

# **The Ultimate Limitation Period: Updating the Limitation Act**

**BCLI Report No. 19**

**July 2002**

## British Columbia Law Institute

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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*The British Columbia Law Institute gratefully acknowledges the financial support of the Law Foundation of British Columbia in carrying out its work*  
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### Canadian Cataloguing in Publication Data

Main entry under title:

The Ultimate Limitation Period: Updating the *Limitation Act*

ISBN *[to be inserted when available]*

1. Limitation Act and the ultimate limitation period – British Columbia. 2. British Columbia. Limitation Act. I. British Columbia Law Institute.

*[Cataloguing numbers to be inserted when available]*

## **British Columbia Law Institute**

The Honourable Geoff Plant, Q.C.  
The Attorney General of the  
Province of British Columbia  
Parliament Buildings  
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

The British Columbia Law Institute has the honour to present the following Report:

### **The Ultimate Limitation Period: Updating the *Limitation Act***

The *Limitation Act* governs the law on limitation of civil actions in British Columbia. The ultimate limitation period found under section 8 of the *Limitation Act* was introduced into the Act in 1975 and sets an outside time limit within which claims must be brought before the courts.

This Report embodies the recommendations of the British Columbia Law Institute in relation to section 8 of the *Limitation Act*. The principal recommendation is that the 30 year ultimate limitation period of general application is far too long as a default rule and should be reduced to 10 years. It is also recommended that the running of time under the proposed ultimate limitation period should commence from the date of the act or omission that constitutes a breach of duty. These recommendations will require consequential revisions to section 8 which are described in the body of the Report.

The recommendations for reform are being issued at this time to ensure that they are available for consideration as part of the wider-ranging Civil Liability Review being carried out by the Ministry of the Attorney General.

June 26, 2002

Gregory K. Steele  
Chair, British Columbia Law Institute

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### I. Background

This Report examines the ultimate limitation period (the “ULP”) in section 8 of the *Limitation Act*.<sup>1</sup> The ULP was introduced into the Act as part of the last major revision of the limitations statute in 1975.<sup>2</sup> It has now been an integral part of British Columbia’s limitations law for over 25 years. There have been some limited legislative developments since 1975 including an extension of the limitation period for claims based on sexual misconduct and a shortening of the ULP for claims against medical practitioners, dentists, hospitals and hospital employees. Aside from these few changes the *Limitation Act* remains today much as it was in 1975.

The time has come for a comprehensive revision of section 8. An examination of the *Limitation Act* indicates that the ULP is in need of modernization as it has become outdated and overly complex, with the result that it no longer provides a fair measure of justice for plaintiffs, defendants or society as a whole.

The goal of this Report is accordingly to identify problems associated with section 8 and make recommendations for reform, giving particular attention to: the appropriate length and commencement date of the ULP; the future of special ULPs; and, the protection to be afforded to particular groups currently falling within the scope of the ULP if that period is reduced. This opportunity has also been taken to address the rules with regard to demand obligations which have long caused considerable hardship to lenders.

A number of reports on limitations law emanating from jurisdictions in Canada and abroad were considered in formulating the final recommendations in this Report. Of particular note is the Report reviewing the ULP by the Law Reform Commission of British Columbia issued in 1990.

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1. *Limitation Act*, R.S.B.C. 1996, c.266.
  2. The 1975 *Limitations Act*, S.B.C. 1975, c. 37, wholly revised limitations law, pursuant to the recommendations of the Law Reform Commission of British Columbia published in its Report entitled *Limitations: Part II - General*, Report No. 6, (1974). (Referred to hereinafter as “LRC 6”). The most significant changes were: the reduction in the number and length of limitation periods; the identification of causes of action in functional terms rather than according to technical classification; the restatement of the rules respecting confirmations; the amendment of the rules governing persons with disabilities; the introduction of tolling provisions postponing the running of time where the plaintiff was not aware of the cause of action; and, the implementation of the ULP of general application.
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### II. Introduction – The Ultimate Limitation Period

#### A. *Limitation Act* – General Scheme

The purpose of limitations legislation is to ensure that civil actions are brought in a timely fashion while affording the plaintiff a reasonable opportunity to seek legal advice, consider a settlement, and, if necessary, bring a claim. Any claim that is not brought within the applicable basic limitation period is vulnerable to a limitations defense which, if successful, will result in the defendant being immune from liability despite the merits of the claim.

The limitation period applicable in any given case depends on the type of action being brought. The basic limitation periods are 2, 6 and 10 years as set out under section 3 of the *Limitation Act*. These periods run from the time that the cause of action arises. (The exception being that for certain causes of action enumerated in section 3(4) of the *Limitation Act*, such as actions based on sexual assault, there is no limitation period applicable.)

In order to protect the rights of plaintiffs the running of time under the limitation periods can be postponed or suspended where one of the tolling provisions in the *Limitation Act* is applicable. These provisions apply where the claim falls within the scope of any of the following sections: section 5 (confirmation of a cause of action); section 6 (statutory discoverability provision); section 7 (legal disability); or, section 11(2) (order staying execution). Postponement is warranted in these cases as the plaintiff's failure to bring a claim within a reasonable period is not due to the plaintiff having slept on his or her rights.

To preserve the underlying policy of the Act section 8 provides a ULP in those cases where the basic limitation period is postponed or suspended, running from the date that the cause of action arises. The ULP sets an outside time limit for asserting a claim, even where one or more of the tolling provisions would otherwise apply to extend the running of time. This provision provides defendants with protection from stale claims and ultimately ensures that defendants are not subject to open ended liability. Section 8 will only come into operation if the basic limitation period has not already expired. After the termination of the applicable limitation period the right to bring an action will be statute-barred.

### B. Developments in the Case Law

The Supreme Court of Canada has considered the operation of the tolling provisions in the context of limitations law in the case of *Kamloops v. Nielsen*<sup>3</sup> and, more recently, in *Novak v. Bond*.<sup>4</sup> The decisions in these two cases represent significant developments in limitations law.

#### *The Kamloops Case*

In *Kamloops* the court adopted a discoverability rule to determine when time starts to run under a limitation period. This follows the English decision of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*<sup>5</sup> *Kamloops* was a construction case involving a claim for negligence with regard to a building with concealed defective foundations. Traditionally time under a limitation period began to run at the date that the cause of action accrued. In *Kamloops* the majority adopted what has become known as the “common law discoverability rule” whereby the accrual of a cause of action is postponed until the date of discoverability, at least for claims founded in tort.<sup>6</sup> Thus, under this rule time does not begin to run until the plaintiff acquired knowledge or the means of knowledge of the material facts giving rise to the cause of action.

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3. [1984] 2 S.C.R. 2, 5 W.W.R. 1. (The common law discoverability rule set out in *Kamloops* was summarized in *Central and Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224, 31 D.L.R. (4th) 481 at 535, a case dealing with a professional negligence claim.)
  4. [1999] 1 S.C.R. 808, 172 D.L.R. (4th) 385.
  5. [1976] Q.B. 858 (C.A). In England the courts rejected the notion of common law discoverability set out in *Sparham-Souter* in the case of *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*, [1983] 2 A.C. 1 (H.L.). *Pirelli* concluded that in the case of negligence the plaintiff’s cause of action accrues and time runs from the date on which the damage occurred. This is consistent with an earlier approach outlined in the decision of *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.). (For further discussion of the English position see: Law Reform Committee (Scarman Committee), *Twenty-fourth Report (Latent Damage)* (1984) at 4.)
  6. The case law in different jurisdictions is conflicting as to whether the common law discoverability rule applies to determine when time runs in actions based on breach of contract. In Ontario the Court of Appeal has interpreted the *Kamloops* decision broadly, holding that in cases based on a breach of duty to take care the common law discoverability rule applies to the running of time whether the issue arises in contract or in tort: *Consumers Glass Co. Ltd. v. Foundation Co.* (1985) 51 O.R. (2d) 385 at 398, 20 D.L.R. (4th) 126 (Ont.C.A.) at 140. Whereas, prior to the recent revision of the Alberta *Limitations Act*, the Alberta Court of Appeal confined *Kamloops* to its facts and held that the common law discoverability rule did not apply to actions based on breach of contract: *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)*, [1988] 6 W.W.R. 427 at 435, 89 A.R. 151 (Alta. C.A.) at 158.

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The *Kamloops* decision created some uncertainty as to whether the common law discoverability rule applied to the commencement date of the basic limitation periods under the British Columbia *Limitation Act*. The courts have now clearly established that this is not the case.<sup>7</sup> Section 6 of the *Limitation Act* creates a statutory discoverability rule that displaces the common law discoverability rule. The statutory rule provides for postponement of the running of time for enumerated causes of action until the plaintiff is aware of material facts, subject to the maximum time limits for bringing a claim under the ULP.

### *The Novak Case*

In *Novak v. Bond* the Supreme Court of Canada considered the postponement provisions in the British Columbia *Limitation Act*. In that case a doctor failed to diagnosis the plaintiff's breast cancer between 1989 and 1990. In 1990 a second doctor diagnosed the plaintiff's cancer, but the plaintiff did not sue the former doctor at that time as she wanted to focus on maintaining her health. In 1995 the cancer returned. This prompted the plaintiff to commence a medical negligence action against the former doctor in 1996, more than 6 years after the plaintiff knew about the misdiagnosis.

McLachlin J., for the majority, observed that the British Columbia Court of Appeal had, in different cases, suggested at least four approaches to determine when time begins to run under s. 6(4)(b) of the *Limitation Act*. These ranged from a restricted approach, which looked to the individual plaintiff's legal capacity to bring an action, to a broader subjective/objective approach, that asked when a reasonable person would hold that the plaintiff should bring an action, taking into account his or her own circumstances and interests. The majority held that the proper approach was to find that time does not begin to run until a 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. The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Applying this test to the case, the majority found that time began to run when the cancer recurred in 1995 and the plaintiff had acted reasonably by focussing on her health, rather than commencing a proceeding, prior to that time.

