A New Uniform Limitations Act

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History of Limitations Reform in Canada and the Need for a New Uniform Act

[1] The Uniform Law Conference of Canada has examined the issue of limitation periods on a number of occasions and has produced two uniform acts in this area of the law. The *Uniform Limitation of Actions Act*[1] was adopted by the Conference in 1931. This Act subsequently formed the basis for the law in Alberta, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon. The Conference examined the issue of limitations again commencing in 1966 and adopted the *Uniform Limitations Act*[2] in 1982.

[2] Much of the major events in the history of Canadian limitations reform have already been canvassed at last year's meeting for the purpose of identifying limitations reform as a potential project for the Conference. Some of this history is worth reiterating as an argument for the Conference to develop another uniform act on limitations.

[3] Very modern limitations legislation that differs significantly from the 1982 Uniform Act is now in force in Alberta[3] and Ontario.[4] Not only has there been significant legislative activity over the past few years in those jurisdictions, British Columbia's legislation,[5] upon which the 1982 Uniform Act is based, has also undergone a number of significant amendments. As well, Quebec adopted new rules on prescription when the new Quebec Civil Code[6] came into force in 1994.

[4] Since the Conference adopted the 1982 Uniform Act, the common law has also evolved dramatically, with the Supreme Court of Canada handing down significant decisions in the area of limitations.[7] Furthermore, limitations law reform work has been actively carried out in a number of jurisdictions. For example, Saskatchewan issued a consultation document in 2003 with proposals that are similar to the Alberta and Ontario law.[8] This follows a very comprehensive report issued by the Law Commission for

England and Wales in 2001,[9] a report by the British Columbia Law Institute on an update to the British Columbia limitations legislation in 2002,[10] and two reports by the Alberta Law Reform Institute on specific aspects of limitations law in 2003.[11]

[5] Perhaps the strongest argument for the Conference to develop a new uniform act lies in the fact that the 1982 Uniform Act has not been well received. In fact, only Newfoundland has adopted that Act.[12] As a result, the limitations law of many Canadian jurisdictions can still be traced back to the 1931 Uniform Act. With various amendments enacted over time by individual jurisdictions in response to local circumstances, the uniformity that was once achieved has now been significantly eroded.

The Alberta and Ontario Limitations Acts: A New Limitations Regime

[6] Both the new Alberta and Ontario limitations legislation are radical departures from conventional limitations statutes of which the 1982 Uniform Act can be considered an example. The conventional approach to limitations legislation is based on the assignment of different limitation periods to specific categories of causes of actions. The commencement of these limitation periods is then subject to complex rules related to the accrual of those causes of action.

[7] This conventional approach to limitations has been severely criticized by the Alberta Law Reform Institute (formerly the Institute of Law Research and Reform). The Institute found no discernable principle to support the assignment of different limitation periods to specific causes of action. The approach only created uncertainty regarding the category under which certain claims fell. The Institute also found no rational basis for why limitation periods must begin running upon the accrual of a cause of action. Perhaps the most well known deficiency of the conventional approach is that it fails to recognize that a person does not always know of a cause of action at the time the limitation period commences. Its mechanical operation would sometimes act unfairly to bar claims even before a potential plaintiff had any knowledge of the cause of action.[13]

[8] The initial attempts at employing a discoverability rule in the law to mitigate against the harshness of its operation only raised new issues. The discoverability rule adopted from the equitable doctrine of laches was to allow limitation periods to commence only upon a plaintiff's discovery of the cause of action or when a plaintiff ought to have discovered the cause of action. However, implementation of the discoverability rule without addressing the other deficiencies of the traditional approach did not achieve wholly satisfactory results. Questions were raised as to what constituted discovery of a cause of action and to what claims the rule would apply. In addition, questions were raised on whether the discoverability rule did not tip the balance too much in favour of potential plaintiffs, creating uncertainty as to when potential liability would end.

[9] The 1982 Uniform Act is an example of an early attempt at adopting a discoverability rule, but when compared to the new Alberta and Ontario statutes, it is apparent that the Act is based on concepts that haven't yet fully crystallized. For example, the 1982 Uniform Act recognizes that time ought not run against those who are not aware of their claim, but the rule is only applicable to a very limited number of actions.[14] It also defined discovery rather nebulously as the discovery of the identity of the defendant and "the facts upon which the action is founded."[15] Furthermore, as the 1982 Uniform Act assigns different limitation periods to different categories of actions, the amount of time to commence an action upon discovery of the claim differed significantly and rather irrationally depending upon the type of claim.

[10] The Alberta and Ontario statutes are examples of limitations legislation that are based on a completely reformulated set of concepts. Both can be traced back to the recommendations of the Alberta Law Reform Institute, which were founded on two basic principles.[16] The first principle of knowledge addresses the interests of plaintiffs for an opportunity to become aware of their claim before the limitations clock starts to run. The second principle of repose addresses the interests of defendants for a period of time upon which they can be assured absolutely that their past acts or omissions will no longer be the subject of a viable claim.[17]

[11] Both statutes are attempts at creating a clear, cohesive limitations regime that would apply to as many claims as possible with the following key elements:

- At their core, the statutes set a short basic limitation period commencing from the discovery of the claim and this period is applicable to all proceedings unless another statutory provision governs. Discovery of a claim is generally defined as when the claimant knows or ought to have known of the claim.
- The statutes also set a longer ultimate limitation period commencing from the date of the act or omission that gives rise to the claim.
- Finally, the statutes set out rules for the suspension or extension of the basic and ultimate limitation periods in specified cases.

[12] Although similar, the Ontario and Alberta statutes differ in their approach in a number of areas. Ontario's legislation is longer and arguably more comprehensive. As a result, this paper will use the Ontario Act as a point of departure for discussion.

