



**Ministry of Attorney General
Justice Services Branch
Civil Policy and Legislation Office**

White Paper on *Limitation Act* Reform: Finding the Balance

September 2010

The “White Paper on *Limitation Act* Reform” was produced in order to solicit input and discussion into reforming the existing *Limitation Act*. The White Paper is not intended to constitute legal advice or to be a statement of the law in respect of the *Limitation Act* or the limitations laws of other provinces and should not be relied upon for those purposes. Individuals with questions regarding the legal effect of provisions of the *Limitation Act* should seek legal advice from a lawyer.

Table of Contents

Executive Summary..... 1

Structure of the White Paper..... 4

PART ONE..... 5

 1. Background 5

 What is the Limitation Act?..... 5

 Scope of the Limitation Act..... 5

 Purpose of the Limitation Act 5

 2. The Limitation Act Review 7

 Consultations 7

 Why Reform the Limitation Act? 8

 Objectives of Reform 9

 3. Invitation to Comment..... 10

PART TWO..... 11

 I. Introduction to the Limitation Act 11

 Application of the Act 12

 II. The Basic Limitation Period..... 14

 1. Duration of the Basic Limitation Period 14

 Two-year Basic Limitation Period 14

 Enforcement of Civil Judgments 15

 Treatment of Debts and Obligations Owed to Government 17

 Approach of Other Jurisdictions Regarding Debts Owed to Government..... 18

 Proposed Reforms for Debts and Obligations Owed to Government 20

 2. Basic Limitation Period and Discovery 22

 Special Discovery Rules 26

 Fraud or Trust Claims 26

 Future Interest in Trust Property 28

 Enforcement of Securities..... 28

 Successors, Predecessors, Principals and Agents 29

 III. The Ultimate Limitation Period..... 30

1. Ultimate Limitation Period and Commencement	30
Accrual Model of Commencement	30
Act or Omission Model of Commencement	32
2. Duration of the Ultimate Limitation Period	34
Single Ultimate Limitation Period	34
3. Special Ultimate Limitation Periods	39
Medical Practitioners, Hospitals, and Hospital Employees.....	39
Conversion Claims against a Good Faith Purchaser for Value	47
Continuous Acts or Omissions and Series of Acts or Omissions	49
4. Summary of Proposals Regarding the Ultimate Limitation Period	51
IV. Special Postponement Rules	53
1. Legal Disability: Postponement During Minority or While an Adult Person is under a Disability ..	53
Notice to Proceed	56
(a) Children and Adult Persons under a Legal Disability	56
(b) Adult Persons Who Come under a Disability.....	57
2. Postponement During Wilful Concealment or Wilfully Misleading as to Appropriateness of Court Proceedings.....	60
V. Agreements.....	64
VI. Demand Obligations	69
VII. Secondary Claims and Claims for Contribution	71
1. Secondary Claims	71
2. Contribution Claims	72
VIII. Acknowledgments	75
IX. Exemptions.....	78
1. Current and Proposed Exemptions	78
2. Child Support and Spousal Support	81
3. Undiscovered Environmental Claims	83
4. Real Property Limitations.....	86
Legal Rights in Real Property in British Columbia	86
Other Provinces’ Approach to Real Property Limitation Periods	86
5. Treatment of Aboriginal Claims under the Limitation Act.....	91
X. Conflict of Laws	94

Application of Exemption for Sexual Assault to Conflict of Laws Provision	97
XI. Rules of Equity	100
XII. Extinguishment / Non-Judicial Remedies	101
XIII. Enforcement of Judgments Where Enforcement Process Outstanding	104
XIV. Schedule.....	105
XV. Transition Rules	108
XVI. Provisions that Will Not be Carried Forward to the New Act.....	113
Appendix A: Consultation Draft Limitation Act.....	121
Appendix B: Summary of Questions	135

Executive Summary

The current *Limitation Act* became law in 1975. At the time, British Columbia was the first jurisdiction in Canada to enact modern limitations legislation. The Province's social, economic and legal context against which the limitations laws operate has changed since the mid-1970s.

The Province now has the benefit of recent thinking on limitations law reforms that have been undertaken across Canada. Since 1999, several provinces have comprehensively reformed, or "modernized" their limitations legislation. These provinces include Alberta, Saskatchewan, Ontario, and most recently, New Brunswick. The Uniform Law Conference of Canada, which is the nation-wide organization that promotes reform and greater uniformity of laws across Canadian jurisdictions, has also examined the issue of limitations law several times over the last century. Most recently, in 2005 the Uniform Law Conference of Canada adopted a model limitations law, the *Uniform Limitations Act*. In addition, both the former British Columbia Law Reform Commission and its successor organization, the British Columbia Law Institute, have produced reports on the subject of the ultimate limitation period.

Beginning in 2007, the Province launched the first comprehensive review of the *Limitation Act* since its introduction. The law reform project began with a Green Paper, entitled "Reforming British Columbia's *Limitation Act*." The Green Paper was used in public consultations in 2007, in which 290 external stakeholders provided feedback. The project responded to calls for change made by a broad range of stakeholders, including the building design and construction sectors (architects, engineers, builders, developers, etc.), the Union of British Columbia Municipalities, local governments, the British Columbia Dental Association and the College of Dental Surgeons of British Columbia. Each of these stakeholders continues to lobby strongly for change.

Introduction

The *Limitation Act* sets out the time periods people have to start a proceeding to sue one another in the civil justice system. Limitation periods are one of the ways the law allocates risk among different members of society. The longer the limitation period or window of potential liability, the greater the economic risk the person bears. However, limitation periods that are too short unfairly limit a person's ability to access the civil justice system to seek recourse for a legal problem.

The *Limitation Act* contains two types of time periods:

1. basic limitation periods, which are the time periods that normally apply, absent special circumstances that would justify stopping the clock; and
2. ultimate limitation periods, which describe the maximum outside time limit past which a basic limitation period cannot extend.

These time periods govern how long a person has before he or she must start an action in court.

The *Limitation Act* contains three separate basic limitation periods of two years, six years and 10 years' duration in which to start a civil action. Identifying which limitation period applies and when it starts to run is very complicated under the current law. Provisions have even been criticized by the courts as being "obscure" and "a longstanding source of frustration in British Columbia."

The ultimate limitation period outlines the maximum time period for postponement of a basic limitation period, bringing certainty as to when exposure to potential liability ends. The current law contains two ultimate limitation periods of six years and 30 years in duration. The ultimate limitation period starts to run once all of the individual elements of a cause of action are present. This means time starts to run once the cause of action has "accrued." Having two different ultimate limitation periods has resulted in unfairness to some groups, while affording special treatment to others. Under the existing law, the accrual model is criticized because it can be very difficult to determine when time starts to run in the ultimate limitation period. The accrual model of commencement, combined with the 30-year ultimate limitation period, can contribute to very old legal actions.

White Paper on *Limitation Act* Reform

This "White Paper on *Limitation Act* Reform" continues the work started in 2007 by responding to the policy topics raised in the earlier public consultations and providing a forum for further discussion on the proposed reforms. Attached to the White Paper is a consultation draft of a proposed *Limitation Act*.

The Ministry of Attorney General's main objectives for reforming the *Limitation Act* are to simplify the law, to bring greater fairness to the law, and to bring the law into line with the developments in limitations law reform across Canada. Identifying when a limitation period starts to run and when it ends, as well as simplifying the number of different limitation periods currently in existence, will make the law clearer and easier to use for both lawyers and the general public. Eliminating special treatment of some groups will bring greater balance between a plaintiff's need to be able to access the civil justice system and a defendant's need for certainty and predictability; namely, a definite end point to potential legal liability. Making B.C.'s limitations law similar to other modernized limitations laws in Canada and to the model limitations law developed by the Uniform Law Conference of Canada will provide more certainty for businesses by making the law and liability more predictable.

The consultation draft was prepared after a thorough review of the consultation feedback from the Green Paper. Because modernizing the *Limitation Act* involves major changes, the Ministry

of Attorney General anticipates repealing the existing law and replacing it with an entirely new statute, rather than making piecemeal amendments.

This White Paper recommends the following major changes to the *Limitation Act*:

- moving from a variety of basic limitation periods, based on the type of legal action, to a single two-year basic limitation period for all civil claims;
- moving from a general 30-year ultimate limitation period to either a single 10- or 15-year ultimate limitation period. Reforms include changing the commencement model of the ultimate limitation period from an “accrual” model to a model that starts the clock running in the ultimate limitation period based on an “act or omission”; and
- eliminating the special six-year ultimate limitation period for negligence claims against doctors, hospitals and hospital employees. All lawsuits will be governed by either a single 10- or 15-year ultimate limitation period.

These reforms will make the law easier to understand. As well as simplifying the law, these changes attempt to balance the rights of both plaintiffs and defendants, while bringing B.C.’s law in line with reforms in Alberta, Saskatchewan, Ontario and New Brunswick, as well as the work of the Uniform Law Conference of Canada.

Reforms will also ensure that important aspects of the current law remain unchanged. The two-year limitation period for starting a lawsuit for a personal injury action remains untouched. The exemption from limitation periods for actions involving minors based on misconduct of a sexual nature and those relating to sexual assault will not be changed.

Reforms will not be retroactive. A transition clause will ensure that with respect to pre-existing situations, people will be able to rely on the laws existing at the time and legal advice that was given to them that pre-dates the new law. The transition clause will also provide a clear and simple model for limiting liability in future situations.

Conclusion

The White Paper is structured to provide a summary of the current limitations law, followed by recommendations for reform. Each section closes with the relevant section of the proposed new law, and in some cases focuses questions on specific provisions. These questions are more detailed than the original questions posed in the Green Paper. They are meant to elicit feedback from interested persons on the appropriateness of the recommended provisions, and highlight additional issues that have emerged since the development of the Green Paper.

Structure of the White Paper

Part One of this White Paper provides an introduction to the law of limitations, an overview of the purpose and rationale for reform to the *Limitation Act*, and a summary of the consultations to date. It also provides details of how to comment on the questions posed in this paper.

Part Two provides a summary of the current limitations law, followed by the recommendations for reform that have emerged from consultations on the 2007 Green Paper. Each section closes with the relevant section of the proposed new law, along with comment notes that explain the specific reforms. The draft legislative provisions in the White Paper are intended to illustrate how B.C.'s limitations law could be reformed in consideration of the feedback from the Green Paper, the modernized limitations laws in Alberta, Saskatchewan, Ontario and New Brunswick, and the model uniform limitations statute developed by the Uniform Law Conference of Canada.

The consultation draft *Limitation Act* is attached as Appendix A.

Specific questions are posed throughout Part Two in order to focus the discussion of the proposed reforms. The feedback the Ministry of Attorney General receives on this White Paper will doubtless continue to reflect the many differing perspectives that were articulated during the consultation period. It is important to note that the Ministry of Attorney General is not yet delivering a final product; the statutory language in the paper is still preliminary. While comments identifying technical and editorial changes are welcomed, readers are encouraged to bear in mind that the legislative provisions included in the paper are a work in progress and do not reflect a final draft. A complete list of the questions found throughout the paper is attached as Appendix B.

PART ONE

1. Background

What is the Limitation Act?

The *Limitation Act* (the “Act”) sets out the time periods or deadlines people have to sue one another in civil court.¹ The Act currently provides for limitation periods of two, six and 10 years, depending on the type of legal problem. It also provides ultimate limitation periods which mark the maximum duration of time past which a limitation period cannot extend. Once the governing limitation period expires, a person can no longer go to court to resolve his or her dispute.

Scope of the Limitation Act

The limitation periods in the Act apply to a broad range of civil lawsuits, including those for negligence, breach of contract, recovery of a debt and wrongful dismissal. It is important to note that the Act is a general or default limitations system. This means that the Act will govern how long a person has to bring a civil lawsuit if no other statute contains a specific time period. Where another more specific law sets a limitation period, that specific limitation period applies rather than the defaults contained in the Act. For example, the Act does not apply to lawsuits for the collection of taxes because tax-related limitation periods are specifically set out in separate statutes.

Identifying which limitation period applies and when it starts to run is very difficult under the current law. Members of the public, business owners and even lawyers find this area of the law to be very complicated.

Purpose of the Limitation Act

By setting the time limits for many of the cases entering the civil justice system, the current Act sets the basic ground rules for those who wish to resolve their disputes in court. Limitation periods do more than simply suggest a timeline for launching civil proceedings, however. Limitation periods are one of the ways the law allocates risk among different members of society. The longer the limitation period or window of potential liability, the greater the economic risk the person bears. Limitation periods have an impact on the behaviour of parties, the structure of loans and other financial arrangements, record keeping practices, the cost and availability of insurance, professional training requirements, and possibly even the viability of businesses.

¹ *Limitation Act*, R.S.B.C. 1996, c. 266, BC Laws, online: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96266_01#section3 (last accessed: May 10, 2010) [BC Act].

The current Act attempts to balance the rights of plaintiffs (those starting civil actions) and defendants (those defending them) by striking a balance between a plaintiff's need to be able to access the civil justice system and a defendant's need for certainty and predictability, namely a definite end point to potential legal liability.

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...

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.²

There are also economic reasons behind limitations legislation. It is said that at some point after the occurrence of conduct that might be actionable, potential defendants should be able to feel confident about arranging their affairs in the knowledge that a lawsuit can no longer be brought against them.³ This can benefit the economy, too. People may not choose to enter into business transactions if they face potential liability of uncertain magnitude.⁴ This is true not only for potential defendants but also third parties who want to know their dealings are not going to be disturbed by an old claim. As well, lengthy limitation periods increase recordkeeping obligations and insurance costs and can impact the cost of doing business.⁵

In addition, there are rationales for limitations legislation based on the effective administration of justice. There are two judgmental reasons for limitation periods, 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 longer the delay before a claim is brought the more likely it is that the quality of the evidence will have deteriorated, which makes judges' decision-making role more difficult.⁶

² *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 [M.(K.) quoted in *Peixeiro*].

³ Alberta Law Reform Institute, *Limitations* (Report #55, 1989) at 17.

⁴ *Ibid.* at 17.

⁵ *Ibid.* at 18.

⁶ *Ibid.* at 17.

The second judgmental reason is rather more philosophical in nature: while judges endeavour to decide cases in light of the knowledge that would be available at the time of the alleged act, it is often very difficult for a judge of a current generation to weigh the reasonableness of conduct which occurred many years ago according to standards of an earlier generation.⁷ Limitations law ensures that conduct giving rise to a civil lawsuit will be judged according to more or less current standards.

This rationale has been recognized by the Supreme Court of Canada and B.C.'s Supreme Court as a valid concern in the context of limitations.⁸

Finally, public confidence turns on an efficient civil justice system. The quick resolution of legal disputes benefits the economy and society generally. Limitation periods help to maintain peace by ensuring that disputes do not drag on indefinitely and help to improve the administration of justice. On the other hand, limitation periods that are too short can negatively affect public confidence in the justice system if those people with potential lawsuits are forced to sue before they have had an opportunity to explore the possibility of settlement, or if cases become time-barred before a people are aware that they have a legal action.

In sum, the current Act serves a number of competing purposes. Reforms to the Act must not only take into account the varied rationales for limitations legislation, but also, in setting limitation periods, must strive to find the correct balance between the competing sets of rights found within each rationale: between a plaintiff's need to be able to access the civil justice system and a defendant's need for certainty and finality.

2. The Limitation Act Review

Consultations

Since 2007, the Civil Policy and Legislation Office of the Ministry of Attorney General (the "ministry") has been reviewing the Act. The law reform project began with a Green Paper, entitled, "Reforming British Columbia's *Limitation Act*." The Green Paper was posted on the ministry's website and was used in public consultations held between February 8 and April 23, 2007. It posed 17 questions on issues related to reforming the Act. Several questions attracted more comments than others, while some questions were not answered. The paper did not address how changes to the Act will affect aboriginal litigation. As well, the paper did not discuss limitation periods set by other statutes and limitation periods governing the civil enforcement of

⁷ *Ibid.* at 19.

⁸ See M.(K.) quoted in Peixeiro, Above Note 2 at 562. See e.g., *Schmitke v. Schmitke*, [1993] B.C.J. No. 2401 (S.C.) at para. 50, online: QL (BCJ) and *BC Rail Partnership v. Canadian National Railway Co.*, [2008] B.C.J. No. 1293 at para. 44, online QL (BCJ), both cases quoting M.(K.).

judgments. Finally, the paper did not address civil claims under section 3(4) of the Act, to which no limitation period applies, such as sexual assault.⁹

Over the public consultation period, 290 external stakeholders provided feedback. The two largest sectors that responded were architects and local governments.

In addition to the online consultations, the Deputy Attorney General was invited to a number of speaking engagements and meetings with interested stakeholders.

Every ministry within the provincial government was provided with the opportunity to comment on the Green Paper, as were the Crown Agency Secretariat, BC Hydro, the Insurance Corporation of British Columbia and WorkSafe BC. The Green Paper was also shared with lawyers at the federal Department of Justice, British Columbia Regional Office.

Since the close of formal consultations, the ministry has had ongoing consultations with government ministries most likely to be affected by limitations reform and has also received further feedback from several external stakeholders.

From the close of consultations on the Green Paper to the present, all stakeholder comments and recommendations have been reviewed, and further work has been done to prepare a proposed consultation draft *Limitation Act*, which is the basis for this White Paper (and is reproduced in Appendix A). Feedback from the White Paper will be considered in finalizing the legislation, which will be prepared as a bill for consideration by the Legislative Assembly.

Why Reform the Limitation Act?

The *Limitation Act* Review is the first comprehensive review of the Act since its introduction in 1975. The review responds to the following:

- 1) Calls for change made by a broad range of stakeholders, including the building design and construction sectors (architects, engineers, builders, developers, etc.), the Union of British Columbia Municipalities, local governments, the British Columbia Dental Association and the College of Dental Surgeons of British Columbia. Each of these stakeholders continues to lobby strongly for change.
- 2) Alberta, Saskatchewan, Ontario and New Brunswick have all updated their limitation statutes. The Uniform Law Conference of Canada (the “ULCC”) has developed a model uniform limitations statute. British Columbia, once a leader in the field of limitations law, needs to keep pace. Both the impact on competitiveness and the cost of doing business, as

⁹ British Columbia Ministry of Attorney General, “Reforming British Columbia’s *Limitation Act*” (February 2007), online: <http://www.ag.gov.bc.ca/legislation/pdf/GreenPaper.pdf> (last accessed: May 10, 2010) [Green Paper].

well as the ministry's priority to have laws that are modern and fair, are reasons to look at bringing B.C.'s statute into line with the developments in other provinces.

- 3) A number of studies and reviews have identified the need for reform, including those from the former British Columbia Law Reform Commission in 1990, the British Columbia Law Institute in 2002 and the provincial government's Civil Liability Review (2002).

Objectives of Reform

The ministry has approached reforms to the Act with the following objectives:

- 1) Reform will simplify and clarify the Act, which will reduce litigation in a difficult area of the law. The current statute is difficult to understand. Laypeople, as well as lawyers and other professionals, have difficulty determining with certainty what the ground rules will be for a given fact pattern.
- 2) To promote internal consistency within the Act; that is, to ensure consistent application of the Act to all plaintiff and defendant groups, where appropriate. This objective, while difficult, strives to find a balance between plaintiffs' rights (to start a civil action) and defendants' rights (for certainty and finality) that is fair and just.
- 3) To harmonize B.C.'s limitations laws with the reformed limitations laws of other provinces, and the ULCC model statute, the *Uniform Limitations Act*,¹⁰ where appropriate. The Province has the benefit of recent developments in limitations law reform, which has produced modernized limitations laws. Bringing B.C.'s limitations law in line with the reformed laws found in other provinces with which B.C. has the greatest economic connections would provide more certainty for businesses, by making the law and liability more predictable.

¹⁰ *Uniform Limitations Act*, (2005), online: Uniform Law Conference of Canada http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf (last accessed: May 10, 2010) [ULCC Act].

3. Invitation to Comment

The ministry is issuing this White Paper to offer interested persons the opportunity to comment on the proposed new limitations legislation. A summary of the questions posed throughout the paper can be found in Appendix B.

Comments may be mailed, faxed or e-mailed to:

Civil Policy and Legislation Office
Justice Services Branch
Ministry of Attorney General
PO Box 9222 Stn Prov Govt
Victoria, British Columbia V8W 9J1
Facsimile: 250 387-4525
E-mail: CPLO_Limitation@gov.bc.ca

Unless clearly marked to the contrary, the ministry will assume that comments received are not confidential and that respondents consent to the ministry 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 the *Freedom of Information and Protection of Privacy Act*.

The deadline for providing feedback is November 15, 2010.

PART TWO

I. Introduction to the Limitation Act

The Act contains two types of time periods:

1. basic limitation periods, which are the time periods that normally apply, absent special circumstances that would justify stopping the clock; and
2. ultimate limitation periods, which describe the maximum outside time limit past which a basic limitation period cannot extend.¹¹

These time periods govern how long a person has before he or she must start an action in court.

In special circumstances the basic limitation period that applies to a given civil legal problem may be postponed up to the governing ultimate limitation period. The Act has several mechanisms which either postpone or suspend the running of time in the basic limitation period. Two of the major postponement mechanisms are discoverability and disability.¹² The first postponement mechanism, discoverability, refers to knowledge. If a person comes to know (or ought to have known) that he or she has a possible court case, the person has “discovered” the cause of action. During the time a person is unaware of the potential action (i.e., if a “reasonable person” would have been unaware of the action), the basic limitation period is postponed. This means the basic limitation period does not begin to run until a person is aware of, or “discovers” that he or she has a cause of action.

The second postponement mechanism, disability, has two parts. The Act says a person is under a disability while the person is a minor (i.e., from birth up to the day before his or her 19th birthday), or while the person “is in fact incapable of or substantially impeded in managing his or her affairs.”¹³ During the time a person is under a legal disability, the basic limitation period is postponed. This means that the basic limitation period does not run during minority or during legal incapacity.

Discovery and disability postpone the running of time in the basic limitation period up to the maximum time allowed in the ultimate limitation period. In addition, there are situations in which both the basic and the ultimate limitation periods are postponed, such as during minority.¹⁴

¹¹ *Ibid.*, ss. 3 and 8.

¹² *Ibid.*, ss. 6 and 7.

¹³ *Ibid.*, s. 7(1)(a)(ii).

¹⁴ *Ibid.*, ss. 7 and 8.

A helpful analogy is that of a stopwatch and an hourglass. The basic limitation period is like a stopwatch counting down a set amount of time, and discovery starts the stopwatch running. A postponement mechanism, such as disability, stops the stopwatch. The ultimate limitation period is like a big hourglass in the background. The total time it takes the sand to pour through the hourglass is the length of the ultimate limitation period. In contrast to the stopwatch, once the hourglass is turned over and sand starts to move, time is meant to continue running in the ultimate limitation period without interruption.

In other words, the stopwatch can be started, stopped and restarted (i.e., the basic limitation period can be postponed, perhaps even more than once) as long as there is time remaining in the stopwatch (i.e., there is time left in the basic limitation period) and as long as there is sand remaining in the hourglass (i.e., there is time left in the ultimate limitation period). However, once either the basic or ultimate limitation period expires, a person with a claim is no longer able to start a civil lawsuit.

Application of the Act

The current Act is referred to as a default statute. Therefore, if another statute sets out a specific limitation period (e.g., a provincial tax statute that contains a seven-year period for collecting tax debts), the Act does not apply. If there is no statute that contains a limitation period for a specific legal problem, then the Act applies.

As discussed previously, the current Act sets out a variety of basic limitation periods, depending on the type of legal problem or “action.” As a result, it may be unclear which limitation period applies to a specific action. For example, the deadline for starting a personal injury action is different than that in a breach of contract case. Personal injury actions fall under the two-year basic limitation period. A breach of contract case could fall under either a two- or six-year basic limitation period, depending on whether the plaintiff has suffered “economic loss arising from the injury.”¹⁵

“Action” is defined to mean “...any proceeding in a court and any exercise of a self help remedy.”¹⁶ This definition is very broad. It includes proceedings to obtain legal remedies from the courts (e.g., damages). It also includes one’s own actions to enforce rights or rectify wrongs without using the court process (e.g., repossession).¹⁷ The way that the word “action” is defined expands the application of the Act to include both how long a person has to sue

¹⁵ BC Act, Above Note 1, s. 3(2)(a) or s. 3(5).

¹⁶ *Ibid.*, s. 1, “action”. See also Black’s Law Dictionary, 7th ed., s.v. “self-help remedy”: “A remedy not obtained from a court, such as repossession”.

¹⁷ *Markevich v. Canada*, [2003] S.C.J. No. 8 at para. 47, online: QL (SCJ); *Sign-O-Lite Plastics Ltd. v. Kennedy*, [1983] B.C.J. No. 60 (S.C.) at para. 10, online: QL (BCJ).

someone in civil court and how long a person has to obtain a legal remedy outside the court process.

It is proposed that “action” be replaced with the following definition of “claim:”

“Claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

This definition comes from the ULCC’s *Uniform Limitations Act* and is also used in the modernized limitations laws of Saskatchewan and Ontario.¹⁸ It is similar to the definition of “claim” in New Brunswick’s reformed *Limitation of Actions Act*.¹⁹ It is proposed that British Columbia follow the lead of the modernized limitations statutes in other provinces and the ULCC’s model law and have the limitation periods in the new Act apply to all “claims” unless specifically exempted.

The new *Limitation Act* (“new Act”) will continue to be a default limitations regime, but it will be more consistent in its application than under the current law. That is, a single basic limitation period will apply to all claims unless the new Act specifies otherwise, or unless the claim is subject to a limitation period found in a more specific law.

The proposed reforms to include “claim” rather than “action,” and to reduce the variety of basic limitation periods to a single basic limitation period are meant to simplify the law, ensure the consistent application of the law, and harmonize B.C.’s limitations law with other modernized limitations statutes in Canada and the ULCC’s model law, where appropriate.

Question:

- 1) Do you have any comments on the definition of “claim” or the move to a single basic limitation period?

¹⁸ ULCC Act, Above Note 10, s. 1; *Limitations Act*, S.S. 2004, c. L-16.1, s. 2(a), online: CANLII <http://www.canlii.org/en/sk/laws/stat/ss-2004-c-l-16.1/latest/part-1/ss-2004-c-l-16.1-part-1.pdf> (last accessed: May 10, 2010) [SK Act]; and *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 1, “claim,” online: CANLII <http://www.canlii.org/en/on/laws/stat/so-2002-c-24-sch-b/latest/so-2002-c-24-sch-b.html#BK1> (last accessed: May 10, 2010) [ON Act].

¹⁹ *Limitation of Actions Act*, S.N.B. 2009, c.L-8.5, s. 1(1), “claim,” online: New Brunswick Attorney General <http://www.gnb.ca/0062/PDF-acts/l-08-5.pdf> (last accessed: May 10, 2010) [NB Act].

II. The Basic Limitation Period

1. Duration of the Basic Limitation Period

Two-year Basic Limitation Period

Leaving aside the actions to which no limitation periods apply, the current Act contains three separate basic limitation periods of two years, six years, and 10 years duration in which to start a civil action.²⁰ As discussed above, the length of the basic limitation period is tied to the type of civil lawsuit (e.g., cause of action) that is being pursued. For example, a civil action for personal injury has a two-year basic limitation period.²¹ An action for recovery of a debt has a six-year basic limitation period.²² An action on a local judgment for the payment of money has a 10-year basic limitation period.²³

The Green Paper sought input on moving to a single two-year basic limitation period instead of a system with a variety of basic limitation periods differentiated by type of action. The Green Paper noted that a single two-year basic limitation period would encourage people to act on their legal problems quickly and prevent stale-dated claims. It pointed out that such a change would both simplify the law and reduce uncertainty about which basic limitation period applied to a set of facts. It observed that the modernized limitations laws of Alberta, Saskatchewan, Ontario and New Brunswick, as well as the *Uniform Limitations Act* adopted by the ULCC, have a single two-year basic limitation period.²⁴

Most respondents supported the idea of a single basic limitation period of two years, commenting on the advantages of having a simplified law that would promote the efficiency of the civil justice system, reduce recordkeeping costs, improve consistency of limitations laws across Canada and increase certainty for defendants. Many commented that a single two-year basic limitation period would reduce the likelihood of stale-dated claims and would promote the resolution of legal disputes closer to the time of the loss or injury. A few respondents indicated that reducing the basic limitation periods from six or 10 years to two years raised access to justice issues (especially in relation to informal loans between friends and family), as such a change could increase the likelihood that valid legal claims would be extinguished.

Those opposed to a single two-year basic limitation period thought that two years may not be enough time to resolve complex contract disputes, collect unpaid debts or pursue cost recovery

²⁰ *Ibid.*, ss. 3(2), (3), (4.1), (5), and (6).

²¹ *Ibid.*, s. 3(2)(a).

²² *Ibid.*, s. 3(5).

²³ *Ibid.*, s. 3(3).

²⁴ *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(a), online: CANLII <http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-l-12/latest/rsa-2000-c-l-12.html> (last accessed: May 10, 2010) [AB Act]; SK Act, Above Note 18, s. 5; ON Act, Above Note 18, s.4; NB Act, Above Note 19, s.5(1)(a); ULCC Act, Above Note 10, s. 4.

actions. They noted that reductions to the basic limitation periods for debt and breach of contract cases would leave less time for settlement discussions and would be uneconomical in situations where there were numerous small debts owing. They also noted that reduced basic limitation periods could result in a sue-first, settle-later mentality that could damage ongoing business relationships.

It is proposed that the new Act will contain a two-year basic limitation for all claims, unless specifically exempted.

A proposal for a 10-year basic limitation period to enforce civil judgments and a tentative discussion about whether the new Act should include a special basic limitation period for collection of government debts are set out in more detail in the sections that follow.

Recommended Draft Provision:

Basic limitation period

- 6 (1) Subject to Parts 3 to 5 [*ultimate limitation period, factors affecting limitation periods, suspension of limitation periods*], a court proceeding must not be commenced in respect of a claim more than 2 years after the day on which the claim is discovered.
- (2) The limitation period established by this section does not apply to a claim referred to in section 7 or 8 [*basic limitation periods for debts owed to government and claims based on judgments*].

Comment:

This section establishes a two-year basic limitation period to commence a court proceeding in respect of a claim, running from the date of discovery. The two-year period is designed to provide sufficient time for a plaintiff to discover a claim, seek legal advice, consider the available options and commence court proceedings. The two-year basic limitation period does not apply to claims in sections 7 or 8 [basic limitation periods for debts owed to government and claims based on judgments].

Enforcement of Civil Judgments

The Green Paper did not address the issue of reforming the basic limitation period for the civil enforcement of judgments, pending a government review of the “Report on the Uniform Civil Enforcement of Money Judgements Act,”²⁵ produced by the British Columbia Law Institute. As policy work continues, no change is being proposed to the current 10-year basic limitation period for the enforcement of a civil judgment for the payment of money or the return of personal property.

²⁵ British Columbia Law Institute, “Report on the Uniform Civil Enforcement of Money Judgements Act,” Report No. 37 (March 2005).

All four of the updated provincial limitations laws have special provisions regarding limitation periods governing the enforcement of civil judgments, although each does so in a slightly different way. Alberta posits a 10-year limitation period for claims “based on a judgment or order for the payment of money” in a stand-alone section of its *Limitations Act*.²⁶

Saskatchewan provides a 10-year limitation period for claims “based on a judgment or order for the payment of money” in the provision of its statute that addresses the ultimate limitation period.²⁷ New Brunswick’s new statute contains a stand-alone 15-year limitation period for a “claim based on a judgment for the payment of money.”²⁸ Ontario is the only modernized province to exclude all court proceedings “to enforce an order of a court” from the limitation periods in its *Limitations Act, 2002*.²⁹

One law reformer has recommended that a 10-year basic limitation period be retained for actions to enforce judgments.³⁰ It is proposed that this recommendation be adopted.