The minority judgment preferred an objective test that would be applied to the plaintiff's particular position and expressed concern that the majority's interpretation of s. 6 of the *Limitation Act* would effectively abolish the statute of limitations. This is a strong statement. At the very least,

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7. *Bera v. Marr*, (1986) 1 B.C.L.R. (2d) 1 at 27, 27 D.L.R. (4th) 161(B.C.C.A.) at 186; *Wittman (Guardian ad litem) v. Emmott*, (1991) 53 B.C.L.R. (2d) 228 at 237, 77 D.L.R. (4th) 77 (B.C.C.A.) at 85; *Levitt v. Carr*, (1992) 66 B.C.L.R. (2d) 58 (C.A.) at 76; *K.L.B. v. British Columbia*, (2001) 87 B.C.L.R. (3d) 52 at 69, 197 D.L.R. (4th) 431 (C.A.) at 447, (Notice of appeal to S.C.C. filed January 4, 2002; as of the date of this Report the appeal is not yet inscribed for hearing.)

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however, defendants will have more difficulty ascertaining the commencement date of the basic limitation period when section 6 applies than would have been the case had one of the more restrictive approaches been adopted. This brings renewed emphasis to the need for a clear and effective ULP setting out the maximum period of liability to counter-balance this uncertainty and provide the traditional peace and repose functions of limitations law.

### **III. Updating Section 8 – Issues and Options**

#### **A. General Considerations**

##### **1. Length of the ULP of General Application**

###### *(a) Current Scheme*

Section 8 of the *Limitation Act* ensures that no action can be brought after the expiration of the ULP, regardless of whether the running of time has been postponed or suspended. As it presently exists section 8 creates three ULPs depending on the type of action at issue:

- A 30 year period of general application.
- A 6 year period applicable to an action based on negligence against a hospital or a hospital employee acting in the course of employment, or an action against a medical practitioner, based on professional negligence or malpractice.
- A 10 year period applicable to an action against a dentist based on professional negligence or malpractice.<sup>8</sup> (Not yet in force)

The ULP of general application was enacted as part of the 1975 *Limitations Act*, pursuant to the recommendations of the Law Reform Commission.<sup>9</sup> The Commission concluded that the ULP should be set at 30 years for several reasons. It was thought that this period would be sufficient to accommodate latent damage claims. It would also not expire until at least a decade after the

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8. *Miscellaneous Statutes Amendment Act (No. 2), 2000*, S.B.C. 2000, c. 26, s.20. (To come into force by regulation under s. 72(1) of that Act.)

9. LRC 6, *supra* n. 2. (The implementation of a maximum limitation period was not without precedent, as a limited outer bar already existed in the *Statute of Limitations*, R.S.B.C. 1960, c. 370, which provided that no action by a person under disability could be brought beyond 40 years for the recovery of land.)

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age of majority was attained. This would prevent any prejudice to plaintiffs who were minors at the time of the occurrence of the material facts giving rise to the claim. Further, it would allow a creditor to take advantage of successive confirmations.<sup>10</sup> The shorter special periods were introduced into the Act later in a piecemeal fashion.

### (b) *Impact of the 30 Year ULP*

The length of the current ULP of general application has not been free from criticism. The main lesson to be drawn from this experience is that a basic ULP of 30 years is far too long.<sup>11</sup> This gives rise to a number of problems.

Due to its long duration the ULP has little practical effect with regard to protecting defendants from stale claims. It allows too much time to pass before proceedings are instituted, making it difficult for defendants to assemble evidence and witnesses. This creates the risk that defendants may be found liable when evidence, which would otherwise have provided protection, is lost or deteriorated due to the passage of time. Defendants who are providers of goods or services are especially susceptible to evidentiary impediments created by stale claims as they will often find it difficult to identify which transactions will give rise to a cause of action.

The 30 year ULP imposes significant expenses on defendants with regard to maintaining records, evidence and insurance until the period has been exhausted. Higher costs in the provision of goods and services form part of the overhead that are typically passed on to clients through increased prices. In turn, while it is in the public interest that there be timely finality to the potential threat of litigation, the current ULP does not bring about an end to the risk of litigation within a reasonable period. In some cases access to protective insurance is elusive as a professional person may be susceptible to liability long after retirement, but may not be able to obtain insurance coverage or may only be able to do so at great expense. This can place an unduly heavy burden on professionals.

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10. Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8*, Report No. 112 (March 1990) at 13. (Referred to hereinafter as “LRC 112”).

11. This is consistent with the position of a number of law reform and other bodies. *See*: “Briefing: Options for Action Regarding the Ultimate Limitation Period Under Section 8 of the B.C. Limitation Act” (January 2002) at 17, written for the Canadian Bar Association - B.C. Branch (“CBABC”) (At the date of this Report the Provincial Council of the CBABC has not taken a position on the recommendations in the Briefing, but has authorized the Legislation and Law Reform Committee to continue its work in this area.); Law Reform Commission of British Columbia, LRC 112, *ibid*, at 31; and, the Alberta Institute of Law Research and Reform, *Discussion Paper No. 4: Limitations* (1986) at 156.

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The prolonged period of potential liability can have a further adverse economic effect. The fact that matters cannot be treated as at a close until the 30 year period is extinguished creates an element of uncertainty about potential future financial costs. As a result defendants may be unwilling to enter into long-term arrangements and future transactions. This can be detrimental to the commercial sector as a whole.

Furthermore, in those cases where stale claims arise under the general ULP courts must expend valuable time and resources determining long past disputes.<sup>12</sup> The passage of time also affects the ability of the court to determine a claim fairly. Unduly long limitation periods give rise to poor decisions, which diminish confidence in the judicial system. As Laycraft J.A. observed in *Costigan v. Ruzicka*, “Every trial judge is aware that stale claims with stale testimony produce bad trials and poor decisions.”<sup>13</sup>

The two other issues that in the past were thought to necessitate a 30 year ULP - protection of minors and the ability to give successive confirmations - are special cases that can be addressed separately and need not dictate the length of the ULP for all causes of action.<sup>14</sup>

### (c) *Recommendation for Reform*

The ULP of general application is too long with the result that it does not provide adequate protection to defendants. It places an unfair burden on defendants and ultimately denies them peace and repose at a time when it is reasonable to expect the risk of litigation to be at an end. 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.<sup>15</sup>

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12. Currently, over 70,000 filings are made each year in the British Columbia Supreme Court alone, court resources are accordingly at a premium and ought to be conserved: B.C. Supreme Court, online: <<http://www.courts.gov.bc.ca/LegalCompendium/Chapter2.htm>>.

13. [1984] 6 W.W.R. 1 at 11, 13 D.L.R. (4th) 368 (Alta. C.A.) at 377.

14. These issues will be dealt with later in this Report.

15. Few reported cases have arisen where the gap between the occurrence of the material elements of the claim and the start of an action was significantly longer than 10 years. Where these types of claims are reported aboriginal land claims are often at issue. See: *Kruger v. The Queen*, [1986] 1 F.C. 3, (1985) 17 D.L.R. (4th) 591 (C.A.); *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193; *Roberts v. Canada* [2000] 3 C.N.L.R. 303, (1999) 247 N.R. 350 (Fed. C.A.).

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Most bodies that have considered the characteristics of a ULP in recent years have opted for a much shorter period, with a trend towards 10 years.<sup>16</sup> A 10 year ULP would, to a great extent, resolve the problems posed by the 30 year period. It would ensure that the right to litigate is cut off at a point where the costs to defendants outweigh the potential prejudice to a small number of claimants who may lose the right to seek relief through the courts. Few claimants would be affected by the reduction in time as it appears that the vast majority of actions, including latent damage claims, are brought within 10 years of the occurrence that gives rise to the claim.<sup>17</sup> This period is also consistent with the most recent amendment to section 8, under which a 10 year period is subject to come into force for malpractice claims against dentists.<sup>18</sup>

The reduction of the 30 year ULP of general application to 10 years would create greater certainty in limitations law and provide a reasonable balance between the interests of plaintiffs, defendants and society.

### Recommendation 1

*Section 8 of the Limitation Act should be amended to provide that the 30 year ultimate limitation period of general application is reduced to 10 years.*

2. Application of the ULP to Fraud, Fraudulent Breach of Trust and Wilful Concealment of Material Facts

Cases involving fraud, fraudulent breach of trust and wilful concealment of material facts can be distinguished from other types of claims. In these cases the delay in bringing an action is due to the conduct of the defendant in concealing facts material to the right of action, not undue delay by the plaintiff in bringing a claim. Special provisions of the *Limitation Act* protect the right of a plaintiff to bring a claim by providing that the running of time with respect to the limitation period is postponed for actions based on fraud or deceit.<sup>19</sup> While fraud or deceit can operate to affect the basic limitation period, section 8 provides an outside limit beyond which no claim may be brought.

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16. See: Table in Appendix A.

17. The Law Reform Commission of Ireland discusses a number of studies which, although not dealing with personal injury claims, are consistent with the finding that a 10 year ULP would provide adequate protection: *Report on the Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage*, Report No. 64 (2001) at 33.

18. *Supra*, n. 8.

19. *Limitation Act*, ss. 6(1) and (3). (Historically equity provided a similar type of protection to plaintiffs who were not aware of a cause of action owing to the conduct of the defendant in the nature of fraud: *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 51, 96 D.L.R. (4th) 289 at 316; *Abernethy v. Ross*, (1986) 70 B.C.L.R. 27 (S.C.) at 30.)

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The protection to which plaintiffs are entitled would be seriously eroded if the proposed 10 year ULP of general application were to apply to actions involving fraud, fraudulent breach of trust and wilful concealment of material facts. A special 30 year ULP would be more appropriate in these 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.<sup>20</sup> It may also act as a deterrence measure. On the other hand, it is recognized that creating an exception to the general ULP adds to the complexity of the *Limitation Act*. This necessitates defining its scope and creates another issue for the courts to resolve. As a matter of policy the creation of special ULPs should be discouraged. In this case, however, there is a strong argument that an exception to the general regime is warranted. The added complexity is outweighed by the fact that the justice system would be brought into disrepute if the *Limitation Act* could be used as an instrument of fraud. There would be a much greater chance for a person to engage in fraudulent or deceptive conduct and avoid liability if the ULP is reduced to 10 years.

Some jurisdictions have addressed this issue by providing that the ULP is suspended during any time that material facts are wilfully concealed. This is linked to the notion that as defendants should not be able to benefit from their wrongful conduct they are not entitled to peace and repose. This solution is problematic on two fronts. The defendant may, in fact, not be guilty of wrongdoing and, on that basis, ought to be afforded some protection. In addition, this can result in the ULP being suspended for an indefinite period if the concealment continues for many years. This is contrary to the purpose of statutes of limitation that are designed to foreclose stale claims as, at some point in time, the evidence will have deteriorated to such an extent that a court will be unable to make a proper determination of the issues. A scheme that provides for open ended liability is therefore not recommended.