Application of a New Uniform Limitations Act

[13] While both the Ontario Act and the Alberta Act seek to abandon the traditional system of assigning specific limitation periods to particular claims in favour of imposing a single basic limitation period on civil proceedings, the statutes set explicit boundaries on their scope. For example, the Ontario Act excludes real property and judicial review proceedings from its application.[18] It also excludes proceedings based on aboriginal and treaty rights, provincial offences proceedings and proceedings based on equitable claims by aboriginal peoples against the Crown.[19]

[14] The Alberta Act states that it does not apply to claims based on adverse possession of real property owned by the Crown.[20] Judicial review proceedings are also not subject to the Alberta Act.[21] Furthermore, the Alberta Act does not apply to actions brought by an aboriginal people against the Crown based on a breach of fiduciary duty owed by the Crown.[22] Unlike the Ontario Act, there is no reference in the Alberta Act to proceedings based on aboriginal and treaty rights.

[15] The Alberta Act does state explicitly that it will apply to claims arising under federal legislation if the remedy is sought in a court created by Alberta or if the claims arose within Alberta and proceedings are brought before a court created by the federal Parliament.[23] Both the Ontario and Alberta legislation also state that they expressly bind the Crown.

[16] The differences between the two statutes regarding their respective application are partly reflective of different drafting approaches. For example, the Ontario Act deals with "court proceedings" and not "civil proceedings" and as a result, the Act must exclude provincial offences proceedings.[24] The Alberta Act refers to "civil proceedings" and therefore makes no reference to provincial offences.[25] Other differences can be attributed to what a legislature wished to clarify. Alberta's provision dealing with claims under federal legislation appears to reiterate the case law.[26]

[17] However, a number of policy choices are clearly realized in the statutes. The exclusion of judicial review proceedings in both statutes effectively allows courts to continue to exercise their discretion in these matters. Both Acts' failure to make exception for equitable claims generally suggest that these claims, for the first time in both provinces, are subject to the general limitations regime. Furthermore, Ontario's explicit exception for equitable claims by aboriginal peoples against the Crown is a clear policy statement that these claims deserve different treatment. The Alberta Act's exception is much narrower and is limited to claims based on breaches of fiduciary duty.

[18] The scope of application of the new Uniform Act, therefore, will need to be considered at the outset. This will require policy decisions on what claims should be subject to the legislation as well as careful crafting of definitions of terms to be used in the statute. The decision to review limitation periods related to real property claims (or not) will also be required. Another matter that would need to be considered is whether notice provisions that have the effect of a limitation period should be the subject of a new Uniform Act. The Ontario Act does not deal with notice provisions. In contrast, the

Alberta Act defines a limitation provision as including such notice provisions. However, given that notice provisions are normally found outside general limitations statutes and Alberta's Act does not apply to limitation provisions in other statutes, the effect of the Alberta definition appears quite limited.

Discoverability and the Two-Year Basic Limitation Period

[19] Both the Ontario and Alberta limitations statutes set a two-year basic limitation period, which would apply to all claims unless explicitly excluded.[27] The two-year period appears to be a reasonable amount of time for a potential plaintiff to investigate a claim, obtain legal advice, consider options, negotiate a settlement and/or initiate legal proceedings if desired.[28] It also appears to be a reasonable amount of time such that it would not allow plaintiffs to unduly delay the commencement of a proceeding. However, the two-year period is fairly arbitrary, as the English Law Commission has recommended a three-year period.[29] This is supported by the Law Reform Advisory Committee for Northern Ireland.[30] In any case, the intent is to keep this period relatively short.

[20] Both the Ontario and Alberta statutes also impose a discoverability rule such that the basic limitation period only commences from the time that the claim was discovered or ought to have been discovered. These rules are defined differently from that of the 1982 Uniform Act. Section 5 of the Ontario Act states that discovery of a claim occurs the day on which the person with the claim knows of the following elements of the claim: that injury, loss or damage had occurred; the identity of the person who caused that injury, loss or damage; and that, having regard to the nature of the injury, loss or damage, a legal proceeding would be an appropriate means to remedy it. A claim is also deemed to have been discovered on the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the above elements of the claim.

[21] The equivalent Alberta provision is similar to that found in the Ontario Act.[31] Further analysis would be required to determine if the differences in drafting of the two

provisions are significant. For example, the Ontario Act refers to a "reasonable person with the abilities and in the circumstances of the person with the claim" whereas the Alberta Act makes no reference to the abilities of the person and merely refers to the circumstances of that person.

The Ultimate Limitation Period

[22] The concept of an ultimate limitation period was adopted as part of the provisions of the 1982 Uniform Act. As a person may be subject to a claim indefinitely if the associated limitation period only runs upon a plaintiff's discovery of the claim, an additional limitation period is necessary to ensure that the interests of defendants for finality and closure are not overlooked. The ultimate limitation period serves to bring certainty as to when exposure to potential liability ends.[32] This limitation period generally commences from the date of the defendant's act or omission that is the subject of the claim. Ultimate limitation periods can now be found in the law of Alberta, British Columbia, Newfoundland and Ontario.[33]

[23] Under s. 15 of the Ontario Act, subject to some limited exceptions, a proceeding may not be commenced in respect of a claim more than 15 years after the date the act or omission in question took place. This ultimate limitation period governs despite a claim not having been discovered within the 15-year period. In other words, a plaintiff generally has 15 years to discover a claim. Otherwise, a valid limitations defence may be brought forward against the claim.