Recommended Draft Provision:

Basic limitation period for claim based on judgment

- 8** Subject to Parts 3 to 5 [*ultimate limitation period, factors affecting limitation periods, suspension of limitation periods*], a court proceeding must not be commenced in respect of a claim based on a judgment for the payment of money or the return of personal property,
- (a) in the case of a local judgment, more than 10 years after the day on which the judgment becomes enforceable, or
 - (b) in the case of an extraprovincial judgment, after the earlier of the following:
 - (i) the expiry of the time for enforcement in the jurisdiction where that extraprovincial judgment was made;
 - (ii) the date that is 10 years after the judgment became enforceable in the jurisdiction where the extraprovincial judgment was made.

Comment:

This section is carried forward from the current Act. The section provides a 10-year basic limitation period for claims to enforce a judgment for the payment of money or the return of personal property. Time runs from the date the judgment becomes enforceable, or in the case of an extraprovincial judgment, from the earlier of the expiry of the enforcement period from the issuing jurisdiction or 10 years from the date the judgment became enforceable.

²⁶ AB Act, Above Note 24, s. 11.

²⁷ SK Act, Above Note 18, s. 7.1.

²⁸ NB Act, Above Note 19, s. 8.

²⁹ ON Act, Above Note 18, s. 16(1)(b).

³⁰ Submission of Arthur L. Close, Q.C. to the Green Paper on Reforming British Columbia’s *Limitation Act* (February 2007), received February 16, 2007 at 2 [A. Close Submission].

Treatment of Debts and Obligations Owed to Government

Currently the Act does not apply to time periods related to tax debts because tax-related limitation periods are set out in specific tax statutes. Similarly, court orders or fines imposed under the provincial *Offence Act* or the federal *Criminal Code* are not governed by the Act. A number of government programs and regulatory schemes have their own limitation periods specified in other statutes. However, where there is no statute that specifically sets out limitation periods for collecting or recovering debts or obligations owing to government, the limitation periods in the current Act apply.

In its discussion of the duration of the basic limitation period, the Green Paper did not specifically ask whether a single basic limitation period should apply to the recovery of debts or obligations owing to government, or whether these types of debts or obligations should be governed by a different basic limitation period. However, during internal consultations, several ministries raised concerns about the impact of reducing the basic limitation period from six to two years on non-tax debt collection and cost recovery actions. These ministries cited the potential loss of revenue to government for debts that will be extinguished with a reduced basic limitation period. They noted that a reduced basic limitation period would have an adverse effect on programs that rely on repayment as a tool to ensure the program can continue to be funded, would create pressure on government to litigate in order to preserve limitation periods, and could increase legal and staffing costs if they were required to step up collection efforts. Finally, they raised concerns about increased costs for government program areas, including the need to revise systems, policies and procedures to conform to a shorter basic limitation period.

Internal stakeholders concerned with a two-year basic limitation period noted that the Province does not act like a commercial lender -- government programs and services are often designed to serve the public good. In many instances government will continue to advance a benefit regardless of whether or not a citizen has outstanding debts owed to government. For example, the Province does not deny medical coverage or emergency response for citizens who have not paid their medical service premiums and/or ambulance fees.

For other kinds of debts, the debtor may be on marginal income and government may behave less aggressively in its collection measures than a commercial lender. For example, student loan debts, income assistance overpayments or Pharmacare overpayments are debts to government that are often owed by people with limited resources who are difficult to locate as they are a highly mobile population. Some of these debts become more collectable over time. For these types of debts, government is more likely to tailor its collection measures to the size of the debt and the circumstances of the debtor, rather than focusing on recovery. For example, government may rely on small monthly repayments or more passive collection measures (such

as recovering debt once an income tax refund is issued by way of set-off) than its commercial counterparts.

Some argue that because government does not behave as a commercial lender with respect to providing services under social programs and because debts and obligations arising from these programs ultimately represent taxpayers' money, that the existing six-year basic limitation period should be maintained, as this represents the public interest. A further argument for retaining the *status quo* focuses on opportunities that the provincial government currently has to cooperate with the federal government on collection activities; these opportunities could be impacted by a shortened basic limitation period.

Approach of Other Jurisdictions Regarding Debts Owed to Government

Other modernized provincial limitations laws show a varied approach to dealing with debts owing to the Crown. For example, while Alberta's limitation law does not contain a special limitation period for debts owing to the Crown, student loans have a six-year limitation period under a separate statute, the *Student Financial Assistance Act*.³¹ As well, lawsuits to recover the public costs of cleaning up contaminated land are also dealt with under a separate statute, the *Environmental Protection and Enhancement Act*, which allows for an extension of time for proceedings to be commenced alleging an adverse effect as a result of the alleged release of a substance into the environment.³²

In Saskatchewan, the government has six years to recover all kinds of debt owing to it under the *Revenue and Financial Services Act*.³³

Ontario's limitations law exempts proceedings to recover money owing to the Crown from any limitation periods on the basis of the public interest. Included in the exemption are:

- claims relating to the administration of social, health or economic programs or the provision of direct or indirect support to the public in connection with social, health or economic policy;
- claims for the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans; and
- the reimbursement of money paid in connection with social, health or economic programs or policies as a result of fraud, misrepresentation, error or inadvertence.³⁴

³¹ *Student Financial Assistance Act*, S.A. 2002, c. S-20.5, s.14, online: CANLII <http://www.canlii.org/en/ab/laws/stat/sa-2002-c-s-20.5/latest/sa-2002-c-s-20.5.html> (last accessed: May 13, 2010).

³² *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s.218, online: CANLII <http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-e-12/latest/rsa-2000-c-e-12.html> (last accessed: May 13, 2010).

³³ *Revenue and Financial Services Act*, S.S. 1983, c. R-22.01, s.65.2, online: CANLII <http://www.canlii.org/en/sk/laws/stat/ss-1983-c-r-22.01/latest/ss-1983-c-r-22.01.html> (last accessed: May 13, 2010).

Under a recent amendment, there is also no limitation period under Ontario's law for undiscovered environmental claims.³⁵

Debts owing to the Crown are included in the two-year basic limitation period and 15-year ultimate limitation period in New Brunswick's recently reformed *Limitation of Actions Act*.³⁶ However, the new law has a transition clause that maintains the *status quo* for the first six years after the *Limitation of Actions Act* becomes law; that is, the government of New Brunswick will continue to have a six-year basic limitation period for recovery of debts for the first six years after the introduction of the reformed limitations law.³⁷

While Manitoba has not yet reformed its limitations legislation, the Manitoba Law Reform Commission released a draft consultation report on the subject in June 2009. It recommended that there be no limitation period in relation to lawsuits:

- 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.³⁸

In so doing, the Manitoba law reform body appears to have accepted the public policy rationale advanced by Ontario policy-makers. The Commission is also considering whether (similar to Ontario) Manitoba should include a special provision exempting undiscovered environmental claims from limitation periods.

There is no separate federal limitations law. This means that unless a federal law states otherwise, the provincial limitations law sets the basic limitation period that applies to a debt action brought by the federal Crown for the recovery of a debt in B.C.

Two situations in which debts owing to the federal Crown are dealt with in separate statutes are federal student loans and federal immigration sponsorship debts. Federal student loans fall under the *Canada Student Loan Act*, which sets a six-year basic limitation period for recovery of student loan debt. There is no limitation period for deduction from or set-off against any amounts owing under a federal student loan.³⁹ Federal immigrant sponsorship debts that are not assigned to the province or territory in which the sponsor resides fall under the

³⁴ ON Act, Above Note 18, ss.16 (2) and (3).

³⁵ *Ibid.*, s.17.

³⁶ NB Act, Above Note 19, s.5(1).

³⁷ *Ibid.*, s.27(1).

³⁸ Manitoba Law Reform Commission, *The Limitation of Actions Act: Draft Report for Consultation* (Winnipeg: Statutory Publications, 2009) at 46 [MLRC 2009 Report].

³⁹ *Canada Student Loans Act*, R.S.C. 1985, c. S-23, s.19.1, online: CANLII <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-23/latest/rsc-1985-c-s-23.html> (last accessed: May 13, 2010).

Immigration and Refugee Protection Act, which says no limitation period applies (i.e., the federal government has an unlimited amount of time in which to recover sponsorship debts owing to it).⁴⁰

Proposed Reforms for Debts and Obligations Owed to Government

In light of the approach taken by other Canadian jurisdictions, two options for reform are proposed.

Option 1:

The first option for reform of B.C.’s current Act would be to retain a six-year basic limitation period for collection of debts or cost recovery associated with social policy or social programs in which government provides a service or benefit. This option would set out a social policy “exemption” from the limitation periods proposed for the new Act for specified categories of government debt and obligations.

Within the categories of government debt and obligations that could be considered to fall within this social policy “exemption” are the following:

Category of Debt	Rationale for Inclusion
Medical fees, including ambulance fees and medical service premiums	Government continues to advance a benefit (ambulance attendance, medical coverage) regardless of whether outstanding fees and premiums have been paid.
Student loans	To ensure consistency with federal legislation.
Immigrant sponsorship debt	To ensure consistency with federal legislation.
Cost recovery for environmental contamination or environmental emergencies	The government is a steward of the environment for the public and should have the ability to recover costs for ensuring the environment is safe for the public.
Overpayments of social policy payments (e.g., income assistance overpayments, Pharmacare overpayments)	Often recipients are on marginal incomes and more long term passive collection measures are more likely to recover these public funds.

The proposed legislation would list the categories of government debt and obligations for which the six-year basic limitation period would continue to apply, as set out in the table above.

⁴⁰ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s.145, online: CANLII <http://www.canlii.org/en/ca/laws/stat/sc-2001-c-27/latest/sc-2001-c-27.html> (last accessed: May 13, 2010).

Option 2:

A second option for reform is to articulate the types of debt that fall within this social policy “exemption” in less detail than in option 1, similar to the language used in Ontario’s reformed limitations statute. This option would set out the categories of government debt and obligations as follows.

There is a six-year basic limitation period to recover money owing to the Crown in respect of:

- *claims relating to the administration of social, health or economic programs or the provision of direct or indirect support to the public in connection with social, health or economic policy;*
- *claims for the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans; and*
- *the reimbursement of money paid in connection with social, health or economic programs or policies as a result of fraud, misrepresentation, error or inadvertence.*

Recommended Reform:

The government is considering both of the options discussed above. The ministry has not yet finalized the legislation for this provision.

Comment:

This reform will continue to provide the government with a six-year basic limitation period to sue to recover debts or obligations owing to government that have accrued as a result of government providing a service or advancing a benefit to an individual as a social policy or social program.

In all other cases, debt claims advanced by the government will be bound by the standard two-year basic limitation period. Lawsuits to enforce a civil judgment will have a 10-year basic limitation period as discussed above (described in section 8 of the consultation draft).

2. Basic Limitation Period and Discovery

As noted previously, discoverability is one of the main postponement mechanisms in the current law that stops the basic limitation period stopwatch. This means that the basic limitation period in many civil disputes does not start to run until the potential plaintiff becomes aware there is a potential claim (i.e., until the legal action is “discovered”).

The Green Paper provided the following example of how discoverability works under the current Act. A person goes for a chiropractic treatment, which is negligently carried out. The patient expects some pain after the treatment but when this extends past the anticipated recovery date, he goes back to his chiropractor who cannot explain the poor recovery. Two years after his initial treatment, the patient arranges to see a second chiropractor. The second chiropractor determines that the patient’s pain is the result of the careless manner in which the first chiropractor had treated the patient. The same day, the patient seeks legal advice and is told he has a potential negligence claim. At this point, he knows of (has “discovered”) his potential civil claim against the first chiropractor.

Recalling the stopwatch analogy, on the date the patient “discovers” his claim the top button on the stopwatch is pressed down, starting the timer running in the basic limitation period. In this case, the set amount of time that the timer counts down is a period of two years. This means the patient has two years from the date he “discovered” his claim to sue the first chiropractor.

The current discoverability provision is set out in section 6. The provision closely follows the recommendation of the former British Columbia Law Reform Commission in their 1974 *Report on Limitations*.⁴¹ At the time of its enactment in 1975, this was the first attempt by a legislature in Canada to postpone the running of time in situations where the potential plaintiff is not aware that he or she has a cause of action. The provision reads as follows:

- 6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):*
- (a) for personal injury;*
 - (b) for damage to property;*
 - (c) for professional negligence;*
 - (d) based on fraud or deceit;*
 - (e) in which material facts relating to the cause of action have been wilfully concealed;*
 - (f) for relief from the consequences of a mistake;*

⁴¹ Law Reform Commission of British Columbia, *Report on Limitations – Part II General* (Project No. 6) 1974 (LRC 15) at 81 and 82, online: BCLI. <http://www.bcli.org/sites/default/files/report15.pdf> (last accessed: May 10, 2010) [BCLRC 1974 Report].

- (g) brought under the Family Compensation Act;*
- (h) for breach of trust not within subsection (1).*

(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and*
- (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.*

(5) For the purpose of subsection (4),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) "facts" include

- (i) the existence of a duty owed to the plaintiff by the defendant, and*
- (ii) that a breach of a duty caused injury, damage or loss to the plaintiff,*

(c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and

(d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.⁴²

Since 1975, there have been several developments in the law of discoverability. Courts have acknowledged that the language of section 6 is cumbersome and difficult to understand and have spent considerable time debating its meaning.

In its consideration of the correct approach to be taken in interpreting section 6(4)(b) of the Act, the Supreme Court of Canada has commented that: “[t]he meaning of this obscure provision has been a longstanding source of frustration in British Columbia.”⁴³ The Court has determined that the appropriate test is one that:

⁴² BC Act, Above Note 1, ss. 6(3)-(6).

⁴³ *Novak v. Bond*, [1999] S.C.J. No. 26 at para. 34, online: QL (SCJ).

*...requires the court to adopt the perspective of a reasonable person who knows the facts that are within the plaintiff's knowledge and has taken the appropriate advice a reasonable person would seek on those facts. Time does not begin to run until this reasonable person would conclude that someone in the plaintiff's position could, acting reasonably in light of his or her own circumstances and interests, bring an action.*⁴⁴

The reasons for preventing a plaintiff from pursuing an action have to be “serious, significant and compelling,” not “tactical.”⁴⁵ This approach applies a subjective/objective test to interpreting the discoverability provision, focusing on the subjective knowledge, interests and circumstances of a particular plaintiff.

Beginning with Alberta in 1999, several provinces and the ULCC have attempted to codify the discoverability principles that are to be applied by the courts in determining when time starts to run in the basic limitation period. The modernized limitation laws in other provinces and the ULCC model statute all follow a similar test for discovery. Each sets out that the basic limitation period will run only from the day on which a plaintiff first knew (or a reasonable person with the abilities and in the circumstances of the plaintiff ought to have known) of the injury, loss or damage that was caused by the defendant. In addition, most contain a further condition that limits the discovery postponement mechanism to a sufficiently serious legal problem (i.e., one a reasonable person would consider taking to court). For example, the ULCC model statute (and in a modified form, Alberta's law) say that the plaintiff must have known or ought to have known that injury, loss or damage is sufficiently serious to warrant a proceeding.⁴⁶ Similarly, the modernized limitations laws of Saskatchewan and Ontario say that the plaintiff must have known or ought to have known “that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.”⁴⁷ New Brunswick's *Limitation of Actions Act* is the only modernized limitations law that does not require that a court proceeding be the appropriate remedy in its formulation of the discovery test.⁴⁸

A comparison with the modernized laws highlights that B.C.'s discoverability provision only applies to a specified list of court actions, rather than being universally applicable.⁴⁹ This has

⁴⁴ *Ibid.* at para. 39. McLachlin J., for the majority, considers at least four different approaches to s. 6(4)(b) that have been suggested by the British Columbia Court of Appeal, and concludes that the appropriate test is a subjective/objective approach that recognizes the special circumstances and interests of individual plaintiffs. It encourages plaintiffs to take steps short of litigation to deal with their problems.

⁴⁵ *Ibid.*

⁴⁶ ULCC Act, Above Note 10, s. 5(b); AB Act, Above Note 24, s.3(1)(a)(iii).

⁴⁷ SK Act, Above Note 18, s. 6(1)(d) and ON Act, Above Note 18, s.5(1)(a)(iv).

⁴⁸ NB Act, Above Note 19, s. 5(2).

⁴⁹ BC Act, Above Note 1, s. 6.

resulted in litigation as plaintiffs try to fit their facts within the provision to gain the benefit of the postponement.

The Green Paper did not specifically ask whether the discoverability provision in section 6 should be reformed. As a result, there was very little feedback on this issue. However, some respondents did address this issue, noting that the current language is ambiguous and requires revision. Law reformer and former executive director of the British Columbia Law Institute, Arthur Close, QC, recommends drafting the discovery rule using language similar to that used by the ULCC in its model statute. He cautions, however, that changing the discoverability provision by using wholly new terms will require courts to create a new body of jurisprudence on the subject, which may not be well received.⁵⁰

Keeping in mind the submissions made in response to the Green Paper, and following a detailed review of the existing approach to discoverability, it is proposed that a revised discoverability provision should be part of the new Act, consistent with law reform efforts elsewhere in Canada. The proposed draft legislation needs to be simple, but it also needs to recognize that courts will continue to have considerable discretion in interpreting the meaning of the discovery test. As one legal scholar has warned, "... courts will not be overly deterred by language [to define discoverability principles] that stands in the way of what they believe to be a just result. The legislature cannot be assured that the language it uses to define discoverability principles will be interpreted in any particular way."⁵¹

Recommended Draft Provision:

General discovery rules

- 9** Except for those special situations referred to in sections 10 to 12 [*special situations for persons of full capacity, special situations for minors, special situations for persons under a disability*], a claim is discovered by a person on the day on which the person first knew or reasonably ought to have known all of the following:
- (a) that injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;

⁵⁰ A. Close Submission, Above Note 30, at 4.

⁵¹ Kent Roach, "Reforming Statutes of Limitations" (2001), 50 U.N.B.L.J. 25 at 43. Professor Roach, in his review of the court's evolving interpretation and imposition of discoverability principles, suggests that the courts are willing to tailor their decisions on the merits of particular cases. He notes at 35: "It would be possible to design new legislation to attempt to displace *Novak v. Bond*, but there are no guarantees given the court's commitment to discoverability and achieving fairness for plaintiffs."

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

Comment:

This section sets out the test for discovering a claim. The basic limitation period will run from the day on which the person first knew or reasonably ought to have known of the injury, loss or damage that was caused by the defendant, and that a court proceeding would be an appropriate remedy. While the drafting style of the proposed provision is slightly different than that used by the ULCC in the model statute, section 9 of the new Act uses the same subjective/objective test to determine when a person ought to have discovered the claim as used in section 5(b) of the Uniform Limitations Act. The proposed provision simplifies and modernizes the current discoverability provision, which has proven to be one of the most difficult sections in the current Act, and which has been the subject of prolonged debate by the courts. This section does not apply to the special discovery rules referred to in sections 10 to 12 [special situations for persons of full capacity, special situations for minors, special situations for persons under a disability].

Question:

- 2) Do you have any concerns with the recommended draft provision, which sets out the test for discovering a claim? If so, please discuss.

Special Discovery Rules

The following sections set out the discovery rules that apply in some special situations in order to clarify when the clock starts to run in the basic limitation period in cases that do not fit neatly into the proposed discoverability provision.

Fraud or Trust Claims

The current Act outlines a more generous discoverability postponement mechanism in relation to certain trust claims, such as those based on fraud or fraudulent breach of trust to which a trustee was a party, in order to protect vulnerable beneficiaries. It does so by setting a higher test for the degree of knowledge someone needs to have in order to have a potential claim. Discovery of these types of trust claims does not occur until the beneficiary is “fully aware” of the fraud, fraudulent breach of trust, or other act of the trustee on which the cause of action is based. To protect vulnerable beneficiaries further, the burden of proving that such an action is discovered rests on the trustee (i.e., the defendant).⁵²

⁵² BC Act, Above Note 1, ss. 6(1) and (2).

While the Green Paper did look at fraud and fraudulent breach of trust claims, its discussion was focussed on the narrow issue of whether the ultimate limitation period should be suspended in such cases. The paper did not specifically ask whether the higher discoverability principle should continue in certain trust claims. However, consultation feedback highlighted support for retention of this principle. Therefore, it is proposed that this higher level of discoverability be carried forward in a manner consistent with the other modernized limitations laws in Canada.

Recommended Draft Provision:

Discovery rule for claims based on fraud or recovery of trust property

13 (1) In this section, “fraud or trust claim” means

- (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
 - (b) a claim to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee’s own use, or
 - (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
 - (i) wilfully conceals from the beneficiary the fact that
 - (A) injury, loss or damage has occurred,
 - (B) the injury, loss or damage was caused by or contributed to by an act or omission, or
 - (C) the act or omission was that of the person against whom the claim is or may be made, or
 - (ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.
- (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware
- (a) that injury, loss or damage had occurred,
 - (b) that the injury, loss or damage was caused by or contributed to by fraud, fraudulent breach of trust, conversion or other act or omission of the trustee on which the claim is based,
 - (c) that the fraud, fraudulent breach of trust, conversion or other act or omission of the trustee on which the claim is based was that of the person against whom the claim is or may be made, and
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy it.
- (3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

Comment:

This section sets out the special discovery principle for claims based on fraud, fraudulent breach of trust or recovery of trust property where the person with the claim is a beneficiary and the person against whom the claim is made is a trustee. There is a higher discoverability threshold than the general discovery test for this set of claims. The beneficiary must be “fully aware” of the fraud, fraudulent breach of trust or recovery of trust property, and the burden of proving that time has begun to run rests on the trustee. This section carries forward the principle from the current Act that vulnerable beneficiaries should be protected and that they should not be required to be reasonably diligent in ensuring that the trustee acts properly. It is worth retaining as it reflects the reliance and dependence in a beneficiary-trustee relationship.

Future Interest in Trust Property

The current Act suspends the running of time in the basic limitation period against a beneficiary “with respect to an action relating to a future interest in trust property... until the interest becomes a present interest.”⁵³ The idea is to prevent unnecessary litigation; that is, to protect beneficiaries with a future interest in a trust from having to litigate in respect of an injury, loss or damage to an interest which he or she may not live to enjoy. It is proposed that this provision be carried forward to the new Act.

Recommended Draft Provision:

Discovery rule for claims for future interest in trust property

- 14** A claim relating to a future interest in trust property is discovered on the later of the following:
- (a) the day on which the claim is discovered under section 9 or 13 [*general discovery rules and special rules for claims based on fraud or the recovery of trust property*], as the case may be;
 - (b) the day on which the interest becomes a present interest.

Comment:

This section sets out the special discovery rules for claims relating to a future interest in trust property. It carries forward section 6(8) of the current Act.

Enforcement of Securities

The current Act does not specify when time begins to run in the basic limitation period for claims to either realize or redeem security. For greater certainty, it is proposed that the new Act specify that time begins to run from the date the right to enforce the security arises.

⁵³ *Ibid.*, s. 6(8).

Recommended Draft Provision:

Discovery rule for claims to realize or redeem security

- 16** A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.

Comment:

This section sets out the special discovery rules for claims to realize or redeem security. It clarifies that the discovery date in lawsuits to realize or redeem security is the day the right to enforce the security arises.

Successors, Predecessors, Principals and Agents

The current Act does not include a separate provision dealing with discoverability in cases of lawsuits that are started by a person claiming through a predecessor, or lawsuits that are started by a principal who has authorized an agent to act on his or her behalf, as long as the agent has a duty to communicate knowledge of all material facts relating to the claim to the principal. It is proposed that a separate section be created in the new Act to clarify when the basic limitation period starts to run for successors, predecessors, principals and agents.

Recommended Draft Provision:

Successors, predecessors, principals and agents

- 18** (1) A claim of a person claiming through a predecessor in right, title or interest is discovered on the earlier of the following:
- (a) the day on which the claim is discovered by the predecessor;
 - (b) the day on which the claim is discovered by the person claiming.
- (2) A claim of a principal, if the principal's agent had a duty to communicate to the principal knowledge of the matters referred to section 9 (a) to (d) [*general discovery rule requirements*], is discovered on the earlier of the following:
- (a) the day on which the claim is discovered by the agent;
 - (b) the day on which the claim is discovered by the principal.

Comment:

This section sets out special discovery rules for lawsuits brought by a successor (i.e., a person advancing the legal rights of a predecessor) or by a principal who has authorized an agent to act on his or her behalf. Claims of a successor are discovered on the earlier of the day the claim is discovered by the predecessor or the day the claim is discovered by the successor. Similarly, claims of a principal, if the principal's agent had a duty to communicate knowledge of the claim to the principal, is discovered on the earlier of the day on which the claim is discovered by the agent or the day the claim is discovered by the principal.

III. The Ultimate Limitation Period

The ultimate limitation period outlines the maximum time period for postponement of a basic limitation period, bringing certainty as to when exposure to potential liability ends. It is necessary to ensure that the interests of defendants for finality and closure are not overlooked. Section 8 of B.C.'s current limitations law establishes two ultimate limitation periods: a general ultimate limitation period of 30 years and a special six-year ultimate limitation period for hospitals, hospital employees acting in the course of their employment and medical practitioners for certain types of legal claims.⁵⁴

1. Ultimate Limitation Period and Commencement

The duration of the ultimate limitation period and commencement are discussed together in this section because these two elements set the maximum timeframe a plaintiff has to start a lawsuit. Commencement indicates when time starts to run in the ultimate limitation period (i.e., when the hourglass is turned over and sand starts to pour through), and the duration of the ultimate limitation period outlines the maximum time past which a basic limitation period cannot be postponed (i.e., the set time in the stopwatch can be started, stopped and restarted as long as the sand is still pouring through the hourglass).

Accrual Model of Commencement

Under the current law, time begins to run in the ultimate limitation period once all of the individual elements of the legal claim are present. This is called "accrual" of the cause of action. For example, in a negligence claim, the ultimate limitation period would not start to run until both the negligent act or omission and the damage have occurred because these are both elements of the tort of negligence. This means that the hourglass would not be turned over and sand would not begin to move until the damage occurred. Once turned over, sand would be allowed to flow uninterrupted for the length of the ultimate limitation period (currently 30 or six years).

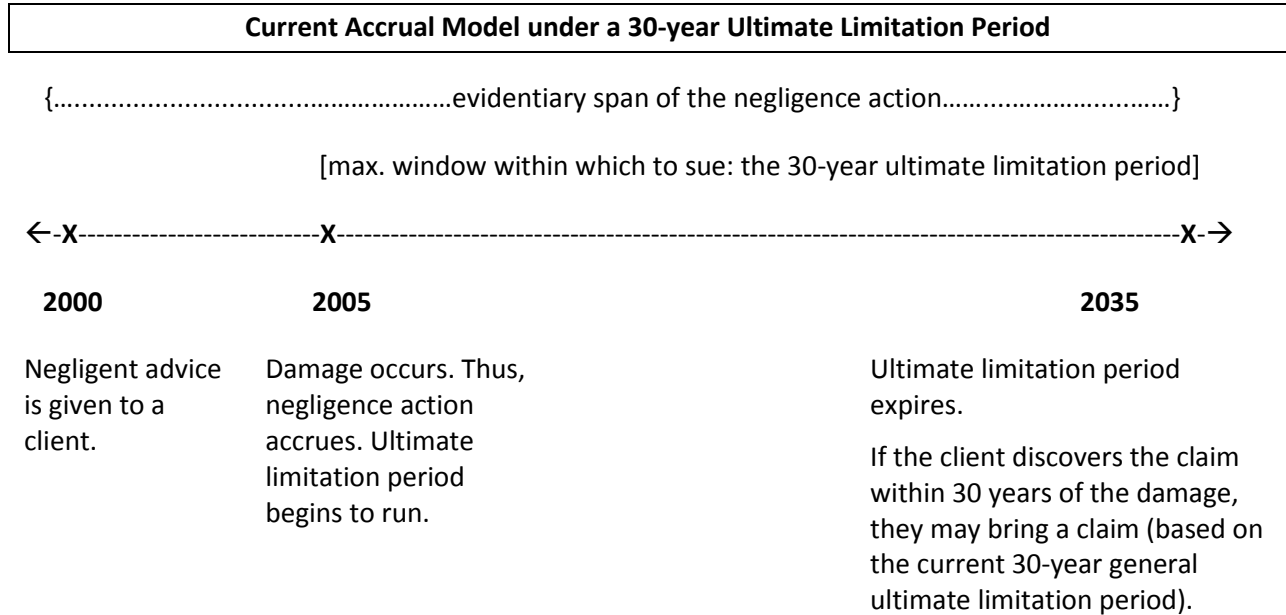
The British Columbia Court of Appeal has clarified that the common law discoverability rule does not apply to the accrual of a cause of action for the purposes of the ultimate limitation period.⁵⁵ This means that the ultimate limitation period starts to run regardless of whether the plaintiff had knowledge of or discovered the claim. Even though some claims are discovered when the damage occurs, discovery is not one of the elements of the legal claim, and, therefore, does not affect when the ultimate limitation period starts to run.

⁵⁴ *Ibid.*, s. 8(1).

⁵⁵ *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.) at 14; *Arishenkoff v. British Columbia*, [2004] B.C.J. No. 1101 (C.A.) at para. 85, online: QL (BCJ).

Under the existing law, the accrual model combined with the 30-year general ultimate limitation period can contribute to some very old claims. Uncertainty is created because people do not know how long they need to keep records or insurance coverage since time may extend beyond 30 years from the original act or omission. For example, if damage from a negligent act does not occur until five years after the wrongful act, there could be a 35-year span between the wrongful act and the commencement of a lawsuit.

An illustration of the current scheme is set out below.



The accrual model is criticized because it can be very difficult to pinpoint when damage actually occurred. Also, time may begin to run at different points depending on the type of cause of action that is litigated. If a set of facts supports both a breach of contract action and a negligence action, it could be more advantageous for a plaintiff to choose to frame his or her lawsuit as a negligence case in order to extend the time limit for going to court.

For example, if an architect gives negligent advice in 1999 that results in a builder constructing a building that collapses in 2011, time will run in the ultimate limitation period from the date of damage (i.e., the date of the collapse of the building). If the plaintiff were to sue the architect for negligence, the ultimate limitation period would start to run in 2011, 12 years after the giving of the negligent advice. Assuming the same facts supported a breach of contract action against the architect and that the breach occurred when the architect gave the negligent advice in 1999, the ultimate limitation period would start to run in 1999, the same date as the breach of contract occurred. These examples illustrate how, under the current scheme, the accrual of the cause of action could result in a significantly different commencement date for the ultimate limitation period.

Act or Omission Model of Commencement

Modernized limitations laws no longer use accrual to determine when time begins to run in the ultimate limitation period. The modernized laws of Alberta, Saskatchewan, Ontario, New Brunswick and the ULCC's *Uniform Limitations Act* have all eliminated the accrual model and instead link the start of the ultimate limitation period to the date of the act or omission giving rise to the legal claim.⁵⁶

The act or omission model simplifies the law by eliminating the need for litigants and courts to determine at what point all the elements of the claim accrued. This creates more certainty as to when the clock starts to run. As well, more certainty results because it does not matter what kind of legal claim is brought: in each case, a claimant has the time within the ultimate limitation period running from the original act or omission to discover the legal problem and start a lawsuit.