A 30 year ULP applicable to cases involving fraud, fraudulent breach of trust and wilful concealment of material facts secures a reasonable balance between the right of the plaintiff to discover the defendant's fraud or deceit and seek redress and the ability of the courts to make a fair decision based on reliable evidence. It should also be noted that retaining a 30 year ULP would not affect the costs that are passed on to consumers as insurance is unlikely to cover fraudulent or deceptive conduct in any event.

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20. This proposal is consistent with recommendations by the Law Reform Commission, LRC 112, *supra*, n. 10 and the position set out in a briefing written for the Canadian Bar Association, *supra*, n. 11. (At the date of this Report the Provincial Council of the CBABC has not taken a position on the recommendations in the Briefing.)

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### Recommendation 2

*Section 8 of the Limitation Act should be revised to provide for a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or wilful concealment of facts material to the claim.*

#### 3. Future of the Existing Special ULPs

Currently the *Limitation Act* has special ULPs of 6 years for claims against medical professionals and institutions and a 10 year period is set to come into force for claims against the dental profession. These special ULPs have their roots in the 1975 *Limitations Act*.

The BC Law Reform Commission in its 1974 Report had recommended simplifying limitations law by adopting a single ULP and eliminating the numerous special limitation periods based on occupation that existed.<sup>21</sup> The legislature departed from this recommendation in the 1975 *Limitations Act* to the extent that, under a House amendment, a special ULP of 10 years was adopted for actions against a medical practitioner or hospital for professional negligence or malpractice.<sup>22</sup> In 1977 the 10 year period was reduced to 6 years and extended to hospital employees acting in the course of their employment under the *Miscellaneous Statutes Amendment Act, 1977*.<sup>23</sup> In 2000 a special 10 year period for actions against dentists for professional negligence or malpractice was included under the *Miscellaneous Statutes Amendment Act (No. 2), 2000*.<sup>24</sup>

If the 10 year ULP of general application is incorporated into the Act, the ULP applicable to dentists would no longer be characterized as “special.” The 6 year ULP that favours medical professionals and institutions would be the only special ULP protecting a professional group remaining in the Act. This raises the question of what should happen to this abridged ULP given that there will only be a 4 year difference between the special ULP of 6 years and the suggested general ULP of 10 years. This gap is much less than the 24 year difference that existed in 1977 when the 6 year period was introduced.

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21. See: LRC 6, *supra*, n. 2 at 105; and the scheme of the *Limitations Act* originally contemplated in the first reading version of Bill 8, *Limitations Act*, 5<sup>th</sup> Sess., 30<sup>th</sup> Leg., British Columbia, 1975.

22. Second reading Bill 8, *Limitations Act*, 5<sup>th</sup> Sess., 30<sup>th</sup> Leg., vol.4, British Columbia, 1975.

23. S.B.C. 1977, c. 76, s.19.

24. *Supra*, n. 8. (Not yet in force.)

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Additionally, of note is the fact that the 6 year ULP currently starts to run according to “accrual” principles so that the time a patient has to bring an action may, in certain circumstances, extend well beyond 6 years from the date of the negligent act. Changes to section 8 along the lines suggested in the upcoming sections, particularly commencing time on the date of the breach of duty, would significantly improve the legal position of those who have the benefit of the current 6 year ULP.

### (a) *Should the Special ULP be Retained?*

A case can be made that the 6 year special ULP has been part of the law of British Columbia for 25 years and it has attained something of the status of a “vested right.” It is not uncommon for the legislature in similar circumstances, while recognizing that an anomaly exists, to simply tolerate it by “grandfathering” the former legal position. The adequacy of a limitation system that incorporates this approach must be considered from a policy perspective. Can it be demonstrated that there are reasons associated with limitations law that justify a special, distinct ULP for medical professionals and institutions?

#### (i) *Economic Costs*

##### A. *Record Retention*

Limitations law is premised, in part, on the need to limit the duration of time that evidence must be preserved.<sup>25</sup> This protects defendants and consumers, who would otherwise bear the brunt of rising costs associated with maintaining evidence for long periods. One concern that arises is that increasing the ULP from 6 to 10 years might impose considerable additional costs on defendants with respect to storing medical records.

Under the existing law some medical records must already be retained for 10 years due to factors other than limitation periods. British Columbia hospitals are governed by the *Hospital Act*.<sup>26</sup> The regulations under that Act require hospitals to maintain medical records for 10 years from the date that the patient was discharged from the hospital in the case of primary documents.<sup>27</sup> A primary document is defined as a document that contains pertinent health care data of a patient's health record (including case histories, discharge summaries, consultation reports, day care records and other documents prepared or signed by an attending practitioner). It also includes reports regarding significant findings, items or comments, initially recorded in a secondary or transitory

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25. *M.(K.) v. M.(H.)*, *supra*, n. 19 at 29.

26. R.S.B.C. 1996, c. 200.

27. *Hospital Act Regulation*, B.C. Reg 121/97, s.14.

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document, that have been transferred to and recorded on a primary document.<sup>28</sup> Further, the regulations specifically recognize that some health records have continuing value for research, historical or other purposes and accordingly hospital administrators are given the right to direct that documents be retained for longer than the minimum periods set out in the regulation.<sup>29</sup> Thus, an increase in the ULP to 10 years would not impact the cost to hospitals for retaining either primary records or records that are already being kept for 10 years or more for research or other purposes.

Physicians in non-institutional settings come under the *Medical Practitioners Act*.<sup>30</sup> According to the “Rules Made Under The *Medical Practitioners Act*” medical records listed under Rule 13 must be kept for a period of not less than 6 years from the date of the last entry recorded.<sup>31</sup> The College of Physicians and Surgeons of British Columbia, the professional regulatory body for physicians in the province, recommends in its Policy Manual that due to the time allowed for service of legal proceedings it may be prudent to keep records for periods in excess of 7 years in circumstances where the patient is under a disability or there is an untoward outcome.<sup>32</sup> The College’s Policy Manual adds that authorities such as the Canadian Medical Protective Association (the liability insurer) have, in the past, recommended keeping records for a period of 10 years and in some cases indefinitely. Thus, it is already the case that there are circumstances in which medical professionals ought to be keeping records for longer than 6 years. This is a further indication that applying the 10 year ULP of general application to medical professionals would not create a significant hardship in terms of record retention costs.

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28. A secondary document is a document that contains information about a patient that may be of vital medical importance at a particular time and may have lasting legal significance but is not considered necessary for care and treatment of the patient beyond that particular time, and includes any diagnostic report, authorization, out-patient record and nursing report or note. A transitory document is a document that appears to have no medical importance or lasting legal significance once a patient has been discharged from a hospital, and includes a diet report, graphic chart or departmental checklist: *Ibid*, s. 13.

29. *Supra*, n. 27, s.14(3).

30. R.S.B.C. 1996, c. 285.

31. Rules Made Under The *Medical Practitioners Act*, Part V, Rule 13, online: <<http://www.cpsbc.bc.ca/policymanual/rules/05.htm>>.

32. College of Physicians & Surgeons of British Columbia, *Policy Manual*, “Medical Records and Requests for Patient Information”, online: <<http://www.cpsbc.bc.ca/policymanual/m/m4a.htm>>.

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### B. Insurance Costs

There is a growing concern about escalating insurance rates in the medical field. A portion of these costs are subsidized by the government, nonetheless physicians are having to pay increasing amounts to obtain liability coverage. This raises the issue of whether extending the ULP from 6 to 10 years would significantly increase litigation and incidentally impose formidable costs on defendants through rising insurance rates.

This question must be answered in the negative for two reasons. First, any increase in the number of claims will be slight. This flows from the fact that the majority of cases are either settled, abandoned, completed without reference to the *Limitation Act*, or subject to a limitations defence under the basic limitation period.<sup>33</sup> It is not the case, therefore, that insurance rates would rise considerably due to a substantial increase in the number of cases that may emerge under a 10 year ULP.

The second reason is that changes to the cost of insurance are affected far more by aspects of litigation other than the limitation period. According to a Special Report by the Canadian Medical Protective Association the significant change affecting medico-legal costs in the high risk area of obstetrics is the “growing size of court awards and settlements in a few cases each year.”<sup>34</sup> Replacing the 6 year ULP with a 10 year ULP would not affect insurance costs to the extent that it would not impact the level of awards in individual cases.

Limitation periods should not be determined by insurance rates as there are more appropriate measures that can be considered to provide relief against rising insurance costs. In this respect, it is notable that the Canadian Medical Protective Association is looking at reforms that it hopes will cut costs including streamlining the defence process by, “reducing the number of expert witnesses required, using alternative dispute resolution wherever possible and shortening trials by agreeing to certain facts or aspects of damages in advance where appropriate.”<sup>35</sup>

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33. Alberta Institute of Law Research and Reform, *supra*, n. 11 at 156.

34. Canadian Medical Protective Association, “Special Report,” at 1, online: <<http://www.cmpa.org/cmpaweb/public/english/tort/reform-e.pdf>>.

35. Thomas, W.D.S. “A Physician’s Foresight, A Profession’s Pride - A History of The Canadian Medical Protective Association 1901-2001” at 40, online: <<http://www.cmpa.org/cmpaweb/publications/english/misc/history-e.pdf>>.

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### (ii) *Number of Claims*

There may be a slight increase in the number of claims against medical professionals and institutions if the applicable ULP is raised to 10 years. Nonetheless, concerns about additional claims need to be considered in the context of the overall objectives of a limitations scheme. The 6 year ULP was introduced into the *Limitation Act* due to the lack of protection provided to defendants by the 30 year ULP. There would not be a similar lack of protection under a 10 year ULP as this period is short enough to ensure that claims are brought within a reasonable time. It should also be borne in mind that British Columbia physicians already enjoy more protection than their colleagues in a number of other provinces, as the cap on the operation of the discoverability rule under the British Columbia *Limitation Act* has no counterpart in the common law discoverability rule. Even if the ULP for medical professionals and institutions is raised to 10 years, this group would still enjoy a higher level of protection than physicians in some other jurisdictions.

An increase in the number of claims is not, in itself, a satisfactory reason to maintain a separate abbreviated ULP. Limitations law is not meant to be a tool to bar legitimate claims for compensation simply to reduce the number of actions against certain professional groups.