[24] The Alberta Act sets an ultimate limitation period of 10 years, which commences from the time the matter giving rise to the proceeding arose. This was done despite the Alberta Institute's recommendation of a 15-year period.[34] British Columbia's ultimate limitation period is set at 30 years from the date the right to bring an action arose. However, the ultimate limitation period is 6 years for claims against medical professionals and medical institutions. Under the 1982 Uniform Act and the Newfoundland Act, a 10-year ultimate limitation period applies to a number of claims,

including personal injury and professional negligence claims, but all others are subject to a 30-year period. The English Law Commission recommended a 10-year ultimate limitation period while the Northern Ireland Advisory Committee favoured a 15-year period.[35]

[25] The establishment of an ultimate limitation period is relatively uncontroversial especially in the context where the basic limitation period only commences from discovery of a claim.[36] However, all other matters related to the ultimate limitation period including its length and scope will require careful consideration due to the variation of existing approaches. For instance, the 30-year ultimate limitation period in the 1982 Uniform Act operates to bar all claims including claims where the applicable limitation period has been reset by an acknowledgment.[37] This is not the case in regard to the ultimate limitation periods found in the Alberta and Ontario Acts. The significant differences on the appropriate length of the ultimate limitation period have already been subject to scrutiny. In a study by the British Columbia Law Institute, the Institute concluded that there was no principled basis for the assignment of special ultimate limitation periods for professional groups, and that the 30-year ultimate limitation period was too long and unfair to defendants.[38]

Some Exceptions to the New Regime

The Schedule of Special Limitation Periods

[26] One of the unique features of the Ontario Act that distinguishes it from other limitations statutes is the listing of limitations provisions found outside of the main Act that continue to apply to certain claims. According to s. 19 of the Ontario Act, these provisions, which are set out in a schedule to the Act, continue to apply to the claim in question and prevail over the conflicting provisions found in the new Act. The schedule, therefore, consolidates all special limitation periods found in other statutes that the Legislature wishes to be exceptions to the general limitations regime in one statute to allow for greater accessibility and transparency.

[27] Provisions in the schedule obviously reflect policy choices made by the Ontario Legislature. Some noteworthy Ontario limitation periods in the schedule include those related to equalization claims under s. 7(3) of the *Family Law Act*;[39] claims for libel under s. 6 of the *Libel and Slander Act*;[40] proceedings by and against an estate under s. 38(3) of the *Trustee Act*;[41] and proceedings against fire and automobile insurers under the *Insurance Act*.[42] Most of these provisions refer to limitation periods that are either longer or shorter than the basic two-year period and have commencement dates that do not depend on the plaintiff's discovery of the claim. While the unique qualities of these claims are given special recognition by the Ontario Act, their limitation periods are nevertheless subject to the statute's rules dealing with minors and incapable persons and with dispute resolution.[43]

[28] The Ontario Act also provides that new limitation periods that are intended to be exceptions to the general regime will need to be set out in the schedule; otherwise they are of no effect.[44] This provision seeks to ensure that new limitation periods cannot be hidden in another enactment.

[29] Other limitations statutes, including the 1982 Uniform Act, do not include a similar schedule of limitation periods. In the Alberta Act, these limitation periods are only referred to in s. 2(4)(b) of that Act, which states that the Alberta Act does not apply where a limitation provision in another statute governs. As a result, these limitation periods remain concealed in various Alberta statutes and the Alberta Act's rule on the suspension of limitation periods in cases of minors and persons under a disability do not apply.

[30] The Ontario Act's schedule appears to be a useful innovation. A list of special limitation periods would make limitations law significantly more accessible. Furthermore, the development of a schedule will throw up a critical lens to existing limitation provisions and require a legislative review of the policy rationales behind those provisions.

Minors and Incapable Persons

[31] Section 15 of the 1982 Uniform Act recognizes that persons under disability, defined as minors and those incapable of managing their affairs because of disease, or physical or mental impairment, should have the benefit of a postponement or suspension of the running of a limitation period. A potential defendant may nevertheless take advantage of a mechanism to provide notice to proceed. In a case involving a minor, notice must be given to the minor's parent or guardian and the appropriate government official. In a case involving an incapable person, it must be given to the person's parent or committee and to the appropriate government official. Provision of a notice to proceed activates the running of the limitation period and it is then entirely up to the parent, guardian, committee or the government official to act in the best interests of the person under disability. The Ontario and Alberta legislation also have provisions regarding postponement/suspension in similar situations; however, both those statutes have different procedures regarding notices to proceed.

[32] According to the Ontario Act, the running of the basic two-year period, the 15-year ultimate limitation period and the limitation periods listed in the schedule will be postponed or suspended for minors and incapable persons who are not represented by a litigation guardian in relation to the claim in question.[45] An incapable person is defined as one who is incapable of commencing a proceeding in respect of the claim because of physical, mental or psychological condition.[46]

[33] Section 9 of the Ontario Act sets out the mechanism for a potential defendant, against whom a minor or incapable person may have a claim, to activate the running of the limitation period. Before the limitation period can run, the potential defendant must find an appropriate person to act as a litigation guardian and apply directly to a court to have the person appointed. However, there are a significant number of statutory safeguards built into the Act to ensure that not only an appropriate litigation guardian is appointed, but also that future notice will be given to the litigation guardian prior to the

expiry of the limitation period.[47] The Act does not make any reference to parents, guardians or public officials.

[34] The Alberta Act also suspends the statute's limitation periods during the period of time that the claimant is a minor[48] or is under a disability.[49] A person under disability is defined as including a person who is unable to make reasonable judgments in respect of matters relating to a claim. Like the Ontario Act and the 1982 Uniform Act, the Alberta Act provides a mechanism for potential defendants to cause the limitation period to run against minors.[50] However, there is no similar procedure in cases involving persons under disability.

[35] The Alberta provisions, which allow potential defendants to start a limitation period running against minors, differ markedly from the Ontario provisions, but have much in common with the 1982 Uniform Act provisions. Like the 1982 Uniform Act, the potential defendant is only obligated to serve notice on the minor's parent or guardian having actual custody of the minor, and the Public Trustee. It is then the responsibility of the Public Trustee to decide whether to: act as next of friend for the minor in relation to the claim; not interfere; or apply to the court for directions. In situations where the minor does not have a parent or guardian, the potential defendant must serve the Public Trustee and the Public Trustee must make an application to the court for directions. Where an application is made to the court for directions, the court must consider a list of statutory criteria to decide whether to direct the Public Trustee to act as next of friend for the minor and whether the limitation period will be suspended or continues to run.