The Green Paper asked about shifting from the accrual model to the act or omission model of commencement in the running of the ultimate limitation period. The majority of respondents favoured the act or omission commencement model. Reasons cited by these stakeholders included greater certainty in the law, a reduced likelihood of litigation, the avoidance of protracted negligence claims, and the opportunity to harmonize B.C.'s law with other modernized limitations laws in Canada.

While supporting reform of the accrual model, some stakeholders suggested alternate dates to start the clock running in the ultimate limitation period; architects suggested that time should run from "occupancy" of a project for construction-related claims.⁵⁷ A similar suggestion was put forward in the Position Paper authored by the Architectural Institute of British Columbia, the Association of Professional Engineers and Geoscientists of British Columbia, the Consulting Engineers of British Columbia and the Institute of Chartered Accountants of British Columbia. They recommended the ultimate limitation period run from the wrongful act, or in the case of a construction defect, from completion of construction of the project.⁵⁸ Natural resource management professionals suggested that the ultimate limitation period should run from "the

⁵⁶ AB Act, Above Note 24, s. 3(3); SK Act, Above Note 18, s. 7(1); ON Act, Above Note 18, s. 15(2); NB Act, Above Note 19, s.5(1)(b); ULCC Act, Above Note 10, s. 6(2).

⁵⁷ Submission of the Architectural Institute of British Columbia to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 20, 2007 [AIBC Submission]; Submission of the Canadian Home Builders Association of B.C. to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 23, 2007 [CHBABC Submission].

⁵⁸ Joint Submission of the Architectural Institute of British Columbia, Association of Professional Engineers and Geoscientists of British Columbia, Consulting Engineers of British Columbia, and Institute of Chartered Accountants of British Columbia, "Position Paper: The Ultimate Limitation Period," dated March 2007 [Joint AIBC Submission].

issuance of a certificate or instrument equivalent to that of substantial completion,” noting that the end dates of projects in their industry are not so easily defined.⁵⁹

A minority of respondents were opposed to the act or omission model. One respondent, the Law Society of British Columbia, viewed commencement of the ultimate limitation period as the critical issue with respect to protecting the public interest and was strongly opposed to abandoning the accrual model. The Law Society commented that:

*To set the ULP from the date of the act or omission has the effect of rewarding defendants whose acts or omissions cause damage down the road, over those defendants whose acts or omissions result in immediate harm. ...The effect would be to provide a benefit to those who insulate buildings with cancer-causing agents, don't recall defective products because cost exceeds the risk, build leaky condominiums, etc., at the expense of those who suffer harm as a result of such acts or omissions.*⁶⁰

The Law Society further stated: “Creating a limitation model that extinguishes rights before those rights exist at law favours certainty over fairness: while this may increase profitability for many actors, it serves to diminish access to justice.”⁶¹

Striking an appropriate balance between finding fairness for potential plaintiffs as well as for potential defendants is an important, but difficult, law reform goal. As regards the ultimate limitation period, the ability to balance competing sets of rights depends not only on the choice of commencement model, but also on the duration of the time period.

Responding to stakeholders’ suggestions for different commencement dates based on the type of industry-related claim by creating a separate model of commencement would be contrary to the reform goals of creating simplicity and internal consistency within the new Act. However, it is acknowledged that using “act or omission” as a trigger to start the clock will not eliminate all difficulties as not all claims fit easily within this model. It is proposed that B.C. move to an act or omission commencement model in order to clarify when time starts running in the ultimate limitation period, but also include within the model a provision that sets out when the ultimate limitation period starts to run for certain types of claims that do not fit easily within the model. A detailed discussion of when the ultimate limitation period starts to run for certain types of claims follows, at page 49.

⁵⁹ Joint Submission of the Association of British Columbia Professional Foresters, Association of Professional Biologists of British Columbia, British Columbia Institute of Agrology, and College of Applied Biology to the Green Paper on Reforming British Columbia’s *Limitation Act* (February 2007), dated April 2007 [Joint ABCPF Submission].

⁶⁰ Submission of the Law Society of British Columbia to the Green Paper on Reforming British Columbia’s *Limitation Act* (February 2007), dated July 13, 2007, at 3 [Law Society Submission].

⁶¹ *Ibid.* at 4.

2. Duration of the Ultimate Limitation Period

Single Ultimate Limitation Period

The current Act contains a general ultimate limitation period of 30 years.⁶² The duration of ultimate limitation periods in the modernized laws and the ULCC's model statute are much shorter. Each contains an ultimate limitation period of either 10 or 15 years. A comparison of other jurisdictions is set out in the table below.

	Commencement Model	Ultimate Limitation Period
British Columbia	accrual	<ul style="list-style-type: none"> • 30-year ultimate limitation period & special six-year medical ultimate limitation period
Alberta	act or omission	<ul style="list-style-type: none"> • single 10-year ultimate limitation period (although the Alberta Law Reform Institute had recommended 15 years, rejecting 10 years as too short⁶³)
Saskatchewan	act or omission	<ul style="list-style-type: none"> • 15-year general ultimate limitation period • two-year ultimate limitation period for conversion claims against a purchaser of property for value and for wrongful death claims
Ontario	act or omission	<ul style="list-style-type: none"> • 15-year general ultimate limitation period • two-year ultimate limitation period for conversion claims against purchaser of personal property for value acting in good faith
New Brunswick	act or omission	<ul style="list-style-type: none"> • 15-year general ultimate limitation period • two-year ultimate limitation period for conversion claims against purchaser of personal property for value acting in good faith • [in other conversion cases, the earlier of two-year basic limitation period (runs from discovery) and 15-year ultimate limitation period] • 15-year ultimate limitation period for recovering principal of a secured debt (from the day the security is taken)
ULCC	act or omission	<ul style="list-style-type: none"> • single 15-year ultimate limitation period

The length of B.C.'s 30-year ultimate limitation period has been repeatedly criticized over the years. Comments provided by law reformer Arthur Close, QC, who was the principal author of the British Columbia Law Reform Commission's 1974 report on limitations, indicated that in 1975

⁶² BC Act, Above Note 1, s. 8(1)(c).

⁶³ Alberta Law Reform Institute, *Limitations*, Report #55, (Dec. 1989) at 35, online: University of Alberta <http://www.law.ualberta.ca/alri/docs/FR55.pdf> (last accessed: May 10, 2010).

there were few precedents to provide guidance on selecting the duration of the ultimate limitation period. Those that did exist contemplated very long periods of time. In his words: “It soon became evident, however, that in large numbers of cases, the 30-year period was much longer than necessary and potentially mischievous.”⁶⁴

The British Columbia Law Reform Commission, in its 1990 report on the ultimate limitation period, commented that since the enactment of the Act, the number of reported cases containing a span of time between material events and the start of a legal action were very few.⁶⁵ Its successor, the British Columbia Law Institute, in its 2002 report on the ultimate limitation period, reasoned that a 30-year ultimate limitation period is “far too long,” resulting in inadequate protection to defendants. The British Columbia Law Institute argued that the “uncertainty inherent in such a lengthy period weakens the limitations system, while the eventuality for which it provides is unlikely to materialize in all but a minority of cases.”⁶⁶ The law reform body recommended reducing the general ultimate limitation period to 10 years, saying that this “would create a greater certainty in limitations law and provide a reasonable balance between the interests of plaintiffs, defendants and society.”⁶⁷

The Green Paper summarized the arguments for reducing the ultimate limitation period, and asked whether British Columbia limitations law should have a single ultimate limitation period of 10 years. This question was by far the most strongly debated of all the questions posed in the Green Paper. Almost every respondent discussed the issue of a single ultimate limitation period in their submissions.

Ninety-three percent of external respondents supported a 10-year ultimate limitation period. That is, the vast majority of respondents supported a reduction of the ultimate limitation period from 30 to 10 years. Reasons cited by stakeholders largely paralleled those discussed in the Green Paper:

- It represents an appropriate limit on the liability exposure of potential defendants. In the case of local governments who are also concerned about joint and several liability in construction cases, this translates into an improved ability to protect scarce community resources. It would also result in reduced record-keeping and insurance costs, savings which could be passed along to consumers.

⁶⁴ Arthur L. Close, Q.C., “British Columbia Developments,” *The New Ontario Limitations Regime: Exposition and Analysis* (Ontario Bar Association: Toronto, 2005) at 232 [A. Close Article].

⁶⁵ Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* March 1990 (LRC 112) at 31, online: BCLI http://www.bcli.org/sites/default/files/LRC112-Ultimate_Limitation_Period.pdf (last accessed: May 10, 2010) [BCLRC 1990 Report].

⁶⁶ British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (July 2002) BCLI Report 19 at 6 and 7, online: <http://www.bcli.org/sites/default/files/UltimateLimit.pdf> (last accessed: May 10, 2010) [BCLI 2002 Report].

⁶⁷ *Ibid.* at 8.

- There is ongoing concern in the building design and construction industry about escalating insurance rates and diminishing scope of coverage. The reduction would make insurance more readily available, and reduce insurance costs, which is of benefit to both the insured and society as a whole.
- A single 10-year ultimate limitation period would ensure consistency amongst health care professionals (e.g., the same ultimate limitation period would apply to dentists who attend at hospitals as well as to doctors).
- It would solve current difficulties associated with stale-dated claims.
- It would harmonize B.C.'s limitations law with those found in other modernized provinces with which British Columbia has the greatest economic connections.
- It would make the law and liability more predictable, providing more certainty for businesses.
- It follows the recommendations of various Canadian law reform bodies.
- It would be good for B.C.'s economy and would enhance B.C.'s overall competitiveness.
- A 10-year period would fit with home owner warranties under the *Home Owner Protection Act*.

Those opposed to a reduction of the 30-year ultimate limitation period to 10 years included a consumer organization representing the interests of B.C.'s housing consumers and the Coalition Against No-Fault.⁶⁸ These respondents argued that in latent discovery cases injustices could occur, such as in cases where a claim is not discovered until after the expiry of a 10-year ultimate limitation period. Several examples were provided. These included cases in which people contract serious or fatal illnesses after being infected with viruses with long incubation periods, with symptoms which are not detected during the length of the ultimate limitation period. Another example included cases where people use prescription drugs before the drugs are adequately tested and later develop serious or fatal illnesses but do not "discover" their claim until after adequate research is conducted, after the expiry of the ultimate limitation period.

Other respondents to the Green Paper noted that 10 years is an insufficient amount of time to discover claims involving complex fraud.

While the Green Paper did not propose a 15-year ultimate limitation period, and, therefore, did not ask stakeholders to state a preference between either a 10 or 15-year ultimate limitation period, some stakeholders shared their opinion on the issue:

⁶⁸ Submission of the Consumer Advocacy and Support for Homeowners (CASH) Society to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), "Reforming BC's *Limitation Act*: The Abandonment of the Public Interest and Social Responsibility," received April 23, 2007; Submission of the Coalition Against No-Fault in BC to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 23, 2007.

- Condominium owners were opposed to a 20-year reduction to the general ultimate limitation period. One condominium organization thought that a 15-year ultimate limitation period struck a fairer balance than 10 years.⁶⁹
- The Law Society of British Columbia preferred a 15-year ultimate limitation period.⁷⁰
- Architects, local governments, the Canadian Home Builders Association of British Columbia, the Building Officials Association of British Columbia and the urban development industry and its related professions strongly preferred a 10-year ultimate limitation period, as did other professionals such as dentists, engineers, chartered accountants, professionals in the natural resource management field, and geoscientists.⁷¹
- The Insurance Brokers Association of British Columbia and the Insurance Bureau of Canada were supportive of a 10-year ultimate limitation period.⁷²

It is acknowledged that the proposal to change the commencement model, combined with a reduction in the ultimate limitation period, means that it is possible for the clock in the ultimate limitation period to finish running before a potential claimant could start a lawsuit in a few cases. The shorter the ultimate limitation period, the more likely this could be a problem.

The Law Society of British Columbia, in its submission on the Green Paper, wrote that the combination of the proposals to eliminate the accrual model of commencement and move to a single 10-year ultimate limitation period will increase the likelihood of otherwise valid legal claims becoming time-barred. The Law Society expressed particular concern for two groups of potential plaintiffs: purchasers of real property in expensive housing markets who could be denied a reasonable opportunity to pursue a latent damage claim (e.g., leaky condo problems)

⁶⁹ Submission of the Condominium Home Owners' Association of BC to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), received April 23, 2007.

⁷⁰ Law Society Submission, Above Note 60, at 2.

⁷¹ AIBC Submission, Above Note 57; Joint AIBC Submission, Above Note 58; CHBABC Submission, Above Note 57; Joint Submission of the College of Dental Surgeons of BC and the BC Dental Association to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 30, 2007; Submission of the Urban Development Institute – Pacific Region to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 23, 2007; Submission of the Building Officials Association of British Columbia to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 18, 2007; Joint Submission of the College of Applied Biology, Association of Professional Biologists of BC, British Columbia Institute of Agrology, and the Association of BC Forest Professionals to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April, 2007, along with individual form letters from architects and local governments in British Columbia.

⁷² Submissions of the Insurance Brokers Association of British Columbia and the Insurance Bureau of Canada to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 23, 2007 and April 20, 2007, respectively.

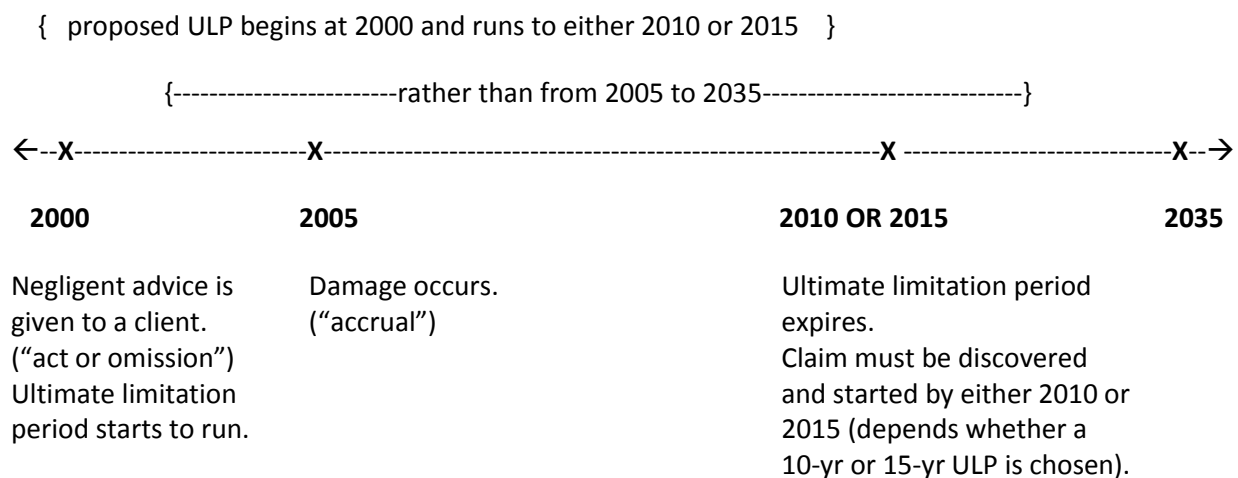
and aging baby boomers who could have health care issues as a result of exposure to products or work environments that may cause illnesses that may not show up until late in life.⁷³

As a result of the feedback received during the consultation period, the ministry continues to review the duration of the ultimate limitation period. While it is still proposing that time start to run in the ultimate limitation period from the act or omission rather than from accrual of the cause of action, it is proposing that the general ultimate limitation period be reduced from 30 years to either 10 or 15 years. Feedback from the White Paper will be considered in finalizing the duration of the ultimate limitation period for the legislation.

To further ameliorate unfairness caused in some latent discovery cases while still balancing the interests of both plaintiffs and defendants, the proposed reforms will also include a number of postponement mechanisms that will suspend limitation periods for all claims involving fraud, wilful concealment, and for undiscovered environmental claims. (See discussion in the sections on “Special Postponement Rules” and “Exemptions” below.)

An illustration of the reforms to the commencement model and duration of the ultimate limitation period is set out below.

Proposed Act or Omission Model with Either a 10- or 15-Year Ultimate Limitation Period



⁷³ Law Society Submission, Above Note 60, at 3.

Recommended Reform:

Reduce the general ultimate limitation period from 30 years to either 10 or 15 years. The ultimate limitation period will start to run from the date of the act or omission giving rise to the claim.

Please note the draft legislative provision dealing with all of the reforms to the ultimate limitation period is set out at the end of the discussion of “The Ultimate Limitation Period” at pages 51 to 52.

Question:

- 3) Should the new Act create a single ultimate limitation period of 10 or 15 years? Please explain the reasons for your choice.

3. Special Ultimate Limitation Periods

Special ultimate limitation periods add complexity to limitations laws. However, they may be necessary to ensure an appropriate balance between potential claimants and defendants in special situations. The next two sections consider this issue in more detail.

Medical Practitioners, Hospitals, and Hospital Employees

The current Act contains a special six-year medical ultimate limitation period that draws a distinction based on occupation. The six-year ultimate limitation period applies to hospitals, hospital employees acting in the course of their employment, and medical practitioners for certain types of legal claims, such as negligence or malpractice.⁷⁴ All other health care workers who are not “hospital employees” or “medical practitioners,” such as chiropractors, optometrists or naturopaths, are governed by the general 30-year ultimate limitation period.⁷⁵ The general 30-year ultimate limitation period applies to all other professionals, including lawyers, dentists, architects and engineers.⁷⁶

In its discussion of the six-year medical ultimate limitation period, the Green Paper noted that none of the modernized Canadian laws or the ULCC’s model law contains a special shortened ultimate limitation period for medical claims.⁷⁷ This means that doctors, hospitals and hospital employees are subject to the same ultimate limitation period as all other defendants (i.e., 10 years in Alberta, and 15 years in Saskatchewan, Ontario and New Brunswick.) The Green Paper also pointed out that two independent law reform reports recommended the elimination of the

⁷⁴ BC Act, Above Note 1, ss. 8(1)(a) and (b).

⁷⁵ *Ibid.*, s. 8(1)(c).

⁷⁶ *Ibid.*

⁷⁷ Green Paper, Above Note 9 at 6.

six-year ultimate limitation period.⁷⁸ In the most recent of these, the British Columbia Law Institute's 2002 report, the law reform body summarized the arguments in support of retaining the six-year ultimate limitation period as including: economic costs (i.e., that an increase in the ultimate limitation period would translate into an increase in record retention costs, as well as costs for defending increased medical claims and rising insurance rates), number of claims, and problems regarding the appropriate assessment of the standard of care.⁷⁹ The British Columbia Law Institute went on to discredit each of these arguments. A summary is included below.

The argument for retaining the six-year ultimate limitation period to avoid increased economic costs includes three "costs": record retention costs, legal fees to defend medical claims, and insurance rates. The British Columbia Law Institute's report noted that while limitations law is premised, in part, on the need to limit the duration of time that evidence must be preserved,⁸⁰ the argument to retain the six-year ultimate limitation period based on record retention costs is flawed. Under the existing law, some medical records must already be retained longer than six years due to factors other than limitation periods.⁸¹ In addition, as will be discussed below, the current commencement model for the ultimate limitation period has the practical result of extending the total duration of time that a doctor or hospital may need to retain records for much longer than six years. The British Columbia Law Institute also noted that the increase in the number of medical claims caused by changes to the ultimate limitation period will be slight because most cases are either settled, abandoned, completed without a limitations defence or time-barred by virtue of the basic limitation period.⁸² The law reform body further commented that an increase in insurance rates is significantly affected by the growing size of court awards and settlements rather than the length of limitation periods.⁸³

In its discussion of the special ultimate limitation period, the British Columbia Law Institute conceded that eliminating the special six-year ultimate limitation period could result in a slight increase in the number of claims against medical professionals but noted that "concerns about additional claims need to be considered in the context of the overall objectives of a limitations scheme."⁸⁴ This is examined in more detail below.

⁷⁸ BCLRC 1990 Report, Above Note 65 at 31 and 61; BCLI 2002 Report, Above Note 66 at 8 and 16.

⁷⁹ BCLI 2002 Report, Above Note 66 at 11-16.

⁸⁰ *Ibid.* at 11, citing *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 29.

⁸¹ *Ibid.* at 11.

⁸² *Ibid.* at 13, citing the Alberta Institute of Law Research and Reform, *Discussion Paper No. 4: Limitations* (1986) at 156, online: University of Alberta <http://www.law.ualberta.ca/alri/docs/rfd004.pdf> (last accessed: May 10, 2010).

⁸³ *Ibid.* at 13.

⁸⁴ *Ibid.* at 14.

Research confirms the analysis of the British Columbia Law Institute; namely, the vast majority of medical cases are dealt with under the two-year basic limitation period. It is only in rare cases that the six-year ultimate limitation period comes into play to bar the claim.⁸⁵

Currently, personal injury lawsuits, including medical malpractice cases, have a two-year basic limitation period that starts to run from discovery.⁸⁶ The six-year ultimate limitation period in medical malpractice or in other hospital-related negligence cases starts to run from the accrual of the medical negligence claim (i.e., the date damage occurs).⁸⁷ For most medical negligence claims, discovery coincides with the date of damage, which means that the two-year basic limitation period and the six-year ultimate limitation period start to run on the same date.

It is rare for damage to occur and not be discovered by the injured patient within six years. Only where the patient has not realized his or her injury within six years from the date of damage will the special medical ultimate limitation period bar the claim.⁸⁸

The last argument that the British Columbia Law Institute considered in its analysis of whether to keep a six-year ultimate limitation period was that involving the application of the standard of care. Medical professionals have argued that a shorter ultimate limitation period for doctors and hospitals is justified as the medical field advances rapidly, which makes it difficult for judges to determine the applicable standard of care in cases involving past conduct. The law reform body countered this argument on two fronts. First, judges are asked to make difficult analyses on a regular basis, including determining what the appropriate standard of care was at the time of the incident. While it may be difficult for a trier of fact from today to judge the reasonableness of conduct which occurred many years ago in “light of the knowledge that ought to have been reasonably possessed at the time of the alleged act,” this is what the law

⁸⁵ A Quicklaw search of reported cases involving medical negligence claims that were statute-barred by the six-year medical ultimate limitation period resulted in four cases: *Mahli v. Brown*, [1996] B.C.J. No. 874 (Prov. Ct.), online: QL (BCJ); *Birrell v. Providence Health Care Society (c.o.b. Providence Health Care)*, [2009] B.C.J. No. 488 (C.A.), online: QL (BCJ); *Wittman (Guardian ad litem of) v. Emmott*, [1991] B.C.J. No. 91 (C.A.), online: QL (BCJ) and *Clover v. Hurley*, [1993] B.C.J. No. 291 (C.A.), online: QL (BCJ).

⁸⁶ BC Act, Above Note 1, ss. 3(2) and 6(3)(a).

⁸⁷ *Ibid.*, ss. 8(1) (a) and (b).

⁸⁸ This fact pattern was considered by the Supreme Court of Canada in *Novak v. Bond* (1999), 172 D.L.R. (4th) 385 (S.C.C.). In this case, the Court considered the postponement provisions in British Columbia’s *Limitation Act*. A doctor failed to diagnose a plaintiff’s breast cancer between 1989 and 1990. In October 1990, a second doctor diagnosed the patient’s breast cancer, but the patient did not sue the former doctor at that time as she wanted to focus on maintaining her health. In 1995, the breast cancer returned. This prompted the plaintiff to commence a medical negligence claim against her former doctor in April 1996. The majority of the Court found that the plaintiff’s claim was discovered when the cancer recurred in 1995 and that the plaintiff had acted reasonably by focussing on her health, rather than commencing a proceeding prior to that time. The ultimate limitation period started to run in October 1990, when the breast cancer was diagnosed. As a result, the plaintiff’s claim was in time.

says must happen.⁸⁹ Second, rapid advances are not unique to the medical profession.⁹⁰ There are many professionals with rapidly evolving standards of care that do not have their own special ultimate limitation period.

It is also important to note the effect of other reforms on the ultimate limitation period. If the commencement model changes to have the ultimate limitation period run from the negligent act or omission rather than when damage occurs, this could mean that the ultimate limitation period in medical negligence cases involving latent damage would start at an earlier point under the new law than under the current law. Medical defendants' exposure to liability must be examined in light of the two inter-connected reforms: duration and commencement of the ultimate limitation period. Several examples follow to illustrate the effect of the proposed reforms. In order to not overly confuse readers, the examples assume the proposed reform to the duration of the ultimate limitation period to be 15 years, rather than setting out either 10 or 15 years.

Example 1: Immediate Damage and Discovery

Under the current Act, a nurse in a hospital gives an injection in 2020, and the patient immediately discovers a problem. Discovery and damage coincide so the two-year basic limitation period and the six-year ultimate limitation period run from the same point: 2020. The basic limitation period expires in 2022 so the patient must start a lawsuit by then. The ultimate limitation period does not come into play. This is what happens in most cases.

CURRENT ACT

(X) Injection		
(X) BLP starts	(X) BLP expires	
2020	2022	2026
(X) ULP starts		(X) ULP expires

Assume (for the purposes of this example only) the new Act is effective in 2012 with a 15-year ultimate limitation period. Under the new Act, the same result will occur. The claim will be barred two years after the injection (i.e., after the expiry of the two-year basic limitation period) in 2022. Discovery and the injection coincide so the basic and ultimate limitation periods run from the same point: 2020. The length of the ultimate limitation period is irrelevant because it does not come into play.

⁸⁹ BCLI 2002 Report, Above Note 66 at 14 and 15, citing *Roe v. Ministry of Health*, [1954] 2 All E.R. 131 (C.A.), at 137; *Wilson v. Swanson*, [1956] S.C.R. 804 at 817, 5 D.L.R. (2d) 113; *McCormick v. Marcotte*, [1972] S.C.R. 18, 20 D.L.R. (3d) 345; *Lapointe v. H'pital Le Gardeur*, [1992] 1 S.C.R. 351, 90 D.L.R. (4th) 7; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at 693, 127 D.L.R. (4th) 577 at 589.

⁹⁰ BCLI 2002 Report, Above Note 66 at 15.

NEW ACT

(X) Injection		
(X) BLP starts	(X) BLP expires	
2020	2022	2035
(X) ULP starts		(X) ULP expires
	(no change in exposure)	

Example 2: Latent Damage and Discovery

If the facts are changed so that both the damage caused by the injection given in 2020 and the patient’s discovery of the problem do not occur until 2034, the current Act would allow the patient to launch a lawsuit until 2036, 16 years after the injection. As in Example 1, discovery and damage coincide so the two-year basic limitation period and the six-year ultimate limitation period start at the same point (i.e., 2034, 14 years after the injection). As noted above, under the accrual model of commencement, the six-year ultimate limitation period does not start to run until all of the elements of the negligence claim have arisen. Because damage is an element of negligence, this means the special six-year ultimate limitation period does not run until damage occurs.

CURRENT ACT

(X) Injection	(X) BLP starts	(X) BLP expires	
2020	2034	2036	2040
	(X) ULP starts		(X) ULP expires

Assume (for the purposes of this example only) that the new Act is effective in 2012 with a 15-year ultimate limitation period. Using the same fact pattern as above, the new Act would result in reduced exposure to liability. This is due to the reformed commencement model which would start the clock in the ultimate limitation period from the relevant act (i.e., 2020, the date of the injection), rather than from the date of damage. The two-year basic limitation period would run from discovery (2034), but the proposed 15-year ultimate limitation period would cap the window in which to sue the nurse in 2035, 15 years from the date of the injection. This is one year less than under the current law.

NEW ACT

(X) Injection	(X) BLP starts	(X) BLP expires	
2020	2034	2035	2036
(X) ULP starts		(X) ULP expires	
		[-----] (reduction in exposure)	

Example 3: Damage First, Discovery Later

This final example deals with cases where the date of damage and discovery do not overlap. The hospital nurse gives the injection in 2020. If the problem caused by the injection does not develop until 2025 and is not discovered by the patient until 2030, the special six-year ultimate limitation period will run from the accrual of the negligence; that is, from the date of damage in 2025, and will bar the lawsuit in 2031. The two-year basic limitation period will not start running until the patient realizes that the injection has caused a problem; that is, it will start running at 2030, but it will be cut short due to the expiry of the ultimate limitation period in 2031.

CURRENT ACT

(X) Injection		(X) BLP starts	(X) BLP expires		
2020	2025	2030	2031	2032	2035
	(X) ULP starts		(X) ULP expires		

Assume (for the purposes of this example only) that the new Act is effective in 2012 with a 15-year ultimate limitation period. Under the new law, the patient would have one additional year to sue. The two-year basic limitation period would start to run upon the patient learning of the problem (i.e., 10 years after the injection, in 2030); however, the basic limitation period would not be capped by the ultimate limitation period. The basic limitation period would expire in 2032. Although the reformed 15-year ultimate limitation period would start running at an earlier point in the new law (i.e., from the date of the injection in 2020, rather than from the date of damage in 2025), it would not expire until 2035. This means that under the new law, the patient would have 12 years after the date of the date of the injection to sue, rather than 11.

NEW ACT

(X) Injection		(X) BLP starts	(X) BLP expires		
2020	2025	2030	2031	2032	2035
	(X) ULP starts		[-----]		(X) ULP expires
			(increase in exposure)		

The legislative history of section 8 of the current Act shows the ongoing debate on the issue of a special ultimate limitation period. When it was enacted in 1975, the Act provided a 10-year ultimate limitation period for negligence and malpractice actions against medical practitioners and hospitals.⁹¹ However, in 1977, the Legislature amended the Act, reducing the 10-year

⁹¹ The version of Bill 8: *Limitation Act* that was introduced at First Reading provided a single 30 year ultimate limitation period. Section 8 was amended at Third Reading to include a special 10 year ultimate limitation period

ultimate limitation period to six years and expanding its application to also include hospital employees acting in the course of their employment.⁹²

Previously, dentists obtained approval from the legislature for a change to their ultimate limitation period from 30 years to 10 years. An amendment to the Act was drafted and received Royal Assent in 2000. However, the amendment has not been brought into force, pending this review.⁹³ For years, dentists have argued that the current Act creates an inconsistency between dentists and medical and other professionals employed within the hospital system: dentists are governed by the general 30-year ultimate limitation period, while doctors, hospitals and hospital employees are governed by a special six-year ultimate limitation period.

The Green Paper discussed eliminating the special six-year ultimate limitation period, and asked whether the new Act should create a single ultimate limitation period of 10 years. Medical stakeholders were opposed to the idea of eliminating the six-year medical ultimate limitation period, arguing that an extension would create some hardship for potential defendants in medical malpractice actions. As well as echoing the arguments in favour of the *status quo* that were discussed by the British Columbia Law Institute report referenced above, the British Columbia Medical Association noted that an increase to the ultimate limitation period could increase physicians' potential exposure in situations which are out of their control, such as surgery wait lists which are the direct result of government funding. They argued that this could result in an increased risk to physicians of being sued for failure to provide timely care than under the current regime.⁹⁴

While opposed to an increase in the duration of the ultimate limitation period, medical stakeholders were generally in support of moving to an act or omission model of commencement. One stakeholder reasoned that this model should provide a more certain commencement date, and might prevent protracted negligence claims from being brought against physicians. However, the British Columbia Medical Association was less definitive; they noted that they have not been able to determine the potential net impact on claims against physicians of the proposed reforms to both increase the duration of the ultimate limitation period and change the commencement model to start time running from the act or omission.⁹⁵

for doctors and hospitals. This version of section 8 was included in the *Limitation Act* which was brought into force on July 1, 1975.