### (iii) *Standard of Care*

An objective of limitations law is to foreclose claims where the evidence has deteriorated over time making a fair decision difficult. It may be argued that a shorter ULP for medical professionals and institutions is justified as the rapid advances in the medical field make it difficult to determine the applicable standard of care after only a few years have passed since the conduct at issue occurred. In turn, although the standard of care to be used by the courts is that which existed at the time of the treatment, in practice the application of this standard is not always possible.<sup>36</sup>

While it may be slightly more difficult in some cases to determine the standards that were in place 10 years ago rather than 6 years ago, the 4 year difference in the majority of cases will have little impact on the court's ability to discern and apply the appropriate standard. The law is very clear that the conduct at issue must be judged in the light of the knowledge that ought to have been

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36. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at 693, 127 D.L.R. (4th) 577 at 589, the court noted that the exception where conformity with common practice at the time of the treatment will not exonerate physicians is when the standard practice itself is negligent. However, this will only arise where the standard practice is "fraught with obvious risks" such that anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise.

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reasonably possessed at the time of the alleged act.<sup>37</sup> Case law reflects the court's understanding and application of this rule. A recent example is *Williams v. Cumberlidge*<sup>38</sup> in which the court referred to a past publication indicative of the practice and knowledge in effect at the time of the procedure in question.

Further, rapid advances are not unique to the medical profession. A large number of other professional groups also face an ever-increasing rate of change. This reasoning does not therefore justify a distinct ULP for medical professionals and institutions.

### (b) *Elimination of the Special ULP*

The Law Commission for England and Wales observed in its *Report on the Limitation of Actions* that, "the limitation regime should only be modified to take account of factors which affect the operation of the regime."<sup>39</sup> The preceding discussion demonstrates that there are not factors unique to medical professionals and institutions affecting the operation of the limitations scheme that justify a distinct ULP.

There are, however, significant advantages to be derived from the elimination of the special period applicable to medical professionals and institutions. A single ULP of 10 years would provide appropriate protection to all defendants and achieve a degree of uniformity. In so doing, it would further the objectives of limitations law by simplifying section 8 and applying the ULP consistently, regardless of occupation. Whereas, the existence of the 6 year ULP detracts from the consistent application of the general ULP. It also gives the appearance of certain professions and institutions being singled out for particularly favourable treatment, not enjoyed by other similarly situated or equally worthy professions and bodies. The continuation of the abridged period further encourages other groups to lobby for similar protection despite the fact that the protection of special interest groups is not an objective of limitations law. This sets the stage for a proliferation of special periods reminiscent of the state of the law prior to the 1975 *Limitations Act*.

As noted earlier the 6 year ULP currently runs from the date of accrual with the result that the time a patient has to bring an action may extend well beyond 6 years from the date of the breach of duty. For example, where the case is based on negligence time will not start to run until there is damage. If the breach of duty occurred in 1990, but there is no damage until 10 years after the breach of duty, the 6 year limitation period would not start to run until the year 2000. In other

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37. *Roe v. Ministry of Health*, [1954] 2 All E.R. 131 (C.A.), at p. 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*, *ibid.*

38. [1999] B.C.J. No. 305 (B.C.S.C.).

39. *Report on the Limitation of Actions*, Report No. 270 (2001) at 82.

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words the ULP might not expire until 16 years after the breach of duty occurred which gave rise to the cause of action. Later in this report it is proposed that time under the ULP be commenced on the date of the act or omission that constitutes a breach of duty. This would significantly improve the legal position of those who have the benefit of the current 6 year ULP as time will run from the date of the breach of duty and expire 10 years after that date, whether damage has occurred or not. This may be viewed as a fair trade-off for conforming to a 10 year ULP.

### (c) *Conclusion*

A distinct ULP for medical professionals and institutions cannot be defended on grounds associated with limitations law. On a principled analysis of the limitations scheme the special ULP should be removed from the *Limitation Act* and replaced with a 10 year ULP of general application. This may slightly erode the position of some groups that benefit from the 6 year ULP. Nonetheless, this is the preferred solution as it rationalizes the law in this area and establishes a system that provides appropriate protection to all defendants equally.

### Recommendation 3

*Sections 8(1)(a) and (b) of the Limitation Act, which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, should be repealed.*

#### B. Commencement of ULP - When Should Time Begin to Run?

What event should trigger the running of time under the ULP? At present, section 8(1) of the *Limitation Act* provides that the ULP starts to run from the date that the cause of action arose. The date that the cause of action arose is the date that it “accrues.” Under the common law a plaintiff’s cause of action is said to “accrue” when all of the elements that constitute the action are present and the cause of action is complete.<sup>40</sup> Where the action is based on a duty arising under a contract time begins to run from the breach of that duty, which is usually the act or omission that causes the damage. Whereas, for an action based on a duty imposed under the general law (negligence) time runs from when the damage occurs. For many years limitations law has adopted the date of accrual as the logical point to commence the running of time under the limitation period.

##### 1. Problems with the Existing Law

The commencement of the running of time under the ULP from the date of accrual should be reconsidered as it creates a number of problems. A cause of action in negligence does not accrue until the plaintiff suffers actual damage. This can be a date far removed from the negligent act

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40. *Reeves v. Butcher*, [1891] 2 Q.B. 509; *Bera v. Marr*, *supra*, n. 7 at 27; *Wittman (Guardian ad litem) v. Emmott*, *supra*, n. 7 at 237.

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or omission that constitutes a breach of duty which caused the damage. In a case where damage occurs 10 years after a building is constructed, and the defect lies hidden, under the existing general ULP time will not be extinguished until 30 years from the date of damage. In other words, the defendant will be exposed to the risk of liability for up to 40 years from the date of the breach of duty. The long delay that can occur raises several difficulties. First, there are evidentiary problems associated with defending a claim based on conduct that may have occurred many years ago. Over time witnesses memories may fade and key documents may have been destroyed. In *Costigan v. Ruzicka* the court noted:

A professional adviser drafts a document or designs a structure and finds himself attacked when, generations later, damage flows from his act. The attack may come at a time when mind and memory have faded or even failed altogether. He may not be able to recall or may have an imperfect memory of instructions or discussions which excluded liability or which redefined in some limiting fashion the duty he undertook.<sup>41</sup>

Second, under the accrual rules it can be difficult to ascertain the date when the plaintiff actually suffered damage so as to start the limitation period running. This is particularly true in construction cases where damage, such as a crumbling foundation, can go undetected for a long time. It is of little help to potential defendants to know that time starts to run from the date of damage when it is impossible to identify when damage occurred. Thus, the uncertainty created by using the accrual rules to determine the period of liability leaves some defendants without any clear indication of when it is safe to destroy records and cease insurance coverage. It can also result in much time and money being spent trying to pinpoint when damage actually occurred.

Finally, the negligent conduct may constitute a breach of duty imposed under both a contract and the general law (negligence) and it is anomalous that the running of the applicable limitation period should turn on the technical question of how the plaintiff's action has been framed. The availability of a limitations defense under one heading but not the other has little to do with whether the claim was brought in a timely and diligent fashion.

### 2. Commence Time Running from Date of the Act or Omission that Constitutes a Breach of Duty

The modern trend in limitation legislation is to move away from a single accrual rule in defining the running of time.<sup>42</sup> Various approaches are possible but the differences are more theoretical than practical. The focal point for reform has been to abrogate the accrual rule - at least in those cases where damage is an essential element of the cause of action - and look to the act or omission that constitutes a breach of duty giving rise to the cause of action.

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41. *Supra*, n. 13 at 11.

42. *See*: Table in Appendix A.

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The advantages of this approach are threefold. It avoids the difficulties of having to determine when a plaintiff has suffered damage for those causes of action where damage is an essential element. Consequently, the maximum duration of the defendant's liability is more easily ascertainable than under the accrual system and this creates greater certainty for the parties involved. The defendant is protected from stale claims in cases where the date of accrual occurs many years after the date of the act or omission that constitutes a breach of duty. Moreover, this date provides a common starting point for the ULP with regard to claims in both tort and contract.<sup>43</sup>

The drawback of abandoning the accrual rule for cases where damage is an essential element of the cause of action is that time could run with respect to a cause of action, and perhaps extinguish it, before the plaintiff has any legal right to bring an action. The law has no difficulty in postponing the running of a limitation period to some time after the cause of action accrued, such as in the case of the limitation period applicable to minor plaintiffs. Whereas, to start time running at an earlier point raises this anomaly that a claim can be barred before damage is incurred. This anomaly will likely only occur in a few cases, this must be weighed against the significant problems that arise under the current system.

Commencing the running of time from the date of the act or omission that constitutes a breach of duty will bring far greater certainty, predictability and simplicity to limitations law than the existing accrual scheme. In terms of general limitations strategy this would also serve to counterbalance the uncertainty for defendants that can arise through the use of the date of accrual and the date of discoverability to commence the basic limitation period.

### Recommendation 4

*Section 8 of the Limitation Act should be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's cause of action is based on the breach of duty, whether that duty arises under a contract, statute or the general law.*

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43. A briefing has been written for the Canadian Bar Association - B.C. Branch which recommends starting time running under the ULP from the date of the act, omission or breach of duty: *Supra*, n. 11. (At the date of this Report the Provincial Council of the CBABC has not taken a position on the recommendations in the Briefing.)

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### C. Successive Confirmations and the ULP

Section 5 of the *Limitation Act* provides that a confirmation of a cause of action, before the basic limitation period expires, by written acknowledgement or part payment starts time running anew. The reason for this provision is that a debtor who gives a confirmation with regard to a debt has admitted liability up to the time of the confirmation and thus has little need for the protection provided by a limitation period.<sup>44</sup>

The ability to give successive confirmations over an extended period of time accommodates commercial arrangements involving long-term financing. Under the existing law the extension of time is subject to the ULP of general application, the expiry of which will statute bar a claim despite a confirmation. If the ULP is reduced and confirmations continue to come within the scope of the amended ULP this would seriously erode the ability of a debtor to give successive confirmations over a prolonged period. Lenders would be wary of entering into long-term financial arrangements if a limitations defense could deny them a reasonable opportunity to pursue a remedy for repayment. The commercial sector would be especially vulnerable to damage if lenders are discouraged from engaging in financial arrangements beyond 10 years.