Assault and Sexual Assault Claims

[36] Distinctive treatment for sexual assault claims did not appear to be considered by the Conference in its preparation of the 1982 Uniform Act. However, a number of legislative and jurisprudential developments seem to call for an examination of the issue. Some provinces have implemented special limitations provisions related to such claims. The British Columbia Act provides that an action may be brought at any time if it is a sexual

assault action or one based on sexual misconduct involving a minor.[51] The Newfoundland Act provides that no limitation period is applicable to actions arising from misconduct of a sexual nature that took place in certain types of relationships. These include fiduciary relationships, relationships of care or authority and relationships of financial, emotional and physical dependency.[52] The Saskatchewan *Limitation of Actions Act*[53] provides for no limitation period in all cases of sexual misconduct and in all cases where injury occurred in a relationship of intimacy or dependency.[54] In *M.(K.)*[55] the Supreme Court of Canada recognized that different considerations applied to the commencement of a limitation period in incest cases. The Court decided that in those cases, the limitation period would run only when the plaintiff had a substantial awareness of the harm and its likely cause.

[37] The Ontario Act takes a different approach to certain assault and sexual assault claims. Some of the Ontario provisions deal with evidentiary rules of presumption, but others follow what other jurisdictions have enacted by stating that there is simply no limitation period associated with a particular claim. Subsection 10(1) states that the two-year basic limitation period for claims based on assault or sexual assault will not run during any time in which the person with the claim is incapable of commencing the proceeding because of physical, mental or psychological condition. Subsections 10(2) and (3) set out rebuttable presumptions of incapability both for cases of sexual assault and for cases of assault where one of the parties to the assault had an intimate relationship with the plaintiff or was one on whom the plaintiff was dependent. These presumptions also affect the 15-year ultimate limitation period, as the running of that limitation period is dependent on whether a person is capable of commencing a proceeding.[56] Claims based on sexual assault where at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom the person was dependent are not subject to a limitation period.

[38] While Ontario has chosen to follow the example of some provinces to set out special rules related to certain assault and sexual assault claims, it is notable that the Alberta Act does not provide for any special treatment in this area. It is arguable that the general

rules related to discovery, fraudulent concealment and minors are flexible enough to adequately accommodate the situations of such plaintiffs without the need for special provisions.[57] However, matters of public policy related to denunciation and deterrence of such conduct, the need for accountability in such cases, and minimizing legal barriers confronting the vulnerable seem to weigh against that position.[58]

Claims with No Limitation Period

[39] That certain claims should not be time limited by statute is not new. Originally, statutes of limitation only imposed limitation periods on specified claims and those claims that were not addressed by statute could generally be brought at any time unless equitable principles applied. Section 16 of the Ontario Act lists proceedings for which there is no associated limitation period. Such a list also appears in the 1982 Uniform Act although many of the actions listed there are related to security interests, real property, and actions for declarations of personal status and title to property.[59] The Ontario Act includes the aforementioned sexual assault proceedings. It also includes proceedings for declarations if no consequential relief is sought, proceedings to enforce court orders (which were subject to a twenty-year limitation period[60]), proceedings to obtain support under the *Family Law Act* (which were subject to a two-year limitation period[61]), proceedings to enforce an arbitration award, and proceedings to redeem or realize on collateral by a creditor or debtor in possession.

[40] Under the Ontario Act, the Crown also benefits from not having a limitation period to recover a range of monies either owing to it or that relate to the administration of social, health or economic programs. These include fines, taxes, and penalties and interest that may be added to a tax or penalty; monies owing in respect of student loans, awards and grants; and monies related to social assistance payments. The Newfoundland Act contains a similar provision regarding certain proceedings by the Crown.[62]

[41] The Alberta Act does not contain a list of proceedings for which there is no limitation period. However, some of the proceedings listed in the Ontario Act are also

referred to in the Alberta Act. For example, declarations of rights and duties, legal relations or personal status are excluded from the application of the Alberta Act.[63] Such proceedings therefore effectively do not have a limitation period, as is the case in Ontario. However, a proceeding for the enforcement of a judgment is subject to a limitation period of 10 years under the Alberta Act.[64]

Environmental Claims

[42] Environmental claims, defined in s. 1 of the Ontario Act 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" are treated differently from other claims. According to s. 17 of the Ontario Act, an "undiscovered environmental claim" is not subject to any limitation period. Effectively, the ultimate limitation period does not apply to environmental claims, but once an environmental claim is discovered, the basic two-year limitation period would apply.

[43] The treatment of environmental claims in the Ontario Act appears to be unprecedented and this exceptional treatment is debatable. Certainly environmental damage is not the only damage that may only be discoverable beyond the 15-year ultimate limitation period. The English Law Commission was particularly concerned with personal injury cases and chose not to subject personal injury claims to the ultimate limitation period. Interestingly, it made no mention of environmental claims in its recommendations.[65]

Agreements to Vary the Limitation Period and Acknowledgments

[44] Section 22 of the Ontario Act states that the Act's limitation periods apply to a claim despite agreements to vary or exclude it. At least two Canadian jurisdictions have rules addressing agreements to alter prescribed limitation periods. Alberta's limitations legislation recognizes that agreements may validly extend, but is silent on agreements to shorten, a limitation period[66] and the Quebec Civil Code states that no prescriptive period

other than that provided by law may be agreed upon prior to the running of the limitation period.[67]

[45] The Ontario Act's provision related to agreements is surprising considering that it was accepted that parties were able to enter into such agreements under the old regime given the former Ontario Act's silence on the issue. Furthermore, there seems to be no law reform report in a common law jurisdiction that has ever supported the position of prohibiting agreements to alter statutory limitation periods. The prohibition in the Quebec Civil Code had been defended on the basis of public order and on the need for certainty, but even the Quebec Civil Code recognizes that different considerations apply to the situation where the limitation period has commenced running.[68]

[46] Although s. 22 does not work retroactively to affect agreements entered into prior to the coming into force of the Act,[69] the Ontario Act's impact on the enforceability of tolling or standstill agreements, and representation and warranty clauses found in many standard form commercial agreements, is now uncertain.[70] How this provision affects the doctrines of waiver and estoppel is also unclear.