⁹² *Miscellaneous Statutes Amendment Act, 1977*, S.B.C. 1977, c. 76, s.19(a).

⁹³ *Miscellaneous Statutes Amendment Act (No. 2)*, 4th Sess., 36th Parliament, British Columbia, 2000, c. 20 (assented to 6 July, 2000).

⁹⁴ Submission of the British Columbia Medical Association to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 19, 2007 at 2.

⁹⁵ *Ibid.*

It is proposed that the reforms discussed in the Green Paper go ahead and the six-year special medical ultimate limitation period be eliminated. Increasing the ultimate limitation period to either 10 or 15 years will only slightly increase the number of claims against medical professionals and institutions than under the current regime. Under the new Act, there will be no change to exposure for defendants in medical negligence claims where damage and discovery overlap, as a two-year basic limitation period will continue to apply.

The proposed change to eliminate the special six-year ultimate limitation period, combined with changing the commencement model to start the ultimate limitation period running from the date of the act or omission, meets the overall objectives of reform. Any concerns about additional medical negligence claims should be considered in the context of these overarching objectives: to simplify the law and to promote internal consistency within the Act.

Reforms will simplify the law by ensuring that all defendants in negligence cases face the same ultimate limitation period, and it will provide defendants with greater certainty as to when the ultimate limitation period commences. Reforms will promote internal consistency by moving to a single ultimate limitation period and reformed commencement model, which is an attempt to find a balance between the rights of potential plaintiffs and the rights of potential defendants that is most fair for everyone. The proposal takes into account the interests of plaintiffs who, without the elimination of the special six-year ultimate limitation period, would be prejudiced by the proposed reform to commencement alone. In addition, the reform reflects the approach taken in provinces with modernized limitation statutes and by the ULCC.⁹⁶

Recommended Reform:

It is recommended that the special six-year medical ultimate limitation period be eliminated so that all potential defendants in cases involving negligence, professional negligence or medical malpractice are subject to the same ultimate limitation period of either 10 or 15 years.

Comment:

Eliminating the special six-year ultimate limitation period is consistent with the approach taken in modernized limitations laws and will serve to simplify the law in British Columbia. As well, it will bring greater fairness to plaintiff and defendant groups.

⁹⁶ AB Act, Above Note 24, s. 3(1)(b); SK Act, Above Note 18, s. 7(1); ON Act, Above Note 18, s. 15(2); NB Act, Above Note 19, s.5(1)(b); ULCC Act, Above Note 10, s. 6(2).

Conversion Claims against a Good Faith Purchaser for Value

A lawsuit for conversion is a claim for damages by a property owner against someone who wrongfully took, used or destroyed the property. In other words, the defendant converted the property to his or her own use, retained possession of the property, or otherwise interfered with it.⁹⁷ Examples of conversion include:

- a person cuts down trees for his or her own use that are on someone else's property;
- a person finds a wedding ring on the bus and does not respond to requests from the owner to return it; or
- a person steals a painting from an art gallery and sells it on the black market.

Currently, an action for conversion has a six-year basic limitation period and 30-year ultimate limitation period.⁹⁸ However, pursuant to section 10 of the Act, where a further or new conversion occurs, an outside six-year limitation period applies.⁹⁹ This means there is a six-year ultimate limitation period for cases involving two or more conversions, running from the first conversion.

Example:

In 2000, thief #1 breaks into Mr. Smith's home and steals his wedding ring (first conversion). The ring is purchased by a pawnshop owner for \$10 in 2004 (second conversion). The ring is stolen from the pawnshop owner by thief #2 in 2005 (third conversion). Thief #2 then sells the ring to an innocent shopper (i.e., the good faith purchaser for value) in 2007. Under the current Act, the ultimate limitation period starts to run in 2000, from the date of the first conversion. This means Mr. Smith would have until 2006 to discover that his ring had been stolen and sue for conversion. As the innocent shopper did not get involved until 2007, after the expiry of the outside six-year limitation period set out in section 10 of the current Act, Mr. Smith cannot sue him.

If the principle in section 10 (which establishes the six-year ultimate limitation period for cases involving multiple conversions) is not carried forward into the new Act, the proposed 10 or 15-year ultimate limitation period will apply to all conversion claims and it may be unclear as to

⁹⁷ See Lloyd Duhaime, *Duhaime Legal Dictionary*, online: <http://duhaime.org/legaldictionary/C/Conversion.aspx> (last accessed: April 8, 2010), s.v. "conversion": "The action of conversion is a common law legal proceeding for damages by an owner of property against a defendant who came across the property and who, rather than return the property, converted that property to his own use or retained possession of the property or otherwise interfered with the property." See also Gerald H.R. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 135: "Conversion consists in a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner. It is an intentional exercise of control over a chattel which seriously interferes with the right of another to control it."

⁹⁸ BC Act, Above Note 1, ss. 3(6)(c) and 8(1)(c).

⁹⁹ *Ibid.*, s. 10.

when that ultimate limitation period starts to run. Without a clarification, one could argue that the ultimate limitation period starts to run after the last conversion rather than the first. If the property is converted again and again, the clock would not start until the very last conversion. This could potentially result in a good faith purchaser facing a conversion lawsuit that dated back more than 10 or 15 years.

One possible option for reform is to include a special two-year ultimate limitation period for conversion claims against a purchaser in good faith, following the model of the modernized statutes in Saskatchewan¹⁰⁰ and Ontario.¹⁰¹ These statutes protect good faith purchasers by only allowing a claimant to sue the good faith purchaser two years “from the day on which the property was converted.” Mr. Smith would have only two years from the conversion to start a lawsuit regarding his wedding ring. However, applying that wording to the above example, it is unclear what date “the property was converted,” as there is more than one conversion. Does Ontario and Saskatchewan’s law run from the first or last conversion? There is no case law to clarify this issue.

Inclusion of a special two-year ultimate limitation period for conversion claims against good faith purchasers may add complexity to the law. It may also result in unfairness to potential claimants who do not discover that their property has been converted for more than two years, causing them to be time-barred from suing defendants who are good faith purchasers.

Another option for reform would be to retain the principle from existing section 10 and clarify that in cases involving more than one conversion, the ultimate limitation period runs from the date of the first conversion. The 10 or 15-year ultimate limitation period and two-year basic limitation period would apply to conversion claims in the same way as all other claims. This would satisfy the objectives of reform, namely, to simplify the Act and to strike an appropriate balance between future claimants and defendants.

It is proposed that the latter option apply and that the new Act clarify that the ultimate limitation period runs from the date of the first conversion. The draft legislation embodying this reform is set out below.

Existing section 10 also addresses cases involving multiple detentions of goods. Some places have abolished this archaic type of lawsuit, also known as the tort of detinue.¹⁰² It is proposed that the reform only apply to conversion claims, and that the reference to cases involving multiple detentions of goods not be carried forward.

¹⁰⁰ SK Act, Above Note 18, s. 7(2).

¹⁰¹ ON Act, Above Note 18, s. 15(3).

¹⁰² See *Wikipedia*, Property Torts, online: http://en.wikipedia.org/wiki/List_of_basic_tort_law_topics (last accessed April 23, 2010). See also England’s *Torts (Interference with Goods Act)*, 1977, c. 32, s. 2 which abolishes detinue, online: UK Office of Public Sector Information http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1977/cukpga_19770032_en_1 (last accessed: May 10, 2010).

Recommended Draft Provision:

- 22 (2) For the purposes of this section and subject to section 32 [*regulations*], the day an act or omission on which any of the following claims is based takes place is,
- (c) in the case of a claim arising out of a conversion, the day on which the property was first converted by any person,

Comment:

This section sets out when the clock starts in all conversion claims: from the date of the first conversion. It is a compromise which protects good faith purchasers for value and other defendants from an undefined period of liability in cases involving late discovery on one hand while still allowing claimants a reasonable period of time in which to launch a conversion suit. This proposal puts some responsibility onto the subsequent good faith purchasers for value, encouraging them to act with due diligence before purchasing used property (e.g., by checking with the appropriate registries such as the Personal Property Registry, Manufactured Home Registry and British Columbia Assigned Vehicle Identification Number Registry).

Questions:

- 4) Should the new Act start the ultimate limitation period running from the first conversion, in order to provide some protection to good faith purchasers for value (or any other defendants) from an undefined period of liability in cases involving multiple conversions? Why or why not?
- 5) Should the new Act continue to refer to detention of goods lawsuits (also known as the tort of detinue)?

Continuous Acts or Omissions and Series of Acts or Omissions

The current Act does not clarify when the ultimate limitation period starts to run in cases involving a continuous act or omission or where there are a series of acts or omissions in respect of the same obligation. For example, a private nuisance claim in which a plaintiff's property is sporadically bombarded by golf balls overshooting a golf course green would involve a continuous nuisance.¹⁰³

It is proposed that the new Act clarify when the ultimate limitation period starts to run in such cases as they do not fit neatly into the act or omission model of commencement. For claims arising from a continuous act or omission, the ultimate limitation period will run from the day on which the act or omission ends. For claims arising from a series of acts or omissions in

¹⁰³ See *Segal v. Derrick Golf & Winter Club*, [1977] A.J. No. 424 (S.C.), online: QL (AJ).

respect of the same obligation, the ultimate limitation period will run from the day on which the last act or omission in the series occurs.

Recommended Draft Provision:

Ultimate limitation period

22(2) For the purposes of this section [*ultimate limitation period*] and subject to section 32 [*regulations*],

the day an act or omission on which any of the following claims is based takes place is,

- (a) in the case of a claim arising out of a continuous act or omission, the day on which the act or omission ceases,
- (b) in the case of a claim arising out 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,

Comment:

Subsections 22(2)(a) and (b) clarify when the ultimate limitation period commences in cases where there is a continuous act or omission or where there are a series of acts or omissions in respect of the same obligation.

4. Summary of Proposals Regarding the Ultimate Limitation Period

Each of the subjects discussed within this section on the ultimate limitation period are contained within the recommended draft provision in the shaded box below. In summary, the proposed reforms include:

- changing the commencement model of the ultimate limitation period to an act or omission model from an accrual model;
- reducing the 30-year general ultimate limitation period to either 10 or 15 years (not yet finalized), unless the new Act specifically exempts a claim from the application of the ultimate limitation period;
- eliminating the special six-year medical ultimate limitation period;
- ensuring the ultimate limitation period runs from the date of the first conversion (for multiple conversion cases); and
- ensuring claims involving continuous or a series of acts or omissions have the ultimate limitation period run from the date the act or omission ceases, or the date the last act or omission in a series occurs.

Recommended Draft Provision:

Ultimate limitation period

- 22(1)** Subject to Parts 4 and 5 [*factors affecting limitation periods, suspension of limitation periods*], even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than [either] 10 [or 15] years after the day on which the act or omission on which the claim is based took place.
- (2) For the purposes of this section and subject to section 32 [*regulations*], the day an act or omission on which any of the following claims is based takes place is,
- (a) in the case of a claim arising out of a continuous act or omission, the day on which the act or omission ceases,
 - (b) in the case of a claim arising out 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 claim arising out of a conversion, the day on which the property was first converted by any person, ...
 - (e) in the case of a claim referred to in section 13, 14, 15 or 16 [*discovery rules for: claims based on fraud or recovery of trust property, future interest in trust property, demand obligations, and to realize or redeem security*], the day on which the claim is discovered in accordance with that section, ...

Comment:

Subsection (1) sets out a general ultimate limitation period of either 10 or 15 years (not yet finalized), running from the day on which the act or omission on which the claim is based took place. This is a significant change from the current Act. The new Act reduces the general

ultimate limitation period from 30 years to either 10 or 15 years. It also eliminates the accrual model of commencement, meaning that time no longer runs from the point at which all of the individual elements of the legal claim are present but instead runs from the wrongful act or omission.

The 10-year or 15-year ultimate limitation period, combined with the act or omission commencement model, brings more certainty and simplicity to the Act and reduces the likelihood of stale-dated negligence claims. It also provides the greatest potential for harmonizing British Columbia's ultimate limitation period and commencement model with the other modernized limitations laws in Canada.

Subsection (2) sets out when the clock will start in different kinds of claims. It does so by specifying the relevant act or omission. This new addition will simplify the law by clarifying when the ultimate limitation period starts in situations that might not have fit neatly into the reformed commencement model.

IV. Special Postponement Rules

In addition to setting the time limits for people to take their legal problems to court once they have become aware of them, the current Act contains other special postponement rules that have the effect of suspending the running of time in both the basic and ultimate limitation periods. This section discusses two of these: postponement during legal disability and postponement during wilful concealment or wilfully misleading a claimant as to the appropriateness of court proceedings.

1. Legal Disability: Postponement During Minority or While an Adult Person is under a Disability

Under the current Act, the basic limitation period does not run while a person is a minor or an incapacitated adult.¹⁰⁴ In contrast, the ultimate limitation period does not run while a person is a minor, but it does run during adult incapacity.¹⁰⁵

The draft legislation set out on the following page follows the recommendations of the British Columbia Law Institute to continue the approach in the current Act with respect to legal disability.¹⁰⁶ That is, both types of legal disability will postpone the running of the two-year basic limitation period, but only minority will postpone the running of the 10- or 15-year ultimate limitation period. In cases where the plaintiff is an adult person under a disability, the 10- or 15-year ultimate limitation period will continue running against that person.

Special rules are proposed for cases that involve multiple episodes of adult disability (e.g., where the person with the claim goes in and out of a coma) where the basic limitation period starts, stops, and then starts again. It is proposed that in cases where an adult person's disability ends, the remaining basic limitation period is the longer of either the length of time the plaintiff had remaining in the basic limitation period prior to coming under a disability, or one year from the time the disability ceased.

It should be noted that the proposal differs from the approach taken by the ULCC's model statute and the limitations laws of Alberta, Saskatchewan and Ontario, which suspend both the basic and ultimate limitation periods during legal disability for both minors and adult persons under a disability.¹⁰⁷ However, it is consistent with the approach taken in the more recent

¹⁰⁴ BC Act, Above Note 1, s. 7.

¹⁰⁵ *Ibid.*, s. 8(1).

¹⁰⁶ BCLI 2002 Report, Above Note 66 at 24 – 26.

¹⁰⁷ ULCC Act, Above Note 10, s. 8(1); AB Act, Above Note 24, s. 5(1); SK Act, Above Note 18, s. 8(1)(b); ON Act, Above Note 18, s.15(4)(a).

statute from New Brunswick, which does not suspend the ultimate limitation period during an adult person's disability.¹⁰⁸

Recommended Draft Provisions:

Discovery rule for minors

- 19** A claim of a minor is discovered,
- (a) unless a notice to proceed is delivered under paragraph (b) before the minor attains the age of 19 years, on the later of the following:
 - (i) the day on which the minor attains the age of 19 years;
 - (ii) the day on which the claim is discovered under section 9, 13, 14, 15, 16, 17 or 18 [*general discovery rules and special rules for claims: based on fraud or recovery of trust property, for future interest in trust property, for demand obligations, to realize or redeem security, for contribution and indemnity, and persons claiming through predecessors and agents*], as the case may be, or
 - (b) the day on which a notice to proceed that complies with the requirements of section 21 (2) [*statutory requirements*] and any requirements prescribed under section 21 (6) [*regulatory requirements*] is delivered in accordance with section 21 (1) [*if claimant has a guardian, requirement to notify guardian and Public Guardian and Trustee*] and with any requirements prescribed under section 21 (6).

Discovery rule for persons under disability

- 20** A claim of a person under a disability is discovered,
- (a) unless a notice to proceed is delivered under paragraph (b) before the person ceases to be a person under a disability, on the later of the following:
 - (i) the day on which the person ceases to be a person under a disability;
 - (ii) the day on which the claim is discovered under section 9, 13, 14, 15, 16, 17 or 18 [*general discovery rules and special rules for claims: based on fraud or recovery of trust property, for future interest in trust property, for demand obligations, to realize or redeem security, for contribution and indemnity, and persons claiming through predecessors and agents*], as the case may be, or
 - (b) the day on which a notice to proceed that complies with the requirements of section 21 (2) [*statutory requirements*] and any requirements prescribed under section 21 (6) [*regulatory requirements*] is delivered in accordance with section 21 (1) [*if claimant has a guardian, requirement to notify guardian and Public Guardian and Trustee*] and with any requirements prescribed under section 21 (6).

¹⁰⁸ NB Act, Above Note 19, s. 18(1).

Ultimate limitation period

22(2) For the purposes of this section and subject to section 32 [*regulations*], the day an act or omission on which any of the following claims is based takes place is,

(g) in the case of a claim of a minor, on the earlier of the following:

(i) the day on which the minor attains the age of 19 years;

(ii) the day on which the claim is discovered under section 19 (b) [*when notice to proceed is delivered*].

(3) Despite sections 20 and 28 [*discovery rules for persons under disability and claimants who become persons under a disability*], the ultimate limitation period established by subsection

(1) [*claim must not be commenced more than [either] 10 [or 15] years after act or omission date*] in relation to a claim begins and continues to run whether or not the person with the claim is or becomes a person under a disability.

Comment:

Sections 19 and 20 set out the special discovery rules for minors and adult persons under a disability. Unless a notice to proceed is delivered, time will start to run in such claims as follows: for minors, the later of the day that person turns 19 years of age or the day that the claim is discovered, and for adult persons under a disability, the later of the day on which the disability ceased or the day that the claim is discovered.

If a Notice to Proceed is delivered in accordance with the Act, then the date of delivery starts the clock running.

Section 22 sets out when time begins to run in the ultimate limitation period for claims of minors, and subsection (3) indicates that the ultimate limitation period begins and continues to run whether or not the adult person with the claim comes under a legal disability (i.e., adult incapacity). This provision clarifies the law by removing any doubt about when potential liability will end. Most adults under a legal disability have a representative who is responsible for managing their affairs, including bringing and defending lawsuits, if necessary.

Recommended Draft Provisions:

Basic limitation period suspended if claimant becomes a person under a disability

28 (1) Subject to section 29, the basic limitation period established by Part 2 in relation to a claim

(a) is suspended if the person with the claim becomes a person under a disability, and

(b) does not run during any time in which that person continues to be a person under a disability.

(2) If the basic limitation period applicable to a claim has been suspended by subsection (1), the basic limitation period resumes running when the person with the claim ceases to be a person under a disability, and that basic limitation period is the longer of the following:

- (a) the length of time that, when the person with the claim became a person under a disability, remained to commence a court proceeding in respect of the claim;
- (b) one year from the time that the person with the claim ceased to be a person under a disability.

...

Ultimate limitation period

22 (3) Despite sections 20 and 28 [*discovery rules for persons under disability and claimants who become persons under a disability*], the ultimate limitation period established by subsection (1) [*claim must not be commenced more than [either] 10 [or 15] years after act or omission date*] in relation to a claim begins and continues to run whether or not the person with the claim is or becomes a person under a disability.

Comment:

This section suspends the basic limitation period during the time a claimant is an adult person under a disability. Once the legal disability ceases, the basic limitation period resumes running. The remaining basic limitation period is the longer of two periods: the length of time the claimant had remaining in the basic limitation period to bring the claim prior to coming under a disability, or one year from the time the disability ceases. This provision ensures that a claimant who is under a legal disability has sufficient time to bring a claim after his or her disability ceases.

Section 22 (3) indicates that the ultimate limitation period begins and continues to run whether or not the adult person with the claim comes under a legal disability (i.e., adult incapacity). This provision clarifies the law by removing any doubt about when potential liability will end. Most adults under a legal disability have a representative who is responsible for managing their affairs, including bringing and defending lawsuits, if necessary.

Notice to Proceed

(a) Children and Adult Persons under a Legal Disability

The current Notice to Proceed provision allows a potential defendant to start the clock running in the basic limitation period against a potential claimant who is an incapacitated adult, and to start the clock running in the basic and ultimate limitation periods against a potential claimant who is a child.¹⁰⁹ Reforms to the new Act do not propose to change how this provision applies.

For example, in 2011, a father and his four-year-old son are crossing a road at a crosswalk, and a car hits the child. The accident occurs in front of a seniors' complex and is witnessed by several elderly residents. The witnesses report that they saw one car rear-end the other, pushing the first car into the crosswalk where it struck the child. The driver of the car that hit the boy is worried that the witnesses who can provide him with a defence will die or not be

¹⁰⁹ BC Act, Above Note 1, ss. 7(6) and 8(2).

able to remember the accident if the case were potentially delayed another 17 years to 2028 (i.e., time is postponed until 2026 when the child turns 19 and reaches the age of majority, and then the adult child who is the potential claimant has another two years before the basic limitation period expires in 2028 to start a lawsuit). The driver can remedy this problem by delivering a Notice to Proceed to the child's parent (guardian) and to the Public Guardian and Trustee in 2011. If delivered properly, the Notice to Proceed starts time running in the basic limitation period against the potential claimant (i.e., the four-year-old child). The child's guardian would then have two years from 2011 to seek legal advice and decide whether or not to sue.

(b) Adult Persons Who Come under a Disability

Under the new Act, the Notice to Proceed provision will also apply to start the clock running in the basic limitation period against a potential claimant who is an adult at the time of the act or omission and who later comes under a legal disability.

For example, in 2011, a father and his four-year-old son are crossing a road at a crosswalk, and a car hits the father. The accident occurs in front of a seniors 'complex and is witnessed by several elderly residents. The witnesses report that they saw one car rear-end the other, pushing the first car into the crosswalk where it struck the father. The father immediately suffers injuries to his neck as a result of the accident. In 2012, the father loses consciousness and goes into a coma, thereby coming under a disability, stopping the clock in the basic limitation period after it had been running for one year. In 2016, the father is still under a disability. The driver of the car that hit the father is worried that the witnesses who can provide him with a defence will die or not be able to remember the accident if the case were potentially delayed up to either 2021 or 2026, 10 or 15 years from the date of the accident (i.e., if the father remains in a coma, time will be postponed in the basic limitation period up to the expiry of the ultimate limitation period, which is either 2021 or 2026, depending on the proposed duration of either 10 or 15 years.) The driver can remedy this problem in 2016 by delivering a Notice to Proceed to the disabled father's guardian and to the Public Guardian and Trustee. If delivered properly, the Notice to Proceed starts time running again in the basic limitation period against the potential claimant (i.e., the disabled father). The disabled father's guardian would then have one year from 2016 to seek legal advice and decide whether or not to sue.

It is proposed that the Notice to Proceed provisions from the current Act be carried forward to the new scheme. The draft legislation set out below contains a Notice to Proceed provision for situations in which children and adult persons under a disability are potential claimants. A second Notice to Proceed provision follows, for situations in which adults who later come under a disability are potential claimants. These have been drafted as separate provisions to further clarify the distinction between the two situations and to improve the readability of the new Act.

Recommended Draft Provision (a):

Notice to proceed if basic limitation period postponed under section 19 or 20 [*minors and persons under disabilities*]

- 21** (1) If the discovery rule under section 19 (a) or 20 (a) [*discovery rules for minors and persons under disabilities*] postpones the running of a limitation period in respect of a minor or a person under a disability and that minor or person under a disability has a guardian, a person against whom the minor or person under a disability may have a claim may, for the purposes of section 19 (b) or 20 (b) [*discovery by notice to proceed*], deliver a notice to proceed to
- (a) the guardian, and
 - (b) the Public Guardian and Trustee.
- (2) A notice to proceed delivered under this section must meet all of the following requirements:
- (a) it must be in writing;
 - (b) it must be addressed to the guardian and to the Public Guardian and Trustee;
 - (c) it must specify the name of the minor or person under a disability;
 - (d) it must specify the circumstances out of which the claim arises or may be alleged to arise, with as much particularity as is necessary to enable the guardian to investigate whether the minor or person under a disability has the claim;
 - (e) it must give warning that, because of the delivery of the notice, section 6, 7 or 8 [*basic limitation periods*], as the case may be, applies as if the claim was discovered on the date of the delivery of the notice;
 - (f) it must give the following warning as applicable:
 - (i) if the person who may have the claim is a minor, that, because of the delivery of the notice, section 22 (2) (g) (ii) [*ultimate limitation period commences on delivery of notice to proceed*] applies to limit the period within which a court proceeding may be commenced in relation to the claim;
 - (ii) if the person who may have the claim is a person under a disability, that section 22 [*ultimate limitation period*] applies to the claim despite the disability;
 - (g) it must specify the name of the person on whose behalf the notice is delivered;
 - (h) it must be signed by
 - (i) the person on whose behalf the notice is delivered, or
 - (ii) the person's solicitor.
- (3) If a notice to proceed that
- (a) complies with subsection (2) and any requirements prescribed under subsection (6), and
 - (b) is delivered in relation to a claim under subsection (1) in accordance with any requirements prescribed under subsection (6), section 19 (b) or 20 (b)

[*discovery by notice to proceed*], as the case may be, applies to the limitation period applicable to the claim as if the person with the claim ceased, on the date of the delivery of the notice, to be a minor or a person under a disability, as the case may be.

- (4) Subsection (3) operates to benefit only the person on whose behalf the notice is delivered and only with respect to a claim arising out of the circumstances specified in the notice.
- (5) A notice to proceed delivered under this section is not an acknowledgment for the purposes of section 26 [*acknowledgment*] and is not an admission for any purpose.
- (6) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed under this section.

Recommended Draft Provision (b):

Notice to proceed if basic limitation period suspended under section 28 [*claimant becomes person under disability*]

- 29** (1) If the basic limitation period established by Part 2 [*basic limitation periods*] in relation to a claim is suspended under section 28 [*claimant becomes person under disability*] in relation to a person under a disability and that person has a guardian, a person against whom the person under a disability may have a claim may deliver a notice to proceed to
- (a) the guardian, and
 - (b) the Public Guardian and Trustee.
- (2) A notice to proceed delivered under this section must meet all of the following requirements:
- (a) it must be in writing;
 - (b) it must be addressed to the guardian and to the Public Guardian and Trustee;
 - (c) it must specify the name of the person under a disability;
 - (d) it must specify the circumstances out of which the claim arises or may be alleged to arise, with as much particularity as is necessary to enable the guardian to investigate whether the person under a disability has the claim;
 - (e) it must give warning that the following apply to limit the period within which a court proceeding may be commenced in relation to the claim:
 - (i) section 22 [*ultimate limitation period*];
 - (ii) because of the delivery of the notice, section 28 (2) [*resumption of suspended limitation period*];
 - (f) it must specify the name of the person on whose behalf the notice is delivered;
 - (g) it must be signed by
 - (i) the person on whose behalf the notice is delivered, or
 - (ii) the person's solicitor.
- (3) If a notice to proceed that

- (a) complies with subsection (2) and any requirements prescribed under subsection (6), and
 - (b) is delivered in relation to a claim under subsection (1) in accordance with any requirements prescribed under subsection (6), section 28 (2) [*resumption of suspended limitation period*] applies to the limitation period applicable to the claim as if the person with the claim ceased, on the date of the delivery of the notice, to be a person under a disability.
- (4) Subsection (3) operates to benefit only the person on whose behalf the notice is delivered and only with respect to a claim arising out of the circumstances specified in the notice.
- (5) A notice to proceed delivered under this section is not an acknowledgment for the purposes of section 26 [*acknowledgments*] and is not an admission for any purpose.
- (6) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed under this section.

Comment:

Sections 21 and 29 set out a Notice to Proceed option that would trigger the running of time in relation to a potential claim of a person under a legal disability (i.e., a minor or an adult person under a disability). Once delivered, a Notice to Proceed starts both the basic and ultimate limitation periods running against a potential claimant under a legal disability, provided that person has a guardian to represent his or her interests. A Notice to Proceed must be delivered to both the claimant’s guardian (e.g., in the case of a child, this would normally be the parent) and the Public Guardian and Trustee, a provincial government agency.

This mechanism provides a number of safety precautions to ensure that the legal rights of claimants under a legal disability are not negatively affected through the early commencement of their lawsuit. Most notably, the Public Guardian and Trustee must be notified of all Notices to Proceed.

2. Postponement During Wilful Concealment or Wilfully Misleading as to Appropriateness of Court Proceedings

Another special postponement rule in the current Act involves situations where the defendant’s dishonesty has caused the plaintiff’s delay in initiating the claim, such as in cases of fraud, fraudulent breach of trust and wilful concealment of material facts. Postponement during a defendant’s wilful concealment of material facts has a long history. This idea has been carried forward from early 19th century English real property legislation.¹¹⁰

The current Act postpones the basic limitation period up to the ultimate limitation period in situations involving defendant dishonesty.¹¹¹ This means that time will not run in the basic

¹¹⁰ BCLRC 1974 Report, Above Note 41, Appendix B at 140.

¹¹¹ BC Act, Above Note 1, ss. 6 and 8.

limitation period until the plaintiff has properly discovered his or her claim. This mechanism is meant to provide some protection to potential plaintiffs who have been the victim of a concealed fraud.

If the general ultimate limitation period is reduced from 30 to either 10 or 15 years and the revised law offers no further protections, wrongdoers who manage to conceal their dishonest conduct for either 10 or 15 years (or longer) will be free from liability. This would be unfair: the plaintiff does not cause the delay but could lose his or her right to sue. Few people will sympathize with the wrongdoer who tries to profit from his or her misconduct by hiding behind a limitations defence.

Modernized limitations laws in Canada have addressed this problem by suspending the ultimate limitation period during periods where a defendant's dishonest conduct causes the delay.¹¹² The ULCC's model law does the same.¹¹³

The Green Paper asked respondents whether the running of the ultimate limitation period should be postponed during periods of a defendant's dishonest conduct (e.g., during the time a defendant wilfully conceals material facts that would allow a plaintiff to discover an action against the defendant). Response was mixed. The majority of people supported the idea, reasoning that this reform would penalize dishonesty and would harmonize B.C.'s limitation law with those found in other modernized provinces. However, a few people were concerned that postponing the ultimate limitation period during "wilful concealment of material facts" was too broad and could result in abuse. For example, it could capture a wide range of defendants, including those whose conduct was not dishonest, but whose actions could be described as "wilfully concealing" a material fact.

The 2002 report of the British Columbia Law Institute highlighted two problems with suspending the ultimate limitation period during periods of defendant dishonesty. First, similar to the concerns raised by respondents to the Green Paper, the authors noted that a defendant may not be guilty of wrongdoing in every case involving wilful concealment of material facts. Second, they pointed out that if the concealment continues for many years, the ultimate limitation period would be suspended for an indefinite period. Instead, the British Columbia Law Institute recommended a special 30-year ultimate limitation period be retained for this class of cases "...as it would ensure that potential plaintiffs have a reasonable opportunity to discover the fraud or the deliberate concealment of a cause of action and seek a remedy."¹¹⁴ A law reformer and the Independent Contractors and Businesses Association of British Columbia

¹¹² AB Act, Above Note 24, s. 4(1); SK Act, Above Note 18, s. 17; ON Act, Above Note 18, s. 15(4)(c); NB Act, Above Note 19, s. 16.

¹¹³ ULCC Act, Above Note 10, s. 6(3).

¹¹⁴ BCLI 2002 Report, Above Note 66, at 9.

also raised concerns with unlimited liability and similarly recommended a 30-year ultimate limitation period.¹¹⁵

However, creating a special 30-year ultimate limitation period for this class of claims would not serve to simplify the limitations regime as it would increase the number of limitation periods put forward in the Act. As well, this approach is not reflected in the updated Canadian limitation laws or in the *Uniform Limitations Act*, all of which deal with this problem by suspending the ultimate limitation period rather than creating a special ultimate limitation period.¹¹⁶

Several respondents to the Green Paper did not agree that the new Act should be structured to postpone the ultimate limitation period during the period in which a defendant's dishonest conduct causes delay. They said that this would create uncertainty and would increase the cost of resolving claims, as there would be the potential that the provision could be abused by both litigants and their lawyers.

