213(1) provides:

> 213 (1) Every certificate of title and duplicate certificate granted under this Act shall, except:
> (a) in case of fraud wherein the owner has participated or colluded; and
> (b) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and
> (c) so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title;
> be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.

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[3] Section 17 of the Act provides:

> This Part [Part II, which relates to proceedings to recover land] is subject to *The Land Titles Act.*

No such provision exists in respect of Part V {Agreement for the Sale of Land).

[4] See D.A. Schmeiser, "Prescription under the Saskatchewan Land Titles Act" (1966), 31 *Sask. Bar Rev*. 54.

[5] *Supra*, note 77 [note 3 in this text].

[6] Unreported judgment reproduced in (1966), 31 *Sask. Bar Rev*. 54, at 59.

[7] (1965), 53 W.W.R. 595 (Sask. Q.B.).

[8] *Ibid*., at 603.

The certificate of title is conclusive evidence in "all courts" and against "all persons" that the registered owner has title to the land. The Court of Appeal in *Montreal Trust Company v. Murphy*[9] agreed with the analysis in *Turner v. Waterman*:

> The title of the registered owner must under our *Land Titles Act* remain intact and indefeasible. It therefore cannot be extinguished by effluxion of time. *The Land Titles Act* being a particular enactment dealing with land must override the general enactment of *The Limitation of Actions Act*.[10]

Thus, section 46 of *The Limitation of Actions Act* cannot operate so as to extinguish the title of the vendor. But can the vendor proceed to cancel the agreement for sale or otherwise regain possession of the land? A reading of the limitation statute suggests that he cannot. The general effect of a limitation period is to bar the remedy, not the right. Although the vendor will not lose title, he will not be able to regain possession. The purchaser, on the other hand, does have possession but cannot gain title by virtue of possession alone.

The purchaser can, however, break this circularity simply by tendering the purchase price and calling for title. The Saskatchewan Court of Appeal in *Jacob Estate v. Nieth Estate*[11] decided that the ten year limitation period governing actions by purchasers set out in section 36 does not start running until the full purchase price is tendered (rather than the date when the last payment is due under the agreement).[12] Nor does the limitation period apply once the full purchase price is paid, because in such a case the vendor is held to be a trustee.[13] It would appear, therefore, that section 36 will only apply where there has been a tender of the full purchase price, but that tender has been refused. In such a case, a second tender after the expiration of the limitation period will not be effective, and the circularity can only be broken by negotiation between the parties.

The position in respect of mortgages is different. Section 33 provides that a mortgagor has ten years within which to commence action to redeem the mortgage where the mortgagee has taken possession of the property. Under section 34, a mortgagee has ten years within which to commence foreclosure or sale proceedings. Again, the principle underlying these provisions is the English notion of possession as a good root of title. The expiration of the limitation period will extinguish the title or interest of the claimant; it will prevent the mortgagee from foreclosing where the mortgagor is in possession, and will prevent the mortgagor from redeeming where the mortgagee is in possession. This unchallenged position therefore gives rise to a good title.

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[9] (1966), 58 W.W.R. 430 (Sask. C.A.).

[10] *Ibid*., at 435.

[11] (1984), 31 Sask. R. 70.

[12] Subsection 36(1) provides, *inter alia*:

No purchaser of land and no person claiming through him shall bring an action in respect of the agreement for the sale thereof, but:

(a) within ten years after the right to bring the action first accrued to the purchaser ...

[13] *O'Dell v. Hastie* (1968), 63 W.W.R. 632 (Sask. Q.B.); *Bell v. Guaranty Trust Company of Canada*, [1984] 2 W.W.R. 348 (Sask. C.A.).

This system does not translate easily into the Torrens system. The mortgagor under the Torrens system retains title to the land: the mortgagor merely obtains a charge on the property. Where the mortgagor is in possession and the ten year limitation period governing foreclosure actions has expired, the mortgagor can simply apply to have the mortgage removed from title.[14] However, where the mortgagee is in possession and the period for redemption has expired, the same procedure does not apply. The mortgagee does not have title to the land. It is no longer meaningful to refer to the mortgagor's action for redemption. The Land Titles mortgage does not involve a transfer of title: the mortgagor does not need to bring an action for reconveyance (redemption) because the mortgagor retains legal title. Although there are no cases on point, it is likely that a court would apply subsection 71(2) and hold that the mortgagor is entitled to recover the land. The limitation period governing redemption will only apply to cases where the mortgagor has given an outright transfer to the mortgagee, but there are collateral facts to establish that it was only intended as security. Thus, except in the exceptional case where an outright transfer was intended as security, the ten year period for redemption actions is a dead letter.