[47] Section 22, however, is not an absolute bar to the formation of agreements affecting limitation periods. Section 11 of the Ontario Act provides for the suspension of the running of the basic and ultimate limitation periods if the parties agree to "have an independent third party resolve the claim or assist them in resolving the claim." A similar provision is not found in the Alberta Act, as parties are able to contractually extend a limitation period. Given Ontario's restriction on the extension of statutory limitation periods, s. 11 grants at least some flexibility to parties to resolve their dispute without the concern for the running of the limitation period. Also, both the Ontario and Alberta Acts recognize that an acknowledgment in some cases may act to effectively extend a limitation period.[71]

[48] The acknowledgment provisions in the Ontario and Alberta statutes are merely attempts to codify the common law and do not appear to be controversial.[72] In contrast,

the consequences of limiting the ability of contracting parties to agree to vary statutory limitation periods appear harsh though there may be a legitimate consumer protection perspective that needs to be considered. With the lack of doctrinal work supporting such a prohibition, the Conference may need to give this issue further study, before deciding on proceeding along the same course as Ontario or Alberta. It should also be noted that consideration will also need to be given to the rules found in the *Convention on the Limitation Period in the International Sale of Goods*[73] to ensure that whatever rules are adopted locally are compatible with the rules of the Convention should there be an intention of adopting the Convention.

Conflict of Laws

[49] Section 23 of the Ontario Act states that the limitations law of Ontario or any other jurisdiction is substantive law. The effect of the Ontario provision means that claims arising in Ontario that are litigated outside Ontario are expected to be subject to the limitations law of Ontario. Foreign claims, in contrast, would be subject to the limitations law of the foreign jurisdiction in which they arose if they are litigated in Ontario.

[50] The Ontario classification differs significantly from the traditional view at common law, which considered statutes of limitation to be procedural if they operated merely to bar the remedy and as substantive if they extinguished the right.[74] Where the foreign limitations statute is classified as procedural, the limitations law of the forum would apply. The Ontario classification also differs from the rule adopted by the Conference in the 1982 Uniform Act and that has been codified in the Alberta Act, which state that the law of the forum is to apply regardless.[75] Both those rules, therefore, operate as if all foreign limitation laws are procedural.

[51] The issue as to whether limitations law should be classified as substantive or procedural has been debated at length and has also been considered by this Conference prior to the adoption of the 1982 Uniform Act. In 1969, the Ontario Law Reform

Commission had summarized the long-standing criticisms of the common law classification and recommended that limitations law should be classified as substantive. According to the Ontario Law Reform Commission, the main difficulties with the common law classification were: its basis on an "unreal" distinction between limitation periods that barred the remedy and those that extinguished the right where, for practical purposes, the claims are rendered worthless in either case; its creation of an opportunity for plaintiffs to engage in shopping for the forum with the longest limitation period; and its requirement for courts to engage in the difficult exercise of determining whether a foreign limitation period was procedural or substantive.[76] The Ontario Law Reform Commission's recommended approach was rejected by the Conference. The primary rationale given by the Conference for favouring the procedural classification was one of public policy. It was of the view that if the forum "does not apply its laws to those impleaded in its courts, particularly its own residents, it fails to provide that protection where it can effectively do so; instead its legal system will apply the standards of some other jurisdiction which may not have a limitations law at all, or may have one that is harsh or capricious."[77]

[52] The Supreme Court of Canada had an opportunity to examine the issue in 1994 and was highly critical of the traditional common law classification in *Tolofson v. Jensen*.[78] It held that statutes of limitation should be classified as substantive. La Forest J. was clearly of the view that the classification of limitation periods as procedural was outdated. In his view a "court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."[79]

[53] La Forest J. further noted that characterizing limitations law as substantive is consistent with the characterization in most civil law countries[80] and is also consistent with the modern British rule as adopted in the *Foreign Limitation Periods Act*.[81] Indeed, the *Foreign Limitation Periods Act* was the result of an extremely comprehensive report by the Law Commission of England and Wales and the Act has been described as a "significant improvement upon the previous law."[82] LaForest J. was also reluctant to

apply public policy as a rationale to preclude the operation of a foreign limitation period by stating, "To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster."[83]

[54] The *Tolofson* decision calls for a reconsideration of the basis for the conflicts rule in the 1982 Uniform Act. The *Tolofson* rule, based on the goal of achieving a coherent conflicts of law regime, effectively sets one clear limitation period, consistent with the applicable law, to apply to a claim regardless of where that claim is litigated, and appears to be far more responsive to modern conditions than the rule in the 1982 Uniform Act. In contrast, the 1982 Uniform Act's rule, based on local public policy, has the potential effect of encouraging forum shopping (for the longest limitation period), frustrating the portability of rights and obligations across borders (as enforceability of contractual provisions regarding limitation periods would become uncertain) and increasing transaction costs by forcing parties to litigate in inappropriate jurisdictions.[84] The Conference's rule further raises a measure of constitutional risk as it remains uncertain whether *Tolofson* has in fact constitutionalized the choice of law rules just as *Morguard Investments Ltd. v. DeSavoye*[85] has constitutionalized the rules for jurisdiction and enforcement of judgments.[86] While the constitutional issue has not been addressed by the courts, the Conference's rule, as codified in the Alberta Act, has already presented interpretive challenges in light of the *Tolofson* decision.[87]

Transition

[55] The approach to transition differs between the Ontario and Alberta statutes. Transition rules fall under s. 24 of the Ontario Act. For claims based on events occurring prior to January 1, 2004, the date of discovery of the claim is an important factor to consider for determining whether the new or old law applies. Generally, for claims that were discovered before January 1, 2004, the old law will continue to apply and such

claims are unaffected by the new legislation. However, for claims that have remained undiscovered and were not statute-barred at the end of 2003, the new legislation deems the events in question to have taken place on January 1, 2004. The effect of these rules is that former limitation periods related to claims of which a plaintiff is aware have not changed, but undiscovered claims related to events arising prior to January 1, 2004 are now subject to the new law. In the latter case, for the purposes of calculating the ultimate limitation period, the period will commence from January 1, 2004.