The draft legislation below attempts to specify as much as possible the types of dishonest behaviour that will suspend the running of the ultimate limitation period. This will help to avoid capturing those defendants whose behaviour may involve concealment but may not be intentionally dishonest.

Recommended Draft Provision:

Basic limitation period suspended if concealment or misleading

- 30** Both the basic limitation period established by Part 2 [*basic limitation periods*] and the ultimate limitation period established by Part 3 [*ultimate limitation period*] in relation to a claim are suspended until the claim is discovered under Part 2 [*basic limitation periods*] if the person against whom the claim is or may be made does any of the following:
- (a) wilfully conceals from the claimant the fact that
 - (i) injury, loss or damage has occurred,
 - (ii) the injury, loss or damage was caused by or contributed to by an act or omission, or
 - (iii) the act or omission was that of the person against whom the claim is or may be made;
 - (b) wilfully misleads the claimant as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.

¹¹⁵ A. Close Submission, Above Note 30, at 5; Submission of the Independent Contractors and Businesses Association of British Columbia to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 23, 2007 at 2.

¹¹⁶ AB Act, Above Note 24, s.4; SK Act, Above Note 18, ss.12 and 17; ON Act, Above Note 18, s.15(4)(c); NB Act, Above Note 19, ss.16 and 22; ULCC Act, Above Note 10, s.6(3).

Comment:

This section suspends both the basic limitation period and the ultimate limitation period until a claim is discovered if a defendant wilfully conceals the necessary facts of the claim from a claimant or wilfully misleads a claimant as to the appropriateness of bringing a court proceeding to remedy the injury, loss or damage. Due to the fact that the ultimate limitation period will be shortened to either 10 or 15 years, there is a risk that dishonest defendants could take advantage of the reduced period and delay proceedings past the ultimate limitation period in order to be free from liability. This provision remedies this undesirable result and protects claimants from being at risk in such situations.

V. Agreements

The current Act is silent as to whether parties may contract out of governing limitation periods. The common law has allowed people to enter agreements that affect the operation of limitation periods. For example, judges have upheld contracts to exclude or shorten limitation periods.¹¹⁷ Judges are also attentive to power imbalances. Case law shows that they tend to favour a strict construction of the contract against the more powerful party in order to protect the party at risk.¹¹⁸

Of the modernized Canadian limitations laws, all but New Brunswick's law specifically allow agreements to extend limitation periods. Alberta's law and the ULCC's model statute explicitly permit extensions but not reductions to limitation periods.¹¹⁹ Saskatchewan's law allows agreements to extend but only up to the maximum set by the ultimate limitation period (e.g., 15 years).¹²⁰

Ontario recently amended its limitations law to allow even greater flexibility. People may agree to suspend or extend the basic limitation period. They may also agree to suspend or extend the ultimate limitation period, provided the claim has already been discovered. The amendment empowers commercial parties to a business agreement to *shorten*, extend or suspend the ultimate limitation period, provided the claim has already been discovered. They may also exclude, *shorten*, extend or suspend a basic limitation period.¹²¹ Ontario is the only modernized province that provides more freedom to contract out of limitation periods to commercial actors than to other parties.

Ontario's law is also the only one that says agreements to vary the ultimate limitation period can only occur after a claim has been discovered. This approach was adopted to address consumer protection concerns and unfair contractual terms. The former executive director of the British Columbia Law Institute is also of the view that agreements to vary should be permitted only in relation to discovered claims to avoid exposing vulnerable parties to risk through the use of boilerplate contracts. He notes that: "Once there is an actual issue for

¹¹⁷ *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc.*, [2008] B.C.J. No. 821 (C.A.), online: QL (BCJ) [Howe Sound]. See also *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at para. 110 in which the reasons of Sopinka J. and Iacobucci J. (given by Iacobucci J., dissenting in part) noted: "...contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other."

¹¹⁸ *Howe Sound*, Above Note 117.

¹¹⁹ AB Act, Above Note 24, s. 7; ULCC Act, Above Note 10, s. 14(1).

¹²⁰ SK Act, Above Note 18, s. 21.

¹²¹ ON Act, Above Note 18, s. 22.

dispute between the parties, then, subject to concepts such as unconscionability, the limitation period should be a matter for legitimate compromise like any other aspect of the dispute.”¹²²

New Brunswick’s Bill 28: *Limitation of Actions Act*, at the time it was referred to its Law Amendment Committee for review, included a provision that confirmed the rule found in case law; namely, that people can agree to both extend and shorten limitation periods.¹²³ However, the New Brunswick Branch of the Canadian Bar Association, in its submission to the Committee, strongly urged an amendment to prohibit agreements that shorten limitation periods. The Bar Association was particularly concerned about unequal bargaining power, noting that:

*In our modern society, many transactions come with forms containing printed conditions which the consumer is in no real position to challenge. Invoices, work orders, purchase orders, bills of lading... lease agreements, employment contracts – all such agreements come with “terms and conditions” which are not in reality negotiable by the consumer of such goods and services, or by the prospective employee.*¹²⁴

The Committee recommended that the Legislature consider the concerns raised by respondents to prohibit shortening of agreements.¹²⁵ New Brunswick’s new law does not include an agreements provision.¹²⁶

The following chart summarizes the approach to agreements taken in the modernized laws and in the *Uniform Limitations Act*.

	Extensions?	ULP Cap?	Reductions?	Special Provisions for Commercial Parties?
B.C.’s current Act	Silent	Silent	Silent	Silent
Alberta	Yes	No	No	No
Saskatchewan	Yes	Yes (i.e., 15 years)	No	No

¹²² A. Close Submission, Above Note 30 at 7.

¹²³ New Brunswick Office of the Attorney General, “Commentary on Bill 28: *Limitation of Actions Act*,” (January 2009), s. 26, online: <http://www.gnb.ca/legis/bill/pdf/56/3/Limitations-e.pdf> (last accessed April 21, 2010) [NB Commentary on Bill 28].

¹²⁴ David G. O’Brien, Chairperson, Civil Litigation Section, On Behalf of The New Brunswick Branch of the Canadian Bar Association, Bill 28: *Limitation of Actions Act*, Submission of the Canadian Bar Association, New Brunswick Branch, to the Standing Committee on Law Amendments, February 24, 2009, at 21.

¹²⁵ New Brunswick, Legislative Assembly, “Bill 28: *Limitation of Actions Act – Summary of Findings*” in *Journals of the Legislative Assembly*, No. 41 (12 May 2009) at 232, online: <http://www.gnb.ca/legis/business/currentsession/56/56-3/journals-e/090512e.pdf> (last accessed: May 11, 2010).

¹²⁶ NB Act, Above Note 19.

	Extensions?	ULP Cap?	Reductions?	Special Provisions for Commercial Parties?
Ontario	Yes, provided claim has been discovered.	No	Yes, for commercial parties. No, for everyone else.	Yes. They can extend or reduce limitation periods.
New Brunswick	Silent	Silent	Silent	Silent
ULCC	Yes	No	No	No

The Supreme Court of Canada has commented on the development of increasingly complex standardized contracts and the opportunity these present for a stronger party to exploit its economic or social superiority over a weaker party who is frequently a consumer or an employee.¹²⁷ In response, many legislators have passed laws aimed at restoring a level playing field for contracting parties. It is questionable whether the Act, as a law of general application, should be utilized for such a purpose.

The Green Paper discussed allowing parties to vary limitation periods by agreement. It asked whether the Act should allow parties to agree to extend limitation periods but not to shorten them, and whether extensions should be limited by the ultimate limitation period. Opinion amongst external respondents was divided, but the majority did not support the idea. The concerns echoed those discussed in the Green Paper: agreements to extend limitation periods could result in abuse (e.g., the stronger party to the contract could pressure the weaker party to agree to an unfair allocation of risk) and allowing agreements would increase uncertainty and undercut the new law’s usefulness.

Of those respondents who wanted an agreements provision in the new law, most supported extensions but not reductions. Some noted that the proposed basic and ultimate limitation periods discussed in the Green Paper might not suit complex, multi-level lending and commercial relationships and argued that commercial parties should be able to extend limitation periods to suit their particular needs.

Of those respondents who wanted an agreements provision in the new law, a slight majority were in support of having an ultimate limitation period act as a cap for extensions by agreement. They wrote that this would promote certainty and fairness in the law because without a cap exceedingly old claims could continue to surface and impose an unreasonable burden on the legal system. Those who did not want a cap said that freedom of contract should prevail and that a new law should be flexible enough to address special circumstances. BC Hydro commented that many of their facilities have long life spans and defects of design or manufacture may not be discovered for decades. The electric utility noted it is essential that

¹²⁷ *Garcia Transport v. Royal Trust*, [1992] 2 S.C.R. 499, per L’Heureux-Dubé J.

they be able to preserve the right to bring claims long after the expiry of the reduced ultimate limitation period.¹²⁸

In light of the amendment to Ontario's limitations law, the Green Paper also asked whether commercial actors should have greater flexibility than others to vary limitation periods. Of those respondents who answered this question, the majority rejected this idea, noting that anyone should be able to agree to extend but not to shorten limitation periods. A few respondents commented that both commercial and non-commercial parties should have equal flexibility.

On the other side of the issue, a few respondents supported greater flexibility for commercial actors, agreeing that commercial parties should be able to do whatever they wished. BC Hydro commented that commercial parties should be able to lengthen or shorten limitation periods by agreement to achieve "commercial objectives."¹²⁹ The Law Society of British Columbia noted:

The safeguard is that commercial actors should avail themselves of legal advice when bargaining away protections, and then the onus would fall on the lawyer to properly advise the commercial actor of the risk. We do not believe this places the public at risk.

The Law Society also commented that a proper definition of who is a commercial actor will be important.¹³⁰

The Green Paper noted three potential benefits of allowing agreements to extend limitation periods. First, it would afford parties engaged in complex commercial relationships (for whom the proposed reduced limitation periods could be ill-suited) the flexibility to structure their arrangements as they saw fit. Second, it would allow greater time for parties to attempt to resolve disputes out of court and avoid the necessity of starting a civil claim simply to preserve the limitation period. Third, such a change would create greater consistency between B.C.'s limitations law and other modernized limitations laws in Canada.¹³¹

That said, it is unclear whether the current Act's silence on this issue has been problematic. Concerns raised in the consultation feedback, the polarized views provided by respondents on this issue, and the recent actions taken by legislators in New Brunswick to remove a proposed agreements provision highlight that a reform to allow agreements to extend limitation periods may not necessarily result in achieving greater simplicity and certainty in the law.

¹²⁸ Submission of BC Hydro to the Green Paper on Reforming British Columbia's *Limitation Act* (February 2007), dated April 20, 2007.

¹²⁹ *Ibid.*

¹³⁰ Law Society Submission, Above Note 60 at 6.

¹³¹ Green Paper, Above Note 9 at 23.

It is tentatively proposed that the new Act expressly permit agreements to extend limitation periods but disallow agreements to reduce limitation periods. However, the question remains whether the proposed reform strikes the right balance between consumer protection and freedom of contract or whether the new Act should continue to remain silent on the issue, leaving the issue for judges to decide on a case-by-case basis.

Recommended Draft Provision:

Agreements to vary limitation periods

- 23** (1) If an agreement expressly provides for the extension of a limitation period established by this Act, the limitation period is altered in accordance with the agreement.
- (2) A limitation period established by this Act may not be reduced by an agreement.

Comment:

This provision will allow parties to extend limitation periods expressly. This could provide parties with more time to attempt to resolve disputes out-of-court and avoid the necessity of starting a civil claim simply to preserve the limitation period. Prohibiting the shortening of limitation periods by agreement is intended to protect parties with unequal bargaining power. The ultimate limitation period would not act as a cap on extensions.

Questions:

- 6) Would it be preferable for the new Act to remain silent on the issue of agreements, leaving it up to judges to ensure that agreements that affect the operation of limitation periods do not unfairly target parties with weaker bargaining power?
- 7) Would codifying only part of the common law (i.e., allowing agreements to extend but not shorten limitation periods) cause any unintended consequences?

VI. Demand Obligations

Demand loans are loans in which there are no fixed conditions for repayment. For instance, there may be no set date upon which the loan comes due and no schedule for repayment. They often arise in the context of friends and family lending one another money and may be intended to run over the long term.

The current statute does not specify when time begins to run in a demand loan. However, case law indicates that time starts to run from the date that the obligation is created¹³² (i.e., when people enter into the demand loan). For example, a mother lends her son \$50,000 in 2000 so that he can buy a house, but does not ask for the money back until 2004. The loan is due in 2004 when the mother makes the demand. Under the existing law, a six-year basic limitation period would apply, starting from 2000 (the date the mother and son entered into the demand loan). In other words, if the son does not pay back his mother as per her request in 2004, she has until 2006 to sue him in civil court.

If the basic limitation period is reduced from six years to two years, and nothing further is done, requests for repayment made more than two years after the creation of the loan will result in unfairness to the lender, as he or she will be out of time or “statute-barred” from suing the debtor. Going back to the previous example, the mother could not sue her son if he defaulted on the loan in 2004 because the basic limitation period would have already expired in 2002.

Another type of unfairness involves demand loans where the lender dies before making the demand or before recovering payment. If the basic limitation period is reduced to two years and time continues to run from the date the loan was created, there is the potential for unfairness to beneficiaries of the estate if the lender dies before repayment is complete, as an executor or administrator may not be aware of this type of informal arrangement.

To avoid these types of unfairness and to allow people to structure demand obligations over the long term, some limitations statutes start the running of time from the moment of default after a demand for repayment. This is true of the ULCC model law and the reformed limitations laws of Alberta, Saskatchewan and Ontario.¹³³ More recently, New Brunswick’s reformed

¹³² BCLI 2002 Report, Above Note 66 at 26, citing *J. Brown’s Estate*, [1893] 2 Ch 300 at 304; *Norton v. Ellam*, (1873) 2 M. & W. 461; *Henback v. Sprague*, [1933] 3 D.L.R. 647 (Man. C.A.); *Barclay Const. Corp. v. Bank of Montreal*, (1988) 28 B.C.L.R. (2d) 376, 6 W.W.R. 707 (S.C.) aff’d (1989) 41 B.C.L.R. (2d) 239 (C.A.); *Berry v. Page*, (1989) 38 B.C.L.R. (2d) 244 at 247, 60 D.L.R. (4th) 289 (C.A.).

¹³³ ULCC Act, Above Note 10, s. 6(4)(c); AB Act, Above Note 24, s. 3(c); SK Act, Above Note 18, s. 10; ON Act, Above Note 18, ss. 5(3) and 15(6)(c). Note that Ontario’s *Limitations Act, 2002* was amended in November 2008 to provide that time starts to run in a demand obligation from “the first day on which there is a failure to perform the obligation, once a demand for the performance is made”. The amendment followed a decision out of the Ontario Court of Appeal in which the majority interpreted the limitation period for demand promissory notes to begin to run as soon as the note was issued, and not following a default after a demand for payment: *Hare v. Hare*, [2006]

statute has linked the running of time to the earlier of two different dates, one of which is the date of default after a demand for repayment, and the other is 15 years from the “day on which the lender is first entitled to make a demand for repayment.”¹³⁴

The Green Paper asked respondents to comment on whether to start the clock in the basic and ultimate limitation periods at the moment of default after the lender has made a demand for performance. Most respondents who answered this question were in favour of starting time running from this date. Returning to the example above, this means that the mother has two years from the son’s default (i.e., from 2004 to 2006) to sue him. Likewise, the ultimate limitation period will also start to run in 2004.

It is proposed that the reforms include a provision specifying that for claims over demand obligations, both the basic and ultimate limitation periods start to run at the moment of default after a lender has made a demand for performance.

Recommended Draft Provisions:

Discovery rule for claims for demand obligations

- 15** A claim for a demand obligation is discovered on the first day that there is a failure to perform the obligation after a demand for the performance has been made.

Ultimate limitation period

- 22 (2)** For the purposes of this section and subject to section 32 [*regulations*], the day an act or omission on which any of the following claims is based takes place is,

- (e) in the case of a claim referred to in section 13, 14, 15 or 16 [*discovery rules for: claims based on fraud or recovery of trust property, future interest in trust property, demand obligations, and to realize or redeem security*], the day on which the claim is discovered in accordance with that section,

Comment:

Section 15 creates a new special discovery rule for claims for demand obligations. The provision clarifies that discovery occurs on the date a person defaults after a demand has been made. Section 22(2)(e) clarifies that the ultimate limitation period also runs from the same date.

These changes will protect legally unsophisticated parties who typically enter into informal lending agreements by ensuring that demand loans will not be time-barred two years after the loan was entered into (i.e., they will modify the common law approach). Put another way, the proposed model will allow long-term demand loans.

O.J. No. 4955 (C.A.), online: QL (OJ). In *Hare*, the Court followed Ontario common law as stated in the decision in *Royal Bank v. Hogg*, [1930] 2 D.L.R. 488 (Ont. S.C.(A.D.)).

¹³⁴ NB Act, Above Note 19, s. 11.

VII. Secondary Claims and Claims for Contribution

1. Secondary Claims

The Green Paper discussed the current Act's treatment of secondary claims (related litigation such as counterclaims, third party claims, and claims by way of set-off following an original lawsuit). The current Act does not set a time limit for starting secondary claims so long as the secondary claims relate to a lawsuit that was started in time.

The Green Paper asked whether the timing of secondary claims should continue to be left up to judges, or whether the new law should specify when time starts to run. Most respondents misunderstood the question. Several lawyers and the Law Society of British Columbia agreed that the new law should maintain a discretionary approach. Other respondents were not supportive of the proposal.

It is proposed that secondary claims remain a discretionary decision of a judge and continue to be governed by the *status quo*; that is, they will not be governed by limitation periods in the new Act. Claims for contribution, however, will be addressed in a separate section (discussed in more detail below).

Recommended Draft Provision:

Counterclaim or other claim or proceeding

- 24** (1) If a court proceeding to which this Act applies has been commenced in relation to a claim (in this section, the “primary claim”) and there is a claim (in this section, the “secondary claim”) that relates to or is connected with the primary claim, the fact that a limitation period established by this Act has expired in relation to the secondary claim does not prevent any of the following from being done in the court proceeding:
- (a) subject to subsection (2), commencing court proceedings in relation to the secondary claim by counterclaim, including the adding of a new party as a defendant by way of counterclaim;
 - (b) subject to subsection (2), commencing third party proceedings in relation to the secondary claim;
 - (c) making claims in relation to the secondary claim by way of set off;
- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution after the expiry of a limitation period in relation to that claim.
- (3) Subsection (1) does not apply if the court determines that a limitation period has expired in relation to the primary claim.
- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

(5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7, 8 or 22 [*basic limitation periods and ultimate limitation period*], be commenced with respect to that claim.

Comment:

This section provides that there is no limitation period for a secondary claim (i.e., a counterclaim, a third party proceeding, or a claim by way of set-off) so long as this secondary claim is related to the primary claim (or original lawsuit), and the primary claim was commenced in time. Judges will still have discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

This section carries forward the principles from section 4 of the current Act but removes the application of this section to claims for contribution. Contribution claims will be governed by limitation periods in the new Act. The next section discusses the rules applicable to contribution claims in more detail.

2. Contribution Claims

The Green Paper identified that under the current law, there is the potential for lengthy delays between the running of time in the original lawsuit and the date a third party receives notice of a claim against him or her for contribution. Consideration was given to the question of whether contribution claims should be treated differently from other types of secondary claims and provided with a limitation period. The Green Paper asked whether the new law should include rules about when time starts to run for contribution claims.

In light of the fact that there appears to be conflicting interpretations of section 4 of the current Act regarding whether a limitation period applies to claims for contribution, and because there was some confusion over the question posed on this topic in the Green Paper, the White Paper will revisit this issue.

Modernized Canadian limitations laws all address the running of the ultimate limitation period in contribution claims although there are subtle differences among them:

- In Saskatchewan and Ontario, the ultimate limitation period runs from the date the person claiming contribution and indemnity is served with the paperwork related to the original claim (upon which the later claim for contribution and indemnity is based).¹³⁵
- The ULCC's model law starts the ultimate limitation period running from either the date the person claiming contribution and indemnity is served with the paperwork related to the original claim or the date the person incurs a liability through settlement.¹³⁶

¹³⁵ SK Act, Above Note 18, s. 14; ON Act, Above Note 18, s. 18.

- Alberta’s law addresses contribution claims but not indemnity claims. The Alberta ultimate limitation period starts to run from the earlier of: the date the person claiming is made a defendant in the original claim or the date the person incurs a liability through settlement.¹³⁷
- New Brunswick’s law sets out a more complicated model for contribution claims. It provides two subsections with different limitation periods, depending on which subsection a contribution claim falls under. Both subsections provide the earlier of two dates in which a contribution claim must be brought.¹³⁸

Except for New Brunswick’s law, it is unclear whether the modernized laws address when the basic limitation period starts to run for contribution claims.

It is proposed that B.C.’s new Act clarify how both the basic limitation period and ultimate limitation period operate for contribution claims by setting out how time is to be calculated. Clearly setting out the time limits for bringing contribution claims will meet the goals of simplifying the Act and bringing greater certainty to third parties.

Example:

A farmer is pre-paid for the organic produce she supplied to a grocery store. The farmer is later sued by the grocery store when it is learned that her produce was contaminated with pesticides. The farmer is served with the paperwork in 2000. In 2001, the farmer learns that the trucking company she hired to transport her produce was also used to haul pesticides to non-organic farmers on neighbouring farms. The lawsuit moves slowly through the court process. The trial date is set for 2008. The farmer only decides to claim for contribution against the trucking company in 2007, when she files a third-party notice to advance her claim.

The current Act would permit the farmer to claim contribution from the trucking company in 2007 because there is no limitation period for contribution claims. It would be left up to the judge to decide whether to allow the claim. The new Act would set time limits for starting a claim for contribution, taking the discretion away from the judge. The proposed provision would clarify that time would run from the date of “discovery” of the contribution claim. The farmer would “discover” her claim on the later of the date that she was originally served with the paperwork by the grocery store in 2000 (that started the lawsuit) and the first date she “knew or reasonably ought to have known that a claim for contribution can be made,” which would be 2001. This means that under the new Act the farmer would have between 2001 and 2003 to start her claim for contribution against the trucking company.

¹³⁶ ULCC Act, Above Note 10, s. 6(5).

¹³⁷ AB Act, Above Note 24, s. 3(3)(e).

¹³⁸ NB Act, Above Note 19, s. 14.

Recommended Draft Provisions:

Discovery rule for claims for contribution

- 17** A claim for contribution is discovered on the later of the following:
- (a) the day on which the claimant for contribution is served with a pleading in respect of a claim on which the claim for contribution is based;
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution can be made.

Ultimate limitation period

- 22** (2) For the purposes of this section and subject to section 32[*regulations*], the day an act or omission on which any of the following claims is based takes place is,
- (f) in the case of a claim for contribution, the day on which the claimant for contribution is served with a pleading in respect of a claim on which the claim for contribution is based,

Comment:

These two sections set out how the basic and ultimate limitation periods operate in claims for contribution. Section 17 means that the basic limitation period will start to run on the later of: the day on which the claimant for contribution is served with the original pleading (in respect of a claim on which the later claim for contribution is based) or the day the claimant knew or reasonably ought to have known that a claim for contribution could be made. Section 22(2)(f) sets out that the ultimate limitation period starts to run from the day on which the claimant for contribution is served with the original pleading (in respect of a claim on which the later claim for contribution is based).

These two sections make the law clearer and will prevent stale-dated contribution claims from being advanced, which can be unfair to third parties.

VIII. Acknowledgments

An acknowledgment refers to an acknowledgment of liability. A part payment of a debt or a written confirmation of a liability are two types of acknowledgments. The current law says successive acknowledgments of this kind restart the clock in the basic limitation period but only up to the governing ultimate limitation period.¹³⁹

For example, a person misses a payment on a bank loan in 2001. Under the current law, both the six-year basic limitation period and the 30-year ultimate limitation period start to run from the date of default. If the debtor makes another payment in 2005, the six-year basic limitation period restarts. The part payment means that the debtor has acknowledged his or her debt, and the bank now has another six years (until 2011) to sue. If the debtor makes another payment in 2010, the basic limitation period resets again. Now the bank has until 2016 to sue. The 30-year ultimate limitation period, which runs from the date of default, still applies. This means that no matter how many part payments are made after the date of the first missing payment (i.e., default), the bank cannot sue the debtor past 2031.

Assuming for this example only that the general ultimate limitation period is reduced to 10 years, and the acknowledgment section continues to be capped by the ultimate limitation period, this will mean that a written confirmation of liability or a part payment will only extend the window to sue up to 10 years. This is a considerable drop from the 30-year window under the existing law. The Green Paper noted that retaining the *status quo* for acknowledgments could adversely affect the commercial sector as lenders would be unlikely to enter into long-term financial arrangements that extend beyond the reduced 10-year ultimate limitation period.

The Green Paper reviewed the different acknowledgment models used by the modernized Canadian laws, as well as the ULCC's model limitations statute and asked respondents to state their preference. The paper noted that the laws of Saskatchewan and Ontario provide that when a person makes a confirmation or part payment, the act or omission on which the claim is based is "deemed to have taken place on the day on which the acknowledgment was made."¹⁴⁰ Under the ULCC's model statute, a confirmation (acknowledgment) starts the clock running in both the basic and ultimate limitation periods.¹⁴¹ Alberta's limitations law says that if a person makes a part payment or an acknowledgment "before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment."¹⁴²

¹³⁹ BC Act, Above Note 1, ss. 5 & 8.

¹⁴⁰ SK Act, Above Note 18, s. 11; ON Act, Above Note 18, s. 13.

¹⁴¹ ULCC Act, Above Note 10, s. 11.

¹⁴² AB Act, Above Note 24, s. 8(2).

Of those respondents who answered the Green Paper's question on acknowledgments, opinion was divided. Each of the three different models found some support, while a small number of respondents advised they preferred no change.

The reform objectives regarding acknowledgments include ensuring that long-term financial arrangements continue, modernizing the law to ensure that electronic communications are acceptable forms of acknowledgments, and bringing greater consistency between B.C.'s new Act and the modernized and model limitations laws in other parts of Canada.

It is proposed that the principles from section 5 [*effect of confirming a cause of action*] of the current law be carried forward into the new Act. In addition, it is proposed that acknowledgments reset both the basic and ultimate limitation periods. This means that the ultimate limitation period will not act as a cap on acknowledgments.

Recommended Draft Provision:

Limitation periods extended if liability acknowledged

- 26** (1) If a person acknowledges liability in respect of a claim, the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgment was made, if the acknowledgment is made
- (a) in a manner referred to in this section, and
 - (b) before the expiry of the limitation period applicable to the claim.
- (2) An acknowledgment of liability in respect of a claim for interest is also an acknowledgment of liability in respect of a claim for
- (a) the outstanding principal, if any, and
 - (b) 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 the collateral.
- (4) An acknowledgment of liability in respect of a claim by a trustee is an acknowledgment of liability in respect of the claim by any other person who is or who later becomes a trustee of the same trust.
- (5) An acknowledgment, by a person in possession of personal property, of liability in respect of a claim to recover or enforce an equitable interest in the personal property is an acknowledgment by any other person who later comes into possession of the personal property of liability in respect of that claim.
- (6) Subsection (1) does not apply to an acknowledgment referred to in subsection (2), (3), (4) or (5) unless the acknowledgment is
- (a) in writing,
 - (b) signed, by hand or by electronic signature within the meaning of the *Electronic Transactions Act*,

- (c) made by the person making it or the person's agent, and
 - (d) made to the person with the claim, the person's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada).
- (7) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is or may be made or by the person's agent is an acknowledgment by the person against whom the claim is or may be made of liability in respect of the claim.
 - (8) 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 security agreement.
 - (9) 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 security agreement.
 - (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.

Comments:

This section restarts the running of time in both the basic limitation period and ultimate limitation period for claims where liability has been acknowledged. While much of the substance of the current section 5 has been retained, the new Act clarifies what constitutes an acknowledgment for specific claims. This will make the law more certain and easier to understand.

Greater certainty will result from the explicit listing of the formal requirements for an acknowledgment as well as the different forms that acknowledgments can take. As two examples, an acknowledgment can be a written document signed by hand or by electronic signature made to the claimant, or it can be a part payment of a sum or interest owing on a claim. By recognizing electronic signatures, the new Act will recognize e-mails as potential acknowledgments.

IX. Exemptions

1. Current and Proposed Exemptions

The current Act specifically exempts certain types of actions from its application. Reforms include carrying forward these exemptions and broadening the list in order to clarify what is and what is not governed by the new law.

Section 3(4) of the current Act specifically lists matters that are not governed by any limitation period and which, therefore, may be brought at any time. Included in this list are actions: “for a declaration as to personal status,” and “for a declaration about the title to property by any person in possession of that property.”¹⁴³ However, all other declarations would likely be governed by a six-year basic limitation period.

In addition, the current Act does not interfere with “...proceedings by way of judicial review of the exercise of statutory powers.”¹⁴⁴ Judicial review applications are cases in which judges examine the decisions taken by public bodies to ensure that they were carried out appropriately (e.g., the decision of a bureaucrat to refuse to re-issue a driver’s licence).

It is proposed that the new Act exempt all declarations and judicial review proceedings from its application. This is consistent with the modernized laws of Saskatchewan and Ontario as well as the ULCC’s model statute.¹⁴⁵ Such a change would make B.C.’s law more consistent with reformed limitations laws elsewhere in the country.

It is also proposed that the remainder of the category of actions to which no limitation period applies from section 3(4) will be brought forward into the exempted claims section of the new Act. This means that claims involving minors “relating to misconduct of a sexual nature”¹⁴⁶ and those relating to “sexual assault”¹⁴⁷ will continue to be exempted from the application of the new Act. These provisions were added in to the current Act in two separate amendments in 1992 and 1994 in order to provide protections for victims of childhood sexual abuse.¹⁴⁸

¹⁴³ BC Act, Above Note 1, ss. 3(4)(i) and (j).

¹⁴⁴ *Ibid.*, s. 2(c).

¹⁴⁵ SK Act, Above Note 18, s. 15(a); ON Act, Above Note 18, s.16(1)(a); ULCC Act, Above Note 10, s. 2(c).

¹⁴⁶ BC Act, Above Note 1, s. 3(4)(k).

¹⁴⁷ *Ibid.*, s. 3(4)(l).

¹⁴⁸ *Limitation Amendment Act, 1992*, S.B.C. 1992, c. 44, s.1(b) added a cause of action based on misconduct of a sexual nature involving a minor to the list of exceptions to the limitation periods in the *Act*; *Limitation Amendment Act, 1994*, S.B.C. 1994, c. 8, s.1 further amended the *Act* to expand the exemption to include causes of actions based on misconduct of a sexual nature involving minors and those based on sexual assault. The amendment also modified the ultimate limitation periods (general 30 year and special six-year medical) somewhat, making them subject to the postponement rules for children until they reached the age of majority.

Other categories of court proceedings that will not be governed by the new Act are appeals, proceedings under the *Offence Act* to prosecute offences, and claims that are subject to a limitation period established by an international convention or treaty that is adopted by an Act.¹⁴⁹ The current limitations statute does not clarify whether these matters are exempted from its scope. It is proposed that these be added to the list of exemptions in the new Act.

Finally, it is proposed that the following also be added to the exemption list:

- claims for the possession of land by a person who has a right to enter for breach of a condition subsequent or a right to possession arising under possibility of reverter of a determinable estate;
- claims to enforce orders for arrears of child support and spousal support; and
- environmental claims that have not been discovered.