This state of the law is intolerable. The limitations law and land titles law must be harmonized. In particular, the law must be changed so that title to land can never be "in a state of limbo".

C. Title by Adverse Possession

It has been said that the idea of title by adverse possession is inconsistent with the philosophy of a Torrens system.[15] Although the Commission does not share the view[16] that the Torrens system compels the abolition of title by adverse possession,[17] it is nevertheless of the opinion that the present rule should be retained.

The issue is whether the registered owner of the land should be entitled to rely upon the certificate of title against those raising possessory claims against him. The case against such reliance is made out as follows:

> Misunderstandings have sometimes arisen from an unwarranted belief that title deeds are sacrosanct documents, whereas the truth is that neither a conveyance nor a land certificate retains its value if the landowner is so lax or so indifferent as to lose physical control of his land.[18]

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[14] See *In Re Hadwin* (1954), 12 W.W.R. (NS) 414 (Sask. C.A.).

[15] See J.S. Williams, "Title by Limitation in a Registered Conveyancing System" (1968), 6 *Alta. L. Rev*. 67.

[16] Thomas Mapp, "Torrens' Elusive Title", Edmonton: *Alberta Law Review*, 1978 at 173 states: "Whether or not a jurisdiction should permit one in adverse possession of land to acquire a right to divest the registered ownership is an important socio-economic question. It is the author's opinion, however, that a decision should not be influenced by the fact that a jurisdiction has a Torrens system."

[17] It should be noted that the Alberta *Land Titles Act*, R.S.A. 1980, c. L-5, s. 74 permits title to be obtained by adverse possession. The principle of indefeasibility is not endangered because third party purchasers for value are not prejudiced by an unregistered possessory title.

[18] M.J. Goodman, "Adverse Possession of Land – Morality and Motive" (1970), 33 *Mod. L. Rev*. 281, at 282.

The duplicate certificate of title may not be a sacrosanct document, but it has altered, subtly, the way people think about land. The registered owner of the land does indeed possess a form of control over it. The person in whose name the land is registered controls the ability to alienate the land. The squatter, while in possession, will know that he lacks a major incident of ownership. Mere physical possession is of less relevance than it was in the past. The Torrens system has eroded the importance of possession. Registration is the key to ownership.

Accordingly, the Commission proposes that there should be no limitation period in respect of actions for recovery of land where an owner has been dispossessed in circumstances amounting to trespass.

D. Actions Relating to Mortgages

Section 12 of *The Limitation of Actions Act* provides that an action to recover any sum of money secured by a mortgage or otherwise charged upon or payable out of land must be brought within ten years. It will be recalled that section 33 creates a ten year period within which a mortgagor must bring an action to redeem the mortgage (where the mortgagee is in possession), while section 34 creates a ten year period within which a mortgagee must bring an action for foreclosure or sale.

The Law Reform Commission of British Columbia concluded that a six year limitation is more appropriate:

> Some arguments can be made in favour of longer limitation [periods]. Historically, limitations law has favoured the secured creditor with respect to the enforcement of his security, and that position should not be lightly disturbed. It may also be argued that the creditor who has taken the trouble to ensure that moneys owing to him are secured against something of value deserves greater protection that the creditor who has not safeguarded his position in that fashion. It is felt, however, that the desirability of a six-year limitation period outweighs those considerations .... Is there any logical reason why there should be a longer limitation period simply because security is given for the performance of the contract? This security, and the remedies attached to it, are merely ancillary to the personal debt, and logic suggests that in enforcing his security, the creditor should be governed by the same limitation period which applies to the personal covenant to repay the loan.[19]

The Commission is of the opinion that the same limitation period should apply to all charges, whether on land or on personal property, and that the period should be six years – the same as that for an action for recovery on an ordinary debt.

The most common scenario is that of the mortgagor in possession. This presents no problem: the mortgagor should continue to have the power to apply to the court to have the mortgage removed from the title after the expiration of the limitation period.

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[19] *B.C. Report*, at 53-54.

The question of the mortgagee in possession is more difficult. This is a less common situation: it will occur where the mortgagee has taken possession of the land but has not completed proceedings for foreclosure or sale.