Removing confirmed causes of action from the scope of section 8 would address the potential conflict between a shorter ULP and successive confirmations. This approach accommodates parties who want to participate in financial arrangements that extend beyond 10 years. It ensures that no outer bar would effect the lender's right to bring proceedings so long as there has been a confirmation within the meaning of section 5 of the Act. The drawback of this option is that it can result in the litigation of stale claims. Limitations law is not, however, meant to interfere with the legal position of parties if the protection provided by limitation periods is unnecessary. In these circumstances the risks associated with stale claims are limited as the confirmation will provide fresh evidence in the majority of cases.

Alternatively, a confirmation could act to restart the running of time under the ULP. This would enable successive confirmations to occur over an extended period, with each one causing the ULP to be renewed. Under this scheme the outer limit for bringing actions can be postponed indefinitely. The debtor does, however, have the ability to terminate the postponement of the limitation period by simply not providing a confirmation. This enables defendants to have a reasonable degree of control over when their potential liability will come to an end. Under this scheme there is, accordingly, limited need for the protection that a fixed ULP provides.

Both options achieve the goal of accommodating successive confirmations. Allowing a confirmation of a cause of action to restart the running of time under the ULP is, however, preferable as it ensures that defendants are protected by an outer limitation period running from the date of the last confirmation.

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44. Alberta Institute of Law Research and Reform, *supra*, n. 11 at 303.

### Recommendation 5

*Section 8 of the Limitation Act should be amended to provide that a confirmation that falls within the meaning of section 5 of the Limitation Act will restart the running of time under the ultimate limitation period.*

#### D. Persons under a Legal Disability

##### 1. Minors

###### (a) General Scheme

Persons under a legal disability are presumed to lack the capacity to assert a claim on their own behalf during the period of disability. Minority is a legal disability that ceases after a fixed period, namely the date that the age of majority is attained. In recognition of this the basic limitation period is postponed for a person who is a minor at the time the cause of action arises until the age of majority is reached.<sup>45</sup> Despite a postponement or suspension of the running of time, no action can be brought after the expiration of the ULP.

The recommendation to reduce the ULP to 10 years raises an incidental issue of how to protect the legal position of minors. The current 30 year ULP is sufficiently long to ensure that a person who is a minor when the cause of action arose will reach the age of majority before the period has expired. If minors are subject to a reduced ULP they could be denied a remedy for a legal wrong before they are deemed to have the capacity to bring a suit on their own behalf.

Concerns about protecting minors from a reduced ULP have arisen in the past with regard to the special ULP applicable to medical professionals and institutions. This problem was discussed in the case law. In *Bera v. Marr*<sup>46</sup> the plaintiff claimed damages for medical negligence that occurred when he was 12 years old during a surgical procedure in 1974. The Court held that the ULP was not subject to postponement but rather commenced on the date that the cause of action came into existence, that being the date of the surgical procedure. The action in *Bera* was commenced before the ULP expired. The finding, however, that the short ULP in the *Limitation Act* applicable to physicians could not be postponed created the potential for the special ULP to

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45. The age of majority in British Columbia is 19: *Age of Majority Act*, R.S.B.C. 1996, c.7.

46. *Supra*, n. 7.

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expire before a minor reached the age of majority. This risk was realized in *Wittman v. Emmott*.<sup>47</sup> In that case the plaintiff had suffered injury at birth. An action was brought on behalf of the plaintiff more than 6 years after the damage occurred. As the commencement of the ULP was not postponed the claim was statute barred due to the shorter ULP conferred on physicians. Consequently, even though the plaintiff was still a minor the claim was held to be out of time. The *Limitation Act* was amended to relieve against this injustice by the adoption of section 8(2).<sup>48</sup> That section provides that, subject to section 7(6) (notice to proceed), the ULP is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.<sup>49</sup> The introduction of section 8(2) into the Act indicated an intention on the part of the legislature to protect the rights of minors, despite the potential for stale claims to proceed to the prejudice of defendants.

### (b) *Options for Reform*

If, as suggested, the ULP of general application is reduced it will need to be tailored in its application to ensure that minors' actions are not barred before the age of majority is attained. The following are three possible approaches to achieve this goal.

#### (i) *Adopt a Special ULP*

One approach is to adopt a special ULP of longer duration for minors. If the ULP of general application is reduced to 10 years, a special 30 year ULP would be sufficiently long to protect the interests of minors. The disadvantage of this option is that it is inconsistent with the earlier proposals which endorsed a policy of keeping the number of different ULPs to a minimum in order to meet the objective of simplifying the *Limitation Act*. This drawback makes this the least desirable of the three approaches.

#### (ii) *Postpone the Running of Time*

An alternative course of action is to postpone the operation of the ULP during the period of minority. This would ensure that the ULP will not expire before a minor reaches the age of majority. It is also a familiar concept for courts and litigants with which there is some experience as the special ULPs are subject to the postponement provisions in section 8(2) under the present Act. The fact that this has worked satisfactorily with the shorter special ULPs suggests that it might be adopted as the rule of general application.

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47. *Supra*, n. 7.

48. *Limitation Amendment Act, 1994*, S.B.C. 1994, c.8.

49. The special ULPs may be postponed under section 8(2), but not the ULP of general application: *Blueberry River Indian Band v. Canada*, *supra*, n. 15 at 402.

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Some jurisdictions have opted for a modified version of the postponement scheme. Based on the assumption that the interests of minors are often looked after by a parent or guardian the ULP is postponed only if there is not a representative that can bring an action on behalf of the minor.<sup>50</sup> The argument being that in those cases where there is a representative the vulnerability of the minor is limited and thus the ULP ought to run in the normal manner.

This solution, however, presents its own problems. Although there may be an equitable duty for a parent or guardian to protect the economic interests of a child in some instances, this does not hold true in all cases. In *M(K) v. M(H)*<sup>51</sup> the court observed that this duty is most often discussed in the case law, albeit in *obiter*, and in the literature in the context of contractual relations between a parent and child that give rise to a presumption of undue influence. In many other instances where such undue influence is not an issue the representative may not bring an action on behalf of a minor, nor be required to do so. The failure to bring an action can occur for any number of reasons including financial concerns, apathy or lack of knowledge about the minor's legal position. Experience has shown that the inability or unwillingness of a representative to bring a claim can occur in far too many cases.<sup>52</sup> This is a serious concern as the failure to commence proceedings on behalf of a minor can result in the parent or guardian forfeiting the minor's legal rights.

The "notice to proceed" provision under section 7(6) of the existing Act is preferred over this scheme as it brings the legal interest of the minor to the attention of both the representative and the Public Guardian and Trustee.<sup>53</sup> Time begins to run against the minor as if he or she had ceased to be under a disability on the date that the notice to proceed is delivered. At the same time if, after the delivery of a notice, the representative fails to take reasonable steps to protect the interests of the minor, the Public Guardian and Trustee will undertake proceedings on behalf

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50. Alberta *Limitations Act*, R.S.A. 2000, c.L-12, s.5. (Note: This diverges from the recommendation by the Alberta Law Reform Institute which disagreed with the policy of allowing the limitation period to run in the normal course for a represented person on the basis that the parent, committee or guardian in too many cases fails to bring a claim to the prejudice of the person under a disability: Report No. 4, *supra*, n. 11 at 292; Alberta Law Reform Institute, Report No. 55: *Limitations* (December 1989) at 78.)

51. *Supra*, n. 19.

52. LRC 112, *supra*, n. 10 at 36; LRC 6, *supra*, n. 2 at 70.

53. A similar scheme has been proposed in Ontario whereby a potential defendant can make a motion to have a litigation guardian appointed for a potential plaintiff who is a minor or incapable: Bill 10, *An Act to Revise the Limitations Act, 2001*, 2<sup>nd</sup> Sess., 37<sup>th</sup> Leg., Ontario, 2001 (1<sup>st</sup> reading 25 April 2001), s. 9.

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of the minor if the Public Guardian and Trustee believes that the proceedings would have a reasonable prospect of succeeding and would result in a judgment that would justify commencing it.<sup>54</sup> Accordingly, it is recommended that if postponement is adopted it should occur irrespective of whether or not there is a parent or guardian in place, subject to the provisions found under section 7(6) of the Act.<sup>55</sup>

The proposal to postpone the ULP during the period of minority, subject to section 7(6), would protect the interests of minors, which could otherwise be prejudiced by the operation of the 10 year ULP of general application.

### (iii) *Remove Minors from the Scope of the ULP*

The conflict between a 10 year ULP and protecting minors' rights could equally be dealt with by removing minors from the scope of the ULP. Section 7(3) of the *Limitation Act* would ensure that the time for a plaintiff, who was a minor at the time that the cause of action arose, to bring a claim is subject to a maximum time bar. Under that section when a minor reaches the age of majority he or she will be able to bring an action within the period that the person would have had if not under a disability or within a period running from the time that the disability ceased, whichever is longer. The latter period is limited to 6 years after the cessation of the disability. (If the 10 year ULP is adopted this 6 year cap should likewise be increased to 10 years for continuity.)

Section 8(3) of the *Limitation Act*, which establishes the right to claim the cumulative effect of the tolling provisions, would be subject to section 7. This would be necessary as otherwise the postponement of the running of time could be unlimited in cases where the material facts are undiscoverable and the action falls outside the scope of the ULP due to minority. This proposal would protect minors and avoid the creation of a further special ULP.

### (c) *Conclusion*

Both the postponement of the ULP and the removal of minors from the scope of the ULP would protect the rights of minors if the ULP of general application is reduced. As between the two alternatives the former option is preferred. This recommendation departs from that found in the Law Reform Commission's 1990 Report under which it was concluded that the ULP should not

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54. *Infants Act*, R.S.B.C. 1996, c.223, s.9.

55. It is recognized that defendants will often not use this type of provision for fear of alerting a plaintiff to a potential right of action. Currently, for example, the Office of the Public Guardian and Trustee on average is served with only 20 Notices to Proceed per month. Limitations law, however, is intended to afford protection against the risks of litigating stale claims, it is not intended to avoid legitimate claims.

run against a minor. The recommendation to postpone the running of time under the ULP during the period of the plaintiff's minority is now favoured as we have experience with section 8(2). Under that provision postponement of ULP appears to have worked well, which suggests that it would adequately protect the rights of minors if adopted as a rule of general application.

### Recommendation 6

*Section 8 of the Limitation Act should be amended to provide that in those cases where the plaintiff is a minor at the time the cause of action arises the ultimate limitation period is postponed until the plaintiff reaches the age of majority.*

#### 2. Other Disabilities

##### (a) General Scheme

Persons are under a legal disability (other than minority) when they are actually incapable of or substantially impeded in the management of their own affairs.<sup>56</sup> Currently, a disability that exists when the cause of action arose will postpone the running of the basic limitation period. If the disability comes into existence later, but before the basic limitation period has expired, the running of time is suspended so long as the plaintiff is under the disability.<sup>57</sup> In either case, the ULP applies to create an outside limit for bringing an action.