The exempted claims listed above will be discussed in further detail in the following sections.

Recommended Draft Provisions:

Exempted court proceedings

- 2** (1) This Act does not apply to the following court proceedings and has no impact on when or if such court proceedings may be brought:
- (a) appeals;
 - (b) judicial review applications;
 - (c) court proceedings under the *Offence Act* to prosecute an offence;
 - (d) court proceedings to obtain a declaration.

...

Exempted claims

- 3** (1) This Act does not apply to the following:
- (a) a claim that is subject to a limitation period established by an international convention or treaty that is adopted by an Act;
 - (b) a claim for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass;
 - (c) a claim for possession of land by a life tenant or person entitled to the remainder of an estate;
 - (d) a claim for the possession of land by a person who has
 - (i) a right to enter for breach of a condition subsequent, or
 - (ii) a right to possession arising under possibility of reverter of a determinable estate;
 - (e) a claim on a local judgment for the possession of land;

¹⁴⁹ See Consultation Draft *Limitation Act*, attached to this White Paper in Appendix A, ss.2(1) and 3(1)(a).

- (f) a claim by a debtor in possession of collateral to redeem that collateral;
 - (g) a claim by a secured party in possession of collateral to realize on that collateral;
 - (h) a claim by a landlord to recover possession of land from a tenant who is in default or over holding;
 - (i) a claim relating to the enforcement of an injunction or a restraining order;
 - (j) a claim to enforce an easement, restrictive covenant or profit à prendre;
 - (k) a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault,
 - (i) if the misconduct occurred while the claimant was a minor, and
 - (ii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
 - (l) a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
 - (m) a claim for arrears of child support or spousal support payable under
 - (i) a judgment, or
 - (ii) an agreement filed with the court under sections 121 or 122 of the *Family Relations Act*;
 - (n) an environmental claim that has not been discovered.
- (2) This Act does not apply to a claim for which a limitation period has been established under another enactment if, under section 27 of this Act, the limitation period established by the other enactment applies to the claim.

Comment:

This section carries forward the list of matters from section 3(4) of the current Act for which no limitation period applies. However, the exemption list has been expanded to include claims that are subject to a limitation period established by an international convention or treaty that is adopted by an Act, claims for the possession of land involving conditional or limited fees, claims for arrears of child support and spousal support, and undiscovered environmental claims.

2. Child Support and Spousal Support

The current Act and the *Family Maintenance Enforcement Act*¹⁵⁰ are silent on the issue of limitation periods governing enforcement of orders for child support and spousal support that are in arrears. Courts have determined that limitation periods for claims for arrears of support fall under the 10-year limitation period for collecting on a judgment and have indicated that time starts to run from the date that the support order was made. In cases of child support, the limitation period does not start until the child reaches the age of majority.¹⁵¹

Other provinces that do not include limitation periods for enforcing support orders include Alberta,¹⁵² Saskatchewan,¹⁵³ Manitoba,¹⁵⁴ and Ontario.¹⁵⁵ As well, Nova Scotia does not include a limitation period for enforcing maintenance orders, but a judge retains the discretion to relieve a debtor of his or her obligation to pay, if certain criteria are met.¹⁵⁶ However, other than Ontario's *Limitations Act, 2002*, which specifically removes a limitation period for collecting support that is in arrears,¹⁵⁷ the other provinces with reformed limitations laws do not include exemptions in their limitations legislation. Instead, they include exemptions from limitation periods for enforcing support orders in their respective statutes governing family maintenance.

It is proposed that claims for enforcement of orders for support be exempted from the limitation periods described in the new Act. As well, it is proposed that agreements with provisions for support that are filed with the court also be included in this reform to ensure that parties to agreements will also benefit. In this way, debtors will not be able to profit from having their support claims extinguished for non-payment after a period of time. Such an approach ensures that vulnerable children and spouses are protected.

¹⁵⁰ *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 27, online: BC Laws http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96127_01 (last accessed: May 11, 2010).

¹⁵¹ *Smood v. Smood*, [2004] B.C.J. No. 193 (S.C.) at para. 45, online: QL (BCJ) & *Duke v. Duke*, [1998] B.C.J. No. 1624 (S.C.) at paras. 18-19, online: QL (BCJ).

¹⁵² *Maintenance Enforcement Act*, R.S.A. 2000, c. M-1, s. 38, online: Alberta's Queen's Printer http://www.qp.alberta.ca/574.cfm?page=M01.cfm&leg_type=Acts&isbncln=9780779747863 (last accessed: May 11, 2010).

¹⁵³ *Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, s. 26, online: CANLII <http://www.canlii.org/en/sk/laws/stat/ss-1997-c-f-6.2/latest/ss-1997-c-f-6.2.html> (last accessed: May 11, 2010).

¹⁵⁴ *Family Maintenance Act*, C.C.S.M. c. F20, s. 63, online: CANLII <http://www.canlii.org/en/mb/laws/stat/ccsm-c-f20/latest/ccsm-c-f20.html> (last accessed: May 11, 2010).

¹⁵⁵ ON Act, Above Note 18, s. 16(1)(c).

¹⁵⁶ *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6, s. 46, online: CANLII <http://www.canlii.org/en/ns/laws/stat/sns-1994-95-c-6/latest/sns-1994-95-c-6.html> (last accessed: May 11, 2010).

¹⁵⁷ ON Act, Above Note 18, s. 16(1)(c) (ON).

An example of how the proposed change will affect the enforcement of support orders is set out below.

Example:

A couple are married without children. The wife, Mary, divorces her husband Mark and is awarded spousal support by a court in 2001. Mark pays the spousal support due in 2001 and 2002 and then leaves the area and ceases paying support altogether. There is 18 years worth of spousal support owing when Mark inherits property in 2020. Under the current Act, a 10-year limitation period for enforcing the award runs from the date of the award, which would be 2001. Therefore, Mary would be statute-barred from pursuing the arrears in spousal support after 2011. Under the new Act, Mary would be able to bring a claim in 2020 for payment of spousal support for the entire 18 years because the new Act will specify that limitation periods do not apply in respect of proceedings to enforce support orders.

Recommended Draft Provision:

3 (1) This Act does not apply to the following:

- (m) a claim for arrears of child support or spousal support payable under
 - (i) a judgment, or
 - (ii) an agreement filed with the court under sections 121 or 122 of the *Family Relations Act*

3. Undiscovered Environmental Claims

The current Act does not set a specific limitation period for environmental claims. Rather, the limitation period that applies to an environmental problem will depend on how the problem is framed. For example, an environmental claim could be brought as a lawsuit based on nuisance, trespass, negligence or even breach of contract, depending on the facts. As discussed earlier in the White Paper, the current law has different limitation periods depending on the type of lawsuit that is launched. This means that some environmental claims will have a two-year basic limitation period while others will have a six-year basic limitation period. The ultimate limitation period under the current law is 30 years.¹⁵⁸

Some damage to the environment is historic or is the result of a number of different owners or users of land. It is possible for many years to pass before there is a clear understanding that there is a problem or who caused it. The proposed reduction of the general ultimate limitation period from 30 to either 10 or 15 years could result in some unfairness to claimants who do not discover an environmental claim within either 10 or 15 years of the act or omission that triggers the damage.

Both Alberta and Ontario have considered this issue, with different results. Ontario's modernized limitations law specifically exempts "an environmental claim that has not been discovered" from the limitation periods set out in that statute.¹⁵⁹ An "environmental claim" is defined as "...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."¹⁶⁰ None of the other modernized limitations laws specifically exclude undiscovered environmental claims.

Alberta takes a different approach. Alberta's *Environmental Protection and Enhancement Act* allows a judge to extend a limitation period for court proceedings involving "an alleged adverse effect resulting from the alleged release of a substance into the environment."¹⁶¹ Hansard reporting of the debate on this Act indicates that the legislation was intended to extend the period within which a person could commence an action for damages to the environment in order to preserve claims when the damage is not evident for several years.¹⁶²

¹⁵⁸ BC Act, Above Note 1, ss. 3(2)(a), (b) and 8(1)(c).

¹⁵⁹ ON Act, Above Note 18, s. 17.

¹⁶⁰ ON Act, Above Note 18, s. 1, "environmental claim."

¹⁶¹ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 218, online: CANLII <http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-e-12/latest/rsa-2000-c-e-12.html> (last accessed: May 11, 2010).

¹⁶² Alberta, Legislative Assembly, *Hansard* (6 April 1998) at 1385 (point 25), online: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_24/session_2/19980406_2000_01_han.pdf (last accessed: May 11, 2010).

Environmental claims are unique from other civil claims because the environment is shared by everyone. Some may argue that any environmental damage ultimately affects all British Columbians, as stewards of the environment for future generations.

To address the impact that a reduced ultimate limitation period may have on environmental problems, it is proposed that “environmental claim” be defined in the new Act, and that limitation periods in the new Act not apply to undiscovered environmental claims. This means that both the basic and ultimate limitation periods will not start to run until an environmental claim is discovered.

The proposed definition of “environmental claim” is “... a claim to recover damages that result from damage to the environment caused by the escape, release or discharge of anything, including, without limitation, a gas, into the environment.” The definition is broad enough to ensure that all types of environmental problems that result in damages to the environment fit within this category of claims.

The example below contrasts an environmental claim under the current law with the proposed reform.

Example 1: Current Act.

A business owner has a container buried on his property that leaks a chemical into the groundwater for 20 years, starting in 2000. In 2020, the chickens on a neighbouring farm stop laying eggs. The chicken farmer immediately investigates and traces the problem to the business owner’s leaking container. The farmer meets with a lawyer and decides to sue her neighbour in negligence. Under the current law, the ultimate limitation period runs for 30 years, starting at the date of the damage. The discovery section of the Act postpones the running of the basic limitation period up to the length of the ultimate limitation period. Thus, even though the farmer did not discover her legal claim for 20 years after the chemical started leaking into the groundwater, she can still sue her neighbour in 2020, as the two-year basic limitation period for negligence will run from this date.

Example 2: New Act without an exemption for undiscovered environmental claims.

Assuming the same fact pattern as above, and assuming a 15-year ultimate limitation period (for the purposes of this example only), if the new Act applied without an exemption for undiscovered environmental claims, the farmer would be governed by a two-year basic limitation period and a 15-year ultimate limitation period. The ultimate limitation period would run from the date of the act or omission (i.e., the leaking of the chemical into the groundwater) and expire in 2015. The two-year basic limitation period would run from the date of discovery (2020). This means that the farmer would be time-barred from suing her neighbour when she discovers the claim in 2020, due to the expiry of the ultimate limitation period in 2015.

Example 3: New Act with an exemption for undiscovered environmental claims.

Assuming the same fact pattern as above, and assuming a 15-year ultimate limitation period (for the purposes of this example only) if the new Act applied with an exemption for undiscovered environmental claims, neither the two-year basic limitation period nor the 15-year ultimate limitation period would start to run until she discovered she had a claim in 2020. This means that under the new law, the farmer would have until 2022 (i.e., the expiry of the two-year basic limitation period) to file her claim.

Recommended Draft Provisions:

Definition

“environmental claim” means a claim to recover damages that result from damage to the environment caused by the escape, release or discharge of anything, including, without limitation, a gas, into the environment.

Exempted claims

3. (1) This Act does not apply to the following:

- (n) an environmental claim that has not been discovered.

...

Ultimate Limitation Period

22(2) For the purposes of this section and subject to section 32 [*regulations*], the day an act or omission on which any of the following claims is based takes place is,

- (d) in the case of an environmental claim, the day on which the claim is discovered in accordance with Part 2,

Comment:

Exempting undiscovered environmental claims from the basic and ultimate limitation periods in the new Act will provide a measure of fairness to claimants who discover environmental claims after either 10 or 15 years.

4. Real Property Limitations

The current law also has some sections that deal with real property or real estate. Many of these are based on recommendations of the former British Columbia Law Reform Commission, the law reform body that preceded the British Columbia Law Institute, in their 1974 *Report on Limitations*.¹⁶³ There are few cases involving these sections, so judges' interpretations have not provided further explanation as to how they are to operate. Many of the provisions use archaic language from very old English laws, which makes them difficult to understand.

The 2007 Green Paper did not address real property limitations policy. However, this White Paper seeks to fill that gap and requests feedback on the best approach to reforming the real property limitation periods. An introduction to B.C.'s real property scheme is set out below to provide some context to the law reform proposals discussed in this section.

Legal Rights in Real Property in British Columbia

Ever since the mid-19th century, British Columbia has used a Torrens system of land title registration.¹⁶⁴ In this system, information about real property is entered into a registry managed by the Land Title Office. Only the person registered as the owner of the real property has the right to sell or otherwise deal with it. The underlying goal of the Torrens registry system is to create indefeasible real property rights; that is, rights that cannot be defeated, annulled or made void.¹⁶⁵ Prior to the Torrens system, land ownership in British Columbia was governed by English law, which prioritized possession over registration of title.

The Torrens system is not universal. Other provinces and territories have different schemes for managing real property.

Other Provinces' Approach to Real Property Limitation Periods

The four provinces that have already reformed their limitations laws have all approached the question of real property limitation periods differently. This is not surprising because limitations laws have to mesh with each province's specific land ownership model.

Alberta has removed most of its real property provisions from its reformed limitations law.¹⁶⁶ Its modernized statute contains a few sections that deal with real property, including one that says that claims for remedial orders for the possession of real property are exempt from the

¹⁶³ BCLRC 1974 Report, Above Note 41, at 45.

¹⁶⁴ Jeff Bedoes, "British Columbia's Land Title and Survey System or Why British Columbia Property Owners Sleep Soundly at Night," online: BC Land Title & Survey www.ltsa.ca/data/img/publication/Why-BC-Property-Owners-Sleep-Soundly-at-Night.pdf (last accessed: May 11, 2010) at 24.

¹⁶⁵ *Law Encyclopedia*, s.v. "indefeasible," online: <http://www.answers.com/topic/indefeasible> (last accessed: May 11, 2010).

¹⁶⁶ *Limitation of Actions Act*, R.S.A. 1980 c. L-15, repealed.

two-year basic limitation period but remain subject to the 10-year ultimate limitation period.¹⁶⁷ Alberta's reformed law does not apply to claims based on adverse possession of real property owned by the Crown.¹⁶⁸

Saskatchewan followed a similar route. When it modernized its limitations law, it chose to abolish the real property provisions that had been part of its former statute.¹⁶⁹

Ontario took a completely different approach. It retained the real property limitation periods from its former limitations statute, and renamed them the *Real Property Limitations Act*.¹⁷⁰ Thus, its limitations law reform project resulted in two new laws: the *Real Property Limitations Act* that addresses limitation periods related to real property,¹⁷¹ and the *Limitations Act, 2002*, which deals with all other limitation periods.¹⁷²

New Brunswick's approach is similar to the one chosen by Ontario. New Brunswick's reforms involved retaining parts of the former *Limitation of Actions Act*¹⁷³ that related to recovery of possession of land and renaming them in a separate statute called the *Real Property Limitations Act*.¹⁷⁴

Options for Reform

Three options are proposed as potential models for reforming the Act's real property provisions.

Option 1: Carry forward the real property provisions from section 3 into the new Act, with minor amendments, and move section 12 [*adverse possession*] to a statute that governs real property.

Section 3 of the current Act sets limitation periods for actions to recover land or to enforce security interests, which might involve real property. It also sets a limitation period for actions relating to interests in land and recovery of trust property.¹⁷⁵ Section 12 says that adverse possession (e.g., squatting) will not allow a person to acquire any property rights or interests.¹⁷⁶

¹⁶⁷ AB Act, Above Note 24, s. 3(4).

¹⁶⁸ *Ibid.*, s. 2(4)(a).

¹⁶⁹ SK Act, Above Note 18.

¹⁷⁰ *Real Property Limitations Act*, R.S.O. 1990, c. L-15, online: CANLII <http://www.canlii.org/en/on/laws/stat/rso-1990-c-l15/latest/rso-1990-c-l15.html> (last accessed: May 11, 2010).

¹⁷¹ *Ibid.*

¹⁷² ON Act, Above Note 18.

¹⁷³ *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, repealed [NB Repealed Act].

¹⁷⁴ *Real Property Limitations Act*, R.S.N.B. 1973, c. L-8. This approach was discussed in NB Commentary on Bill 28, Above Note 123, at 1. New Brunswick's new *Limitation of Actions Act* was brought into force on May 1, 2010. At this time the former real property provisions were renamed in a separate statute called the *Real Property Limitations Act*.

¹⁷⁵ BC Act, Above Note 1, s. 3.

¹⁷⁶ *Ibid.*, s. 12.

Section 12 is consistent with the current Torrens registration system in that title to real property no longer turns on possession as it did 150 years ago, but rather on registration with the Province's Land Title Office.

Under this option, most of the provisions in section 3 would be carried forward to the new Act, without change. However, it is proposed that the following amendments be made to the real property provisions:

(a) Reduce the six-year basic limitation period to two years for the following claims:

- by a tenant against a landlord, whether or not the tenant was dispossessed in circumstances amounting to trespass (section 3(6)(e));

Comment: This claim is not about a land interest. It presumes the landlord is a trespasser. Therefore, it should be governed by a two-year basic limitation period.

- by a secured party not in possession of collateral to realize on that collateral (section 3(6)(a)); and

Comment: This claim should be governed by a two-year basic limitation period, like all other claims for debt recovery. Secured and unsecured parties should be governed by the same basic limitation period.

- by a debtor not in possession of collateral (on which the debt is secured) to redeem that collateral (section 3(6)(b)).

Comment: Same reason as above.

(b) Include the following claims in the list of claims that are not governed by a limitation period:

- by a person who has a right to enter for breach of condition subsequent or arising under possibility of reverter of a determinable estate (section 3(6)(f)); and

Comment: This claim is not that different than other fee interests (e.g., leases) which have no limitation periods. As such, for consistency, it should not be governed by a limitation period.

- to enforce an easement, restrictive covenant or profit à prendre (section 3(4)(h)).

Comment: This claim is not that different than section 3(4)(a), except it is a lesser right. As such, for consistency, it should not be governed by a limitation period.

(c) Repeal the recovery of trust property provisions in section 3(3)(a) to (e) that are currently governed by a 10-year basic limitation period.

Comment: Claims for recovery of trust property will be governed by the two-year basic limitation period that will apply to all claims, except those that are specifically exempted by the new Act. Special discovery rules for claims based on fraud, fraudulent breach of trust or recovery of trust property where the person with the claim is a beneficiary and the person against whom the claim is made is a trustee are discussed in the section on “Fraud or Trust Claims.” The safeguards for claimants with such claims will be carried forward in the new Act in recommended draft provision section 13.

(d) Move section 12 [*adverse possession*] to a statute that governs real property.

Comment: Section 12 provides a substantive rule that abolishes title by adverse possession that is not necessarily duplicated in the *Land Title Act*.¹⁷⁷ It may be that section 12 fits better within another statute that deals specifically with real property, such as the *Land Title Act*, rather than within the new Act. However, as noted above, further work needs to be done to determine if there will be any adverse consequences if the Province moves this provision out of the current Act.

Option 1 is the recommended option for reform. However, as the wording of the existing sections are interconnected and difficult to understand, it is unclear whether simply moving existing section 3 from the old law to the new one, and moving section 12 to a more suitable statute, will advance the law reform goals of making limitations law more certain and predictable and easier to understand.

Option 2: Move the real property provisions into a separate law.

A second option is to follow the approach taken in Ontario and New Brunswick, which is to retain some of the real property related limitations provisions from the current Act and rename them in a separate statute that is devoted specifically to that subject.

Ontario’s dual law approach has been criticized. Legal experts have examined some of the consequences of the reforms involving the *Real Property Limitations Act* and the *Limitations Act, 2002*, and have highlighted some of the inconsistent results that emerge when both statutes apply to govern a claim.¹⁷⁸ While removing the real property related sections from the new Act and putting them into a separate law seems as though it would simplify the new Act, it could have the opposite effect, at least for those claims which involve both real property and a general limitations feature.

¹⁷⁷ *Land Title Act*, R.S.B.C. 1996, c. 250, online: CANLII

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96250_00 (last accessed: May 11, 2010).

¹⁷⁸ See Anne Werker, “Limitation Periods in Ontario and Claims By Beneficiaries,” (2008) 34 *Advocates’ Q.* 1. See also John J. Chapman, “Eight (Unanswered) Questions on the New *Limitations Act*,” (2008) 34 *Advocates’ Q.* 258.

Option 3: Repeal the real property provisions in section 3, and move section 12 [*adverse possession*] to a statute that governs real property.

(a) Repeal the real property provisions in section 3.

Comment: This reform follows the general approach taken by Alberta and Saskatchewan as part of their reforms to their respective limitations statutes. If the current provisions in B.C.'s Act are not necessary in light of the Torrens system of land title registration, they should be repealed. This would simplify the new Act, making it more certain and easier to understand. Further work needs to be done to determine if there will be any adverse consequences if the Province repeals the real property provisions in section 3 as part of the reforms to the new Act.

(b) Move section 12 [*adverse possession*] to a statute that governs real property.

Comment: As noted in Option 1, another statute that deals specifically with real property may be a more appropriate statute for this provision. However, as noted above, further work needs to be done to determine if there will be any unintended consequences with moving this provision out of the current Act.

Question:

8) Which option for reforming the real property provisions do you prefer? Please explain your response.

5. Treatment of Aboriginal Claims under the Limitation Act

Currently the Act does not contain any special limitation periods for aboriginal claims. Depending on the cause of action, an aboriginal claim could be based on a two-, six- or 10-year basic limitation period. The basic limitation period for breach of fiduciary duty claims brought by aboriginal peoples against the Crown is six years. The general ultimate limitation period is 30 years.

Because the reforms propose a single two-year basic limitation period and a single either 10- or 15-year ultimate limitation period, the issue of whether the proposed reforms unfairly limit aboriginal claims has arisen.

The limitations laws of Alberta, Saskatchewan, and Ontario all make specific reference to claims made by aboriginal peoples against the Crown.

Alberta was the first jurisdiction to modernize its limitations legislation in 1999. Its previous law had no ultimate limitation period. Its reforms imposed a 10-year ultimate limitation period but provided that actions brought by aboriginal peoples based on a breach of fiduciary duty by the Crown would be governed by the previous limitations law as if the new law was not in force.¹⁷⁹

Ontario was next to reform its limitations legislation in 2002. It previously had no ultimate limitation period. Ontario's reforms, which created a 15-year general ultimate limitation period, also included a provision which stated that "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*," and "proceedings based on equitable claims by aboriginal peoples against the Crown," are "...governed by the law that would have been in force with respect to limitation of actions if this Act [Ontario's reformed limitations legislation] had not been passed."¹⁸⁰

Saskatchewan modernized its limitations legislation in 2005. Like Alberta and Ontario, Saskatchewan did not have an ultimate limitation period in its limitations law prior to reform. Its modernized law has a 15-year general ultimate limitation period. The law provides that "proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*..." are "...governed by the laws respecting the limitation of actions that would have been in force if this Act [Saskatchewan's limitations legislation] had not been passed."¹⁸¹

Neither New Brunswick's reformed limitations statute nor the ULCC's *Uniform Limitations Act* address First Nation issues.

¹⁷⁹ AB Act, Above Note 24, s.13.

¹⁸⁰ ON Act, Above Note 18, ss.2(1) (e) and (f) and 2(2).

¹⁸¹ SK Act, Above Note 18, ss.3(2) and (3).

Manitoba's Law Reform Commission has recently recommended reform to Manitoba's limitations law, and proposes an exemption for "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*," following Saskatchewan's approach.¹⁸²

It should be noted that the reforms to the limitations laws in Alberta, Saskatchewan and Ontario do not completely eliminate the application of limitation periods to aboriginal rights and title claims, and do not change the fact that once a claim is discovered a basic limitation period begins to operate. However, as each of these jurisdictions did not include an ultimate limitation period in their former law, no ultimate limitation period applies to aboriginal rights or title claims.

The Green Paper explicitly stated that it would not be addressing the issue of First Nation claims, however the ministry has been involved in discussions and exchanged correspondence on this issue. Some of the arguments that have been raised by First Nations in support of exemptions to limitation periods generally focus on historical claims and the belief that when the basis for those claims occurred:

- a disproportionately large number of aboriginal people lacked formal education;
- many aboriginal people could not read, write, speak or understand English;
- aboriginal people lacked familiarity with the Canadian legal and government processes;
- between 1927 and 1951 it was illegal for Indians to hire lawyers without the consent of the Superintendent of Indian Affairs; and
- it wasn't clear until some court decisions that there were legal remedies available to First Nations.

On the other hand, as stated by the Supreme Court of Canada:

*...the policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims... Witnesses are no longer available, historical documents are lost and difficult to contextualize and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.*¹⁸³

Recent court decisions have taken different approaches when dealing with the issue of limitation periods and aboriginal rights and title claims.¹⁸⁴ While the case law is still evolving,

¹⁸² MLRC 2009 Report, Above Note 38, at pages 26-27.

¹⁸³ *Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372 at para. 13 [Lameman].

¹⁸⁴ *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700; see also Lameman, Above Note 183.

the Province should be cautious about legislating in an area where the law is currently unsettled.

It is proposed that reforms to the new Act preserve the *status quo* with respect to section 35 aboriginal rights and title claims under the *Constitution Act, 1982*, and follow the approach of other modernized provinces to have these claims governed by B.C.'s previous limitations law. This will mean that the former basic and ultimate limitation periods will apply to aboriginal rights and title claims. Maintaining the *status quo* for these claims will ensure that the Province does not inadvertently impinge on aboriginal rights in the process of reforming the Act, while also ensuring that the current body of law in this area retains its relevance.

Recommended Draft Provision:

- | |
|---|
| <p>2 (2) This Act does not apply to court proceedings based on existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in the <i>Constitution Act, 1982</i>.</p> <p>(3) Court proceedings referred to in subsection (2) are governed by the laws respecting the limitation of actions that would have been in force if this Act had not been passed.</p> |
|---|

Comment:

This section ensures that aboriginal rights and title claims will continue to be governed by the status quo: that is, the current Act will continue to apply to govern aboriginal rights and title claims after it is repealed and the new Act is brought into force. All other claims in which aboriginal peoples are either plaintiffs or defendants will be governed by the new Act.

X. Conflict of Laws

Conflict of laws addresses the inter-relationship between two or more places and their respective laws. It seeks to provide answers to three different categories of conflicts:

- (1) choice of law (i.e., which law governs the dispute);
- (2) choice of jurisdiction (i.e., where should the dispute be heard); and
- (3) recognition and enforcement of foreign judgments.¹⁸⁵

The current Act includes a conflict of laws provision that states:

Foreign limitation law

*13 (1) If it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced.*¹⁸⁶

The law has evolved since the current Act was enacted in 1975. Back then, there was an ongoing debate regarding whether limitations laws were procedural (i.e., affecting a person's legal remedy) or substantive (i.e., affecting a person's legal right). The Supreme Court of Canada has now confirmed that for the purposes of conflict of laws, limitation periods are substantive, except those that can be shown beyond all doubt to be procedural for such purposes.¹⁸⁷ This distinction is important because procedural matters are always governed by the domestic law of the place where the lawsuit was started (e.g., the rules of court in that domestic law). In contrast, the court's choice of law rules dictate whether substantive matters are governed by the domestic law of the place where the lawsuit was started or the law of the place where the wrongdoing occurred. For example, in claims involving tort law (e.g., a personal injury case as a result of a car accident) the choice of law rules direct a court to use the law of the place where the accident or wrongdoing occurred.¹⁸⁸

The conflict of laws section in the current Act does not reflect this evolution of the law. The clause needs to be updated so that a modern approach to conflict of laws is embodied in the new Act.

¹⁸⁵ Professor W. Tetley, McGill Faculty of Law, *The Glossary of Conflict of Laws*, s.v. "conflict of laws," online: <http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/> (last accessed: April 7, 2010).

¹⁸⁶ BC Act, Above Note 1, s. 13.

¹⁸⁷ *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 at para. 88, online: QL (SCJ) [Tolofson].

¹⁸⁸ *Ibid.* at para. 42.

Using the following conflict of laws example, the Green Paper asked respondents to choose their preferred option. The two options are reproduced below.

Example:

If a B.C. couple have a car accident in California, conflict of laws rules are meant to help to determine where a plaintiff can start a lawsuit and which limitations law prevails. Choice of law rules indicate that the substantive law of the place where the car accident occurred should apply. Upon the couple's return to B.C., the injured passenger, the wife, sues her husband, the driver, using the B.C. court system.

Questions:

- (a) Assume the limitation period in California is three years and the limitation period in B.C. is two years. Under each option, how much time does the wife have to start a claim?
- (b) Assume the limitation period in California is one year and the limitation period in B.C. is two years. Under each option, how much time does the wife have to start a claim?

Option 1:

For the purposes of applying the rules regarding conflict of laws, the limitations law of [*enacting jurisdiction*] or any other jurisdiction is substantive law.

Option 1 Answers:

- (a) The choice of laws rules indicate that the substantive law of the place where the car accident occurred is California's limitations law. Therefore, the wife will have three years to start her claim to sue her husband using the B.C. court system.
- (b) The choice of laws rules indicate that the substantive law of the place where the car accident occurred is California's limitations law. Therefore, the wife will have one year to start her claim to sue her husband using the B.C. court system.

Option 2:

- (1) The limitations law of [*enacting jurisdiction*] applies to any proceeding commenced or sought to be commenced in [*enacting jurisdiction*].
- (2) Despite subsection (1), if a proceeding commenced or sought to be commenced in [*enacting jurisdiction*] is to be determined in accordance with the law of another jurisdiction and that

jurisdiction's limitations law establishes a shorter limitation period than the law of [*enacting jurisdiction*], the shorter limitation period applies to the proceeding.

Option 2 Answers:

(a) Subsection (1) of Option 2 indicates that the limitations law of B.C. will apply to any proceeding commenced in B.C. Therefore, the wife will have two years to start her claim to sue her husband using the B.C. court system. Subsection (2) does not apply because California's limitation period is longer than B.C.'s limitation period.

(b) Subsection (2) applies to this example. The limitations law of California will apply to any proceeding commenced in B.C. due to the fact that California's law establishes a shorter limitation period than the law in B.C. Therefore, the wife will have one year to start her claim to sue her husband using the B.C. court system.

As discussed in the Green Paper, Option 1 would allow foreign litigants ready access to B.C.'s civil justice system. It follows the approach taken by Ontario and the ULCC's model statute.¹⁸⁹ It takes into account the increasing mobility of wealth, skills and people.

Option 2 focuses on the conservation of judicial resources used for the resolution of civil suits brought within a local jurisdiction's borders. This is the approach taken in the modernized limitations laws of Alberta and, to a certain extent, Saskatchewan, as well as in New Brunswick's new statute.¹⁹⁰

Very few people commented on which conflict of laws option they preferred. One respondent who did comment was law reformer and former executive director of the British Columbia Law Institute. He advised that Option 1 represented the consensus of private international law experts, including those advising the English Law Commission in its 1982 report, *Classification of Limitation in Private International Law*.¹⁹¹ The report recommended that the English rule of classifying limitation periods as procedural be abandoned. Instead, a court should apply the limitation period which governs the substantive issue according to the jurisdiction to which the court was directed by its choice of law rules.¹⁹²

On the other side of the issue was the Law Society of British Columbia. They wrote that Option 2 "discourages sitting on a claim in circumstances where the governing substantive law provides a lesser limitation period [than in B.C.]..." In addition, the Law Society thought this

¹⁸⁹ ON Act, Above Note 18, s. 23; ULCC Act, Above Note 10, s.15.