The New South Wales Commission took the position that the mortgagee in possession should lose all rights in the land after the expiration of the period for foreclosure or sale.[20] It reasoned that once the mortgagee can no longer sue on the covenant, all rights should be lost in respect of the security. The British Columbia Law Reform Commission took a different view. It thought that the time period for foreclosure or sale should not run against the mortgagee in possession. The mortgagee will usually take possession as a means of enforcing its security and the limitations statute should "accord with the realities of the mortgagee's position".[21]

The Commission proposes that the more pragmatic position of the British Columbia Commission be adopted. The dispossessed mortgagor may have disappeared. If that is so, the effect will be that the title is placed in limbo. The mortgagee has possession of the land, but has no way of acquiring title. In such a case, it is better to permit the mortgagee in possession to obtain title to the land.

E. Actions Relating to Agreements for Sale

It is common in Saskatchewan to use agreements for sale as a method of financing the sale of land. In England and Ontario this use of an agreement for sale is unknown: a financing arrangement between the vendor and purchaser would be accomplished by a sale and mortgage back. This use of the agreement for sale may have developed because of the Torrens system's greater emphasis on title. The vendor is reluctant to surrender his status as a registered owner until the full purchase price is paid. The agreement for sale was also an attractive sales and financing vehicle because it permitted neighbours to agree on a fairly informal basis (not requiring deeds, mortgages, lawyers or banks). The actual transfer is deferred until the purchase price is paid.

The Commission has examined a number of alternatives for reform. At a minimum, the statute must ensure that title to land is not placed in limbo. The Commission has concluded that there are two feasible alternatives. First, the statute could provide that no limitation period apply to actions under agreements for sale. The vendor can at any time bring an action for cancellation of the agreement and regain possession of the land. The purchaser can, at any time before cancellation proceedings are concluded, tender the full purchase price and have the land transferred to him.[22]

This alternative is deficient in one respect. The informality of many agreements for sale is just the sort of situation that limitation periods are intended to cure. The purchaser will have been in possession of the land for many years. The vendor may have disappeared. Or the vendor

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[20] *N.S.W. Report*, at para. 214 and 215.

[21] *B.C. Report*, at 56.

[22] This alternative was canvassed in the Commission's *Tentative Proposals for Changes in Limitations Legislation – Part I: The Effect of Limitations on Title to Real Property* (1981).

or purchaser, or both, may have died. The terms of the agreement may be contained in a series of letters, some of which are missing. There may be incomplete records of how much was paid under the agreement. Limitation rules are designed to eliminate stale claims of this sort.

The second alternative is to permit the purchaser in possession to have title transferred to him after the expiration of the vendor's limitation period. The vendor under the agreement for sale would then be in the same position as the vendor (mortgagee) under a sale and mortgage back. In effect, the expiration of the limitation period would operate so as to estop the vendor from claiming that the purchase price had not been paid. The vendor would merely hold the title in trust for the purchaser.

This alternative is also less than ideal. In Saskatchewan the agreement for sale is regarded as something more than a mere security device in the form of a mortgage. Again, the reason is that many owners of land regard retention of title as their legal control over the land. Prompt action to oust the defaulting purchaser is thought to be unnecessary since the vendor possesses the key to any dealing with the land.

Should this second alternative be adopted, an amendment to *The Land Titles Act* would be required to permit the court to extinguish the title of the vendor and transfer it to the purchaser. This would in no way affect the principle of indefeasibility. A bona fide purchaser would still be entitled to rely upon the registry. The provision would only operate between the parties to the original transaction.

The first alternative likely is more in harmony with the expectations of those who enter into agreements for sale. The limitations statute should no longer provided for the extinguishment of title, but should provide that actions by vendors for cancellation of an agreement for sale and actions by purchasers to obtain title to land under an agreement for sale not be subject to a limitation period. The Commission is also of the view that the amount required to be paid by the purchaser in order to obtain title to the land should be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due. The purpose of this limitation is to prevent a vendor who has neglected his rights for many years from claiming a prohibitive accumulation of compound interest from the purchaser.

A state of limbo may still be possible under this proposal in cases where the vendor has disappeared. The purchaser will be unable to tender the purchase price and call for title. The Commission proposes that this problem be remedied by an amendment to *The Land Titles Act* permitting the purchaser to pay into court the amount owing under the agreement for sale, and then obtaining title to the land.[23]

[23] See the Commission's *Tentative Proposals for Changes in Limitations Legislation – Part I: The Effect of Limitations on Title to Real Property* (1981), at 17-18 for draft legislation that would implement this proposal.