[56] Special rules exist for claims that were not or are not now subject to a limitation period. Under s. 24(4), claims that were subject to a limitation period under the old law, but were not statute-barred at the end of 2003, are no longer subject to a limitation period if there is no limitation period under the new legislation for those types of claims. For those categories of claims that were not subject to a limitation period under the old law, but which are under the new law, their treatment under the transition provisions depends on whether the claim had been discovered or remained undiscovered immediately before January 1, 2004. If the claim was discovered before January 1, 2004, there continues to be no limitation period for that claim. If the claim was not discovered before January 1, 2004, the claim will be subject to the new law, and for the purposes of calculating the ultimate limitation period, the period will commence from January 1, 2004.

[57] Finally, it should be noted that while claims that are statute-barred before January 1, 2004 will generally continue to be statute-barred after that date, there are some exceptions. These exceptions deal with certain claims based on assault or sexual assault and are referred to in s. 24(7) of the new Act.

[58] The Alberta Act's approach to transition is far less complex as it tries to bring as many claims under the new law as soon as possible. Section 2 of the Alberta Act provides that the new law is to govern every proceeding commenced on or after March 1, 1999. For claims that were discovered before March 1, 1999, the applicable limitation period will be either the remainder of the period under the old law or two years from March 1, 1999 whichever is the shorter.

[59] The effect of the Alberta transition provisions on undiscovered claims is far more dramatic than similar provisions in Ontario as undiscovered claims could be barred fairly early in the life of the new legislation. For example, a claim that arose on April 1, 1989 and which remained undiscovered would be statute barred within one month of the coming into force of the Alberta Act, as the 10-year ultimate limitation period would apply retroactively. Furthermore, those claims that arose before March 1, 1989 would be statute barred on the date that the Act came into force. The Ontario Act avoids this result and gives such claims another 15 years from the coming into force of the Act to be discovered. The retroactive effect of Alberta legislation is vulnerable to the criticisms of all legislation with a retroactive character; however, the Ontario Act necessitates as much knowledge of the old law as the new law long after the new law has come into force.[88]

Conclusion

[60] The foregoing discussion should not be seen as a comprehensive survey of issues and approaches related to the law on limitations. Its goal is far more modest and is to serve as a basis for deciding to work on a new uniform act. The trend in limitations law clearly points towards a core limitations regime composed of a basic limitation period based on discoverability and a longer ultimate limitation period running from the happening of the act or omission on which the claim is based. On top of this core regime is added a layer of rules for exceptional circumstances and special claims.

[61] The argument for uniformity in the core regime seems unassailable as no compelling reason appears to have been advanced against the philosophy underlying the core regime. This new regime is more principled than the approach of the past. It is relatively simple and transparent facilitating access to and understanding of the law. Uniformity across the country in regard to the core regime would further enhance accessibility and understanding of this area of the law and facilitate commercial transactions.

[62] The same argument could be made to support many of the special rules. For example, the rules related to acknowledgments and their effect on a limitation period are already fairly uniform and there does not appear to be any reason for why they should not be. However, it may not be possible to be so unequivocal regarding all of the special rules. Local circumstances and policies may override the value of uniformity so as to require different treatment in different jurisdictions regarding a variety of claims.

[63] This paper, therefore, concludes with the following recommendations. It is recommended that the Conference commence work on the development of a uniform limitations act based on a core limitations regime using the core regimes in both Alberta and Ontario as models. It is recommended that the work should also include the development of special limitations rules in regard to claims and circumstances that require special treatment. And it is recommended that the current limitations law of Alberta, Ontario and Quebec be referred to in the development of the new legislation.

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[1] Online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l4> [hereafter 1931 Uniform Act].

[2] Online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1l3> [hereafter 1982 Uniform Act].

[3] *Limitations Act*, R.S.A. 2000, c. L-12 [hereafter Alberta Act].

[4] *Limitations Act*, S.O. 2002, c. 24, Sch. B [hereafter Ontario Act].

[5] *Limitation Act*, R.S.B.C. 1996, c. 266 [hereafter British Columbia Act].

[6] S.Q. 1991, c. 64 [hereafter C.C.Q.].

[7] Some key decisions include; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman* (1995) 25 O.R. (3d) 1, aff'd [1997] 3 S.C.R. 549; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 [hereafter *M.(K.)*]; *Gauthier v. Brome Lake (Town)*, [1998] 2 S.C.R. 3; *Novak v. Bond*, [1999] 1 S.C.R. 808; and *Bannon v. Thunder Bay (City)*, [2002] 1 S.C.R. 716.

[8] See Saskatchewan, Department of Justice, *Proposals for Reform: Limitation of Actions and Joint and Several Liability* (Regina: Department of Justice, 2003).

[9] Law Commission of England and Wales, *Limitation of Actions* (Law Com. No. 270) (London: Her Majesty's Stationery Office, 2001) [hereafter English Law Commission].

[10] British Columbia Law Institute, *The Ultimate Limitation Period: Updating the Limitation Act* (BCLI Report No. 19) (Vancouver: The Institute, 2002).

[11] Alberta Law Reform Institute, *Limitations Act: Adverse Possession and Lasting Improvements*, (Final Report No. 89) (Edmonton: The Institute, 2003) and Alberta Law Reform Institute, *Limitations Act: Standardizing Limitation Periods for Actions on Insurance Contracts* (Final Report No. 90) (Edmonton: The Institute, 2003) [hereafter Alberta Report No. 90].

[12] See *Limitations Act*, S.N.L. 1995 c. L-16.1 [hereafter Newfoundland Act].