¹⁹⁰ AB Act, Above Note 24, s. 12; SK Act, Above Note 18, s. 27; NB Act, Above Note 19, s. 24.

¹⁹¹ A. Close Submission, Above Note 30 at 7; English Law Commission, *Classification of Limitation in Private International Law*, 1982 (HMSO: London).

¹⁹² English Law Commission, Above Note 191, at 42.

approach would prevent extensions in cases where the governing substantive law had a longer limitation period than under B.C.'s law.¹⁹³

It is tentatively proposed that the conflict of laws provision be updated following the principles underlying Option 1. The proposed provision will clarify that limitation laws are substantive. This means that in the car accident example above, if a judge determines that the California law applies to the lawsuit started in B.C., the limitations law of California (the other jurisdiction) will apply.

Application of Exemption for Sexual Assault to Conflict of Laws Provision

As discussed above, exemptions for actions based on sexual misconduct and sexual assault will be carried forward from the current Act. The current Act also includes a provision in section 13(2) that ensures that if the choice of laws rules apply to an action based on sexual misconduct or sexual assault, that a court must not apply a limitation period to the action, despite section 13 (1). The provision reads as follows:

*13(2) If section 3 (4) (k) or (l) [no limitation period for actions based on sexual assault] applies to an action described in subsection (1) of this section, the court must apply section 3 (4) despite subsection (1) of this section.*¹⁹⁴

This means that the current conflict of laws provision protects plaintiffs who are seeking damages for sexual assault from having a limitation period apply to their claim in situations where the choice of law rules say the law from the other jurisdiction is to be applied to the lawsuit. This could be very important because not all limitations laws exempt sexual assault lawsuits from their scope.¹⁹⁵ For example, the plaintiff is a B.C. resident who was previously sexually assaulted in Alberta but does not sue for 20 years. The plaintiff later brings her claim in a B.C. court, and the court decides that Alberta law should apply. The proposed conflict of laws provision will clarify that the limitations laws of Alberta are substantive. As Alberta's law

¹⁹³ Law Society Submission, Above Note 60, at 6.

¹⁹⁴ BC Act, Above Note 1, s. 13(2).

¹⁹⁵ The following provinces' statutes currently provide protections for persons bringing claims based on sexual assaults: Manitoba's *Limitation of Actions Act*, C.C.S.M. c. L150, s. 2.1(2), online: CANLII <http://www.canlii.org/en/mb/laws/stat/ccsm-c-l150/latest/ccsm-c-l150.html> (last accessed: May 11, 2010); SK Act, Above Note 18, s. 16(1); ON Act, Above Note 18, ss. 16(1)(h) and 24(7), Newfoundland's *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 8(2) & 15(5)(c), online: CANLII <http://www.canlii.org/en/nl/laws/stat/snl-1995-c-l-16.1/latest/snl-1995-c-l-16.1.html#8> (last accessed: May 11, 2010); Northwest Territories and Nunavut's respective *Limitation of Actions Acts*, R.S.N.W.T. 1988, c. L-8, s. 2.1, online: CANLII <http://www.canlii.org/en/nt/laws/stat/rsnwt-1988-c-l-8/latest/rsnwt-1988-c-l-8.html> R.S.N.W.T. (Nu.) 1988, c. L-8, s. 2.1, online: CANLII <http://www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-l-8/latest/rsnwt-nu-1988-c-l-8.html> (last accessed: May 11, 2010); Yukon's *Limitation of Actions Act*, R.S.Y. 2002, c. 139, s. 2(3), online: CANLII <http://www.canlii.org/en/yk/laws/stat/rsy-2002-c-139/latest/rsy-2002-c-139.html> (last accessed: May 11, 2010) and the ULCC Act, Above Note 1, s. 9(1). NB Act, Above Note 19, s. 14.1 also includes a provision that exempts assaults of a "sexual nature" from limitation periods.

provides a limitation period for sexual assault claims, the plaintiff would be statute-barred from pursuing her claim in B.C. However, if the provision in section 13(2) is included in the reforms, this would mean that the plaintiff would be governed by the exemption in B.C.'s law that maintains there is no limitation period for claims of sexual assault.

While it is proposed that the new conflict of laws provision carry forward section 13(2) from the current Act, several issues arise. On the one hand, including section 13(2) would ensure that conflicts cases involving claims for sexual assault would always extend a protection to plaintiffs, regardless of the jurisdiction where the wrongdoing occurred. On the other hand, inclusion of section 13(2) would complicate the conflict of laws provision. As well, it could encourage forum shopping, as plaintiffs who are out of time to commence their claims in a jurisdiction that has a limitation period for claims for sexual assault may attempt to have their case heard in B.C. No other modernized provincial law has taken this approach.

Recommended Draft Provision:

Conflict of laws

- 4 (1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.
- (2) If section 3 (1) (k) or (l) [*exemption for sexual misconduct or sexual assault*] applies to a claim, the court must apply section 3 (1) despite subsection (1) of this section.

Comment:

Conflict of laws principles have evolved since the current Act was brought into force in 1975. For example, the Supreme Court of Canada has clarified that limitation laws are substantive. Previously, they were classified as procedural.

Other modernized limitations laws in Canada include a statement in their conflict of laws sections that limitations laws are substantive; however, this would not mean much to laypeople or to people who are not conflicts experts. The proposed section is more understandable. It states that the limitation period from another jurisdiction's limitations law must apply if a lawsuit brought in a B.C. court is being decided using the substantive law of that other place. So, if a personal injury claim is being decided by a B.C. judge using California law because the car accident took place in California, the California limitation period would apply.

Subsection (2) will be carried forward from the current Act. As noted in the section on exemptions, the new law will continue to provide no limitation period for sexual assault lawsuits. This subsection will ensure that protection extends to sexual assault claims that are governed by the conflict of laws provision.

Questions:

- 9) Do you have any comments or concerns with the proposed conflict of laws provision (option 1)? Please explain.

- 10) Should section 13(2) of the current Act be carried forward to the new conflict of laws provision, to ensure that claims for sexual assault, which will continue to have no limitation period, will also be excluded in cases involving conflict of laws rules? Why or why not?

XI. Rules of Equity

Equity was a branch of English law separate from the common law (e.g., the law created through the decisions of judges). In historic times, a litigant whose legal problem would not be remedied through a strict application of the common law could turn to the courts of equity, the decision-maker being a representative of the King: the Lord Chancellor or the keeper of the King's conscience. The courts of equity aimed to ensure fairness and offered litigants some protection against the harsh application of the common law.¹⁹⁶ Today, the common law and equity are no longer separate, and judges in B.C. apply equitable principles when deciding cases.

The current law recognizes certain specific equitable principles, such as acquiescence and inexcusable delay, that give judges flexibility when resolving civil disputes. Existing section 5 allows a judge to dismiss a civil lawsuit on the basis of these two equitable principles even if it was started in time.¹⁹⁷

The Green Paper did not suggest any change to this section. It is proposed that it be carried forward into the new law.

Recommended Draft Provision:

Rules of equity not overridden

- 5** Nothing in this Act interferes with any of the following:
- (a) a rule of equity that refuses relief, on the ground of acquiescence, to a person whose right to bring an action is not barred by this Act;
 - (b) a rule of equity that refuses relief, on the ground of inexcusable delay, to a person who claims equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act.

Comment:

Existing section 5 is carried forward from the previous Act to the new one in order to continue to allow judges to refuse relief on the equitable grounds of acquiescence or inexcusable delay.

¹⁹⁶ *Wikipedia*, "Equity and Trusts," online: http://en.wikipedia.org/wiki/Law#Equity_and_trusts (last accessed: May 11, 2010). See also *Law Dictionary*, s. v. "equity," online: Law.Com <http://dictionary.law.com> (last accessed: May 11, 2010) and in Lloyd Duhaime, Above Note 97, s. v. "equity".

¹⁹⁷ BC Act, Above Note 1, s. 5.

XII. Extinguishment / Non-Judicial Remedies

In 1974, just before the existing Act was introduced, the former British Columbia Law Reform Commission recommended that the limitations law contain an extinguishment clause that extinguishes legal rights for various causes of action upon the expiry of a limitation period.¹⁹⁸ This clause was intended to confirm that B.C.'s law should be classified as a substantive law. As noted previously, back then, the procedural versus substantive distinction was an important step in a conflict of laws analysis.¹⁹⁹

The extinguishment provision in section 9 of the current Act is largely based upon the draft legislation provided by the former British Columbia Law Reform Commission in their 1974 report.²⁰⁰ It should be noted that section 9 only applies to a specified list of causes of action: it does not apply to every category of civil lawsuit. The extinguishment provision provides that both legal rights and in certain cases involving property, a plaintiff's title to property, are extinguished upon the expiry of a limitation period.²⁰¹ This means that a plaintiff's legal right to sue is extinguished, and where the cause of action involves property, a plaintiff's title to property is also extinguished once the limitation period expires. The current extinguishment provision has been regarded by both the courts and by legal experts as falling within the ambit of substantive law, rather than procedure, as it affects legal rights, not legal remedies.²⁰²

The pre-reform limitation laws of Alberta, Saskatchewan, Ontario and New Brunswick took different approaches to extinguishment. Alberta's former law did not contain an extinguishment clause. The former laws of Saskatchewan, Ontario and New Brunswick contained a provision that extinguished both the right to take proceedings to recover land (and

¹⁹⁸ BCLRC 1974 Report, Above Note 41, at 97.

¹⁹⁹ The procedural vs. substantive debate discussed in the "Conflict of Laws" section has largely been resolved, and therefore there is no need to retain an extinguishment clause to fulfill the purpose of emphasizing that the *Limitation Act* is substantive law. The Supreme Court of Canada has ruled that limitations laws are substantive, and many Canadian limitations laws contain a statement saying that limitations laws are to be considered substantive law for conflicts of law purposes: Tolofson, Above Note 187, at paras. 85-87. This means that for claims involving tort law (e.g., a personal injury case as a result of a car accident), because limitation law is considered to be substantive law, courts will apply limitation periods from the place where the accident or wrongdoing occurred.

²⁰⁰ BCLRC 1974 Report, Above Note 41, at 224 & 225.

²⁰¹ BC Act, Above Note 1, s. 9.

²⁰² *Business Development Bank of Canada v. Papke*, [2003] B.C.J. No. 2689 (S.C.), aff'd [2005] B.C.J. No. 1091; Graeme Mew, *The Law of Limitations*, (Toronto: Butterworths, 2004) at 66 & 67; A. Close Article, Above Note 64 at 234-5.

money charged on land) and a person's title to the land (or money charged) on the expiration of the limitation period.²⁰³

Neither the ULCC's model limitations law nor the modernized laws of Alberta, Saskatchewan or Ontario include an extinguishment provision.²⁰⁴

New Brunswick's reformed law approaches the issue slightly differently. It includes a specific clause that prevents a claimant from enforcing any non-judicial remedies in respect of a claim upon the expiry of a limitation period.²⁰⁵ This means that once a limitation period has expired, and a claimant cannot sue, he or she cannot exercise an alternate non-judicial remedy to achieve a similar result.²⁰⁶ For example, a landlord who is statute-barred from suing his tenant for non-payment of rent cannot exercise his common law right to seize the personal property of the tenant to then sell for the payment of the rent.²⁰⁷

The extinguishment section in B.C.'s current Act is wordy and complicated. Because its subsections list only certain categories of lawsuits, it does not extinguish all types of civil claims.

As discussed above in the "Treatment of Aboriginal Claims under the *Limitation Act*" section, it is proposed that aboriginal rights and title claims continue to be governed by the *status quo*, meaning that the current Act will continue to apply to these types of claims once the new Act comes into force. As a result, the extinguishment clause in the current Act will continue to apply to aboriginal rights and title claims. However, there is case law indicating that the current Act cannot extinguish interests in reserve lands, aboriginal rights, or aboriginal title. This is because provincial governments are not constitutionally competent to legislate with respect to "Indians and lands reserved for Indians," which is an area of federal government authority.²⁰⁸

Reforms to the current Act will simplify the law related to extinguishment. Instead of retaining the current extinguishment provision, a new section based on New Brunswick's non-judicial remedies clause is proposed, in order to make the law clearer and more easily understood. While a non-judicial remedies clause differs from an extinguishment clause in that once a limitation period expires, the clause prohibits a person from exercising a legal remedy rather than extinguishing a legal right, the practical effect is the same. Even if a person's legal right

²⁰³ *Limitation of Actions Act*, R.S.A. 1980, c.L-15, repealed; *Limitation of Actions Act*, R.S.S. 1978, c. L-15, s.46, repealed; *Limitations Act*, R.S.O. 1990, c.L.15, ss.15 and 45(1)(g) and (h), repealed; NB Repealed Act, Above Note 173, ss. 60 and 61(2).

²⁰⁴ ULCC Act, Above Note 10; AB Act, Above Note 24; SK Act, Above Note 18; ON Act, Above Note 18.

²⁰⁵ NB Act, Above Note 19, s. 23.

²⁰⁶ NB Commentary on Bill 28, Above Note 123, at 16.

²⁰⁷ *Wikipedia*, s. v. "Distrain", online: <http://en.wikipedia.org/wiki/Distrain> (last accessed: May 11, 2010).

²⁰⁸ *Thomas et al. v. Alcan Aluminum*, [1999] 1 C.N.L.R. 92 (B.C.S.C.).

survives, in the absence of a remedy to enforce it, “such right, in and of itself, is of little, if any, value.”²⁰⁹

The proposed new section will specifically provide that if another provincial statute provides a plaintiff with an alternate remedy without court proceedings, and this alternate remedy is available to a plaintiff after the expiry of a limitation period in the new Act, such a remedy will be allowed.

Recommended Draft Provision:

Non-judicial remedies

- 31** (1) In this section, “non-judicial remedy” means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings, but does not include a remedy available under an enactment.
- (2) If a claimant is prevented from commencing a court proceeding in relation to a claim as a result of the expiry of a limitation period established by this Act or the expiry of any longer limitation period agreed to under section 23 (1) [*agreements to vary limitation periods*], the claimant is not entitled to enforce against the person against whom the claim is or may be made any non-judicial remedy that the claimant would but for this section be entitled to enforce in relation to the claim.

Comment:

This section is based on New Brunswick’s non-judicial remedies clause. It differs in that it specifically does not extend to remedies found in other provincial laws. For example, if a landowner sees a gasoline tanker truck tip over and spill fuel onto her property but she does not sue before the governing limitation period expires, the non-judicial remedies section will stop her from launching a late nuisance lawsuit under the new Act, but will not affect her right to apply for a remediation order under the British Columbia Environmental Management Act (i.e., a non-judicial remedy). The idea is to prevent a general law, such as a limitations law, from restricting access to administrative or statutory remedies found in other more specific provincial laws.

This section will also respect any longer limitation periods entered into by agreement (see proposed section 23 [Agreements to vary limitation periods]).

²⁰⁹ G. Mew, Above Note 202, at 65. He further notes: “It is not surprising, therefore, that both case law and legal texts seldom distinguish between whether it is the right or the remedy that is lost upon the expiration of the limitation period.”

XIII. Enforcement of Judgments Where Enforcement Process Outstanding

Existing section 11 deals with cases where an enforcement process has not been completed by the end of a limitation period and with orders that stay execution on a judgment.²¹⁰ The Green Paper did not discuss any reforms to this section. It is proposed that section 11 of the current Act be carried forward to the new law.

Recommended Draft Provision:

Completion of enforcement process

- 25** (1) Despite any other provision of this Act, if, on the expiration of the limitation period established by section 8 [*basic limitation period for claim based on judgment*] with respect to proceedings on a judgment, there is an enforcement process outstanding, the judgment creditor or the judgment creditor's successors may do any of the following:
- (a) continue proceedings on an unexpired writ of execution, but the writ may not be renewed;
 - (b) commence or continue proceedings against land on a judgment registered under Part 5 of the *Court Order Enforcement Act*, but the registration may not be renewed unless those proceedings have been commenced;
 - (c) continue proceedings in which a charging order is claimed.
- (2) If a court makes an order staying execution on a judgment, the running of time with respect to the limitation periods established by this Act for proceedings on that judgment is postponed or suspended for so long as the order staying execution is in force.

Comment:

This section carries forward section 11 of the current Act into the new law.

Subsection (1) delays the expiration of a limitation period for a claim to enforce a judgment when there is an enforcement process outstanding. This provision protects a claimant's rights by maintaining his or her ability to complete an outstanding enforcement process.

Subsection (2) stops the running of limitation periods under the Act for matters that are postponed or suspended by a court order staying execution on a judgment, for so long as the stay order is in effect. This ensures that a stay order does not count in the calculation of a limitation period to the detriment of a potential claimant.

²¹⁰ BC Act, Above Note 1, s. 11.

XIV. Schedule

As noted previously, the Act sets default limitation periods. However, many civil lawsuits are governed by time limits found in laws other than the Act. For example, there is a 10-year time limit for starting a lawsuit under the *Civil Forfeiture Act*.²¹¹

The Green Paper did not include any proposal to reference the time limits found in other provincial laws in the new Act. However, since then, it has become apparent that it may be useful to include a comprehensive list of limitation periods found in other provincial statutes (to which the Act does not apply) to further simplify the limitations regime in the province. The ULCC endorsed the idea of a Schedule, noting in its model statute that enacting jurisdictions may wish to include a Schedule in their respective statutes. Ontario's reformed limitations legislation is the only provincial statute that follows the approach of the ULCC and contains a Schedule.²¹²

To promote the law reform goal of greater clarity, it is proposed that a Schedule be added to the new Act that lists these other time limits, which are exceptions to the Act's default limitations regime. The Schedule will bring together all the statutory limitation periods that apply to civil lawsuits, which will make the law clearer and easier to use for both lawyers and the general public.

It is hoped that the Schedule will help reduce losses claimed against lawyers and their insurer for failing to identify a relevant limitation period. According to data from the Law Society of British Columbia, one of the most common mistakes made by lawyers is missing limitation periods or deadlines.²¹³ As many limitation periods are located in statutes outside the current Act, a Schedule will assist lawyers by consolidating relevant statutory limitation periods in one place, for ease of reference.

As the new Act is structured to only apply to how long a person has to bring a "claim" in civil court, the new Act will also only list in the Schedule limitation periods found in other provincial statutes that apply to how long a person has to bring a "claim" in civil court. This means that the Schedule will not list time limits for bringing all court proceedings (e.g., it will not list limitation periods for bringing appeals). In addition, it will not list time periods to provide notice, or time periods to begin an administrative process, as neither of these is a "claim."

²¹¹ *Civil Forfeiture Act*, S.B.C. 2005, c.29, s. 35, online: BC Laws http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_05029_01#section35 (last accessed: May 11, 2010).

²¹² ULCC Act, Above Note 10, s. 12 and Schedule; ON Act, Above Note 18, s. 19 and Schedule.

²¹³ The Law Society of British Columbia, "Missed Limitations and Deadlines, Beat the Clock: Timely Lessons from 1600 Lawyers (Vancouver, Lawyers' Insurance Fund, 2007) at 4, 24 & 25, online: http://www.lawsociety.bc.ca/regulation_insurance/insurance/docs/beat-the-clock.pdf (last accessed: May 11, 2010).

The limitations law in Ontario and the ULCC's model statute have both clarified that the rules that postpone the running of time against minors and legally disabled adults will apply to the limitation periods referred to in the Schedule.²¹⁴ In addition, Ontario's law ensures that limitation periods referred to in its Schedule are suspended from the time an agreement for attempted resolution of the claim is made.²¹⁵

It is proposed that the new Act contain a Schedule that will consolidate all limitation periods found in other statutes that apply to claims. For limitation periods outside the new Act to be effective, the relevant provisions must be listed in the Schedule. However, the Schedule will ensure that if another statute establishes a limitation period that applies to a claim that is specifically exempted by the new Act, such as a claim based on sexual assault, that the other statute's limitation period will not apply. The new Act will clarify that the postponement mechanisms for minority and adult legal disability apply to the limitation periods listed in the Schedule.

Recommended Draft Provision:

Application of other limitation periods

- 27** (1) If another Act establishes a limitation period that purports to apply to a claim referred to in section 3 (1) [*exempted claims*] of this Act, that limitation period does not apply to the claim.
- (2) If another Act establishes a limitation period that purports to apply to a claim other than a claim referred to in section 3 (1) [*exempted claims*] of this Act, that limitation period does not apply to the claim unless
- (a) the provision establishing it is listed in the Schedule to this Act, or
 - (b) the provision establishing it
 - (i) is in existence on the date of the coming into force of this section, and
 - (ii) incorporates by reference a provision listed in the Schedule to this Act.
- (3) Sections 19, 20, 21, 28 and 29 [*discovery rules for minors, persons under disability, persons who become under disability, and notice to proceed if basic limitation period postponed under sections 19, 20, or 28*] apply to a limitation period established by a provision referred to in subsection (1).

Comment:

This is a new section. The Schedule it will create will make the law clearer and more understandable by listing all of the limitation periods that could apply to bringing a civil lawsuit, even those from other provincial laws. It is hoped that the Schedule will help both lawyers and non-lawyers to determine which limitation period applies to the civil claim at issue.

²¹⁴ ON Act, Above Note 18, s. 19(5); ULCC Act, Above Note 10, s. 12(4).

²¹⁵ ON Act, Above Note 18, s. 19(5).

Subsection (1) clarifies that if the new Act exempts a claim from its application, another provincial statute cannot legislate a limitation period in relation to that claim.

Subsection (2)(b) ensures no civil limitation period is unintentionally abolished by the creation of the Schedule. Time limits in other statutes that are listed in the Schedule, and those that are created by referential incorporation of a specific limitation period will continue, as long as the statute containing the specific limitation period is listed in the Schedule.

In addition, subsection (3) clarifies that the provisions in the Act governing postponement for minority and adult disability will apply to limitation periods in other statutes that are contained in the Schedule.

XV. Transition Rules

The Green Paper discussed the need to include a transition clause in order to transition effectively from the existing limitations law to the new one. It proposed a model transition clause to govern claims that arose before the effective date of the new statute, for which no court proceeding had been started. The model transition clause is reproduced below for ease of reference.

The model transition clause divided possible claims into three categories:

- (1) those already out of time;
- (2) those that are still “alive” but discovered *before* the effective date of the new Act; and
- (3) those that are still “alive” but discovered *after* the effective date.

The Green Paper Model Transition Clause:

- 1) Claims already out of time as of the effective date would not be revived.
- 2) Claims discovered before the effective date must be brought by the earlier of:
 - i) the second anniversary of the effective date, or
 - ii) the date the former limitation period would have expired.
- 3) Claims discovered after the effective date:
 - i) if previously governed by the 30-year ultimate limitation period, the new Act applies as if the act or omission occurred on the effective date of the new statute, or
 - ii) if previously governed by the six-year ultimate limitation period, the former limitation period applies.²¹⁶

Only a small number of people commented on the effectiveness of the model transition clause. Most were generally in favour. However, concerns were raised by the former executive director of the British Columbia Law Institute and by the Law Society of British Columbia about the potential for part 2(i) of the Green Paper’s model transition clause to create unfairness for claimants and add greater complexity to the new Act. Specifically, the Law Society of British Columbia was concerned that it could be administratively impractical to require lawyers to review all of their files in order to identify and warn clients whose basic limitation period would decrease under the new Act.²¹⁷

In response to this feedback, the following transition provision is proposed.

²¹⁶ Green Paper, Above Note 9 at 25.

²¹⁷ Law Society Submission, Above Note 60, at 7.

Proposed Transition Provision:

- *If a former limitation period expires prior to the effective date of the new Act, the transition clause will not revive the claim.*
- *For all claims that are pre-existing (i.e., the act or omission occurred prior to the effective date of the new Act) and which are discovered before the effective date of the new Act, the former limitation periods apply. The ultimate limitation period will continue to run from accrual and the basic limitation period will continue to run from discovery.*
- *For all pre-existing claims that are discovered after the effective date of the new Act:*
 - *if the claim was formerly governed by the 30-year ultimate limitation period, the reduced either 10- or 15-year ultimate limitation period runs from the effective date. The two-year basic limitation period runs from discovery; or*
 - *if the claim was formerly governed by the six-year ultimate limitation period, the former six-year ultimate limitation period continues to apply, running from the date of accrual. The two-year basic limitation period runs from discovery.*

The proposed transition provision is part of the new Act's attempt to ensure that, with respect to pre-existing situations, people will be able to rely on legal advice given to them that pre-dates the new law; it also provides a clear and simple model for limiting liability in future situations.

Ontario's reformed *Limitations Act, 2002* has a transition clause which embodies this idea. Claims discovered *before* the effective date of the modernized law are governed by the former limitation period. For claims discovered *on or after* the effective date, the new law applies as if the act or omission had taken place on the effective date.²¹⁸ The Ontario Court of Appeal has analyzed this wording and found that the transition clause applies to the ultimate limitation period.²¹⁹ For clarity, B.C.'s proposed transition clause will specify that it applies to both the basic and ultimate limitation periods. Examples of the operation of the proposed transition clause are set out below.

Example 1: Claim Out of Time by Effective Date

In 2000, a homeowner hires an architect to add a porch onto the front of her house. The architect designs the porch, which starts to sag later that year. Part of the porch collapses in 2001, but the homeowner decides to do nothing. The new limitations law enters into force in

²¹⁸ ON Act, Above Note 18, s. 24.

²¹⁹ *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd. et al.*, [2007] 84 O.R. (3d) 414 (C.A.) (leave to appeal to S.C.C. dismissed).

2012, and the homeowner, who has had a change of heart, decides to try to sue the architect for negligence.

The homeowner is prevented from suing the architect in 2012 because her negligence suit is out of time. If she had wanted to sue, the Act that was in place when she discovered the damage in 2001 required the homeowner to act by 2003, within the two-year basic limitation period for negligence. The new law will not revive a lawsuit that is already out of time.

Example 2: Discovery Before the Effective Date

Assume the dates in the example are changed so that the architect provides negligent advice in 2000, damage to the porch occurs in 2011, and discovery by the homeowner also occurs in 2011. The effective date of the new Act remains at 2012. Because the pre-existing claim and discovery occur prior to the effective date, and the claim is not yet out of time in 2012, the transition clause will result in the former limitation periods applying to the claim. This means the former 30-year ultimate limitation period will run from the date of damage (2011). The former two-year basic limitation period will run from discovery (2011). The homeowner will normally have up to 2013 to sue, unless another postponement mechanism applies.

Example 3: Discovery After the Effective Date (30-year Ultimate Limitation Period)

Assume the dates in the example are changed so that the architect provides negligent advice in 2000, the porch starts to sag in 2015 but the homeowner does not discover this until 2016, when part of the porch collapses, and the effective date of the new Act remains at 2012. As a result of the transition clause, the new law applies. This is because, while the pre-existing claim occurs prior to the effective date, discovery occurs in 2016, after the effective date. For claims that are discovered after 2012 that were previously governed by a 30-year ultimate limitation period, either the 10- or 15-year ultimate limitation period runs from the effective date of the new Act. The basic limitation period runs from discovery. This means that absent special circumstances that would justify a further postponement, the homeowner would have two years to sue the architect, running from the date she discovered the negligence; that is, between 2016 and 2018.

Example 4: Discovery After Effective Date (6 Year Ultimate Limitation Period)

The following example illustrates how the transition clause will work for claims formerly governed by the special six-year ultimate limitation period.

In 2009, a surgeon removes a cancerous tumour from a patient's abdomen. In 2015, the patient is again diagnosed with cancer. At that point, the patient is advised by a specialist that the manner in which the tumour was removed by the surgeon in 2009 greatly increased the chance of a recurrence of the cancer. For the purposes of this example, assume that the cancer returned in 2010 (i.e., the damage occurred in 2010, a year after the surgery). The patient was unaware that

the cancer returned until he was diagnosed in 2015. Therefore, the cancer was “discovered” by the patient in 2015.

Assume the new Act comes into force in 2012. The patient goes to a lawyer in 2017 because he wants to sue the surgeon for medical malpractice.

Because this case involves a pre-existing claim that occurred prior to the new Act, but which was not “discovered” until after the effective date, the transition clause applies. Being a medical malpractice suit, the patient’s claim falls into the category of case that would have formerly been governed by a special six-year ultimate limitation period. The transition rules provide that this category of case will continue to be bound by the former six-year ultimate limitation period, running from the date of the damage (i.e., 2010, the date the cancer returned). Because the ultimate limitation period expires in 2016, the patient is statute-barred from suing the surgeon in 2017. The transition rules provide that the two-year basic limitation period runs from discovery; however, because the patient did not act on his rights before the expiry of the ultimate limitation period in 2016, he cannot sue the surgeon.

Recommended Draft Provision:

Transition

33 (1) In this section:

“**effective date**” means the day on which this section comes into force;

“**former Act**” means the *Limitation Act*, R.S.B.C. 1996, c. 266, as it read immediately before the effective date;

“**former limitation period**” means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date;

“**pre-existing claim**” means a claim

(a) that is based on an act or omission that took place before the effective date, and

(b) with respect to which no court proceeding has been commenced before the effective date.

(2) A court proceeding must not be commenced with respect to a pre-existing claim if a former limitation period expired before the effective date.

(3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.

(4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date, Part 2 of this Act applies to the pre-existing claim, and,

(a) if the pre-existing claim is one referred to in section 8 (1) (a) or (b) of the former Act, section 8 of the former Act applies to the pre-existing claim, or

- (b) if the pre-existing claim is one referred to in section 8 (1) (c) of the former Act, Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of
- (i) the effective date, and
 - (ii) the day the act or omission takes place under section 22 (2).

Comment:

This section sets out the transition rules for determining the limitation periods for claims based on an act or omission that took place before the effective date of the new Act and for which no lawsuit has been started.

Subsection (2) says claims that are already out of time before the new Act comes into force will not be revived.

Subsection (3) says that claims that are discovered before the new Act comes into force will be subject to the limitation periods in the former Act.

Subsection (4) says that claims that are discovered after the new Act comes into force will come under the new Act. If such a claim previously had a six-year ultimate limitation period, that six-year period continues to apply. If such a claim had a 30-year ultimate limitation period, the new ultimate limitation period applies (either 10 or 15 years), running from the later of the effective date of the new Act or a day established under section 22(2). Section 22(2) is a deeming provision that establishes when time runs for certain claims that may not fit neatly into the reformed commencement model that starts the ultimate limitation period.

The transition rules are meant to transition civil litigation to the new regime without prejudicing claimants that have discovered their claims prior to the new Act coming into force. Preserving the current Act's rules for claimants that have already discovered their claims protects those claimants that may have received legal advice or made decisions based on the current Act. Subsection (4) is a compromise that enables access to justice to be preserved while limiting liability for future situations.

XVI. Provisions that Will Not be Carried Forward to the New Act

As noted in Part One of this White Paper, the proposed reforms will be carried out by repealing the existing law and replacing it with a new one. As a result, many sections of the current Act will not be carried forward to the new Act. In some cases, the principles behind a certain section will be carried forward into the new Act. Other sections will be eliminated because they are no longer necessary. The sections of the current law that will not be carried forward into the new law are listed below, along with a brief rationale.

Interested parties are invited to comment on the proposed “not carried forward” list found below.

Not carried forward:

Definitions, section 1:

"action" includes any proceeding in a court and any exercise of a self help remedy;

"collateral" means land, goods, documents of title, instruments, securities or other property that is subject to a security interest;

"trust" includes an express, an implied and a constructive trust, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only because 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 secured party in collateral;

Comment:

Action

A structural shift to the new Act is proposed. The definition of “action” is very broad and includes “any proceeding in a court or exercise of a self-help remedy.” (Emphasis added). In the new law, limitation periods will only apply to govern the time periods people have to bring “claims” in a court. This will make B.C.’s limitations law similar to those of the modernized limitations laws in other provinces and the ULCC’s model statute.