An outer limit is necessary in this context since, unlike minority, the duration of the postponement or suspension is unknown and could extend many years beyond the time the basic limitation period would otherwise have expired. Accordingly, where the plaintiff is a person under a legal disability (other than minority) there is a concern to protect the rights of potential defendants against the postponement or suspension of the limitation period for an unlimited number of years.

The current scheme adequately protects the position of persons who are under a legal disability; but it does so in the context of a ULP of general application of 30 years. If the ULP is significantly reduced its application to incapacitated persons will need to be reconsidered. In this respect there are three alternative options.

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56. *Limitation Act*, s. 7.

57. Special rules govern the running of the basic limitation period once a disability ceases: *Limitation Act*, ss. 7(3) and 7(5).

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### (b) *Options for Reform*

A special ULP of 30 years for persons under a legal disability could be retained in the amendments to section 8. This would provide sufficient opportunity for an action to be brought on behalf of a person under a legal disability. The difficulty with this solution is that it is contrary to the policy of discouraging the creation of new special ULPs.

Some jurisdictions have chosen to suspend the ULP during the time that a person is under a legal disability.<sup>58</sup> This creates a situation in which there is no fixed limit on the extension of time that adult claimants under a legal disability can bring an action. Suspension provisions that are not subject to a cap in these circumstances significantly weaken the limitations system as defendants would never know if and when claims might be brought in favour of a person under a disability. This creates a great deal of uncertainty for defendants and places them in a worse position than under the current 30 year ULP. In light of this, a suspended ULP is not an adequate solution for amending the existing law.

A third, and in our view, more acceptable solution is to apply the shorter ULP without any special provisions affecting its application to persons under a legal disability. The incapacity of such persons would continue to be recognized under the basic limitation period, while the ULP would run in its ordinary course.

Although this will result in some erosion of the legal position of adult claimants under a legal disability its importance should not be overstated. Such persons have faced a truncated ULP for many years with respect to claims against medical professionals and institutions. Originally, minors were in a similar position but pressure to protect their interests led to the creation of the special rule now embodied in section 8(2) of the *Limitation Act*. There was not a similar provision adopted in relation to persons under a disability other than minority which suggests that the shorter ULPs did not have a serious effect on their rights. This indicates that the proposed 10 year ULP would adequately protect the legal rights of adults under a legal disability.

Further protection is provided where an adult under a legal disability has a representative appointed under a power of attorney, representation agreement, or legislative enactment.<sup>59</sup> The representative will typically be responsible for managing the affairs of the incapacitated adult, including bringing a law suit on his or her behalf if necessary.

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58. Alberta *Limitations Act*, *supra*, n. 50, s. 5.

59. The *Patients Property Act*, R.S.B.C. 1996, c. 349, governs in this respect, it is to be succeeded by Part 2 of the *Adult Guardianship Act*, R.S.B.C. 1996, c.6, although at the date of this Report the latter remains unproclaimed.

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The running of time would be subject to the “notice to proceed” provision found under the existing Act. Under that provision if a person under a disability has a guardian and anyone against whom that person may have a cause of action has a notice to proceed delivered to the guardian and to the Public Guardian and Trustee, time will begin to run against that person as if that person had ceased to be under a disability on the date the notice is delivered.<sup>60</sup>

The ULP should be applied to persons under a disability (other than minority) in the ordinary course.

### Recommendation 7

*The ultimate limitation period of general application should apply to persons under a legal disability (other than minority) in the normal course.*

#### E. Demand Obligations

A demand obligation (usually a demand loan) is an obligation for which there is no fixed time or specific conditions for performance.<sup>61</sup> Under the common law the limitation period for a cause of action based on a demand obligation starts to run from the date that the obligation is created.<sup>62</sup> The running of time starts at this point as repayment of a demand obligation can be required at any time after the loan is made. Accordingly, while limitation periods typically run from a date that is related to the existence of a wrong, that is not the case for demand obligations.<sup>63</sup>

This common law rule can often be harsh in its application as it can result in an unsuspecting claimant finding that his or her action is statute barred before repayment is ever demanded. It is recommended that a provision be adopted under which the basic limitation period commences when a default in performance occurs after a demand for performance is made. This would create a greater degree of fairness by linking the running of time to the existence of a wrong.

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60. *Limitation Act*, s. 7(6).

61. Demand obligations often arise between friends and family where money is lent without the parties establishing terms for repayment.

62. *J. Brown's Estate*, [1893] 2 Ch 300 at 304; *Norton v. Ellam*, (1837) 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 (B.C.C.A.).

63. Alberta Law Reform Institute, Report No. 55, *supra*, n. 50 at 71.

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The proposed scheme would open the door to a demand for performance being made many years after the obligation was created. A long delay carrying with it the problems associated with litigating stale claims, including the erosion of the certainty and diligence functions of limitations law. The adoption of an outside limit on the right to bring a claim would overcome this problem. The limitation period could be extinguished after 30 years from the creation of the obligation, notwithstanding the fact that a demand for performance has not been made. This would ensure finality to the period of liability and, at the same time, would allow for loans that are intended to span many years.

### Recommendation 8

*The Limitation Act should be amended as follows:*

(1) *The limitation period for a demand obligation will commence on the date that a default in performance occurs after a demand is made.*

(2) *Despite (1) a claim cannot be brought after 30 years from the date that the demand obligation is first created.*

## IV. Transition Scheme

Limitations legislation cannot be static, but must be amended in order to reflect the changing needs and policy choices of society. At the same time, these changes must be made taking into account the fact that relationships have been established and transactions entered into on the assumption that the existing provisions of the *Limitation Act* will govern. This brings into question the transition scheme that should be adopted to deal with claims that have arisen, but not been extinguished, before the new provisions under section 8 come into force.

### A. *Interpretation Act*

One option is to rely on the transitional provisions in the *Interpretation Act*<sup>64</sup> and the common law rules of statutory interpretation to govern matters that arise before the amendments to section 8 take effect. The *Interpretation Act* provides that with regard to matters occurring before a new provision comes into force the procedure established by the new enactment must be followed “as far as it can be adapted” in the enforcement of rights existing or accruing under the former enactment.<sup>65</sup>

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64. R.S.B.C. 1996, c.238, s. 36.

65. *Ibid.*, s. 36(1)(c). (This provision does not lay down an absolute rule or preclude the operation of the rule against retrospective application: *Bera v. Marr*, *supra*, n. 7 at 23.)

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A review of the rules of statutory interpretation, as discussed in *Driedger on the Construction of Statutes* and the case law, suggests that where the new provision comes into force before the existing limitation period has expired and where it would not just affect the time for bringing an action, but would extinguish an otherwise viable right of action or revive an action that was statute-barred, the presumption against retrospective application of the new provision will be very strong.<sup>66</sup> Accordingly, neither the right of a defendant to an accrued limitations defense nor the viable right of a plaintiff to bring proceedings should be taken away by conferring on the statute retrospective operation, unless such a construction is unavoidable.<sup>67</sup>

Whereas, in cases where the new provision comes into force before the existing limitation period has expired and where it would affect the time for bringing an action, shortening or extending it, but not extinguish or revive a right of action, there may be an argument made to counter the presumption against the retrospective application of the legislation. If the existing limitation period has not expired and time is extended the plaintiff will likely benefit from the extended period. If the existing limitation period has not expired and time is truncated the plaintiff might be subject to the abbreviated period, the court, in making this determination, will consider how close in time the abbreviated period is set to expire.<sup>68</sup>

These rules could be applied on a case by case basis to determine whether the existing or amended provisions apply. This solution will, however, create some uncertainty for parties as to when time is extinguished and will add yet another issue for the courts to decide. This could be avoided by adopting a clearly set out transition scheme.

### B. Alternative Transitional Scheme

The Law Reform Commission in its 1990 Report proposed a scheme whereby if a claim arises or an act, omission or breach of duty occurs before the effective date of the new provisions the existing ULP will continue to govern. The exception being that in those cases where the existing ULP would expire more than 10 years after the date on which the amendments come into force, the claim will be absolutely barred on the tenth anniversary after the effective date of the amendments.<sup>69</sup> Causes of action that are already statute-barred when the new provisions come into force would not be revived by the amendments to section 8.

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66. *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 546. (See also: *Martin v. Perrie*, [1986] 1 S.C.R. 41, 24 D.L.R. (4th) 1; *Sun Alliance v. Angus*, [1988] 2 S.C.R. 256, 52 D.L.R. (4th) 193; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.)

67. *Tolofson*, *ibid*; *Upper Canada College v. Smith*, (1920) 61 S.C.R. 413, 57 D.L.R. 648.

68. G. Mew, *The Law of Limitations* (Toronto: Butterworths, 1991) at 12.

69. LRC 112, *supra*, n. 10 at 66.

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This scheme will ensure that, in most cases, the existing right of a defendant to assert a limitation defence is not impaired.<sup>70</sup> At the same time, the 10 year cap ensures that a claim that accrues immediately before the new provisions come into force is not governed for almost a further 30 years by the “old” law, frustrating the intent of the reforms.

The transitional provisions applicable to minors pose a special concern. If the applicable ULP is that which runs for 10 years from the date that the amendments come into force, that period could end before the minor reaches the age of majority. Thus, for minors the transitional scheme should apply, with the exception that time will not run against a minor from the effective date of the amendments, but rather for 10 years from the date that the minor attains the age of majority. Put another way, the applicable ULP will be the earlier of the existing ULP or 10 years after the minor reaches the age of majority.

In cases of fraud, fraudulent breach of trust, or wilful concealment of material facts that arise before the effective date of the amendments, the 10-year cap would not apply. Instead the claim would be barred under the ULP which governed before the changes came into force (30 years running from the date of accrual) for those cases where the cause of action arose before the effective date of the amendments. Claims where the act or omission that constitutes a breach of duty occurs before the amendments come into force, but the cause of action has not arisen before the effective date, will be governed by a ULP of 30 years running from the effective date of the amendments.