F. Actions to Recover Rent

The Limitation of Actions Act draws a distinction between actions to recover a rent charge and actions to recover arrears of rent. In the former instance, a ten year limitation period is imposed,[24] while in the latter a six year limitation period is created.[25]

The rent charge is not common today. Ordinary rent (rent-service) originates out of a landlord-tenant relationship. A rent charge lacks this characteristic. It is a real property version of an annuity: a sum of money is made payable out of land, which is secured by a right of distress. Accordingly, it operates as a charge against the land.

The Commission has proposed that a six year limitation period operate in respect of actions for debt and equally in respect of actions against land upon which the debt has been charged. No distinction would therefore need to be made between rent-service and rent-charge. Both would be subject to a six year period.

G. Actions Relating to Personal Property

In Saskatchewan a ten year period operates in respect of mortgages of personal property. A mortgagee has ten years within which to commence proceedings for foreclosure or sale where the mortgagor is in possession. The mortgagor has ten years with which to redeem the mortgage where the mortgagee is in possession. In 1933, provisions were added in respect of conditional sales agreements.[26] The seller has ten years with which to commence proceedings for sale or recovery of the goods.

In both the case of a chattel mortgage and of a conditional sales agreement, an action for the debt is barred after six years, yet the mortgagee or seller may have recourse against the goods until the ten year period has expired. The Commission is of the view that the action in respect of personal property should be subject to a six year period. The interest in the property is taken merely as collateral security. The property interest should be extinguished when the action for the debt is barred.

The introduction of the six year period creates a uniform period in respect of most commercial matters. Whether it is an action to recover a debt, or an action to proceed against real or personal property given as security, a six year period will generally apply. This uniformity will enhance commercial certainty. Modern financing arrangements may involve a number of related transactions. The present law may fracture such arrangements where some limitation periods have expired while others have not.

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[24] Section 12.

[25] Section 14.

[26] S.S. 1933, c. 17; now sections 39-41.

The introduction of *The Personal Property Security Act*[27] in 1981 has rendered obsolete the chattel mortgage/conditional sales agreement distinction. The statute should instead adopt the terminology of "debtor", "secured party" and "security agreement".

It will be recalled that section 46 of the present Act provides that the right and title to the land is extinguished once the limitation period has expired. This provision does not apply, however, to personal property. It has been suggested that this means that merely the remedy is extinguished: the right (in this case, the title to the goods) is not. There is some question whether this accurately reflects the law. J.E. Cote points out that English law does not recognize "title" in an absolute sense:

> ... "ownership" of a chattel is the sum of the rights possessed with respect to it, that these rights consist of, or are protected by, the ability successfully to bring a suit in tort in defence of the chattel, and when those rights in tort are gone "the right has in point of law ceased to exist".[28]

If the right to the property is not extinguished, then what is the result? Can the "true owner" attempt to regain possession by exercising a self-help remedy? And if the person in possession does not own the goods, then he will not be able to transfer good title. Again a "state of limbo" will result. The "true owner" will not be able to obtain possession of the goods, but the possessor will not be able to transfer good title to another. This result is unacceptable. Section 46 should be expanded to provide that upon the expiry of the limitation period, the right or title to personal property is extinguished.[29]

One further matter must be addressed. There are certain situations in which successive dealings with personal property can give the plaintiff a number of possible actions. For instance, if A's chattel is converted first by B and then by C, A will be able to sue C for the subsequent conversion even if his remedy against B is statute-barred. This is a serious deficiency. There is little protection afforded by the common law to the bona fide purchaser. He should at very least be entitled to rely upon the passage of time to ensure that his ownership will not be challenged. The Commission therefore proposes that the six year limitation period run from the date of the original conversion notwithstanding that further conversions may take place.

H. Non-Security Interests in Land

The intricate English system, with its various estates and relative interests, does not translate easily into a Torrens system, with its notion of absolute title. There are a number of interests which can be registered against the land, but which are less than absolute title to the land. Actions by tenants for possession of land, actions by holders of a life interest, actions in respect of incorporeal hereditaments, actions to enforce restrictive covenants, and actions for possession of land upon the exercise of the possibility of reverter or right of re-entry for a condition broken are all actions relating to interests in land. The interest may be protected by

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[27] R.S.S. 1978, c. P-6.1.

[28] "Prescription of Title to Chattels" (1969), 7 *Alta. L. Rev.* 93, at 99.