Collateral

It is not necessary to define “collateral” in the new law. Modernized limitations laws elsewhere, such as those in Ontario and Saskatchewan, that refer to “collateral” within the body of their respective acts do not also include definitions for “collateral.”²²⁰ A number of other B.C. laws,

²²⁰ SK Act, Above Note 18 & ON Act, Above Note 18.

including the *Financial Administration Act*, the *Securities Act*, the *Sale of Goods Act*, and the *Land Title Act*, make repeated references to “collateral” but do not define the term.²²¹

Trust

It will also be unnecessary to carry forward the definition of “trust” into the new law. The trust provisions in the draft legislation are based on Saskatchewan’s modernized limitations law. Saskatchewan’s law does not include a definition.²²² Also, research reveals that many other B.C. laws that deal with trusts do not include a definition.²²³

Not carried forward:

Limitation periods

3(1) In subsections (4) [*no limitation periods*] and (6) [*six-year basic limitation period for specified lawsuits*], “debtor” means a person who owes payment or other performance of an obligation secured, whether or not the person owns or has rights in the collateral.

Comment:

The definition of “debtor” will be removed from the new law. The sections of the draft legislation that include it are largely based on the modernized limitations laws of Ontario and Saskatchewan, and neither of these includes a definition of “debtor” or “creditor”. In addition, such definitions are not included in other B.C. laws, including the *Business Corporations Act*²²⁴ and the *Court Order Enforcement Act*,²²⁵ which also suggests that it is not necessary.

Not carried forward:

Limitation periods

3 (5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

(6) Without limiting subsection (5) and despite subsections (2) [*two-year basic limitation period*] and (4) [*no limitation period*], after the expiration of 6 years after the date on which right to do so arose an action may not be brought:

²²¹ *Financial Administration Act*, R.S.B.C. 1996, c. 138; *Securities Act*, R.S.B.C. 1996, c. 418; *Sale of Goods Act*, R.S.B.C. 1996, c. 410. See also *Land Title Act*, R.S.B.C. 1996, c. 250. These are available online at the BC Laws Webpage: <http://www.bclaws.ca/> (last accessed: May 11, 2010).

²²² SK Act, Above Note 18.

²²³ See *Builders’ Lien Act*, S.B.C. 1997, c. 45, *Business Corporations Act*, S.B.C. 2002, c. 57 [Business Corporations Act] and the *Estate Administration Act*, R.S.B.C. 1996, c. 122, online: BC Laws Website <http://www.bclaws.ca/> (last accessed: May 11, 2010).

²²⁴ Business Corporations Act, Above Note 223.

²²⁵ *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, online: BC Laws http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01 (last accessed: May 11, 2010).

- (a) by a secured party not in possession of collateral to realize on that collateral;
- (b) by a debtor not in possession of collateral to redeem that collateral;
- (c) for damages for conversion or detention of goods;
- (d) for the recovery of goods wrongfully taken or detained;
- (e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;

Comment:

The current Act contains basic limitation periods of two, six and 10 years' duration. The length of the basic limitation period is currently tied to the type of civil lawsuit (e.g., cause of action) that is being started. These sections will not be carried forward to the new Act as the new Act proposes a different system determining of limitation periods. Most claims will have a two-year basic limitation period, but claims for the enforcement of judgements (i.e., to enforce an already existing court order) will continue to have a 10-year basic limitation period.

Not carried forward:

3 (7) A beneficiary, against whom there would be a good defence under this section, does not derive any greater or other benefit from a judgment or order obtained by another beneficiary than he or she could have obtained if he or she had brought the action or other proceeding and this section had been pleaded.

Comment:

This section addresses a rather unique and likely uncommon situation. It applies where there has been a breach of trust, and there are multiple beneficiaries: some of whom know about the breach and have let the basic limitation period expire (i.e., have acquiesced to the breach) and others who later learn of the breach and wish to sue. The beneficiaries who knew of the breach and did not act cannot benefit from an order against the trustee(s) obtained in a lawsuit brought by the beneficiaries who acted in time.

The trust experts that the ministry consulted with on section 3(7) held differing views as to the usefulness of the provision. However, they all agreed the situation it targets is relatively rare. Moreover, the trust experts thought that even without section 3(7), judges would likely reach the same result; that is, they would not allow a beneficiary who had acquiesced to a breach to benefit from the lawsuit brought by another beneficiary who had not.

Not carried forward:

Running of time postponed

6 (7) Subsections (3) and (4) [*postponement until discovery of a specified list of actions*] do not operate to the detriment of a purchaser in good faith for value.

Comment:

It is unclear how this section works to protect purchasers in good faith for value from the discoverability provisions in subsections 6(3) and (4). It is questionable whether a defendant who is wilfully concealing material facts from a plaintiff can also be classified as a purchaser in good faith for value. There is no case law to assist in interpreting this section. As the discoverability rule in the new Act will apply to all claims and as courts have previously applied common law discoverability principles to limitation periods in laws which did not include discoverability in order to ensure fairness to plaintiffs, it is proposed that this section not be carried forward.

Not carried forward:

Ultimate limitation period

8 (1) Subject to section 3 (4) [*no limitation period*] and subsection (2) [*ultimate limitation period suspended during minority*] of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 [*fraud or fraudulent breach of trust*] or 11 (2) [*order staying execution on a judgment*] or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor [*adult person under a disability*], no action to which this Act applies may be brought

(a) against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on negligence, after the expiration of 6 years from the date on which the right to do so arose,

(b) against a medical practitioner, based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose,

Comment:

The new Act will create either a 10- or 15-year ultimate limitation period for all civil lawsuits. The special six-year ultimate limitation period found in existing section 8 will be eliminated.

Not carried forward:

Cause of action extinguished

9 (1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

(2) On the expiration of a limitation period set by this Act for a cause of action specified in column 1 of the following table, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of the table and of a person claiming through the person in respect of that property is, as against the person against whom the cause of action formerly lay and as against the person's successors, extinguished.

Column 1 <i>Cause of action</i>	Column 2 <i>Property</i>
For conversion or detention of goods.	The goods.
To enforce an equitable estate or interest in land.	The equitable estate or interest.
To redeem collateral, in the possession of the secured party.	The collateral.
To realize on collateral in the possession of the debtor.	The collateral.
To recover trust property or property into which trust property can be traced.	The trust property can be traced, as the case may be.
For the possession of land by a person having a right to enter for a condition subsequent broken or a possibility of reverter of a determinable estate.	The land.

(3) A cause of action, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period set by this Act for an action between the same parties on the judgment or to recover the principal money.

Comment:

This section extinguishes a person's legal right to sue, along with a person's title to property, in certain categories of cases, if the limitation period has expired. The proposed "non-judicial remedies" section of the new law is meant to replace the extinguishment clause. As a result, section 9 will not be carried forward.

Not carried forward:

Conversion or detention of goods

10 If 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 the person or by a person claiming through the person,

- a) further cause of action for the conversion or detention of the goods,
- b) a new cause of action for damage to the goods, or
- c) a new cause of action to recover the proceeds of a sale of the goods,

accrues to the person or a person claiming through the person, no action may be brought on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to the plaintiff or to a person through whom the plaintiff claims.

Comment:

In conversion or the detention of goods cases that might involve more than one legal wrong, existing section 10 creates an outside six-year limitation period from the accrual of the first cause of action. This provision will not be carried forward.

The new law proposes a single ultimate limitation period of either 10 or 15 years. It will specify that the ultimate limitation period runs from the first conversion.

Not carried forward:

Repeal of special limitation periods

15 (1) If an Act that incorporates or constitutes a private or public body contains a provision that would have the effect of limiting the time in which an action

(a) within section 3 (2), (3) and (4) [*two-year limitation period, 10-year limitation period and no limitation period*], or

(b) to enforce any right or obligation not specifically created by that Act,

may be brought against that body, that provision is repealed to the extent that it is inconsistent with this Act.

(2) Subsection (1) does not apply to a limitation provision that specifically provides that it operates despite this Act.

Comment:

Section 15 is based on a recommendation of the British Columbia Law Reform Commission in its 1974 report. The provision was intended to do away with the special protections commonly given to bodies or corporations specifically constituted or incorporated by statute, to limit their liabilities in undertaking certain important functions.²²⁶ The proposed reforms include clarifying that the new Act will only apply to govern time limits for bringing claims in civil court, unless a claim is specifically exempted. In cases where another provincial law contains a limitation period that is listed in the Schedule, the other limitation period will take precedence. However, the new Act will clarify that for those claims that are specifically exempted by the new Act, no other statute can create a limitation period to supersede this provision. In light of these reforms, section 15 is no longer relevant. It is not necessary to carry section 15 forward to the new Act.

²²⁶ BCLRC 1974 Report, Above Note 41 at 106 and 107.

Appendix A: Consultation Draft Limitation Act

PART 1 - INTERPRETATION

Division 1 - Definitions

Definitions

1 (1) In this Act:

“**claim**” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

“**discover**”, in relation to a claim, has the meaning set out in Divisions 2 and 3 of Part 2;

“**environmental claim**” means a claim to recover damages that result from damage to the environment caused by the escape, release or discharge of anything, including, without limitation, a gas, into the environment;

“**extraprovincial judgment**” means a judgment, order or award other than a local judgment;

“**guardian**” means

- (a) a parent or guardian who has actual care and control of a minor, or
- (b) a committee appointed under the *Patients Property Act*;

“**judgment**” means an extraprovincial judgment or a local judgment;

“**limitation period**”, in relation to a claim, means the period after which a court proceeding must not be brought with respect to the claim;

“**limitation period established by this Act**”, in relation to a claim, means the limitation period that applies to the claim under section 6, 7, 8 or 22;

“**local judgment**” means any of the following:

- (a) a judgment, order or award of
 - (i) the Supreme Court of Canada relating to an appeal from a British Columbia court,
 - (ii) the British Columbia Court of Appeal,
 - (iii) the Supreme Court of British Columbia,
 - (iv) the Provincial Court of British Columbia, or
 - (v) an arbitration under the *Commercial Arbitration Act*;
- (b) an arbitral award to which the *Foreign Arbitral Awards Act* or the *International Commercial Arbitration Act* applies;

“**person under a disability**” means an adult person who is incapable of or substantially impeded in managing his or her affairs;

“**secured party**” means a person who has a security interest;

“**security agreement**” means an agreement that creates or provides for a security interest;

"**security interest**" means an interest in collateral that secures payment or performance of an obligation;

"**writ of execution**" includes an order for seizure and sale issued under the Small Claims Rules.

Division 2 – Court Proceedings and Claims to Which This Act Does Not Apply

Exempted court proceedings

- 2** (1) This Act does not apply to the following court proceedings and has no impact on when or if such court proceedings may be brought:
- (a) appeals;
 - (b) judicial review applications;
 - (c) court proceedings under the *Offence Act* to prosecute an offence;
 - (d) court proceedings to obtain a declaration.
- (2) This Act does not apply to court proceedings based on existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*.
- (3) Court proceedings referred to in subsection (2) are governed by the laws respecting the limitation of actions that would have been in force if this Act had not been passed.

Exempted claims

- 3** (1) This Act does not apply to the following:
- (a) a claim that is subject to a limitation period established by an international convention or treaty that is adopted by an Act;
 - (b) a claim for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass;
 - (c) a claim for possession of land by a life tenant or person entitled to the remainder of an estate;
 - (d) a claim for the possession of land by a person who has
 - (i) a right to enter for breach of a condition subsequent, or
 - (ii) a right to possession arising under possibility of reverter of a determinable estate;
 - (e) a claim on a local judgment for the possession of land;
 - (f) a claim by a debtor in possession of collateral to redeem that collateral;
 - (g) a claim by a secured party in possession of collateral to realize on that collateral;
 - (h) a claim by a landlord to recover possession of land from a tenant who is in default or over holding;
 - (i) a claim relating to the enforcement of an injunction or a restraining order;
 - (j) a claim to enforce an easement, restrictive covenant or profit à prendre;
 - (k) a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault,
 - (i) if the misconduct occurred while the claimant was a minor, and

- (ii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
 - (l) a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
 - (m) a claim for arrears of child support or spousal support payable under
 - (i) a judgment, or
 - (ii) an agreement filed with the court under sections 121 or 122 of the *Family Relations Act*;
 - (n) an environmental claim that has not been discovered.
- (2) This Act does not apply to a claim for which a limitation period has been established under another enactment if, under section 27 of this Act, the limitation period established by the other enactment applies to the claim.

Division 3 – Application

Conflict of laws

- 4** (1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.
- (2) If section 3 (1) (k) or (l) applies to a claim, the court must apply section 3 (1) despite subsection (1) of this section.

Rules of equity not overridden

- 5** Nothing in this Act interferes with any of the following:
- (a) a rule of equity that refuses relief, on the ground of acquiescence, to a person whose right to bring an action is not barred by this Act;
 - (b) a rule of equity that refuses relief, on the ground of inexcusable delay, to a person who claims equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act.

PART 2 –BASIC LIMITATION PERIODS

Division 1 – Establishment of Basic Limitation Periods

Basic limitation period

- 6** (1) Subject to Parts 3 to 5, a court proceeding must not be commenced in respect of a claim more than 2 years after the day on which the claim is discovered.
- (2) The limitation period established by this section does not apply to a claim referred to in section 7 or 8.

Basic limitation period for debts and obligations owed to government

7

Basic limitation period for claim based on judgment

- 8** Subject to Parts 3 to 5, a court proceeding must not be commenced in respect of a claim based on a judgment for the payment of money or the return of personal property,
- (a) in the case of a local judgment, more than 10 years after the day on which the judgment becomes enforceable, or
 - (b) in the case of an extraprovincial judgment, after the earlier of the following:
 - (i) the expiry of the time for enforcement in the jurisdiction where that extraprovincial judgment was made;
 - (ii) the date that is 10 years after the judgment became enforceable in the jurisdiction where the extraprovincial judgment was made.

Division 2 – Discovery of Claim

General discovery rules

- 9** Except for those special situations referred to in sections 10 to 12, a claim is discovered by a person on the day on which the person first knew or reasonably ought to have known all of the following:
- (a) that injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy it.

Special situations for persons of full capacity

- 10** For a claim set out in section 13, 14, 15, 16, 17 or 18 of an adult person of full capacity, the discovery rules set out in that section apply.

Special situations for minors

- 11** For a claim of a minor, the discovery rules set out in section 19 apply.

Special situations for persons under a disability

- 12** For a claim of a person under a disability, the discovery rules set out in section 20 apply.

Division 3 – Special Discovery Rules

Discovery rule for claims based on fraud or recovery of trust property

- 13** (1) In this section, “**fraud or trust claim**” means

- (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
 - (b) a claim to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use, or
 - (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
 - (i) wilfully conceals from the beneficiary the fact that
 - (A) injury, loss or damage has occurred,
 - (B) the injury, loss or damage was caused by or contributed to by an act or omission, or
 - (C) the act or omission was that of the person against whom the claim is or may be made, or
 - (ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.
- (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware
- (a) that injury, loss or damage had occurred,
 - (b) that the injury, loss or damage was caused by or contributed to by fraud, fraudulent breach of trust, conversion or other act or omission of the trustee on which the claim is based,
 - (c) that the fraud, fraudulent breach of trust, conversion or other act or omission of the trustee on which the claim is based was that of the person against whom the claim is or may be made, and
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy it.
- (3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

Discovery rule for claims for future interest in trust property

- 14** A claim relating to a future interest in trust property is discovered on the later of the following:
- (a) the day on which the claim is discovered under section 9 or 13, as the case may be;
 - (b) the day on which the interest becomes a present interest.

Discovery rule for claims for demand obligations

- 15** A claim for a demand obligation is discovered on the first day that there is a failure to perform the obligation after a demand for the performance has been made.

Discovery rule for claims to realize or redeem security

- 16** A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.

Discovery rule for claims for contribution

- 17** A claim for contribution is discovered on the later of the following:
- (a) the day on which the claimant for contribution is served with a pleading in respect of a claim on which the claim for contribution is based;
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution can be made.

Successors, predecessors, principals and agents

- 18** (1) A claim of a person claiming through a predecessor in right, title or interest is discovered on the earlier of the following:
- (a) the day on which the claim is discovered by the predecessor;
 - (b) the day on which the claim is discovered by the person claiming.
- (2) A claim of a principal, if the principal's agent had a duty to communicate to the principal knowledge of the matters referred to section 9 (a) to (d), is discovered on the earlier of the following:
- (a) the day on which the claim is discovered by the agent;
 - (b) the day on which the claim is discovered by the principal.

Discovery rule for minors

- 19** A claim of a minor is discovered,
- (a) unless a notice to proceed is delivered under paragraph (b) before the minor attains the age of 19 years, on the later of the following:
 - (i) the day on which the minor attains the age of 19 years;
 - (ii) the day on which the claim is discovered under section 9, 13, 14, 15, 16, 17 or 18, as the case may be, or
 - (b) the day on which a notice to proceed that complies with the requirements of section 21 (2) and any requirements prescribed under section 21 (6) is delivered in accordance with section 21 (1) and with any requirements prescribed under section 21 (6).

Discovery rule for persons under disability

- 20** A claim of a person under a disability is discovered,
- (a) unless a notice to proceed is delivered under paragraph (b) before the person ceases to be a person under a disability, on the later of the following:
 - (i) the day on which the person ceases to be a person under a disability;
 - (ii) the day on which the claim is discovered under section 9, 13, 14, 15, 16, 17 or 18, as the case may be, or
 - (b) the day on which a notice to proceed that complies with the requirements of section 21 (2) and any requirements prescribed under section 21 (6) is delivered in accordance with section 21 (1) and with any requirements prescribed under section 21 (6).

Notice to proceed if basic limitation period postponed under section 19 or 20

- 21** (1) If the discovery rule under section 19 (a) or 20 (a) postpones the running of a limitation period in respect of a minor or a person under a disability and that minor or person under a disability has a guardian, a person against whom the minor or person under a disability may have a claim may, for the purposes of section 19 (b) or 20 (b), deliver a notice to proceed to
- (a) the guardian, and
 - (b) the Public Guardian and Trustee.
- (2) A notice to proceed delivered under this section must meet all of the following requirements:
- (a) it must be in writing;
 - (b) it must be addressed to the guardian and to the Public Guardian and Trustee;
 - (c) it must specify the name of the minor or person under a disability;
 - (d) it must specify the circumstances out of which the claim arises or may be alleged to arise, with as much particularity as is necessary to enable the guardian to investigate whether the minor or person under a disability has the claim;
 - (e) it must give warning that, because of the delivery of the notice, section 6, 7 or 8, as the case may be, applies as if the claim was discovered on the date of the delivery of the notice;
 - (f) it must give the following warning as applicable:
 - (i) if the person who may have the claim is a minor, that, because of the delivery of the notice, section 22 (2) (g) (ii) applies to limit the period within which a court proceeding may be commenced in relation to the claim;
 - (ii) if the person who may have the claim is a person under a disability, that section 22 applies to the claim despite the disability;
 - (g) it must specify the name of the person on whose behalf the notice is delivered;
 - (h) it must be signed by
 - (i) the person on whose behalf the notice is delivered, or
 - (ii) the person's solicitor.
- (3) If a notice to proceed that
- (a) complies with subsection (2) and any requirements prescribed under subsection (6), and
 - (b) is delivered in relation to a claim under subsection (1) in accordance with any requirements prescribed under subsection (6),
- section 19 (b) or 20 (b), as the case may be, applies to the limitation period applicable to the claim as if the person with the claim ceased, on the date of the delivery of the notice, to be a minor or a person under a disability, as the case may be.

- (4) Subsection (3) operates to benefit only the person on whose behalf the notice is delivered and only with respect to a claim arising out of the circumstances specified in the notice.
- (5) A notice to proceed delivered under this section is not an acknowledgment for the purposes of section 26 and is not an admission for any purpose.
- (6) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed under this section.

PART 3 –ULTIMATE LIMITATION PERIOD

Ultimate limitation period

- 22** (1) Subject to Parts 4 and 5, even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than [either] 10 [or 15] years after the day on which the act or omission on which the claim is based took place.
- (2) For the purposes of this section and subject to section 32, the day an act or omission on which any of the following claims is based takes place is,
- (a) in the case of a claim arising out of a continuous act or omission, the day on which the act or omission ceases,
 - (b) in the case of a claim arising out 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 claim arising out of a conversion, the day on which the property was first converted by any person,
 - (d) in the case of an environmental claim, the day on which the claim is discovered in accordance with Part 2,
 - (e) in the case of a claim referred to in section 13, 14, 15 or 16, the day on which the claim is discovered in accordance with that section,
 - (f) in the case of a claim for contribution, the day on which the claimant for contribution is served with a pleading in respect of a claim on which the claim for contribution is based, or
 - (g) in the case of a claim of a minor, on the earlier of the following:
 - (i) the day on which the minor attains the age of 19 years;
 - (ii) the day on which the claim is discovered under section 19 (b).
- (3) Despite sections 20 and 28, the ultimate limitation period established by subsection (1) in relation to a claim begins and continues to run whether or not the person with the claim is or becomes a person under a disability.

PART 4 – FACTORS AFFECTING LIMITATION PERIODS

Agreements to vary limitation periods

- 23** (1) If an agreement expressly provides for the extension of a limitation period established by this Act, the limitation period is altered in accordance with the agreement.

- (2) A limitation period established by this Act may not be reduced by an agreement.

Counterclaim or other claim or proceeding

- 24** (1) If a court proceeding to which this Act applies has been commenced in relation to a claim (in this section, the “primary claim”) and there is a claim (in this section, the “secondary claim”) that relates to or is connected with the primary claim, the fact that a limitation period established by this Act has expired in relation to the secondary claim does not prevent any of the following from being done in the court proceeding:
- (a) subject to subsection (2), commencing court proceedings in relation to the secondary claim by counterclaim, including the adding of a new party as a defendant by way of counterclaim;
 - (b) subject to subsection (2), commencing third party proceedings in relation to the secondary claim;
 - (c) making claims in relation to the secondary claim by way of set off.
- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution after the expiry of a limitation period in relation to that claim.
- (3) Subsection (1) does not apply if the court determines that a limitation period has expired in relation to the primary claim.
- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.
- (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 8 or 22, be commenced with respect to that claim.

Completion of enforcement process

- 25** (1) Despite any other provision of this Act, if, on the expiration of the limitation period established by section 8 with respect to proceedings on a judgment, there is an enforcement process outstanding, the judgment creditor or the judgment creditor’s successors may do any of the following:
- (a) continue proceedings on an unexpired writ of execution, but the writ may not be renewed;
 - (b) commence or continue proceedings against land on a judgment registered under Part 5 of the *Court Order Enforcement Act*, but the registration may not be renewed unless those proceedings have been commenced;
 - (c) continue proceedings in which a charging order is claimed.
- (2) If a court makes an order staying execution on a judgment, the running of time with respect to the limitation periods established by this Act for proceedings on that judgment is postponed or suspended for so long as the order staying execution is in force.

Limitation periods extended if liability acknowledged

- 26** (1) If a person acknowledges liability in respect of a claim, the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgment was made, if the acknowledgment is made
- (a) in a manner referred to in this section, and
 - (b) before the expiry of the limitation period applicable to the claim.
- (2) An acknowledgment of liability in respect of a claim for interest is also an acknowledgment of liability in respect of a claim for
- (a) the outstanding principal, if any, and
 - (b) 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 the collateral.
- (4) An acknowledgment of liability in respect of a claim by a trustee is an acknowledgment of liability in respect of the claim by any other person who is or who later becomes a trustee of the same trust.
- (5) An acknowledgment, by a person in possession of personal property, of liability in respect of a claim to recover or enforce an equitable interest in the personal property is an acknowledgment by any other person who later comes into possession of the personal property of liability in respect of that claim.
- (6) Subsection (1) does not apply to an acknowledgment referred to in subsection (2), (3), (4) or (5) unless the acknowledgment is
- (a) in writing,
 - (b) signed, by hand or by electronic signature within the meaning of the *Electronic Transactions Act*,
 - (c) made by the person making it or the person's agent, and
 - (d) made to the person with the claim, the person's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada).
- (7) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is or may be made or by the person's agent is an acknowledgment by the person against whom the claim is or may be made of liability in respect of the claim.
- (8) 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 security agreement.
- (9) 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 security agreement.
- (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.

Application of other limitation periods

- 27** (1) If another Act establishes a limitation period that purports to apply to a claim referred to in section 3 (1) of this Act, that limitation period does not apply to the claim.
- (2) If another Act establishes a limitation period that purports to apply to a claim other than a claim referred to in section 3 (1) of this Act, that limitation period does not apply to the claim unless
- (a) the provision establishing it is listed in the Schedule to this Act, or
 - (b) the provision establishing it
 - (i) is in existence on the date of the coming into force of this section, and
 - (ii) incorporates by reference a provision listed in the Schedule to this Act.
- (3) Sections 19, 20, 21, 28 and 29 apply to a limitation period established by a provision referred to in subsection (1).

PART 5 – SUSPENSION OF LIMITATION PERIODS

Basic limitation period suspended if claimant becomes a person under a disability

- 28** (1) Subject to section 29, the basic limitation period established by Part 2 in relation to a claim
- (a) is suspended if the person with the claim becomes a person under a disability, and
 - (b) does not run during any time in which that person continues to be a person under a disability.
- (2) If the basic limitation period applicable to a claim has been suspended by subsection (1), the basic limitation period resumes running when the person with the claim ceases to be a person under a disability, and that basic limitation period is the longer of the following:
- (a) the length of time that, when the person with the claim became a person under a disability, remained to commence a court proceeding in respect of the claim;
 - (b) one year from the time that the person with the claim ceased to be a person under a disability.

Notice to proceed if basic limitation period suspended under section 28

- 29** (1) If the basic limitation period established by Part 2 in relation to a claim is suspended under section 28 in relation to a person under a disability and that person has a guardian, a person against whom the person under a disability may have a claim may deliver a notice to proceed to
- (a) the guardian, and
 - (b) the Public Guardian and Trustee.
- (2) A notice to proceed delivered under this section must meet all of the following requirements:

- (a) it must be in writing;
 - (b) it must be addressed to the guardian and to the Public Guardian and Trustee;
 - (c) it must specify the name of the person under a disability;
 - (d) it must specify the circumstances out of which the claim arises or may be alleged to arise, with as much particularity as is necessary to enable the guardian to investigate whether the person under a disability has the claim;
 - (e) it must give warning that the following apply to limit the period within which a court proceeding may be commenced in relation to the claim:
 - (i) section 22;
 - (ii) because of the delivery of the notice, section 28 (2);
 - (f) it must specify the name of the person on whose behalf the notice is delivered;
 - (g) it must be signed by
 - (i) the person on whose behalf the notice is delivered, or
 - (ii) the person's solicitor.
- (3) If a notice to proceed that
- (a) complies with subsection (2) and any requirements prescribed under subsection (6), and
 - (b) is delivered in relation to a claim under subsection (1) in accordance with any requirements prescribed under subsection (6),
- section 28 (2) applies to the limitation period applicable to the claim as if the person with the claim ceased, on the date of the delivery of the notice, to be a person under a disability.
- (4) Subsection (3) operates to benefit only the person on whose behalf the notice is delivered and only with respect to a claim arising out of the circumstances specified in the notice.
- (5) A notice to proceed delivered under this section is not an acknowledgment for the purposes of section 26 and is not an admission for any purpose.
- (6) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed under this section.

Basic limitation period suspended if concealment or misleading

- 30** Both the basic limitation period established by Part 2 and the ultimate limitation period established by Part 3 in relation to a claim are suspended until the claim is discovered under Part 2 if the person against whom the claim is or may be made does any of the following:
- (a) wilfully conceals from the claimant the fact that
 - (i) injury, loss or damage has occurred,
 - (ii) the injury, loss or damage was caused by or contributed to by an act or omission, or
 - (iii) the act or omission was that of the person against whom the claim is or may be made;

- (b) wilfully misleads the claimant as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.

PART 6 - GENERAL

Non-judicial remedies

- 31** (1) In this section, “**non-judicial remedy**” means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings, but does not include a remedy available under an enactment.
- (2) If a claimant is prevented from commencing a court proceeding in relation to a claim as a result of the expiry of a limitation period established by this Act or the expiry of any longer limitation period agreed to under section 23 (1), the claimant is not entitled to enforce against the person against whom the claim is or may be made any non-judicial remedy that the claimant would but for this section be entitled to enforce in relation to the claim.

Power to make regulations

- 32** (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
- (2) Without limiting subsection (1), the Lieutenant Governor in Council may amend the Schedule, by regulation, to add or remove a provision of another Act that establishes a limitation period.

Transition

- 33** (1) In this section:
- “**effective date**” means the day on which this section comes into force;
- “**former Act**” means the *Limitation Act*, R.S.B.C. 1996, c. 266, as it read immediately before the effective date;
- “**former limitation period**” means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date;
- “**pre-existing claim**” means a claim
- (a) that is based on an act or omission that took place before the effective date, and
- (b) with respect to which no court proceeding has been commenced before the effective date.
- (2) A court proceeding must not be commenced with respect to a pre-existing claim if a former limitation period expired before the effective date.
- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
- (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date, Part 2 of this Act applies to the pre-existing claim, and,
- (a) if the pre-existing claim is one referred to in section 8 (1) (a) or (b) of the former Act, section 8 of the former Act applies to the pre-existing claim, or

- (b) if the pre-existing claim is one referred to in section 8 (1) (c) of the former Act, Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of
- (i) the effective date, and
 - (ii) the day the act or omission takes place under section 22 (2).

SCHEDULE

Act	Section(s)
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Appendix B: Summary of Questions

1. Do you have any comments on the definition of “claim” or the move to a single basic limitation period?
2. Do you have any concerns with the recommended draft provision, which sets out the test for discovering a claim? If so, please discuss.
3. Should the new Act create a single ultimate limitation period of 10 or 15 years? Please explain the reasons for your choice.
4. Should the new Act start the ultimate limitation period running from the first conversion, in order to provide some protection to good faith purchasers for value (or any other defendants) from an undefined period of liability in cases involving multiple conversions? Why or why not?
5. Should the new Act continue to refer to detention of goods lawsuits (also known as the tort of detinue)?
6. Would it be preferable for the new Act to remain silent on the issue of agreements, leaving it up to judges to ensure that agreements that affect the operation of limitation periods do not unfairly target parties with weaker bargaining power?
7. Would codifying only part of the common law (i.e., allowing agreements to extend but not shorten limitation periods) cause any unintended consequences?
8. Which option for reforming the real property provisions do you prefer? Please explain your response.
9. Do you have any comments or concerns with the proposed conflict of laws provision (option 1)? Please explain.
10. Should section 13(2) of the current Act be carried forward to the new conflict of laws provision, to ensure that claims for sexual assault, which will continue to have no limitation period, will also be excluded in cases involving conflict of laws rules? Why or why not?

White Paper on *Limitation Act* Reform:

Finding the Balance

Erratum

1. On page 66 of the white paper, the sentence beginning, “The concerns echoed....” should read:

“The concerns echoed those discussed in the Green Paper: agreements *either to shorten or extend* limitation periods could result in abuse (e.g., the stronger party to the contract could pressure the weaker party to agree to an unfair allocation of risk) and allowing agreements would increase uncertainty and undercut the new law’s usefulness.”