Under the existing Act where there has been a confirmation of the cause of action the right to bring a claim is subject to the 30 year ULP of general application. It is recommended in this Report that a 10 year ULP be adopted and that a confirmation will restart the running of time under the ULP. Thus, confirmations that arise before the amendments come into force should be subject to the existing ULP or a ULP of 10 years running from the date that the amendments come into force, whichever expires first. If the 10 year period is applicable it can be renewed by a confirmation. Whereas, if the existing 30 year period is applicable it can not be renewed by a confirmation.

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70. For example, where a claim arises before the new provisions come into force the ULP applicable to a physician would be 6 years from the date that the cause of action arose, provided that this period would not be longer than 10 years from the date that the amendments come into effect. This will alleviate concerns in the majority of cases where records have only been kept for 6 years on the basis of the existing law.

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### Recommendation 9

*Section 8 of the Limitation Act should be amended as follows:*

*(1) For a claim that arises before the effective date of the amendments to section 8 of the Limitation Act or after the effective date of amendments to section 8 of the Limitation Act and is based on an act or omission that constitutes a breach of duty occurring before the effective date, the plaintiff must bring an action on the claim before the earlier of:*

- (a) the expiration of the ultimate limitation period which governed the claim before the effective date of the amendments; and*
- (b) ten years from the effective date of the amendments;*

*subject to the earlier expiration of a basic limitation period.*

*(2) Time does not run against a minor under recommendation (1)(b) from the effective date of the amendments to section 8 of the Limitation Act, but rather from the date that the minor attains the age of majority.*

*(3) If a claim for fraud or fraudulent breach of trust, or a claim in which material facts relating to the claim have been wilfully concealed arises before the effective date of the amendments to section 8 of the Limitation Act, the claim is governed by the ultimate limitation period which applied immediately before the effective date of the amendments.*

*(4) If a claim for fraud or fraudulent breach of trust, or a claim in which material facts relating to the claim have been wilfully concealed arises after the effective date of the amendments to section 8 of the Limitation Act and is based on an act or omission that constitutes a breach of a legal duty occurring before that date, the claim is governed by an ultimate limitation period of 30 years, running from the effective date of the amendments.*

*(5) If there has been a confirmation of the cause of action under section 5 of the Limitation Act, the claim is subject to the existing ULP or a ULP of 10 years running from the date that the amendments come into force, whichever expires first. If the 10 year ULP is the applicable limitation period, a confirmation will restart the running of time under the ULP.*

*(6) Nothing in these amendments to section 8 of the Limitation Act revives any cause of action that is statute barred on the date that the amendments come into force.*

## V. Conclusion

### A. General

The need to update and modernize the ULP found under section 8 of the *Limitation Act* is apparent in light of the problems that arise under the existing law. The principal recommendation in this Report is that section 8 should be repealed and replaced by a revised provision that will address these issues. The new provisions will incorporate a number of fundamental changes to the current law, each of which will substantially improve the certainty, finality and fairness of the limitations system.

The first recommendation is that the ULP of general application should be reduced from 30 to 10 years. The current 30 year ULP of general application is unreasonable as it exposes defendants to an excessive period of risk and places an undue economic burden on not only defendants but ultimately on society as a whole. At the same time, the risk of litigation materializing more than 10 years after the occurrence giving rise to the claim is unlikely to occur in the vast majority of cases. This recommendation would bring about a greater degree of fairness in limitations law.

The second proposal is that time should start to run under the ULP of general application from the date of the act or omission that constitutes a breach of duty that gives rise to a cause of action. By defining the commencement date in this fashion it would not be necessary to pinpoint the date of damage, defendants would be protected from stale claims and there would be a single starting date regardless of whether the action is framed in contract or tort. This would avoid the problems associated with using the date of accrual to start time running.

It is further proposed that the special short 6 year ULP be deleted from the Act. Medical professionals and institutions will be brought within the scope of the ULP of general application. This will rationalize the law in this area and establish a system that provides fair and appropriate protection to all defendants equally, regardless of occupation.

An exception to the general regime is proposed for claims involving fraud or fraudulent breach of trust, or claims in which material facts relating to the claim have been wilfully concealed. In these cases a 30 year ULP should be retained to protect claimants who are delayed in bringing a claim due to the conduct of the defendant in concealing facts material to the right of action.

Two further amendments are necessitated by the reduction of the ULP to 10 years. The ULP of general application will need to be tailored for claimants who are minors at the time the cause of action arises. Postponing the running of time under the ULP until the age of majority is reached will ensure that, despite the shorter ULP of general application, the right of a minor to bring a claim will not be extinguished during the period of legal disability. (Minors will continue to be

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subject to the “notice to proceed” provision in section 7(6) of the Act.) Further, the relationship between the ULP and confirmed causes of action will need to be addressed. By restarting the running of time under the ULP where there has been a confirmation of a cause of action a debtor will be able to give successive confirmations. This will accommodate financial arrangements that are intended to extend beyond 10 years.

This opportunity has also been taken to recommend that the common law rule with regard to demand obligations, which is often harsh in its application, be amended. The basic limitation period would start to run from the date that there is a default in performance after a demand for repayment has been made, thereby ensuring that the running of time is linked to the existence of a wrong. This would be subject to an outer limit of 30 years running from the date that the demand obligation was first created.

Finally, while a wide ranging review of limitations law is beyond the scope of this project, it has become apparent in the course of our research that a future comprehensive study of the *Limitation Act* would be of great value.

### **B. Summary of Recommendations**

It is proposed that section 8 of the *Limitation Act* be revised to incorporate the following recommendations:

#### **Recommendation 1**

*Section 8 of the Limitation Act should be amended to provide that the 30 year ultimate limitation period of general application is reduced to 10 years.*

#### **Recommendation 2**

*Section 8 of the Limitation Act should be revised to provide for a special ultimate limitation period of 30 years applicable to cases of fraud, fraudulent breach of trust or wilful concealment of facts material to the claim.*

#### **Recommendation 3**

*Sections 8(1)(a) and (b) of the Limitation Act, which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, should be repealed.*

#### **Recommendation 4**

*Section 8 of the Limitation Act should be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's cause of action is based on the breach of duty, whether that duty arises under a contract, statute or the general law.*

#### **Recommendation 5**

*Section 8 of the Limitation Act should be amended to provide that a confirmation that falls within the meaning of section 5 of the Limitation Act will restart the running of time under the ultimate limitation period.*

#### **Recommendation 6**

*Section 8 of the Limitation Act should be amended to provide that in those cases where the plaintiff is a minor at the time the cause of action arises the ultimate limitation period is postponed until the plaintiff reaches the age of majority.*

### **Recommendation 7**

*The ultimate limitation period of general application should apply to persons under a legal disability (other than minority) in the normal course.*

### **Recommendation 8**

*The Limitation Act should be amended as follows:*

*(1) The limitation period for a demand obligation will commence on the date that a default in performance occurs after a demand is made.*

*(2) Despite (1) a claim cannot be brought after 30 years from the date that the demand obligation is first created.*

### **Recommendation 9**

*Section 8 of the Limitation Act should be amended as follows:*

*(1) For a claim that arises before the effective date of the amendments to section 8 of the Limitation Act or after the effective date of amendments to section 8 of the Limitation Act and is based on an act or omission that constitutes a breach of duty occurring before the effective date, the plaintiff must bring an action on the claim before the earlier of:*

- (a) the expiration of the ultimate limitation period which governed the claim before the effective date of the amendments; and*
- (b) ten years from the effective date of the amendments;*

*subject to the earlier expiration of a basic limitation period.*

*(2) Time does not run against a minor under recommendation (1)(b) from the effective date of the amendments to section 8 of the Limitation Act, but rather from the date that the minor attains the age of majority.*

*(3) If a claim for fraud or fraudulent breach of trust, or a claim in which material facts relating to the claim have been wilfully concealed arises before the effective date of the amendments to section 8 of the Limitation Act, the claim is governed by the ultimate limitation period which applied immediately before the effective date of the amendments.*

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(4) *If a claim for fraud or fraudulent breach of trust, or a claim in which material facts relating to the claim have been wilfully concealed arises after the effective date of the amendments to section 8 of the Limitation Act and is based on an act or omission that constitutes a breach of a legal duty occurring before that date, the claim is governed by an ultimate limitation period of 30 years, running from the effective date of the amendments.*

(5) *If there has been a confirmation of the cause of action under section 5 of the Limitation Act, the claim is subject to the existing ULP or a ULP of 10 years running from the date that the amendments come into force, whichever expires first. If the 10 year ULP is the applicable limitation period, a confirmation will restart the running of time under the ULP.*

(6) *Nothing in these amendments to section 8 of the Limitation Act revives any cause of action that is statute barred on the date that the amendments come into force.*

### **C. Draft Amendments**

Attached to this Report as Appendix C is an example of draft amendments to the *Limitation Act* that reflect the recommendations made in this Report.

### **D. Acknowledgments**

The Institute wishes to acknowledge the contribution of Caroline Carter, Staff Lawyer, who undertook the research and preparation of this Report.

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### Appendix A

Table 1 sets out recent recommendations by law reform and other bodies with regard to the application of the ULP.

**Table 1**

	<b>Alberta <i>Limitations Act</i><sup>1</sup></b>	<b>Law Reform Commission of B.C.<sup>2</sup></b>	<b>Law Commission for England and Wales<sup>3</sup></b>	<b>Ontario Bill 10<sup>4</sup></b>
<b>Number of ULPs</b>	Single ULP.	ULP of general application and a special longer ULP for cases of fraud, fraudulent breach of trust or wilful concealment of material facts relating to the claim.  (Recommended that special 6 year ULP for medical professionals and institutions be deleted.)	Single ULP for non-personal injury claims.	Single ULP.
<b>Length of ULP</b>	10 years	10 years	10 years <sup>5</sup>	15 years

1. R.S.A. 2000, c.L-12. (In force March 1, 1999.)
2. Recommendations from the *Report on the Ultimate Limitation Period: Limitation Act, Section 8*, Report No. 112 (March 1990).
3. Recommendations from the *Report on the Limitation of Actions*, Report No. 270 (2001).
4. Bill 10, *An Act to Revise the Limitations Act, 2001*, 2<sup>nd</sup> Sess., 37<sup>th</sup> Leg., Ontario, 2001 (1<sup>st</sup> reading 25 April 2001).
5. The Law Commission for England and Wales agreed that the ULP of general application should be 10 years, however, it departed from this position to the extent that it recommended that no ultimate limitation should apply to personal injury claims: *Supra*, n. 3 at 66, 69.