[29] The question of extinguishment of right will be discussed at greater length at pages 105-111 of this report.

way of caveat registered against title. Section 71 of *The Land Titles Act* does not apply, since the holder of such an interest is not a "registered owner". Thus, the limitations statute will govern.

1. Actions by Tenants for Possession

The Commission has recommended that there should be no limitation period in respect of an action by an owner for possession of land in circumstances amounting to trespass. This should also apply to actions for possession of land against strangers holding adversely against the tenant. It should not, however, apply to actions by tenants for possession against the landlord. In such a case a six year period should apply.

2. Life Interests

It is still possible to create a life interest under the Torrens system. The title is not transferred to the life tenant. The title may be transferred into the name of the remainderman, in which case the life tenant should protect his interest by filing a caveat. Or if the life interest is created by will, the executors may retain title to the land until the death of the life tenant.

The Commission shares the view of the British Columbia Law Reform Commission that successive interests in land should, so far as possible, be treated in a similar fashion.[30] The registry system is such that only one person can be registered as "owner". That person is, by virtue of *The Land Titles Act*, protected from claims of title by adverse possession. The other "owners" – i.e., the life tenant and the remainderman – should be in a similar position. The limitations statute should provide that the right of a life tenant or remainderman to bring an action for possession of land is not subject to a limitation period.

3. Possibilities of Reverter and Rights of Entry for Conditions Broken

Successive interests in land at common law were created when determinable estates and conditional estates were granted. In the former, the determinable estate ceased immediately when the events described in the words of limitation occurred and reverted back to the grantor. In the latter, the estate is subject to a condition subsequent so that if the condition is breached, the estate could be determined if a right to enter was [exercised].

Such interests are not common today, but it is still possible to create such interests and protect them by caveat. The British Columbia Law Reform Commission stated:

> Having regard to the mechanics of the land registry system, we feel there is some advantage in having these interests subject to a limitation period. The effect of a limitation period would be to keep the land marketable and thus support the purpose of the land registry system. It would mean that those dealing with the land would only have to examine events during some specified period in order to determine whether the condition has been broken.[31]

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[30] *B.C. Report*, at 60-61.

[31] *B.C. Report*, at 61-62.

The Commission agrees. A six year limitation period should be imposed on such actions.

A person who has taken steps to assert his ownership (i.e., taken possession of the land) but has not, however, taken steps to have the title transferred to him should not be affected by the limitation period.

4. Easements, Restrictive Covenants and Profits-a-Prendre

Easements, restrictive covenants, and profits-a-prendre are interests in land that do not amount to interests in possession. The Commission is of the opinion that such actions should not be limited by time. Unlike the determinable or conditional estate, the easement, restrictive covenant or profit-a-prendre does not require a search to see if a contingency has occurred. It is entirely reasonable to allow the interest-holder to rely upon his registration in the land titles system.

I. Summary of Proposals

1. Actions for recovery of land where an owner has been dispossessed in circumstances amounting to trespass should not be subject to a limitation period (i.e., the acquisition of title to land by adverse possession should not be possible).

2. Actions by secured parties to realize upon a mortgage or other security interest should be subject to a six year limitation period.

3. No limitation period should apply in respect of an action to realize on collateral where the secured party is in possession of the collateral.

4. Actions by debtors not in possession of property subject to a security interest to redeem the property should be subject to a six year limitation period.

5. Actions by a purchaser under an agreement for sale of land to obtain title to the land should not be subject to a limitation period.

6. Actions for cancellation of an agreement for sale should not be subject to a limitation period.

7. The amount required to be paid by the purchaser in order to obtain title under an agreement for sale of land should be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due.

8. *The Land Titles Act* should be amended so as to allow a purchaser to pay into court the balance of the purchase price where the vendor cannot be located.

9. The right and title to personal property should be extinguished upon the expiry of the limitation period.

10. The limitation period for actions for conversion should begin to run from the date of the original conversion notwithstanding that further conversions may subsequently occur.

11. Actions by a tenant against his landlord for possession of land should be subject to a six year period.

12. An action by a life tenant or remainderman for possession of land should not be subject to a limitation period.

13. Actions based on a right to enter for a condition broken or a possibility of reverter should be subject to a six year limitation period.

14. No limitation period should apply to actions for the enforcement of easements, restrictive covenants, and profits-a-prendre.