[13] For a full analysis of the conventional approach to limitations legislation and its deficiencies see: Institute of Law Research and Reform, *Limitations* (Report for Discussion No. 4) (Edmonton: The Institute, 1986).

[14] 1982 Uniform Act, s. 13(1).

[15] 1982 Uniform Act, s. 13(2)(b).

[16] Alberta Law Reform Institute, *Limitations* (Report No. 55) (Edmonton: The Institute, 1989) at 1 [hereafter Alberta Report].
[17] This second principle of repose arguably also includes traditional justifications for limitation periods such as ensuring that stale claims based on unreliable evidence would not be brought to court; that financial resources of individuals are efficiently utilized; and that cases are adjudicated based on standards applicable at the time of the acts or omissions on which the claims are based.
[18] Ontario Act, s. 2(1)(a) and (c) respectively.
[19] Ontario Act, s. 2(1)(e) and (f) respectively.
[20] Alberta Act, s. 2(4)(b).
[21] Alberta Act, s. 1(i)(iii).
[22] Alberta Act, s. 13.
[23] Alberta Act, s. 2(3).
[24] See Ontario Act, s. 2(1).
[25] See Alberta Act, s. 1(i).
[26] See *Clark v. Canadian National Railway Co.* (1985), 17 D.L.R. (4th) 58 (N.B.C.A.), aff'd [1988] 2 S.C.R. 680.
[27] Alberta Act, s. 3 and Ontario Act, s. 4.
[28] See Alberta Report, *supra* note 16 at 34 and Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991) [hereafter Ontario Report] at 4.
[29] English Law Commission, *supra* note 9 at 65 - 66.
[30] Law Reform Advisory Committee of Northern Ireland, *Limitation of Actions* (LRAC No. 11) (Belfast: The Stationery Office, 2002) at 6. It should also be noted that in Quebec, art. 2925 C.C.Q. sets out a three-year period for actions to enforce a personal right or a movable right.
[31] Alberta Act, s. 3.
[32] See Alberta Report, *supra* note 16 at 65 and Ontario Report, *supra* note 28 at 34.
[33] See s. 3(1)(b) of the Alberta Act, s. 8(1) of the British Columbia Act, s. 22 of the Newfoundland Act, and s. 15 of the Ontario Act.
[34] Alberta Report, *supra* note 16 at 35.
[35] The English Law Commission recommended a 10-year period ultimate limitation period that would generally commence from the accrual of the cause of action, but recommended that there be no ultimate limitation period that should be applied to claims in respect of personal injuries to the claimant (see English Law Commission, *supra* note 9 at 66 - 72). The Northern Ireland Advisory Committee was of the view that a 10-year period was too short (see Northern Ireland Advisory Committee, *supra* note 30 at 6 - 9).
[36] Note that Quebec has chosen not to adopt an ultimate limitation period in its Civil Code.
[37] 1982 Uniform Act, s. 18.
[38] *Supra* note 10.
[39] R.S.O. 1990, c. F.3 [hereafter *Family Law Act*].
[40] R.S.O. 1990, c. L.12.
[41] R.S.O. 1990, c. T.23 [hereafter *Trustee Act*].
[42] R.S.O. 1990, c. I.8.
[43] See s. 19(5) of the Ontario Act. The Ontario Act does not subject these limitation provisions to the rules regarding the suspension of a limitation period where there has been wilful concealment on the part of the defendant or where the defendant has wilfully misled the claimant. Consideration should be given to whether this is appropriate, as a recent decision by an Ontario court suggests that, at least in the circumstances examined by that court, it should be otherwise. In *Giroux v. Trillium Health Centre*, [2004] O.J. No. 557 (Ont. S.C.J.), the doctrine of fraudulent concealment was used to prevent a limitation period from barring a negligence claim against a doctor brought by the relatives of the deceased patient despite s. 38(3) of Ontario's *Trustee Act* which sets a 2-year limitation period commencing from the death of the deceased.
[44] This rule also applies to new (but not pre-January 1, 2004) provisions that incorporate by reference a provision listed in the schedule. While incorporating by reference provisions that predate the Ontario Act are not listed, the Act provides at least some assurance that any new limitation period will always be found in the statute.
[45] See sections 6, 15(4) and 19(5) of the Ontario Act.