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	<b>Alberta <i>Limitations Act</i></b>	<b>Law Reform Commission of B.C.</b>	<b>Law Commission for England and Wales</b>	<b>Ontario Bill 10</b>
<b>Fraud</b>	ULP is suspended during any period that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought occurred.	Retain 30 year ULP for cases of fraud, fraudulent breach of trust or wilful concealment of material facts relating to the claim.	ULP is suspended and does not run from the date that a fact relevant to the cause of action is dishonestly concealed until the date on which it comes to the notice of the claimant. (Absent concealment the ULP would apply in the normal course).	ULP does not run during any time in which: the defendant wilfully conceals that the injury, loss or damage that he/ she caused or contributed to has occurred; or, wilfully misleads the claimant as to the appropriateness of a proceeding as a means to remedy the wrong.
<b>Commencement of ULP</b>	Date that claim arose. This is defined for certain causes of action. (For example, a claim based on a breach of a duty arises when the conduct, act or omission occurs.)	Date on which the act, omission or breach of duty occurred, if the action is based upon an act, omission, or breach of duty. The date of accrual in any other case.	Date of accrual. Except for causes of action in tort where injury, loss or damage is an essential element and cases for breach of statutory duty, then time starts running on the date of the act or omission giving rise to the cause of action.	Date on which the act or omission on which the claim is based took place.
<b>Successive Confirmations &amp; the ULP</b>	Confirmation within the meaning of ss. 8 & 9 restarts the running of time under the ULP.	Confirmation within the meaning of s. 5 restarts the running of time under the ULP.	Confirmation within the meaning of s.27 restarts the running of time under the ULP.	Confirmation within the meaning of s.13 restarts the running of time under the ULP.

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	<b>Alberta <i>Limitations Act</i></b>	<b>Law Reform Commission of B.C.</b>	<b>Law Commission for England and Wales</b>	<b>Ontario Bill 10</b>
<b>Adults with Legal Disabilities &amp; the ULP</b>	<p>ULP is suspended during any period that the claimant is a person under a disability. A person under a disability means a dependent adult under the <i>Dependent Adults Act</i> or an adult who is unable to make reasonable judgments in respect of matters relating to the claim.</p>	<p>ULP runs against adults with legal disabilities in the normal manner.</p> <p>(The “notice to proceed” provision under s. 7(6) is retained.)</p>	<p>ULP runs against adults with legal disabilities in the normal manner.</p> <p>(Special rules apply to personal injury cases.)</p>	<p>The ULP does not run during any time in which the adult claimant is under a legal incapacity and not represented by a litigation guardian in relation to the claim.</p> <p>(If the running of a limitation period is postponed due to legal incapacity a potential defendant may make a motion to have a litigation guardian appointed for a potential plaintiff.)</p>
<b>Minors &amp; the ULP</b>	<p>ULP is suspended during any period that the claimant is a person under a disability. A person under a disability means a minor who is not under the actual custody of a parent or guardian.</p> <p>(Period is also suspended if the claim is against a parent or guardian.)</p>	<p>Remove minors from scope of the ULP. Under s.7 minors can bring an action within the amount of time they would have had if not under a disability or, if longer, the amount of time allowed under the basic limitation period running from the age of majority. The latter period would be capped at 6 years.</p> <p>(The “notice to proceed” provision under s. 7(6) is retained.)</p>	<p>ULP is treated as ending on the later of: 3 years from the date that the age of majority is attained; or, the end of the period when the limitation period would otherwise end.</p>	<p>The ULP does not run during any time in which the claimant is a minor and not represented by a litigation guardian in relation to the claim.</p> <p>(If the running of a limitation period is postponed due to minority a potential defendant may make a motion to have a litigation guardian appointed for a potential plaintiff. )</p>
<b>Demand Obligations</b>	<p>Time starts running when a default in performance occurs after a demand for performance is made.</p>	<p>Not addressed</p>	<p>Cause of action accrues on the date that a demand for repayment is made.</p>	<p>Time begins on the day that the default occurs.</p>

**Appendix B**

*Limitation Act, R.S.B.C. 1996, c. 266*

**Section 8**

8 (1) Subject to section 3 (4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11 (2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, 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, or
- (c) in any other case, after the expiration of 30 years from the date on which the right to do so arose

(2) Subject to section 7 (6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

(3) Subject to subsection (1), the effect of sections 6 and 7 and subsection (2) of this section is cumulative.

**Appendix C**

**Draft Amendments for Revising the Limitation Act**

**Section 3A is added as follows:**

**Demand Obligations**

3A. For the purposes of section 3, a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made.

**Section 7 is repealed and the following is substituted:**

7. (1) For the purposes of this section, a person is under a disability while the person is a minor.

(2) Where, at the time the right to bring an action arises, a person is a minor, the running of time with respect to a limitation period fixed by this Act is postponed until that person ceases to be a minor.

(3) Where the running of time against a person having a cause of action has been postponed by subsection (2) and that person ceases to be a minor, that person may bring an action within the longer of

- (a) the period, running from the time the right to bring the action arose, within which that person could have brought the action if that person had not been a minor at the time the right to do so arose; or
- (b) a period running from the date on which that person ceased to be a minor, equal in length to the period within which that person could have brought the action if that person had not been a minor at the time the right to do so arose, but in no case shall that period extend more than 10 years after the date on which that person ceased to be a minor.

7.1 (1) For the purpose of this section a person is under disability while the person is in fact incapable of or substantially impeded in the management of his or her affairs, otherwise than by reason solely of minority.

(2) Where, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

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(3) Where the running of time against a person with respect to a cause of action has been postponed by subsection (2) and that person ceases to be under a disability, that person may bring an action within the longer of

- (a) the period within which that person could have brought an action had that person not been under a disability when the right to do so arose, running from the time that the cause of action arose; or
- (b) the period within which that person could have brought an action had that person not been under a disability when the right to do so arose, running from the time that the disability ceased, but in no case shall that period extend more than 10 years after the cessation of disability.

(4) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person having a cause of action comes under a disability, the running of time against that person is suspended so long as that person is under a disability.

(5) Where the running of time against a person with respect to a cause of action has been suspended by subsection (4) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either

- (a) the length of time remaining to bring an action at the time the person came under disability; or
- (b) one year from the time that the disability ceased.

7.2 (1) For the purposes of this section,

- (a) “**guardian**” means a parent or guardian who has actual care and control of a minor or a committee appointed under the *Patients Property Act*, and
- (b) a person is under a disability while the person is a minor, or is in fact incapable of or substantially impeded in the management of his or her affairs, otherwise than by reason solely of minority.

(2) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

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(3) Despite sections 7, 7.1 and 8(2), where a person under disability has a guardian and anyone against whom the person under disability may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Guardian and Trustee in accordance with this section, time commences to run against that person as if the person had attained majority or ceased to be under a disability, as the case may be, on the date the notice is delivered.

- (4) A notice to proceed delivered under this section must
- (a) be in writing;
  - (b) be addressed to the guardian and to the Public Guardian and Trustee;
  - (c) specify the name of the person under disability;
  - (d) specify the circumstances out of which the cause of action may arise or may be claimed to arise with such particularity as is necessary to enable the guardian to investigate whether the person under a disability has the cause of action;
  - (e) give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;
  - (f) specify the name of the person on whose behalf the notice is delivered; and,
  - (g) be signed by the person on whose behalf the notice is delivered, or the person's solicitor.

(5) Subsection (3) operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(6) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(7) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed.

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### Section 8 is repealed and the following is substituted:

8. (1) Subject to section 3(4), section 5, section 8.2, section 8.3 and subsection (2) of this section, but despite a postponement or suspension of the running of time under sections 6, 7 or 11(2), no action to which this Act applies shall be brought after the expiration of

(a) 30 years, where the limitation period has been postponed pursuant to sections 6(1), 6(3)(d) or 6(3)(e); or

(b) 10 years, in any other case;

from

(c) the date on which the act or omission that constitutes a breach of duty occurred, if the action is based upon an act or omission that constitutes a breach of duty whether that duty arises under a contract, statute or the general law; or

(d) if the action is based upon a series of related acts or omissions or a course of conduct that constitutes a breach of duty, the last act or omission in the series or the end of the course of conduct that constitutes a breach of duty, whether that duty arises under a contract, statute or the general law; and

(e) in any other case, the date on which the right to do so arose.

(2) Subject to section 7.2(3), the running of time with respect to the limitation period set by subsection (1)(b) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

8.1 Subject to section 8(1), the effect of sections 6 and 7 and section 8(2) is cumulative.

8.2 Despite section 3 and 3A, no proceeding shall be commenced in respect of any demand obligation 30 years after the date on which the obligation was first created.

**Transitional Provisions**

8.3 (1) Subject to section 3(4), section 5, section 8.2 and subsections (2) and (3) of this section where

- (a) the right to bring an action arose before this section comes into force and the action is not statute barred on that date; or
- (b) a right to bring an action arises after this section comes into force and the cause of action is based on an act or omission that constitutes a breach of duty occurring before that date;

the action, despite a postponement or suspension of the running of time under sections 6, 7.1 or 11(2), shall not be brought after

- (c) the expiration of the ultimate limitation period that would have governed the cause of action before this section came into force; or
- (d) 10 years after the date on which this section comes into force;

whichever is earlier.

(2) Subsection (1) does not apply to an action where the limitation period fixed by section 3 has been postponed pursuant to section 7 and

- (a) the right to bring the action arose before this section comes into force; or
- (b) the action is based on an act or omission that constitutes a breach of duty occurring before this section comes into force, but the right to bring the action has not arisen at that time

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and in such a case the action, despite the postponement of the limitation period, shall not be brought after

- (c) the expiration of the ultimate limitation period which governed the cause of action before this section came into force; or
- (d) 10 years from the date on which the person ceased to be a minor,

whichever is earlier.

(3) Subsection (1) does not apply to an action where the limitation period fixed by section 3 has been postponed pursuant to sections 6(1), 6(3)(d) or 6(3)(e) and

- (a) the right to bring the action arose before this section comes into force; or
- (b) the action is based on an act or omission that constitutes a breach of duty occurring before this section comes into force, but the right to bring the action has not arisen at that time

and in such a case the action, despite the postponement of the limitation period fixed by section 3, shall not be brought after

- (c) the expiration of the ultimate limitation period which governed the cause of action before this section came into force, in a case to which paragraph (a) applies; or
- (d) 30 years from the date on which this section comes into force, in a case to which paragraph (b) applies.