APPENDIX D

Excerpt from:

PROPOSALS FOR A NEW LIMITATION OF ACTIONS ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice
April, 1989

IV. REAL PROPERTY ACTIONS

1. INTRODUCTION

Nineteenth century English limitation law was preoccupied with real property. That preoccupation was inherited by the Saskatchewan *Limitation of Actions Act.* No fewer than fifteen sections of the Act are devoted to real property actions. Whether the complexity of the English system was ever really necessary or not, much of it is clearly anachronistic in Saskatchewan today. The striking feature of the transplant of English limitations law to Saskatchewan is the disregard of the predominate position of the Torrens system of land registration in the province.

Some provisions of *The Limitations of Actions Act* have simply lost their effect. But in some cases the interplay between limitations law and land titles law has led to a "state of limbo" in which one party has possession of land but cannot obtain title, while the other has title but cannot obtain possession.

2. TITLE BY ADVERSE POSSESSION

Section 18 of *The Limitation of Actions Act* establishes a basic ten year limitation period applicable to "proceedings to recover any land". However, section 17 of the Act provides that the Act is subject to *The Land Titles Act*. Section 71 of *The Land Titles Act* provides that:

> After land has been brought under this Act no right, title or interest adverse to or in [derogation] of the title or of the rights to possession of the registered owner shall be acquired, or held to have been acquired since December 19, 1913, by the possession of another, and the right of a registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been impaired or effected by any such possession since the said date.[1]

Thus a registered interest in land is not affected by a limitation period.

The ten year limitation period may still apply, however, to unregistered interests in land. There is land in the province that has not been brought within the land titles system. In addition, life interests and other future estates in land cannot be registered under the Act, but are often created by will or otherwise. If the life interest is protected by a caveat, it will presumably be protected from the limitation period. Otherwise the ten year limitation applies.[2]

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[1] Originally enacted in *An Act to Amend the Land Titles Act*, s.s. 1913, c. 30, s. 6. Section 71(1) preserves the rights of adverse possessors who became entitled to the land prior to its registration in the land titles system.

[2] Sections 23-27 of *The Limitation of Actions Act* apply to future interests, establishing a complex set of rules for determining when the ten year limitation period runs. In addition, a five year limitation period will apply in the case where a person dispossessed of the proceeding estate has been statute barred, and the future interest holder has become entitled to possession.

The Commission shares the view of the British Columbia Law Reform Commission that all interests in land should, so far as possible, be treated in a similar fashion.[3] Furthermore, the Commission is of the opinion that no limitation period should apply to an action for recovery of land against an adverse possessor. The concept of title by adverse possession may not be inconsistent with the philosophy of the Torrens system,[4] but in Saskatchewan since 1913 no limitation has applied in an action by the registered owner of land against the adverse possessor. As one writer has suggested

> Whether or not a jurisdiction should permit one in adverse possession of land to acquire a right to divest the registered ownership is an important socio-economic question.[5]

In Saskatchewan, the duplicate certificate of title has come to be regarded as what one author has called a "sacrosinct document".[6] The Torrens system has eroded the importance of possession as a basis for asserting title to land. Registration is now the key to ownership. Furthermore, since most developed land in the province is within the land titles system, the Commission is of the opinion that it would be appropriate to abandon the notion that possession can create an interest in land. No limitation period should apply to actions for possession of land, whether the land is within the land titles system or not.[7] It should be noted that under this approach, no limitation period would apply to future interests in land.

3. MORTGAGES AND AGREEMENTS FOR SALE

The most difficult problems in applying limitation periods to interests in real property arise in regard to mortgages and agreements for sale.

Section 12 of *The Limitation of Actions Act* provides that an action to recover any sum of moneys secured by mortgage or otherwise charged upon or payable out of land must be brought within ten years. Section 33 applies a ten year limitation period to actions for redemption of a mortgage (where the mortgagee is in possession), and to actions for foreclosure or sale.

The status of actions relating to agreements for sale is unclear. In *Re Scheidt*,[8] it was held that the ten year limitation period applicable to actions for possession of land was intended to govern only when title was claimed by adverse possession, and not where the action relates to an agreement for sale. In *Turner v Otterman*[9] on the other hand, it was held that the ten year

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[3] B.C. Report, at 60-61.

[4] The *Alberta Land Titles Act*, R.S.A. 1980, c. L-5, s. 74, for example, permits title to be obtained by adverse possession. Some writers have, however, suggested that adverse possession is inconsistent with the Torrens system - J.S. Williams, "Title by Limitation in a Registered Conveyancing System" (1968), 6 Alta. L. Rev. 67.