[46] Ontario Act, s. 7(1).
[47] *Ibid*.
[48] Alberta Act, s. 5.1.
[49] Alberta Act, s. 5.
[50] Alberta Act, s. 5.1.
[51] British Columbia Act, s. 3(4)(k)(l).
[52] Newfoundland Act, s. 8(2)(3).
[53] R.S.S. 1978, c. L-15.
[54] *Ibid*., s. 3(3.1).
[55] *Supra*, note 7.
[56] See sections 15(4)(a) and 15(5) of the Ontario Act.
[57] The Quebec Civil Code also does not provide for special treatment for sexual assault cases. However, art. 2904 C.C.Q. states that prescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others.
[58] See Ontario Report, *supra* note 28 at 20. See also J. Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 U.T.L.J. 169 and Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: The Commission, 2000).
[59] See 1982 Uniform Act, s. 6
[60] *Limitations Act*, R.S.O. 1990, c. L.15, (renamed *Real Property Limitations Act* by S.O. 2002, c. 24 Sch. B, s. 26(2)), s. 45(1)(c).
[61] *Family Law Act*, R.S.O. 1990, c. F.3, s. 50.
[62] Newfoundland Act, s. 8(4).
[63] Alberta Act, s. 1(i)(i).
[64] Alberta Act, s. 11.
[65] English Law Commission, *supra* note 9.
[66] See s. 7 of the Alberta Act. An amendment to this section by the *Justice Statutes Amendment Act, 2002*, S.A. 2002, c. 17 was to clarify that agreements to shorten a limitation period set out in the Act are invalid. The amendment was proclaimed to be in force on June 1, 2003, but was later "unproclaimed" on May 28, 2003. A discussion of the history of this amendment may be found in Alberta Report No. 90, *supra* note 11at 33.
[67] Art. 2884 C.C.Q. Note that art. 2883 C.C.Q. expressly allows for the renunciation of prescription once time has begun to run, although renunciation may not be done in advance. There is no similar provision in the Ontario Act.
[68] See generally, J.-L. Baudouin & P.-G. Jobin, *Les obligations*, 5th ed. (Cowansville, QC: Editions Yvon Blais, 1998) at 807 - 808.
[69] Ontario Act, s. 24(8).
[70] See J. Cameron, "New Limitation Periods – Contracting in Ontario" (2004) 40 Can. Bus. L.J. 109; E.S. Knutsen, "Ontario's Limitations Act, 2002: Highlights in a Banking Law Context" (2004) 23 Nat. B.L Rev. 1; G. Mew, "When Does Time Run? When Does Time Run Out? When Does the Clock Stop Running?" in T.P.D. Bates and G. Mew, chairs, *The Limitations Act, 2002: Learn the New Rules Before Time Runs Out* (Toronto: Law Society of Upper Canada, 2003) at 2-12.
[71] See Ontario Act, s. 13 and Alberta Act, s. 8.
[72] However, there has been some criticism regarding potential ambiguity in the drafting of the Ontario provisions. See A. Matheson, "Limitation Periods for Demand Promissory Notes" (2004) 23 Nat. B.L Rev. 4 at 7.
[73]14 June 1974, U.N. Doc. A/CONF.63/15 (1974), 13 I.L.M. 952 and *Protocol Amending the Convention on the Limitation Period in the International Sale of Goods*, 10 April 1980, U.N. Doc. A/CONF.97/18 Annex II (1980), 19 I.L.M. 696.
[74] See J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham, ON: Butterworths, 2004) at 6-8; L. Collins, ed., *Dicey and Morris on the Conflict of Laws*, vol. 1, 13th ed. (London: Sweet & Maxwell, 2000) at 172 - 176.
[75] See 1982 Uniform Act, s. 21 and Alberta Act, s. 12.
[76] Ontario Law Reform Commission, *Report of the Ontario Law Reform Commission on Limitation of Actions* (Toronto: Department of the Attorney General, 1969) at 133 – 136.
[77] "Limitation of Actions: Alberta Report" [1979] Unif. L. Conf. Proc. 155 at 211.

[78] [1994] 3 S.C.R. 1022 [hereafter *Tolofson*].
[79] *Ibid*. at 1070.
[80] See for example, art. 3131 C.C.Q.
[81] *1984*, (U.K.) 1984, c. 16.
[82] P.B. Carter, "The Foreign Limitation Periods Act 1984" (1985) 101 L.Q.R. 68 at 78. See also P.A. Stone, "Time Limitation in the English Conflict of Laws" (1985) 4 L.M.C.L.Q. 497.
[83] *Tolofson*, *supra* note 78 at 1073.
[84] See generally J. Herbert, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v. Jensen* (1998) 56 U. of T. L. Rev. 3 [hereafter Herbert].
[85] [1990] 3 S.C.R. 1077.
[86] Herbert, *supra* note 84 at 44 - 45.
[87] Seemingly irreconcilable, the Alberta Court of Queen's Bench decided in *Castillo v. Castillo* (2002), 24 C.P.C. (5th) 310 that both the approach in *Tolofson* and the Alberta Act's provision would apply in conflicts cases. In *Castillo*, the applicant driver and respondent passenger while on holiday had been in a single vehicle accident in California. Both were in the process of moving to Alberta and were considered residents of Alberta. The respondent was treated in Alberta upon her return and filed a claim in Alberta almost two years after the accident. The applicant applied for summary dismissal on the basis that the California one-year limitation period applied on the basis of *Tolofson* and therefore the respondent's claim was statute barred. The respondent argued that the Alberta Act's two-year limitation period applied as a result of the Alberta Act's conflicts rule characterizing limitation periods as procedural.

The Court took the view that a two-step process must now be applied in these cases. First, the *lex loci delicti* must be examined to determine whether the plaintiff has a cause of action that is not statute barred. If the plaintiff has an action, then the limitations law of Alberta must be examined to determine whether the plaintiff's action is statute barred in Alberta.

While the decision in *Castillo* is creative in its ability to apply both the *Tolofson* decision and the conflicts rule in the Alberta Act, it remains unsatisfactory as supporting a coherent conflicts of law regime. The Alberta Court of Queen's Bench's test can be reformulated into the following rule: the forum will apply its limitation period unless the foreign limitation period would bar the claim, in which case the foreign limitation period would apply. The problem with this new rule is that the same problems identified by La Forest J. regarding the classification of limitation laws as procedural remain. For example, assume the same facts of *Castillo*, but assume that the limitation period was longer in California than Alberta and the plaintiff commenced the proceeding within the limitation period of California, but was statute-barred under Alberta law. In this situation, the application of the two-step test would bar the claim in Alberta effectively forcing the Alberta parties to litigate in California. This result could hardly be convenient to the parties nor would it recognize the modern reality of easy mobility of people across borders – two points La Forest J. emphasized in his decision to characterize limitations law as substantive. See G. Robertson, "*Castillo v. Castillo*: Limitation Periods and the Conflict of Laws" (2002) 40 Alta. L. Rev 447 for further commentary.
[88] Another approach to transition is found in s. 6 of *An Act Respecting the Implementation of the Reform of the Civil Code*, S.Q. 1992, c. 57. That section states:

> Where the new legislation lengthens a prescribed period of time, the new period applies to existing situations and account is taken of the time already elapsed.
>
> Where it shortens a prescribed period, the new period applies, but begins to run from the coming into force of the new legislation. However, the period prescribed in the former legislation is maintained where it would in fact be extended if the new period applied.
>
> Where a period of time not prescribed in the former legislation is introduced by the new legislation and begins with an event which in fact occurred before the coming into force of that legislation, the period, if not already expired, runs from that coming into force.

These provisions should certainly be taken into account in developing transition provisions.