[5] "Torrens' Elusive Title", (1978) Alta. L. Rev., at 173.

[6] N.J. Goodman, "Adverse Possession of Land - Morality and Motive" (1970), 33 Mod. L. Rev. 281, at 282.

[7] In the "Tentative Proposals for Changes in Limitations Legislation, Part 2: Limitation of Actions Act", it was recommended that a six year limitation apply to possibilities of reverter and rights of entry.

[8] (1966), 31 Sask. Bar. Rev. 54, at 59.

[9] (1965), 53 W.W.R. 595.

limitation period does apply to agreements for sale. Nevertheless, the court also found that "the doctrine of title by prescription is inconsistent with indefeasibility of title [in *The Land Titles Act*]". Thus, *The Limitation of Actions Act* cannot operate so as to extinguish the title of the vendor. It follows that while the vendor will not [lose] title, he will be unable to regain possession. The purchaser, on the other hand, has possession but cannot gain title by virtue of possession alone.[10]

The problem of "title and limbo" does not ordinarily arise in regard to mortgages. A mortgager under the Torrens system retains title of the land: the mortgagee merely obtains a charge on the property. Where the mortgager is in possession and the ten year limitation period governing foreclosure actions has expired, the mortgagor can simply apply to have the mortgage removed from the title.[11] However, when the mortgagee is in possession and the period for redemption has expired, the same procedure does not apply. The mortgagee does not have title to the land. It is likely that the court, relying on indefeasibility of title under the land titles system, would hold that the mortgagor is still entitled to recover the land. Thus, the ten year period for redemption actions is probably a dead letter.

A "state of limbo" may arise in one other unusual circumstance in regard to either a mortgage or agreement for sale. If a dispossessed mortgagor has disappeared, the mortgagee will presumably be unable to obtain clear title. Similarly, if the vendor under an agreement for sale can no longer be located, the purchaser can not obtain title because there is no one to whom price can be tendered.

This state of the law is intolerable. Limitations law and land titles law should be harmonized. The law must be changed so that title to land can never be "in a state of limbo".

In the Commission's opinion, a limitation period should apply to both actions by a mortgagee against a mortgagor in possession, and by a mortgagor against a mortgagee in possession. Further, the Commission is of the opinion that the same limitation period should apply to all charges, whether on land or on personal property, and that that period should be six years -- the same as that for an action for recovery of an ordinary debt. Adoption of this policy in respect to mortgages will not, however, eliminate all the problems created by the existing law. When the limitation period has run against a mortgagee, the mortgagor will continue to [have] the right to apply to court to have the mortgage removed from title, but a limitation period in itself will not give title to a mortgagee in possession after time has run against a mortgagor. That problem can be solved by creating a right in the mortgagee in possession to obtain title to the land by court order.

The policy recommended in regard to mortgages is not appropriate in regard to agreements for sale. The Commission has concluded that no limitation period should apply to

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[10] The purchaser can, apparently, break this circularity by tendering the purchasing price and calling for title: see *Jacob Estate v. Nieth Estate* (1984), 31 Sask. R. 70 (C.A.), holding that the limitation does not run against the purchaser until full purchase price is tendered.

[11] See *Re Hadwin* (1954) 12 W.W.R. (N.S.) 414 (C.A.)

actions under agreements for sale. The vendor should be able at any time to bring an action for cancellation of the agreement and regain possession of the land. The purchaser should be able, at any time before cancellation proceedings are concluded, to tender the full purchase price and have the land transferred to him. For this purpose, the purchase price should be the [principal] owing together with interest accruing for the six year period following the date the last payment under the agreement became due; otherwise, a vendor who neglected his rights for many years could claim a prohibitive accumulation of compound interest. This approach will largely avoid the problem of "title in limbo". However, to deal with the anomalous case where the vendor can no longer be located, provision should be made for payment of the purchase price into court by the purchaser in order to obtain title.

This solution to the problem of the agreement for sale is not entirely satisfactory. At first blush, it might appear attractive to apply the same limitation period to an agreement for sale as to a sale and mortgage back. However, in the Commission's opinion such a policy would not be in harmony with the expectations of those who enter into agreements for sale. Because the duplicate certificate of title is regarded as a "[Sacrosanct] document", it has altered the way people think about land. The agreement for sale is attractive to many vendors because the presumably indefeasible title is retained in the vendor's hands until the land is paid for.

IX. RECOMMENDATIONS

1. THE PROPOSED ACT [marginal notes deleted]

SHORT TITLE AND INTERPRETATION
1. This Act may be cited as *The Limitations Act.*

2. In this Act:

(a) "action" includes any proceeding in a court and any exercise of a self-help remedy;
(b) "judgment" means a judgment or order of a court, or an award pursuant to an arbitration to which *The Arbitration Act* applies;
(c) "security interest" means an interest in property that secures payment or performance of an obligation but does not include the interest of a vendor who retains title to land as security for the purchase price;
(d) "trust" includes express, implied, resulting and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a security interest in property.

RULES OF EQUITY
3. (1) Nothing in this Act:
(a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) interferes with a rule of equity that refuses relief, on the grounds of laches, to a person claiming equitable relief whose right to bring an action is not barred by this Act.

(2) Where a limitation period is contained in any other statute, the provisions of this Act apply to it as though it were a limitation period contained in this Act.

LIMITATION PERIODS

4. The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose:

(a) an action in contract other than an action specifically mentioned in section 5, 6 or 7;
(b) an action in tort other than an action specifically mentioned in section 5, 6 or 7;
(c) an action under *The Fatal Accidents Act*;
(d) an action in tort under *The Privacy Act*;
(e) a civil action by the Crown or any other person to recover a fine or other penalty imposed under any Act.

5. The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose:

(a) an action against the personal representative for a share of the estate;
(b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was privy;
(c) an action against a trustee for the conversion of trust property to the trustee's own use;
(d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;
(e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor.

6. (1) The following actions are not governed by any limitation period and may be brought at any time:

(a) an action by a debtor in possession of property subject to a security interest to redeem the property;
(b) an action by a secured party in possession of property subject to a security interest to realize on the property;
(c) an action for possession of land by a life tenant or remainder man;
(d) an action relating to the enforcement of an injunction or a restraining order;
(e) an action to enforce an easement, restrictive covenant, or profit-a-prendre;
(f) an action for a declaration as to personal status;
(g) an action for or declaration as to the title to property by any person in possession of that property;
(h) an action for possession of land where an owner has been dispossessed under circumstances amounting to trespass;
(i) an action by a purchaser to obtain title to land under an agreement for sale;
(j) an action by a vendor for cancellation under an agreement for sale of land; and

(k) an action on a judgment for the possession of land.

(2) In an action by a purchaser to obtain title to land under an agreement for sale, the amount required to be paid by the purchaser to the vendor shall not include interest accruing after the expiration of six years after the last payment under the agreement for sale became due.

7. (1) Any other action not specifically provided subject to for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), the following actions shall not be brought after the expiration of six years after the date on which the right to do so arose:

(a) an action to recover a debt whether secured or not;
(b) an action for restitution or unjust enrichment, other than an action based on a constructive trust;
(c) an action by a secured party not in possession of property subject to a security interest to realize on the property;
(d) an action by a debtor not in possession of property subject to a security interest to redeem the property;
(e) an action for damages for conversion or detention of goods or chattels;
(f) an action to recover goods or chattels wrongfully taken or detained;
(g) an action by a tenant against his landlord for possession of land; and
(h) an action on a foreign judgment.

(3) Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him:

(a) a further cause of action for the conversion or detention of the goods;
(b) a new cause of action for damages to the goods; or
(c) a new cause of action to recover the proceeds of a sale of the goods;

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of six years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

LIMITATION OF ACTIONS ACT

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. There have been efforts over the years to modernize and to impose some uniformity on these various 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, and Saskatchewan, and introduced into the Legislature of 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. It is time for Manitoba to consider adopting limitations legislation based on similar principles.

The 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. The Act badly requires modernization, and in this report the Commission has identified what it sees as the primary areas 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 occurred. 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. Exceptions would include, by way of example, claims arising out of sexual assault or domestic abuse, claims based on constitutionally protected Aboriginal or treaty rights, actions seeking purely declaratory relief, and proceedings to recover fines or taxes owing to the Crown.

The Commission seeks comments on all aspects of this consultation report, and, in particular, in relation to the abolition of special limitations provisions applicable to real property claims.

The Commission has appended a draft Act, which we consider could form the basis of a new limitations regime in Manitoba. It is based closely on the Uniform Act proposed by the Uniform Law Conference of Canada, which in turn is based on the Alberta and Ontario legislation, and incorporates the best of the various amendments adopted along the way. 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.